Office of Audits
Office of Inspector General
U.S. General Services Administration

PBS National Capital Region's $1.2 Billion Energy Savings Performance Contract for White Oak was Not Awarded or Modified in Accordance with Regulations and Policy

Audit Number A150009/P/5/R17006
August 24, 2017

Executive Summary

PBS National Capital Region's $1.2 Billion Energy Savings Performance Contract for White Oak was Not Awarded or Modified in Accordance with Regulations and Policy
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Why We Performed This Audit

The objective of our audit was to determine whether the PBS National Capital Region (NCR) awarded the White Oak Energy Savings Performance Contract and subsequent modifications in compliance with applicable regulations and guidance.

What We Found

PBS NCR did not comply with applicable laws, regulations, and guidance when awarding and administering the Energy Savings Performance Contract task order. We found that PBS NCR:

- Violated the Competition in Contracting Act of 1984 and the competition requirements set forth in the Federal Acquisition Regulation by making a cardinal change to the contract that substantially increased the contract's scope of work for operations and maintenance. This action eliminated price competition and denied opportunities for other contractors.
- Did not award and administer the task order in compliance with contract requirements, acquisition regulations, and internal policy.

What We Recommend

Based on our findings, we recommend several improvements to PBS NCR's internal controls of the award and administration of this and future Energy Savings Performance Contract task orders. Our recommendations include expediting the procurement of a new operations and maintenance contract, instituting management controls to ensure that procurements for White Oak comply with the Competition in Contracting Act of 1984 and the Federal Acquisition Regulation, determining and implementing the appropriate corrective action needed for PBS NCR personnel's non-compliance with competition requirements, instituting management controls, and implementing training for PBS NCR personnel to ensure that contract files contain adequate documentation of contract actions.

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Introduction

We performed an audit of the PBS National Capital Region's (NCR) White Oak Energy Savings Performance Contract (ESPC), awarded December 23, 2010, at a value over $785.8 million. The total task order value as of October 31, 2016, was over $1.2 billion.

Purpose

We initiated this audit as a result of our prior audit report, *PBS Energy Savings Performance Contract Awards May Not Meet Savings Goals*.[1] The scope of that audit originally included PBS NCR's task order for the Food and Drug Administration's (FDA) Federal Research Center, White Oak campus (White Oak) project. Due to the size and complexity of the White Oak project, we conducted a separate audit of the White Oak task order and its modifications.

Objective

The objective of our audit was to determine whether PBS NCR awarded the White Oak ESPC task order and subsequent modifications in compliance with the applicable regulations and guidance.

See ***Appendix A*** – Scope and Methodology for additional details.

Background

Congress passed the FDA Revitalization Act in November 1990. The goal of the act was to consolidate FDA's facilities.[2] In 1990, FDA personnel were located in 23 different buildings at seven different sites in the Washington, D.C., area. By 1996, these figures increased to 40 buildings at 18 sites. However, a number of those sites were inadequate for the FDA's mission. In 1995, the Base Realignment and Closure Commission decided to close the Naval Surface Warfare Center at the White Oak site in Silver Spring, Maryland. Subsequently, this location became the prime candidate for, and was ultimately selected as, the site for the FDA consolidation project.

The FDA consolidation, both new construction and ESPC work, was completed in multiple phases. Phase one was awarded in July 2002 under a Department of Energy (DOE) contract for the design and implementation of one central utility plant, intended to provide utilities to the White Oak facilities. In May 2005, PBS NCR awarded phase two, using the same DOE contract, to further expand operations and maintenance (O&M) services and the central utility plant.

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[1] *PBS Energy Savings Performance Contract Awards May Not Meet Savings Goals* (Report Number A150009/P/5/R16003, September 27, 2016).

[2] Public Law 101-635, *Food and Drug Administration Revitalization Act*, provides authority to grant contracts, in consultation with GSA, for the consolidation of the FDA facilities. The contracts shall be for the design, construction, and operation of consolidated FDA facilities.

The DOE contract payments used for phases one and two, were capped prior to the award of phase three. Therefore, GSA used a DOE Super ESPC contract for phase three. DOE's Super ESPCs are umbrella contracts with pre-qualified energy companies that comply with Federal Acquisition Regulation (FAR) requirements. Agencies, including GSA, have the option to use the Super ESPCs and can use these contracts to award task orders more quickly because the competitive selection process has already been completed and the selection process has been streamlined.

Using DOE's Super ESPC, GSA awarded Task Order GS-P-11-11-MK-0002 for phase three to: (1) expand the central utility plant to provide additional electrical generation equipment, and (2) add related O&M services to support the growth in the southeast quadrant of the White Oak campus. This task order is the focus of this audit. The task order's value has grown 58 percent since it was awarded in December 2010, from the original value at over $785.8 million to the current value of $1.2 billion.

Energy Savings Performance Contracts

ESPCs began in 1986 with amendments to the National Energy Conservation Policy Act (42 U.S. Code 8287). The amendments stated in part that, "The head of a Federal agency may enter into contracts … solely for the purpose of achieving energy savings and benefits ancillary to that purpose" for a term not to exceed 25 years. The Energy Policy Act of 1992 (Public Law No. 102-486) further extended agencies' authority to use ESPCs for performing energy-efficiency improvements and directed the DOE to develop ESPC regulations. As a result, in 1995, DOE issued implementing regulations in Title 10 of the Code of Federal Regulations Part 436, *Federal Energy Management and Planning Programs*.

Under an ESPC, GSA enters into a long-term contract with an energy company that arranges private financing and installs energy efficiency improvements. GSA then makes payments to the energy company until the improvements have been paid off. The annual payment schedule for the ESPC cannot exceed the value of the annual utility savings created by the installed energy-efficiency improvements.

As part of an ESPC, GSA and the energy company collaborate to develop the annual energy and financial savings and to create a plan that will assess and verify the projected savings. This is known as a Measurement and Verification Plan. ESPCs are designed to shift performance risk associated with energy-efficiency improvements from GSA to the energy company. The performance risk is transferred by requiring verification that the energy-efficiency improvements achieve the expected financial savings before GSA makes payments to the energy company. If the project does not achieve the expected savings, then the agency can suspend payments until the conditions are corrected.

Energy Savings

The DOE Federal Energy Management Program defines energy savings as a reduction in the cost of energy, water, and wastewater treatment relative to a pre-project baseline cost. These savings are generally recurring savings that occur annually. Savings are calculated as the difference between the baseline and the energy cost after the ESPC's energy-efficiency improvements are in place. Congress allowed agencies to keep some or all of any annual savings available after the agencies made required contractual payments to the energy company. Currently, GSA may retain and use 100 percent of all savings without further appropriation.

The key components of energy savings are the cost baseline, measurement and verification, and energy-related savings.

Baseline. As part of contracting for ESPCs, GSA and the energy company must agree on a baseline, which is the cost for energy consumption the government would have incurred without the ESPC project. The baseline is calculated as follows:

Baseline = (Energy Use x Energy Cost) +
(Operations & Maintenance + Repair & Replacement)

Baseline costs are established as part of the measurement and verification methodology that the energy company and the agency agree upon when awarding a task order.

Measurement and Verification. Measurement and verification is the method of quantifying the energy and cost savings resulting from improvements in energy-consuming systems. After the installation of the energy improvements, energy and cost figures are compared to a historical baseline, which may be adjusted to reflect changing operating conditions or utility rates. The federal ESPC authority requires the energy company to undertake measurement and verification activities and provide documentation to demonstrate if projected savings have been met.

Energy-Related Savings. The DOE defines this as a reduction in expenses (other than energy cost savings) related to energy-consuming equipment and equipment operations, maintenance, renewal, replacement, or repair expenses. One-time energy-related cost savings can result from avoided expenditures of O&M or repair and replacement funds, or from avoided capital expenditures for projects (*e.g.*, equipment replacement) that, because of the ESPC project, will no longer be required.[3]

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[3] *Department of Energy, Indefinite Delivery Indefinite Quantity, Multiple Award, Energy Savings Performance Contract* (December 2008).

Results

PBS NCR did not adhere to applicable law, regulation, and policy in the award and subsequent modification of the White Oak phase three ESPC task order. Specifically, PBS NCR's expansion of the contract's scope of work resulted in a cardinal change, which failed to comply with the competition requirements set forth in the Competition in Contracting Act of 1984 (CICA) and the FAR. As a result, PBS NCR eliminated price competition and denied opportunities for other contractors.

Additionally, PBS NCR's award and administration of the contract was inadequate to address the unique and complex requirements of the ESPC contracts. As a result, PBS NCR did not comply with the terms and conditions of the DOE Super ESPC contract, the FAR, or its own policy. Therefore, PBS NCR should promptly strengthen its internal controls of ESPC contracts to ensure that these contracts are properly awarded and administered and the Agency achieves its energy saving goals.

Finding 1 – PBS NCR's award of a task order for expanded operations and maintenance services at the White Oak campus resulted in a cardinal change that violated federal competition requirements.

PBS NCR's procurement of expanded O&M services for the entire White Oak campus did not comply with competition requirements. As a result, price competition was eliminated and contractors were not offered the opportunity to bid. The expanded scope of work, an addition of over $309 million, represents a 39 percent price increase from the original task order value of over $785.8 million. Because of the significant increases in the scope from the original task order, the additional work should have been competed per CICA and the FAR.

On December 23, 2010, PBS NCR awarded Task Order GS-P-11-11-MK-0002 for over $785.8 million for ESPC phase three. Phase three was to provide all labor, materials, equipment, and supervision to design, construct, operate, and maintain the energy technologies used to transport energy from the central utility plant to the facilities at White Oak. The task order term was through March 31, 2034, with the first 39 months for implementation and 20 years for the performance period.

PBS NCR originally awarded O&M services for the buildings constructed under the first two phases of the ESPC project at White Oak. The phase one and two O&M scope of work included electrical, HVAC, plumbing, elevator, fire protection, and maintenance/repair services under $10,000. As FDA employees moved onto the campus, GSA determined additional services were needed. However, the phase one and two task orders under the contract were capped.

As a result, PBS NCR requested that the contractor for ESPC phase three submit a proposal to incorporate the O&M specifications for buildings in the first two phases and to expand the O&M services to include the entire campus. To incorporate these changes, PBS issued Modifications 20 and 26, noncompetitively awarding over $309 million in O&M services to the ESPC contractor. Modification 20 for over $164 million expanded the O&M services so that all buildings on the campus would have identical O&M requirements to the upgraded O&M required for the phase three work. Modification 26 for over $145 million upgraded the O&M services to include:

- Provide regular walking tours of all FDA buildings on the White Oak Campus.
- Respond to, secure, and assist with clean-up of all building-related emergencies.
- Respond to all animal room alarms and temperature alarms, silence the alarms, and document issues.
- Provide an end-of-shift report for all emergencies, building issues, and concerns identified or addressed during the shift.
- Respond to critical building automation alarm notifications in Buildings 10, 52/72 and 64 within 10 minutes or less.
- Inspect all main building entrances during inclement weather to assure walkways are clear and safe.

PBS's award of Modifications 20 and 26 constitutes a cardinal change to the ESPC because the expanded scope of work, which (1) added services and (2) included buildings and areas that were not required in the base phase three task order, differs significantly from the scope of the original contract. As a result, PBS NCR violated both CICA and FAR competition requirements.

CICA requires full and open competition in government procurements as obtained through the use of competitive procedures.[4] After competitive award of a contract, that contract cannot be altered so materially by negotiation between the government and the successful bidder as to constitute a cardinal change to the original contract. A cardinal change occurs when the government effects an alteration in a contract's scope of work so drastic that it effectively requires the contractor to perform duties materially different from those originally negotiated for. In such instances, the new requirements must be rebid for the protection of other contractors and the integrity of the bid process. When new requirements are not rebid, the modification essentially becomes a sole-source award. FAR 6.3 *Other Than Open and Full Competition* permits sole-source procurements only under limited circumstances and requires written justification for sole-source awards or when contracting without full and open competition.

In accordance with the CICA and FAR requirements cited above, contracting officers must seek competition for government procurements or document a justification for other than full and open competition. However, we found no evidence that PBS NCR documented a justification for other than full and open competition, nor any documentation that it recognized the scope increase as a possible cardinal change. PBS officials made no effort to justify the sole-source award nor did any of the circumstances permitting sole-source awards apply. According to the contracting officer, PBS NCR requested guidance from DOE on expanding the O&M services but was told that White Oak was "a different animal" and DOE provided no assistance.

[4] 41 U.S. Code 3301(a)(1).

Furthermore, as an after the fact rationalization of the sole-source award, PBS officials maintained that using one O&M contractor was a logical follow-on to the O&M services needed in ESPC I and II. PBS officials stated they decided to award the contract to the incumbent O&M contractor to avoid potential issues experienced when using multiple contractors to service the campus.

Because of the significant increases in scope from the original task order, PBS should have acquired the White Oak ESPC O&M requirements through competition in accordance with the FAR. Instead, PBS issued a modification to its task order. This eliminated price competition because contractors who were capable of performing the work at a potentially lower cost were not provided the opportunity to compete for the work.

<u>Recommendations</u>

We recommend that the Regional Commissioner, PBS NCR:

1. Take immediate action to expedite the procurement of a new O&M contract that adheres to competition requirements specified in the Competition in Contracting Act of 1984 and the Federal Acquisition Regulation.
2. Determine and implement the appropriate corrective action needed for PBS NCR personnel's non-compliance with competition requirements.
3. Institute the necessary management controls to ensure that procurements for the campus comply with the Competition in Contracting Act of 1984 and Federal Acquisition Regulation 6.3.

<u>GSA Comments</u>

PBS did not concur with *Finding 1* or *Recommendation 1*, plans to take no corrective action on *Recommendation 2,* and has concurred with *Recommendation 3*. PBS stated in its response that:

> PBS's evaluation of the modifications determined they were within the scope and intent of the existing contract (ESPC III) when awarding the task order for operations and maintenance (O&M) at the White Oak campus. The cardinal change doctrine does not advance the bright-line approach adopted by the Office of the Inspector General.

Further, PBS stated:

> PBS has concluded that given the specific contractual and operational conditions of the White Oak campus, recompeting Modifications 20 and 26 would likely subject the Government to significant contractual, programmatic, and/or financial impacts.

GSA's comments are included in their entirety in ***Appendix B***.

<u>OIG Response</u>

Through modifications 20 and 26 PBS improperly sole-sourced over $300 million of work to an incumbent contractor. However, PBS does not acknowledge or take responsibility for its failure to comply with federal law and regulations. As such, PBS is creating an environment that tolerates noncompliance with federal laws and regulations when operationally convenient and, as a result, this activity will likely continue going forward. While we recognize that addressing the contracting issues we identified may be expensive and complicated, all of this could have been avoided had PBS followed applicable laws and regulations.

We reiterate that PBS is required to satisfy all procurement regulations on modifications 20 and 26, including the requirement for full and open competition. The expanded scope of work for both modifications differs significantly from the terms of the contract, which constitutes a cardinal change, violating CICA and FAR competition requirements. Although PBS asserts that competing modifications 20 and 26 would result in contractual, programmatic, and financial impacts, these impacts are a direct result of PBS' failure to follow the law in the first place, and do not justify the failure to compete.

The FAR designates circumstances when competition is not required. PBS did not meet those circumstances prior to award of the contract. FAR 6.3 permits sole-source awards or contracting without full and open competition with proper written justifications. PBS never executed a written justification in accordance with FAR 6.303 to show sufficient facts and rationale for PBS's actions. Furthermore, although the government may benefit from having the same contractor in a federal building for both the building's general O&M and the O&M of the energy conservation measures, these benefits do not satisfy the FAR requirements for exceptions to full and open competition. Therefore, we maintain that the procurements in modification 20 and 26 did not comply with CICA and FAR requirements for full and open competition.

Finding 2 – PBS NCR did not award and administer the White Oak ESPC task order in compliance with the DOE contract requirements, acquisition regulations, and internal policy.

ESPCs are unique contract vehicles because of their long-term commitment and complex financial terms. Compliance with the contract, regulations, and policy is therefore essential to mitigate risk. However, PBS NCR's award and administration of the task order for energy conservation measures and O&M services for the FDA consolidation project at the White Oak campus did not comply with contract requirements, acquisition regulations, or agency policy. These issues are detailed in the following sections.

Non-Compliance with DOE Super ESPC Requirements

DOE's Super ESPCs are umbrella contracts with pre-qualified energy companies that comply with FAR requirements. Agencies, including GSA, can issue task orders against the Super ESPC more quickly than by awarding a standalone contract. However, procurements made using the DOE Super ESPC must follow the requirements specified in the contract. We found that PBS NCR did not meet two contract requirements when it awarded the task order for phase three: there is no documentation that baseline measurements for the LED lighting energy conservation measure was witnessed by government representatives and the contractor's final financial proposal did not comply with requirements of the DOE Super ESPC.

- *PBS NCR Did Not Document Baseline Witnessing:* As part of contracting for ESPCs, GSA and the energy company must agree on a baseline, which is the cost for energy consumption the government would have incurred without the ESPC project. One of the energy conservation measures implemented at the White Oak campus was installation of light-emitting diode lighting, which is more cost-effective than standard lighting. An important factor to ensure energy saving is witnessing the establishment of the baseline computations. The contractor developed the baseline from a lighting survey it completed in 2010. However, there is no documentation that these baseline measurements were witnessed by government representatives.

  The Federal Energy Management Program's *Guide to Government Witnessing and Review of M&V* [Measurement and Verification] *Activities* states that:

  > Contract administration requirements for the agency COR [contracting officer's representative]/COTR [contracting officer's technical representative] for the ESPC task order include the following: Prior to ECM [energy conservation measure] installation, witness measurements and review calculations, records (e.g., utility bills), and other elements of baselines to confirm accuracy and consistency with the approved M&V plan.

  The contracting officer stated that a federal employee witnessed the lighting baseline measurements; however, they could not provide any supporting documentation. Baselines must be accurately measured to ensure that projected ESPC savings are accurate. Inflated savings projections could result in the government making payments for savings that are never realized. As stated in our prior ESPC audit report:

  > Given the importance of the baseline measurements to the computation of estimated savings and verification of actual savings, compliance with FEMP [Federal Energy Management Program] requirements for baseline measurement witnessing, supported by

documentation in the contract file, is the best way to protect the government's investment in ESPCs in the future.[5]

- *Contractor's Financial Proposal Did Not Have All Certifications:* The contractor's final financial proposal did not comply with requirements of the DOE Super ESPC because it did not provide a Selection Memorandum certifying that financing was competed among multiple financiers, the rationale for the financier selection, and the reason why the selection was the best value for the government. According to the contracting officer, PBS NCR was not aware of the DOE Super ESPC's financing requirement for a certified Selection Memorandum. However, the contract file included documentation that DOE advised the contracting officer, prior to award, that the contractor's final proposal did not contain a certified Selection Memorandum. Without the Selection Memorandum certification, there is no assurance that the selection of the contract financier was the best value for the government.

Inadequate Acquisition Planning and Documentation of Price Reasonableness

When PBS NCR awarded phase three of the ESPC project, it violated FAR requirements by not having an acquisition plan and by failing to document the price reasonableness determination for individual energy measures. In addition, Modification 14 did not have an independent government estimate, as required.

According to FAR 7.102, *Policy,* agencies are required to perform acquisition planning for all acquisitions. Furthermore, an acquisition plan for acquisitions over $50 million must be approved or waived by the Head of the Contracting Agency. However, there was no acquisition plan for the task order. The contracting officer told us that an acquisition plan was started, but due to multiple versions of the final proposal, the plan was not completed prior to award.

In addition, the contracting officer did not adequately document a determination of fair and reasonable pricing per FAR 15.404-1, *Proposal and Analysis Techniques*. FAR 15.404-1 states that the contracting officer is responsible for evaluating the price reasonableness of an offer. The contract file did not contain a price negotiation memorandum or any other documentation detailing the contracting officer's pricing determination. The contracting officer stated all documentation to make a fair and reasonable price determination is in the file. However, there is nothing in the file to establish that the contracting officer made an affirmative determination that prices were reasonable. Because PBS NCR did not perform its due diligence and comply with the FAR, the government may be paying higher prices than necessary.

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[5] *PBS Energy Savings Performance Contract Awards May Not Meet Savings Goals* (Report Number A150009/P/5/R16003, September 27, 2016, Page 7).

Non-Compliance With Agency Policy

Along with the requirements contained in the DOE Super ESPC contract vehicle and the FAR, GSA policy imposes additional requirements for ESPCs. We found that PBS NCR failed to comply with two requirements: it did not incorporate the Limitation of Government Obligation (LOGO) clause into the White Oak O&M contract and did not hold the required Preaward Review Board evaluation.

- *PBS NCR Did Not Incorporate the LOGO Clause:* As discussed in *Finding 1*, Modification 26, valued at over $145 million, significantly expanded O&M services at White Oak. These services were expanded beyond the O&M related to the energy conservation measures. The modification did not include the LOGO clause, which is required for severable services contracts per PBS Procurement Instructional Bulletin (PIB) 13-05, *Incremental Funding on Building Recurring Service Contracts*. Severable services are services that are ongoing or repetitive in nature, including O&M services, for which benefit is received each time the service is rendered. The LOGO clause limits the government's liability for these services, authorizing a contractor to perform only up to the specified limitation, unless written notice is provided.

  According to the contracting officer, PBS NCR did not add the clause based on email guidance from personnel in GSA's Office of the Chief Financial Officer that ESPCs did not meet the requirements for LOGO. The email stated that "LOGO is applicable to recurring service contracts where the services are severable. ESPC contracts are underlying 20 year contracts so LOGO would not apply, we fund the contracts annually." PBS also referenced PIB 13-05 Supplement 1, *Incremental Funding on Building Recurring Service Contracts*, which states that O&M services that cannot be easily separated from the ESPC portion of the contract do not require the LOGO clause. However, as detailed in *Finding 1*, Modification 26 contains services that can be easily separated from the ESPC and should be re-competed.

  Therefore, per PIB 13-05, the LOGO clause applies to, and should be included in, all procurements of building recurring service contracts that are incrementally funded with non-ESPC O&M services. Without the inclusion of the LOGO clause, the government is exposed to a greater liability with the contractor. The fact that the ESPC period of performance is 20 years does not determine whether the LOGO clause is applicable. The ESPC is an incrementally funded contract that includes a modification for O&M services, which are severable services; therefore, the LOGO clause applies.

- *PBS NCR Waived the Preaward Review Board Without a Postaward Review:* Although the initial award of Task Order GS-P-11-11-MK-0002 totaled over $785.8 million, PBS NCR waived the required Preaward Review Board review. NCR Procurement Bulletin WPP-2005-03 requires that all contract files in a preaward status and over the dollar threshold of $500,000 are subject to the

Preaward Review Board evaluation and approval prior to award. The requirement for waiving the Preaward Review Board is to hold a Postaward Review Board no later than 5 days after award; however, PBS NCR did not hold that review either. According to the contracting officer, there was a rush to award this task order to keep up with the construction timeline for FDA's request to move its employees into the space.

PBS NCR implemented the Preaward Review Board to strengthen its contracting procurement processes because of weaknesses that its management and prior audits identified. Bypassing this corrective action resulted in non-compliance with its own policy and allows for PBS contracting weaknesses.

Since PBS NCR did not comply with contract requirements, acquisition regulations, or agency policy, the government lacks assurance that the task order pricing is fair and reasonable, and assumes increased financial liability. To mitigate these problems on this and future ESPC task orders, PBS NCR needs to modify the task order and improve its internal controls.

<u>Recommendations</u>

We recommend that the Regional Commissioner, PBS NCR:

4. Implement internal controls to ensure ESPCs comply with DOE regulations and guidance including:
    a. Verifying that costs of implementing energy conservation measures are paid for from the resulting cost savings;
    b. Witnessing and independently verifying that baselines developed by the energy company are accurate; and
    c. Verifying that the financial Selection Memorandum from the energy company is certified as being the best value for the government.
5. Implement training for PBS NCR personnel responsible for:
    a. The preparation of acquisition plans;
    b. Price reasonableness determinations for ESPC contracting, including the development and use of independent government estimates;
    c. Contract file documentation requirements; and
    d. Compliance with requirements to hold a Preaward Review Board review prior to award, or if waived, a Postaward Review Board review for applicable task orders.
6. Once the procurement of a new O&M contract is secured, as stated in *Finding 1*, include the Limitation of Government Obligation clause on all non-ESPC O&M services.

<u>GSA Comments</u>

PBS concurred with *Finding 2* and *Recommendations 4* and *5*, but did not concur with *Recommendation 6*. PBS stated in its response that:

> In line with PBS' response to Finding 1 and Recommendation 1 above, PBS evaluated the modifications to be within the scope of ESPC III. PBS is in compliance with the current Limitation of Government Obligation (LoGO [sic]) policy. Procurement Instructional Bulletin 16-01, Rev. 2.0 (Sept. 28, 2016) (referencing LoGO [sic] frequently asked questions document available at https://insite.gsa.gov/portal/content/655266). In addition, OCFO memorandum Standard Operating Procedure for Energy Savings Performance Contracts, dated April 2017 states: "Payment schedules can be monthly, quarterly, biannual or annual. In addition, funds required in succeeding years must be obligated annually in full using the coding in the funding matrix below." Based on this guidance, PBS does not believe the LoGO [sic] clause needs to be included in the existing contracts or modifications.

GSA's comments are included in their entirety in ***Appendix B***.

<u>OIG Response</u>

Although PBS asserts that the LOGO clause does not apply because the O&M is a part of the ESPC, including entire building O&M, we disagree as the services added are severable and unrelated to the original scope of the ESPC. Modification 26 added O&M services to the ESPC that are independent and unrelated to the White Oak ESPC services. PBS added the services to the contract to centralize all of the O&M services at White Oak under a single contract for its convenience.

In its response, PBS references two documents: PIB 16-01 Rev 2.0, dated September 2016, which provides guidance on using the LOGO clause and the Standard Operating Procedure for Energy Savings Performance Contracts memorandum, dated April 2017, which provides financial guidance for ESPCs. Both are internal GSA guidance and both were not in place at the time the modification was awarded. While PBS is attempting to use current guidance to justify a prior contract modification, neither absolves PBS of the need to obligate funds for the modification. Under PIB 16-01, Modification 26 is subject to the LOGO clause as it applies to all building recurring service procurements such as the O&M services included in Modification 26. Further, the Standard Operating Procedure for Energy Savings Performance Contracts provides guidance on the financial processing of a standard ESPC. It provides no financial guidance for adding severable O&M services to an ESPC.

Conclusion

PBS NCR awarded ESPC Task Order GS-P-11-11-MK-0002, valued at over $785.8 million, to improve energy efficiency at the White Oak campus. Although the task order value has grown to a value over $1.2 billion, PBS NCR may not be able to achieve its energy efficiency goals because it did not take the proper steps for awarding and administering the task order and subsequent modifications. We found that:

- PBS NCR violated CICA and the competition requirements set forth in the FAR by making a cardinal change to the contract that substantially increased the contract's scope of work for operations and maintenance. This action eliminated price competition and denied opportunities for other contractors.
- PBS NCR did not comply with the DOE contract requirements, acquisition regulations, and internal policy.

Strengthening internal controls will assist PBS NCR to award and administer ESPC task orders more effectively and help ensure GSA achieves its energy savings goals.

Audit Team

This audit was managed out of the Great Lakes Region Audit Office and conducted by the individuals listed below:

Adam Gooch	Regional Inspector General for Auditing
Michael Lamonica	Audit Manager
Sherese Shy-Holmes	Auditor-In-Charge

Appendix A – Scope and Methodology

We assessed PBS NCR's compliance with applicable regulations and guidance for the award of Task Order GS-P-11-11-MK-0002, awarded December 23, 2010, with an initial value at over $785.8 million.

To accomplish our objective, we:

- Reviewed the background and history of the ESPC program, including legislation, executive orders, and DOE guidance;
- Reviewed the background and history of the FDA Revitalization Act;
- Completed Federal Energy Management Program training on ESPCs;
- Evaluated and analyzed previous GSA Office of Inspector General audit reports of ESPCs;
- Evaluated and analyzed previous audit reports of ESPCs issued by Inspectors General of DOE, the National Aeronautics and Space Administration, and the National Archives and Records Administration, as well as the U.S. Government Accountability Office;
- Examined memorandums of understanding between GSA and FDA;
- Examined contract file documentation, including proposals, awards, price reasonableness determinations, and independent government estimates;
- Compiled and analyzed data on the energy measures included in the base award and subsequent modifications;
- Assessed the training and qualifications of ESPC officials and contracting officers;
- Researched the FAR and GSA Acquisition Manual regulations and guidance related to ESPCs; and
- Interviewed ESPC program officials, contracting officers, and other PBS NCR officials about the ESPC program and this specific ESPC task order.

We conducted the audit between November 2015 and August 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Internal Controls

Our assessment of internal controls was limited to those necessary to address the objectives of the audit. Identified internal control issues are discussed in the Results section of this report.

GSA

GSA National Capital Region

JUN 16 2017

MEMORANDUM FOR ADAM GOOCH
REGIONAL INSPECTOR GENERAL FOR AUDITING
GREAT LAKES REGION AUDIT OFFICE (JA-5)

MICHAEL GELBER

THROUGH: MICHAEL GELBER
ACTING COMMISSIONER
PUBLIC BUILDINGS SERVICE (P)

FROM: MARY D. GIBERT
REGIONAL COMMISSIONER
PUBLIC BUILDINGS SERVICE (WP)

SUBJECT: PBS National Capital Region's $1.2 Billion Energy Savings Performance Contract for White Oak was Not Awarded or Modified in Accordance with Regulations and Policy
Report Number A150009-2

This memorandum is in response to the Office of the Inspector General's final audit on "PBS National Capital Region's $1.2 Billion Energy Savings Performance Contract for White Oak was Not Awarded or Modified in Accordance with Regulations and Policy."

The Public Buildings Service (PBS) appreciated the opportunity to review the contents of the draft report with the audit team on February 28, 2017 and on May 16, 2017.

Attached is PBS's response addressing the audit's findings and recommendations.

If you have any questions, please contact me at (202) 708-5891.

Attachment

U.S. General Services Administration
301 7th Street, SW
Washington, DC 20407-0001
www.gsa.gov

Attachment
GSA Response to the OIG Audit Report A150009-2

Finding 1 – PBS's award of a task order for expanded operations and maintenance services at the White Oak campus resulted in a cardinal change that violated federal competition requirements.

Response: PBS's evaluation of the modifications determined they were within the scope and intent of the existing contract (ESPC III) when awarding the task order for operations and maintenance (O&M) at the White Oak campus. The cardinal change doctrine does not advance the bright-line approach adopted by the Office of the Inspector General. Axel Electronics, Inc., ASBCA 18990, 74-1 BCA 10,471 (1974). The determination of whether a change order constitutes a cardinal change is highly dependent on the facts and circumstances surrounding each order. "There is no exact mathematical formula for determining when a change is outside the scope of the contract." Contel Advanced Systems, Inc., ASBCA 49072, 2002-1 BCA 31,808 (2002). "The determination turns on an assessment of the parties' intention at the time of contract formation, an evaluation of the quality and magnitude of the changed work, and the impact of the change on the whole project." Id. Cost and disruption of a change are not considered determinative. Axel Electronics, Inc., ASBCA 18990, 74-1 BCA 10,471 (1974). Increases more than doubling the cost of work have been held to have been within the scope of the contract. Id.; Cannon Structures, Inc., AGBCA 90-207-1, 93-3 BCA 26,059 (1993). Changes are not outside the scope of a contract unless they rendered the work wholly different from that for which the Government contracted. Akcon, Inc., ENGBCA 5593, 90-3 BCA 23,250 (1990).

The base ESPC III task order included, among other things, O&M services for several interrelated White Oak campus components. Additionally, ESPCs I, II, and III at the White Oak campus were complimentary, and were performed in an integrated manner by one vendor. Further, each task order involved significant O&M requirements. ESPCs I and II and the buildings they impact are specifically referenced in the ESPC III contract. Additionally, the need to standardize O&M services across all White Oak buildings was discussed at length during the negotiation of ESPC III. On this record, the parties' expectations at the time of contract formation reasonably included O&M services at nearby components at the White Oak facility.

Given that the modifications consisted of adding O&M services to a contract that already included a large O&M requirement, the nature of the work was not qualitatively different from the scope of work under this contract, particularly as the original task order already covered and impacted multiple buildings on the integrated and contiguous

White Oak campus. In this regard, note as well that the energy savings performance contract authority specifically relates the term "energy savings" to a "building or buildings or other federally owned facilities." 42 U.S.C. § 8287c(2)(A). In the context of a FEMP ESPC task order, a contractor could anticipate to see additional similar work impacting additional adjacent buildings on the White Oak campus.

As the relative magnitude of a contractual change is not determinative of the propriety of such change; PBS believes each of the referenced change orders were relatively proportional to the base award.

Finding 2 – PBS did not award and administer the White Oak ESPC task order in compliance with the DOE contract requirements, acquisition regulations, and internal policy.

Response: PBS validated the baseline for the LED Lighting ECM using wattage of existing and replacement bulbs, fixture count, kWh cost, and run hours prior to award. In addition, PBS actively engaged with the vendor to assess and verify accuracy of the baseline prior to award. Therefore, PBS assesses the ECM baseline to be appropriate. PBS extensively reviewed and documented its analysis in the project review comments. PBS participates along with Department of Energy (DOE) Project Facilitators in the annual Measurement and Verification process to ensure that measurements are properly taken and that the report reflects that savings were achieved during the performance year.

The contract file does include an Investor Deal Summary, provided by the vendor. While this information was not memorialized in a certified document, PBS and DOE reviewed this Investor Deal Summary, which contained three offers, and concluded through oral discussions that the choice of financier was appropriate and in the best interest of the Government. PBS confirmed with DOE's Federal Project Executive and Financing Specialist that a certified selection memorandum is not required.

Recommendations

OIG recommends that the Regional Commissioner, PBS:

1. Take immediate action to expedite the procurement of a new O&M contract that adheres to competition requirements specified in the Competition in Contracting Act of 1984 and the Federal Acquisition Regulation.

PBS does not concur with this recommendation.

Response:

The OIG is recommending that PBS expedite the award of a new O&M contract to replace Modifications 20 and 26. As stated above, PBS evaluated the modifications to be within the scope of ESPC III. The Contracting Officer: (a) knew the factors to be considered and weighed in assessing whether the modifications were within or outside the scope of ESPC III's original scope of work; (b) knew the close connection between O&M services, the campus buildings, and ESPCs I, II and III; (c) knew the magnitude of the initial award and each change order; (d) knew that increased O&M requirements were within the parties' contemplation at the time of task order negotiation; and, therefore, determined that the services were within the scope of the task order.

PBS reviewed Modifications 20 and 26 to determine the practical consequences of the OIG's recommendation. PBS has concluded that given the specific contractual and operational conditions on the White Oak campus, re-competing Modifications 20 and 26 would likely subject the Government to significant contractual, programmatic and/or financial impacts.

Modification 20 is designed to align performance standards for the O&M services initially procured under ESPCs I and II with the standards established for O&M services under ESPC III. Modification 20 provides better definition of expectations, accountability, and performance standards on the base O&M services, and represents an enhancement of O&M services for ESPCs I and II. These enhancements are designed to ensure that the White Oak campus functions at a level necessary to minimize risk of catastrophic failures to the Food and Drug Administration's (FDA) critical mission.

Were Modification 20 to be terminated, PBS's calculations show that it would forego approximately $82 million in savings from 2018 to 2033.

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Award of Modification 20 enhancements to another vendor would result in one vendor performing the initial level of services established in ESPCs I and II, and another vendor performing enhanced services. Additionally, some enhancements could not be coherently applied to any other vendor. These circumstances could result in wasteful duplication on the one hand and a loss of certain enhancements on the other.

Bifurcated performance increases the risk of a critical operational failure which could greatly impact the FDA's mission at this facility.

Alternatively, PBS could consider deleting all O&M services in Modification 20, and ESPCs I and II in order to re-compete the Modification 20 services. Further analysis will need to be conducted, but PBS believes that such action could obligate the Government to pay the ESPC II termination liability of approximately $50 million (in addition to the above-referenced loss of $82 million in expected savings). As well, such action may also require that ESPC I be terminated, triggering a termination liability of approximately $28 million.

In addition, any termination of Modification 20 services may require payment of termination for convenience settlement costs.

Given that PBS evaluated Modification 20 to be within the scope of ESPC III, and considering the impacts to both GSA and FDA referenced above, PBS does not believe that Modification 20 should be terminated.

With respect to Modification 26, any re-competition could similarly add significant operational inefficiencies that impact PBS's ability to timely act on any required repairs or maintenance. Because Modification 26 provides for above-standard after-hours services and services during inclement weather, award of Modification 26 services to another vendor could result in PBS having one vendor responsible for operating and maintaining equipment during the day and another vendor responsible for monitoring equipment after hours. This paradigm would, in the view of both PBS and FDA, impact the Government's ability to promptly respond to failure to critical equipment. Untimely response to any potential or impending operational failure on the campus is detrimental to FDA's mission-critical and failure-intolerant research mission. Contractual accountability may also be impacted, and the Government would experience increased administrative burdens.

Notwithstanding those impacts, the potential financial impact of a partial convenience termination and the fact that PBS evaluated the modifications to be within the scope of ESPC III, PBS will evaluate each line item in Modification 26 to determine whether to re-compete specific requirements, including *e.g.,* walking tours after hours and during inclement weather. PBS also will contact DOE to explore modifying ESPCs I and II to add the Modification 20 and 26 services to those task orders. PBS believes such modifications would be relatively straightforward in-scope changes to the preexisting orders.

2. Determine and implement the appropriate corrective action needed for PBS personnel's non-compliance with competition requirements.

Response:

PBS evaluated the modifications to be within the scope of ESPC III. Accordingly, no disciplinary action is required. In the event noncompliance occurs, PBS will consult within the agency, and take disciplinary action if appropriate. Please note the Contracting Officer for Modification 20 has retired.

3. Institute the necessary management controls to ensure that procurements for the campus comply with the Competition in Contracting Act of 1984 and Federal Acquisition Regulation 6.3.

Response:

Although, PBS evaluated the modifications to be within the scope of ESPC III, PBS NCR will institute procedures to (1) formalize that contracting officers document any determination that large change orders are within the scope of the original contract or order, and (2) re-emphasize the need for a justification for an exception to full and open competition or fair opportunity in instances where the change is outside of the scope of the initial contract or order.

4. Implement internal controls to ensure ESPC task orders comply with DOE regulations and guidance including:

a. Verifying that costs of implementing energy conservation measures are paid for from the resulting cost savings.

b. Witnessing and independently verifying that baselines developed by the energy company are accurate.

c. Verifying that the financial Selection Memorandum from the energy company is certified as being the best value for the Government.

Response:

4. a. PBS concurs with this recommendation. PBS currently has a process in place to perform measurement and verification validation which ensures that PBS only pays based on cost savings.

4. b. PBS concurs with this recommendation. PBS does perform the required baseline and verification evaluations to ensure the energy company calculations and assertions are correct.

4. c. PBS concurs with this recommendation. PBS will ensure that a certified Selection Memorandum will be included in future contract documents to ensure that the choice of financier is appropriate and in the best interest of the Government.

5. Implement training for PBS personnel responsible for:

   a. The preparation of acquisition plans.

   b. Price reasonableness determinations for ESPC contracting, including the development and use of independent Government estimates.

   c. Contract files documentation requirements.

   d. Compliance with requirements to hold a Pre-award Review prior to award, or if waived, a Post Award Review for applicable task orders.

Response:

5. a. PBS concurs with this recommendation. PBS will conduct training on the preparation of acquisition plans. In addition, the PBS NCR Regional Commissioner's Office requires Acquisition Plans be circulated for signature through the Acquisition Planning Module. The Acquisition Planning Module will be the repository for signed acquisition plans.

5. b. PBS concurs with this recommendation. The Contracting Officer has taken ESPC training inclusive of cost and price analysis as recently as October 2016.

5. c. PBS concurs with this recommendation. Since this ESPC was awarded in 2010, PBS has taken measures to establish a contract file checklist that is used to ensure contract documents are not missing from contract files. The checklist is used by Team

Leaders, Branch Chiefs, and Contracting Officers to ensure required documentation is included in the contract file under the appropriate tab. PBS conducts pre-award and post award reviews to ensure the use of the checklist.

5. d. PBS concurs with this recommendation. Prior to this audit, PBS issued a bulletin in September 2015 and in February 2017 to implement corrective action. However, PBS will revisit these internal controls to strengthen pre-award reviews of significant modifications. (See attached NCR Acquisition Management Bulletin 2015-05 and memorandum dated, February 27, 2017.)

6. Once the procurement of a new O&M contract is secured, as stated in *Finding 1*, include the Limitation of Government Obligation clause for all non-ESPC O&M services.

Response:

In line with PBS' response to Finding 1 and Recommendation 1 above, PBS evaluated the modifications to be within the scope of ESPC III. PBS is in compliance with the current Limitation of Government Obligation (LoGO) policy. Procurement Instructional Bulletin 16-01, Rev. 2.0 (Sept. 28, 2016) (referencing LoGO frequently asked questions document available at https://insite.gsa.gov/portal/content/655266). In addition, OCFO memorandum Standard Operating Procedure for Energy Savings Performance Contracts, dated April 2017 states: "Payment schedules can be monthly, quarterly, biannual or annual. In addition, funds required in succeeding years must be obligated annually in full using the coding in the funding matrix below." Based on this guidance, PBS does not believe the LoGO clause needs to be included in the existing contracts or modifications.

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Appendix C – Report Distribution

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Commissioner (P)

Deputy Commissioner (P)

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