



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

Evaluation and Inspection Services

October 8, 2009

Memorandum

TO: Thomas Skelly
Delegated to Perform Functions of the Chief Financial Officer

FROM: Wanda A. Scott /s/
Assistant Inspector General
Evaluation, Inspection, and Management Services

SUBJECT: Final Inspection Report
Inspection to Evaluate the Implementation and Effectiveness of the Department's
Procedures in Response to Section 306 of the Fiscal Year 2008 Appropriations
Act – Maintenance of Integrity and Ethical Values within the Department
Control Number (ED-OIG/ I13J0001)

This final inspection report presents the results of our inspection to evaluate the implementation and effectiveness of the Department of Education's (Department) procedures in response to Section 306 of the Fiscal Year 2008 Appropriations Act – Maintenance of Integrity and Ethical Values within the Department (Section 306) and the Department's response to those results.

BACKGROUND

Section 306 of the Fiscal Year 2008 Appropriations Act – Maintenance of Integrity and Ethical Values within the Department – required the Department to implement procedures (1) to assess whether a covered individual or entity has a potential financial interest in, or impaired objectivity towards, a product or service purchased with, or guaranteed or insured by, funds administered by the Department of Education or a contracted entity of the Department; and (2) to disclose the existence of any such potential financial interest or impaired objectivity. The statute further provides that covered individuals or entities are Department officers or professional employees, contractors or subcontractors and their employees, consultants and peer reviewers. This provision has since been codified at 20 U.S.C. § 3490.

On February 22, 2008, the Department issued a notification to all Department managers titled, "Procedures to Comply with Section 306 of the Fiscal Year 2008 Appropriations Act." OIG evaluated the Department's procedures and the results were presented in a final inspection report, "Inspection to Evaluate the Adequacy of the Department's Procedures in Response to Section 306 of the Fiscal Year 2008 Appropriations Act – Maintenance of Integrity and Ethical Values Within the Department (ED-OIG/I13I0004)," issued on April 21, 2008. In that report, we

concluded that the procedures specific to contractors, subcontractors, and individuals hired by the contracted entity, if fully implemented as planned, were adequate to assess and disclose the existence of any potential financial interest or impaired objectivity.

As part of those Department procedures for contractors, subcontractors, and individuals hired by the contracted entity; applicable contract solicitations since August 2007 were to include the following requirements:

- A conflict of interest clause which covers organizational and personal conflicts of interest. The clause mentions that conflicts may arise in the following situations: unequal access to information, biased ground rules, or impaired objectivity.
- A conflict of interest certification which includes the language of the conflict of interest clause, as well as a certification in which the organization must certify that it has disclosed all information related to potential conflicts of interest for itself, any subcontractor, and any individual hired by the contracted entity.
- Instructions requiring organizations to submit a conflict of interest plan. In the conflict of interest plan, the organization is required to provide details on its policies and procedures to identify and avoid potential organizational or personal conflicts of interest (or apparent conflicts of interest). The organization's plan should also address procedures taken to neutralize or mitigate such conflicts, if they have not been or cannot be avoided.

The effectiveness of the Department's ability to uncover and disclose the existence of potential financial interests or impaired objectivity through these procedures is dependent on the accuracy of the information provided in response to the contract solicitation and the winning contractor's commitment to implementing the plan and reporting back to the Department.

Contracts and Acquisitions Management (CAM) and Federal Student Aid's (FSA) Acquisitions group are the Department functions responsible for the solicitation, award, administration, and closeout of all contracts and other acquisition instruments in the Department of Education. The Director of CAM also serves as the Department's Senior Procurement Executive (SPE) with responsibility for all of the Department's acquisitions.

INSPECTION RESULTS

The objective of our inspection was to evaluate the implementation of the Department's procedures in response to Section 306 with regard to Department contractors, subcontractors, and individuals hired by the contracted entity to determine if they are properly implemented and are effective to uncover and disclose the existence of potential financial interests or impaired objectivity. We determined that the Department's procedures have not been implemented properly; however, we continue to conclude that, if properly implemented, the procedures would be effective to uncover and disclose the existence of potential financial interests or impaired objectivity. No information came to our attention during the course of our inspection that would indicate the Department failed to identify an actual conflict of interest. CAM provided examples

of two contract solicitations in which the Contracting Officer identified a potential conflict of interest and tailored a conflict of interest clause to address the potential conflict.

We found that the Department has not: 1) Adequately addressed the application of Section 306 to product contracts; 2) Consistently implemented conflict of interest procedures for service contracts valued over \$100,000; and 3) Adequately addressed the requirements of Section 306 for service contracts valued \$100,000 and below.

FINDING NO. 1 – The Department Has Not Adequately Addressed the Application of Section 306 to Product Contracts

During our 2008 review of the adequacy of the Department’s procedures to comply with Section 306 (ED-OIG/I13I0004) it appeared that the Department’s procedures applied to all contracts of every type. We have since determined that the Department has not adequately addressed the application of Section 306 to product contracts. CAM officials stated that conflict of interest plans are not required for the acquisition of products. According to CAM officials, there cannot be a conflict of interest with a product so it has not applied Section 306 requirements to these contracts. Examples of products purchased under Department contracts include software purchases, parking spaces, and products purchased off of the General Services Administration’s (GSA) Federal Supply Schedules.

At the time of our inspection, CAM had not consulted with the Department’s Office of General Counsel (OGC) on whether its decision to exempt product contracts from Section 306 requirements is supportable. CAM cited language in the conflict of interest certification that refers only to “work performed under the contract or task order,” not to goods delivered. They also cited Federal Acquisition Regulation (FAR) § 9.502 which lists four examples of possible conflicts, all of which are related to service contracts. Although these provisions provide some support for CAM’s position, neither specifically exempts product contracts from conflict of interest requirements. In fact, FAR § 9.502 provides that the applicability of the organizational conflict of interest provision is not limited to any particular kind of acquisition. Given CAM’s position and the FAR statement that the conflict of interest provision is not limited to any particular kind of acquisition, CAM should request a formal opinion from OGC to determine whether the requirements of Section 306 apply to product contracts.

Recommendation

We recommend that the Acting Chief Financial Officer —

- 1.1 Request a formal opinion from OGC on whether CAM’s position regarding product contracts is supportable and implement policies and procedures in accordance with OGC’s opinion.

FINDING NO. 2 – The Department’s Conflict of Interest Procedures for Service Contracts Valued Over \$100,000 Have Not Been Consistently Implemented

We found that the Department’s conflict of interest procedures for service contracts valued over \$100,000 have not been consistently implemented. We determined that Department contracting officials did not consistently include the conflict of interest clause, certification, and plan instructions in the contract solicitations. We also determined that the contract files did not consistently contain conflict of interest plans or evidence to show that the plans had been evaluated. Due to inconsistent implementation, it appears that the conflict of interest procedures were not adequately communicated to all relevant Department employees.

CAM’s *Procedure for Identifying and addressing conflict of interest (CO-120)* provide guidance to different acquisition team members on their responsibilities related to identifying and addressing conflicts of interest. The three specific steps are to:

- Identify and avoid, neutralize, or mitigate potential conflicts during acquisition planning and other pre-award activity,
- Identify, evaluate, and resolve conflicts during contract administration, and
- Brief subsequent acquisition team members.

The *CO-120* procedures do not include specific guidance on how to evaluate conflict of interest plans. CAM officials stated that there are no criteria for reviewing conflict of interest plans and that their procedure for evaluating conflict of interest plans was a “reasonableness test” by which the contracting officer (CO) responsible for the contract determines whether or not the plan is reasonable. In our review, we did not find evidence to support that the plans were reviewed for reasonableness. CAM officials also stated that the evaluation of the plan is not necessarily documented in the file if the plan was determined to be reasonable. Without criteria and guidance for reviewing conflict of interest plans and documentation to ensure the plans have been reviewed, CAM has no assurance that COs have performed the reviews and that the reviews were consistent and thorough.

The *CO-120* procedures are enhanced when supplemented by the conflict of interest clause, the conflict of interest certification, the conflict of interest plan instructions, and conflict of interest plan. As stated in our previous report on Section 306 (ED-OIG/I13I0004), the Department’s procedures for contractors, subcontractors, and individuals hired by the contracted entity, if fully implemented as planned, are adequate to assess and disclose the existence of potential financial interests or impaired objectivity. The Department cannot effectively uncover and disclose the existence of potential financial interests or impaired objectivity until these procedures have been properly implemented.

Recommendations

We recommend that the Acting Chief Financial Officer —

- 2.1 Develop guidance for Group Managers and COs to assess the conflict of interest plans submitted by vendors;

- 2.2 Communicate the Department’s conflict of interest procedures for service contracts valued over \$100,000 to all relevant employees so that the procedures may be consistently implemented across the Department; and
- 2.3 Develop a process to confirm or validate that conflict of interest plans have been reviewed for reasonableness.

FINDING NO. 3 – The Department Has Not Adequately Addressed the Requirements of Section 306 for Service Contracts Valued \$100,000 and Below

Service contracts valued \$100,000 and below are not adequately addressed under CAM’s current conflict of interest procedures. CAM officials stated that the inclusion of the conflict of interest clause, the conflict of interest certification, the conflict of interest plan instructions, and conflict of interest plan is a procedure only required for service contracts valued over \$100,000.

All Department contracts valued at \$100,000 and below are categorized as simplified acquisitions, which, according to the FAR, are acquisitions of supplies or services not exceeding \$100,000 that have simplified procedures in order to reduce administrative costs, improve opportunities for vendors, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors.¹ According to a CAM official, a conflict of interest plan is not required for simplified acquisitions because “the cost burden on both the contractor and the Department would be prohibitive and be contrary to the concept of simplified acquisitions.”

The Department’s policy of applying the conflict of interest procedures only to service contracts valued over \$100,000, does not meet the requirements of Section 306. The Department cannot effectively uncover and disclose the existence of potential financial interests or impaired objectivity for service contracts valued \$100,000 and below if CAM’s procedures do not adequately address contracts below the simplified acquisition threshold.

Recommendations

We recommend that the Acting Chief Financial Officer —

- 3.1 Address the requirements of Section 306 for service contracts valued \$100,000 and below in a manner consistent with the simplified acquisition regulations; and
- 3.2 Ensure that all executive officers are aware of their responsibilities regarding conflicts of interest for service contracts valued \$100,000 and below.

¹ The regulations at 48 C.F.R. § 13.002 specify the use of simplified acquisition procedures in order to “(a) Reduce administrative costs; (b) Improve opportunities for small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns to obtain a fair proportion of Government contracts; (c) Promote efficiency and economy in contracting; and (d) Avoid unnecessary burdens for agencies and contractors.”

DEPARTMENT COMMENTS

On September 3, 2009, we provided the Department with a copy of our draft inspection report for comment. We received the Department's comments to the report on October 2, 2009. The Department concurred with all of our findings and recommendations with the exception of Recommendation 1.1. We have summarized the Department's comments on that recommendation and provided our response below. In response to our determination that "Department contracting officials did not consistently include the conflict of interest clause, certification, and plan instructions in the contract solicitations," the Department stated that it believes it is more practicable to include the requirement for a conflict of interest plan only in solicitations where the potential for a conflict of interest is known in advance. The Department stated that in all other cases, a conflict of interest plan is required from the successful vendor prior to the award of a contract, rather than at the solicitation phase. The Department stated that its procedure for requiring conflict of interest plans needs to be revised accordingly. We recognize this as a departure from the Department's original procedures to comply with Section 306 issued on February 22, 2008. This procedure, if implemented in conjunction with our recommendations, will meet the requirements of Section 306. The Department's response, in its entirety, is attached.

Department Comments

The Department concurred in part with Recommendation 1.1. The Department stated that on September 22, 2009, CAM sought a formal opinion from OGC as to CAM's interpretation of the statute. The Department notes that OGC's opinions are advisory and the SPE is ultimately "responsible for...implementation of unique acquisition policies, regulations and standards of the executive agency."

OIG Response

We recognize the advisory nature of OGC opinions and the responsibilities of the SPE. We note that although OGC opinions are advisory; disregarding an OGC opinion may put the Department at risk of non-compliance with Federal requirements.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of our inspection was to evaluate the implementation of the Department's procedures in response to Section 306 with regard to Department contractors, subcontractors, and individuals hired by the contracted entity to determine if they are properly implemented and are effective to uncover and disclose the existence of potential financial interests or impaired objectivity.

We began our fieldwork on April 7, 2009, and conducted an exit conference on August 13, 2009.

The scope of our review included all contracts both solicited and awarded between April 21, 2008 (the date of the final inspection report - ED-OIG/I13I0004), and April 6, 2009 (the date of our request for files). In order to evaluate the Department's implementation of its conflict of interest

procedures, we reviewed a random sample of Department contract files from within this time period. FSA contracts were included in our sample because, although FSA has a separate acquisitions group, the same conflict of interest procedures to comply with Section 306 apply. We stratified our sample into three categories:

- Contracts valued over \$100,000 – a random sample of 15 from a universe of 50;
- Contracts valued \$25,001-\$100,000 – a random sample of 10 from a universe of 26; and
- Contracts valued \$3,000-\$25,000 – a random sample of 30 from a universe of 140.

We reviewed all 15 of the files for contracts valued over \$100,000. We reviewed files for 9 of the 10 contracts valued \$25,001-\$100,000 and 10 of the 30 contracts valued \$3,000-\$25,000. Because CAM informed us, during our fieldwork, that the conflict of interest procedures are only required for service contracts valued over \$100,000, we ended our review of contracts under \$100,000. We also reviewed CAM's "Procedure for Identifying and addressing conflict of interest" and relevant e-mails provided by CAM. We met with Department staff in the Office of the Chief Financial Officer's Contracts and Acquisitions Management office and Federal Student Aid's Acquisitions group. Additionally, we referred to OIG's final inspection report regarding the Department's procedures to comply with Section 306 (ED-OIG/I13I0004).

Our inspection was performed in accordance with the *2005 President's Council on Integrity and Efficiency Quality Standards for Inspections* appropriate to the scope of the inspection described above.

ADMINISTRATIVE MATTERS

An electronic copy of this final inspection report has been provided to your Audit Liaison Officer. We received your comments, which concurred with all of our findings and generally concurred with our recommendations.

Corrective actions proposed (resolution phase) and implemented (closure phase) by your offices will be monitored and tracked through the Department's Audit Accountability and Resolution Tracking System (AARTS). Department policy requires that you enter your final corrective action plan (CAP) for our review in the automated system within 30 days of the issuance of this report.

In accordance with the Inspector General Act of 1978, as amended, the Office of Inspector General is required to report to Congress twice a year on the audits that remain unresolved after six months from the date of issuance.

In accordance with the Freedom of Information Act (5 U.S.C. §552), reports issued by the Office of Inspector General are available to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act..

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United States Department Of Education
Office of the Chief Financial Officer

MEMORANDUM

DATE: October 2, 2009

TO: Wanda A. Scott
Assistant Inspector General
Evaluation, Inspection and Management Services

FROM: Thomas P. Skelly /s/
Delegated to Perform Functions of the Chief Financial Officer

SUBJECT: Inspection ED-OIG/I13J0001, entitled "Inspection to Evaluate the Implementation and Effectiveness of the Department's Procedures in Response to Section 306 of the Fiscal Year 2008 Appropriations Act – Maintenance of Integrity and Ethical Values within the Department"

The Department has reviewed the Inspector General's (IG) draft inspection and was encouraged that there was no information indicating that the Department failed to identify an actual conflict of interest.

The Department notes that Conflict of Interest is an issue that is of concern across the Government and that while the Department implemented policy addressing this issue in 2007, OMB is expected to issue Government-wide policy shortly. If such action is taken, the Department will need to consider the Government-wide policy as it relates to current agency-specific requirements.

The Department's comments regarding specific findings and recommendations are as follows:

FINDING NO. 1: The Department Has Not Adequately Addressed the Application of Section 306 to Product Contracts.

The Department concurs with this finding. The Department believes that its reading of the legislation is the only reasonable interpretation. In the case of a product contract, the contract's sole purpose is to supply a product. For those situations, we believe that a conflict of interest cannot exist for a supplier or its employees. However, the Department agrees that specific guidance articulating this position should be more widely disseminated.

Recommendation 1.1: Request a formal opinion from OGC on whether CAM's position regarding product contracts is supportable and implement policies and procedures in accordance with OGC's opinion.

The Department concurs in part with the recommendation. On September 22, 2009, CAM sought a formal opinion from the Office of the General Counsel (OGC) as to CAM's interpretation of the statute. However, OGC's opinions are advisory. In accordance with FAR 2.101, the Senior Procurement Executive (SPE) is ultimately "responsible for ...implementation of unique acquisition policies, regulations and standards of the executive agency."

FINDING NO. 2: The Departments' Conflict of Interest Procedures for Service Contracts Valued Over \$100,000 have not been consistently implemented.

The Department concurs with this finding.

Our understanding is that this finding is based, at least in part, on a February 22, 2008, memorandum from the General Council which stated that the COI provisions are included in all "applicable solicitations." We believe it is more practicable to include the requirement for a COI plan only in solicitations where the potential for a COI is known in advance. In all other cases, the COI Plan is required from the successful vendor prior to the award of a contract, rather than at the solicitation phase. As with Finding No. 1, we believe that the procedure requires revision in order to make this clearer.

Recommendation 2.1: Develop guidance for Group Managers and COs to assess the conflict of interest plans submitted by vendors.

The Department concurs with the recommendation. The Department will develop guidance for the assessment of conflict of interest plans and include this guidance in CO-120 or its replacement.

Recommendation 2.2: Communicate the Department's conflict of interest procedures for service contracts valued over \$100,000 to all relevant employees so that the procedures may be consistently implemented across the Department.

The Department concurs with the recommendation. Upon completion of 2.1 and 2.3, the Department will reissue guidance to all relevant employees.

Recommendation 2.3: Develop a process to confirm or validate that conflict of interest plans have been reviewed for reasonableness.

The Department concurs with the recommendation and will implement a process by which Contracting Officers will document that they have reviewed COI plans for reasonableness and identify the process in the guidance in CO-120 or its replacement.

FINDING NO. 3: The Department Has Not Adequately Addressed the Requirements of Section 306 for Service Contracts valued \$100,000 and Below.

The Department concurs with this finding.

Recommendation 3.1: Address the requirements of Section 306 for service contracts valued \$100,000 and below in a manner consistent with the simplified acquisition regulations.

The Department concurs with the recommendation. As agreed between the IG and the SPE at the Exit Conference, the Department has included language in the Education Acquisition Regulation (EDAR) to address procurements at or below the Simplified Acquisition Threshold, currently \$100,000. The regulation is currently undergoing Department clearance review.

Recommendation 3.2: Ensure that all executive officers are aware of their responsibilities regarding conflicts of interest for service contracts valued \$100,000 and below.

The Department concurs with the recommendation. Upon receiving Department clearance for publication of the EDAR, all personnel responsible for simplified acquisitions will be notified of any actions they are responsible for taking with regards to COI.

If you have any questions concerning this response, please contact Jim Ropelewski at 202-245-6221.