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| Issue Date August 26, 2011 |
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| Audit Report Number 2011-AT-1015 |
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TO: Mary Wilson, Director, Office of Community Planning and Development,
Knoxville, TN, 4JD

//signed//

FROM: James D. McKay, Regional Inspector General for Audit, Atlanta Region, 4AGA

SUBJECT: The City of Memphis, TN, Did Not Ensure Compliance With All Requirements for
Its Homelessness Prevention and Rapid Re-Housing and Community
Development Block Grant-Recovery Programs

HIGHLIGHTS

What We Audited and Why

We audited the City of Memphis' administration of its Homelessness Prevention and Rapid Re-Housing Program (HPRP) and Community Development Block Grant-Recovery (CDBG-R) funds received under the American Recovery and Reinvestment Act. We selected the City for audit because it received more than \$3.3 million in HPRP funds and more than \$2.1 million in CDBG-R funds, the most for any Tennessee city. The City had expended more than \$1.5 million, or about 47 percent, of its HPRP funds, and \$846,713, or about 39 percent, of its CDBG-R funds by March 14, 2011.

Our objective was to determine whether the City's Division of Housing and Community Development administered its HPRP and CDBG-R funds in compliance with the Recovery Act and other applicable requirements. Specifically, our objective was to determine whether the City ensured that (1) program participants were eligible, (2) program expenditures were supported with adequate documentation, (3) program reporting requirements were met, and (4) subgrantees were monitored and trained.

What We Found

Although the City complied with most Recovery Act requirements, its program administration was deficient in some areas. The City (1) procured an architectural and engineering contract using the incorrect procurement methodology and without an adequate cost analysis, (2) paid a contractor for work performed without an executed contract, (3) delayed the execution of a greening and demolition contract to such an extent that the lowest bidder dropped out, (4) did not always comply with U.S. Department of Housing and Urban Development (HUD) guidance for implementing the “Buy American” provision of the Recovery Act, and (5) could not support the job figures reported in its most recent quarterly report for either the HPRP or CDBG-R grants. These conditions occurred because the City did not follow all of the requirements of the Recovery Act or its own policies and procedures. As a result, it incurred \$619,114 in questioned costs related to its procurements and could not ensure compliance with all Recovery Act requirements.

What We Recommend

We recommend that the Director of the Knoxville Office of Community Planning and Development require the City to (1) provide adequate support and justification for the procurement deficiencies and repay its program any portion of the \$619,114 in questioned costs that it cannot support, (2) provide staff training on procurement requirements, and (3) provide HUD assurance that it has sufficient controls in place to ensure compliance with applicable procurement and Recovery Act requirements.

For each recommendation without a management decision, please respond and provide status reports in accordance with HUD Handbook 2000.06, REV-3. Please furnish us copies of any correspondence or directives issued because of the audit.

Auditee’s Response

We discussed the findings with City officials during the audit. We provided the draft report to the City on July, 26, 2011, and discussed the findings with City officials at an exit conference on August 4, 2011. The City provided its written comments on August 8, 2011. City officials expressed general disagreement with the findings and recommendations.

The complete text of the auditee’s response, along with our evaluation of that response, can be found in appendix B of this report. Attachments to the auditee’s response were not included in the report, but are available for review upon request.

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BACKGROUND AND OBJECTIVE

On February 17, 2009, the President signed the American Recovery and Reinvestment Act of 2009. The purpose of the Recovery Act was to jumpstart the Nation's ailing economy, with a primary focus on creating and saving jobs in the near term and investing in infrastructure that will provide long-term economic benefits. This legislation included \$1.5 billion in Homelessness Prevention and Rapid Re-housing Program (HPRP) funds for communities to provide financial assistance and services to either prevent individuals and families from becoming homeless or help those who are experiencing homelessness to be quickly re-housed and stabilized. The Recovery Act also included a \$1 billion appropriation of Community Development Block Grant-Recovery (CDBG-R) funds to carry out activities authorized under Title 1 of the Housing and Community Development Act of 1974.

The City of Memphis, TN, is an entitlement grantee. The U.S. Department of Housing and Urban Development (HUD) annually awards grants, including Community Development Block Grants (CDBG), to entitlement grantees to carry out a wide range of community development activities directed toward revitalizing neighborhoods, economic development, and providing improved community facilities and services. The City manages its community development programs, including HPRP and CDBG-R, through its Housing and Community Development Division.

The City received \$3.33 million in HPRP funds and \$2.17 million in CDBG-R grant funds under the Recovery Act on June 10 and July 27, 2009, respectively. The City's HPRP activities focused on homelessness prevention services, financial assistance for rent and utilities, operation of a homeless hotline, and administering a Homeless Management Information System database. The City planned to use its CDBG-R funds for three activities, the greening and demolition of the fairgrounds site, the demolition of Manassas High School, and the rehabilitation of a commercial laundromat.

Our objective was to determine whether the City administered its HPRP and CDBG-R programs according to the requirements of the Recovery Act and applicable HUD requirements. Specifically, our objective was to determine whether the City ensured that (1) program participants were eligible, (2) program expenditures were supported with adequate documentation, (3) program reporting requirements were met, and (4) subgrantees were monitored and trained.

RESULTS OF AUDIT

The City Did Not Fully Comply With Recovery Act Requirements

Although the City administered its HPRP and CDBG-R funds in accordance with most major Recovery Act requirements, its program administration was deficient in some areas. The City did not (1) always use the proper procurement methodology for procuring goods and services, (2) execute a contract before making payments for completed work, (3) always execute contracts in a timely manner, (4) always comply with HUD guidance for implementing the “Buy American” provision of the Recovery Act, (5) always perform an adequate cost analysis before executing contracts, and (6) adequately support the reported figures for jobs created with Recovery Act funding. These conditions occurred because City staff failed to follow all applicable requirements in the Recovery Act or its own policies and procedures. As a result, the City incurred \$619,114 in questioned costs related to its procurements and could not ensure compliance with all Recovery Act requirements.

The City Complied With Most Recovery Act Requirements

The City complied with most major Recovery Act requirements for both its HPRP and CDBG-R funding. It

- Expended program funds for only eligible activities,
- Maintained adequate documentation to support expenditures (with the exception of the expenditures detailed below),
- Ensured the eligibility of HPRP participants,
- Ensured that its HPRP subgrantees were monitored and trained as required, and
- Ensured that CDBG-R contractors complied with Davis-Bacon Act requirements when applicable.

The City Made Procurement Errors

The Architectural and Engineering Contract Was Not Properly Procured

The City planned to demolish buildings on the site of the fairgrounds and replace them with green areas, parking areas, etc. As part of that development, the City procured the services of an architectural and engineering (A&E) firm for a wide

range of services. However, the City failed to adequately justify the procurement method or perform the required cost analysis.

City staff misunderstood Federal procurement requirements and used the sole source procurement method when procuring the A&E firm's services. Regulations at 24 CFR (Code of Federal Regulations) 85.36(d)(4) allow sole source procurement only when certain circumstances are met. The regulations read in part, "(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies: (A) The item is available only from a single source; (B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (C) The awarding agency authorizes noncompetitive proposals; or (D) After solicitation of a number of sources, competition is determined inadequate."

The City justified the sole source method of procurement by stating that the procurement was an "urgent and time-sensitive engagement." The City then cited the factors for which it deemed the engagement to be urgent and time sensitive. However, the factors it cited consisted only of a list of the firm's supposed unique qualifications related to its knowledge of the fairgrounds, thus failing to explain how the procurement was an urgent and time-sensitive engagement.

The City also failed to perform the cost analysis required by the regulations and its own procurement policy. Federal procurement procedures at 24 CFR 85.36 read in part, "Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications." The regulations also required that the cost analysis include verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits.

The City supplied an e-mail document as evidence of a cost analysis for the A&E services. The e-mail stated that the City would use 6 or 7 percent of the total project cost as the fee rate. There was no explanation of the methodology used for determining these percentages or how the City determined them to be reasonable. As a result, the City could not assure HUD that the A&E services were procured at a fair and reasonable cost.

The City awarded the original A&E contract using a portion of its annual CDBG grant. Later contract extensions and contract amendments included both annual CDBG and CDBG-R funds. Since the original contract was improperly procured, we considered all CDBG and CDBG-R funds expended on the contract to be unsupported. The City expended a total of \$310,000 in CDBG and CDBG-R funds on the contract (including extensions and amendments), and the contractor had earned an additional \$25,000 for which the City was planning to use CDBG-R funds.

The City Expended CDBG-R Funds for Work Completed Without an Executed Contract

The City properly obtained sealed bids for the greening and demolition of the fairgrounds. The greening and demolition work was performed under two separate contracts known as “package 2” and “package 3.” Soon after beginning the work on package 2, the City discovered that additional work was needed to complete the project. The additional work added \$648,718 (of which \$235,978 was CDBG-R funds) to the original \$564,475, increasing the contract to more than \$1.2 million. An amendment covering the additional work was drawn up but was not executed. The City paid the contractor for the completed work.

The City’s contracting procedures, which it failed to follow, required a contract to be executed before payments could be made for completed work. Therefore, the expenditure of \$235,978 in CDBG-R funds for the additional fairgrounds work was unsupported.

The City Lost the Services of the Low Bidder Due to Its Long Delay in Executing a Contract

The City properly obtained sealed bids for package 3 for the greening and demolition of the fairgrounds and properly selected the lowest bidder to perform the work. The City’s bid documents required that the submitted bids remain viable for 120 days. This timeframe appears to have been a reasonable amount of time to write, review, and execute the contract with the lowest bidder. However, the City failed to enter into a contract within the 120 days, and the low bidder rescinded its bid at the 120-day mark. The City later executed a contract for the work related to package 3 with the next lowest bidder. The City incurred an additional \$48,136 in CDBG-R costs due to failing to execute a timely contract with the lowest bidder. We considered the additional costs to be unreasonable.

The City Did Not Always Comply With the Recovery Act’s “Buy American” Provision

The City did not always follow HUD guidance for implementing the “Buy American” provision of the Recovery Act. Section 1605 of the Act reads in part, “BUY AMERICAN SEC. 1605. USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS. (a) None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.” The City did not include the “Buy American” provision in the contract amendment for additional work related to the greening and demolition of the fairgrounds (which included some construction work). As a result, there was no assurance that the company receiving Recovery Act funds complied with the requirement.

The City Did Not Adequately Document the Number of Jobs Created

Section 1512(c) of the Recovery Act required recipients of funds to report quarterly on the Internet at FederalReporting.gov. The recipients were to report on the nature and status of their projects and the number of jobs created or retained. We reviewed the City's latest HPRP and CDBG-R reports for the quarter ending March 31, 2011, for timeliness, completeness, and accuracy.

The City's quarterly reports were generally timely, complete, and accurate, but the information related to the creation and retention of jobs was not always sufficiently supported. The City was unable to support the reported jobs created for either the HPRP or the CDBG-R grant. OMB (Office of Management and Budget) Memorandum M-10-08 outlined how "jobs created or retained" should be calculated. The City reported on March 31, 2011, that it had created a total of 9.92 jobs via HPRP and an additional 27 jobs using CDBG-R grant funds. The City had no written internal control procedures related to the required reporting, and staff members stated that they used the instructions found at the FederalReporting.gov Web site for guidance. When asked to support the job figures, the City could not. As a result, it could not assure HUD or the public that its reported job figures were accurate.

Conclusion

Although the City administered its HPRP and CDBG-R funds in accordance with most major Recovery Act requirements, its program administration was deficient in some areas. This condition occurred because City staff failed to follow all applicable requirements of the Recovery Act and the City's own policies and procedures. As a result, the City incurred \$619,114 in questioned costs related to its procurements and could not ensure compliance with all Recovery Act requirements.

Recommendations

We recommend that the HUD Tennessee Community Planning and Development Director require the City to

- 1A. Provide adequate support for the procurement method and cost of the fairground's A&E contract or repay its program (CDBG or CDBG-R as appropriate) \$310,000 using non-Federal funds. In addition, the City should not use Federal funds to pay the contractor an additional \$25,000 (earned but not paid) until it provides the needed support.

- 1B. Provide assurance that controls are in place to ensure that the required cost analysis will be performed for all future contracts or amendments.
- 1C. Provide adequate support for the \$235,978 it paid for greening and demolition work without an executed contract or repay its CDBG-R program using non-Federal funds.
- 1D. Provide adequate justification for the loss of the lowest bidder for package 3 of the fairgrounds project or repay \$48,136 in unreasonable costs to its CDBG-R program using non-Federal funds.
- 1E. Train the appropriate City staff on Federal and City procurement policies and procedures to ensure that they are understood and followed as required.
- 1F. Include the “Buy American” provision in all future applicable contracts.
- 1G. Provide assurance that appropriate controls are in place to ensure that accurate and supported job numbers are included on the quarterly reports required by the Recovery Act.

SCOPE AND METHODOLOGY

Our objective was to determine whether the City administered its HPRP and CDBG-R programs according to the requirements of the Recovery Act and applicable HUD requirements. Specifically, our objective was to determine whether the City ensured that (1) program participants were eligible, (2) program expenditures were supported with adequate documentation, (3) program reporting requirements were met, and (4) subgrantees were monitored and trained.

To accomplish our objectives, we reviewed

- The Recovery Act, HPRP and CDBG-R program regulations at 24 CFR Part 570 and 24 CFR 85.36; and HUD's Knoxville Office of Community Planning and Development's correspondence and files pertaining to the City's HPRP and CDBG-R grant.
- The City's policies and procurement and contracting manuals, list of HPRP-assisted families and units, HPRP participant files, City program draw requests, the two latest City audits, and the City's organizational charts.

We also interviewed City employees and HUD's Knoxville staff involved with oversight of the City's community planning and development programs.

We tested the computer-processed data supplied by the City for reliability while performing our audit steps, and no problems were noted.

We selected a nonstatistical random sample of 20 participants (from a universe of 785 adult participants) receiving HPRP assistance on which to perform participant file reviews. We also selected a nonstatistical random sample of 10 HPRP draws (from a universe of 47 draws) and reviewed the expenditures for eligibility and accuracy. Our sample covered \$475,500, or approximately 27 percent, of the total HPRP expenditures as of April 28, 2011. The results from these samples pertain only to the units sampled and were not projected to the universe as a whole.

We reviewed 100 percent of the City's CDBG-R expenditures as of May 1, 2011, and all CDBG-R procurements.

We performed our onsite work from April 25 through June 10, 2011, at the Memphis Housing Community Development Division's offices located at 701 North Main Street, Memphis, TN. The review generally covered the period May 2009 through April 2011 and was expanded as necessary.

We conducted the audit 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 objective(s). We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

INTERNAL CONTROLS

Internal control is a process adopted by those charged with governance and management, designed to provide reasonable assurance about the achievement of the organization's mission, goals, and objectives with regard to

- Effectiveness and efficiency of operations,
- Reliability of financial reporting, and
- Compliance with applicable laws and regulations.

Internal controls comprise the plans, policies, methods, and procedures used to meet the organization's mission, goals, and objectives. Internal controls include the processes and procedures for planning, organizing, directing, and controlling program operations as well as the systems for measuring, reporting, and monitoring program performance.

Relevant Internal Controls

We determined that the following internal controls were relevant to our audit objective:

- Compliance with laws and regulations – Policies and procedures that management has implemented to reasonably ensure that resource use is consistent with laws and regulations.
- Safeguarding of resources – Policies and procedures that management has implemented to reasonably ensure that resources are safeguarded against waste, loss, and misuse.

We assessed the relevant controls identified above.

A deficiency in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, the reasonable opportunity to prevent, detect, or correct (1) impairments to effectiveness or efficiency of operations, (2) misstatements in financial or performance information, or (3) violations of laws and regulations on a timely basis.

Significant Deficiency

Based on our review, we believe that the following item is a significant deficiency:

- The City failed to follow all applicable Recovery Act or procurement requirements (finding).

APPENDIXES

Appendix A

SCHEDULE OF QUESTIONED COSTS AND FUNDS TO BE PUT TO BETTER USE

| <u>Recommendation number</u> | <u>Unsupported 1/</u> | <u>Unreasonable or Unnecessary 2/</u> | <u>Funds to be put to better use 3/</u> |
|----------------------------------|---------------------------|---|---|
| 1A | \$310,000 | | \$25,000 |
| 1C | 235,978 | | |
| 1D | | <u>\$48,136</u> | |
| Total | <u>\$545,978</u> | <u>\$48,136</u> | <u>\$25,000</u> |

- 1/ Unsupported costs are those costs charged to a HUD-financed or HUD-insured program or activity when we cannot determine eligibility at the time of the audit. Unsupported costs require a decision by HUD program officials. This decision, in addition to obtaining supporting documentation, might involve a legal interpretation or clarification of departmental policies and procedures.
- 2/ Unreasonable or unnecessary costs are those costs not generally recognized as ordinary, prudent, relevant, or necessary within established practices. Unreasonable costs exceed the costs that would be incurred by a prudent person in conducting a competitive business.
- 3/ Recommendations that funds be put to better use are estimates of amounts that could be used more efficiently if an Office of Inspector General (OIG) recommendation is implemented. These amounts include reductions in outlays, deobligation of funds, withdrawal of interest, costs not incurred by implementing recommended improvements, avoidance of unnecessary expenditures noted in preaward reviews, and any other savings that are specifically identified. In this instance, if the City implements recommendation 1A, the amount payable to the contractor will be properly supported for eligible activities consistent with CDBG-R program requirements.

Appendix B

AUDITEE COMMENTS AND OIG'S EVALUATION

Ref to OIG Evaluation

Auditee Comments

August 8, 2011

Mr. James D. McKay
Regional Inspector General for Audit
U. S. Department of Housing and Community Development
Region 4 Office of Inspector General
Office of Audit, Box 42
Richard B. Russell Federal Building
75 Spring Street, SW, Room 330
Atlanta, GA 30303-3388

SUBJECT: The City of Memphis, TN - Draft Audit Report: Homeless Prevention and Rapid Re-Housing Program (HPRP) and Community Development Block Grant - Recovery (CDBG-R) funds. April 25-June 10, 2011.

Dear Mr. McKay,

As per your request of July 26, 2011, please accept this as the City of Memphis, Division of Housing and Community Development (HCD) comments to the draft audit report prepared as a result of the site survey work performed by Charles Pagano and Shane Weaver, HUD/OIG Senior Auditors, from April 25-June 10, 2011 relative to activities funded by the Homeless Prevention and Rapid Re- Housing Program (HPRP) and Community Development Block Grant - Recovery (CDBG-R).

An exit conference was held here in Memphis on August 4th with David Butcher, Assistant Regional Inspector General for Audit, Charles Pagano, HUD/OIG Senior Auditor and pertinent HCD staff copied here. During the conference we discussed the format and timing for HCD's response to the draft audit report, as well as the next steps in the process which will include working with Mary Wilson, Director of Region IV Community Planning and Development, on any recommendations or management decisions made relative to the report.

I appreciated the positive comments from Mr. Butcher and Mr. Pagano concerning HCD's program administration of these funds. I expressed, however, that the City's high level of commitment to regulatory compliance motivates these comments and documentation in support of our activities which we believe will address any concerns which may be raised by the final report.

Letter to James D. McKay

August 8, 2011

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If you have any questions or need additional information relative to HCD's response, please do not hesitate to contact me at (901) 576-7308 or Debbie Singleton at (901) 576-7304.

Thank you.

cc:

A C Wharton, Jr., Mayor, City of Memphis
Mary Wilson, Director, HUD Community Planning and Development
John Baldwin, Senior Community Planning Development Representative
Debbie Singleton, Administrator, Compliance, City of Memphis HCD
Kimberly Mitchell, Administrator, Homeless and Special Needs,
City of Memphis HCD
Harry Green, Manager, Accounting, City of Memphis HCD
Patrick Smith, Internal Auditor, City of Memphis HCD

RESULTS OF AUDIT

Finding 1: The City Did Not Fully Comply With Recovery Act Requirements

Although the City administered its HPRP and CDBG-R funds in accordance with most major Recovery Act requirements, its program administration was deficient in some areas. The City did not (1) always use the proper procurement methodology for procuring goods and services, (2) execute a contract before making payments for completed work, (3) always execute contracts in a timely manner, (4) comply with HUD guidance for implementing the "buy American" provision of the Recovery Act, (5) always perform an adequate cost analysis before executing contracts, and (6) adequately support the reported figures for jobs created with Recovery Act funding. These conditions occurred because City staff failed to follow all applicable requirements in the Recovery Act or its own policies and procedures. As a result, the City incurred \$619,114 in questioned costs related to its procurements and could not ensure compliance with all Recovery Act requirements.

The City Complied With Most Recovery Act Requirements

The City complied with most major Recovery Act requirements for both its HPRP and CDBG-R funding. It

- Expended program funds for only eligible activities,
- Maintained adequate documentation to support expenditures (with the exception of the expenditures detailed below),
- Ensured the eligibility of HPRP participants,
- Ensured that its HPRP subgrantees were monitored and trained as required, and
- Ensured that CDBG-R contractors complied with Davis-Bacon Act requirements when applicable.

The City Made Procurement Errors

The Architectural and Engineering Contract Was Not Properly Procured

The City planned to demolish buildings on the site of the fairgrounds and replace them with green areas, parking areas, etc. As part of that development, the City procured the services of an architectural and engineering (A&E) firm for a wide

range of services. However, the city failed to adequately justify the procurement method or perform the required cost analysis.

City staff misunderstood Federal procurement requirements and used the sole source procurement method when procuring the A&E firm's services. Regulations at 24CFR (Code of Federal Regulations) 85.36(d)(4) allow sole source procurement only when certain circumstances are met. The regulations read in part, "(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies: (A) The item is available only from a single source; (B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (C) The awarding agency authorizes noncompetitive proposals; or (D) After solicitation of a number of sources, competition is determined inadequate."

The City justified the sole source method of procurement by stating that the procurement was an "urgent and time-sensitive engagement." The City then cited the facts for which it deemed the engagement to be urgent and time sensitive. However, the factors it cited consisted only of a list of the firm's supposed unique qualifications related to its knowledge of the fairgrounds, thus failing to explain how the procurement was an urgent and time-sensitive engagement.

The City also failed to perform the cost analysis required by the regulations and its own procurement policy. Federal procurement procedures at 24 CFR 85.36 read in part, "Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications." The regulations also required that the cost analysis include verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits.

The city supplied an e-mail document as evidence of a cost analysis for the A&E services. The e-mail stated that the City would use 6 or 7 percent of the total Project cost as the fee rate. There was no explanation of the methodology used for determining these percentages or how the City determined them to be reasonable. As a result, the City could not assure HUD that the A&E services were procured at a fair and reasonable cost.

The City awarded the original A&E contract using a portion of its annual CDBG grant. Later contract extensions and contract amendments included both annual CDBG and CDBG-R funds. Since the original contract was improperly procured, we considered all CDBG and CDBG-R funds expended on the contract to be unsupported. The City expended a total of \$310,000 in CDBG and CDBG-R funds on the contract (including extensions and amendments), and the contractor had earned an additional \$25,000 for which the City was planning to use CDBG-R funds.

CITY RESPONSE:

Comment 1

1. Regulations at 24CFR (Code of Federal Regulations) 85.36 (d) (4) (i) allow procurement by non-competitive proposals only when award of a contract is infeasible under the other forms of procurement and one of the following circumstances applies: (A) The item is available only from a single source; (B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (C) The awarding agency authorizes noncompetitive proposals; or (D) After solicitation of a number of sources, competition is determined inadequate.

In initially procuring the A & E services, the City immediately needed a firm with the most intrinsic and historic knowledge available relative to the 175+ acre Memphis Fairgrounds in order to review a proposal from a potential developer and assist the City with its due diligence process in order to move forward on making a decision relative to the development proposal. As the City believed its need made it urgently necessary to obtain this review and assistance from a firm that was most familiar with the site, its design and history, the A & E firm was engaged as provided by 24 CFR 85.36(d) (4) (i) (A) and (B) due to the public exigency created by the development decision which could not be delayed and as such, the firm that was chosen provided both historic and intrinsic knowledge of the site due to the following factors:

- The firm participated in the design of the Pipkin Building, the Youth Center Building, The Revolution and various other buildings and structures on the site.
- The firm was the original designer of the 1977 Site Master Plan for the Memphis Fairgrounds.
-

As the City's immediate need for a decision could be expedited with the assistance of a firm with a specific familiarity with the site, the firm was selected. A copy of the Justification Memo is attached as Exhibit A. The Memo provides the qualifications of the firm as the sole source provider in order to meet this time-sensitive need to reach a decision as to the viability of the redevelopment of the Memphis Fairgrounds.

Comment 2

2. 24 CFR 85.36 (d) (4) (ii) provides: Cost analysis, i.e. verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits is required. As a professional services contract does not usually contain cost or profit quotes but rather hourly rates or percentage rates based on the total project costs, the City believes the reviewed by the City Engineer, as evidenced by the attached email as Exhibit B, as to cost reasonableness was based on industry standards as experienced and funded by the City for other City projects.

Therefore, the City believes adequate determination and documentation has been provided to justify that the original Architectural and Engineering contract was properly procured, cost were determined to be reasonable and the \$335,000 in CDBG and CDBG-R funds contract funds (including extensions and amendments) are eligible disbursements for which adequate support has been submitted.

The City Expended CDBG-R Funds for Work Completed Without an Executed Contract

The City properly obtained sealed bids for the greening and demolition of the fairgrounds. The greening and demolition work was performed under two separate contracts known as "package 2" and "package 3." Soon after beginning the work on package 3, the City discovered that additional work was needed to complete the project. The additional work added \$648,718 (of which \$235,978 was CDBG-R funds) to the original \$564,475, increasing the contract to more than \$1.2 million. An amendment covering the additional work was drawn up but was not executed. The City paid the contractor for the completed work.

The City's contracting procedures, which it failed to follow, required a contract to be executed before payments could be made for completed work. Therefore, the expenditure of \$235,978 in CDBG-R funds for the additional fairgrounds work was unsupported.

CITY RESPONSE:

Comment 3

With the award of CDBG-R funding from HUD came the opportunity to fund the hard development costs associated with the construction of the publicly owned Grand Promenade Park, as a public facilities and improvements project, eligible under 24 CFR §570.201 (c). The project provided for the clearance of obsolete structures on the site.

As submitted to and approved by HUD, the Grand Promenade Park (now known as Tiger Lane) was proposed as the focal point of a 175-acre public/private project that reflects our city's values related to strong neighborhoods, strong families, and new economic anchors; provide public space for community and family events; restore primary access to the area and provide connectivity to the Cooper Young neighborhood and surrounding areas through vehicular, bicycle and pedestrian access.

The CDBG-R demolition project, procured and contracted as Packages 2 & 3 referenced above, was placed on hold subject to resolution of the concerns and needs of the major tenants of the Liberty Bowl Memorial Stadium (the Southern Heritage Classic, the University of Memphis and the Liberty Bowl Classic). Final council approval was obtained on March 23, 2010. In addition to final approval for the demolition, the Memphis City Council approved, allocated and appropriated \$15,260,000 in local funds (11 to 1 leverage of federal funding) for the construction of "Tiger Lane" with the understanding that the project would be completed for use by the Southern Heritage Classic on September 6, 2010. The Tiger Lane included the construction and installation of sewers, gutters, streets, sidewalks, landscaping, parking, walking spaces, lighting flagpoles, restrooms and a water feature.

In order to meet the public's urgent need to complete the Tiger Lane project within the extremely compressed time frame (90+ days), it was determined the Package 2

contractor, who had control of the site, must provide simultaneous demolition services and construction related services in order to coordinate the placement of utility services, cooperate with the accelerated phasing of the project, permit site access, prepare a radial cast wall (earth retaining structure) as site preparation for the subsequent accelerated construction of the Tiger Lane project. The details of the additional work were included in the Construction Change Directives (CCD) #1 and #2, attached as Exhibits C and D. The Tiger Lane project commenced on June 7, 2010 and was completed on time and on budget. It also resulted in a 54% minority participation, the largest participation rate for a City project to-date.

After further review of the City Attorney's Office, the City's Purchasing Agent and the Director of Finance, it was decided that in lieu of the requested contract modification, the CCDs would serve as individual invoices for payments. The payments for the CCDs were submitted under two separate payment requests and approved by the Director of Finance for payment. Copies of the payment requests and authorizing e-mails are attached as Exhibit E.

Therefore, the City believes adequate determination and documentation has been provided to justify that the City reviewed, approved and expended all CDBG-R Funds for Work Completed under Package 2 subject to the City's contracting policies and that adequate support for the \$235,978 has been submitted.

The City Lost the Services of the Low Bidder Due to Its Long Delay in Executing a Contract

The City properly obtained sealed bids for package 3 for the greening and demolition of the fairgrounds and properly selected the lowest bidder to perform the work. The City's bid documents required that the submitted bids remain viable for 120 days. This timeframe appears to have been a reasonable amount of time to write, review, and execute the contract with the lowest bidder. However, the City failed to enter into a contract within the 120 days, and the low bidder rescinded its bid at the 120-day mark. The City later executed a contract for the work related to package 3 with the next lowest bidder. The City incurred an additional \$48,136 in CDBG-R costs due to failing to execute a timely contract with the lowest bidder. We considered the additional costs to be unreasonable.

CITY RESPONSE:

Although the review provides above that a 120 day timeframe appears to have been a reasonable amount of time to write, review, and execute the contract with the lowest bidder, the following circumstances prevented the City from executing a contract within 120 days from bid opening:

- The "bid viability period" expired on January 25, 2010.
- The Authority to Use Grant Funds, see Exhibit F, was approved on January 29, 2010 and received by HCD on February 5, 2010.
- The lowest bidder formally withdrew his bid on February 1, 2010, see Exhibit G.

Comment 4

- Final City Council approval received on March 23, 2010.

Therefore, the City does not believe there was a failure to execute a contract in a timely manner, as the next lowest bidder became the lowest bidder at the time of the expiration of the "bid viability period" and prior to the final approval given by City Council. As the lowest bid at the time of the approval from City Council was selected, there was not a \$48,136 unreasonable or unnecessary expenditure. The City also believes adequate determination and documentation has been provided to justify that the City awarded its CDBG-R funds to the lowest bidder for Package #2, subject to the City's contracting policies.

The City Did Not Comply With the Recovery Act's "Buy American" Provision

The City failed to follow HUD guidance for implementing the "buy American" provision of the Recovery Act. Section 1605 of the Act reads in part, "BUY AMERICAN SEC. 1605. USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS. (a) None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States." The City did not include the "buy American" provision in the contract for the rehabilitation of the commercial laundromat and the contract amendment for additional work related to the greening and demolition of the fairgrounds (which included some construction work). As a result, there was no assurance that the companies receiving Recovery Act funds complied with the requirement.

CITY RESPONSE:

In reference to the comments above relative to compliance with the "Buy America Provision":

SMA (Commercial Laundromat): Since this project is not a public building or public work project, the Buy America provisions may not apply. However, no contract funds have been expended on the project, and if required, the contract may be amended to include the "Buy America Provisions". In the interim, the contractor has provided an executed "P.L.-5 -ARRA 2009 - Buy America Provisions Contractor Certification" (see Exhibit H) which contains all provisions and certifications of the Buy America cited above.

Greening and Demolition Project: As previously provided in the City Response relative to the additional work performed, approved and funded for the additional CCD work association with the Tiger Lane, the CCDs served as invoices for payments in lieu of executing a contract amendment. In the absence of a contract

Comment 5

amendment and in order to acknowledge and assure compliance with the provisions of the "Buy America" provisions the contractor has executed "P.L.-5 -ARRA 2009-Buy America Provisions Contractor Certification" (see Exhibit I).

Therefore, the City believes adequate determination and documentation has been provided to justify that the City has complied with the Recovery Act's "Buy American" Provision.

The City Did Not Adequately Document the Number of Jobs Created

Section 1512(c) of the Recovery Act required recipients of funds to report quarterly on the Internet at Federalreporting.gov. The recipients were to report on the nature and status of their projects and the number of jobs created or retained. We reviewed the City's latest HPRP and CDBG-R reports for the quarter ending March 31, 2011, for timeliness, completeness, and accuracy.

The City's quarterly reports were generally timely, complete, and accurate, but the information related to the creation and retention of jobs was not always sufficiently supported. The City was unable to support the reported jobs created for either the HPRP or the CDBG-R grant. OMB (Office of Management and Budget) Memorandum M-10-08 outlined how "jobs created or retained" should be calculated. The City reported on March 31, 2011, that it had created a total of 9.92 jobs via HPRP and an additional 27 jobs using CDBG-R grant funds. The City had no written internal control procedures related to the required reporting, and staff members stated that they used the instructions found at the FederalReporting.gov Web site for guidance. When asked to support the job figures, the City could not. As a result, it could not assure HUD or the public that its reported job figures were accurate.

CITY RESPONSE:

Pursuant to the OMB Memorandum M-10-08, section 5.3, the City used the guidance provided in calculating the number of FTE jobs for both the HPRP and CDBG-R projects. In addition, section 5.2 of the OMB Memorandum M-10-08, number 10. states that the guidance does not establish specific requirements for documentation or other written proof to support reported estimates on jobs created or retained; however, recipients should be prepared to justify their estimates. To that extent, the jobs relative to the CDBG-R project were based on the documented time sheets submitted during the project phase.

Subsequent to the review, staff has reviewed its supporting documentation and assured that its quarterly report for the quarter ending June 30, 2011 reflects its reviews and accurately reports CDBG-R job figure estimates. As follows:

Comment 6

"The CDBG-R project was actually completed in the 3rd quarter of 2010 for The Fairground/Grand Promenade Park. In that quarter, there were only 17 FTE jobs created. This is a correction from the previous two quarters. Upon bid review, the City opted to utilize the Division of Public works for site demolition on New Chicago/Manassas project. Additional delays in the bidding process has resulted in the slower than expected progress of this project. The SMA Alliance/ Laudromat project contract was executed and an amendment was required due to changes in the over all project. The project has been redesigned and re-engineered to increase the scale of the project. The environmental assessment has been completed for the expanded site. There are currently no jobs to report this quarter."

Therefore, the City believes it has adequately reviewed its documentation and accurately reported job figure estimates.

OIG Evaluation of Auditee Comments

- Comment 1** In order to justify its selection of the A&E contractor, the City supplied the same information in its response that it supplied during the audit. The documentation outlines the A&E firm's supposed unique qualifications but contains no explanation as to why the contract was of an urgent and time-sensitive nature. The procurement regulations do not allow selection of an A&E firm as a sole source provider based only on qualifications.
- Comment 2** The City supplied the same information in its response that it supplied during the audit to document its cost analysis for the A&E contract. The copy of an email that it provided simply assigns a percentage of the project cost to the amount of the A&E contract without an explanation as to how the percentage was determined. The regulations at 24 CFR 85.36(f)(1) require a much more detailed cost analysis than the City performed in order to ensure that the cost of the A&E contract was reasonable.
- Comment 3** The City supplied the same information in its response that it supplied during the audit (contract change directives, check request documentation, etc.) to support its payment for the greening and demolition work. The City's comments do not change the fact that the additional construction work was performed and paid for without an executed contract. The City's procurement procedures required contracts to be obtained for all purchases of goods or services over \$50,000. In this case, the additional work performed by the contractor totaled \$648,718. As such, the City was required to obtain a contract for the additional work. In addition, the method of payment used by the City in this case, check requests, is limited by the City's contracting procedures to payments of no more than \$2,500 in the aggregate. The City paid the contractor an additional \$235,978 in CDBG-R funds.
- Comment 4** The City advertised for sealed bids for the demolition and greening work at the fairgrounds work on September 11 and 14, 2009, and the bids were opened and tabulated on September 25, 2009. As such, on September 25, 2009, the City had an approved activity in place and had a contractor to perform the work. However, the City delayed over 3 months, until January 11, 2010, to request authority to use grant funds. There is nothing in the City's response that explains the long delay or indicates that it attempted to expedite the approval process as the 120 day expiration date approached (e.g., faxing the form and alerting HUD of the upcoming deadline). As a result, the authority to use grant funds form was not approved by HUD until January 29, 2010, and the City did not receive the approved form until February 5, 2010, or two weeks after the bid expiration date was reached. In the absence of an acceptable explanation for the delays from the City, we believe that the extra \$48,136 in costs resulting from the withdrawal of the low bidder was unreasonable.
- Comment 5** The City commented that the "Buy American" provision may not apply because the laundromat is not a public works project. Based on some additional research

including information supplied by the Director of the Knoxville office of Community Planning and Development, we agree that the “Buy American” provision does not apply in this case because the laundromat is privately owned. The exemption for privately owned projects is detailed in CPD Notice 09-05. We amended the report accordingly.

The certification provided by the City to show compliance with the “Buy American” provision of the Recovery Act for the additional work related to the greening and demolition of the fairgrounds was required to accompany the contractor’s partial payment estimates. The fact remains that the contract change directives under which the additional work performed as part of package 2 of the project did not include the “Buy American” provision as required by the Recovery Act.

Comment 6 The OMB guidance states that recipients should be prepared to justify their reported jobs figures. During the review, OIG made several requests for the City’s documentation to support how the jobs figures were calculated. No support was supplied during the review, and none was supplied in the City’s response.