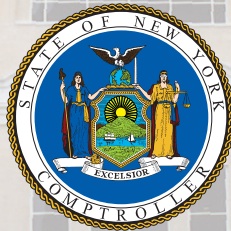




New York City Department of Education

Non-Competitively Awarded Contracts

Report 2008-N-1



Thomas P. DiNapoli

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State of New York Office of the State Comptroller

Division of State Government Accountability

May 19, 2009

Dear Chancellor Klein:

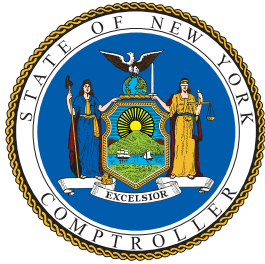
The Office of the State Comptroller is committed to helping State agencies, public authorities and local government agencies manage government resources efficiently and effectively and, by so doing, providing accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit on Non-Competitively Awarded Contracts. The audit was performed according to the State Comptroller's authority under Article V, Section 1, of the State Constitution; and Article II, Section 8, of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

*Office of the State Comptroller
Division of State Government Accountability*



State of New York Office of the State Comptroller

EXECUTIVE SUMMARY

Audit Objective

Our objective was to determine whether the New York City Department of Education (DoE) is complying with all applicable procurement requirements when it approves non-competitive contract awards.

Audit Results - Summary

According to DoE's Procurement Procedures, contracts should be awarded in a competitive manner whenever feasible and appropriate. Non-competitive awards are permitted in some prescribed circumstances. We found DoE does not always document its compliance with all procurement requirements necessary to justify non-competitive contracts. We also found that certain improvements are needed to DoE's procurement requirements to provide better assurance that non-competitive contracts are, in fact, appropriate.

During the three fiscal years ending June 30, 2008, the DoE awarded 3,183 contracts totaling \$6.2 billion, of which 2,488, totaling \$4.3 billion, could have been awarded competitively. Of those 2,488 contracts, 291 contracts, which met or exceeded a \$100,000 threshold, were awarded upon the approval of the DoE Committee on Contracts. These 291 contracts totaled about \$342.5 million, including 280 contracts (96 percent) with a value of about \$327 million categorized as "other special circumstances." Of the remaining 11 contracts, 10 were categorized as "sole source" and one was categorized as a "grant proposal."

We found that 173 of the 291 non-competitive contracts during our audit period (59 percent) had start dates prior to the Committee meeting at which the contract was approved. One contract, for \$16.5 million, was approved on June 1, 2006 - 25 days prior to the date it was required to be listed in the City Record.

We also found that DoE often lacked documentation to support its compliance with applicable procurement requirements for non-competitive contracts submitted to the Committee on Contracts for approval. We concluded that improvements are needed to DoE's procurement requirements to provide better assurances that the Committee on Contracts approves only appropriate non-competitive contracts.

For example, in 44 of the non-competitive contracts submitted to the Committee under the category of “other special circumstances” were for the stated reason that avoiding competition was cost-effective. In these instances, the requestor was required to prepare cost/price analysis forms demonstrating why the contract price is the best price available. However, we examined four contracts where competition was reportedly not cost-effective and found there were no cost/price analysis forms to support this statement. In fact, DoE was unable to provide any documented analysis regarding the cost-effectiveness of the decision not to bid these contracts. The contracts ranged in value from \$400,000 to \$8.3 million and totaled \$14.7 million.

We concluded that the category of “other special circumstances” which accounts for the vast majority of contracts submitted to the Committee on Contracts, needs to be clarified in DoE’s Procurement Procedures. Current procedures divide the category “other special circumstances” to include five sub-categories of justification including the need to: provide continuity of services, respond to time constraints, ensure cost-effectiveness, obtain uniquely qualified contractors and “other.” However, there is no guidance that defines precisely what these sub-categories mean and what constitutes adequate justification under any of them.

The lack of documentation supporting the justification for non-competitive contracts submitted to the Committee on Contracts, as well as the vagueness of the categorization of “other special circumstance” which constituted the majority of the \$342.5 million of non-competitive contracts submitted to the Committee during our audit period, significantly diminishes assurance that DoE’s non-competitive contracts are justified. In addition, despite DoE’s requirements that contract work should not start before formal approval is given, work on many of the non-competitive contracts did, in fact, start before such approval.

We made six recommendations for strengthening DoE’s controls over the award of contracts without competitive bid.

INTRODUCTION

Background

DoE is responsible for the New York City public school system, which contains more than 1,400 schools serving nearly 1.1 million students. DoE's annual budget of more than \$15 billion is supported by Federal, State and City funding. In the three fiscal years ended June 30, 2008, DoE reportedly awarded a total of 3,183 contracts totaling \$6.2 billion. Within that global count, the population of contracts that could have been competitively awarded was reported as 2,488 (approximately \$4.3 billion) of which 291 contracts (\$342.5 million) were awarded upon application to and approval by the Committee. That latter number is 11.7 percent of the total number of contracts awarded and 8 percent of the total dollar value of contracts that could have been competitively awarded over the same three-year period.

DoE's procurement practices must comply with certain regulations and procedures (Procurement Procedures) that were developed by DoE in accordance with Section 2590-h of the State Education Law. According to these Procurement Procedures, DoE's contracts should be awarded in a competitive manner whenever feasible and appropriate. If a contract is valued at more than \$100,000, its exemption from competitive contracting requirements must be approved by DoE's Committee on Contracts. The Committee consists of the Deputy Chancellor for Teaching and Learning and representatives from DoE's Office of Legal Services, Division of Financial Operations, and the Office of Auditor General. Non-competitive awards are permitted in the following circumstances:

- listing applications (for the purchase of copyrighted materials, artistic performances, and admission fees to cultural institutions or programs),
- sole source procurements (a single contractor is deemed capable of providing the needed goods or service),
- health and safety emergency situations,
- when a competitive grant proposal specifically names the vendor that should receive the grant award,
- purchases from another New York City agency or a public utility, and
- other special circumstances (no examples or further description is provided).

Audit Scope and Methodology

We audited selected DoE contracting practices for the period July 1, 2005 through June 30, 2008. Our objective was to determine whether DoE complied with applicable procurement requirements when awarding no-bid

contracts. To accomplish our objective, we interviewed DoE officials and reviewed DoE's Procurement Procedures. We also reviewed records and documentation relating to the 291 non-competitive contracts that were approved by DoE's Committee on Contracts through May 28, 2008 of our three-year audit period. We judgmentally selected certain of these contracts for more detailed examination; selecting the contracts on the basis of various risk factors.

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

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for the purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

This audit was performed in accordance with the State Comptroller's authority under Article V, Section 1 of the State Constitution, and Article III, Section 33 of the General Municipal Law.

Reporting Requirements

We provided a copy of this report, in draft, to DoE officials for their review and comment. Their comments were considered in preparing this report and a copy of DoE's comments are contained in this report. We request that within 90 days of the final release of this report, New York City Department of Education officials report to the State Comptroller advising what steps were taken to implement the recommendations contained herein, and if not implemented, the reasons why.

DoE officials disagree with our conclusions regarding the operations of the Committee on Contracts. They do agree that documentation could be improved and will strive to implement these changes.

This report, dated May 19, 2009, is available on our website at
<http://www.osc.state.ny.us>.
Add or update your mailing list address by contacting us at: (518)474-3271
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**Contributors to
the Report**

Major contributors to this report were Kenrick Sifontes, Sheila Jones, Daniel Raczynski, Irina Kovaneva, Teeranmattie Mahtoo-Dhanraj, and Elijah Kim.

Audit Findings and Recommendations

Documentation Supporting Non- Competitive Awards

A total of 44 of the 280 contracts categorized as “other special circumstances” were exempted, solely or in part, because it was cost-effective to avoid competition. In such cases, DoE’s Procurement Procedures require that the requestor submit certain documentation supporting this determination. The documentation is to show why the contract price is the best price available and is to include cost/price analysis forms completed by DoE’s Division of Contracts.

To determine whether the cost-effectiveness of these contracts was documented in accordance with DoE’s requirements, we judgmentally selected a sample of four of the contracts submitted to the Committee for exemption because it was considered cost effective to avoid competition. The four contracts ranged from \$400,000 to \$8.3 million and totaled \$14.7 million.

We found that DoE’s requirements were not met, as there were no cost/price analysis forms for any of the contracts and DoE was unable to provide any documentation showing that such an analysis had been performed by the Division of Contracts. While the request memos contained statements indicating that the cost was fair and reasonable, these statements were not supported by documented analysis. As a result, there was inadequate assurances these non-competitive awards were, in fact, more cost-effective than competitive awards.

In addition to the documentation requirements for cost-effectiveness, there are also other general documentation requirements for all contracts that are submitted to the Committee. For example, the contracts should be accompanied by an explanation of the basis or justification for their consideration as an exception to competitive contracting requirements; a description of the efforts made to meet proper procurement procedures; the reason the proposed vendor was selected; a detailed budget and work plan from the service provider; and an explanation of the efforts made to identify alternative sources.

To determine whether these general documentation requirements were being met, we selected a judgmental sample of 21 contracts and reviewed the documentation that was submitted to the Committee in support of the contracts. The contracts ranged from \$235,000 to \$16.5 million and totaled \$54.8 million.

We found that the general documentation requirements were not always being met and we noted multiple omissions on the 21 contracts. For example,

for seven contracts, totaling \$43.6 million, there was no documentation supporting claims that efforts had been made to meet proper procurement procedures, and in 3 of the 21 contracts, totaling \$7.2 million, there was no explanation of the basis or justification for their consideration as exceptions. Also, in a contract for \$1 million, there was no documentation supporting the reason for the proposed vendor's selection. For 2 of the 21 contracts, totaling \$2.1 million, we were unable to review the documentation because, according to DoE officials, the boxes containing the documentation were mistakenly destroyed by an archive contractor.

In response to our findings, DoE officials stated that some of the undocumented information was inferred or discussed at Committee meetings. According to the officials, this information does not need to be documented, even though the procedures state that the information is required.

We disagree with DoE officials and note that public accountability and transparency are best served when the basis and need for non-competitive contract awards are fully explained by documentation. In the absence of such documentation, the fairness and openness of DoE's procurement practices may be called into question.

In this regard, we note that minutes are not maintained for the Committee's meetings. DoE officials told us that when the Committee requires additional information not included in the submission package, it may make telephone calls to obtain this information, sometimes even calling the vendors. However, there is no record of these actions. Meeting minutes would provide such a record and, in their documentation of the overall decision-making process, would greatly enhance the accountability over DoE's non-competitive award of contracts. We recommend such minutes be maintained.

Recommendations

1. Ensure that the Committee on Contracts obtains all required documentation specified in support of approval for non-competitive procurements. Instruct the Committee to return submissions to requestors when required documentation is missing.
2. Investigate the inappropriate destruction of contract documentation by the archives contractor and determine what additional safeguards are needed to prevent future such incidents. (In response to the draft report, DoE officials determined that it was not the archives contractor, but a DoE employee who mistakenly destroyed the records. They state training has occurred to prevent future problems.)
3. Prepare and maintain appropriately detailed minutes for all meetings of the Committee on Contracts.

Allowable Reasons for Non-Competitive Awards

DoE allows non-competitive contract awards in six circumstances. Five of these six circumstances are well-defined in the Procurement Procedures. However, “other special circumstances” is not well defined. As a result, this category of allowable non-competitive contracts may be open to abuse. As was previously noted, 280 of the 291 non-competitive contracts approved during our audit period (96 percent) fell into the “other special circumstances” category, rather than one of the well-defined categories. Moreover, as previously discussed, our review of the contracts in the category identified a number of instances in which the basis for the non-competitive awards was questionable because of a lack of documentation. The lack of supporting documentation coupled with a lack of definition for this category, increases the risk that this category can be used to circumvent competitive bidding requirements.

The Committee has attempted to give some definition to this category, as it has broken the category down into five subcategories: Continuity, Time Constraints, Cost-Effective, Uniquely Qualified, and Other. However, there are no written definitions or guidelines for these subcategories. Department officials believe the name of each subcategory provides sufficient guidance for its use. However, we believe the names, by themselves, are not enough, and in the absence of additional guidance, the subcategories are more likely to be used for contracts that could, and should, be awarded competitively.

To provide additional protection against possible abuse, and to promote competitive contracting practices, we recommend additional written guidance be developed for the use of the subcategories in the “other special circumstances” category of allowable non-competitive contracts. For example, guidance could clarify precisely what is meant by each sub-category and the extent of analysis required to justify a no-bid contract award for each sub-category.

Recommendation

4. Revise DoE’s Standard Operating Procedures Manual to provide additional guidance for the use of the “other special circumstances” including definitions of each sub-category and classification of the extent of analysis required to justify a no-bid contract award for each sub-category.

Contract Start Dates

According to DoE’s Procurement Procedures, contract work should not begin until the contract has been formally approved. For non-competitive awards, this occurs after the contract has been approved by the Committee and registered with the New York City Comptroller’s Office.

However, we found that 173 of the 291 non-competitive contracts approved during our audit period (59 percent) had start dates prior to the Committee meeting at which the contract was approved. For example, one contract

was approved in December 2005 for rental payments that covered the period beginning in September 2005, a delay of 120 days.

Department officials stated that contracts will occasionally start before they are formally approved, but it is not DoE's practice to encourage such arrangements. However, officials were unable to explain why so many of the non-competitive contracts commenced prior to Committee approval. We note that 138 of the 173 contracts were extensions or renewals, but even so, such contracts should be formally approved before services are continued by the contractors. In the absence of this approval, both DoE and the contractors lack the protections normally provided by properly executed contracts.

In addition, prospective contracts exceeding certain dollar amounts are supposed to be listed in the City Record before they are awarded. However, we found this was not done for one of the non-competitive contracts we reviewed. The contract, for strategic advisory and financial management services, totaled \$16.5 million and was approved on June 1, 2006. However, it was not listed in the City Record until June 26, 2006; 25 days later. Such delays in advertising contract work can undermine the openness of DoE's procurement process.

- Recommendations**
5. Identify, on an ongoing basis, contracts that begin before they have been approved and follow up with the responsible individuals to determine why this has happened and whether corrective actions are needed.
 6. Ensure that notices of contracts are posted in the City Record prior to the start date of the contracts.

AGENCY COMMENTS

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Finance and Administration

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April 28, 2009

Mr. Steven E. Sossei
Audit Director
Office of the State Comptroller
Division of State Government Accountability
110 State Street, 11th Floor
Albany, NY 12236

Re: Draft Audit Report: *Non-Competitively Awarded Contracts*
Number 2008-N-1

Dear Mr. Sossei:

This cover letter addressing our general observations, and the attached detailed response speaking to recommendations and findings more specifically, constitute the New York City Department of Education's ("Department") formal response ("Response") to the findings and recommendations made in the Office of the State Comptroller's ("Comptroller") draft audit report titled *Non-Competitively Awarded Contracts* ("Report").

It is necessary at the outset to provide guidance to the reader on the subject matter and scope of the Comptroller's audit, since much of it is either missing from or unclear in the body of the Report. First, the audit concerned "non-competitively awarded" contracts in excess of \$100,000 that were approved by the Department's Committee on Contracts ("Committee") over a three year period (School Years 2005/2006 – 2007/2008). Second, those contracts are for professional services only. Third, the Committee's work must be considered in the context of the Department's overall business practices and in light of the fact that the contracts awarded upon approval by that body reflect only 11.7 percent of the total number of contracts awarded and 8 percent of the total dollar value of contracts that could have been competitively awarded over the three-year audit period.

As to our business practices, the Department obtains goods and services through a variety of procurement methods; the selection is largely dependent upon the nature of the goods or services sought and how soon they are needed. For example, Pre-Qualification Solicitations are used for selected pedagogic professional services to afford schools the opportunity to competitively and expeditiously solicit services from a list of pre-

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Comment 1

* See State Comptroller's Comments on Page 25

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qualified vendors. Market conditions and other circumstances can make it impractical to do a competitive solicitation, such as for textbooks and other sole source goods and services; a non-competitive process may also be employed where exigent circumstances exist, *e.g.* when a school building becomes uninhabitable creating an *immediate* need to re-locate students.

When all circumstances related to the procurement make it practical, the preferred method would be a competitive bid or request for proposals rather than a request to the Committee for an exception to competitive bidding. However, competitive procurements for professional services may not be warranted under circumstances that are within the ambit of the Committee's scope of concern. Those conditions include situations in which it is most efficacious to continue a contract with the same vendor, such as when a data system is being designed; the services represent a demonstration or pilot project from which the Department will obtain information that will assist with determining whether a Request for Proposal ("RFP") should issue and the scope of that RFP; the immediate need for service limits the time available for a procurement process; the procurement method is innovative; the vendor is uniquely qualified by virtue of location; it is more cost effective to avoid a procurement; the vendor has been designated by the New York City Council; the vendor is specifically cited in a grant; the specific vendor has been incorporated into a labor agreement; or the vendor is a sole source provider.

The Committee, which is a deliberative body, is comprised of management-level representatives of central Department offices with responsibility for instruction, operations and oversight. It has a singular agenda, to wit, to determine whether this agency's programmatic objectives would be well served and its fiscal responsibilities well met were it to procure the particular services under consideration without requiring a competitive bid. As such, the Committee members, each of whom brings his/her own area of expertise to the proceedings, scrutinize each exception request, consult requestors for clarification during those proceedings as necessary, and, finally give approval only as appropriate. The Committee's approval of an exception request is inchoate since it was from its inception - and remains today - an advisory committee to the Chancellor with no independent authority to enter into professional service agreements or make recommendations directly to the Board and with no greater authority than the Chancellor invested it with.

Historically, the Committee has its roots in rules that were in effect at the time there was a Board of Education ("Board") and limitations on the Chancellor's ability to enter directly into a contract. Before October 22,

1997, the Board possessed contract authority for all actions, competitive and non-competitive, exceeding \$15,000. Post that date, by resolution of the Board that body ceded to the Chancellor authority for all contract actions under \$100,000. Text of the resolution also directed the Chancellor to "promulgate and implement appropriate administrative procedures and safeguards." That direction led to the establishment of the Committee.

Although the Chancellor was given authority to enter into contracts for professional services valued below \$100,000, the Chancellor could not enter into a contract valued in excess of \$100,000 without a Board resolution. The Chancellor was not, however, precluded from seeking the advice and recommendation of his own Committee before asking the Board to consider such a contract. And, when the Chancellor did that, the process was completely transparent in that the Chancellor would advise the Board that the Committee had reviewed the request and recommended that the procurement go forward. Since the Chancellor was the ultimate decision-maker with respect to whether to present a matter to the Board, even where the Committee approved the procurement, the Chancellor could decide not to take the recommendation.

Upon its dissolution in 2002, the Board's authority became vested in the Chancellor. The Chancellor, as the new authority for all contract actions, continued the practice of having the Committee pre-screen non-competitively bid service contract requests in excess of \$100,000. Thus, while the Chancellor's scope of responsibility increased, that of the Committee remained no greater than it had been when first conceived.

Thematically, the Report plays upon the potential that a non-competitive procurement will result in services that do not reflect the best available price or quality. However, while we are mindful of the risk and do not suggest that our record-keeping is flawless, the Report asks the public to draw negative inferences about the Department's non-competitive procurements without offering a single example demonstrating that the potential for contracting at an inflated price and for poor quality services was realized by any of the Department's non-competitive procurements. Indeed, it is because the risk exists that the Committee exercises its charge with a great deal of diligence and gravity.

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Comment 2

A more considered analysis of the Committee's work would have surfaced and reported that before a matter is calendared for consideration by the Committee, the Department's Division of Contracts and Purchasing pre-screens the application to determine whether an alternative procurement method is available and whether the applicant has clearly

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Comment 3

* See State Comptroller's Comments on Page 25

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articulated facts in support of a recognized basis for an exception to competitive bidding. It is obvious that careful prescreening effectively precludes non-meritorious and non-compliant requests from reaching the Committee's agenda, thereby skewing to the high end the percentage of exception requests that are approved. And, even after having been filtered through DCP, each request is subjected to the Committee's careful review, which draws upon its members' areas of expertise and often includes as a component of the proceedings consultation with requestors. As evidence of the Committee's close and independent examination, we offered to the auditors, among other indicators, that one year is the predominant length of the Committee-approved term of contract notwithstanding that the requests may have been for longer terms. Regardless of the reason for approval, the percentage of requests granted by the Committee for a contract term of only one year or less was 39 percent in FY 2006, 88 percent the next year, and 71 percent in FY 2008.

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Comment 4

Despite our general discomfiture with the lack of context and specificity around the circumstances that justified the Committee's individual determinations to approve requests for exceptions to competitive bidding, we do largely agree with most of the Comptroller's recommendations to enhance the documentation supporting the Committee's deliberations and recommendations, so as to better enable the Department to demonstrate to the public the considered basis for exceptions to competitive bidding. The specific enhancements that the Department intends to implement are detailed in the attached Response to Findings.

Sincerely,



Kathleen Grimm

C: Photeine Anagnostopoulos
George Raab
Michael Best
David Ross
Brian Fleischer
Jay Miller
Marlene Malamy
Andrea Breland-Turner

* See State Comptroller's Comments on Page 25

NON-COMPETITIVELY AWARDED CONTRACTS (Report 2008-N-1): NEW YORK CITY DEPARTMENT OF EDUCATION RESPONSE TO FINDINGS AND RECOMMENDATIONS

The following, with the attached cover letter of New York City Department of Education (“Department”) Deputy Chancellor Kathleen Grimm, comprises the response to the State of New York Office of the Comptroller’s (“Comptroller”) draft audit report titled *Non-Competitively Awarded Contracts* (“Report”).

Recommendation 1. *Ensure that the Committee on Contracts obtains all required documentation specified in support of approval for non-competitive procurements. Instruct the Committee to return submissions to requestors when documentation is missing.* (Report, p. 12).

Response to Recommendation. We are in agreement with the recommendation.

Response to Findings. It would be wrong to conclude that the Committee was acting outside the public’s interests when it approved four exception requests on a “cost-effectiveness” basis without conducting cost price analyses as cited in the Report. (Report, p. 11).

Thus, to provide assurance to the public that the Department’s actions were fiscally responsible, we offer the following:

- In one of the four cases cited, the Department engaged a nationally-known and respected organization that, using a combination of public and in-kind funding sources, conducts a unique and successful recruitment, training and mentoring program for high-achieving college graduates who agree to work in our most difficult to staff schools.
- In another case, the Department was able to procure the services of a not-for-profit corporation that, with a funding ratio of three parts private to one part public money, offers a program whereby high school students are given an opportunity to plan and implement school enhancement and beautification projects in a controlled environment that encourages teambuilding skills, good citizenship and regard for the school community.
- A third contract was awarded to a not-for-profit organization to continue a program which, using a combination of private and public funding, matches senior citizen volunteers with low performing elementary schools to work with students at risk of academic failure. The Department’s share of the total contract cost is roughly 22 percent, which is, on its face, advantageous and, certainly, cost effective.
- The fourth matter concerns the extension of a contract for a Department-wide electronic timekeeping system that had been awarded after a comprehensive and competitive procurement process. In approving an extension, the Committee credited representations made by the Executive Director of the Department’s Division of Financial Operations that a new vendor would be unable to maintain

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Comment 5

*** See State Comptroller’s Comments on Page 25**

or upgrade the existing system, thereby requiring the Department to purchase an entirely new system at significant cost. A key consideration as well was that the existing service provider had agreed to reduce the annual cost of its contract services by \$200,000, a savings of approximately \$1,000,000 over the term of the contract.

More broadly, in discussing whether the Department met documentation requirements in general, the Report merely states numbers without providing essential details. And, as illustrated below, missing too is disclosure that what appear to be findings relating to separate matters are actually double or triple counts of the same matters. (Report, pp. 11-12).

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Comment 6

Thus, the auditors report that having reviewed Committee records to determine whether the requests for exceptions to competitive bidding were supported with documentation, "general documentation requirements were not always being met." Examples - to which we respond - are offered as follows:

- *Finding.* "[For] seven contracts, totaling \$43.6 million, there was no documentation supporting claims that efforts had been made to meet proper procurement procedures." (Report, p. 12).
Response. We are at a loss to understand why the auditors looked for the purportedly missing documentation when the point of five of the seven requests was that a procurement process was not a consideration at all because - as the request memoranda made abundantly clear - the matters concerned an amendment to an exiting contract; an application to continue services without interruption to facilitate a Chancellor's initiative; a request to continue key Community Education Council services with a vendor that originally had been selected in a competitive process that produced only two proposers¹; or an obligation to contract with the vendor as a requirement of an agreement with a labor union. Similarly, one of the cases involved federal pass-through funds that were required to be spent in consultation with non-public schools. In that case, not only was the selected vendor the one recommended by the non-public schools, but it was the sole vendor that expressed interest in providing services in response to a Department-placed advertisement published in the City Record.
- *Finding.* "In three contracts, totaling \$7.2 million, there was no explanation of the basis or justification for their consideration as exceptions." (Report, p. 12).
Response. It would appear, at least from the way the finding is laid out, that the three contracts that are the subject of this particular finding are three *in addition to* the seven already cited. (See above). However, that is not the case. Not only are they included within the finding referred to above, but the requests clearly state the reasons therefor.
- *Finding.* "Also, in a contract for \$1 million, there was no documentation supporting the reason for the proposed vendor's selection." (Report, p. 12).
Response. The one contract cited for having been approved without a discernable reason is now being counted for a third time, and we question the point of the

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Comment 7

¹ The other bidder's proposal was considered deficient and was not considered a viable candidate for the contract.

Comptroller's repetitions. Even more troubling is the Comptroller's failure to note that this is the contract that was approved under the terms of a collective bargaining agreement. We are at a loss to understand how the Comptroller could fail to acknowledge the plainly evident basis for the exception.

Recommendation 2. *Investigate the inappropriate destruction of contract documentation by the archives contractor and determine what additional safeguards are needed to prevent future such incidents.* (Report, p. 12).

Response. The inquiry, which has already been made, has surfaced that the documents' destruction occurred at the Department's own archives facility, not at a contractor's. The files were mistakenly marked for destruction by an employee who was newly hired at that time and unfamiliar with the protocols. We have been assured by the archives Director that all employees who now have responsibility for any aspect of document destruction have been trained and are thoroughly familiar with records retention rules.

Recommendation 3. *Prepare and maintain appropriately detailed minutes for all meetings of the Committee on Contracts.* (Report, p. 12).

Response. The Department agrees to implement the recommendation in part.

During the deliberative portion of the Committee's meetings, members pose questions internally and state opinions. The ability to engage in these informal internal discussions allows for a free exchange that is valuable to the process, which would not be improved were formal minutes to be kept. Nonetheless, we can agree to memorialize the substance of questions that may be asked of the managers associated with the request and the answers given. That writing would be made part of the exceptions request file.

Recommendation 4. *Revise DoE's Standard Operating Procedures Manual to provide additional guidance for the use of the "other special circumstances" including definitions of each sub-category and classification of the extent of analysis required to justify a no-bid contract award for each sub-category.* (Report, p. 13).

Response. The Department agrees to implement the recommendation to the extent that "other special circumstances" will be expanded in the *Standard Operating Procedures Manual* to include the subcategories the Committee has already assigned to that term. However, we will not classify "the extent of analysis required to justify a no-bid contract award for each sub-category" since, if we have interpreted the recommendation correctly, that guidance, which seems to suggest we create yardsticks for measuring whether requests are meritorious, does not promote a flexible approach to the Committee's work.

Recommendation 5. *Identify, on an ongoing basis, contracts that begin before they have been approved and follow up with the responsible individuals to determine why this has happened and whether corrective actions are needed.* (Report, p. 14).

Response to Recommendation. The Department can agree to treat contract implementation before the contract has been approved as a performance management issue.

Response to Findings. We are concerned about the lack of detail embedded in the finding – detail that was known to the auditors and would have informed the public of the facts underlying the Report’s extreme instance of a contract start date that preceded by 905 days the date it was approved by the Committee. (Report, page 15).

Although it should not fall solely upon the auditee to flesh out audit findings, in undertaking that responsibility we note that the contractor central to the 905-day example is a private college on whose grounds is located a New York City middle school. Because it was - and still is - sensible to use a space that was the most easily accessible to the Department’s students, the Committee timely approved an exception to competitive bidding request resulting in a contract for the middle school’s use of the college’s gymnasium beginning in School Year 2001/2002. During the period the contract was in effect, the Department underwent a re-organization. As an unfortunate consequence, the new responsibility center failed to process payments to the college for the use of its gymnasium in School Years 2003/2004 and 2004/2005. When the Committee met on December 2005, it was asked to approve a contract not only for the full 2005/2006 school year, but approval to remit the missed payments for the earlier years. Therefore, at worst, one might view the action as retroactive to September 2005 (the beginning of the 2005/2006 school year), which would total 120 days. Nonetheless, although the auditors had the same information we presented here, the decision apparently was made to calculate the retroactivity back to 2003 and report a gap of 905 days.

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Comment 8

Recommendation 6. *Ensure that notices of contracts are posted in the City Record prior to the start date of the contracts.* (Report, p. 14).

Response. The Department will continue its efforts to comply with procurement rules and notes that only one exception was found in the area that is the subject of the recommendation.

* See State Comptroller’s Comments on Page 26

STATE COMPTROLLER'S COMMENTS

1. DoE officials are incorrect in their assessment that the report is unclear or missing information. The audit scope is clearly detailed within the report (page 8), as are the numbers of contracts covered by the audit (page 7). This information does place the Committee's work in perspective.
2. DoE officials are aware that the scope of the audit did not include an examination of either the price paid or the quality of the work completed. It is further interesting to note that DoE officials were insistent at the audits' opening meeting, that the work of the Committee had no bearing upon the quality of the work ultimately provided by the contractor. What was examined was the Committee's compliance with their own procurement policies and procedures regarding documentation of the decision making process. Our examination found that work and decisions were undocumented and we agree, not flawless. Further, DoE's statement that OSC has asked the public to draw a negative inference regarding the use of non-competitive procurements represents the DoE's conclusion and not OSC.
3. As stated in the report, many of the Committee's decisions are not well documented. Thus it was not possible for the auditors to see that careful, independent consideration was always given by the Committee in making decisions. It was also not possible to see evidence of "prescreening" done by DoE procurement unit. These are the very reasons we have made recommendations to increase the documentation of and the transparency of the decisions made by the Committee.
4. We did not ignore the information provided by DoE and it was considered in drawing our conclusions. However, we asked for documentation, in line with their own procurement requirements, to support the decisions made by the Committee.
5. In all of these instances, the DoE was required by their own procedures, to document the cost effectiveness of the decisions. If as the DoE contends the decisions were self evident an analysis of the situation would have been relatively easy to perform. This was not routinely done by DoE.
6. We agree that these contract exceptions are not additive in nature and we have modified the report to make it clear that there were multiple problems with the documentation for the same contract.

7. The DoE explains the circumstances why exceptions were requested but it does not explain why action was not taken by the DoE. For example, DoE cites that the exception was granted in one instance so that a Chancellor's initiative program would not be disrupted. Designating a program as a Chancellor's initiative does not provide a blanket exemption from a having to adhere to a competitive procurement model.

8. We have changed the report to reflect the 120 day lapse rather than the 905 day lapse originally indicated in the report. It should be noted that this was but one example and other instances of lengthy delays were also noted, such as a lapse of nearly 500 days in a contract for computer services. Furthermore, the significant percentage of exceptions, 59 percent, illustrates that this matter is a problem.