



OFFICE OF INSPECTOR GENERAL



DEPARTMENT OF THE INTERIOR

RECOVERY OVERSIGHT ADVISORY

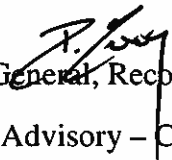
A Critical Point Evaluation Product



**RECOVERY OVERSIGHT OFFICE**
Washington, DC 20240

JUL 08 2009

To: Nancy Adrian
Bureau Procurement Chief, Bureau of Land Management

From: Robert A. Knox 
Assistant Inspector General, Recovery Oversight

Subject: Recovery Oversight Advisory – Concerns About Solicitation L09PS00662 (ROO-ROA-BLM-S003-2009)

Congress provided us with funding to oversee and ensure accountability of the \$3 billion appropriated to the Department of the Interior (Department or DOI) in the American Recovery and Reinvestment Act of 2009 (Recovery Act or Act). To help safeguard these taxpayer dollars, we are focused on: preventing fraud, waste, and abuse of recovery and reinvestment dollars; early detection to reduce the impact of misuse when it does occur; and ensuring transparency in our oversight efforts. In a spirit of collaboration with the Department as it implements the massive programs envisioned under the Act, this advisory informs you of concerns we have concerning a pre-solicitation notice for the Bureau of Land Management (BLM), Arcata, CA Road Maintenance Contract, pre-solicitation notice L09PS00662 (referred to in this advisory as “notice”).

The notice was posted on Federal Business Opportunities (FedBizOpps) (www.fbo.gov) and was identified in the course of our Recovery Act oversight efforts. Although the transaction in this announcement is not being made with Recovery Act funds, our findings indicate a lack of compliance with federal laws and Department policy on the proper choice of award vehicle for road maintenance. If this problem is not addressed, we are concerned that such non-compliance could also occur for awards made with Recovery Act funds by this or other offices.

We contacted an official at the BLM National Operations Center in Denver, Colorado on June 16, 2009 with our concerns. He concurred and agreed to remove the notice. We describe below the details of our concerns. Please provide, within 30 days of receipt of this advisory, a written response detailing the corrective actions the BLM plans to take to implement the recommendations, targeted completion dates, and title(s) of officials responsible for implementation.

Findings

The work described in the notice will be performed on BLM-managed and adjacent property in Mendocino and Humboldt Counties, CA. We have several concerns that we believe, if addressed, will help to ensure the acquisition is completed appropriately and in compliance with applicable laws, rules, and regulations.

First, BLM has issued inconsistent communication about how it intends to make the award. The notice BLM posted on FedBizOpps on June 4, 2009, specified that funding is available for a total small business set-aside, three-year multi-award indefinite-delivery type contract. A solicitation dated June 15, 2009, for the same work, is advertised as unrestricted. Clarification is needed to ensure consistency in communications to potential interested parties.

A second area of concern pertains to a statutory requirement for the contractor selected to comply with the Davis-Bacon Act, as amended (40 U.S.C. §§ 3141-3148), which specifies that payment of not less than a prevailing wage rate must be made to workers on federal or federally funded construction projects over \$2,000. BLM's notice and solicitation define the work layout as road maintenance or watershed restoration. The North American Industry Classification System (NAICS) code referenced, 237310, defines highway, street, and bridge construction, including rehabilitation and repairs. Given the work layout and NAICS coding, this project clearly falls within the parameters of the Davis-Bacon Act, yet there is no reference to this Act in the terms and conditions.

Additionally, there is repeated language throughout the solicitation that describes duties of the Contracting Officer Representative (COR) that appear to be beyond his or her authority. Specifically, the scope of work grants the COR the ability to authorize the mobilization of additional equipment to the job site beyond that specified in a task order, as well as authority to authorize charges in excess of a task order. Under the Federal Acquisition Regulation (FAR), contracting officers retain the sole authority to execute contract modifications on behalf of the government (48 C.F.R. § 43.102). Other personnel are expressly prohibited, by the same regulation, from directing or encouraging the "contractor to perform work that should be the subject of a contract modification" or acting in a manner to "cause the contractor to believe that they have the authority to bind the Government." Such activities, which involve authorizing obligations or expenditures of appropriated funds under contracts, when undertaken by a COR, are not only a violation of the FAR, but can also increase the risk of inadvertent violations of the Antideficiency Act (31 U.S.C. §1341). The Antideficiency Act is one of the major laws through which Congress exercises its constitutional control of the public purse, and it prohibits agencies from obligating the government in excess or in advance of appropriations. Government employees may be subject to administrative action and/or fined or imprisoned for violating the Act.

Finally, the acquisition type used for this contract appears to be commercial based upon the use of the Standard Form (SF) 1449, Solicitation/Contract/Order for Commercial Item. However, the scope of the work detailed in the solicitation is clearly construction. FAR 53.236-1(d)(1) prescribes the use of the SF 1442 when soliciting offers and awarding construction contracts exceeding the simplified acquisition threshold for construction, alteration or repair.

Recommendations

We recommend that BLM:

- 1) Clarify, by amending the solicitation, whether the bureau intends to award the contract as a total small business set-aside or unrestricted competition.

- 2) Amend the solicitation to include the requirements of the Davis-Bacon Act.
- 3) Correct language throughout the solicitation to remove all references to the COR authorizing obligations or expenditures of appropriated funds.
- 4) Amend the solicitation so a SF 1442 is used.

BLM Response

BLM officials telephonically acknowledged our findings and agreed to remove the solicitation until appropriate amendments are prepared. We are encouraged to hear that your office will take immediate action, and look forward to details on and documentation of the actions taken.

We will post this advisory on our website (www.doioig.gov/recovery) and Recovery.gov. Information contained in this advisory may also be included in our semi-annual reports to Congress. If you have any questions, or would like a more detailed briefing, please do not hesitate to contact me.

cc: Senior Advisor to the Secretary for Economic Recovery and Stimulus
Acting Assistant Secretary – Policy, Management and Budget
Director, Office of Acquisition and Property Management
Director, Office of Financial Management
BLM Project Lead
BLM Audit Liaison
Departmental GAO/OIG Audit Liaison
Audit Liaison, Office of the Secretary

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