



City of New York

OFFICE OF THE COMPTROLLER

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COMPTROLLER



MANAGEMENT AUDIT

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Deputy Comptroller for Audit

Audit Report on the Department of
Education's Controls Over Non-
Competitive and Limited-Competition
Contracts

MG13-119A

June 17, 2015

<http://comptroller.nyc.gov>



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June 17, 2015

To the Residents of the City of New York:

My office has audited the New York City Department of Education (DOE) to determine whether it has adequate controls over its awards of contracts on a non-competitive and limited-competition basis and whether it adequately monitors and evaluates vendor performance on such contracts. 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.

With the exception of the assignments of existing contracts, the audit found that sampled contract files generally contained written statements justifying the use of a non-competitive or limited competition procurement process and evidence of the required authorizations. However, the audit identified weaknesses in the contract assignment process and in particular with DOE's justification for allowing contracts to be assigned to a vendor chosen by the existing contract holder, its assessment of the proposed vendors' performance, and its rationales for granting specific assignments. DOE should address these weaknesses to decrease the risk of collusion among its bidders. The audit also found that DOE did not strongly enforce the requirement that its contract managers formally monitor and evaluate the performance of vendors. In addition, DOE does not have minimum guidelines for monitoring contracts, nor a standard format with criteria for its contract managers to follow when conducting performance evaluations. These omissions have contributed to inconsistent and frequently non-existent records of monitoring activity. Finally, DOE failed to consistently submit contracts to the Comptroller's Office on time for registration.

The audit makes eight recommendations, including that DOE ensure that the supporting documentation is obtained and carefully reviewed before approving assignment requests; develop and implement sufficiently detailed written procedures to detect the warning signs of possible collusion; establish minimum guidelines for contract monitoring; develop a standard format with standard criteria and ratings for evaluating vendor performance; and ensure that it submits contracts for registration to the Comptroller's Office in accordance with applicable time frames.

The results of the audit have been discussed with DOE 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".

Scott M. Stringer

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THE CITY OF NEW YORK OFFICE OF THE COMPTROLLER MANAGEMENT AUDIT

Audit Report on the Department of Education's Controls Over Non-Competitive and Limited-Competition Contracts

MG13-119A

EXECUTIVE SUMMARY

The objectives of this audit were to determine whether the Department of Education (DOE) has adequate controls over the awarding of contracts on a non-competitive and limited-competition basis and whether DOE adequately monitors and evaluates vendor performance on such contracts.

According to DOE's Procurement Policy and Procedures (PPPs), the preferred method for awarding contracts is through the competitive process. When it is not feasible or appropriate to do so, DOE uses limited competition procurement methods. Awarding of these contracts must be done in accordance with the PPPs and is subject to varying levels of approval, including approval of the Principal or Head of Office, the Executive Director of the Division of Contracts and Purchasing, and the Chancellor of DOE. In addition, the PPPs require all vendors with contracts to have their performance evaluated and monitored on an ongoing basis.

In Fiscal Year 2013, DOE awarded 421 contracts valued at \$595,852,433 using non-competitive and limited competition award methods. These contracts were for a variety of goods and services including student bus transportation, textbooks and computer software, as well as training and support programs for teachers.

Audit Findings and Conclusions

While the files we sampled generally contained written statements justifying the use of a non-competitive or limited competition procurement process and evidence of the required authorizations, this was not the case with assignments of existing contracts. Rather, where existing contracts were assigned, the audit identified weakness in the assessment of vendor performance, justifications for assignments, and DOE's rationale for granting assignments. These weaknesses should be addressed by DOE to decrease the risk of collusion among bidders, some of whom we found lost bids only to be assigned the same contracts a short time later.

The audit also found that DOE had not strongly enforced the requirement that its contract managers formally monitor and evaluate the performance of vendors. As a result, vendors with

past poor performance on DOE contracts were more likely to be awarded or assigned new contracts. In addition, DOE had not established minimum guidelines for monitoring contracts nor has it developed a standard format with criteria for its contract managers to follow in conducting performance evaluations. Finally, DOE failed to consistently submit contracts to the Comptroller's Office on time for registration, which reduces the transparency of DOE's contracting processes.

Audit Recommendations

To address the issues raised by this audit, we make eight recommendations including that DOE should:

- Ensure that the supporting documentation, including comprehensive checks, performance evaluations (when applicable), and justification for the assignment requests, is obtained and carefully reviewed before approving assignment requests.
- Develop and implement sufficiently detailed written procedures to detect the warning signs of possible collusion. The procedures should include, among other things: the different forms of collusion that could exist; conditions favorable to collusion; and the steps to be taken when the possibility of collusion has been identified (such as winning vendors requesting that their contracts be assigned to other vendors that bid on those contracts).
- Establish minimum guidelines for contract monitoring. Such guidelines should include, but not be limited to, a detailed description of the monitoring process, including frequency of contact with a vendor, documentation of monitoring efforts made, and the recommended actions where instances of vendor non-compliance are identified.
- Develop a standard format with standard criteria and ratings for evaluating vendor performance and establish a schedule indicating when such evaluations should be performed.
- Ensure that it submits contracts for registration to the Comptroller's Office in accordance with applicable timeframes.

Agency Response

In its response, DOE officials generally agreed with five of the audit's eight recommendations, stating that they will implement three recommendations and claiming that they were already in compliance with two other recommendations. DOE partially agreed with one recommendation regarding the need to obtain and review supporting documents before approving assignment requests, claiming that they are already in compliance with this aspect of the recommendation, but appear to disagree with the need for to obtain and review justifications prior to the approval of contract assignments, claiming that they already scrutinize assignments sufficiently. In addition, DOE did not agree to implement a recommendation regarding the development and implementation of written procedures to detect the warning signs of collusion and a recommendation advising DOE to establish minimum guidelines for contract monitoring. DOE also raised objections to our classification of the award methods and to our audit scope.

DOE also challenges our finding regarding the inadequacy of its controls over the contract assignment process and dismisses our concern that the risk of collusion is increased when vendors are allowed to assign contracts without a comprehensive review by DOE. DOE's primary argument is that no benefit to the vendors was achieved because there was no price inflation subsequent to the contract award; hence, they contend there is no indication of collusion.

However, this argument fails to recognize that if there is collusion, “competing” vendors agree *in advance* which vendor will submit the lowest bids and thus no real competition exists and all the collusive bids, including the low bid, are artificially high. In such a scenario, there would be no need to attempt to inflate the price after the contract award because the winning bid would already include the price inflation. We have discussed this issue with DOE several times during the course of this audit; unfortunately, DOE’s argument indicates that officials still have a fundamental misunderstanding of collusion. In such an environment, we are concerned that DOE may not develop and impose the necessary safeguards to mitigate the risk of collusion.

After carefully reviewing DOE’s arguments, we do not find a basis to alter any of our findings or recommendations.

The full text of DOE’s response is included as an addendum to this report.

INTRODUCTION

Background

DOE is the largest school district in the United States, serving approximately 1.1 million students in over 1,800 schools throughout New York City (City). DOE contracts with outside vendors to acquire necessary goods and services including, but not limited to, student bus transportation, textbooks and computer software, and training and support programs for teachers.

Rules governing DOE procurements are found in the agency's PPPs.¹ According to the PPPs, the preferred method for awarding contracts is through a competitive process. When a fully competitive process is not feasible or appropriate and a procurement meets specified criteria, DOE may use non-competitive or limited-competition procurement methods.² Non-competitive procurement methods include sole source, assignment, renewal, and extension. Limited-competition procurement methods include emergency purchase, listing application, and negotiated acquisition.

Regardless of procurement method, the PPPs require the head of the office seeking the goods or service to approve all contracts under \$25,000, the Executive Director of DOE's Division of Contracts and Purchasing (DCP) unit to approve contracts between \$25,000 and \$100,000, and the DOE Chancellor or his/her designee to approve contracts valued at greater than \$100,000. For non-competitive or limited competition contracts, the PPPs also require written justification by a DOE contract manager, explaining the reason that it was not feasible or appropriate to award the contract using a more competitive method.³ If the vendor already has another contract with DOE, the contract manager's justification must include the contract manager's assessment of the vendor's performance on that contract.

As recorded in the City's Financial Management System, DOE awarded 421 contracts valued at \$595,852,433 during Fiscal Year 2013 using non-competitive and limited-competition award methods and 663 contracts valued at \$2,607,073,476 using competitive award methods. Thus, nearly 19 percent of DOE's Fiscal Year 2013 contract award dollars were awarded through a non-competitive or limited competition process. A breakdown of the dollar value of the contracts by procurement method is shown in Table I below.

¹ DOE is not required to follow the City's Procurement Policy Board rules.

² Categories of permissible non-competitive and limited-competition procurements and their definitions are listed in the appendix.

³ For DOE procurements, the contract manager is responsible for ensuring that the contract is administered in accordance with the terms of the contract and DOE's guidelines.

Table I

DOE Contracts Awarded
in Fiscal Year 2013

	Total # of Contracts in Population	\$ Value	Percent of Total Contract Dollars Awarded
Non-Competitive			
Sole Source	1	\$122,000	0.004%
Assignment	23	\$102,966,392	3.21%
Renewals	77	\$116,437,631	3.64%
Extension	116	\$200,441,401	6.26%
Limited-Competition			
Emergency Purchases	27	\$69,125,957	2.16%
Listing Application	39	\$13,746,625	0.43%
Negotiated Acquisition	138	\$93,012,427	2.90%
SUBTOTAL	421	\$595,852,433	18.60%
Other Award Methods	663	\$2,607,073,476	81.40%
TOTALS	1,084	\$3,202,925,909	100%

Objective

The objectives of our audit were to determine: 1) whether DOE has adequate controls over the awarding of contracts on a non-competitive and limited-competition basis; and 2) whether DOE adequately monitors and evaluates vendor performance on such contracts.

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 objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. 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 primary scope of this audit covered non-competitive and limited-competition contracts awarded by DOE during Fiscal Year 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 with DOE

The matters covered in this report were discussed with DOE officials during and at the conclusion of this audit. A preliminary draft report was sent to DOE and discussed at an exit conference held on April 21, 2015. On May 7, 2015, we submitted a draft report to DOE with a request for comments. We received a written response from DOE on May 21, 2015.

In their response, DOE officials generally agreed with five of the audit's eight recommendations, stating that they will implement three recommendations: Recommendation 5 regarding the development of a standard format for evaluating vendor performance; Recommendation 7 concerning DOE's monitoring of its contract managers, and Recommendation 8 regarding the timeliness of DOE's submission of contracts for registration. The officials claimed that they were already in compliance with two other recommendations: Recommendation 1 relating to DOE's establishment of standards for evaluating vendors proposed to take over contracts through assignments, and Recommendation 6 on ensuring that performance evaluations are conducted for contracts seeking extensions or renewals. DOE partially agreed with one recommendation: Recommendation 2 regarding the need to obtain and review supporting documents before approving assignment requests, claiming that they are already in compliance with this aspect of the recommendation. However, they appear to disagree with the need to obtain and review justifications prior to the approval of assignment contracts, claiming that they already scrutinize assignments sufficiently. In addition, DOE did not agree to implement two recommendations: Recommendation 3 regarding the development and implementation of written procedures to detect the warning signs of collusion, and Recommendation 4 advising DOE to establish minimum guidelines for contract monitoring.

As part of their response, DOE officials disagreed with the audit's inclusion of "renewals, extensions or assignments of contracts that were originally awarded through a competitive process among the population of non-competitive or limited-competitive processes." At the start of the audit, we had asked DOE to classify the award methods used. They informed us that they do not have such types of categories and advised us to create our own classifications. We did so using the premise that extensions and renewals are built into the contracts and assignments are allowed to be made at the discretion of the assignor with the approval of DOE. While these contracts may have initially been awarded using a competitive method, the competitive process is greatly diminished and ultimately becomes non-competitive where the contracts are awarded to the same vendor, as is the case with extensions and renewals. Similarly, in the case of assignments, the vendors are allowed to designate another vendor to whom the contract would be assigned, subject to DOE's approval, without entering into a competitive selection process for that award.

DOE officials also argued that the audit scope had not been formally expanded to include DOE's post-procurement process for contract monitoring. However, the monitoring of contractors is an integral part of an internal control process for contracts, in part to ensure the propriety of possible extensions, renewals and subsequent contract awards. It cannot be overlooked as part of a review of DOE's controls over the use of its various methods of source selection for procurements. While there must be sufficient monitoring for all contracts, it is especially critical for contracts that are extended or renewed in order to ensure that the extension or renewal is based on the quality of the work performed by the vendor. Notwithstanding the efforts made to procure a contract, DOE cannot afford to be lax with its monitoring and oversight subsequent to the awarding of the contracts.

Finally, DOE challenges our findings regarding the inadequacy of its controls over the contract assignment process and dismisses our concern that the risk of collusion is increased when vendors are allowed to assign contracts without a comprehensive review by DOE. DOE states that “the singular objective of collusion is to inflate prices” and that with regard to the assignments discussed in the report, “no benefit had been achieved through the assignments. Each assignee was a bidder that had submitted higher bids than those that had been awarded contracts. Each assignee, as a condition of the assignment, had to accept the same terms as had the original awardee, including those pertaining to price.”

DOE appears to base its argument on the premise that if there was no price inflation subsequent to the contract award, no benefit was achieved and thus no indication of possible collusion. However, in making this argument, DOE fails to recognize that if there is collusion, “competing” vendors agree *in advance* which vendor will submit the lowest bids and what those bids will be, with the understanding that once the contracts are awarded, the winning vendor will assign one or more of the awarded contracts to its “competitors.” In such a scenario, the assignee would be willing to accept the same terms as the original awardee because the winning bid already included the price inflation.

We have discussed this issue with DOE several times during the course of this audit. Unfortunately, DOE’s argument indicates that officials still have a fundamental misunderstanding of collusion. In such an environment, we are concerned that DOE may not develop the necessary safeguards to mitigate the risk that collusion could occur.

In conclusion, after carefully reviewing DOE’s arguments, we do not find a basis to alter any of our findings or recommendations.

The full text of DOE’s response is included as an addendum to this report.

FINDINGS AND RECOMMENDATIONS

Our review of sampled contracts found that DOE's non-competitive and limited competition contract files generally contained written statements justifying the procurement process as well as evidence of the required authorizations, except in the case of assignments of existing contracts. With contract assignments, the audit identified weaknesses in assessing vendor performance, justifications for assignments, and DOE's rationale for approving assignments. These weaknesses should be addressed by DOE to decrease the risk that collusion could occur and go undetected.

With regard to DOE's controls over the monitoring and evaluation of non-competitive and limited-competition contracts, we found a number of weaknesses. Specifically, we found that DOE has not: 1) strongly enforced the requirement that its contract managers formally monitor and evaluate the performance of vendors; 2) established minimum guidelines for monitoring contracts; and 3) developed a standard format with criteria for its contract managers to follow in conducting performance evaluations. These weaknesses increase the risk that poorly performing contractors seeking extensions or renewal will receive them despite their performance.

Finally, DOE failed to consistently submit contracts to the Comptroller's Office for registration in a timely manner. This failure decreased the transparency and oversight of these DOE procurements.

The details of our findings are discussed in the following sections of this report.

Inadequate Controls Over the Contract Assignment Process

Our review of DOE controls over the contract assignment process identified a number of weaknesses, including a lack of specific procedures in the PPPs to direct how proposed assignments should be evaluated and assessed. Consequently, we found limited evidence that DOE assessed vendor performance prior to assignment, limited evidence that the justifications provided by vendors requesting assignments were sufficiently reviewed, and few if any restrictions regarding the timing of assignments and to whom assignments are granted.

DOE allows an existing contract to be assigned to another vendor for a number of reasons, including when the original contract vendor cannot meet its contractual obligations. In such instances, the vendor will request permission to assign its contract or a portion thereof to another vendor it recommends. When a contract is assigned, the new vendor assumes the contract responsibility under the same terms as the old vendor for the remainder of the contract.

While the PPPs dictate specific procedures to guide all other award methods, they do not provide any rules specific to the assignment process. For example, the PPPs require vendors who are awarded contracts through a competitive bidding process⁴ to demonstrate that they have the capability to meet the requirements of the contract, as set forth in the bid documents. In addition, these vendors must also pass a thorough background investigation designed to ensure that they are "responsible vendors"⁵ and that they have sufficient financial stability to meet the guidelines

⁴ Competitive bidding is the process by which multiple vendors are able to compete for contracts by submitting bids.

⁵ According to § 2-05 of DOE's PPPs, a responsible contractor is one which has the capability in all respects to perform fully the contract requirements and the business integrity to justify the award of a DOE contract. Factors affecting a contractor's responsibility may include financial resources, experience, a satisfactory record of performance, and a satisfactory record of business integrity.

set forth in the contract. However, the PPPs do not have any such requirements for vendors who are awarded contracts through an assignment.

Notwithstanding the PPPs absence of explicit guidance, DOE officials stated that where an assignment is sought, it is important to assess the prospective vendor's qualifications. DOE officials stated that prior to approving an assignment, contract managers must perform background checks on any vendors proposed to take over a contract through an assignment to determine whether any adverse information exists regarding the vendors, such as pending lawsuits or related issues that could have a negative impact on their performance. Among other things, the contract managers should evaluate the prior performance of the vendor proposed to take over a contract via an assignment. To do this, DOE requires that they gather prior DOE evaluations where the proposed vendor has or had another contract with DOE and collect letters of recommendation in instances where the proposed vendor has not had another contract with DOE. Contract managers must submit that documentation with the assignment request to DOE procurement officials for approval.

However, we found limited evidence that these steps had been consistently performed. In all five of the transportation contract assignments in our sample of eight assignments, we found no evidence that meaningful evaluations were undertaken of the assignees' performance on their prior DOE contracts before they were granted assignments.⁶ All of the five transportation contract assignments, with a total value of \$94,286,161, were made to companies that had existing and/or prior contracts with DOE. While DOE provided us with performance letters from contract managers for four of the five prospective vendors that certified that their prior DOE performance was satisfactory, none of those four letters were supported by performance evaluations or any evidence of monitoring that had been done by the contract managers. The absence of such evaluations raises concerns whether DOE had carefully assessed assignees' ability to take on the contracts. Having only a performance letter without support for the decision increases the risk that poorly performing vendors may be awarded contracts. Finally, the performance letter in the file of a fifth assignment we reviewed was not for the correct time period. Thus, it is of limited relevance.

The contract files also contained limited evidence that DOE adequately considered whether assignment requests were justified before granting them. For example, the files for two of the sampled transportation assignments contained inconsistent justifications for the assignments. In one contract file, a document identified the reason for the assignment as "sale," while another document in the same file stated that the reason was "to consolidate work." In a second contract file, one document explained the need for the assignment as stemming from the vendors having entered into contract with each other, while another document in the same file identified the poor performance of the assignor as the reason. When these discrepancies were brought to their attention, DOE officials stated that the reason given for an assignment is not a major concern and does not have to be detailed.

Finally, we found that DOE has few, if any, constraints on the timing of assignments and to whom contracts are assigned. DOE officials informed us that once a contract is awarded, a vendor may assign it at any time thereafter because the agency has no rules governing how soon after a vendor is awarded a contract it might seek to assign it. In addition, competing vendors are not prohibited from receiving an assignment. Our review of the case files reveal that three of the five

⁶ With regard to the other three contracts in our sample of eight assignments that were not transportation contracts, two involved name changes of the principal owners or the vendor, respectively, both of which are considered a formality and not an actual assignment of a contract. The third was an assignment of a contract for the provision of day care services where the evidence we found established that all of the requirements for an assignment had been met.

sampled contracts were assigned less than a year after the initial contracts were awarded. In two instances, the contractors awarded the initial contracts made the assignment requests before the start dates for either contract and the contracts were assigned less than three months after their start dates. In all three instances, the assignees were vendors who also bid on the original contracts.

By not placing any restrictions on contract assignment, the benefits of the competitive bidding process is undermined and the risk of collusion among vendors competing for contracts is increased. Collusion occurs when vendors work together to limit competition, using methods such as price fixing, bid rigging, and market allocation.⁷ Federal law prohibits such anticompetitive conduct; violators are subject to prosecution by the Antitrust Division of the U.S. Department of Justice.

Not only does collusion eliminate competition, it may also lead to higher prices. Where collusion exists in the case of an assignment, competing vendors may agree in advance which vendor will submit the winning bids with the understanding that once the contracts are awarded, the winning vendor will assign one or more of the awarded contracts to its “competitors.”

While the various justifications and timing of the sampled contract assignments were not in and of themselves evidence that collusion between the vendors occurred, we believe that further review by DOE of possible collusion was warranted before it permitted winning vendors to assign their contracts to competing vendors who lost out on the bids. When we asked DOE officials to identify the safeguards in place against collusion, they did not provide us with any. Rather, they responded that most of the vendors involved in the contract assignments we examined have relationships with one another and do business together.

Although we found no direct evidence of collusion, we note that the risk of collusion is increased in situations where there is a relationship between vendors. DOE needs to put safeguards in place to help ensure that such risk is mitigated. Instead, by allowing vendors to assign contracts at will at any point during the contract and by not diligently examining the reasons provided by vendors that request assignments to assess their legitimacy, DOE has created an environment where the risk of collusion is significantly increased.

Recommendations

1. DOE should establish standards for evaluating the responsibility and capacity of vendors proposed to take over contracts through assignments that are at least as detailed and comprehensive as those that apply to vendors who seek to be awarded contracts by DOE.

DOE Response: “The DOE can agree with the recommendation inasmuch as it reflects current practice.

“Although assignments are outside the contract procurement process, the DOE conducts vetting procedures similar to those performed with respect to competitive procurements. Thus, assignees must pass a thorough background

⁷ According to the Department of Justice, price fixing is “an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold;” bid rigging is “the way that conspiring competitors effectively raise prices where purchasers – often federal, state, or local governments – acquire goods or services by soliciting competing bids;” and market allocation occurs when “competing firms allocate specific customers or types of customers, products, or territories among themselves.”

investigation and a review to determine whether they can satisfactorily perform the obligations they will be assigned.”

Auditor Comment: We are pleased that DOE has agreed to implement this recommendation. DOE officials claim that they conduct vetting procedures for assignments similar to those performed with respect to competitive procurements. As we discuss in the audit report, however, the assessments of the assignees we reviewed were quite limited. We urge DOE to promulgate policies and procedures governing this area to ensure that full meaningful vetting is done for every assignment.

2. DOE should ensure that the supporting documentation, including comprehensive checks, performance evaluations (when applicable), and justification for the assignment requests, is obtained and carefully reviewed before approving assignment requests.

DOE Response: “The DOE can agree with the recommendation inasmuch as it reflects the current practice of performing thorough background reviews of potential assignees as well as the Department’s plan to roll out an electronic performance evaluation system in spring 2015 that will assist contract responsibility centers in tracking oversight efforts.

“However, we reject the assertion that we do not scrutinize assignments sufficiently. The DOE does not initiate assignments. We consider efficacy of an assignment upon receiving a request from the vendor and existing policies and procedures govern our review. Moreover, it is DOE practice to view an assignment request favorably when the assignee is accepting all terms and conditions of the assignor’s contract, including price. As with any procurement, should any cause for concern present itself during our review of an assignment, it would be addressed in accordance with our established and standard practices.”

Auditor Comment: We are pleased that DOE partially agrees with this recommendation. In its response, DOE states that it does not initiate the assignments and acknowledges that it currently tends to view assignment requests favorably. Because DOE does not initiate the assignments, it is all the more critical that DOE conducts the steps outlined in the recommendation so that it can ascertain the proposed vendor’s capacity to perform the contract obligations and its responsibility as a vendor.

DOE Response: “In reporting on the timing of contract assignments the auditors appear to suggest that the DOE consider employing hard time constraints for assignments. It is, therefore, necessary to say that doing so would effectively hamstring operations and potentially create situations wherein necessary services would not be provided. Our current process considers assignments requested by contractors on a case-by-case basis; decisions are made in the best interests of this agency.”

Auditor Comment: As part of its contractor selection process, DOE should ensure that vendors are able to fulfill contractual obligations before they are awarded contracts. This would eliminate or at least minimize the concern articulated by DOE that it would be unable to receive necessary goods or services

if it adopted a rule rejecting contract assignments before a specified period of time. DOE could build into such a rule some measure of flexibility for unusual situations that might necessitate an early request for an assignment. This would then enable DOE to carefully review the merits of a request for an assignment prior to the prescribed time. However, the fact that three of the five sampled contractors requested assignments within a year of being awarded the contracts—two requested the assignments *before the contracts even started*—raises questions concerning the adequacy of DOE’s determination that these vendors had the capability to fulfill the terms of the contracts in the first place.

3. DOE should develop and implement sufficiently detailed written procedures to detect the warning signs of possible collusion. The procedures should include, among other things: the different forms of collusion that could exist; conditions favorable to collusion; and the steps to be taken when the possibility of collusion has been identified (such as winning vendors requesting that their contracts be assigned to other vendors that bid on those contracts).

DOE Response: DOE disagreed with this recommendation, stating that “DOE procurement managers are fully aware of the warning signs of collusion and take seriously their responsibility to report concerns about possible collusion in the bidding process to appropriate law enforcement agencies. The managers’ performance in that regard would not be enhanced by written guidelines that are already published and readily available on the Justice Department’s website.”

Auditor Comment: DOE has provided no evidence to support its contention that its procurement managers are fully aware of all the warning signs of collusion. Additionally, DOE has no assurance that the managers will refer to the Justice Department’s website each time they award a new contract. DOE should have procedures in place that are readily available to remind the procurement managers of the need to be attentive to the warning signs of collusion.

Inadequate Evidence of Contract Monitoring and Performance Evaluations

Contract Monitoring

Our review of 18 contract files found that DOE has not established minimum guidelines for monitoring contracts. Instead, DOE lets contract managers devise their own processes to ensure that vendors are fulfilling their contractual obligations as set forth in the PPPs. According to § 4-05 of DOE’s PPPs, “the Contract Manager will assure that all material goods, supplies, services and construction purchased by the DOE meet standards for quality, function and utility consistent with specifications established by the items purchased. Contractors’ performance shall be monitored against such standards and indicators on an ongoing basis.”

Lacking clear procedures for either the monitoring or recording efforts taken to monitor contract performance, the monitoring efforts engaged in by contract managers has been inconsistent. For example, our sample included three contracts with non-profit organizations to provide Universal Pre-Kindergarten services for five year terms. In the case of two contracts, the only evidence of monitoring by the contract manager was one visit to each of the facilities during the five years the contract was in place. For the third contract, we received no evidence of a site visit. The files

contained no other evidence (e.g., correspondence, monitoring reports) of oversight during the contract terms. All three contracts were renewed for an additional two years; there was no evidence that the contract manager visited the facilities or performed any other monitoring during the additional two-year period.

In another example, DOE's contract with a school uniform vendor required the contractor to submit detailed usage reports, backorder reports and quarterly reports pertaining to the contract. The contract files, however, contained no evidence that these reports were ever submitted. Moreover, there was no evidence in the files to indicate that the contract manager had undertaken any activities to monitor the vendor's performance at all or brought to the vendor's attention its failure to fulfill its reporting obligations. This contract was renewed and subsequently extended by DOE.

In a third example, DOE had a three-year contract with a vendor to provide food-related services. When we requested evidence of DOE's monitoring efforts for this contract, we were provided with three warehouse inspections only. We received no evidence to indicate that DOE was actively monitoring this vendor's performance. This contract was renewed and subsequently extended by DOE for an additional three and one half years. Failure to adequately monitor contracts hinders DOE's ability to ensure that vendors are adequately providing goods and services in accordance with contract terms and that City funds are only being spent for purposes set out in the contracts. Further, failure to adequately monitor contract performance deprives DOE of the ability to improve program performance through early identification and resolution of issues. It also increases the risk that DOE will fail to identify poorly performing vendors in a timely manner in order to avoid a potential disruption in the provision of goods or services.

Finally, we found that 16 of the 18 contract files reviewed contained little, if any, evidence of any monitoring. Thus, we have limited assurance that contract managers are adequately monitoring contractor performance as required. When questioned, we found that DOE contract officials have not strongly enforced the contract managers' monitoring requirement and in fact, DOE acknowledged in an email that "DOE's procurement policies do not speak with specificity about a formal process for conducting monitoring."

Performance Evaluations

Failure to adequately monitor contractor performance also hinders the ability of contract managers to properly evaluate contractor performance. According to § 4-05(d) of the PPP Guidelines, "DOE shall establish an electronic process for evaluating and documenting the performance of its vendors. The process shall include reporting in a standard format with standard criteria and ratings; and evaluations shall be done in accordance with a schedule established by the DOE."

Our review found that contract managers generally did not conduct required performance evaluations of vendors. DOE could not provide evidence that evaluations were conducted for 10 of 18 sampled contracts (8 extensions, 5 renewals, and 5 assignments). Of the eight evaluations provided, only two had supporting documents (e.g., monitoring reports, performance indicators, correspondence) to substantiate the evaluations and an additional two had only some of the supporting documents for the evaluations. Upon questioning, DOE contract officials noted that they have not strongly enforced the requirement that contract managers formally evaluate contractor performance. Officials have also not developed a standard format with criteria, as required by the PPPs, for contract managers to follow in conducting such evaluations. Officials give contract managers wide latitude in how they assess contractor performance, relying primarily

on their judgment and experience in determining whether contractors are performing satisfactorily. They do not require that such assessments be formally documented.

However, by not establishing a standard format for conducting evaluations or requiring managers to document the basis for their evaluations, DOE has no consistent way to gauge contract performance. The City relies on the Vendor Information Exchange System (VENDEX) to serve as, among other things, a resource where City agencies are required to report the performance of entities that have City contracts. While DOE is not required to enter its vendor ratings in VENDEX, it also has not established its own system to record evaluations of the performance of its vendors. The absence of such a reporting system not only decreases transparency but also hinders the ability of DOE management to ensure that its vendors' performance is evaluated on a regular basis, and that contract renewals and extensions are not granted to poor performers.

The failure of DOE to ensure that contract managers conduct performance evaluations for vendors seeking contract renewals or extensions, and that those evaluations are sufficiently supported, increases the risk that poorly performing contractors will be rewarded by having their contracts extended or renewed.

After receiving our preliminary draft report, DOE officials informed us at the exit conference for this audit that they anticipate creating an electronic performance evaluation system by spring 2015.

Recommendations

4. DOE should establish minimum guidelines for contract monitoring. Such guidelines should include, but not be limited to, a detailed description of the monitoring process, including frequency of contact with a vendor, documentation of monitoring efforts made, and the recommended actions where instances of vendor non-compliance are identified.

DOE Response: “For the reasons that follow, the DOE declines to implement Recommendation 4. ...

“DOE’s procurement policies and procedures do not prescribe a specifically defined process for conducting monitoring and evaluation largely because the DOE’s contracts cover a significant range of business, technical and service activity and contract ownership, a one size fits all approach would not serve the needs of this agency. Clearly, a contract for delivery of Central office supplies cannot, and should not, be managed and monitored in the same way as one for delivery of school-based special education support services. What is important is that the managers responsible for contract implementation engage in necessary oversight and maintain documentation consistent with the Department’s Procurement Policy and Procedures so that contractor performance can be evaluated. To facilitate compliance with that standard, the Department has designed, and will soon roll out, an electronic system.”

Auditor Comment: We are aware of the wide spectrum of contracts that DOE enters into. However, that would not preclude minimum requirements, such as requiring contract managers to formally document their monitoring efforts in order to serve as a basis for their evaluations. It would also not preclude DOE from developing additional minimum monitoring requirements applicable to specific types of contracts. In addition, until an electronic system is put into place and is

fully operational, DOE should consider a manual process incorporating the key areas set forth in VENDEX evaluations, covering the areas of timeliness of performance, fiscal administration and accountability, and overall quality of performance.

5. DOE should develop a standard format with standard criteria and ratings for evaluating vendor performance and establish a schedule indicating when such evaluations should be performed.

DOE Response: “The Department will be implementing Recommendation 5 of its own accord as early as this spring.”

6. DOE should ensure that performance evaluations are conducted, especially for those contracts seeking renewals or extensions, and that it maintain the results of such evaluations for future reference.

DOE Response: “The DOE can agree with the recommendation inasmuch as it reflects the current practice of considering a vendor’s performance when renewing or extending a contract.”

Auditor Comment: DOE states that the recommendation reflects its current practice. However, this statement is not consistent with what we found during the course of the audit. In addition, in light of DOE’s refusal to set minimum standards for contract monitoring, we question the adequacy of DOE’s evaluations, which should be based on the assessments of vendor performance by personnel who have closely monitored the contracts. Nevertheless, we are pleased that DOE agrees with the recommendation.

7. DOE should monitor the compliance of its contract managers in ensuring that contract monitoring and performance evaluations are conducted in accordance with its PPP Guidelines.

DOE Response: “As stated above, the DOE intends to implement an electronic evaluation system. Among the benefits provided, that system will aid in the oversight of contract management.”

Contracts Not Submitted for Registration in a Timely Manner

The New York City Charter requires all contracts procured for the provision of goods, services or construction that are paid by City funds be registered by the New York City Comptroller. The Comptroller has 30 calendar days from the date that it receives the contract to register or object to the contract. The process is designed to ensure that sufficient funds exist to make payments for that contract, that all appropriate certifications and documentation has been obtained and submitted, that the contractor is not involved in corrupt activity or that there was no possible corruption in the letting of the contract.

DOE did not ensure that contracts were submitted on a timely basis. Of the 32 contracts that we reviewed for this purpose,⁸ 23 (70 percent) started before DOE submitted the contracts to the Comptroller’s Office for registration. In nine instances, DOE included a letter explaining the reason for the late submission. Explanations included a delay in the legal process and approval

⁸ According to PPP Guidelines, emergency contracts are exempt from registration and were not part of this test.

of the vendor. These 23 contracts started, on average, about 3 months prior to submission, ranging from 4 days to 238 days before submission.

Late submission of contracts for registration leads to vendors providing goods and services without finalized contracts and thereby may deprive DOE of adequate controls over the vendor's performance. Further, failure to register contracts timely could cause cash-flow issues if insufficient funds have been encumbered to cover the cost of the contracts. In addition, late registration could lead to a disruption of services because the City cannot pay vendors prior to contract registration. Vendors may, in anticipation of these delays, increase prices, thereby creating additional costs to the City. Further, the City risks being held accountable for interest on loans that vendors are forced to take out because of the untimely registration of the contracts. Finally, late registration contributes to lack of transparency of how DOE is spending City taxpayer funds.

Recommendation

8. DOE should ensure that it submits contracts for registration to the Comptroller's Office in accordance with applicable time frames.

DOE Response: "The DOE will continue its efforts to register contracts timely."

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 objective. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. 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 non-competitive and limited-competition contracts awarded by DOE during Fiscal Year 2013.

To achieve the audit objectives, we reviewed applicable laws, regulations, and procedures, including DOE's PPP Guidelines and Comptroller's Directive #1 (Principals of Internal Controls). We also reviewed the Comptroller's Office of Contract Administration's contract registration process. In addition, we reviewed the Mayor's Office of Contracts Agency Procurement Indicators Report for Fiscal Year 2013.

To obtain an understanding of DOE's contract procurement processes, we conducted a walk-through with the executive director of the Division of Contract Procurement (DCP) and the chief administrator of Vendor Research and Price Analysis. We also met with representatives from the Committee on Contracts (COC). During these meetings, we received information about managerial oversight, approval of procurements, and background checks for vendors.

To obtain an understanding of how contract files are organized and maintained, we conducted a walkthrough of DOE's filing system and reviewed five contract files with the Chief Administrator of Vendor Research and Price Analysis as well as with one contract manager. We interviewed eight contract managers to obtain an understanding of how they monitor contracts and discussed issues regarding certain of their contracts.

To obtain an understanding of how information pertaining to a contract is recorded and maintained, we interviewed the Director of Policy and Technology and the Director of Contract Registration. We conducted a physical walkthrough of DOE's Central Tracking System (CTS) and Contract Processing System (CPS). We also learned about DOE's Financial Accounting and Management Information System (FAMIS) regarding vendor payments.

We obtained a list of 41,463 contracts, valued at approximately \$3 billion, which DOE awarded during Fiscal Year 2013 and that were recorded in the City's Financial Management System (FMS). We sorted these contracts by award method and identified 305 contracts that were awarded on a non-competitive or limited-competition basis, valued at \$395,411,033. We also obtained a list of 116 contracts that DOE extended during Fiscal Year 2013 valued at \$200,441,401 and that were not recorded in FMS as extensions.⁹ Our total population consisted of 421 contracts valued at \$595,852,434, consisting of the following:

- 217 non-competitive contracts (1 sole source, 23 assignments, 77 renewals and 116 extensions) with a total value a total of \$419,967,423.93.

⁹ DOE does not track extensions based on the procurement methods outlined by the Mayor's Office of Contracts. Instead, DOE records the extension under the original procurement method and tracks it internally as an extension.

- 204 limited-competition contracts (27 emergency purchases, 39 listing applications, and 138 negotiated acquisitions) with a total value of \$175,885,009.

From our population of 421 contracts, we selected a targeted sample of 37 non-competitive and limited-competition contracts for review. The breakdown is as follows:

- 22 non-competitive contracts, with a total value of \$125,743,496, consisting of 1 sole source, valued at \$122,000; 5 renewals, valued at \$8,275,556; 8 assignments, valued at \$94,986,208; and 8 extensions, valued at \$22,359,732.
- 15 limited-competition contracts, with a total value of \$11,285,122, consisting of 5 emergency purchases, valued at \$2,063,619; 5 listing applications, valued at \$2,145,000; and 5 negotiated services, valued at \$7,076,503.

Table II highlights our total audit sample and the various individual sub-samples we used in conducting our audit tests.

Table II

DOE-Related Contracts Awarded in
Fiscal Year 2013

	(A) Total # of Contracts in Population	(B) Total Audit Sample	(C) Total # of Contracts Tested for Procurement	(D) Total # of Contracts Tested for Monitoring	(E) Total # of Contracts Tested for Contract Registration
Non-Competitive					
Sole Source	1	1	1		1
Assignment	23	8	5	5	8
Renewals	77	5		5	5
Extension	116	8		8	8
SUBTOTAL	217	22	6		22
Limited-Competition					
Emergency Purchases	27	5	5		
Listing Application	39	5	5		5
Negotiated Acquisition	138	5	5		5
SUBTOTAL	204	15	15		10
Other Award Methods	663				
TOTALS	1084	37	21	18	32

We initially sampled 21 contract procurement files (5 emergency purchases, 5 listing applications, 5 negotiated services, 1 sole source and 5 assignment contracts) to determine whether DOE complied with its guidelines when procuring non-competitive and limited-competition contracts

(see column C in Table 2 above). We determined whether there were written justifications and approvals by the Executive Director of contract procurement and the DOE chancellor for the types of awards used for these procurements. This sample was expanded to 37 non-competitive and limited competition contracts to include various targeted tests as noted in Table 2 and detailed below.

We reviewed the files for 18 sampled contracts (8 extensions, 5 renewals, 5 assignments and) to determine whether DOE had monitored the vendors during the duration of the contract (see column D in Table 2 above). We also reviewed the information maintained within the contract files to determine whether DOE conducted performance evaluations as required by its PPPs prior to approving the assignments, renewals and extensions. For the sampled assignments, we determined whether DOE had conducted background checks prior to approving the assignments.

Five of the eight assignment contracts sampled were transportation contracts. We reviewed the files for these five contracts to gain an understanding of the circumstances that led to their assignments. We obtained a checklist that is to be used by contract managers, which identifies the documents required for assignments. We determined whether those documents were present in the files. We also reviewed the bid tabulation for the solicitation of the original contracts to determine whether the assignees had submitted bids for those contracts. In addition, we reviewed the justifications provided by the vendors requesting the assignments to determine whether the justifications were adequately supported.

Of the 37 contracts in our initial sample, five were emergency contracts. For the remaining 32 sampled contracts (see column E in Table 2 above), we obtained information from the Comptroller's Omnibus Automated Image Storage and Information Systems (OAISIS) to determine whether the contracts were registered in a timely manner.

We did not evaluate the reliability and integrity of the data we obtained from FMS because we relied on the City's external auditors who review this citywide system as part of their annual audit of the city's financial statements.

The results of the above tests, while not statistically projected to their respective populations, provided a reasonable basis for us to assess the adequacy of DOE's controls over the procurement of contracts awarded on a non-competitive or limited-competition basis.

Categories of Non-Competitive and Limited-Competition Procurements

Category	Definition
Non-Competitive	
Sole Source	When there is only one source through which the goods can be purchased and when no other product is available in the marketplace that meets the same or substantially similar requirements of form, function and utility. This may include installation, maintenance or other services associated with the proper use or operation of the goods where it is beneficial to DOE to include such services in the contract.
Assignment	When a vendor can no longer meet its contractual obligations, the contract can be assigned to another vendor. The new vendor assumes the responsibility of the contract under the same existing terms as the old vendor and carries out the remainder of the contract.
Renewals	Contracts may provide for the renewal or extension with the same vendor with substantially unchanged terms and conditions, but possibly revised quantities, lists, schedules or items to be supplied, for a specified period.
Extension	A contract may be extended for a cumulative period not to exceed one year from the date of expiration of the contract including any renewals or extensions explicitly provided for in such contract. The terms and conditions of an extension must be the same or substantially equivalent to the terms and conditions of the original contract. A contract may be extended one or more times beyond the cumulative twelve-month period provided that the vendor's performance is satisfactory or that any deficiencies have been or are addressed or are effectively addressed through a corrective action plan and the extension(s) is for the minimum time necessary to meet the need.
Limited-Competition	
Emergency Purchases	An emergency condition is an unforeseen danger to life, safety, property, or a necessary service. The existence of such a condition creates a need for goods, services or construction that cannot be met through normal procurement methods.
Listing Application	May be established for the purchase of content provided directly to students, materials that are available only from the publisher, artistic performances, and admission to programs offered by cultural institutions. These materials and services are considered unique, as they cannot be purchased by open, competitive means.
Negotiated Acquisition	Negotiated Services shall be used when other methods of procurement are not practical or possible. The award of the contract shall be based upon a combination of cost, quality and efficiency.



Raymond J. Orlando
Chief Financial Officer

May 21, 2015

Marjorie Landa
Deputy Comptroller for Audit
The City of New York
Office of the Comptroller
One Centre Street
New York, NY 10007-2341

Re: Audit Report on the Department of Education's Controls over Non-Competitive and Limited-Competition Contracts (MG13-119A)

Dear Ms. Landa:

This letter, with the attached response to recommendations ("Response"), constitutes the formal response of the New York City Department of Education ("Department") to the City of New York Office of the Comptroller's ("Comptroller") draft audit report titled *Audit Report on the Department of Education's Controls over Non-Competitive and Limited-Competition Contracts* ("Report").

The Report acknowledges that the Department adequately documents the justification and authorization for non-competitive and limited-competition procurements; however we are concerned that certain other conclusions are not grounded in fact.

The audit engagement letter dated June 3, 2013 stated the scope of the audit as the Department's "controls over the use of various methods of source selection for procurements." During fieldwork, the audit scope apparently was narrowed to focus solely on contracts procured through non-competitive and limited-competitive processes. However, though the Department advised that it considered it to be misleading, the auditors chose to include renewals, extensions or assignments of contracts that were originally awarded through a competitive process among the population of non-competitive or limited-competitive processes.

At no point, however, was the audit scope formally expanded to include the Department's post-procurement processes around contract monitoring. Nonetheless, there appears prominently in

the Report that the Department “has not established minimum guidelines for monitoring contracts” and, that upon their review of the contents of 18 contract files, the auditors found only “limited assurance that contract managers are adequately monitoring contractor performance as required.” (Report, p. 10). The pronouncement is disturbing not only because the stated audit scope did not include contract performance monitoring, but, more significantly, because the narrow scope and questionable quality of field work do not sufficiently support it.

Seven business centers responsible for contract implementation were represented by the 18 sampled contracts: Office of Pupil Transportation (five contracts); Division of Early Childhood Education (three contracts); Office of SchoolFood (two contracts); Division of School Facilities (two contracts); Division of Instructional and Information Technology (two contracts); Teacher Recruitment (two contracts) and Division of Contracts and Purchasing (“DCP”) (two contracts). DCP has oversight responsibility for very few of the contracts it procures and then only in cases where there is no single responsibility center that would naturally fill that role. Of the 18 sampled contracts that resulted from DCP’s non-competitive and limited-competition procurements only the school uniform contract fell within that category.

Nonetheless, of the nine Department personnel identified by the auditors as having been interviewed regarding contract monitoring, six were assigned to DCP. The other three managers were assigned to the Offices of Pupil Transportation (“OPT”), SchoolFood (“OSF”) and Teacher Recruitment. Missing were managers assigned to the Division of Early Childhood Education (“DECE”) who would have provided insight into the activity around Universal Prekindergarten (“UPK”) contract oversight. Representatives of DCP advised the auditors that the UPK contracts were monitored and managed by individuals working for DECE in the borough field offices. However, to our knowledge, the auditors did not meet with any of the individuals from the field offices. DECE contract managers would have informed the auditors that instructional, family, and engagement staff provides on-site monitoring and support for all UPK contracts. For example, all sites get visited by an instructional coach at least three times per year, while sites in need of more support get visited more frequently. DECE’s cadre of social workers visit programs in high needs areas to support high quality family engagement and positive social/emotional development and its operations analysts focus on administrative practices through a combination of desk reviews and visits.

Despite this, the Report cites UPK contracts within the three examples of the Department’s “inconsistent” monitoring efforts. Rounding out the three examples are one school uniform and one school food distribution contract. In choosing one example to support the Report’s segue from the “failure to adequately monitor contract performance” to the conclusion that such failure “also hinders the ability of contract managers to properly evaluate contract performance,” the auditors lighted upon the contracts for student transportation. (Report, p. 10).

We find it concerning that OPT and OSF were singled out as examples of poor contract management practices since, as the auditors would have known from manager interviews, the offices are almost entirely structured around the type of active, hands-on contract oversight that allows management to make well-informed determinations whether contractors have performed satisfactorily. In that regard, it is notable that, post-interview, the auditors confirmed in writing

their understanding of OPT and OSF operations, which comprise multiple units the primary function of which is to provide contract management. In each case the auditors were told, and so acknowledged, that the offices' charge is met through the employment of various data systems; field inspections; complaint intake and data entry by trained staff; assessment of damages; and, in the case of OPT, investigations, issuance of violations and conduct of hearings as warranted. These substantial and ongoing activities, which could have been confirmed by the auditors through observation and review of data reports and site visits, investigation and hearing logs, should have been dispositive of a finding that the contracts were more than adequately monitored, so that when OSF and OPT managers signaled to DCP that a contractor's performance was satisfactory, that determination was based on sound evidence.

As a final point, we address the Report's narrative around collusion and posit that it is arguably reckless, and certainly wrong, to use the term "risk of collusion" without enlightening the public with respect to how collusive agreements exhibit themselves and, most importantly, what they seek to achieve. Indeed, it appears to the Department that, without that necessary framework, the term may have been used purposely to raise the specter of alliances among companies that transport students and to assail the Department for failing to sense their presence. We say that because despite the Department's efforts to persuade the auditors to veer from hot-button language and articulate a logical, substantive basis for their conclusion, the Report remains very short on the latter.

It falls, then, to the Department to provide required substance, which we do by referencing the United States Department of Justice's "Antitrust Primer."¹ Made clear in that publication is that while collusion may take several forms—chief among them being bid rigging, price fixing and market allocation (as acknowledged in the Report)—the singular objective of collusion is to inflate prices (missing from the Report). And so, it is useful to review the facts against that background. The Report's discussion of collusion falls within the context of *assignment* of contracts. The salient and largely overlooked fact is that the assigned contracts had been awarded in the first instance only after a robust competition among 92 bidders; 52 of that number had not bid before on Department contracts. This truly competitive bidding environment, which ultimately identified 16 low, responsible bidders for award (ten of which were new to the Department), hardly could have furthered the operation of a conspiracy that is the means by which collusive schemers achieve their goal of realizing a tangible benefit.

Further, as we interpret the auditors' position, it is suggested that five awardees' requests for contract assignment or the timing of the requests should have signaled to the Department that something was amiss such that a backwards look at the bidding process and/or a referral to a law enforcement authority would have been warranted. That point of view is without any support inasmuch as no benefit had been achieved through the assignments. Each assignee was a bidder that had submitted higher bids than those that had been awarded contracts. Each assignee, as a condition of the assignment, had to accept the same terms as had the original awardee, including those pertaining to price.

¹ <http://www.justice.gov/atr/public/guidelines/211578.pdf>; See also, http://www.justice.gov/atr/public/guidelines/disaster_primer.htm

Our managers are well aware of the warning signs of collusion and the strict obligation to report any instance where such activity is suspected. Both the Department's contract managers and lead contract officers participate in a mandatory compliance training that includes a presentation from the Office of Special Commissioner of Investigation that reinforces the earliest signs of collusion and the stringent reporting process that must immediately follow. We conclude that the matter at hand was not one of them.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Raymond J. Orlando', written in a cursive style.

Raymond J. Orlando
Chief Financial Officer

NEW YORK CITY DEPARTMENT OF EDUCATION RESPONSE TO FINDINGS AND RECOMMENDATIONS

The following, with the attached cover letter from New York City Department of Education (“Department”) Chief Financial Officer, comprises the response to the City of New York Office of the Comptroller’s (“Comptroller”) draft audit report titled *Audit Report on the Department of Education’s Controls over Non-Competitive and Limited-Competition Contracts* (“Report”).

Recommendation 1. *DOE should establish standards for evaluating the responsibility and capacity of vendors proposed to take over contracts through assignments that are at least as detailed and comprehensive as those that apply to vendors who seek to be awarded contracts.*

Response. The DOE can agree with the recommendation inasmuch as it reflects current practice.

Although assignments are outside the contract procurement process, the DOE conducts vetting procedures similar to those performed with respect to competitive procurements. Thus, assignees must pass a thorough background investigation and a review to determine whether they can satisfactorily perform the obligations they will be assigned.

Recommendation 2. *DOE should ensure that the supporting documentation, including comprehensive checks, performance evaluations (when applicable), and justification for the assignment requests, is obtained and carefully reviewed before approving assignment requests.*

Response. The DOE can agree with the recommendation inasmuch as it reflects the current practice of performing thorough background reviews of potential assignees as well as the Department’s plan to roll out an electronic performance evaluation system in spring 2015 that will assist contract responsibility centers in tracking oversight efforts.

However, we reject the assertion that we do not scrutinize assignments sufficiently. The DOE does not initiate assignments. We consider efficacy of an assignment upon receiving a request from the vendor and existing policies and procedures govern our review. Moreover, it is DOE practice to view an assignment request favorably when the assignee is accepting all terms and conditions of the assignor’s contract, including price. As with any procurement, should any cause for concern present itself during our review of an assignment, it would be addressed in accordance with our established and standard practices.

In reporting on the timing of contract assignments the auditors appear to suggest that the DOE consider employing hard time constraints for assignments. It is, therefore, necessary to say that doing so would effectively hamstring operations and potentially create situations wherein necessary services would not be provided. Our current process considers assignments requested by contractors on a case-by-case basis; decisions are made in the best interests of this agency.

Recommendation 3. *DOE should develop and implement sufficiently detailed written procedures to detect the warning signs of possible collusion. The procedures should include, among other things: the different forms of collusion that could exist; conditions favorable to collusion; and the steps to be taken when the possibility of collusion has been identified (such*

as winning vendors requesting that their contracts be assigned to other vendors that bid on those contracts).

Response. As stated in the attached cover letter, DOE procurement managers are fully aware of the warning signs of collusion and take seriously their responsibility to report concerns about possible collusion in the bidding process to appropriate law enforcement agencies. The managers' performance in that regard would not be enhanced by written guidelines that are already published and readily available on the Justice Department's website.

Recommendation 4. *DOE should establish minimum guidelines for contract monitoring. Such guidelines should include, but not be limited to, a detailed description of the monitoring process, including frequency of contact with a vendor, documentation of monitoring efforts made, and the recommended actions where instances of vendor non-compliance are identified.*

Recommendation 5. *DOE should develop a standard format with standard criteria and ratings for evaluating vendor performance and establish a schedule indicating when such evaluations should be performed.*

Response. For the reasons that follow, the DOE declines to implement Recommendation 4. However, the Department will be implementing Recommendation 5 of its own accord as early as this spring.

DOE's procurement policies and procedures do not prescribe a specifically defined process for conducting monitoring and evaluation largely because the DOE's contracts cover a significant range of business, technical and service activity and contract ownership, a one size fits all approach would not serve the needs of this agency. Clearly, a contract for delivery of Central office supplies cannot, and should not, be managed and monitored in the same way as one for delivery of school-based special education support services. What is important is that the managers responsible for contract implementation engage in necessary oversight and maintain documentation consistent with the Department's Procurement Policy and Procedures so that contractor performance can be evaluated. To facilitate compliance with that standard, the Department has designed, and will soon roll out, an electronic system.

Recommendation 6. *DOE should ensure that performance evaluations are conducted, especially for those contracts seeking renewals or extensions, and that it maintain the results of such evaluations for future reference.*

Recommendation 7. *DOE should monitor the compliance of its contract managers in ensuring that contract monitoring and performance evaluations are conducted in accordance with its PPP Guidelines.*

Response. The DOE can agree with the recommendation inasmuch as it reflects the current practice of considering a vendor's performance when renewing or extending a contract. As stated above, the DOE intends to implement an electronic evaluation system. Among the benefits provided, that system will aid in the oversight of contract management.

Recommendation 8. *DOE should ensure that it submits contracts for registration to the Comptroller's Office in accordance with applicable time frames.*

Response. The DOE will continue its efforts to register contracts timely.