



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

**Recovery Act Report – Funding for Modifications
50 UN Plaza Renovation Project
Audit of PBS’s Major Construction and
Modernization Projects Funded by the American
Recovery and Reinvestment Act of 2009**

*Report Number A090172/P/R/R13003
March 27, 2013*



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DATE: March 27, 2013

TO: Dorothy Robyn
Commissioner, Public Buildings Service (P)

Kevin Richards
Acting Regional Commissioner
Public Buildings Service, Pacific Rim Region (9P)

FROM: Marisa A. Roinestad
Program Director
Real Property Audit Office (JA-R)

SUBJECT: Recovery Act Report – Funding for Modifications
50 UN Plaza Renovation Project
Audit of PBS's Major Construction and Modernization Projects
Funded by the American Recovery and Reinvestment Act of 2009
Audit Number A090172/P/R/R13003

During our oversight of the General Services Administration's (GSA) major modernization and new construction projects, funded by the American Recovery and Reinvestment Act (Recovery Act), we noted concerns regarding the issuance of contract modifications for the 50 United Nations (UN) Plaza Renovation Project in the Pacific Rim Region (Region 9) that warrant your attention. The Public Buildings Service (PBS) issued a price-to-be-determined-later (PDL) modification that created an invalid obligation and allowed unused Recovery Act funds to expire. In addition, PBS used Minor Repairs and Alterations (R&A) funds to supplement the Recovery Act on this project without notifying Congress. PBS also used Building Operations funding for tenant improvements in support of other GSA components.

PBS created an invalid obligation resulting in the expiration of \$4.2 million of Recovery Act funds.

PBS improperly issued a modification using the PDL methodology that obligated funds in excess of the amount awarded to the contractor. As a result, \$4.2 million of Recovery Act funds were allowed to expire. After being notified, PBS subsequently corrected the improper obligation and later used the expired funds as a proper upward adjustment.

Improper Use of Price-to-be-Determined-Later Modification

On September 17, 2010, PBS issued Modification PC 27 against Contract Number GS-09P-09-KT-C-0065,¹ using Recovery Act funds. The modification increased the project's Guaranteed Maximum Price to account for changes to elements of the project. The contract file contained two signed modifications, both labeled PC 27: a modification labeled as "internal" for \$7,032,000 and a modification issued to the contractor at a Not-to-Exceed (NTE) amount of \$2,800,000. In processing the modification, PBS obligated the internal value amount of \$7,032,000.

The modification was improper in two ways. First, the modification's use of the PDL methodology was improper. Although the modification does not state that it was issued using the PDL methodology, the files reflect this intention as the project team was to continue negotiations with the contractor for these work items after the modification was issued. The authority in the General Services Administration Acquisition Manual (GSAM) to use a PDL modification is limited to situations where work must proceed prior to the completion of price negotiations for an equitable adjustment.² However, the work for this modification did not begin until approximately six months later in March 2011.

Second, by using two versions of the modification with different amounts, PBS obligated funds in excess of the amount awarded to the contractor and created an invalid obligation. PBS stated that it did this in order to obligate funding without revealing GSA's negotiation position.

However, it appears that the primary reason the modification was handled in this manner was to prevent the PBS Program Management Office (PMO) from reprogramming the funding to another project. According to the "Business Clearance for Modification of Construction Services," the urgency behind the modification was to obligate these funds to meet the PMO's Recovery Act obligation deadline of September 30, 2010; otherwise, the Recovery Act funds could be reprogrammed to other projects.

Nonetheless, since PBS did not incur a liability in excess of the \$2,800,000 awarded to the contractor, the difference between that amount and the amount obligated (\$7,032,000) constitutes an improper obligation of \$4,232,000. No further contract actions related to the work items of PC 27 took place to definitize the project value before the Recovery Act funds expired on September 30, 2011. Subsequently, PBS issued Modification PC 44 in January 2012 using the expired funds to increase the NTE amount by \$2,788,685 for a total NTE amount of \$5,588,685.

¹ This was the Construction Manager as Constructor contract for the 50 UN Plaza Renovation project.

² GSAM 552.243-71 (m) states, "If the Contracting Officer determines that it is in the Government's interest that the Contractor proceed with a change before negotiation of an equitable adjustment is completed, the Contracting Officer may order the Contractor to proceed on the basis of a unilateral modification to the contract increasing or decreasing the contract price by an amount to be determined later."

Early Notification and PBS Corrective Action

On February 9, 2012, we notified PBS management of our concerns regarding Modifications PC 27 and PC 44. We questioned the improper obligation and noted that Recovery Act funds expired on September 30, 2011. As a result, PBS issued Modification PA 45 correcting the improper obligation of the \$4,232,000 in Recovery Act funds.

Subsequently, on May 3, 2012, PBS issued Modification PS 48 to definitize the Modification PC 27 work items and obligate these funds. PBS noted that the action to obligate these funds was based on an Office of General Counsel opinion allowing the use of expired funds for valid upward adjustments. In reviewing the opinion, it appears this modification falls within the parameters allowing for use of expired funds.

Management Comments

In its comments, management agreed with the audit finding and concurred with Recommendations 1 and 2 (See **Appendix B**).

PBS supplemented project funds without notifying Congress.

PBS issued five contract modifications using Minor R&A funds to supplement Recovery Act funding. PBS did not notify Congress of this, as recommended by PBS policy. These modifications included relocating the server room (PC 25), a sally port security entrance (PC 37), upgrading the café (PC 38), wireless mounts (PS 40), and installing a photovoltaic panel (PS 41).

Minor R&A funds are part of PBS's Capital Program and are generally intended for repair and alteration work below the prospectus limit.³ As part of its Recovery Act implementation, PBS issued guidance entitled, "ARRA Funding and Prospectus Guidance" to clarify how Minor R&A funds could be used in combination with Recovery Act funding. This policy states that "if the funding is being used for different scope, even if it is on the same project or in the same building, and the funding exceeds the prospectus threshold, that does not necessitate notification." Alternately, "if the funding is for the same scope on the same project, it is recommended that GSA notifies its authorizing committees."

PBS management provided a two part explanation for using the Minor R&A funds. First, the modifications were for program changes beyond the original scope that was funded by the Recovery Act. Second, tenant-requested changes of this nature are normally funded through Reimbursable Work Authorizations (RWA); however, since GSA is the

³ The prospectus threshold is adjusted annually and was \$2.79 million for alteration projects in fiscal year 2012. Congressional approval is required for projects above the prospectus limit.

tenant agency, PBS asserted that RWA funding was not available and that Minor R&A funds were an appropriate funding source.

Neither of these explanations supports PBS's actions. First, work such as the café upgrade and photovoltaic panel are covered in the original project scope rather than representing new or different scope. The renovation of the UN Plaza building is a full modernization for seismic upgrades, a new heating and ventilation system, upgrades to electrical and plumbing systems, full roof replacement, life-safety system improvements, installation of photovoltaic systems, and restoration of historical building interiors. The project includes work such as telecommunications, security upgrades, energy systems, and food service.

Second, other work in the modifications, such as the wireless mounts, would typically be funded by tenants via RWAs and not through PBS's Capital Program. In this case, PBS did not have the legal authority to use PBS's Capital Program funds for the tenant-requested improvements. Therefore, even though the building tenant will be the GSA Pacific Rim Regional Headquarters, the use of Minor R&A funds was not appropriate.

Given these circumstances, the use of Minor R&A funds to supplement the Recovery Act funds required congressional notification in accordance with PBS policy.

Management Comments

In its comments, management partially disagreed with the audit finding but concurred with Recommendation 3 (See **Appendix B**).

Office of Inspector General Response

We reiterate our position that the modifications were for changes within the original project scope.

PBS funds were used for other tenant costs.

PBS Building Operations funding was used to pay for tenant improvements in support of other GSA components. According to the GSA Budget Administration Handbook, Building Operations funds are primarily for the operational costs of owned and leased buildings and the management and administration of PBS programs. However, on the following modifications, PBS Building Operations funds were used for tenant improvements in support of other GSA components, not just PBS:

- PBS issued an administrative modification to transfer funds for the wireless mounts in Modification PS 40 from Minor R&A to Building Operations, subsequent to our review. These improvements appear to be for GSA, the tenant agency, not just PBS.
- PBS used Building Operations funds to provide design and construction administrative services for tenant-requested re-design of workspace. One of

these tenants was the Federal Acquisition Service. During our audit, we discussed the funding of Modification PC 46⁴ with PBS and were told that the PBS budget staff would request the Federal Acquisition Service fund its portion of Modification PC 46.

Usually, tenant-requested changes are funded by the tenant agency using an RWA. In these cases, PBS inappropriately funded the tenant improvements using its Building Operations funds rather than obtaining an RWA from the other GSA components. As a result, Building Operations funds are being used to fund the costs of other GSA components rather than solely for the management and administration of PBS programs.

Management Comments

In its comments, management partially disagreed with the audit finding but concurred with Recommendation 4 (See **Appendix B**).

Office of Inspector General Response

We reiterate our position that PBS Building Operations funds should not be used to pay for tenant improvements in support of other GSA components.

Recommendations

We recommend that the Commissioner, Public Buildings Service and the Acting Regional Commissioner, Public Buildings Service, Pacific Rim Region:

- (1). Notify Congress and the Office of Management and Budget of inaccurate Recovery Act financial reporting on the 50 UN Plaza project caused by the invalid obligation. This can be done as part of the corrective actions taken in response to alert report, *Limited Scope Audit of Invalid Obligations and Contingency Funding for Recovery Act Projects, Report Number A120174/P/R/W13001*, dated October 24, 2012.
- (2). Develop and implement policy to establish appropriate use of PDL modifications and to prevent the obligation of funds in excess of awards made to contractors.
- (3). Notify Congress and the Office of Management and Budget of the use of Minor R&A funds to supplement the 50 UN Plaza Recovery Act project.

⁴ Modification 46 to the Architect/Engineer contract with HKS, Inc. (contract number GS-09P-09-KT-C-0048)

- (4). Obtain funding from other GSA components for the cost of tenant-requested improvements or notify Congress and the Office of Management and Budget about the use of Building Operations funds for other GSA components.

We appreciate the support provided throughout this audit. If you have any questions concerning this report, please contact me at (202) 273-7241.

Sincerely,



Marisa A. Roinestad
Program Director
Real Property Audit Office (JA-R)

Appendix A – Purpose, Scope, and Methodology

Background

The Recovery Act provided GSA with \$5.55 billion to convert federal buildings into High-Performance Green Buildings, as well as to construct federal buildings, courthouses, and land ports of entry. The Recovery Act mandated that \$5 billion of the funds be obligated by September 30, 2010, and that the remaining funds be obligated by September 30, 2011. The GSA Office of Inspector General is conducting oversight of the projects funded by the Recovery Act.

Purpose

The objective of the Office of Inspector General's Recovery Act oversight is to determine if PBS is planning, awarding, and administering contracts for major construction and modernization projects in accordance with prescribed criteria and Recovery Act mandates.

Scope

The scope of our review included several contract modifications for the Construction Manager as Constructor and Architect/Engineer contracts for the 50 United Nations Plaza Renovation project.

Methodology

To accomplish the objective we conducted fieldwork in the Pacific Rim Region, reviewed contract files and other pertinent project documents, met with PBS project staff, and reviewed applicable guidance and regulations.

Except as noted below, we conducted the audit between January 2012 and August 2012 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.

The planning for this review is based on the audit plan for oversight of Recovery Act projects, as well as review guidance being applied to all Recovery Act projects. A separate audit guide was not prepared for this project.

Internal Controls

As this work was performed under the continuing oversight of all GSA Recovery Act projects, management controls are currently under assessment. Only those management controls discussed in the report have been assessed.

Appendix B – Management Comments



GSA Pacific Rim Region

March 18, 2013

MEMORANDUM FOR: SUSAN P. HALL
ACTING DEPUTY ASSISTANT INSPECTOR
GENERAL FOR AUDITING
REAL PROPERTY AUDIT OFFICE (JA-R)

THRU: DOROTHY ROBYN *[Signature]*
COMMISSIONER
PUBLIC BUILDINGS SERVICE (P)

FROM: KEVIN RICHARDS *[Signature]*
ACTING REGIONAL COMMISSIONER
PUBLIC BUILDINGS SERVICE, PACIFIC RIM REGION (9P)

SUBJECT: Recovery Act Report – Funding for Modifications
50 United Nations Plaza Renovation Project Audit of PBS's Major
Construction and Modernization Projects Funded by the
American Recovery and Reinvestment Act of 2009
(A090172/P/R)

The Public Buildings Service (PBS) appreciates the opportunity to comment on the subject draft audit report. The report recommends that the PBS Commissioner and the Acting Regional Commissioner of the Pacific Rim Region take the following actions:

1. Notify Congress and the Office of Management and Budget (OMB) of inaccurate Recovery Act financial reporting on the 50 United Nations Plaza (50 UN Plaza) project caused by the invalid obligation.
2. Develop and implement policy to establish appropriate use of price-to-be-determined-later (PDL) modifications and to prevent the obligation of funds in excess of awards made to contractors.
3. Notify Congress and OMB of the use of minor repairs and alterations funds (R&A) to supplement the 50 UN Plaza project.
4. Obtain funding from other GSA components for the cost of tenant-requested improvements or notify Congress and OMB about the use of building operations funds for other GSA components.

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Appendix B – Management Comments (cont.)

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Below I address each of the proposed recommendations in turn:

Notify Congress of Invalid Obligation

PBS completed the required corrective actions by the end of December 2012. PBS has also thoroughly reviewed lessons learned regarding the application of PDL modifications. As a result, any future PDLs will be timely followed up with a negotiated price and converted to bilateral form. Moreover, PBS has established policy requiring that any future contract modifications for Recovery Act projects be reviewed by the Recovery Executive, Regional Counsel and the Regional Acquisition Officer.

Region 9 recently submitted summary sheets to Central Office for those projects with corrective actions. GSA will transmit the funding sources to Congress by including them in GSA's quarterly obligations report to Congress and OMB.

Develop and Implement Policy Regarding Use of PDL Modifications

PDL modifications preserve the Government's interest in construction contracting. PBS has drafted policy regarding the proper use of PDL modifications under the Federal Acquisition Regulations and Federal appropriations law.

Notify Congress and OMB of use of Minor Repair and Alterations Funds

PBS issued five contract modifications where minor R&A funds supplemented Recovery Act funding, and the modifications were for program changes beyond the original project scope. PBS's use of the R&A funds complied with PBS's "ARRA Funding and Prospectus Guidance." Since the modifications totaled less than the prospectus threshold and the project scopes were different, Congressional notification was *recommended*, but not required. However, PBS has begun working with the Office of Design and Construction to complete the recommended congressional and OMB notifications by the end of the third quarter of fiscal year 2013.

Obtain Funding from Other GSA Components

PBS used minor R&A funds and building operations funds to cover the cost of tenant improvements at 50 UN Plaza for two reasons. First, GSA will be 50 UN Plaza's sole tenant. Second, the Recovery Act funding for the 50 UN Plaza project did not cover the cost of tenant improvements, nor of furniture, fixtures, equipment and other items necessary for occupancy.

PBS has and will continue to use the funding obtained from other GSA components to pay these costs.

If you have any questions or need additional information, please contact Matthew Jear, Region 9 Recovery Executive, at (415)-522-3159.

Appendix C – Report Distribution

Commissioner, PBS (P)

Acting Deputy Commissioner, PBS (PD)

Acting PBS Chief of Staff (PB)

Acting Director, PBS Executive Response (PBA)

Regional Recovery Executive, PBS, Pacific Rim Region (9P2)

National Program Office ARRA Executive, PBS (PCB)

Chief of Staff, PBS Office of Construction Programs (PCB)

Regional Administrator, Pacific Rim Region (9A)

Acting Regional Commissioner, PBS, Pacific Rim Region (9P)

Regional Counsel, Pacific Rim Region (LD9)

Division Director, GAO/IG Audit Response Division (H1C)

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