



City of New York

OFFICE OF THE COMPTROLLER

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FINANCIAL AUDIT

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Deputy Comptroller for Audit

Audit Report on the Department of
Environmental Protection's
Procurement Practices and Payment
Process for Professional Services

FN14-074A

June 11, 2015

<http://comptroller.nyc.gov>



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
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NEW YORK, NY 10007

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June 11, 2015

To the Residents of the City of New York:

My office has audited the New York City Department of Environmental Protection's (DEP) procurement practices and payment process for professional services. We audit City operations such as these to increase accountability and ensure that City resources are used effectively, efficiently, and in the best interest of the public.

This audit found that although DEP is generally in compliance with applicable procurement requirements, it does not have adequate controls over its contract payment process. Specifically, DEP did not effectively review contractors' invoices to ensure that payments were accurate, appropriate, and adequately documented. As a result, in the contracts sampled, we identified \$7.9 million in payments made for contractors working in job titles that were not listed in their contracts and \$364,834 in excess payments made to contractors based on incorrect title and overhead rates. Additionally, the audit found that some contract files were missing required documentation such as the conflict of interest statements signed by contract proposal evaluators, Notices of Vendor Selection, and statements entitled Intent to Enter into Contract for awards over \$100,000. Further, the audit found that DEP did not follow the approval procedures for awarding or registering emergency contracts as required by the City's Procurement Policy Board Rules.

The audit made 12 recommendations, including that DEP conduct a review of the \$7.9 million in questionable payments identified in the audit report to determine whether the contractors billed the City appropriately; recoup the \$364,834 in overpayments from its contractors; ensure that all statements regarding potential conflicts of interest are signed and kept on file before proceeding with ranking each contract proposal; and obtain the required approvals and registration with the Comptroller's Office in a timely manner.

The results of the audit have been discussed with DEP officials, and their comments have been considered in preparing this report. Their complete written response is attached to this report.

If you have any questions concerning this report, please e-mail my Audit Bureau at audit@comptroller.nyc.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott M. Stringer", written over a horizontal line.

Scott M. Stringer

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THE CITY OF NEW YORK OFFICE OF THE COMPTROLLER FINANCIAL AUDIT

Audit Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

FN14-074A

EXECUTIVE SUMMARY

The objectives of this audit were to determine whether New York City Department of Environmental Protection (DEP) made accurate and appropriate payments to professional service contractors; ensured compliance with the terms of its contracts and applicable City payment requirements; and complied with City requirements for procurement including the Procurement Policy Board Rules (PPB Rules) and applicable Comptrollers' Directives.

DEP is responsible for the management and conservation of the City's water supply, transmission, and distribution systems. It is also responsible for overseeing capital construction programs for such systems. In order to meet its responsibilities, DEP contracts with various companies for professional services such as engineering and architecture to assist it in overseeing its capital projects. DEP is required to comply with the City's procurement and payment guidelines as established in the City's PPB Rules and in Comptroller's Directive #2, "Procedures for the Audit of Payment Requests Submitted Under Cost Reimbursable Contracts," Directive #7, "Audit of Requests for Payment Received Under Contracts for Construction, Equipment and Construction Related Services," and Directive #24, "Agency Purchasing Procedures and Controls."

For Fiscal Years 2012 and 2013, DEP reported 521 active professional service contracts, for which it made approximately \$1.8 billion in payments.¹

Audit Findings and Conclusion

Although DEP is generally in compliance with the procurement practice requirements, it does not have adequate controls over its contract payment process. Specifically, we found that DEP did not effectively review contractors' invoices to ensure that requested payments were accurate,

¹ The 521 professional service contracts that the audit identified included ones that had not expired, terminated, or become inactive during the scope period. Many of these contracts were signed prior to Fiscal Year 2012 and the cumulative payments were obtained in January 2014. In addition, although these contracts were active, some did not have any payments processed during our scope period (Appendix II).

appropriate, and adequately documented. As a result, among the contracts sampled, DEP processed questionable payments of \$7.9 million for titles not listed on the contracts and processed excess payments of \$364,834 using incorrect title rates and overhead rates. Additionally, we found that DEP did not:

- Adequately document certain aspects of the procurement process. We found that some contract files were missing the conflict of interest statements signed by contract proposal evaluators, Notices of Vendor Selection, and statements entitled Intent to Enter into Contract for awards over \$100,000. The absence of these documents from contract files makes DEP's selection process less transparent and increases its vulnerability to a challenge alleging that the solicitation process was not impartial.
- Follow the approval procedures for awarding or registering emergency contracts as required by PPB Rules. As a result, these contracts could have been executed without the required independent review and approval by the Comptroller's Office to ensure the City is protected against contractors with a history of substandard performance.

Audit Recommendations

This report recommends that DEP should:

- Recoup the \$364,834 in overpayments from its contractors.
- Conduct a review of the \$7.9 million in questionable payments identified in this audit report and determine whether the contractors billed the City appropriately and/or whether any overpayments were adjusted in subsequent payment requests or at contract close-out.
- Review all previous payments for contracts cited in this report that received excess and questionable payments and determine any amounts that should be recouped from these contractors in accordance with the contracts, change orders and the EAO audits.
- Track all hours billed against change order limitations in order to control the hours billed and prevent project overpayments.
- Ensure that interim payments accurately reflect the overhead rates and title rates in accordance with the City law and rules, the applicable contracts and/or EAO audits, to prevent overpayments.
- Ensure contractors only bill for work performed by contractor staff in titles listed in the contracts and change orders at the rates associated with those titles to avoid improper payments and overpayments.
- Ascertain compliance with the terms of the contracts and City law and rules prior to approving and processing contractor payment requests to prevent excess payments.
- Perform required audit steps mandated by Comptroller's Directives #2 and #7 for reimbursement of direct and indirect labor costs.
- Ensure that contractors maintain adequate insurance coverage for the duration of the contract in accordance with the contract, and that documentation of this (i.e., insurance certificates) be maintained in the contract files.
- Ensure that all statements regarding potential conflicts of interest are signed and on file before proceeding with ranking each contract proposal.

- Ensure that contract files maintain all documentation to support the award of the contract to specific professional service contractors.
- Obtain the required approvals and registration with the Comptroller's Office in a timely manner.

Agency Response

In its response, DEP generally disagreed with our report findings and stated that “All DEP payments are reviewed and approved in accordance with all applicable Comptroller's Directives: numbers 2, 7, and 24. Individual payments are reviewed and approved by Project Managers as well as by the Office of Engineering Audit (OEA). OEA is an office independent of, and not subject to, the control of the project management teams. DEP staff reviewed all of the payments in question and found that none were made in error.”

While it is commendable that the OEA is independent of the project management teams, the audit shows that the OEA's independent review of these vendor invoices fell short as discussed in our detailed findings. Considering that DEP undertakes projects worth billions of dollars, it is critical for DEP to establish tighter controls over its approval process in order to prevent processing excess and questionable payments.

Despite DEP's disagreement over the audit findings, DEP officials agree with 9 of the 12 recommendations in this report.

The full text of the DEP response is included as an addendum to this report.

AUDIT REPORT

Background

DEP is responsible for the management and conservation of the City's water supply, transmission, and distribution systems. DEP distributes more than one billion gallons of clean drinking water each day to nine million New York City residents and collects and treats wastewater to protect the City's environment and harbor. DEP is also responsible for overseeing one of the City's largest capital construction programs which includes complex billion dollar plus projects, such as the Croton Water Filtration Plant, City Water Tunnel No. 3, and the upgrade of the Newtown Creek Wastewater Treatment Plant.

DEP contracts with various companies for professional services such as engineering and architecture to assist it in overseeing its capital projects. When entering into these contracts, DEP is required to comply with the City's procurement guidelines as established in the City's PPB Rules. DEP is also required to comply with procurement and payment guidelines provided in Comptroller's Directive #2, "Procedures for the Audit of Payment Requests Submitted Under Cost Reimbursable Contracts," Directive #7, "Audit of Requests for Payment Received Under Contracts for Construction, Equipment and Construction Related Services," and Directive #24, "Agency Purchasing Procedures and Controls."

DEP's Payment and Accounting Unit is generally responsible for reviewing, processing, and maintaining invoices submitted by vendors. In addition, for construction-related contracts, Directive #7 requires that DEP's Engineering Audit Office (EAO) review all payments to ensure compliance with the contract terms and any subsequent contract modifications/changes, determine whether salary rates comply with the contract terms, and ensure appropriate documentation and approvals were obtained.

For Fiscal Years 2012 and 2013, DEP reported 521 active professional service contracts, for which it made approximately \$1.8 billion in payments.

Objectives

The objectives of this audit were to determine whether DEP:

- Made accurate and appropriate payments to professional service contractors and ensured compliance with the terms of its contracts and applicable City payment requirements; and
- Complied with City requirements for procurement including the Procurement Policy Board Rules (PPB Rules) and applicable Comptroller's Directives.

Scope and Methodology Statement

We conducted this performance 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 objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

The scope of this audit covered all professional service contracts that were active in either Fiscal Years 2012 or 2013. Please refer to the Detailed Scope and Methodology at the end of this report for the specific procedures and tests that were conducted.

Discussion of Audit Results

The matters covered in this report were discussed with DEP officials during and at the conclusion of this audit. A preliminary draft report was provided to DEP officials and discussed at an exit conference held on April 9, 2015. On April 27, 2015 we submitted a draft report with a request for comments. We received a written response from DEP on May 11, 2015.

In its response, DEP claims that the report findings were incorrect in a number of respects and that DEP staff reviewed all the payments in question and found that none were made in error. DEP also disagrees that the documents we identified as missing from the contract files would cause the process to be less transparent or increase DEP's vulnerability to a challenge.

DEP states, in part, that "All DEP payments are reviewed and approved in accordance with all applicable Comptroller's Directives: numbers 2, 7, and 24. Individual payments are reviewed and approved by Project Managers as well as by the Office of Engineering Audit (OEA). OEA is an office independent of, and not subject to, the control of the project management teams. DEP staff reviewed all of the payments in question and found that none were made in error."

While it is commendable that the OEA is independent of the project management teams, based on the criteria in effect at the time (i.e., the terms of applicable contracts and change orders), we found that payments were made and approved by the OEA that were inconsistent with those contracts and change orders. Thus the audit indicates that the OEA's independent review of these vendor invoices fell short as discussed in our detailed findings.

Considering that DEP undertakes projects worth billions of dollars, it is critical for DEP to establish tighter controls over its approval process in order to prevent processing such excess and questionable payments.

Despite DEP's disagreement over the audit findings, DEP officials agree with 9 of the 12 recommendations in this report.

The full text of the DEP response is included as an addendum to this report.

FINDINGS

DEP does not have adequate controls over its contract payment process. The audit found that DEP did not effectively review contractors' invoices to ensure that requested payments were accurate, appropriate, and adequately documented. As a result, among the contracts sampled, DEP processed questionable payments of \$7.9 million for titles not listed on the contracts and processed excess payments of \$364,834 using incorrect title rates and overhead rates. The audit also found three out of eighteen payments for which DEP failed to provide the insurance certificates covering the audit scope period.

Further, although DEP generally complied with procurement requirements, it did not adequately document certain aspects of that process. Specifically, examination of a sample of contracts from the audit scope period revealed that contract files were missing the conflict of interest statements signed by contract proposal evaluators, Notices of Vendor Selection, and statements entitled Intent to Enter into Contract for awards over \$100,000. The absence of these documents from contract files makes DEP's selection process less transparent and increases its vulnerability to a challenge alleging that the solicitation process was not impartial.

Finally, DEP did not follow the approval procedures for awarding or registering emergency contracts as required by the PPB Rules. As a result, these contracts could have been executed without the required independent review and approval by the Comptroller's Office to ensure the City is protected against contractors with a history of substandard performance.

Inadequate Review of Contractor Invoices

DEP made \$7.9 million in questionable payments to contractors and improperly processed excess payments totaling \$364,834 as a result of having made payments without having adequately ensured that contractors' invoices complied with the terms of the applicable contracts. A review of the documentation provided by DEP for a sample of payment vouchers and contracts found that DEP approved payments for titles that did not correspond to the titles in the contracts and that it additionally paid contractors using incorrect overhead rates and incorrect rates for titles authorized under the contracts. According to DEP officials, it is their practice to perform a final audit at the contract close-out stage and to recoup any excess payments from the contractors. However, as some contracts are extended for 10 or more years, these closeouts might occur many years after the contract overpayments were made.

Moreover, according to Comptroller's Directive #7, when auditing payments requested under a consultant service contract, the agency's EAO must:

- Review all payments to ensure compliance with the contract terms and any subsequent contract modifications/changes;
- Determine whether salary rates are in compliance with the terms of the contract;
- Ensure there was appropriate justification, documentation and approvals where there are significant variances from previous payment requests; and
- When reviewing change orders providing for an increase in hours, ensure that hours in the original contract have been accounted for.

These City project management requirements are designed to ensure that contractors provide the goods and services the City contracted to receive before payment is made. The failures to

comply with these requirements and their potential consequences are described in greater detail in the finding subsections below.

DEP Response: “The contracts in question are Cost Reimbursable Contracts. The salary rates in effect at the time the work was performed are the correct salary rates. A change order may have been approved while lower salaries were in effect for the particular employees. While DEP is always committed to getting the most value from its contractors for the lowest price, the estimated rates are not germane to the final paid rates because the contracts ‘shall be limited to direct payroll of technical and professional employees for time spent on the project.’

“The methodology that the Comptroller used in the audit is applicable to fixed or loaded salary rate contracts. The contracts in this audit are Cost Reimbursable Contracts and thus the audit’s conclusions are unfounded.”

Auditor Comments: DEP’s interpretation of the payment terms is predicated on the notion that the titles and rates of pay in the contract and change orders applicable at the time of payment are not directly relevant to the payment of invoices submitted by the contractors. This is not supported by the language of the contracts. The salary rates listed in the contracts and change orders are not identified as estimated rates but rather set out as the rates that DEP is obligated to pay at a given point in time. Although these rates and titles might change based on subsequent change orders agreed to by the parties, that fact does not alter the force of the plain contract language. Based on our review of the contracts and change orders, the salary rates paid were higher than those established and in effect at the time the work was performed, resulting in the overpayments cited in this report. If these rates are subsequently determined to be inequitable, then as DEP notes elsewhere, additional change orders can be negotiated and entered into to redress the lack of equitability.

Furthermore, we disagree with DEP’s contention that our methodology cannot be applied to Cost Reimbursable Contracts. We compared the payment invoices with the hourly rates that were stipulated in the contracts and change orders. Regardless of whether the payments were for Cost Reimbursable Contracts or Fixed Priced Contracts, all payments should have been made in accordance with the contract terms and Comptroller’s Directive #7. We note that the Comptroller’s Directive 2, section 4.3 clearly states “In addition to complying with the provisions of this Directive, audits of all *cost reimbursable* construction, and engineering and architectural service contracts must also be conducted in accordance with the provisions of Comptroller’s Internal Control and Accountability Directive 7.” Comptroller’s Directive #7 requires agencies to review all payments for compliance with the terms of the contracts and change orders including the salary rates in effect at the time the service was rendered for which the payments were requested. Therefore, DEP should review the direct payroll of the technical and professional employees against the terms of their contracts in effect at the time.

Titles Were Not Reconciled with Contracts Resulting in Questionable Payments of Over \$7.9 million

DEP processed \$7.9 million in questionable payments for 11 out of 28 payment vouchers reviewed. Some of the titles listed on the contractors’ invoices for these 11 payments did not correspond with any of the job titles specified in the contracts. For example, the title of “Engineer,” listed multiple times on the invoice provided by the contractor and processed for payment on voucher #12WT3047, did not correctly identify the title in accordance with change order #27. That change order specifies that under Task #11, payment may be made for work by specific types of engineers only, such as “Project Engineers” or “Process Engineers.” These titles are significant

not only because they specify the level of skill and knowledge required for specific tasks but also because the different titles are paid at different hourly rates, ranging from \$44.11 to \$71.78. Accordingly, where invoices failed to specify an engineer's specialty, we were unable to determine whether the payment was appropriate or whether the title and the rate associated with it was a qualified title for the project. Moreover, we have no evidence that DEP had sufficient information to know what the correct rate of pay should have been in each case. Thus, significant overpayments could have been made.

Similarly, payment voucher #12WS304 for invoice #98 included the title of "Associate," which is not a title authorized to work on or receive payment under the relevant contract. In addition, the payment voucher also included a request for payment for work performed by another contractor working with the prime contractor in a joint venture, where multiple titles that were billed for were also not identified in the contract. Further, these additional titles did not appear in any of the timesheets or the payroll reports provided to DEP. Nonetheless, DEP processed and paid these invoices instead of requiring the contractors to bill according to the titles and rates stated in the contract or properly approved change orders.

Comptroller's Directive #2 specifically requires that a City agency ensure that a contractor "has complied with the terms and conditions of the contract that are applicable to the payment requested" before payment is made. Further, according to Section 4-02 of the PPB Rules, "All changes to existing contracts shall be approved by the ACCO and shall be reflected in a change order, which, once authorized, shall become a part of the original contract. A copy of the change order shall be sent to the vendor within ten days after authorization of the change." However, notwithstanding this requirement, we found that the titles and rates billed by the contractors did not reflect those embodied in the contract and approved change orders in effect at the time of payment.

In addition, although DEP spot-checked the hours submitted for payment with the timesheets in connection with payment voucher #12WS304 for invoice #98, DEP did not track the number of service-hours billed against the approved change order to determine whether the project was heading for further overruns in professional service-hours. DEP stated that the EAOs who audited and certified these payments only verified the rates per the payroll report and the contractor invoice. They did not verify the rates in terms of the contract/ change order.

DEP Response: "[O]ne cannot determine if an individual consultant is qualified for the project just by looking at the invoice. The Comptroller's assertion does not account for the experience of DEP's Project Managers and the role that they perform in overseeing the work of the consultants and approving their payments. In fact, DEP Project Managers work directly with the Design Consultants and approve the invoices. DEP's Project Managers are familiar with the scope of the work and the experience and qualifications of the individual consultants that performed the work.

DEP reviewed the payments that the Comptroller stated were 'questionable' and determined that DEP properly made the payments. DEP wants to, and is required to, pay vendors in a timely fashion. DEP does not want to delay payments by returning them to vendors simply for the purpose of adding more descriptive titles to the invoices. DEP, however, will remind its project managers that consultants should identify the specific type of engineer whose services are included in the invoice."

Auditor comments: Contrary to the focus of DEP's response, the audit finding is not that consultants were or were not qualified for the jobs they performed. Rather, we found that the titles used for paying these consultants were not specified in the contracts or in subsequent change orders. As is required by the Comptroller's Directives #2 and #7, the terms of the contracts

and change orders were used by the audit team as the criteria to determine whether payments were appropriate.

DEP acknowledges that it does not perform a review of the invoices for titles and rates outlined in the contracts, but rather relies on reviews based on criteria outside the express contract and change order terms as the basis for payments. Therefore, DEP does not adhere to the contracts or the criteria set forth in the Comptroller's Directives for the review of Cost Reimbursable Contracts. Furthermore, DEP is not obligated to make timely payments for vendor invoices that are not provided in accordance with the agreed upon terms of the contract. DEP should, therefore, make a concerted effort to correct this situation and recoup any overpayments generated and paid to the vendors.

DEP Improperly Processed Excess Payments Totaling \$364,834

Incorrect Overhead Rates

DEP made overpayments totaling \$221,732 under 11 payments processed against two contracts for which the overhead rates exceeded the applicable rates. Overhead rates for these 11 payments were established in these contracts, #20030021743 and #9236727, by the "EAO audit rate" and by change order #10, which specifically included revised overhead rates for the sub-contractors. In the case of these two contracts, DEP's EAO was required to conduct an audit to update "interim overhead factors . . . periodically every two years" and the "final audited overhead factors" were supposed to "be used as the basis to establish the interim overhead factors."

However, we found that DEP failed to consistently apply the correct overhead rate. Rather, in connection with payment voucher #12WS304 for invoice #98 dated August 24, 2011, DEP overpaid the contractor \$7,814 based on the contractor's invoice which applied an incorrect overhead rate of 176 percent instead of the 170.1 percent rate established by the EAO's audit of overhead rates. In connection with 10 other payments under contract #9236727, DEP overpaid a contractor \$213,918 because DEP did not apply the subcontractor overhead rates stated in change order #10 or the EAO audited overhead rates.

These invoices were billed at rates higher than those reflected in the revised EAO audit of overhead rates applicable to that period. Nevertheless, DEP did not adjust any of the payments accordingly. After the exit conference, DEP officials provided additional documentation to indicate that DEP made some adjustments to the overhead rates paid to the contractors. However, these documents lacked sufficiently detailed information to substantiate that the overpayments were actually fully recouped because they did not include the payment vouchers associated with the recoupments. In addition, they did not include any calculations that would demonstrate how DEP arrived at the amounts of the overpayments.

By paying overhead rates that were higher than the rates required by the contracts, DEP is overpaying its contractors. According to DEP officials, it is their practice to perform a final audit at the contract close-out stage and to recoup any excess payments from the contractors. However, we note that the contracts referenced above have been active since 1992 and 2003, respectively, and extended multiple times. DEP has, to date, not performed such a review and reconciliation on either contract. Our concern is that some of these contracts have been active for over 20 years and DEP's practice of reviewing these payments towards the end of the contract may result in the project incurring unnecessary costs. Not only would overpayments not recouped for more than 20 years potentially constitute a substantial interest-free loan of City funds, but

given the length of time it takes for DEP to conduct its final review and reconciliation, there is a possibility that the excess contract payments may not be recouped.

DEP Response: “The period of performance covered by these 10 payments was June 2011 to March 2012. Change order 10 was approved in May 2002, almost 10 years earlier. Overhead rates are subject to change. The overhead rate applicable in 2002 is unlikely to be the same rate as in 2015. The Comptroller’s reference to change order 10 is confusing because none of the payments to which this part of the audit refers is for work performed pursuant to change order 10. The Comptroller’s incorrect association of an invoice to a change order occurs in other findings.

DEP did provide an audited overhead rate for one of the prime contractors. However, it was for 2010. Again, these payments covered 2011 and 2012. In October 2014 DEP issued audited rates for years 2011-2013 to the contractor. In January 2015, DEP calculated that the contractor owed DEP \$1.2 million in net adjustments (netting billings at higher and lower overhead rates) pertaining to 37 contracts including approximately \$115,000 on contract 9236727.

According to the Comptroller, an unnamed DEP official stated that it is DEP’s practice to perform a final audit at the contract close-out stage and to recoup any excess payments from the contractors, thereby possibly providing the vendor with an interest free loan. That DEP may perform an audit at the end of the contract does not mean that DEP does not perform any overhead audits during the course of the contract. Overhead audits can result in either an over- or under-payment. DEP will continue to improve on the number and frequency of overhead audits to ensure that DEP pays an accurate overhead rate.”

Auditor Comments: We disagree with DEP’s contention. According to the contract, DEP has to pay the vendor the latest approved overhead rate. While we agree that overhead rates are subject to change, such change is required to be documented either through an EAO audit or through a change order. As such, for the purpose of our audit, we used the latest existing overhead rate, which was established in change order number 10 and then incorporated into change order number 21 issued in 2008 for sub-consultants. Though the invoices did not reflect these established overhead rates, DEP nonetheless approved and paid the higher overhead rates in the invoices. DEP’s approvals therefore, resulted in excess payments beyond the established rates.

Incorrect Title Rates

DEP failed to adequately review invoices and as a result, approved and processed payments that exceeded the rates for the billable titles resulting in overpayments of \$82,504. Specifically, we found that DEP overpaid contractors \$64,544 for work performed under contract #9236727 for invoices #388 to #398. For instance, the proper rate for Senior Project Engineer services under Task 10.1 was \$57.37 an hour pursuant to change order #29.² However, the contractor billed and DEP paid for these services at the incorrect rate of \$77.84 an hour.

Similarly, in connection with payment voucher #2FY0430 for invoice #12, DEP overpaid the contractor \$11,736. While the contract’s highest rate for the title of “Research Scientist” during the “Deployment, Maintenance and Retrieval of Robotic Buoys” stage of the project was \$40.09 per hour, nonetheless, DEP approved and paid for the services of a “Research Scientist” at the rate of \$65.55 per hour, which is 63.5 percent over the approved contract rate. In addition, we found that DEP approved overpayment of \$6,224 for invoice #98-21484 based on the contractor’s

² Change order #29 provides a rate for “project engineers” without distinguishing between junior or senior.

billing for the titles of “Designer/Drafter” and “Engineer” at an hourly rate of \$44.17 and \$49.46 instead of the maximum eligible hourly rates of \$30.73 and \$41.91.

DEP’s failure to adequately review the invoices submitted by the contractors for payment violates Comptroller’s Directive #7, which requires that the EAO review all payments to see that they are in “compliance with the contract terms and any subsequent contract modifications/changes,” and that “salary rates are in compliance with the terms of the contract.” When we met with DEP officials to discuss this issue, DEP officials stated that these change orders were estimates and in a “Cost Plus Contract,” the rates for professional services are not reviewed for compliance with the change order.³ However, we note these contracts have stated rates for the services provided. Therefore, the review for compliance is also required.

DEP Response: “This finding is incorrect. A review of this payment voucher (and the 10 prior payments) shows that under task 10.1, a total of four hours was billed for the title Sr. Project Engineer at the rate of \$77.84, for a total payment of \$311. It is not clear how the Comptroller calculated \$61,240 in overpayments and, despite DEP’s informing the Comptroller of this discrepancy at the exit conference, the Comptroller retained this unsupported finding in the final draft report.”

Auditor Comments: As is stated in this report, the excess payments processed apply to invoice numbers 388 through 398. Our example of the Senior Project Engineer was just one example and does not include all the incorrect title rates processed by DEP. These exceptions were discussed with DEP during our exit conference. In addition, DEP was provided with a detailed list of contracts and the corresponding invoices where the contractors billed at incorrect rates. Accordingly, contrary to the assertion in the audit response, DEP had all the information necessary to enable it to ascertain the basis for the Comptroller’s calculation of \$61,240 in overpayments.

Additional Overpayments

The audit found that DEP made excess payments totaling \$60,598 because it did not enforce the terms stated in its contracts and applicable change orders. These excess payments were made for work that was never approved, for employees who exceeded the number allowed by the contract in specific titles, for ineligible overhead, and for work by employees on specific tasks that exceeded the number of days allowed. Specifically, we found the following overpayments:

- **Payment Voucher #2FY1270:** DEP overpaid \$36,243 (\$18,330 and \$17,913, respectively) in connection with invoices #90105741 and #90105745, for work that was either not listed in the contract and subsequent change orders, or that exceeded the amount allowable for the invoiced period.

DEP Response: “On payment voucher 2FY1270 the audit asserts that DEP ‘overpaid \$36,243 for work that was either not listed in the contract or subsequent change orders, or that exceeded the amount allowable for the invoice period.’ Again, the Project Manager reviewed the invoices received from the contractor for the period of 1/1/12 to 6/30/12 and found that the invoice amounts matched the work that was done during this period as outlined by the contract’s scope of work. DEP did not find any evidence that payment was made for work that was not designated on the contract.”

³ “Cost Plus” Contracts allow contractors to bill for their direct labor costs, overhead costs, and profits.

Auditor Comments: Contrary to DEP's contention that all of the work paid for was designated in the contract, we were not able to match the work that was billed to the specifications for the same scope period in the contract based on the documentation provided by DEP. For example, for work related to Esopus Creek, the vendor billed the amount of \$2,766, whereas the contract allows for \$204 resulting in a discrepancy of \$2,562. Similarly, for work related to Schoharie Creek, the vendor billed for \$1,952, whereas the contract did not provide at all for this work. A detailed schedule highlighting these issues was provided to DEP in October after our pre-exit and again upon their request in March 2015. It is evident that the scope of work outlined under the contract was not matched to the invoice.

- Payment Voucher #2013PA13437: DEP overpaid \$17,184 in connection with invoice #BC25117 because DEP did not ensure that the allowable number of employees in certain titles matched the number invoiced. Specifically, six employees were paid using the title of Database Administrator while the contract limits this title to only three employees.
- Payment Voucher #2013PA10520: DEP overpaid \$480 in connection with invoice #20121416501 that paid for three days of consultant work instead of the two days per week as stipulated in the agreement.

DEP Response: "The audit also asserts that voucher payments # 2013PA 13437 and # 2013PAI 0520 resulted in overpayments when in fact that is not correct. Voucher # 2013PA13437 was an accurate payment made to the contractor in the amount of \$412,549.00. The contract does not specify the number of Database Administrator titles, but does indicate the estimated hours and the estimated hourly rate. As a result, DEP was in compliance when voucher # 2013PA13437 was processed.

Voucher # 2013PA10520 was an accurate payment to a contractor for Engineering Consulting Services. The contract bid sheet has an hourly rate of \$60.00 with 1,600 hours. The payment in question paid for 80 hours at \$60.00 totaling \$4,800.00, well within the contract's limits. As a result, DEP did not overpay the vendor."

Auditor Comments: Whereas DEP is correct in saying that the contract provides for an hourly rate and the number of hours per professional for payment voucher # 2013PA13437, DEP does not acknowledge that the contract also provides for three not six professionals at this rate. The payment of three additional Database Administrators beyond the three allowed for in the contract resulted in an overpayment as stated in the report.

Regarding the payment processed under voucher # 2013PAI 0520, DEP officials correctly state that the payment in question is "within the contract's limit." However, the contract also specifically provides under the heading "Working Hours" that consultants "[s]hall perform two (2), eight (8) hour work days a week, from Monday through Friday only, exclusive of legal holidays, between the hours of 7:00 AM to 5:00 PM." Nevertheless, the contractor's invoice presented billing for the three days in one week. Thus, this request, approved and paid by DEP, is inconsistent with the terms of the agreement.

- Payment Voucher #12WS304: DEP overpaid \$6,691 in connection with invoice #98 for overhead costs charged and paid based on direct labor costs for a Principal of the company even though the contract states, "[n]o overhead factor shall be applied to the cost of Principals' time.

DEP Response: “The report claims that on Payment Voucher 12WS304 a principal was overpaid \$6,691 because an overhead factor was applied to their salary rate even though the contract states ‘[n]o overhead factor shall be applied to the cost of Principals’ time.’ This language refers to the principal of the firm and prohibits the application of overhead to time spent by the principal of the firm when performing duties appropriate to a principal of a firm. There is no contractual prohibition against applying overhead to a ‘principal engineer’ who is performing engineering duties. Although DEP stated this at the exit conference, the Comptroller retained this incorrect finding in the final draft audit.”

Auditor Comments: The finding is not about whether or not the specific consultant is a “principal engineer.” Rather the finding is highlighting the fact that any individual who is designated as an official or a principal of the company is prohibited from having overhead costs applied to their time as stipulated in the contract. The list provided to us by DEP on July 11, 2014, clearly lists the individual as the “principal” of the company. DEP’s contention that the individual was functioning in the capacity of an engineer is irrelevant because as the “principal” of the company his time should not be reimbursed with overhead costs as stated in our finding.

Table I below provides a summary of all contracts reviewed as part of this audit that had excess and questionable payments.

Table I

Summary of Contracts with Excess
and Questionable Payments

	#	Payments Reviewed	Excess Payments	Questionable Payments	Total Excess/ Questionable Payments ⁴
1	9236727	\$16,679,962	\$278,461	\$7,497,826	\$7,776,287
2	20030021743	838,141	20,730	390,478	411,208
3	20090019708	154,405	11,736	-	11,736
4	20100015551	422,238	36,243	-	36,243
5	20121416501	4,800	480	-	480
6	20121405941	412,549	17,184	-	17,184
	Total	\$18,512,095	\$364,834	\$7,888,304	\$8,253,138

Inadequate Insurance Documentation

During our review of DEP’s contract payments, we found that many of the payment files did not contain required insurance certificates. After discussing this issue with DEP officials at our exit conference, DEP officials provided us with the contractors’ current insurance certificates including umbrella policies. However, not all of those umbrella policy certificates were in effect for the audit scope period under review. Based on our review of these certificates, we found three out of 18 contracts (contract #s 20040014147, 20030021743, and 9236727) for which DEP failed to provide insurance certificates that covered the audit scope period. Additionally, for these three contracts,

⁴ Calculations for Excess or Questionable Payments included direct costs and/or overheads and are based on the rates, titles, and budget listed on the contracts, change orders, and/or EAO audits. The \$364,834 in excess payments also includes estimated profit.

we were unable to determine whether there was sufficient insurance coverage for our audit scope period.

The insurance coverage requirement in the contract is included to protect the City from potential liability while contractors are providing services to the City. The majority of the City contracts specify that contractors should submit the renewed Insurance Certificate to the Commissioner prior to the expiration date of the required coverage. DEP should closely monitor contractors to ensure they maintain sufficient insurance coverage for the specified time of the contract as required.

DEP Response: “DEP agrees that contractors must maintain the correct insurance coverage in accordance with the contract requirements and that a copy should be maintained in the contract file. DEP has verified that all of the insurance certificates in question are currently maintained in a shared online database. As a matter of policy, DEP also sends a hard copy of all insurance certificates to the NYC Law Department.”

Missing Proposal Evaluators’ Conflicts of Interest Statements

Four out of the 20 contract files reviewed were missing evaluators’ signed statements attesting to their lack of any conflicts of interest. As a result, we could not confirm whether the proposal evaluators had certified that they would adhere to the requisite prohibitions on conflicts of interest and that they were in fact free from actual or perceived potential conflicts. PPB Rules Section 3-03(g) requires “each member of the evaluation committee(s) to submit a signed statement . . . agreeing to prohibitions on any conflicts of interest.” In addition, DEP’s own evaluation procedures require that “each member certify that they have no direct or perceived conflict of interest with any such proposer.” Since the signed statements were missing from the files, we could not determine whether DEP took this measure required to help ensure that the solicitation process was impartial.

When this issue was raised with DEP during the course of the audit, we were told that the requirement for evaluator conflicts of interest statements was only made effective in Fiscal Year 2013. However, in fact, the PPB Rules have contained such a requirement at least since November 2008.

DEP Response: “The audit recommends that DEP ‘ensure that all statements regarding potential conflicts of interest are signed and on file before proceeding with ranking each contract proposal.’ During the course of the audit, copies of conflict of interest statements were requested for certain procurements. DEP responded by saying that for those particular procurements, the conflict of interest statements were not required. Since the Comptroller’s audit does not identify the four contracts for which the statements are allegedly missing, DEP cannot determine whether the Comptroller is referring to procurements for which these statements are required or to procurements for which these statements are not required.

It is standard practice for DEP to obtain conflict of interest forms from committee members. DEP did not inventory the contents of the files prior to turning them over and it is impractical for DEP to spend significant resources to research this point any further. There are over 200 open contracts that were procured as Requests for Proposals (RFPs) and there have been no findings or allegations that any DEP employee has violated a conflict of interest provision while serving on an evaluation committee.

With respect to the Comptroller's statements regarding the implementation of Procurement Policy Board Rule 3-03(g), DEP notes that the 2010 printed version of the Rules does not include a requirement to obtain conflict of interest statements.”

Auditor Comments: Contrary to DEP’s response, the four contracts for which the conflict of interest statements were missing had been identified to DEP officials twice during our audit. However, DEP officials were unable to provide the required statements. In addition, DEP’s claim that the 2010 version of the PPB Rules does not contain a requirement to obtain the conflict of interest statement is inaccurate. The 2010 version of the PPB Rules clearly states that “each member of the evaluation committee(s). . .submit a signed statement . . . agreeing to prohibitions on any conflicts of interest.”

Public Notices Missing from Contract Files

Three out of 20 reviewed contract files did not contain the required City Record notices, one was missing a vendor selection notice, and two were missing notices of intent to enter into specific contracts. Section 2-11(a) of the PPB Rules states that, “prior to entering into any contract or exercising a renewal option in a contract exceeding in value \$100,000, the agency shall hold a public hearing to receive testimony regarding the proposed contract.” Additionally, Section 2-11(c) states, “Notice of public hearings shall be published once in the City Record.” Due to the lack of documentation in the contract files, we could not determine whether DEP performed the required steps for awarding these contracts or whether the contracts were awarded in the best interest of the City. Where copies of these notices were missing from the contract files, we were unable to determine if the required public notices were provided in accordance with the PPB Rules. The absence of such notices in the contract files increases the risk that there was less than the required level of competition in the vendor selection process.

DEP Response: “Regardless of whether the copies of documents are missing or not, the Comptroller's conclusion is unsupported. That documents were allegedly missing does not mean that DEP did not ‘perform the required steps’ for award, nor does it mean that awards were not made in the best interests of the City. It clearly does not, as the Comptroller states, ‘increase the risk that there was less than the required level of competition’ since the documents referred to by the Comptroller are created after the competition is over and the vendor is selected.”

Auditor Comments: PPB Rules require that all documents be maintained in the contract files including public notices. These Rules are designed to ensure that the City gets the best value with the best prices for the services procured, including services for emergency situations.

Emergency Contracts Awards Did Not Follow Proper Procedures

A review of active emergency consultant contracts found three emergency contracts, totaling \$6.7 million, for which DEP did not obtain Comptroller’s Office approval prior to the contract start date as required by the PPB Rules. In addition, 9 out of 10⁵ active emergency contracts were submitted to the Comptroller’s Office for registration after the required 30-day timeframe established in the PPB Rules. In one instance, the registration took place almost a year after the contract start date. PPB Rules, Section 2-12(e) regarding emergency contracts requires that “the awarding agency shall within thirty days of award, submit a copy of the contract to the Comptroller

⁵Nine emergency contracts were extracted from the Comptroller's Checkbook and one emergency contract was selected as part of an initial sample for review of procurement practices.

for registration.” Since DEP did not adhere to the appropriate PPB Rules for awarding emergency contracts, there is an increased risk that the contractors selected for these emergency contracts may not have been in the best interest of the City. Appendix I provides details for the emergency contracts.

DEP Response: “One of the three contracts which DEP did not obtain the Comptroller's approval for was an emergency contract initiated by another City agency and taken over by DEP. This contract was in response to the devastation that occurred as a result of Superstorm Sandy and was part of a group of contracts that helped restore basic utilities to homes that were damaged by Sandy. DEP responded immediately to assist in these recovery efforts.

The other two contracts were for services provided at Gilboa Dam when Hurricane Irene hit upstate New York. Over the course of that weekend, DEP and upstate regulators were so concerned about a failure or spillover of the dam that the highest emergency response plan was activated. Approximately 46,000 people that would have been affected by a failure or spillover of the Gilboa Dam reside in the inundation area which extends for over 100 miles downstream of the dam. Despite making every effort to comply with PPB Rules, DEP cannot delay or refrain from protecting the public, the water system, or its infrastructure while waiting for the Comptroller to approve an emergency contract.

The audit states that the failure to adhere to the requirement to obtain the Comptroller's approval increased the risk that the vendors selected may not have been in the best interest of the City. DEP seeks responsible vendors with the experience, expertise, and resources necessary to satisfactorily complete the work in accordance with DEP requirements. While DEP acknowledges that these findings are technically true, it would have presented an unacceptable public safety risk for DEP to have delayed performing the emergency work.

While not specified in the PPB Rules, the Comptroller's Office has historically made it a practice to delay granting approval of an emergency until the Agency provides a scope of work, a detailed cost estimate, a vendor, and whatever other information the Comptroller's Office requests.

The audit states that the failure to adhere to the requirement to obtain the Comptroller's approval increased the risk that the vendors selected may not have been in the best interest of the City. DEP seeks responsible vendors with the experience, expertise, and resources necessary to satisfactorily complete the work in accordance with DEP requirements. Emergency contracts must be drafted, reviewed by the project team, agency counsel, the City Corporation Counsel, and by the vendor. Unfortunately, this cannot always be done within 30 days.”

Auditor Comments: DEP misdirects its response by principally focusing on the need for emergency contracts, which we do not dispute and which is not at issue in the audit. However, even in emergency situations, the PPB Rules require that both the Comptroller and the City Council approve the vendors selected by DEP for emergency services. As previously stated, the PPB Rules provides guidance to ensure that the City gets the best prices and the best value for the services procured from responsive and responsible vendors, including in emergency situations. Further, DEP's contention that the Comptroller's Office has historically delayed granting approval for emergency contracts is disproven by the facts. Of the 10 contracts we sampled for this audit, DEP submitted 7 to the Comptroller's Office for approval prior to the contract start date and each one of those 7 was approved by the Comptroller's Office within the timeframe set forth in the Rules. DEP should make a concerted effort to apply this recommendation for all future emergency procurement of services.

RECOMMENDATIONS

DEP should:

1. Recoup the \$364,834 in overpayments from its contractors.

DEP Response: “DEP disagrees with this finding and has concluded that it did not overpay its contractors as the Comptroller describes. Our review of the audit’s specific findings has not shown that there are any overpayments made and therefore there is nothing to be recouped. We correctly reviewed time sheets and payroll reports as detailed in Comptroller’s Directive 2 and the overhead timing finding was addressed on the next payment and recouped on payment 114.”

Auditor Comments: We are pleased that DEP made an effort to recoup some of the overhead costs we identified as overpayments in our findings. We note that this effort was made after we brought the issue to DEP’s attention. However, although DEP reviewed the timesheets with the payroll reports, it did not review the invoice with the terms of the contracts and applicable change orders as is required by both the Comptroller’s Directives 2 and 7. DEP should note that according to Directive 7, the EAO is required “to review all payments to ensure compliance with the contract terms and any subsequent modification/changes.” As a result of not complying with this requirement, DEP approved and processed invoices that did not match the terms of the contract and subsequent change orders. Accordingly, as specified in our findings, we determined that overpayments were made as a result. DEP should make a concerted effort to recoup all of those overpayments that have not yet been recouped.

2. Conduct a review of the \$7.9 million in questionable payments and determine whether the contractors billed the City appropriately and/or whether the payments were adjusted in subsequent payment requests or at contract close-out.

DEP Response: “DEP disagrees with the findings that led to this recommendation. As explained above, our approval and audit of cost reimbursable contracts complies with Comptroller’s Directive 2 and Article IV of the contract. DEP reviews payroll reports and timesheets and monitors allowable salary escalations as detailed in Comptroller’s Directives 2 and 7. The Comptroller’s finding is based on an incorrect characterization of the rules pertaining to Cost Reimbursable Contracts and DEP’s overhead rate adjustments.”

Auditor Comments: Although DEP contends it is in compliance with payment requirements for Cost Reimbursable Contracts, as noted above, Comptroller’s Directive 2, section 4.3 clearly states “In addition to complying with the provisions of this Directive, audits of all *cost reimbursable* construction, and engineering and architectural service contracts must also be conducted in accordance with the provisions of Comptroller’s Internal Control and Accountability Directive 7,” which requires the EAO to “determine that all salary rates are in compliance with the terms of the contract.” DEP did not determine this and, therefore, payments were processed that were identified as questionable in the audit. In addition, Directive 2, section 3.1, defines direct cost as “those costs that are specifically incurred for . . . labor.” Based on this definition, DEP was required to review all payments related to labor costs including titles, salaries and hours worked in conjunction with the terms of the contract. Whereas DEP in their response says it monitors payrolls

and timesheets, this review is limited since both of these source documents are generated by the vendor. Therefore, DEP's EAO should conduct independent reviews that ensure compliance with the contract terms. In addition, DEP should review all questionable titles constituting the \$7.9 million in overpayments prior to reimbursing the contractors for any future payment requests.

3. Review all previous payments for contracts cited in this report that received excess and questionable payments and determine the amounts to recoup from these contractors in accordance with the contracts, change orders and the EAO audits.

DEP Response: "DEP disagrees with the findings that led to this recommendation. As explained above, our approval and audit of Cost Reimbursable Contracts complies with Comptroller's Directive 2 and Article IV of the contract. DEP reviews payroll reports and timesheets and monitors allowable salary escalations as detailed in Comptroller's Directives 2 and 7. This finding is based on an incorrect characterization of the rules pertaining to Cost Reimbursable Contracts and DEP's overhead rate adjustments."

Auditor Comments: DEP's interpretation of the Comptroller's Directives' applicability to the contracts at issue in this audit is incorrect. As stated above, DEP should include as a criteria in its review process a match of payroll with timesheets (both documents generated from vendor) and also titles, rates and hours, in accordance with the contract terms. This will make DEP fully compliant with the Comptroller's Directives' requirements for the review and payment processes. Also DEP should utilize existing EAO or contract overhead rates until a new audit of the overhead rates is performed or an amended change order is approved.

4. Track all hours billed against change order limitations in order to control the hours billed and prevent project overpayments.

DEP Response: "DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance."

Auditor Comments: We are pleased that DEP agrees with this recommendation. However, we found no basis for DEP's contention that it was in compliance during the period covered. Rather, our audit revealed that billed hours were not tracked during the review process.

5. Ensure that interim payments adjust the overhead rates and title rates in accordance with the City law and rules, the applicable contracts and/or EAO audits, to prevent overpayments.

DEP Response: "DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance."

Auditor Comments: We are pleased that DEP agrees with our recommendation. However, as noted in our findings, DEP failed to adjust the interim payments with the latest overhead rates established through the EAO audits or through an amended change order.

6. Ensure contractors only bill for titles listed and approved in the contract or change order to avoid improper payments and overpayments.

DEP Response: "DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance."

Auditor Comments: We are pleased that DEP agrees with this recommendation. However, its statement that it was in compliance is contrary to our audit findings that contractors were billing and DEP was approving payments for titles and rates that did not conform with the terms of the contract.

7. Ascertain compliance with the terms of the contracts and City law and rules prior to approving and processing consultant payment requests to prevent excess payments.

DEP Response: “DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.”

Auditor Comments: We are pleased that DEP agrees with this recommendation. However DEP’s statement that it was in compliance during the period covered is inconsistent with our findings. Specifically, as noted in our findings, DEP did not always ascertain compliance with the contracts’ terms.

8. Perform required audit steps mandated by Comptroller’s Directives #2 and #7 for reimbursement of direct and indirect labor costs.

DEP Response: “DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.”

Auditor Comments: We are pleased that DEP agrees with this recommendation. However, DEP’s statement that it was in compliance during the period covered is inconsistent with our findings. Rather, our audit revealed that DEP did not perform certain review steps outlined in the Comptroller’s Directives that resulted in audit identified overpayments to its vendors.

9. Ensure that contractors maintain adequate insurance coverage for the duration of the contract in accordance with the contract, and that documentation of this (i.e., insurance certificates) be maintained in the contract files.

DEP Response: “DEP agrees that contractors must maintain the correct insurance coverage in accordance with the contract requirements and that a copy should be maintained in the contract file. DEP has verified that all of the insurance certificates in question are currently maintained in a shared online database. As a matter of policy, DEP also sends a hard copy of all insurance certificates to the NYC Law Department.”

Auditor Comments: We are pleased that DEP agrees with this recommendation and that they are maintaining adequate insurance coverage. We urge DEP to ensure that documentation of this coverage is properly maintained in each contract file.

10. Ensure that all statements regarding potential conflicts of interest are signed and on file before proceeding with ranking each contract proposal.

DEP Response: “DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.”

Auditor Comments: We are pleased that DEP agrees with this recommendation. Although DEP states it was in compliance during the audit period covered, our audit revealed that in four instances this was not the case.

11. Ensure that contract files maintain all documentation to support the award of the contract to specific professional service contractors.

DEP Response: “DEP agrees that contract files should maintain all documentation to support the award of professional services contracts. Required documentation is also uploaded into the City’s Automated Procurement Tracking System (APT) and forwarded to the Comptroller as part of the registration package.”

12. Obtain the required approvals and registration with the Comptroller’s Office in a timely manner.

DEP Response: “DEP agrees that it should obtain all oversight approvals in a timely manner.”

DETAILED SCOPE AND METHODOLOGY

We conducted this performance 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 objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

The scope of this audit covered all professional service contracts that were active in Fiscal Years 2012 or 2013.

To obtain an understanding of DEP's procurement process, we reviewed the PPB Rules and all relevant Comptroller's Directives, including Directives #1, #2, #7 and #24. We used these guidelines as criteria in evaluating the adequacy and effectiveness of DEP's internal controls for procuring and paying for professional services. We also interviewed DEP officials regarding their roles and responsibilities in relation to procurement practices and payment processes. We documented the processes in flowcharts and memorandums.

To identify all active professional services contracts, we requested that DEP provide a list of all active professional service contracts during Fiscal Years 2012 and 2013 that were paid by the Capital Fund and General Fund. We compared DEP's list to the City's Financial Management System (FMS) payment information to determine the completeness of the list.⁶ Based on our analysis, we determined there were 422 and 99 active professional service contracts that were paid by the Capital Fund and General Fund, respectively. We then judgmentally selected one to two contracts from the top nine categories of award methods from each funding source (see Appendix II). In addition, we judgmentally selected nine emergency contracts based on our review of the Comptroller's Checkbook data to determine whether DEP obtained prior approvals before the contract start date and registered the contracts in a timely manner.

We selected 10 contracts paid by the Capital Fund, totaling \$428,806,442 out of \$2,222,458,518 (19 percent) in encumbered funds to be our sample. Similarly, we selected 10 contracts paid by the General Fund, totaling \$15,668,660 out of \$19,419,907 (81 percent) in encumbered funds.

We reviewed the solicitation documents of the sampled contracts to determine whether DEP complied with the procurement guidelines, such as publishing the required notices, obtaining the required vendors' proposals, obtaining conflict of interest statements from the proposal evaluators, documenting the evaluation process and justification of the awards, maintaining VENDEX questionnaires submitted by the vendors, and obtaining DOI clearances in a timely manner.

To determine whether DEP documented and properly selected the most qualified and responsible contractor, we reviewed the detailed evaluations and the summary of rating sheets, the Selection Committee's Recommendation for Award, and Contractor Responsibility memorandums. We also checked whether Agency Chief Contracting Officer's (ACCO) authorizations were present. For solicitation methods other than RFPs, such as "sole source" or "negotiated acquisitions," we ensured that proper justifications and approvals were contained in the contract files. We

⁶ Our population included contracts awarded prior to Fiscal Years 2012 and 2013 that were in active status. These contracts may not have payments processed during our audit scope period. We identified the professional service contracts by object codes 6800s and 2300s in FMS.

determined that the required publication of Vendor Selection and Notice of Award were published in the City Records for those award types that required it.

To determine whether DEP ensured compliance with contract insurance requirements, we reviewed each contract's insurance terms and coverage requirements and compared it to the contractor's insurance certificates maintained in DEP's files for our scope period.

To determine whether DEP processed payments in accordance with the contracts' terms and the requirements delineated in Comptroller's Directives #2, #7, and #24 for payments against professional service contracts, we judgmentally selected one payment voucher (the highest amount) from each of the nine sampled contract award categories, totaling \$16,604,689 for our review. Because one of the contracts did not have payments during Fiscal Years 2012 and 2013, we judgmentally selected one payment from one additional contract.⁷ In addition, during our review, we noted that one of our sample payment vouchers included over \$8.6 million for the release of funds that were previously withheld due to lack of funds for payment. Subsequently, DEP generated additional change orders to increase the funding for the contract against which this payment was made. DEP provided documentation that included 10 additional payment vouchers, totaling \$7,773,352 under which these funds were withheld. In order to determine the appropriateness of the released funds, we reviewed all 10 vouchers for compliance with the terms of the contract agreement and with the Comptroller's Directives #2 and #7. Due to these additional reviews, our sample increased from 18 payments to 28 payments, totaling \$24,378,441 (see Appendix III).

We also interviewed officials at DEP's division of Office of Engineering Audit (OEA) to gain an understanding of the process in place for conducting the Engineering Audit Office (EAO) reviews.

We reviewed the payment terms for each contract and the subsequent change orders that were effective at the time the payment was approved and processed. We reviewed the supporting documents for each payment to determine whether the payment matched the terms of the contract, including whether the hourly rates charged and paid matched the hourly rate per the contract or change orders that were in effect at the time of approving the payments. We verified the amount billed for each task against the terms of the contract or change order in place at the time of payment. We calculated the amounts billed for contracts with "not-to-exceed" clauses in order to determine that the payments did not exceed the amount allocated for each specific task. We determined that overhead factors complied with the terms set forth in the contracts and were calculated in accordance with Comptroller's Directive #2. To determine whether the correct overhead rates were applied when approving payments, we reviewed the contract terms and when available, obtained the EAO audits of the overhead rates for each contractor. We then compared the invoiced rates to the allowable rates stated in the contract or the applicable EAO audit.

⁷ One of the nine highest award categories was "multiple awards" where a task order was generated and included in our original sample for survey; therefore, we reviewed this task order for payment only.

List of Emergency Contracts Reviewed

#	Contract #	Original Contract Amount	Contract Amount as of 8/27/13	Contract Period	Date of Comptroller Approved the Emergency Contracts	Prior Approval Obtained (Y/N)	Date Submitted to Comptroller's Office for Registration	Date Registered	# of Days After Contract Start Date Before Submission to Comptroller	Submitted for Registration Within 30 Days of Contract Start Date (Y/N)
1	20131406294	\$ 317,500	\$ 317,500	8/29/11 to 8/29/12	9/2/11	N	11/15/12	12/17/12	319	N
2	20121438060	1,570,162	1,570,162	8/26/11 to 2/25/14	8/31/11	N	5/4/12	5/21/12	181	N
3	20131422611	4,865,350	4,865,350	11/12/12 to 12/21/12	11/17/12	N	5/16/13	5/29/13	134	N
4	20121424197	477,000	477,000	7/29/11 to 10/30/12	7/20/11	Y	12/14/11	1/9/12	99	N
5	20121441133	300,000	238,332	12/24/11 to 6/24/12	12/23/11	Y	5/10/12	6/4/12	99	N
6	20121409676	3,724,741	5,473,387	8/22/11 to 8/21/14	7/21/11	Y	10/12/11	12/7/11	38	N
7	20131415621	30,000,000	48,018,178	11/19/12 to 12/30/13	11/17/12	Y	2/1/13	2/12/13	55	N
8	20131415361	1,100,000	1,100,000	11/5/12 to 11/17/12	11/4/12	Y	1/2/13	1/17/13	43	N
9	20121409632	10,500,000	7,500,000	8/22/11 to 8/21/14	7/20/11	Y	9/22/11	10/17/11	24	Y
10	20040014147	1,700,000	7,067,138	9/16/03 to 6/30/12	8/7/03	Y	12/15/03	1/12/04	65	N

Contract Population by Award Method

CAPITAL CONTRACTS

Total Award Categories	Award Methods	Total Encumbered Amount as of 1/20/14	Total Amount Paid as of 2/3/14	Number of Contracts
1	Negotiated Acquisition	\$ 916,095,072	\$ 819,070,944	52
2	RFP or Prequalified List	1,015,806,808	715,447,481	108
3	Request for Proposal	174,621,718	121,865,321	84
4	Multiple Awards	27,943,707	27,879,565	91
5	Emergency	22,590,615	18,238,076	7
6	Competitive Bid	19,448,660	19,394,280	16
7	Government to Government	17,846,427	12,203,502	23
8	Assignment	13,250,307	11,400,110	14
9	Sole Source	11,214,166	9,735,613	6
10	Miscellaneous	1,912,514	1,912,514	3
11	Renewal of Contract	972,956	972,956	9
12	Contracts Conversion	448,900	448,900	3
13	Requirement Services	147,645	147,645	2
14	Pre-qualified Bidders List	101,609	101,609	2
15	Intergovernmental Procurement	57,414	57,414	2
	Total	\$2,222,458,518	\$1,758,875,930	422

GENERAL FUND CONTRACTS

Total Award Categories	Award Methods	Total Encumbered Amount as of 1/20/14	Total Amount Paid as of 2/3/14	Number of Contracts
1	Intergovernmental Procurement	\$ 9,804,547	\$ 9,804,547	8
2	Request for Proposal	4,826,303	4,762,460	6
3	Government to Government	2,361,445	2,361,445	6
4	Negotiated Acquisition	748,145	748,145	1
5	Multiple Awards	319,556	319,556	1
6	RFP/Prequalified List	312,764	312,764	1
7	Not Found contracts	348,544	348,544	27
8	Small Purchase	245,676	245,676	8
9	Small Purchase - Goods/Services	221,317	221,317	5
10	Competitive Bid Total	88,200	88,200	2
11	Micro-Purchase	61,823	61,823	21
12	Small Purchase Sole Source	28,000	28,000	3
13	Sole Source	21,775	21,775	1
14	Small Purchase Written	20,393	20,393	3
15	Small Purchase - Intergovernmental	11,418	11,418	1
	Total	\$19,419,907	\$19,356,063	99

Fund Source	Total Encumbered Amount	Total Amount Paid	Number of Contracts
Capital	\$2,222,458,518	\$1,758,875,930	422
General	19,419,907	19,356,063	99
Combined Total	\$2,241,878,425	\$1,778,231,993	521

CAPITAL CONTRACTS AND PAYMENTS

#	CONTRACT #	AWARD METHOD	CONTRACT TERM	CONTRACT ENCUMBERED AMOUNT AS OF 1/20/2014	TOTAL PAYMENTS AS OF 2/3/2014	2012/2013 PAYMENTS REVIEWED	% OF TOTAL REVIEWED
1	20090015627	RFP	2/15/2009-4/21/2012	\$ 22,967,072	\$ 18,585,685	\$ 410,047	2.21%
2	20090018734	GOV-TO-GOV	1/1/2009-1/2/2016	3,771,240	3,771,240	1,017,507	26.98%
3	20040014147	EMERGENCY	9/16/2003-6/30/2012	7,067,138	6,800,376	293,196	4.31%
4	9236727	NEGOTIATED ACQUISITION	6/22/1992-12/31/2014	226,007,524	206,846,822	16,679,962	8.06%
5	20010011878	RFP PRE-QUALIFIED LIST	11/20/2000-2/7/2012	5,578,548	5,517,740	66,250	1.20%
6	20101417884	SOLE SOURCE	6/7/2010-12/24/2013	7,115,115	7,115,115	2,642,120	37.13%
7	20060007824	ASSIGNMENT	4/18/2005-6/2/2015	3,291,108	3,152,732	160,021	5.08%
8	20090034498 (1)	RFP PRE-QUALIFIED LIST	8/8/2009-8/5/2014	49,018,744	-	-	0%
9	20030021743 (1)	NEGOTIATED ACQUISITION	9/1/2002-12/31/2013	92,874,844	89,534,568	838,141	0.94%
10	20117200706 (1)	MULTIPLE AWARDS	8/1/2005-7/15/2012	936,970	936,970	214,106	22.85%
11	20080002100 (2)	SOLE SOURCE	7/30/2007-8/18/2014	3,499,072	-	-	0%
12	97C2484 (2)	NEGOTIATED ACQUISITION	3/1/1996-6/30/2012	100,490,882	-	-	0%
TOTAL CAPITAL CONTRACT PAYMENTS				\$522,618,256 (1)	\$342,261,247	\$22,321,350	4.58%

GENERAL FUND CONTRACTS AND PAYMENTS

#	CONTRACT #	AWARD METHOD	CONTRACT TERM	CONTRACT ENCUMBERED AMOUNT AS OF 1/20/2014	TOTAL PAYMENTS AS OF 2/3/2014	2012/2013 PAYMENTS REVIEWED	% OF TOTAL REVIEWED
1	20090019708	NEGOTIATED ACQUISITION	1/1/2009-12/15/2012	\$ 748,145	\$ 748,145	\$ 154,405	20.64%
2	20111444148	SMALL PURCHASE	5/30/2011-5/5/2012	74,640	74,640	19,200	25.72%
3	20117201696	MULTIPLE AWARDS	10/25/2010-4/15/2011	176,375	176,375	13,430	7.61%
4	20100015551	GOV-TO-GOV	10/1/2009-9/30/2012	1,676,654	1,676,654	422,238	25.18%
5	20121416501	SMALL PURCHASE	11/21/2011-11/20/2014	50,880	50,880	4,800	9.43%
6	20121405941	INTER-GOVERNMENTAL	9/1/2011-8/31/2014	9,804,547	5,714,750	412,549	7.22%
7	20131409560	RFP PRE-QUALIFIED LIST	12/20/12-12/20/16	239,442	239,442	119,721	50.00%
8	20121431239	RFP	2/29/2012-3/1/2014	676,401	676,401	676,401	100.00%
9	20111423600	RFP	2/3/2011-2/28/2014	2,131,449	2,131,449	234,347	11%
10	20122010682 (3)	PURCHASE ORDER	7/20/2011-7/19/2012	90,126	-	-	0%
TOTAL GENERAL FUND PAYMENTS				\$15,668,660	\$11,488,737	\$2,057,091	7.44%
TOTAL GENERAL FUND AND CAPITAL CONTRACTS' PAYMENTS				\$538,286,916	\$ 353,749,984	\$24,378,441	4.73%

Note (1) Contract #20090034498 had no payments processed in FYs 2012 and 2013; replaced it with Contract #20030021743 for payment review only. Contract #20117200706: a task order reviewed for payment only. The total amount of capital contracts reviewed for procurement compliance is **\$428,806,442** (522,618,256-92,874,844-936,970)

Note (2) Contracts reviewed for procurement compliance only.

Note (3) Purchase order based on a Supreme Court decision.



May 11, 2015

Marjorie Landa
Deputy Comptroller for Audit
One Centre Street, Room 1100
New York, NY 10007-2341

Emily Lloyd
Commissioner

Re: Audit FN14-074A - Audit Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

Steven W. Lawitts
First Deputy Commissioner

Dear Ms. Landa:

59-17 Junction Blvd.
Flushing, NY 11373

Attached is our formal response to the above referenced draft report dated April 27, 2015.

Tel. (718) 595-6576
Fax (718) 595-3525
slawitts@dep.nyc.gov

Please contact John Lento at (718) 595-3424 if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "SL", enclosed within a blue circular scribble.

Steven W. Lawitts
First Deputy
Commissioner

Attachment

C: Honorable Emily Lloyd, Commissioner, Department of Environmental Protection
John Lento, DEP Audit Coordinator
George Davis, Mayor's Office of Operations

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

The Comptroller concluded that:

1. DEP does not have adequate controls over its payment process.

Response: All DEP payments are reviewed and approved in accordance with all applicable Comptroller's Directives: numbers 2, 7, and 24. Individual payments are reviewed and approved by Project Managers as well as by the Office of Engineering Audit (OEA). OEA is an office independent of, and not subject to, the control of the project management teams. DEP staff reviewed all of the payments in question and found that none were made in error.

2. DEP did not adequately document certain aspects of the procurement process. The absence of documents from contract files makes DEP's selection process less transparent and increases its vulnerability to a challenge.

Response: DEP agrees that the Comptroller was unable to find or identify certain documents in the files that the Comptroller reviewed. However, DEP disagrees that the absence of the documents cited by the Comptroller made the process less transparent or increased vulnerability to a challenge.

3. DEP did not follow approval procedures for awarding or registering contracts. The Comptroller concluded, therefore, that these contracts may have been executed without the Comptroller's independent review to ensure that the City was protected against contractors with a history of substandard performance.

Response: DEP agrees that, for three emergency contracts, the Comptroller was unable to locate an approval that pre-dated the start of the contract work. DEP disagrees that the absence of these approvals led to, or increased the risk of, substandard contractors being awarded emergency contracts.

Specific Responses

Inadequate Review of Contractor Invoices

The Comptroller acknowledges that DEP verified that the hours billed matched the time sheets presented. However, the Comptroller also states that DEP did not match the billed salary rates with the estimated salary rates in various change orders. The Comptroller, therefore, concludes that DEP paid the incorrect rate. The contracts in question are Cost Reimbursable Contracts. The salary rates in effect at the time the work was performed are the correct salary rates. A change order may have been approved while lower salaries were in effect for the particular employees. While DEP is always committed to getting the most value from its contractors for the lowest price, the estimated rates are not germane to the final paid rates because the contracts "shall be limited to direct payroll of technical and professional employees for time spent on the project".

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

The methodology that the Comptroller used in the audit is applicable to fixed or loaded salary rate contracts. The contracts in this audit are Cost Reimbursable Contracts and thus the audit's conclusions are unfounded.

Titles Were Not Reconciled with Contracts Resulting in Questionable Payments of Over \$7.9 million

The audit also states that DEP made \$7.9 million dollars in "questionable" payments because "some of the titles listed did not correspond with any of the job titles specified in the contracts." For example, the audit states that "the title of engineer listed multiple times on the invoice provided for voucher #12WT3047 did not correctly identify the title in accordance with change order 27. That change order specifies that under task 11, payment may be made for work by specific types of engineers only, such as Project Engineers or Mechanical Engineers." Where invoices failed to specify an engineer's specialty, the Comptroller's auditors state that they were "unable to determine whether the payment was appropriate and whether the title and the rate associated with it was a qualified title for the project."

However, one cannot determine if an individual consultant is qualified for the project just by looking at the invoice. The Comptroller's assertion does not account for the experience of DEP's Project Managers and the role that they perform in overseeing the work of the consultants and approving their payments. In fact, DEP Project Managers work directly with the Design Consultants and approve the invoices. DEP's Project Managers are familiar with the scope of the work and the experience and qualifications of the individual consultants that performed the work.

DEP reviewed the payments that the Comptroller stated were "questionable" and determined that DEP properly made the payments. DEP wants to, and is required to, pay vendors in a timely fashion. DEP does not want to delay payments by returning them to vendors simply for the purpose of adding more descriptive titles to the invoices. DEP, however, will remind its project managers that consultants should identify the specific type of engineer whose services are included in the invoice.

The report also states that "DEP overpaid a contractor \$61,240 for work performed under contract 9236727 based on its erroneous approval of payment voucher 12WT3047 for Senior Project Engineer services. Under Task 10.1, the proper rate was \$57.37 an hour pursuant to change order #29. However, the contractor billed and DEP paid for these services at the incorrect rate of \$77.84 an hour".

This finding is incorrect. A review of this payment voucher (and the 10 prior payments) shows that under task 10.1, a total of four hours was billed for the title Sr. Project Engineer at the rate of \$77.84, for a total payment of \$311. It is not clear how the Comptroller calculated \$61,240 in overpayments and, despite DEP's informing the Comptroller of this discrepancy at the exit conference, the Comptroller retained this unsupported finding in the final draft report.

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

Excess Payments Totaling \$364,834/Incorrect Overhead Rates

The audit report contends that on payment 98 DEP overpaid the contractor by \$7,814 as a result of the contractor billing an overhead rate of 176%, although the Department had given the contractor an audited overhead rate of 170.1% and that DEP "...did not adjust any of the payments accordingly" and "...to date, [has] not performed such a review and reconciliation on either contract."

This is not true. DEP established the audited overhead rates after payment 98 was processed. On the very next payment, payment 99, and all other payments going forward, the contractor billed the audited rate of 170.1%. On payment 114, DEP received a credit in the amount of \$77,790.35 for the time period covered by the audit report. Although DEP informed the Comptroller of this at the exit conference, the Comptroller retained this inaccurate finding in the final draft audit.

In a similar manner, the report states that "...in connection with 10 other payments under contract # 9236727, DEP overpaid a contractor \$213,918 because DEP did not apply the subcontractor overhead rates stated in change order 10 or the EAO audited rate."

The period of performance covered by these 10 payments was June 2011 to March 2012. Change order 10 was approved in May 2002, almost 10 years earlier. Overhead rates are subject to change. The overhead rate applicable in 2002 is unlikely to be the same rate as in 2015. The Comptroller's reference to change order 10 is confusing because none of the payments to which this part of the audit refers is for work performed pursuant to change order 10. The Comptroller's incorrect association of an invoice to a change order occurs in other findings.

DEP did provide an audited overhead rate for one of the prime contractors. However, it was for 2010. Again, these payments covered 2011 and 2012. In October 2014 DEP issued audited rates for years 2011-2013 to the contractor. In January 2015, DEP calculated that the contractor owed DEP \$1.2 million in net adjustments (netting billings at higher and lower overhead rates) pertaining to 37 contracts including approximately \$115,000 on contract 9236727.

According to the Comptroller, an unnamed DEP official stated that it is DEP's practice to perform a final audit at the contract close-out stage and to recoup any excess payments from the contractors, thereby possibly providing the vendor with an interest free loan. That DEP may perform an audit at the end of the contract does not mean that DEP does not perform any overhead audits during the course of the contract. Overhead audits can result in either an over- or under-payment. DEP will continue to improve on the number and frequency of overhead audits to ensure that DEP pays an accurate overhead rate.

The audit states that DEP spot checks only a sample of timesheets submitted with a payment and that "DEP did not track the number of service-hours billed against the approved change order to determine whether the project was heading for further overruns." This is incorrect. The teams

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

managing the project and the budget closely monitor the budget, including tracking service-hours.

Additional Overpayments

The report claims that on Payment Voucher 12WS304 a principal was overpaid \$6,691 because an overhead factor was applied to their salary rate even though the contract states "[n]o overhead factor shall be applied to the cost of Principals' time." This language refers to the principal of the firm and prohibits the application of overhead to time spent by the principal of the firm when performing duties appropriate to a principal of a firm. There is no contractual prohibition against applying overhead to a "principal engineer" who is performing engineering duties. Although DEP stated this at the exit conference, the Comptroller retained this incorrect finding in the final draft audit.

On payment voucher 2FY1270 the audit asserts that DEP "overpaid \$36,243 . . . for work that was either not listed in the contract or subsequent change orders, or that exceeded the amount allowable for the invoice period." Again, the Project Manager reviewed the invoices received from the contractor for the period of 1/1/12 to 6/30/12 and found that the invoice amounts matched the work that was done during this period as outlined by the contract's scope of work. DEP did not find any evidence that payment was made for work that was not designated on the contract.

The audit also asserts that voucher payments # 2013PA13437 and # 2013PA10520 resulted in overpayments when in fact that is not correct. Voucher # 2013PA13437 was an accurate payment made to the contractor in the amount of \$412,549.00. The contract does not specify the number of Database Administrator titles, but does indicate the estimated hours and the estimated hourly rate. As a result, DEP was in compliance when voucher # 2013PA13437 was processed.

Voucher # 2013PA10520 was an accurate payment to a contractor for Engineering Consulting Services. The contract bid sheet has an hourly rate of \$60.00 with 1,600 hours. The payment in question paid for 80 hours at \$60.00 totaling \$4,800.00, well within the contract's limits. As a result, DEP did not overpay the vendor.

Inadequate Insurance Documentation

The Comptroller provided a list of contracts for which it stated that DEP failed to obtain the contractually required insurance. DEP reviewed its insurance and concluded that the finding is incorrect. On April 10, 2015, DEP responded to the insurance section of the preliminary draft audit report dated March 11, 2015 and re-submitted the questioned ACORD forms to illustrate that commercial general liability insurance ("CGL"), commercial automobile liability insurance ("Auto"), and professional liability insurance ("Prof.") were provided by the consultants. In its response, DEP noted that, contrary to the preliminary draft report, joint ventures, rather than

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single entity firms, are party to the DEP contracts with registration numbers 20040014147, 20030021743, and 9236727. As a matter of transparency, DEP submitted the ACORD forms provided by each of these joint ventures.

In its final draft audit report dated April 27, 2015, the Comptroller states that it is unable to determine whether there was sufficient insurance coverage during the audit scope period for registration numbers 20040014147, 20030021743, and 9236727. The Comptroller's finding is incorrect because it does not take into account the nature of joint ventures and the insurance provided by the firms comprising the joint venture.

For example, DEP awarded contract CAT-200: Design of Catskill/Delaware Ultra Violet light Disinfection Facilities (Reg. No. 20030021743) to a joint venture. The contract requires insurance coverage of \$2M/\$4M in Commercial General Liability insurance coverage, \$2M in Auto insurance coverage, and \$5M/\$5M in Professional insurance coverage. One of the parties to the joint venture submitted proof of policies with the following limits: \$2M/\$4M in Commercial General Liability insurance coverage, \$2M in Auto coverage, and \$5M/\$5M in Professional coverage. The other party to the joint venture submitted proof of policies with \$1M/\$2M in Commercial General Liability insurance coverage, and \$1M in Auto insurance coverage, and \$5M/\$5M in Professional insurance coverage. On its face, the insurance coverage for Commercial General Liability and Auto appears to be inadequate; however, one of the parties to the joint venture has submitted proof of an umbrella liability policy providing \$5M/\$5M coverage, which is sufficient to supplement any shortfall in Commercial General Liability and Auto insurance coverage.

Missing Proposal Evaluators' Conflicts of Interest Statements

The audit recommends that DEP "ensure that all statements regarding potential conflicts of interest are signed and on file before proceeding with ranking each contract proposal."

During the course of the audit, copies of conflict of interest statements were requested for certain procurements. DEP responded by saying that for those particular procurements, the conflict of interest statements were not required. Since the Comptroller's audit does not identify the four contracts for which the statements are allegedly missing, DEP cannot determine whether the Comptroller is referring to procurements for which these statements are required or to procurements for which these statements are not required.

It is standard practice for DEP to obtain conflict of interest forms from committee members. DEP did not inventory the contents of the files prior to turning them over and it is impractical for DEP to spend significant resources to research this point any further. There are over 200 open contracts that were procured as Requests for Proposals (RFPs) and there have been no findings

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

or allegations that any DEP employee has violated a conflict of interest provision while serving on an evaluation committee.

With respect to the Comptroller's statements regarding the implementation of Procurement Policy Board Rule 3-03(g), DEP notes that the 2010 printed version of the Rules does not include a requirement to obtain conflict of interest statements.

Public Notices Missing from Contract Files

The audit states "Three out of 20 reviewed contract files did not contain the required City Record notices, one was missing a vendor selection notice, and two were missing notices of intent to enter into specific contract."

The Comptroller's audit does not identify the contract files from which these documents are allegedly missing. DEP does not confirm or deny that these documents were missing from the files reviewed by the Comptroller. As noted above, the contents of the files were not inventoried prior to turning custody of them to the Comptroller.

Regardless of whether the copies of documents are missing or not, the Comptroller's conclusion is unsupported. That documents were allegedly missing does not mean that DEP did not "perform the required steps" for award, nor does it mean that awards were not made in the best interests of the City. It clearly does not, as the Comptroller states, "increase the risk that there was less than the required level of competition" since the documents referred to by the Comptroller are created after the competition is over and the vendor is selected.

Emergency Contracts Awards Did Not Follow Proper Procedures

The audit found that for three emergency contracts totaling \$6.7 million, DEP did not obtain the Comptroller's Office approval prior to the contract start date. The report also notes that contracts were submitted to the Comptroller beyond the 30 day timeframe required by the PPB Rules.

One of the three contracts which DEP did not obtain the Comptroller's approval for was an emergency contract initiated by another City agency and taken over by DEP. This contract was in response to the devastation that occurred as a result of Superstorm Sandy and was part of a group of contracts that helped restore basic utilities to homes that were damaged by Sandy. DEP responded immediately to assist in these recovery efforts.

The other two contracts were for services provided at Gilboa Dam when Hurricane Irene hit upstate New York. Over the course of that weekend, DEP and upstate regulators were so concerned about a failure or spillover of the dam that the highest emergency response plan was

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

activated. Approximately 46,000 people that would have been affected by a failure or spillover of the Gilboa Dam reside in the inundation area which extends for over 100 miles downstream of the dam. Despite making every effort to comply with PPB Rules, DEP cannot delay or refrain from protecting the public, the water system, or its infrastructure while waiting for the Comptroller to approve an emergency contract.

The audit states that the failure to adhere to the requirement to obtain the Comptroller's approval increased the risk that the vendors selected may not have been in the best interest of the City. DEP seeks responsible vendors with the experience, expertise, and resources necessary to satisfactorily complete the work in accordance with DEP requirements. While DEP acknowledges that these findings are technically true, it would have presented an unacceptable public safety risk for DEP to have delayed performing the emergency work.

While not specified in the PPB Rules, the Comptroller's Office has historically made it a practice to delay granting approval of an emergency until the Agency provides a scope of work, a detailed cost estimate, a vendor, and whatever other information the Comptroller's Office requests. In many instances, circumstances allow for this information to be consolidated and submitted to the Comptroller. In other instances, it is not, and will never be, possible for DEP to comply with the level of detail required by the Comptroller before commencing the emergency work covered by the contract. In the case of Gilboa, for example, it would have been unreasonable, risky, and potentially dangerous for DEP to wait for the Comptroller's approval before directing a consultant to begin a safety inspection and before planning an emergency response.

The audit states that the failure to adhere to the requirement to obtain the Comptroller's approval increased the risk that the vendors selected may not have been in the best interest of the City. DEP seeks responsible vendors with the experience, expertise, and resources necessary to satisfactorily complete the work in accordance with DEP requirements. Emergency contracts must be drafted, reviewed by the project team, agency counsel, the City Corporation Counsel, and by the vendor. Unfortunately, this cannot always be done within 30 days.

Recommendations

Based on the published findings, the Comptroller recommended that DEP:

- **Recoup the \$364,834 in overpayments from its contractors.**

Response: DEP disagrees with this finding and has concluded that it did not overpay its contractors as the Comptroller describes. Our review of the audit's specific findings has not shown that there are any overpayments made and therefore there is nothing to be recouped. We correctly reviewed time sheets and payroll reports as detailed in

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

Comptroller's Directive 2 and the overhead timing finding was addressed on the next payment and recouped on payment 114.

- *Conduct a review of the \$7.9 million in questionable payments identified in this audit report and determine whether the contractors billed the City appropriately and/or whether any overpayments were adjusted in subsequent payment requests or at contract close-out.*

Response: DEP disagrees with the findings that led to this recommendation. As explained above, our approval and audit of cost reimbursable contracts complies with Comptroller's Directive 2 and Article IV of the contract. DEP reviews payroll reports and timesheets and monitors allowable salary escalations as detailed in Comptroller's Directives 2 and 7. The Comptroller's finding is based on an incorrect characterization of the rules pertaining to Cost Reimbursable Contracts and DEP's overhead rate adjustments.

- *Review all previous payments for contracts cited in this report that received excess and questionable payments and determine any amounts that should be recouped from these contractors in accordance with the contracts, change orders and the EAO audits.*

Response: DEP disagrees with the findings that led to this recommendation. As explained above, our approval and audit of Cost Reimbursable Contracts complies with Comptroller's Directive 2 and Article IV of the contract. DEP reviews payroll reports and timesheets and monitors allowable salary escalations as detailed in Comptroller's Directives 2 and 7. This finding is based on an incorrect characterization of the rules pertaining to Cost Reimbursable Contracts and DEP's overhead rate adjustments.

- *Track all hours billed against change order limitations in order to control the hours billed and prevent project overpayments.*

Response: DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.

- *Ensure that interim payments accurately reflect the overhead rates and title rates in accordance with the City law and rules, the applicable contracts and/or EAO audits, to prevent overpayments.*

Response: DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

- *Ensure contractors only bill for work performed by contractor staff in titles listed in the contracts or change orders at the rates associated with those titles to avoid improper payments and overpayments.*

Response: DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.

- *Ascertain compliance with the terms of the contracts and City Law and rules prior to approving and processing contractor payment requests to prevent excess payments.*

Response: DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.

- *Perform required audit steps mandated by Comptroller's Directives #2 and #7 for reimbursement of direct and indirect labor costs.*

Response: DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.

- *Ensure that contractors maintain adequate insurance coverage for the duration of the contract in accordance with the contract, and that documentation of this (i.e., insurance certificates) be maintained in the contract file.*

Response: DEP agrees that contractors must maintain the correct insurance coverage in accordance with the contract requirements and that a copy should be maintained in the contract file. DEP has verified that all of the insurance certificates in question are currently maintained in a shared online database. As a matter of policy, DEP also sends a hard copy of all insurance certificates to the NYC Law Department.

- *Ensure that all statements regarding potential conflicts of interest are signed and on file before proceeding with ranking each contract proposal.*

Response: DEP agrees with this recommendation, was in compliance during the period covered by this audit, and continues to be in compliance.

- *Ensure that contract files maintain all documentation to support the award of the contract to specific professional service contractors.*

Response: DEP agrees that contract files should maintain all documentation to support the award of professional services contracts. Required documentation is also uploaded

Response to Audit FN14-074A - Report on the Department of Environmental Protection's Procurement Practices and Payment Process for Professional Services

into the City's Automated Procurement Tracking System (APT) and forwarded to the Comptroller as part of the registration package.

- *Obtain the required approvals and registration with the Comptroller's Office in a timely manner.*

Response: DEP agrees that it should obtain all oversight approvals in a timely manner.