

Office of Inspector General

**Audit of Contracts
FMC-05-00021 and FMC-06-00007
Procurement of Consulting Services
A07-02**



May 2007

FEDERAL MARITIME COMMISSION



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TO: The Commission

FROM: Adam R. Trzeciak
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SUBJECT: Transmittal of OIG Audit Report

Attached for your information is a recently completed Office of Inspector General (OIG) audit entitled *Audit of Contracts FMC-05-00021 and FMC-06-00007, Procurement of Consulting Services*. The audit contains four findings and three recommendations for corrective action.

The audit found that the procurement action entered into with the contractor did not follow the requirements for contracting as contained in the Federal Acquisitions Regulation (FAR) or the Federal Maritime Commission's (FMC) own internal policies and procedures. We also questioned whether this contract was adequately monitored by the agency. The contractor was not required to submit progress reports and the Statement of Work contained no deliverables or timeframes to hold the contractor accountable. Invoices submitted by the contractor contained no FAR-required details, e.g., receipts, time sheets, mileage calculations, etc., that would allow anyone reviewing these claims to verify their veracity and their accuracy. All such invoices were, nonetheless, approved and paid.

Moving forward, the OIG believes that the agency should rely on assistance from the Bureau of Public Debt (BPD), the agency's administrative services agent, for contract support. BPD has contracting experts that let over \$200 million in contracts each year. By contrast, the FMC enters into few contracts totaling less than \$787,000 annually. The agency simply does not do enough contracting to maintain the expertise it needs and to stay current with complex federal regulations in the acquisitions area.

The OIG is also recommending that the agency recover \$65,922 of \$159,329 in fees and expenses it paid to the contractor over a two year period, due primarily to the absence of receipts, explanations and/or documentation to support his claims.

I am available at your convenience to discuss the audit findings and recommendations.

PROCUREMENT SUMMARY

The procurement of consulting services provided by the contractor began in the last quarter of FY 2003.¹ The Federal Maritime Commission (FMC) was seeking assistance to enhance its strategic, performance and annual planning processes. Agency staff contacted the Office of Personnel Management's Federal Executive Institute (FEI) to inquire how the institute could assist the FMC. FEI provided the FMC with the names of three candidates with the requisite skills. The three were interviewed by the chairman and two senior managers. The contractor was selected based on his practical, hands on, Federal experience. The agency signed an Interagency Agreement (IA) with FEI to provide these services for one year, effective 09/25/03 through 09/30/04. The contractor's fee was \$250 per hour. FEI's overhead fee added another approximately \$60 per hour.

Shortly after the contractor began work under the IA, the scope of services broadened considerably. He performed an organizational analysis and identified "fundamental issues" that needed to be addressed before he would undertake any strategic planning activities. This modified requirement was endorsed by the FMC chairman. The IA, however, was not modified.

In FY 2005, the FMC renewed the IA with FEI, effective 10/1/04 through 09/30/05, but, early in the fiscal year, the agency began to take steps to contract directly with the contractor. The decision was primarily financial – the FMC would save the hourly overhead paid to FEI. The contractor, we suspect, also favored the new arrangement as he had been experiencing payroll problems (e.g., delays) with FEI.

To contract with the contractor directly meant that the agency did not compete the requirement in the open market. Instead, the agency issued a "sole source" contract. The agency updated the work statement (Statement of Work or SOW) and prepared a "Justification & Analysis" (J&A), which, in effect, justifies the use of a sole source contract. The SOW we reviewed contained separate sections on procurement (i) objectives and scope and (ii) compensation. The objectives and scope identified 18 specific services to be provided by the contractor. The compensation section set his compensation at \$250 per hour or \$2,000 per day, plus expenses. However, the work statement did not specify deliverables or project timeframes.

According to the J&A in the contract file, the contractor was *the only responsible source to meet the agency's needs and no other services would satisfy agency requirements*. Further, the contracting officer (CO) identified the contractor's *hands on experience working with FMC management* as the reason that he was the only responsible source.

¹ It is the policy of the Office of Inspector General not to identify individuals by name in publicly-available audit reports. Although it may make for cumbersome reading at times, we routinely refer to the subject of the audit as "the contractor."

The agency did not prepare a formal contract, but instead detailed the procurement on Optional Form 347, *Order for Supplies or Services*, or simply, a purchase order (PO). The PO referenced the SOW, which provided minimum guidance and parameters regarding the services the contractor would be providing.

While the OIG identified no documentation in the file identifying the contract type, our review of supporting documentation and discussions with FMC and General Services Administration (GSA) procurement staff indicate that the FMC entered into a Time and Materials (T&M) contract with the contractor. A T&M contract specifies an hourly wage and reimburses contractor expenses at cost. T&M contracts are well suited to situations where the length of the services to be provided is difficult to estimate.

When entering into a T&M contract, federal regulations require that the CO prepare a "Determinations and Findings" (D&F) memorandum which (i) documents the steps taken by the CO to ensure that no other contract type is suitable and (ii) identifies a ceiling price on the contract. Although the OIG found no D&F in the file, given the nature of the services, it is unlikely that other contract types would be appropriate. The CO did establish a ceiling price of \$2,000 per day in the SOW but did not set a ceiling on the procurement in its entirety.

On December 21, 2004, the FMC issued Order No. FMC-05-00021, which continued the consulting services provided to the FMC by the contractor for FY 2005 and references the SOW and the 18 specific services to be provided. The period of performance was identified as 12/01/04 to 09/30/05. The total amount of the award was \$60,000. The FMC issued a modification to the PO on 09/01/05 for an additional \$7,000. On 10/26/05, the FMC issued Order No. FMC 06-00007 for \$10,000 to continue consulting services provided by the contractor for FY2006. On 01/10/06 and 07/12/06, the FMC issued modifications to the PO to increase funding by \$55,000 and \$20,000 respectively.

The FMC received its first invoice from the contractor on December 22, 2004, totaling \$8,939.80, for services he provided to the Commission between 12/06/04 – 12/10/04. During most of fiscal year 2005, all of fiscal year 2006 and one month in FY 2007, the FMC paid 22 invoices submitted by the contractor totaling \$159,329 for fees and expenses related to his consulting services at the agency.²

All contractor invoices were submitted monthly and contained two line items: (i) professional fees, and (ii) travel, materials and other expenses. Invoices contained no support for either category, such as time sheets, a description of tasks performed during the month, hotel bills, airfare receipts or any other documentation. All invoices were approved without question by the agency.

² One additional invoice for \$6,500 was submitted in FY 2007 for fees and expenses resulting from an FMC-cancelled visit. That invoice is not included in the universe of amounts claimed by the contractor because, as of the issuance of this audit report, it has not been paid by the FMC.

The OIG review of support provided by the contractor in response to the OIG audit found questionable claims, to include billing the FMC at a flat rate of \$2,000 per day on site instead of the \$250 per hour identified in the SOW, unsubstantiated claims for work performed off site, miscalculated per diem claims, lodging claims in excess of GSA-established allowances, inconsistent mileage claims between the contractor's home and Washington, D.C., missing receipts for most claims over \$75, and claims for "misc." and "supplies" with no explanation or substantiation.

The contractor discussed the content and results of his meetings with FMC staff with the agency's chairman generally on a monthly basis. No summaries or reports were required or prepared to document contractor activities or outcomes. Review of the contractor's invoices, to include verification of hours worked and expenses billed to the agency, was not performed.

As we reviewed this procurement as a whole, to include a lack of deliverables and timeframes, unclear objectives and invoices lacking details to justify claims, the OIG concludes that the contractor had more control over this contract than did the agency.

Audit of Contracts FMC-05-00021 and FMC-06-00007 Procurement of Consulting Services

BACKGROUND

The Federal Maritime Commission (FMC) is an independent regulatory agency responsible for the regulation of ocean-borne transportation in the foreign commerce of the United States. The principal statutes or statutory provisions administered by the Commission are the Shipping Act of 1984, the Foreign Shipping Practices Act of 1988, section 19 of the Merchant Marine Act of 1920 and Public Law 89-777. In FY 2006, the Commission was authorized a total of 180 full time equivalent (FTE) positions and had an appropriation of approximately \$21,000,000. That appropriation supported the actual employment of 125 FTE positions, rent, travel, training and the purchase of other goods and services during the fiscal year.

The Office of Administration is responsible for implementing the administrative directives of the chairman. The Director oversees the agency's administrative offices: Office of Human Resources (OHR), Office of Information Technology (OIT), Office of Financial Management (OFM) and the Office of Management Services (OMS).

The OMS directs and administers a variety of management service functions that provide administrative support to the program operations of the Commission. The Office procures, secures and/or furnishes all supplies, equipment and services required in support of the agency's mission, and arranges for facilities management and security. The Director of OMS serves as the agency's Chief Contracting Officer.

On September 25, 2003, the FMC entered into an Interagency Agreement (IA) with the Office of Personnel Management's (OPM) Federal Executive Institute (FEI) *to provide training, guidance, and materials for agency executives in the areas of strategic, performance, and annual planning, in accordance with the Government Performance and Results Act (GPRA)*. The agency accepted one of the FEI-recommended consultants to provide those services to meet the FMC's identified need. The IA was renewed on 10/1/04 for one additional year.

On December 21, 2004, the FMC issued purchase order FMC-05-00021 to continue consultant services provided by the contractor through the vehicle of a sole source contract. From December 2004 through October 2006, the contractor provided services to, and was paid directly by, the FMC. The agreement with him allowed for compensation at the rate of \$250 per hour or \$2,000 per day.

OBJECTIVE, SCOPE AND METHODOLOGY

The objective of the audit was to determine whether Federal Acquisition Regulation (FAR) provisions were followed throughout all phases of the contract.³ To meet this objective, the Office of Inspector General (OIG) reviewed (i) how the need was determined, (ii) the statement of work, including deliverables, (iii) the selection process, evaluation criteria and scoring, (iv) contract award, (v) contract monitoring, (vi) approval of invoices, including all supporting documentation for days worked, mileage, lodging and other billed expenses, and (vii) the justification and timing of contract modifications.

The scope of our review covered the period December 2004 through October 2006, although we collected documentation going back to September 2003 to provide background for the audit. Prior to the initiation of the contract, the contractor worked for the FMC through the vehicle of an IA with the Office of Personnel Management's FEI. FMC obligating documents show that FMC paid FEI approximately \$60,000 for services provided by the contractor to the FMC during the period September 2003 through November 2004.⁴ From December 2004 through October 2006, the FMC paid the contractor directly the sum of \$159,329.

We began the audit by reviewing the contract file, beginning with the IA between the FEI and the FMC to understand how the contractor was identified and selected. We also reviewed purchase orders, order modifications, work statements, the Justification and Analysis (J&A) in the contract file and notes by senior agency officials regarding the evaluation of proposed contractors. We reviewed correspondence between the contractor and agency procurement and program staff discussing various performance and payment issues and strategies per the contract.

In addition to our document review, we met with agency officials who played some role in implementing the contracts. We met with the FMC's contracting officer and procurement specialist to discuss how the contractor was identified and selected, the FAR requirements pertaining to this procurement action and how they were implemented, contract monitoring and payment of invoices. We also met with the Director of OFM to discuss contract funding mechanisms and the timing of actions taken to fund the PO and the order modifications. We discussed contractor evaluations and contract requirements with senior management officials who participated in the selection process, including the former chairman of the FMC. We met with General Service Administration (GSA) FAR Counsel staff to discuss FAR provisions and authorities as they pertain to this procurement action.

³ The Federal Acquisition Regulation is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. As such, it is the definitive authority for procurement actions implemented by the Federal government.

⁴ The sums paid to FEI include FEI overhead of approximately 25 percent. In addition, funds were paid through interagency transfers. As the IA with FEI was not within the scope of this audit, we relied on FMC obligating documents (Optional Form 347) to estimate expenditures.

We submitted questions to the contractor via his home email account requesting information on events leading up to his appointment and his billing practices.⁵ We also requested billing documentation to support his fee and expense claims. With information provided by the contractor, the OIG determined whether his submitted claims were adequately supported and allowable, based on FAR cost guidelines. We then totaled all of the “questioned costs” and provided details to management to recover those costs from the contractor.

To identify criteria for the audit, we reviewed FAR sections applicable to sole source procurements, T&M contracts and claims reimbursement guidance. We also reviewed Commission Order 112, *Procurement*, to identify agency-specific contracting policies.

We conducted this compliance audit in accordance with generally accepted government auditing standards during the period December 2006 through March 2007. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence that provides a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained supports our findings and conclusions based on our audit objectives. All fieldwork was performed at FMC headquarters in Washington, D.C.

FINDINGS

The procurement action entered into with the contractor did not follow the requirements for contracting as contained in the FAR or the FMC’s own internal policies and procedures. The agency’s needs were not articulated in the SOW and there was no proposal submitted by the contractor describing how he would meet the government’s needs. The agency did not document evaluation criteria or evaluation results. The sole source justifications in the contract file were limited to documenting a need for strategic planning and that only the contractor could meet that need. Over the life of this agreement with the contractor, no strategic planning services were provided by him.

Instead of full and open competition, the FMC ordered services directly from the contractor. This sole source procurement was improperly documented. The J&A, i.e., the government’s rationale for requiring a sole source award, was unconvincing and lacked most FAR-required documentation. Further, the procurement action was not advertised as required in either the *Commerce Business Daily* or “Fedbizopps.com,” to provide some assurances that someone as qualified as the contractor, who could have performed the same services at a lower price, did not exist or at least was not available to work for the agency when the need arose. Over the life of the contract, we identified no attempts to remove the “barriers to competition” that would have enabled this requirement to be competed.

⁵ Following our first correspondence with the contractor, he obtained legal counsel. All subsequent correspondence occurred through his counsel.

We also question whether this contract was adequately monitored by the agency. The contractor was not required to submit progress reports, and the SOW contained no deliverables to hold the contractor accountable. The chairman oversaw the contractor through monthly meetings when the contractor was on site. Status reports were not required or provided. Invoices submitted by the contractor contained no FAR-required details, e.g., receipts, time sheets, mileage calculations, etc., that would allow anyone reviewing these claims to independently verify their veracity and their accuracy. All such invoices were approved and paid.

Finding 1. Requirement Not Clearly Defined

According to Chapter 10 of the FAR, acquisitions begin with a description of the Government's needs. In the summer of 2003, the FMC identified a need for "strategic, performance and annual planning in accordance with the Government Performance and Results Act." To meet this need, agency executives contacted the FEI for assistance in identifying an individual who could assist the FMC in meeting this need.

The contractor was preferred by agency executives because of his "hands-on, practical experience" managing large governmental facilities. But according to one agency executive involved in the decision process, the chairman wanted more than a strategic planner. He wanted an individual to work as an advisor to effectively bring about change at the agency. According to the contractor, he was initially asked to assist with strategic planning, but determined that the FMC had more "fundamental issues" that took priority. He advised that these, rather than planning activities, needed to be addressed first. The chairman agreed with this assessment.

The IA was not modified to reflect this changed focus. Nor did the OIG identify any documentation describing the change in the agency's needs in the contract file for this period. The FY 2004 contract file contained a draft SOW entitled "Statement of Work for Strategic and Annual Plans." The SOW deliverables included strategic plans and updated annual plans. On 10/1/04, the FMC renewed the IA for another year, again calling for assistance in providing planning activities. According to the CO, this changed focus (from planning to addressing "other fundamental issues") was not communicated to him.

In December 2004, the FMC and the contractor determined that it would be mutually beneficial if the agency contracted directly with him for services. The FMC could save FEI overhead costs, and payment problems experienced by the contractor through his employer, FEI, would be ameliorated. According to the former FMC chairman, the CO recommended to him that contractual arrangements be changed. The chairman signed off (agreed to) the recommendation and, according to him, left the contracting details to the administrative staff. On 12/21/04, the agency signed a purchase order obligating \$60,000 for the "*continuation of consulting services provided to the FMC by (the contractor) for FY 2005 as described in the attached Statement of Work.*" The contractor now worked directly for the FMC.

The revised SOW more clearly references the types of activities the contractor would be performing than prior SOW's that focused entirely on "planning." Under the SOW heading "Objectives and Scope," the contractor's broadened responsibilities were identified:

- 1 diagnosis of the organization and follow-on assistance in implementing required changes;
- 2 advice and counsel to the chairman;
- 3 organization diagnosis to include the Myers Briggs Type Indicator, 360 degree and other evaluations;
- 4 leadership team development for the chairman and Senior Executive Service;
- 5 conflict resolution and mediation services;
- 6 strategic planning;
- 7 project management and time management;
- 8 workforce planning;
- 9 executive coaching;
- 10 team building and staff development;
- 11 development of mission, vision and values statements;
- 12 realignment/reorganization;
- 13 dealing with problem employees;
- 14 overhaul of the performance appraisal system;
- 15 implementation of change;
- 16 understanding policy, politics and administration;
- 17 organizational alignment; and
- 18 working with clients, stakeholders, customers and other interested parties.

While these appear to represent what the contractor was capable of providing to the agency, it is unclear to the OIG which of these services represented a need of the agency and how this need would be addressed.

FMC internal guidance for procurements is found in Commission Order 112, effective 12/15/03. Section 7(a) places responsibility on the CO to ensure that the scope of work "*is sufficiently clear to hold both the contractor and the Government accountable.*" Section 7(b)(2) requires that the requesting unit "*identify the products or services required, the quantity or length of service, the timeframe when the product or service is needed and a total cost estimate.*" Section 8 (b)(2)(ii) cautions that the SOW should solicit only the actual needs of the Government. The OIG believes that agency efforts in this procurement action did not meet the requirements identified above.

The revised SOW also fell short of FAR guidelines. According to FAR Subpart 8.405-2, *Ordering Procedures for Services Requiring a Statement of Work*, all SOW's shall include the (1) work to be performed, (2) location of the work, (3) period of performance, (4) deliverable schedule, (5) applicable performance standards, and (6) any

special requirements (e.g., security clearances, travel, special knowledge).⁶ By contrast, the SOW prepared by the FMC and the contractor⁷ contained sections on FMC background, objectives and scope, security requirements, government furnished resources, points of contact, billing information and procurement authority.

Without identifying performance periods, work products or deliverables, deliverable schedules and applicable performance standards, the FMC left the requirement open ended and in the control of the contractor.

Finding 2. Sole Source Procurement Improperly Justified

FAR 2.101 defines a sole source acquisition as a contract for the purchase of supplies or services that is entered into by an agency after soliciting and negotiating with only one source.

41 U.S.C. 253 requires, with certain limited exceptions, that contracting officers promote and provide for full and open competition in soliciting offers and awarding Government contracts. Similarly, Commission Order 112, *Procurement*, states that all procurement transactions shall be conducted in a manner that provides for and promotes, to the maximum extent practicable, full and open competition, and does not place unnecessarily restrictive conditions or provisions in the contracting action that unduly limit competition.

41 U.S.C. 253(c) authorizes, under certain conditions, contracting without providing for full and open competition. However, before such contracting can be initiated, one of the exemptions to full and open competition must apply. FAR Subpart 6.302 identifies seven such exemptions:

1. Only one responsible source and no other supplies or services will satisfy agency requirements;
2. Unusual and compelling urgency;
3. Industrial mobilization; engineering, developmental, or research capability; or expert services;
4. International agreement;
5. Authorized or required by statute;
6. National security; and
7. Public interest.

The FAR contains guidance for each exemption to assist agency officials in determining whether the exemption applies to the planned procurement action. The FMC

⁶ FAR 8.4, *Federal Supply Schedules*, provides guidance to Federal agencies when selecting vendors from GSA's Federal Supply Schedule. The FMC contractor was not selected as part of this program. However, the FAR guidelines concerning what constitutes an effective SOW provide useful criteria in evaluating the SOW prepared by the FMC.

⁷ The OIG learned that the contractor assisted FMC staff in preparing the revised SOW because it was unclear to the CO what services the contractor would be providing to the agency.

cited the first exemption to justify its sole source procurement of services from the contractor.

FAR Subpart 6.303-1 requires contracting officers to document the reasons for using a sole source contract. Subpart 6.303-2 requires that each justification contain sufficient facts and rationale to justify the use of the specific authority cited (e.g., which of the seven exemptions apply) and pertinent information to include the identification of the agency and the contracting activity and a description of the action being approved. Some of the other required elements of a sole source justification include the following information:

1. A description of the supplies and services required to meet the agency's needs, including the estimated value of those services.
2. A demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited.
3. A description of the efforts made to ensure that offers are solicited from as many potential sources as is practicable, including whether a notice was or will be publicized. (See below.)
4. A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable. (See below.)
5. A statement of the reasons why market research was not conducted (if applicable).

The justification in the file contained relevant background information about the FMC and a justification for the sole source procurement, as stated below:

In order to improve its planning processes, the FMC entered into an interagency agreement with the OPM's Federal Executive Institute (FEI) for leadership support to provide training, guidance and materials for agency executives in strategic performance and annual planning. Under the auspices of this September 30, 2003 interagency agreement, the FMC met with several of FEI's consultants and selected (the contractor) as the best candidate for the FMC's needs. (He) has worked closely with the FMC chairman, the agency's senior executives and managers since that time. Pursuant to discussions with management officials and (the contractor), the agency has decided to contract directly with (him) for his services, and in doing so the FMC would save more than 30 percent in contract and service fees. As a result of this procurement approach, and his hands on experience in working with FMC management personnel, (he) is the only responsible source to satisfy this agency's executive strategic planning and training requirements...

This document continues the planning requirement first identified in the IA with FEI and not the broadened responsibilities contained in the SOW that was referenced in the purchase order that was dated 12/21/04 (FY 2005). Further, it does not (i) identify the services that only the contractor is uniquely qualified to provide, (ii) describe the services

required to meet the agency's needs, (iii) demonstrate that the contractor's unique qualifications requires use of the authority (e.g., exemption) cited, (iv) describe efforts made to ensure that offers were solicited from many sources, (v) determine that the proposed cost to the Government is fair and reasonable, and (vi) explain why market research was not conducted. It essentially says that the contractor is the best source because he's worked at the FMC before and knows the agency. The same justification is used again in FY 2006, which indicates that the FMC did not take steps to remove the barriers to competition that necessitated the sole source procurement, as required by the FAR.

Two of the above-identified requirements deserve special attention as they are instrumental in assuring that the government, regardless of the sole source selection, continues to receive the best value. FAR 6.301(d) requires that the CO solicit offers from as many potential sources as is practicable under the circumstances when not providing for full and open competition. Part 5 of the FAR describes policies and procedures for publicizing contract opportunities. Subpart 5.101 requires the CO to disseminate information on proposed contract actions expected to exceed \$25,000 in a "Government-wide Point of Entry" (GPE), such as the Commerce Business Daily or fedbizopps.gov. The FAR's intention is to document that the Government has taken steps to compete but found no comparable source. This contract action did not provide for any public notice.

The second unaddressed requirement involves a determination that the proposed price (to the Government) is fair and reasonable. Contracting officers generally conduct market research to determine the "going rate" for similar services. While the selection of another contractor was not a likely outcome in this instance, a price reasonableness determination could have put pressure on the contractor to approximate rates of similarly qualified consultants. Instead, he was allowed to set his fee without having to consider competitive pressures. One individual at the FEI indicated that the contractor's rates were at the "high end" among its organization development consultants.

The OIG concludes that the CO had few options other than to do a sole source procurement. The bottom line is that the contractor was already on board and working with agency executives and the CO did not feel re-competing the requirement was an option.

We also noted that no one in the chain of command in the Office of Administration challenged this procurement. According to Commission Order 112, *Procurement*, the Director of Administration is the Senior Procurement Executive (SPE) responsible for providing management direction and general administrative guidance regarding all procurement strategies, implementing procurement policies and approving all purchases over \$10,000. The Deputy Director for Administration is responsible for challenging barriers to competition, reviewing procurement practices and reporting to the SPE. The Deputy is also responsible for reviewing for concurrence all purchases over \$10,000, prior to SPE review. While both of these officials told the OIG that they had some concerns either with the contractor or the agency's procurement of a non-GSA

schedule vendor, neither raised these, or any sole-source concerns, to the chairman or attempted to modify the procurement.

Finding 3. Time and Materials Contract Requirements Not Fulfilled

According to FAR 16.601(a)(1), a T&M contract provides for acquiring supplies or services on the basis of direct labor hours at specified, fixed rates that include wages, overhead, general and administrative expenses and profit. FAR 52.232-7, *Payments Under T&M Contracts*, states that the amount shall be computed by multiplying the appropriate hourly rates prescribed by the number of direct labor hours performed.

The OIG identified no document in the file identifying the contract as a T&M or any other contract type. On the other hand, the SOW states that the contractor will be paid at an hourly rate plus expenses. FMC procurement staff and GSA contract experts both indicated that this was a T&M contract. It is important to establish this fact as the T&M contract places certain requirements on both the government and the contractor.

FAR 16.601(c) states that a T&M contract may be used when it is not possible at the time of placing the contract to estimate accurately costs with any reasonable degree of confidence. In this action, the nature of the services provided made it difficult to estimate costs because the length of services to be provided was indeterminate. FAR 16.601(c)(1) identifies a significant disadvantage of the T&M contract. It provides no positive project incentive to the contractor for cost control or labor efficiency; therefore appropriate government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.

FAR 16.601(d) provides guidance on what documentation must accompany a T&M contract. A T&M contract may be used (1) only after the CO executes a determination and findings (D&F) that no other contract type is suitable, and (2) only if the contract includes a ceiling price that the contractor exceeds at its own risk.

A D&F is a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions. According FAR Subpart 1.704, each D&F shall set forth enough facts and circumstances to clearly and convincingly justify the specific determination made.

The FMC did not perform a D&F prior to entering into this contract. However, the result would not likely have changed regardless. The nature of the services provided by the contractor did not easily lend themselves to the government's preferred fixed price contract, and the lack of deliverables and timeframes makes anything other than a T&M contract difficult to manage. The agency did set a ceiling price of \$2,000 per day that the contractor could bill, but did not establish a ceiling price for the life of the contract.

The T&M contract, due to its placing maximum risk on the government, requires the CO to take additional steps to protect the government's interests, to include aggressive monitoring (see below) and the inclusion of select contract clauses -

boilerplate language inserted in all government contracts. The FAR requires the government to reference 13 clauses in the contract. The OIG determined that no required clauses were referenced in the PO or any document that we reviewed.⁸

Based on our review, the OIG concludes that the agency did not take additional steps to monitor this contract, as recommended by the FAR, to provide some assurances that efficient methods and effective cost controls were used. As a result, some of the risks inherent in a T&M contract were realized – as described below.

Finding 4. Inadequate Monitoring of the Contract

Establishing the contractual relationship, especially documenting what is expected of the contractor, when it is expected by and setting requirements for invoicing are essential to a smoothly run contractual relationship. While the nature of the services made setting timeframes and deliverables difficult to quantify and qualify, not having either has made it difficult to hold the contractor accountable.

The OIG cannot opine on the effectiveness of the contractor or whether he met performance objectives because neither objectives nor deliverables were identified in the SOW. However, we were able to review billing statements (invoices) with the narrow focus of determining whether they were supported by adequate documentation and whether the claims were reimbursable.

The OIG reviewed contractor invoices for the period December 2004 through October 2006 – a total of 22 invoices totaling over \$159,000. Based on our review of the invoices alone, (i.e., prior to our request for supporting documentation from the contractor), we were not able to determine whether the fees and expenses billed to the agency were in keeping with FAR guidance. In all cases, the FMC paid the invoices lacking any support or documentation from the contractor.

The OIG, in keeping with FAR provisions 42.101(a)(2), 52.215-2 and 4.703, requested documentation to support claims made by the contractor resulting from services he performed as a consultant to the FMC.⁹ Based on our review of this information, the OIG identified unsupported claims and non-reimbursable items that were

⁸ Although the OIG identified four FAR clauses referenced in the SOW (1.403, *Individual Deviations*, 13.003(a) *Simplified Acquisition Policy*, 13.301, *Government wide Commercial Purchase Card*, and 37.203(b)(3), *Advisory and Assistance Services Policy*), none of these clauses are required T&M solicitation provisions and contract clauses per FAR 52.307.

⁹ FAR 42.101(a)(2-3) states that the auditor is responsible for reviewing the financial and accounting aspects of the contractor's cost control systems and performing other analyses and reviews that require access to the contractor's financial and accounting records supporting proposed and incurred costs. FAR 52.215-2 states that the contractor shall maintain and the CO, or an authorized representative of the CO, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred directly or indirectly in performance of this contract. FAR 4.703 requires contractors to make available records to satisfy contract audit requirements for three years after final payment.

paid by the agency. The OIG has provided line-item detail to the contracting officer with the recommendation that funds be recovered from the contractor. The total amount questioned by the OIG is \$65,921.21. Below is a summary of the methodology and subtotal by major cost categories.

Professional Fees

According to the contractor’s response to questions from the OIG, he set his fees at \$2,000 per day for work performed “on-site,” and \$250 per hour for work performed “off-site.” According to the SOW, which provides guidance on contractor compensation, his fees were to be reimbursed at a rate of “\$250 per hour or \$2,000 per day.” No distinction was made between on-site versus off-site activities. According to the FMC’s contracting officer, his compensation was set at \$250 per hour, or \$2,000 per day, based on him working an 8 hour day. The CO further explained that his intent in setting the contractor’s compensation was to continue the arrangement the agency had with FEI. Under this agreement, he was paid \$250 per hour.

Invoices contained a line item labeled “professional fees.” Only by requesting additional details from the contractor during the audit did we identify the “on-site vs. off-site” distinction. The OIG questions components of each category as described below.

On-Site Fees: The OIG concluded that the contractor’s routine practice of charging a flat, on-site fee of \$2,000 per day is not supported in the statement of work, nor did we identify evidence that it was pre-approved by anyone at the FMC. Billing at a flat rate resulted in a significant overpayment because on most visits, he did not work on site for eight hours. For example, for the first 10 months of CY 2006, he billed the FMC for 20 days at a rate of \$2,000 per day. According to his work agendas, on only four of those days did he work on site for eight hours. By billing at a daily rate, the contractor was paid almost \$7,000 more than he was entitled to under the terms of the SOW, as shown below:

<u>2006</u>	<u>Amount Billed</u>	<u>Hours Worked</u>	<u>OIG-Recalculated</u>
January	\$4,000.00	11.25	\$2,812.50
February	4,000.00	13.00	3,250.00
March	4,000.00	13.50	3,375.00
April	4,000.00	10.50	2,625.00
May	4,000.00	12.00	3,000.00
June	4,000.00	15.00	3,750.00
July	4,000.00	14.50	3,625.00
August	4,000.00	14.50	3,625.00
September	4,000.00	14.75	3,687.50
October	<u>4,000.00</u>	14.50	<u>3,625.00</u>
	<u>\$40,000.00</u>		<u>\$33,375.00</u>

The OIG multiplied the actual hours the contractor was on site at scheduled appointments by the \$250 approved hourly rate to arrive at the recalculated fee.

The contractor stated that the FMC chairman and the CO approved this flat rate at the inception of the contract with the FMC. He also stated that the rate was reflected in the “fee schedule” he provided to the agency at the commencement of the contract. According to the former chairman and the CO, the contractor did not request to be paid a flat rate, nor did either receive or approve a contractor fee schedule. Further, the CO indicated that the contractor provided his fee schedule for the first time in January 2007, months after last performing services for the agency.

For the 22 months reviewed by the OIG, we are questioning on-site fees totaling \$15,375.

Off-Site Fees: Unlike its on-site fee counterpart, the OIG found no documentation to support these fees totaling \$32,000 over 22 months. Several FAR cost principles apply to the OIG analysis of these claimed costs.¹⁰ FAR 31.205-33(b) states that costs of professional and consultant services are allowable when reasonable in relation to the services rendered. Since the OIG could not determine the nature of the services provided based on invoices submitted or subsequent requests to the contractor for documentation as part of the audit, we have no basis to conclude whether the claims were, in fact, reasonable.

FAR 31.205-33(f) states that fees for services rendered shall be allowable only when supported by evidence of the nature and scope of the services furnished. FAR 31.205-33(f)(2) requires invoices to contain sufficient detail as to the time expended and the nature of the actual services provided. As stated, the OIG identified no documentation to identify or describe the hours worked off-site.

The contractor told the OIG that he did not maintain logs or other documentation for off-site fees. Instead, at the end of the month, he reviewed his activities (e.g., calls to and from FMC personnel, preparation for on-site trips, research, drafting agendas, etc.). He then “*averaged the amount of time invested and billed the FMC for a half day or whole day, depending on the amount of work dedicated to FMC activities.*”

Without records, it is unclear how such an accounting can accurately detail the time spent among several Federal clients.¹¹ Having to go back several weeks to estimate time spent, for example, on a phone call seems to the OIG to be a difficult and inexact proposition. Also unclear is the contractor’s basis and authority for billing in half / whole day (\$1,000 / \$2,000) increments. At a minimum, it seems to run counter to the contractor’s stated policy of billing at \$250 per hour while off site. As he maintained no documentation to support his off-site fees, we could not assess whether his claims were valid. For instance, the OIG rhetorically asks whether a \$1,000 claim reflects four hours of detailed preparation or a 45 minute phone call to discuss scheduling. The OIG could

¹⁰ FAR, Part 31 – *Contract Cost Principles and Procedures*, contains guidance for the pricing of contracts and subcontracts. These principles also provide useful guidance to assess contractor service costs.

¹¹ In addition to the FMC, the contractor indicated that he worked for three other federal agencies during the period that he performed consulting services for the FMC.

not determine the answer from either the invoices submitted or the additional information provided by the contractor in response to the audit. The OIG noted that for the 22 invoices reviewed, all preparation (off-site) fees were in \$1,000 increments.

Due to the absence of any meaningful accounting records to document incurred costs and the contractor's practice of rounding preparation time into \$1,000 increments, the OIG is questioning all off-site fees, totaling \$32,000.

Expenses

The "expenses" cost category includes airfare, hotel, per diem, supplies, taxis, travel time from Asheville, NC, parking and supplies. On invoices received and paid by the FMC, the line item that captured these cost categories read "travel, materials and other expenses." One sum was provided on the invoice to capture all expenses, with no distinction among cost categories. No receipts were provided with any invoice submitted to the FMC for payment.

Chapter 31 of the FAR provides cost guidance to contractors. For example, FAR 31.205-46 states that costs incurred by contractor personnel on official company business are allowable, subject to certain limitations. Costs incurred for lodging, meals and incidental expenses are allowable only to the extent they do not exceed the maximum per diem rates in effect at the time of travel. Maximum per diem rates would not generally constitute a reasonable charge on partial travel days (e.g., day of departure and return). Documentation to support actual costs incurred shall be in accordance with contractor's established practices, provided that a receipt is required for each expenditure of \$75 or more.

In addition to the FAR, the SOW in effect for the procurement action stated that "an **itemized invoice** (emphasis added) received by the agency, and acceptance and approval by either the CO or the agency chairman, are the conditions required for proper payment."

To assist in the audit, the OIG requested that the contractor break out all expenses claimed and provide receipts going back two years (December 2004). In response, the OIG received most hotel receipts but little else in the way of documentation to substantiate claims. In our review of the documentation provided, we did not question any claim less than \$75 as long as the claim was explained. For example, we did not question parking and taxi fares because these were identified on documents provided in response to the audit. On the other hand, there were charges for \$45, \$50 and other amounts that contained no explanations and were not accompanied by receipts. We questioned those claims.

Transportation: The contractor traveled between his home and Washington, D.C. on commercial airlines or by use of his personal vehicle (POV). While the contractor provided no airfare receipts, he did provide select credit card statements and airline reservation printouts from on-line travel services that corresponded to his FMC visits.

On one trip, he departed from Indianapolis, IN, instead of his home airport (Asheville, NC), a distance of about 500 miles, without any explanation. We did not question this particular cost but identify it here to illustrate one example of a claim that should have been discussed with the contractor prior to reimbursement. Due to fluctuating airfares, the increase in fare (\$60) over the prior fare (two months previous) seemed reasonable.

Another inconsistency that should have been explained concerns a mileage claim resulting from the use of the contractor's personal vehicle. In January 2005, the contractor claimed \$367 for round trip mileage (GSA reimbursement rate of .375/mile) between his home and the FMC. In August 2006, he claimed \$575 for the same trip (GSA reimbursement rate of .445/mile). The difference in GSA reimbursement rates accounts for \$68 of the \$208 discrepancy. The contractor indicated that the claim for \$575 included parking.

Although a three-day parking fee of \$140 seems excessive, we suspect that he used his vehicle for other purposes while in Washington, D.C. We did not question the claim.

The OIG identified three months in 2006 that lacked any supporting documents of any kind for airfare. The OIG questions \$1,448 in airfare claims. We also identified another \$140 in unsubstantiated administrative fees resulting from the contractor's time required to schedule flights. Total questioned costs are \$1,588.

Lodging: In response to the audit, the contractor generally provided receipts for hotel stays occurring in CY 2006. While the OIG identified some charges on the receipts that are not reimbursable, most claims were supported.

For CY2005, the contractor provided only two hotel receipts in response to our request. Instead, he provided credit card statements identifying the hotel, transaction date and the amount billed. Lacking line-item detail prevented us from identifying non-reimbursable claims, as we identified on CY 2006 hotel invoices submitted to us. Nevertheless we questioned no hotel charges supported by a credit card statement.

We are questioning \$902 in hotel claims due to (i) missing receipts (two months) and (ii) exceeding the GSA lodging allowance by \$286 over a three-night stay.

Travel Time: In January 2006, the contractor began billing the agency for time spent traveling between Asheville, NC and Washington, D.C. The flat charge was \$500. It is unclear how the fee was determined or why the fee was applied beginning in 2006.

According to the contractor, the fee was claimed pursuant to the fee schedule provided to the agency. He also stated that the chairman and the CO approved the fee. The OIG notes that we found no fee schedule in the contract file, nor is his assertion regarding approvals supported by our discussions with the former chairman and the CO. We recognize that travel time is a legitimate expense, but question the unilateral setting

of the fee. As we could not identify any authorization or approval for the fee from FMC officials, the OIG questions all \$5,000 claims for travel time.

Undocumented expenses: These expenses include the amount of unexplained claims from ten 2005 invoices. Despite a request from the OIG, the contractor did not provide any documentation to support these claims or any explanation of them. Total amount questioned is \$8,981.

All other: This category includes supplies, miscalculated per diem claims, concierge services, laundry charges without staying the required days, and unexplained "misc. claims." Total questioned costs are \$2,025.

The total fees and expenses billed to the FMC from December 2004 through October 2006 was \$159,329.22. The OIG is questioning \$65,921.21 in claims from this time period for reasons stated above.

SUMMARY

The OIG audit focused on two separate but interrelated aspects of the procurement with the contractor. First, we reviewed the identification and selection of the contractor and the contractual relationship. Second, we looked at how this contract was monitored. The method in which this contract was administered and monitored has contributed significantly to the sums questioned by the OIG.

This particular contract was unique in that the direction for its initial procurement and substantive oversight came from the chairman of the agency. The chairman participated in the selection of the contractor with two other senior executives and felt comfortable with the contractor's capabilities and skill set. Another government agency, OPM, assisted in the search and procurement of this contractor. There was no evidence here to suggest that any prior relationship existed between the chairman and the contractor.

OIG concerns about this procurement emerged with the decision to hire the contractor directly through a sole-source procurement. The contractor spent one year working closely with agency executives and had significant background into the issues that the chairman wanted to address. On the surface it made little sense to start over and look for a new contractor. The FAR allows for sole source contracts in these types of circumstances, but the CO must take extra steps to protect the government's interests. At the FMC, short cuts were taken to expedite the hiring of this contractor. While the agency did save significant overhead costs as an outcome, in the long run, it likely cost the agency far more by not questioning this contractor's rates and not including deliverables, timeframes and an overall ceiling on costs in the work statement or elsewhere.

There appears to have been a significant breakdown in communication behind the agency's failure to monitor this contract adequately. The roles of the key players were

not spelled out. Instead, assumptions were made about who was doing what. As a result, the contractor was able to submit invoices that, on their face, contained no support for the claims he made. The CO indicated that the chairman was monitoring the contract and assumed that the billings were monitored too. The chairman told the OIG that he assumed that the agency's finance and contracting staff had already verified the invoices for accuracy and compliance with agency and government requirements before he approved payment. The contractor stated that the SOW did not require receipts, so none were provided.

The OIG believes that the agency lost control of this contract because there were minimal controls and conditions placed on the contractor. The agency overpaid for services, both by removing competitive pressures on the contractor and by approving all claims submitted by the contractor without requiring even minimum support or documentation.

While the CO must assume the responsibility for not adhering to FAR requirements when initiating this contract action, it is also apparent that he was acting to save the agency FEI overhead costs while keeping the chairman's preferred contractor at the agency. This does not mean in any respect that the chairman and/or senior officials expected the CO to circumvent the rules. Nor have we found evidence that undue pressure was exerted on the CO.

Moving forward, it is difficult to imagine all the circumstances "re-converging" that lead to this procurement: the need, the selection, the contract formulation and the active role played by the agency's presidentially-appointed chairman in the selection and substantive monitoring of the contractor. Nevertheless, steps must be taken to implement basic controls to ensure other procurements are not jeopardized by real or perceived influence on the CO, or that the regulations are not marginalized due to time constraints or potential political influence.

As a first step, the FMC has to ensure that other existing contracts are not similarly "broken." The CO should review all existing procurements to ensure they were let consistent with the FAR, and in instances where regulations were not followed, the agency must modify the contracts immediately or address the requirements when the contract is re-competed, depending on the judgment of the CO in conjunction with the Director of Administration. Areas to focus on include contract type, the SOW, including deliverables, timeframes and support (documentation) required to pay invoices.

Second, the agency should rely on its administrative support contractor, the Bureau of Public Debt (BPD), for procurement and acquisitions services. As a small agency, the FMC enters into relatively few contract actions annually. The regulations are complex and do change. For a modest fee, BPD will assign its contract specialists to process FMC's procurement actions. This can be done for procurements over a base amount (e.g., \$10,000, \$25,000, etc.), freeing FMC procurement staff to focus on customer service and small acquisitions.

RECOMMENDATIONS

The OIG recommends that the Director of Administration:

1. Review all existing contracts to ensure that each contains relevant FAR clauses protecting government interests. Ensure existing procurements are FAR-compliant. Modify contracts as needed.
2. Transfer the contracting function to the Bureau of Public Debt. FMC contract staff could then focus on assisting FMC employees and serve as a liaison between BPD and FMC staff.
3. Recover fees paid to the contractor totaling \$65,921.21 due to unallowable claims and inadequate documentation to support the costs.



[Redacted Copy]

Memorandum Office of Administration

TO : Inspector General

DATE: April 23, 2007

FROM : Director of Administration

SUBJECT : Comments on A07-02 – Audit of Contracts FMC-05-00021 and FMC-06-00007,
Procurement of Consulting Services

The Office of Administration (“OA”) has reviewed the findings and recommendations made in the instant audit, and submits the following response:

Finding 1: Requirement not clearly defined.

Finding 2: Sole source procurement improperly justified.

OA concurs with the IG’s assessment of a failure to ensure compliance with FAR requirements. This deficiency occurred for a variety of reasons, commencing with the focus change under the initial Interagency Agreement conducted and administered through the Federal Executive Institute, and continuing through the subsequent reliance upon sole source contracting methods and subsequent *ad hoc* extensions to that contract.

OA acknowledges that responsibility for this lack of compliance may be shared across many agency components, inclusive of senior management in Administration and assigned OA contracting staff. Without diminishing nor over-emphasizing the singular role exercised by the agency head in this matter, any expectations or reliance asserted by others with regard to the contracts’ development, performance and oversight should not have precluded OA and its staff from providing appropriate advice in developing contract documents, and in requesting from the contractor or other parties such information necessary and adequate to OA’s ongoing servicing and payment under these contracts.

Finding 3. Time and Materials contract requirements not fulfilled.

Finding 4. Inadequate monitoring of the contract.

The Office of Administration concurs with the IG's assessment that the sole source contract constitutes a Time and Materials (T&M) contract, given that no other or more specific contract type was identified at the initiation of the contract. In retrospect, the omission of contract type at the earliest stages of this contract gave rise to contracting staff and senior management not ensuring that documents related specifically to use of T&M contracts were completed, and that necessary contract clauses were incorporated at the time of contracting. Subsequently, the lack of established requirements for documentation of work accomplished hampered contract monitoring. Moreover, absent clear communication to OA staff of its continuing responsibility to review and ensure adequate documentation by the contractor prior to payment, the process of invoice review proved inadequate for the purposes intended.

With respect to the recommendations contained in the audit report, I have established the following corrective actions to facilitate accomplishment of the recommended remedies:

Recommendation #1: The Director of Administration review all existing contracts to ensure that each contains relevant FAR clauses protecting government interests. Ensure existing procurements are FAR-compliant. Modify contracts as needed.

Response: The Office of Administration concurs with the IG's recommendation, and has begun this review process commencing with FY 2007 renewals and recurring orders. Any new procurement requests above the \$5,000 threshold are now sent to the Bureau of Public Debt (BPD) for procurement action; all requests above the micro-purchase threshold are directed to BPD for guidance, even if acquired directly by the Office of Management Services. We will review all existing contracts as recommended and modify any contracts requiring adjustment to be made FAR-compliant. We have established a due date of July 30, 2007, to accomplish this corrective action.

Recommendation #2: The Director of Administration consider transferring OA's contracting function to the Bureau of Public Debt.

Response: The Office of Administration concurs with the IG's recommendation with respect to employing Bureau of Public Debt to better service the agency's procurement needs. In FY 2006, OA obtained approval for funding to upgrade FMC's cross-servicing procurement support from BPD to provide full-service contracting support. The program was implemented on a more limited scale in January 2006; in FY 2007, as mentioned above, OA implemented more comprehensive procedures whereby procurement requests above the \$5,000 threshold now are sent to BPD for procurement action. BPD review and contract servicing specifically includes review of agency justification for sole source procurements, inclusion of relevant FAR clauses in agency contracts, and ongoing monitoring of invoices for adequacy of detail and documentation. Thus, corrective action has been accomplished for this recommendation.

Recommendation #3: The Director of Administration recover costs totaling \$65,921.94 due to unallowable claims and inadequate documentation to support costs.

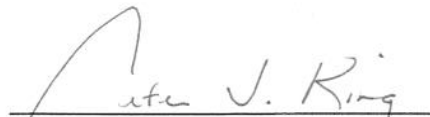
Response: The Office of Administration concurs with the IG's recommendation to seek recovery of certain claims or costs relating to this contract.

While OA substantially concurs with the methodologies employed by the IG in determining the amounts of unallowable claims based on information and documents provided by the contractor, OA staff is currently reviewing internal agency records which may mitigate a portion of the documentation requirements for those "off-site" professional fees which the contractor was unable to provide to the IG in the course of the audit. OA anticipates that the amount recommended for recovery may be adjusted downward in this single category of off-site fees, where such records appear to document ongoing consultations with the Chairman or FMC senior management. Any such documentation found will be made available to the IG for review.

The FMC will use established debt collection procedures to attempt to recover the funds discussed in the above Recommendation. On Treasury's website, examples of debts which are covered by the Debt Collection Improvement Act include payments disallowed by Inspector General audits (www.fms.treas.gov/debt/questions.html). The procedure OA will use to collect these funds is described in Commission Order 107, *Cash Management*: an invoice will be prepared by OA and BPD will process it as described in section 4 of the Order. If, for any reason, the debt is not collected within established timeframes, the debt will be referred to Treasury for collection, as provided in section 9 of the Order. The Order establishes FMC's procedures based upon Treasury guidelines in 31 CFR Part 901; 31 CFR 901 also sets forth, among other things, the content of demand letters, collection by administrative offset, collection in one lump sum or in installments, and the assessment of interest and penalties. The authority for FMC's administrative offset procedures are currently codified in 46 CFR Part 505.

Actual recovery of the funds depends on circumstances outside of FMC's control, thus completion of the FMC's responsibilities in initiating recovery of the funds will resolve this corrective action. By June 30, 2007, the FMC will initiate a process to recover the recommended amount (or an amended amount, depending upon the outcome of OA's review described above).

If you have any questions concerning the above, please feel free to contact me.


Peter J. King

cc: Commissioners
Director, OFM
Director, OMS
General Counsel