United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on the District of Columbia, Committee on Appropriations, House of Representatives

September 2001

DISTRICT OF COLUMBIA

D.C. Public Schools Inappropriately Used Gas Utility Contract for Renovations

G A O

Accountability * Integrity * Reliability

GAO-01-963

Contents

Letter		1
	Results in Brief	1
	Background	3
	Contract Was Improperly Used and Precluded Competition	5
	Sound Practices Not Followed in Using the Washington Gas Contract	9
	Actions Being Taken by the School System to Address Problems	18
	Conclusion	19
	Recommendations	19
	Agency Comments and Our Evaluation	20
Appendix I	**Scope and Methodology**	23
Appendix II	**Comments from the District of Columbia Public Schools**	25
	GAO Comments	49
Appendix III	**Comments from the Washington Gas Light Company**	50
	GAO Comments	55
Appendix IV	**Comments from the General Services Administration**	58
	GAO Comments	65
Appendix V	**None of the School System's Orders Fell Within Scope of the GSA Contract**	67
	The GSA Contract	67
	School System's Use of the GSA Contract	68
	Contract Did Not Contemplate the Work Ordered	69
	Orders Not Performed by Regulated Utility	71
	Areawide Contracts Limited to Regulated Utility Services	72
	Conclusion	73
Appendix VI	**GAO Contact and Staff Acknowledgments**	75

Tables

Table 1: Date and Value of Individual Orders 10

Figures

Figure 1: Types of Projects Performed Under the Washington Gas Contract 6
Figure 2: Timeline Showing School System's Use of the Washington Gas Contract 13
Figure 3: Percent of Work Awarded to Subcontractors 14
Figure 4: Contracted Work and Contract Adjustments 17

Abbreviations

GSA General Services Administration

G A O
Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

September 28, 2001

The Honorable Joe Knollenberg
Chairman, Subcommittee on the District
of Columbia
Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

By mid-1997, the condition of the District of Columbia's public schools had reached crisis proportions. Most of the schools were over 50 years old and had not been well-maintained. The District was faced with a substantial amount of deferred maintenance, which contributed to safety problems such as fire code violations and leaky roofs.

You requested that we assess the pace and quality of the District's effort to renovate and modernize its public schools—an effort expected to cost $1.3 billion over 10 years. This is the first in a series of reports responding to your request.[1] It focuses specifically on the District of Columbia school system's use of an areawide utility contract for gas and energy management services between the General Services Administration (GSA) and the Washington Gas Light Company (Washington Gas) to renovate the schools. We looked at whether the school system properly used and administered this contract.

Results in Brief

The District of Columbia school system has mismanaged the contract with Washington Gas in making tens of millions of dollars in renovations to the schools. It improperly used the gas utility contract as a vehicle for quickly obtaining a broad range of renovation services. Moreover, there was a complete breakdown in internal controls in the administration and oversight of the contract. By circumventing important management and oversight controls, the school system put the renovation work at considerable risk of improper billing, poor quality work, and high prices.

[1] Subsequent reports will address school system and Army Corps of Engineers renovation efforts, including procedures for dealing with asbestos; modernization efforts (building new schools); and the planned transfer of responsibility for school renovations and modernizations from the Corps of Engineers to the school system. We are also sending a separate letter to GSA concerning its oversight of the use of areawide utility contract.

Specifically, the school system inappropriately used the gas contract to obtain a variety of renovation services. These included painting, carpeting, plumbing, and electrical work; boiler, air conditioning, and heating repairs; playground upgrades; bathroom renovations; and refurbishing of flag poles. None of this work was within the scope of the contract. Nevertheless, Washington Gas marketed its services to the school system and performed these services without regard to the scope of the contract.

Additionally, in carrying out the renovation work, the school system failed to adhere to numerous controls and procedures that were supposed to be in place to ensure that the District obtains the best price and service and to maintain proper relationships between contractors and the government. For example:

- The school system failed to obtain required reviews and approvals from the District of Columbia's Office of Contracting and Procurement, the school system's General Counsel, the City Council, and the Control Board for numerous orders. These oversight processes are designed to ensure that (1) available alternatives have been considered, (2) cost estimates are reasonable, (3) work has been adequately competed, and (4) contracts are legally sound. In fact, review requirements were either ignored altogether or circumvented. For example, school officials combined renovation projects into packages just under the dollar thresholds required for review by the City Council.
- Even though most of the work was readily available from licensed plumbing, heating, electrical, or general contractor firms, school system contracting officials chose not to acquire the services competitively. Instead, all work was awarded on a sole-source basis to Washington Gas as the prime contractor.
- The school system failed to obtain independent cost estimates or conduct pricing analyses for much of the renovation work. Moreover, the school system did not negotiate the contractor's fee. In fact, Washington Gas' fee—which increased from 20 to 25 percent in fiscal year 2001—was applied at a flat rate to all renovation orders, regardless of the size or complexity of the work or the extent of Washington Gas' involvement with the projects. When Washington Gas directed work to an unregulated subsidiary, the school system paid this subsidiary a fee in addition to the fee charged by Washington Gas.
- The school system's contracting officer did not delegate facilities staff with authority to direct changes to renovation work or provide them with guidance on their roles and responsibilities. In the absence of such guidance, facilities staff took on duties normally belonging to the prime

contractor, such as selecting subcontractors and approving their prices, and other duties normally belonging to the contracting officer, such as directing changes in ordered renovation work.

The school system used the Washington Gas contract to make a range of improvements to schools because it was a fast and convenient contract vehicle in a time of great community pressure to make repairs to the District of Columbia's public schools. However, by circumventing important management and oversight controls, the school system put the renovation work at considerable risk of improper billing, poor quality work, and high prices. We found that the school system was overcharged by about $1.9 million because of duplicate billings and billings for work not completed.

These problems raise serious doubt about whether fair and reasonable prices were obtained on the renovation orders and whether the school system should continue use of the gas utility contract. The school system now recognizes these problems and is aggressively pursuing a number of corrective measures, such as discontinuing use of the contract for general construction, reviewing outstanding invoices, competing further work, and hiring inspectors. If successfully implemented, these as well as other longer term planned actions should improve controls over school renovation contracts and ensure that prices are fair and reasonable. We are making recommendations to ensure that these corrective actions are implemented in a timely manner.

We received written comments on a draft of this report from the school system, Washington Gas, and GSA. The school system outlined a number of corrective actions, many of which have already been implemented. Washington Gas took exception to several of our findings concerning the scope of the contract, fees, and billing issues. GSA did not take exception to our findings regarding the school system's lack of internal controls and agreed that some of the work was outside the scope of the contract. However, GSA did not agree with our position that none of the work performed by Washington Gas was in the contract's scope. The agencies' comments, as well as our detailed response, appear in appendixes II, III, and IV.

Background

In response to public concerns about safety and maintenance, the District of Columbia undertook a major effort to renovate and modernize its public schools in 1998. It has budgeted $1.3 billion for the renovations from fiscal year 1998 through 2007.

The school system began this effort by entering into a Memorandum of Agreement with the Army Corps of Engineers. The agreement was for engineering, procurement, and technical assistance to ensure that construction contracts were awarded and managed so that schools could open in the fall of that year. In the Fiscal Year 1999 District of Columbia Appropriations Act, Congress authorized the Corps of Engineers to provide the school system with engineering, construction, and related services.

Until fiscal year 2001, the District of Columbia's Office of Contracting and Procurement was the central authority for procurements made by the various city agencies, including the school system. In October 2000, the school system obtained its own procurement authority. It assumed responsibility for about a third of the school renovation projects on the fiscal year 2001 capital projects list, while the Corps of Engineers was responsible for the remainder. To obtain renovation services for the repairs under its purview, the school system has almost exclusively used a GSA areawide public utility contract with Washington Gas for gas, gas transportation, and energy management services.[2]

GSA entered into the contract with Washington Gas, a regulated public utility, without competition because the company has an exclusive franchise by law to provide certain utility services in its service area. The "energy management" services available from the contract could, if the contractor has these services on file with the Public Service Commission, include services intended to provide energy savings, efficiency improvements, energy audits, conservation measures such as lighting control and boiler control improvements, and water conservation device installation.

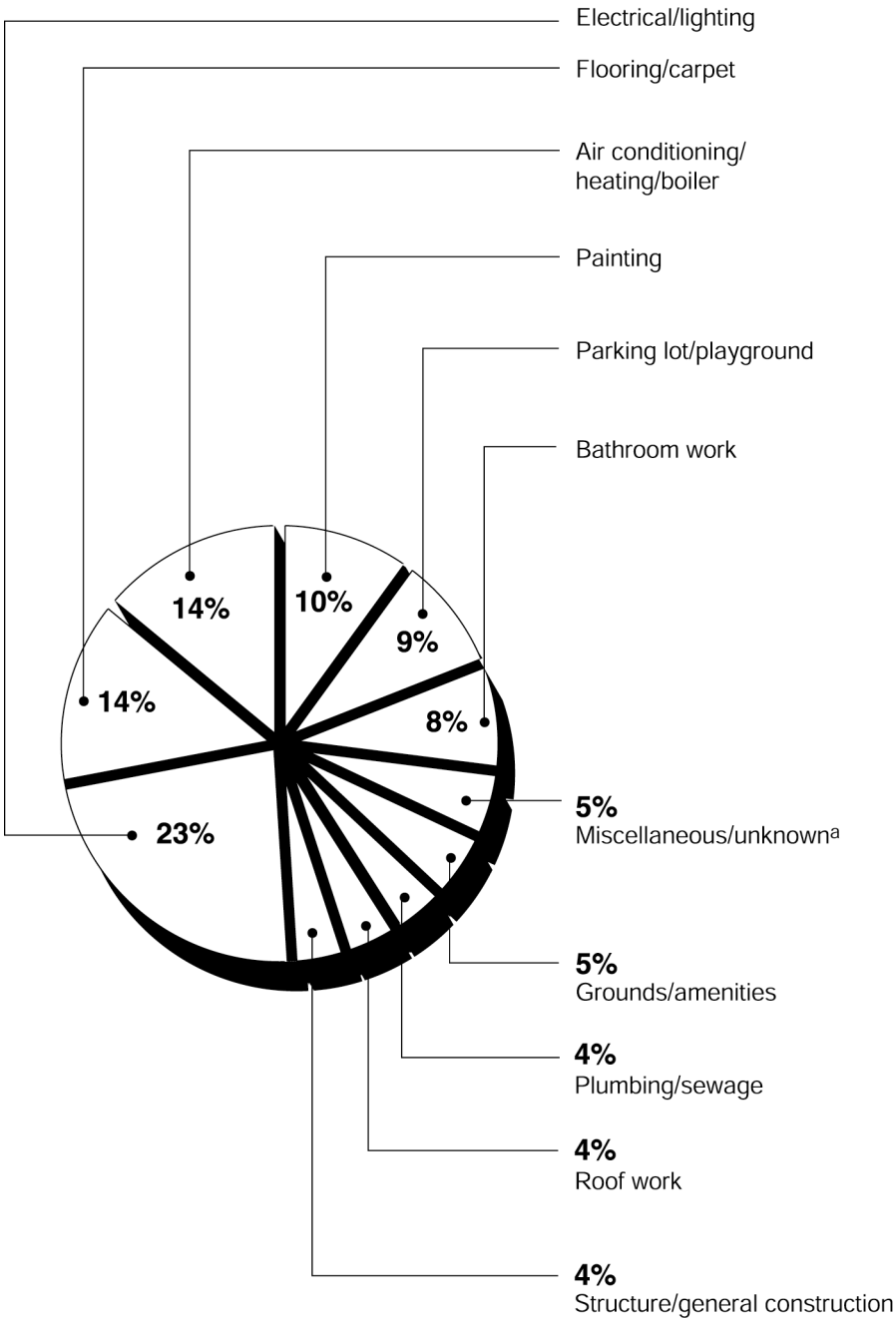
[2] GSA has statutory authority to make its utility service contracts available to the District of Columbia government. GSA has authorized the District to use the Washington Gas areawide utility contract.

Contract Was Improperly Used and Precluded Competition

The school system improperly used the gas utility contract as a vehicle for obtaining a broad range of facility improvements and maintenance work. In doing so, it precluded competition by awarding all of the work on a sole-source basis to Washington Gas as the prime contractor. The types of services provided under the Washington Gas contract could have been performed by licensed plumbing, heating, electrical, or general contractor firms.

The GSA contract with Washington Gas is limited to the provision of regulated gas utility and energy management services. In contrast, our analysis of completed projects from August 2000 through March 2001 shows that the school system has paid Washington Gas $25 million for a range of projects, including painting, carpeting, and electrical work; boiler, air conditioning, heating, and structural repairs; bathroom, auditorium, and swimming pool renovations; and flag pole refurbishments. Figure 1 shows the major categories of services.

Figure 1: Types of Projects Performed Under the Washington Gas Contract



[a]We could not categorize the type of work when a proposal included a variety of projects or when it did not provide sufficient detail for us to make a determination.

Based on our reading of the contract, the governing regulation, and discussions with GSA and the District of Columbia Public Service Commission, we do not believe these services were within the scope of the GSA contract because none of the work or services were regulated utility services or otherwise on file with the Public Service Commission. Appendix V contains details on our analysis.

The school system first started using the GSA areawide contract with Washington Gas in the last months of calendar year 1997 to provide emergency boiler repairs and temporary boiler rentals. These services were outside the scope of utility services described in the contract. In 2000 and 2001, the range of services expanded to include many other types of projects ordered by the school system, all of which were also outside the contract's scope. Washington Gas marketed its project management services to the school system and performed these services without regard to the scope of its contract with GSA.

The school system's chief contracting officer explained to us that the Washington Gas contract was used because it was an existing source of supply that could be quickly implemented to keep the schools open. In contrast, according to the contracting officer, the typical lengthy procurement process using solicited competitive bids would have prevented the timely acquisition of the needed work and services. The contracting officer considered the GSA contract to be available for use because the type of work was, in the contracting officer's view, energy-related.

Other contracting options were available to the school system. For example, the school system could have used the Army Corps of Engineers to perform school renovations. The Corps carried out most of the renovation work for the school system from fiscal years 1999 through 2001. Further, the Corps had alternative contract vehicles for which it had well-defined statements of work, independent cost estimates, and negotiated contractor fees. The then-Chief Facilities Officer informed us that he was reluctant to give additional work to the Corps, however, because he believed the Corps processes and procedures were too slow given the crisis atmosphere and pressure from the community to carry out renovations quickly.

GSA Concerns With School System's Use of the Contract

After we raised questions about the school system's use of the Washington Gas contract, the GSA contracting officer responsible for the contract sent a May 2001 letter to the school system's contracting officer stating that (1) the contract is not intended to provide general facility improvements and

maintenance that are not energy-related and (2) continued use of the contract for services outside the scope and intent would jeopardize the school system's ability to continue using the contract. The GSA contracting officer was unaware of the scope of services for which the school system was contracting with Washington Gas because neither the school system nor Washington Gas had reported use of the contract to GSA as required.

An Assistant General Counsel at the General Services Administration also told us that many of the construction services provided by Washington Gas to the school system clearly fell outside the scope of the areawide contract because these services dealt with general construction as opposed to gas, gas transportation, or energy management services. Further, the Counsel explained that energy management services must result in documented energy cost savings or a reduction in energy usage.

To ensure that the contract is properly used in the future, the GSA contracting officer referred the school system's contracting officer to GSA guidance on areawide utility contracts.[3] However, we believe this guidance in insufficient and unclear. For example, the guidance could be interpreted as allowing the school system to order any service Washington Gas, or more precisely, its subsidiaries and subcontractors, might have to offer.[4] It also lists many energy management projects that are not regulated utility services that could be provided under areawide contracts, such as window and air conditioning replacements.

We are sending a separate letter to GSA detailing our concerns with its guidance and providing recommendations on improving oversight and guidance on areawide utility contracts.

[3] The guides are the *Utility Areawide Guide* and *Procuring Energy Management Services with the Utility Areawide Contract*.

[4] Both guides state, for example, "The Areawide Contract can be used to procure any type of service that a utility has to offer, from straightforward electric, gas, and steam service to water management, energy management, and demand-side management projects with guaranteed savings. In short, if your local utility services provider offers it, your Agency can procure it quickly and easily using the GSA Areawide Contract."

Sound Practices Not Followed in Using the Washington Gas Contract

Our review also revealed serious breakdowns in internal controls and gross shortcomings in the way the work under the gas utility contract was ordered and handled. The school system failed to adhere to review and oversight requirements. School system personnel inappropriately chose a select group of subcontractors to perform the work. The school system did not take steps to obtain fair and reasonable prices and failed to perform adequate and effective contract administration. The absence of effective controls and oversight has put the $32.9 million already spent on the renovation work—as well as some $10.2 million in outstanding orders—at considerable risk of improper billing, poor quality work, and high prices.

Management and Oversight Practices Fundamental to Successful Contracting

Establishing and following strong management and oversight practices is critical to successful contracting efforts. To ensure that they get the best deal possible agencies should fully consider risks as well as alternative solutions. They generally should compete the work they want done. In noncompetitive contracting situations, particular care needs to be taken to ensure fair and reasonable prices.

Moreover, once a contract is awarded, agencies need to take steps to effectively oversee their contractors. For example, they should have effective plans for assuring the quality of the work performed by the contractor. When these controls are not in place, agencies assume undue risk and could end up paying more than they should.

The District of Columbia has controls in place to ensure that it obtains fair and reasonable prices and to provide contract oversight. For example, District agencies are required to perform procurement planning and conduct market surveys to promote and provide for competition for supplies and services. In addition, until fiscal year 2001, the District of Columbia's Office of Contracting and Procurement was required to review contracting actions (including the school system's) totaling $50,000 or more. Currently, the school system's Office of General Counsel is required to review contract actions of $25,000 or more. Among other things, these reviews require evidence that independent cost estimates have been performed, work has been competed or justified as a sole-source procurement, and a legal review has been performed.

School System Did Not Adhere to Review and Oversight Requirements

The school system did not adhere to a number of oversight requirements in carrying out the renovation work. Such requirements are in place to ensure that the District obtains the best price and service, contracts are legally sound, payments to contractors are justified, and work has adequately been competed. Specifically:

- The school system did not obtain required reviews and approvals from the District of Columbia's Office of Contracting and Procurement. When the school system began using the Washington Gas contract, it had not yet been granted it own contracting authority. As such, it was required to submit actions totaling $50,000 or more to the Office of Contracting and Procurement up until October 2000. This review considered such things as the cost of the work, whether the contract was legally sound, whether the work was competed, and whether sole-source procurements were adequately justified. However, only 2 of 20 actions that were subject to this review—representing $1.3 million of $14.9 million—were submitted.
- The school system did not obtain required approvals from its General Counsel. When the school system obtained its contracting authority in October 2000, the school system's guidance required contract actions totaling $25,000 or more to be submitted to the General Counsel for review and approval. However, the contracting officer ignored this requirement and did not submit $28.2 million of orders that met this review threshold. General Counsel officials told us that they were unaware of the extent to which the school system was using the Washington Gas contract.
- The school system bypassed the City Council approval process. District of Columbia law requires City Council approval of any proposed District government contract (including orders under an existing contract) having a value of more than $1 million. The proposed contract is to be accompanied by a summary that includes a description of the selection process and a certification that the proposed contract is legally sufficient and has been reviewed by the District of Columbia Office of the Corporation Counsel. The school system bypassed this process by grouping about $43 million of renovation work into orders of $950,000 each—just under the $1 million threshold. Sometimes, the school system issued as many as three such orders in a single day. Table 1 details the value and dates of the specific orders.

Table 1: Date and Value of Individual Orders

Date of order	Value of order
February 10, 1999	$200,000
April 3, 1999	$650,000
May 21, 1999	$ 61,836
August 18, 1999	$600,000
September 10, 1999	$450,000
September 29, 1999	$700,000
November 8, 1999	$900,000
January 21, 2000	$500,000

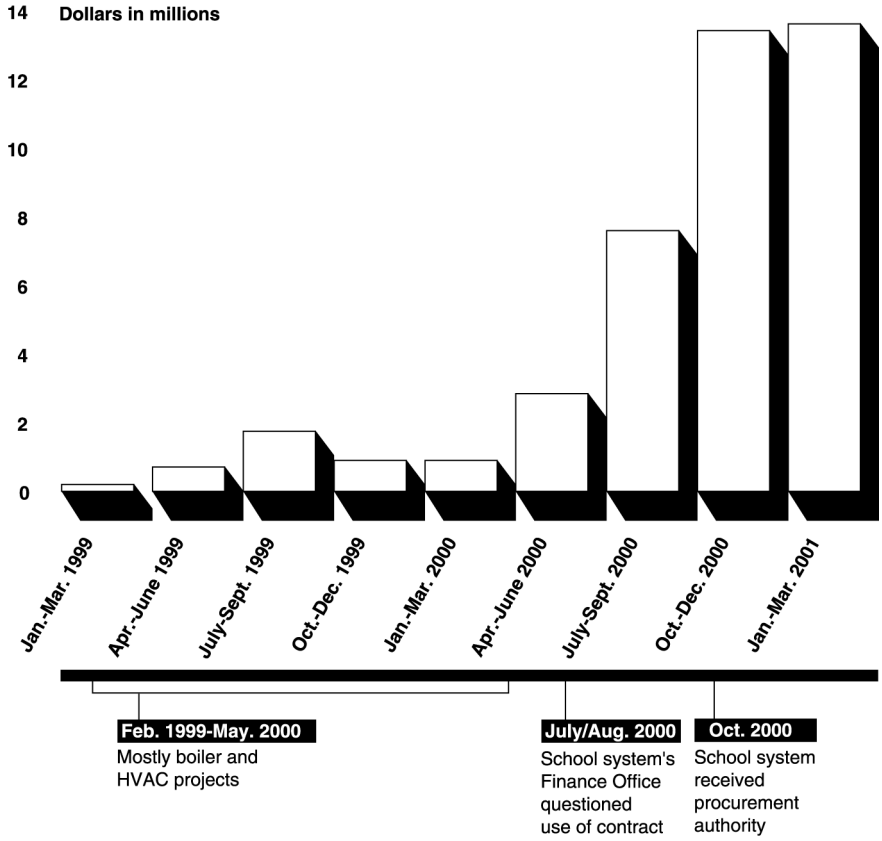
Date of order	Value of order
March 02, 2000	$400,000
May 18, 2000	$950,000
June 22, 2000	$950,000
June 30, 2000	$950,000
August 8, 2000	$950,000
August 8, 2000	$950,000
August 10, 2000	$950,000
August 24, 2000	$950,000
August 24, 2000	$950,000
September 12, 2000	$950,000
September 27, 2000	$950,000
September 27, 2000	$950,000
October 17, 2000	$950,000
October 17, 2000	$950,000
October 17, 2000	$950,000
November 16, 2000	$950,000
November 16, 2000	$950,000
December 5, 2000	$400,000
December 6, 2000	$950,000
December 13, 2000	$950,000
December 13, 2000	$950,000
December 13, 2000	$975,000
December 13, 2000	$975,000
December 20, 2000	$975,000
December 20, 2000	$975,000
December 20, 2000	$975,000
December 22, 2000	$950,000
January 11, 2001	$950,000
January 11, 2001	$950,000
January 11, 2001	$950,000
January 25, 2001	$950,000
January 25, 2001	$950,000
January 25, 2001	$950,000
January 30, 2001	$950,000
January 30, 2001	$950,000
February 8, 2001	$950,000
February 12, 2001	$950,000
February 12, 2001	$950,000
February 12, 2001	$950,000
March 8, 2001	$850,000
March 8, 2001	$950,000
March 8, 2001	$425,000
March 21, 2001	$775,000
TOTAL	**$43,136,836**

- Required approvals from the District of Columbia's Financial Responsibility and Management Assistance Authority were not obtained. The authority, also known as the Control Board, was established in 1995 to repair the District's failing financial conditions and to improve the effectiveness of its various entities.[5] The Board is responsible for reviewing and approving certain contracts awarded by the District. One criterion triggering review by the Board is contracts awarded on a sole-source basis. Officials on the Board told us that they should have reviewed all of the orders placed under the Washington Gas contract because they consider the contract to be a sole source procurement. They told us that they had reviewed only one of the orders, for emergency boiler repairs in 1997. After that time, the school system did not forward any subsequent orders under the contract to the Board for review.

  An additional oversight mechanism within the school system is the Office of Finance, which is concerned with the District's financial health and approves funding for contract orders as well as payments to contractors. The school system's Office of Finance questioned the use of the Washington Gas contract in July and August 2000 because of the large number of orders being made to Washington Gas. However, it approved orders after receiving assurances from the contracting officer that the orders were justified. We believe these assurances were insufficient because they did not show that the work was within the scope of the contract and they were not supported by justification for using a sole-source contract or pricing analyses. As figure 2 illustrates, the school system substantially increased the value of the orders once the Office of Finance continued approving orders based on the assurances of the contracting officer.

[5] The Board is to be dissolved on September 30, 2001.

Figure 2: Timeline Showing School System's Use of the Washington Gas Contract



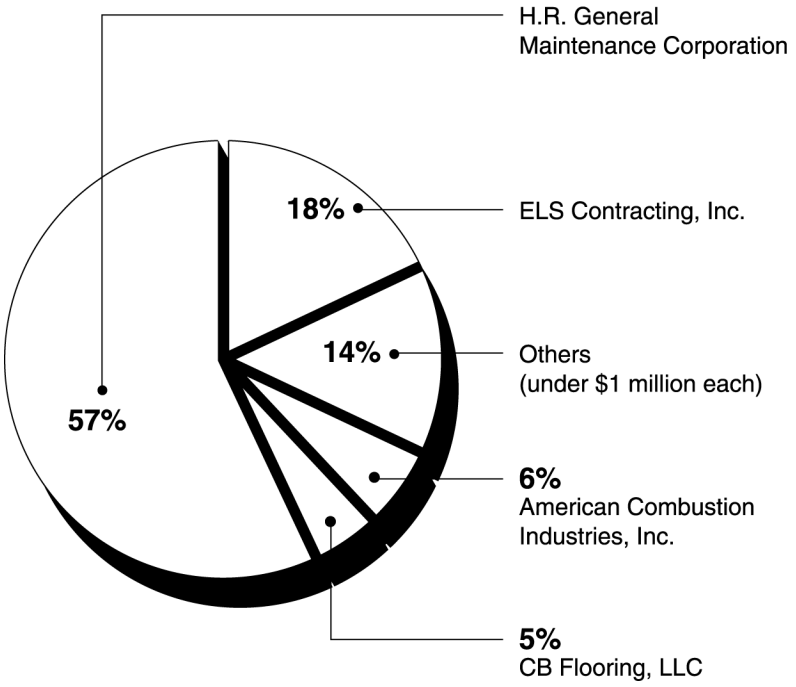
HVAC Heating, ventilation and air conditioning

By not following oversight requirements, the school system put the renovation work at considerable risk of improper billing and high prices. In fact, we found that the school system was overcharged by about $1.9 million because of duplicate billings and billings for work not completed. We found 11 cases where Washington Gas had billed the school system twice for the same work. These duplicate billings totaled $243,174. For example, Washington Gas billed the school system twice for $18,250 for painting performed by a subcontractor at M.M. Washington Senior High School and for $62,000 for lighting work at Aiton Elementary School. In other cases, Washington Gas billed the school system for the full cost of the work before subcontractors had completed the work. These improper billings totaled about $1.7 million.

School System Inappropriately Selected Subcontractors to Perform Work

All of the work performed by subcontractors under the Washington Gas contract could have been awarded on a competitive basis. However, school system officials chose to rely for the most part on a select group of subcontractors to perform the work. Subcontractors were frequently preselected based on their area of expertise. For example, if carpeting was needed, a certain company usually received the work. Another company was usually called to do painting, a third for electrical repairs, and a fourth for general construction. Figure 3 shows the amount of work awarded to these four subcontractors from August 2000 through March 2001.

Figure 3: Percent of Work Awarded to Subcontractors



School System Did Not Take Steps to Ensure That Prices Were Fair and Reasonable

Reliable cost estimates and pricing analyses are central to determining whether the price of a product or service is fair and reasonable. As such, they are required as part of the District's contract oversight requirements. Nevertheless, we found that independent cost estimates and pricing analyses were prepared for almost none of the orders under the Washington Gas contract. The school system relied on its facilities staff, not contracting officials, to conduct these reviews, but the staff did not do them.

Additionally, the school system did not determine that Washington Gas' prices and fees for the renovation work were fair and reasonable, as required, or negotiate the fee charged by Washington Gas. The Washington Gas contract does not establish prices or fees for any of the work ordered by the school system. Rather, prices were to be negotiated between the contractor and the school system.

In 1999 and 2000, Washington Gas generally charged the school system a 20-percent fee on each project conducted under the contract. The fee included services such as project management, engineering design, inspection services, and administrative services, as well as overhead and profit. The fee was not negotiated. In fact, it applied to all renovations orders regardless of size or complexity of work and regardless of the extent of Washington Gas' role in individual projects.

Washington Gas increased its fee at the beginning of fiscal year 2001 from 20 to 25 percent because the school system was requesting additional work and larger projects. This increase was also not negotiated, and the 25-percent fee was applied as a flat rate to all projects. The school system's contracting officer was unaware that the fee had been raised until we notified her. The then-Chief Facilities Officer raised concern about the fee with Washington Gas and requested that it be lowered. However, no action was taken.

Lastly, for much of the boiler work, the school system paid a fee to a subsidiary of Washington Gas (American Combustion Industries, Inc.), in addition to the 25-percent fee charged by Washington Gas. In some cases, as a result of this situation the school system paid fees of up to 50 percent—with half going to Washington Gas and half to its subsidiary.

Because the school system failed to use competitive procedures, neglected to prepare reliable cost estimates and pricing analyses, and failed to negotiate fees, it had no way of knowing whether prices were fair and reasonable. In fact, the school system has paid Washington Gas a total of $6 million in fees for very limited program management services. For the most part, only 4 employees at Washington Gas worked on school renovation-related efforts. One employee served as a liaison with the school system; another prepared the listings of work to be completed and

informed the subcontractor to begin work; a third inspected the work; and a fourth ensured that the subcontractors were paid.[6]

Further, on many projects, Washington Gas did not provide all of the services that, according to Washington Gas officials, formed the basis for its fee. For example, Washington Gas collected $74,448 in fees for a $297,795 parking lot and playground renovation project at Hendley Elementary School. For its 25-percent fee, Washington Gas just prepared the listing of renovation work to be completed, told the subcontractor to begin work, inspected the work, and paid the subcontractor.

School System Did Not Adequately Administer the Contract

Facilities staff took on duties normally belonging to the prime contractor and contracting officer without any authority to do so. Specifically, school system facility staff who did not have contracting authority were intimately involved in selecting subcontractors, approving proposed prices, making changes to the work, assuring the quality of the work performed, and approving invoices for payment. For example:

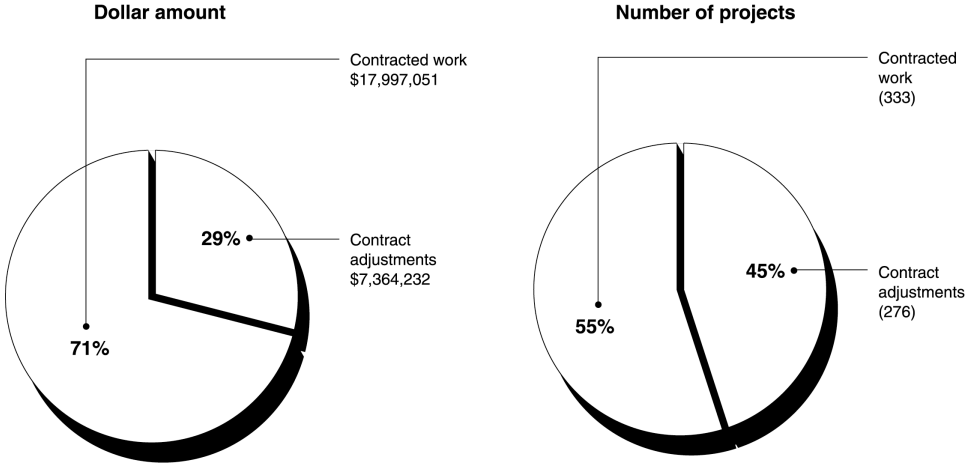
- The prime contractor normally selects subcontractors, approves their prices, and defines their scopes of work. In this case, however, the school system facilities staff—not Washington Gas, the prime contractor—solicited and approved subcontractor proposals. At times, these proposals were vague and broad in scope, making it difficult to determine how prices were established and approved. For example, one proposal, for drain cleaning at "various D.C. public schools," offers to snake and clean various drains for a not-to-exceed price of $100,000. The schools were not listed, nor was the extent of the work detailed. A $25,421 proposal to install carpet in five rooms at Shaw Junior High School did not indicate the area of carpet; therefore, a realistic evaluation of the price could not be made.
- District contracting officers normally ensure that procurements of supplies, services, or construction conform to the quality and quantity requirements of the contract. In this case, however, the facilities staff performed quality assurance without any official delegation of responsibility to do so. Many times, the facilities official who had selected the subcontractor and approved the subcontractor's work and price also inspected the work and authorized payment. Furthermore, many

[6] The inspector is a consultant to a Washington Gas subsidiary, American Combustion Industries, Inc. The consultant was also responsible for inspecting the work of this firm, which performed much of the boiler repairs for the school system. We plan to further address quality assurance issues in a future report.

inspections were not well-documented, and for some projects, facilities staff approved completed work by simply signing the subcontractor's invoices without indicating that the work had been inspected and deemed acceptable.

- Facilities staff directed Washington Gas to adjust contracted work for 276 projects, totaling $7.4 million, between August 2000 and March 2001. These projects comprised about 29 percent of the $25.4 million paid to Washington Gas during that time period.[7] (See fig. 4). Nevertheless, the contracting officer did not officially modify contracted work, as required, to reflect these changes. In fact, the contracting officer, who was responsible for making contract modifications, was unaware of the changes.

Figure 4: Contracted Work and Contract Adjustments



Contracting officials sometimes provide program staff with limited authority to perform such duties as monitoring technical performance and reporting any potential or actual problems to the contracting officer. In these cases, the contracting officer formally designates this authority, and in doing so, provides the program staff with detailed guidance on what these duties entail and do not entail. In particular, the guidance stresses

[7] Our analysis of Washington Gas invoices and subcontractor proposals and invoices showed that work totaling only about $107,453 of the $7.3 million in contract adjustments was classified as "emergency" work. These projects included electrical work, drain work, and lighting repairs. According to facilities staff, other adjustments to contracted work were made in response to calls from school principals or community leaders requesting that specific projects at certain schools be completed quickly.

that program staff are not empowered to authorize, agree to, or sign any modifications to the work. However, for work done under the Washington Gas contract, the school system's contracting officer did not delegate this authority to the facilities staff or provide them with guidance about their roles and responsibilities.

Actions Being Taken by the School System to Address Problems

School system officials have recognized that the renovation work was not properly managed and informed us that they are aggressively pursing a number of corrective actions related to the Washington Gas contract:

- The school system has discontinued use of the Washington Gas contract for all projects that fall outside the school system's legally-defined scope of the contract. Further, all outstanding invoices for completed work will be paid contingent on Washington Gas subcontractors submitting proper documentation.
- For any remaining safety-related work directed to Washington Gas, the request for services will include a statement of work that the Washington Gas company will use to develop proposals and compete the work.
- The school system will explore appropriate actions, including possible legal recourse against Washington Gas for overpayments under the contract.
- The practice of bundling projects in groups of $950,000 will be discontinued.

School system officials also advised us that, in the longer term, they are taking a number of steps to strengthen contract review and administration in general:

- All contract orders are being assigned to competitively-selected contractors.
- The school system has hired a team of contracting staff with expertise in construction. The team is responsible for assuring that well-defined proposals and independent cost estimates are prepared and for negotiating contractors' fees.
- Limited contract administrative functions will be provided to the facilities staff.
- The school system's General Counsel will review all construction and renovation contracts of $25,000 and above. The Office of General Counsel will determine whether available contracting alternatives have been considered, cost estimates are reasonable, work has been adequately completed, and contracts are legally sound.
- All contract orders will be evaluated to ensure that they fall within the scope of the contract and that appropriate types of funding are used for

each action. Participants in this review now include the Office of Contracts and Acquisitions, the Office of the General Counsel, the Office of Facilities Management, and the Office of the Chief Financial Officer.

- The Office of Facilities Management now prepares government estimates and scopes of work for all construction work exceeding $5,000.
- The school system has hired construction inspectors to ensure compliance with contract documents and quality requirements. Final inspection is required prior to making the final payment to the contractor. The school system is also establishing an Office of Compliance to monitor the overall facilities contracting process.
- The Finance Office is reviewing the revised contract review procedures to see if improvements can be made.
- The Board of Education will now review all contracts over $100,000.

Conclusion

The school system was facing a crisis situation when it undertook its school renovation effort in 1997, and it was under considerable pressure to quickly get the schools upgraded and in safe condition. Obtaining services under GSA's contract with Washington Gas may have offered a quick and convenient way of fixing the school system's immediate problem. However, this approach was inappropriate because it went well beyond the scope of the contract. It also undercut competition and was used without determining that prices were fair and reasonable. Therefore, we have serious doubts that the school system has received the best value for its money. Moreover, the contract was administered without regard to management and oversight controls that are in place to ensure that proper procurement practices were followed and that the work performed was of good quality.

Unless actions are taken to improve controls over the actions remaining under the Washington Gas contract and procurement planning for future school renovation contracts, the hundreds of millions of dollars being spent to fix the schools—including the $10.2 million in outstanding orders under the Washington Gas contract—will remain at risk to the same problems. The measures the school system is planning should help mitigate this risk. However, the school system will need to make a concerted effort to ensure that they are quickly and effectively implemented and sustained throughout future renovation contracts.

Recommendations

We recommend that the Superintendent of the District of Columbia School system ensure that the school system's planned corrective actions are implemented in a timely manner.

In addition, we recommend that the Superintendent ensure that the contracting officer complies with District of Columbia procurement procedures in contracting for the remaining school renovation work, including procurement planning, use of competitive acquisition procedures, and ensuring that contractor prices and fees are fair and reasonable.

We also recommend that, specifically regarding the Washington Gas contract, the Superintendent direct the contracting officer to terminate, if cost-beneficial, outstanding orders that are beyond the scope of the contract and properly procure the replacement work through available government sources or competitive procedures.

Lastly, we recommend that the school system's Chief Financial Officer take a more active role in the contract review process. Because this official is concerned with ensuring the District's financial health, the official should notify appropriate authorities about irregular contracting activities that may be taking place.

Agency Comments and Our Evaluation

The District of Columbia Public Schools, Washington Gas, and GSA provided written comments on a draft of this report. The comments, along with our responses, appear in appendixes II, III, and IV, respectively.

The school system did not take exception to our findings or recommendations. It noted that many organizational and procedural changes have occurred over the past year to correct the problems identified in the report. We have incorporated references to these actions in the report where appropriate. In our future work on school renovation and modernization efforts, we will evaluate the actions taken by the school system.

The school system stated that it has discontinued use of Washington Gas for projects that fall outside the legally-defined scope of the contract. However, we remain concerned that the legal definition of the scope of work applied by the school system is not consistent with our interpretation of the Washington Gas contract. As discussed in our comments on GSA's response to our report (appendix IV), as well as our analysis presented in appendix V, in our opinion none of the work Washington Gas has performed for the school system is within the scope of the contract.

In an e-mail follow-up to its written response, the school system stated that it has not canceled any of the outstanding orders for which purchase

orders had been issued because the majority of the work was deemed necessary for life/health/safety requirements or was critical to the opening of schools in the fall of 2001. In addition, the school system stated that there was insufficient time to stop the work in progress without incurring substantial penalties and potential liability. Further GAO comments on the school system's response appear in appendix II.

Washington Gas took exception to our findings dealing with the scope of services, its role as a prime contractor, the fee charged under the contract, and billing issues. For example, it stated that we were incorrect in our assertions that fees were not negotiated and that overcharges occurred.

There is no evidence in school system's or Washington Gas' files, or from discussions with any of the officials involved with this contract, that the fees were ever negotiated. On the issue of overcharges, in an August 13, 2001, letter to the school system's superintendent, Washington Gas stated that it had verified that duplicate billings did occur. It intends to credit the school system for the overbillings in its June 2001 invoice; however, as of the time of this report, neither the invoice nor the credit had been submitted to the school system. In a document provided to us, Washington Gas indicated that duplicate billings totaled $482,915. Given these facts, we do not understand how Washington Gas can assert that overcharges did not occur. Further GAO comments in response to Washington Gas' letter appear in appendix III.

GSA did not take issue with our findings that the school system improperly used the Washington Gas contract to accomplish general construction or to our findings with regard to internal contracting practices in the school system.

However, both GSA and Washington Gas disagreed with our position that none of the renovation work performed by Washington Gas was within the scope of the areawide utility contract. GSA pointed out that one of the exceptions to the Competition in Contracting Act provides that other than competitive procedures may be used when a statute expressly authorizes or requires that the procurement be made from a specified source. GSA stated that the Energy Policy Act provides such authorization. We stand by our position that work performed on a sole-source basis under areawide utility contracts must be regulated by a public regulatory authority, and that this was not the case for any of the work ordered by the school system from Washington Gas. We provide additional details on this issue in our response to GSA's comments in appendix IV. We will soon issue a report to GSA addressing its guidance on areawide utility

contracts and its oversight of the school system's use of the Washington Gas contract.

We are sending copies of this report to other interested congressional committees; the Administrator, General Services Administration; the Mayor of the District of Columbia; the Chair of the City Council; the District of Columbia Board of Education; the Chief Financial Officer, District of Columbia Public Schools; the Superintendent of District of Columbia Public Schools; and the Vice President and General Counsel, Washington Gas Light Company.

If you have any questions regarding this report, please contact me on (202) 512-4181. An additional contact and staff acknowledgments are listed in appendix IV.

Sincerely yours,

David E. Cooper, Director
Acquisition and Sourcing Management

Appendix I: Scope and Methodology

To identify the review process for using the Washington Gas contract, we reviewed the District of Columbia Code; title 27 of the District of Columbia's Municipal Regulations; and policies and procedures issued by the Office of Contracting and Procurement and DCPS. We held discussions with officials in the Office of the Chief Counsel, District of Columbia; the Control Board; the Office of Contracting and Procurement; and the school system's General Counsel, Office of Finance, and Office of Contracts and Acquisitions.

To determine whether the work was within the scope of the GSA areawide contract, we reviewed the contract and applicable regulations. We analyzed billing records from Washington Gas to DCPS for about 600 projects from August 2000 through March 2001 and checked these records against subcontractor proposals and invoices to determine the types of services obtained. We also interviewed the contracting officer in GSA's Public Utilities/Energy Center of Expertise and the GSA Assistant General Counsel; officials in the District of Columbia Public Service Commission; the Office of Contracting and Procurement; the school system's General Counsel; the former Chief Facilities Officer; and the current Deputy Directors in the Facilities Division.

To assess the internal controls in place to administer the contract within the Facilities Division, we reviewed records maintained in the Division and the school system's contracting and finance offices. We held discussions with officials in the District of Columbia Office of Contracting and Procurement; the former Chief Facilities Officer and the current Deputy Directors; the project managers in the Facilities Division; the school system's contracting and finance offices; and the Washington Gas Light Company.

To evaluate the fee charged by Washington Gas for services provided under the contract, we analyzed Washington Gas's billing records to the school system as well as subcontractor proposals and invoices. We interviewed and obtained information from officials at Washington Gas and the school system's contracting, facilities, and finance offices.

To identify duplicate billings, we identified projects for which Washington Gas had billed the school system twice where the dollar amount, school, and service were identical. We considered double billings to have occurred when we could find only one proposal for the 2 billings. To identify cases where Washington Gas had billed the school system for work not completed, we reviewed the company's official files to determine whether progress payments had been made or whether the subcontractor

submitted invoices. In addition, we checked to see whether the subcontractor had been paid by Washington Gas. Washington Gas' normal policy was to pay the subcontractors before billing the school system.

To determine whether contracted work was adjusted, we compared the listing of projects compiled by Washington Gas under each order under the contract with the listing of projects accompanying Washington Gas' bill to the school system for each specific order. When projects were billed but not listed on the original order, we considered them to be contract adjustments.

We performed our work from March through August 2001 in accordance with generally accepted government auditing standards.

Appendix II: Comments from the District of Columbia Public Schools

Note: GAO Comments supplementing those in the report text appear at the end of this appendix.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS
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www.k12.dc.us

September 21, 2001

David E. Cooper
Director
Acquisition and Sourcing Management
United States General Accounting Office
441 G Street, NW Room 4A48
Washington, DC 20568

RE: Revised DCPS Response to GAO draft report, GAO-01-963

Dear Mr. Cooper:

Please find enclosed our revised response to the GAO's draft report *District of Columbia: District of Columbia Public Schools Inappropriately Used Gas Utility Contract for Renovations.* This version incorporates responses to your follow up questions to our initial submission regarding recoup of funds for which DCPS was improperly double billed by Washington Gas, and the reassignment of unexecuted work from Washington Gas. The new information is reflected in changes to responses on pages 2 and 5.

Please don't hesitate to contact me at (202) 442-5618 if you have any questions about the revisions or need additional information.

Thank you.

Sincerely,

Louis J. Erste
Chief Operating Officer

Enclosure

Lje/ms

Children First

Agency Comments

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Response to Draft GAO Report:

D.C. Public Schools Inappropriately Used Gas Utility Contract for Renovations

DCPS' response to the draft report is organized as follows: The report lists actions being taken by DCPS to address the problems identified in the report. This response elaborates on several of these actions and lists additional actions in Part I, where they are organized according to the GAO's major findings. Part II responds to the report's recommendations and Part III lists changes or revisions DCPS is requesting to the draft report.

I. SPECIFIC FINDINGS OF THE GAO REPORT & RELATED ADDITIONAL ACTIONS BEING TAKEN BY DCPS TO RECTIFY THEM

As the GAO report states, the improper use of the Washington Gas contract occurred during a time period in which the school system was under significant pressure to expedite a long backlog of needed renovations to schools and ensure that school buildings were ready in the opening of school. During the time in question, the school system and offices responsible for the actions also were experiencing substantial upheaval and have undergone significant change. Many of the changes have taken place within the last year.

In the nine months prior to being alerted of the problems identified in the report, DCPS received a new superintendent, who installed an entirely new senior management team, including a Chief Operating Officer and a team of experienced new managers to support the facilities department, and it regained its contracting authority as well as authority over its procurement staff, which until October 2000 had been overseen by the city's Office of Contracting and Procurement. This period also saw the reinstatement of the Board of Education, which had been disempowered since 1997.

Additional change followed in the months after the GAO's initial findings: the school system terminated the Chief Facilities Officer who had been responsible for the work conducted under the Washington Gas contract, replaced its Chief Financial Officer and senior financial management staff, and hired experienced specialists to join a team dedicated solely to managing contracting and procurement for the system's construction and renovation projects. Senior management also immediately implemented a number of new procedures and processes in response to the GAO findings. Some of these are mentioned in the GAO report, additional responses are detailed below:

FINDING 1: Contract was improperly used and precluded competition

The report states that DCPS plans to discontinue use of Washington Gas and Light (WGL) as a contracting source for construction projects, with the exception

of ongoing safety work, and that all invoices will be reviewed and paid if they meet contract specifications (p.18). This should be amended:

- the school system has discontinued use of WGL for all projects that fall outside the strict definition of the legally defined scope of the WGL contract. All unexecuted work will be assigned to competitively selected contractors once auditors have completed a comprehensive review of the work orders that were sent to WGL by contractors without formal authorization by DCPS to determine whether any were executed without authorization and DCPS staff can determine the exact number of those that must be reassigned.

Further:

- The school system is making payment for completed work contingent on WGL contractors submitting for review proper documentation for all work for which such documentation has not been yet been provided.

- DCPS has not yet been reimbursed for any of the items for which the GAO determined it had been improperly double billed. WGL has hired an independent auditor to investigate the GAO's findings in this regard and has said that it will withhold reimbursements until auditors have verified the findings.

- DCPS has not yet received the adjustments to the June invoice promised by WGL in its August 13th letter. WGL officials have explained that the determination of the size of the adjustment requires completion of the audit referenced above.

FINDING 2: Sound practices not followed in using the Washington Gas contract

A. **School system did not adhere to review and oversight requirements.**

The report stated that all construction and renovation procurements greater than $25,000 now are being reviewed by the Office of the General Counsel (OGC). This should be expanded further to say that:

- All construction and renovation procurements referred to OGC for review are being evaluated to determine whether available contracting alternatives have been considered, cost estimates are reasonable, work has been adequately competed, and contracts are legally sound.

The report states also that "all contract actions will be evaluated to ensure that they fall within the scope of the contract and that appropriate types of funding are

used for each action." It should be added that participants in this review now in include the Office of Contracts and Acquisitions (OCA), OGC, the Office of Facilities Management (OFM), and the Office of the Chief Financial Officer (OCFO).

In addition:

- The Board of Education will now review all contracts over $100,000.
- OCA will seek Control Board approval for all contracts for which it is required.
- OCA is working with OCG to determine what review of contract actions greater than $50,000 against federal supply schedule contracts are now required and begin complying immediately with such requirements.

B. **School system inappropriately selected subcontractors to perform work.**

The report states that "all contract actions must be assigned to competitively selected contractors (p19)." This should be modified to read "all contract actions are being assigned to competitively selected contractors."

C. **School system did not take steps to ensure prices were fair and reasonable.**

The report states that "The staff assigned to the contracting and facilities organizations are being increased." (p.18) This statement should be changed as follows:

- Prior to July 2001, DCPS had no dedicated contracting staff with expertise in construction. In July 2001, DCPS hired a team solely responsible for managing contracting and procurement for all facilities functional areas. The team, which is located on-site at OFM, is responsible for assuring the preparation of well-defined proposals and independent cost estimates, as well as negotiating contractors' fees.

  In addition:

- OFM now prepares government estimates for all construction work exceeding $5,000 in value (labor + materials).

D. **School system did not adequately administer contract**

Additional changes have taken place since DCPS was notified of GAO's findings:

- OFM now prepares Scopes of Work for all proposed construction work exceeding $5,000 in value.

- OFM now requires a final inspection for all construction work. Satisfactory final inspection approval is also required prior to approval of final payment.

Finally, in addition to hiring construction inspectors to ensure compliance with contract documents and quality requirements:

- DCPS is developing an Office of Compliance to monitor the quality of the overall facilities contracting process, including:
  - justification for contractor selection.
  - payments made according to contract terms.
  - internal controls over the current construction/contracting process.
  - compliance with current laws, rules and regulations.
  - billing cost from contractor relating to supporting documentation, appropriateness and proper recording.
  - construction and contract process as it relates to efficiency, effectiveness, and economical effects on the overall budget.

II. DCPS RESPONSE TO GAO RECOMMENDATIONS

Recommendation 1:

The Superintendent should ensure that planned corrective actions are implemented in a timely manner.

Response:

Most of the corrective actions have already been implemented or are currently in the process of being implemented. In April 2001, immediately after the contract improprieties were brought to the Superintendent's attention, the Chief Operating Officer directed the suspension of continued inappropriate use of the Washington Gas contract and established a Facilities Management Transition Task Force to develop solutions to each of the issues that were raised in the initial DCPS investigation of the allegations. Many of the new procedures and actions detailed in this response have been adopted as the result of the task force's recommendations.

Recommendation 2:

The Superintendent should ensure that the contracting officer complies with District of Columbia procurement procedures in contracting for the remaining school renovation work, including procurement planning, use of competitive acquisitions procedures, and ensuring that contractor prices and fees are fair and reasonable.

Response:

At the Superintendent's direction, the Office of the General Counsel will advise the contracting staff on all future school renovation work to ensure compliance

with the District of Columbia's procurement statutes and regulations, including procurement planning, use of competitive acquisition procedures, and ensuring that contractor prices are fair and reasonable. In addition, all facilities procurements will be subject to review, prior to payment, by the Office of the Chief Financial Officer. In addition, OFM staff has received special training on cost estimating and scope development and, as a result, all projects are now well-defined by detailed written scopes of work prior to implementation, and all invoices are reviewed by project management staff for acceptance of work and accuracy of financial information prior to payment.

Recommendation 3:

The Superintendent should direct the contracting officer to terminate, if cost-beneficial, outstanding orders that are beyond the scope of the contract and properly procure the replacement work through available government sources or competitive procedures.

Response:

See comment 1.

The Superintendent has directed that the Chief Contracting Officer review all future requests for purchase orders on major facilities contracts to ensure that they fall within the scope of the relevant contract, and has directed the Chief Financial Officer to institute a review process that will ensure that no current or future payments are made for work that falls outside the scope of any major facilities' contracts. Both facilities and contracting staff have been notified that no future work is to be awarded under the contract. The contracting officer and OFM are currently conducting an analysis of the work orders that were sent to WGL to determine which, if any, have been executed and which have not. Once that review is complete and corroborated by WGL's audit, the work will be reassigned to competitively selected contractors. The contracting officer will be assisted in this by the Office of General Counsel, which is assisting in developing solicitations and conducting procurements that result in award of multiple contracts that can be used effectively and efficiently for facility repair and renovation.

Recommendation 4:

The Chief Financial Officer should take a more active role in the contract review process, including notification of appropriate authorities about irregular contracting activities that may be taking place.

Response:

Several changes in financial oversight at DCPS have occurred in recent months. A new Agency Chief Financial Officer for DCPS, along with a new team of experienced school finance professionals, was put in place in July, 2001. The new CFO has already begun implementing mechanisms that will allow him and his team actively to oversee, comply with, and enforce all applicable laws, regulations, and policies relating to capital projects and procurement. To improve internal accounting controls in general, he has dissolved the position of

Controller and replaced it with two high level positions: Director of Accounting Operations and Director of Financial Reporting. By shortening the span of control in the former Controller's Office, the CFO has increased the level of scrutiny and oversight of fiscal activity. In order specifically to improve financial controls for capital projects (and therefore procurement), he has created the new position of Capital Projects Accounting Manager (requiring experience in procurement) and recruited an experienced and certified accounting professional and former procurement officer for the position. The Office of the Chief Financial Officer is fully committed to having a balanced set of reliable preventive and detective controls in place so that appropriate actions can be taken to comply with regulations, safeguard DCPS financial interests and to alert appropriate authorities of irregularities.

III. REQUESTED CHANGES TO THE DRAFT REPORT

See comment 2.

On p. 7, the GAO writes that "The then-Chief Facilities Officer was reluctant to give additional work to the Corps, however, because he believed the Corps processes and procedures were too slow given the crisis atmosphere and pressure from the community to carry out renovations quickly." Unless this observation is based on statements of the former Chief Facilities Officer to the writer, it is speculative and DCPS requests that it be either deleted or re-worded to indicate that it reflects the writer's opinion.

Agency Comments

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Response to Draft GAO Report:
D.C. Public Schools Inappropriately Used Gas Utility Contract for Renovations

ATTACHMENTS

1. Letter from Superintendent Paul Vance to DCPS Chief Financial Officer Don Rickford re: development of a payment review process for facilities contracts
2. Letter from Superintendent Vance to DCPS Director of Contracts and Acquisitions, Dee Chambers re: review of all purchase orders for facilities contracts
3. Letter from Superintendent Vance to Dreck Wilson, Deputy Director for Facilities Operation and Maintenance and Sarah Woodhead, Deputy Director for Facilities Planning and Design Construction re: data and documentation required for facilities management payments.
4. E-mail from Louis Erste, Chief Operating Officer, announcing formation of Facilities Management Transition Task Force and immediate actions required to correct actions with regard to Washington Gas
5. New Capital and Energy Conservation Definitions
6. Memorandum from Sarah Woodhead to Louis Erste on Capital Program Control Measures
7. New Capital Projects Monitoring Procedures developed by the Chief Financial Officer
8. DCPS answers to questions raised by GAO during Exit Conference with D.C. Public Schools regarding DCPS Use of Washington Gas Contract for School Renovations, August 6, 2001

DISTRICT OF COLUMBIA
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202-442-5885, fax: 202-442-5026
www.k12.dc.us

Mr. Donald Rickford
Chief Financial Officer
District of Columbia Public Schools
825 North Capitol Street, N.E.
Washington, D.C. 20002

April 18, 2001

Dear Mr. Rickford,

You are hereby directed to immediately develop and initiate a review process to assure that no current or future payments are made outside the scope of any major facilities contract and that capital funds are not used for operations and maintenance.

Please include in this new review process a detailed examination of each category of work on all Facilities Management invoices to insure that invoices for work that is not capital in nature are not paid for with capital funds – and that no payments are made for work performed outside the scope of the authorizing contract.

In support of your efforts to accomplish this review, please be advised that I have directed our Facilities Management Department to provide you with any project data and financial documentation you deem necessary.

You should also know that I have requested the District of Columbia Office of the Inspector General to contract with an independent audit firm to review prior payments for major facilities work. I have requested performance and recovery audits that will examine acceptance of service, invoice receipt and approval, and payment processing activities and procedures for our major facilities contracts.

Finally, you should know that I have ordered our Procurement Department to carefully review all future requests for purchase orders on major facilities contracts to assure that they fall within the definitions of the relevant contract and to assure that capital funds are not used for operations and maintenance.

If you have any questions regarding this matter or require additional information, please contact Louis J. Erste at 442-5001.

Respectfully,

Paul L. Vance
Superintendent

Children First

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Ms. Delores Chambers-Dupuy
Director of the Office of Contracts and Acquisitions
District of Columbia Public Schools
825 North Capitol Street, N.E.
Washington, D.C. 20002

April 18, 2001

Dear Ms. Chambers,

You are hereby directed to carefully review all future requests for purchase orders on major facilities contracts to assure that they fall within the definitions of the relevant contract – and to assure that capital funds are not used for operations and maintenance.

You should also know that I have directed our CFO to immediately develop and initiate a review process to assure that no current or future payments are made outside the scope of any major facilities contract and that capital funds are not used for operations and maintenance. He will include in the review process a detailed examination of each category of work on all Facilities Management invoices to insure that invoices for work that is not capital in nature are not paid for with capital funds – and that no payments are made for work performed outside the scope of the authorizing contract. I have also directed our Facilities Management Department to provide him with any project data and financial documentation he deems necessary.

Finally, you should know that I have requested the District of Columbia Office of the Inspector General to contract with an independent audit firm to review prior payments for major facilities work. I have requested performance and recovery audits that will examine acceptance of service, invoice receipt and approval, and payment processing activities and procedures for our major facilities contracts.

If you have any questions regarding this matter or require additional information, please contact Louis J. Erste at 442-5001.

Respectfully,

Paul L. Vance
Superintendent

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Mr. Dreck Wilson, Deputy Director for
Facilities Operations and Maintenance

Ms. Sarah Woodhead, Deputy Director for
Facilities Planning and Design Construction
Facilities Management Division
District of Columbia Public Schools
1709 Third Street, N.E.
Washington, D.C. 20002

April 18, 2001

Dear Mr. Wilson and Ms. Woodhead,

You are hereby directed to provide our Chief Financial Officer with any project data and financial documentation he deems necessary for his review of any and all Facilities Management payments.

I have directed our CFO to immediately develop and initiate a review process to assure that no current or future payments are made outside the scope of any major facilities contract and that capital funds are not used for operations and maintenance. He will include in the review process a detailed examination of each category of work on all Facilities Management invoices to insure that invoices for work that is not capital in nature are not paid for with capital funds – and that no payments are made for work performed outside the scope of the authorizing contract.

Please be advised that I have ordered our Procurement Department to carefully review all future requests for purchase orders on major facilities contracts to assure that they fall within the definitions of the relevant contract and to assure that capital funds are not used for operations and maintenance.

Finally, you should also know that I have requested the District of Columbia Office of the Inspector General to contract with an independent audit firm to review prior payments for major facilities work. I have requested performance and recovery audits that will examine acceptance of service, invoice receipt and approval, and payment processing activities and procedures for our major facilities contracts.

If you have any questions regarding this matter or require additional information, please contact Louis J. Erste at 442-5001.

Respectfully,

Paul L. Vance
Superintendent

Children First

Sanders, Mona (OOS)

Sent:	Saturday, April 21, 2001 7:04 PM
To:	Mazyck, Veleter (OGC); Wilson, Dreck (OFM); Woodhead, Sarah (OFM); Rickford, Donald (CFO); Harris, Norma (CFO); Travers, Jonathan (CFO); Smith, Eugene (OOS); Chambers-Dupuy, Delores (OCP); Hatcher, Kathy (OCP)
Cc:	Vance, Paul (OOS); Seleznow, Steven (OOSUP); Boyd, Linda (OPR); Lattimore, Patricia (HRM); Fiel, Patrick (OSS); Sanders, Mona (OOS); Simms, Karen (OOSUP); 'Louis J. Erste'
Subject:	Facilities Management Transition Task Force
Importance:	High
Follow Up Flag:	Follow up
Flag Status:	Flagged

Facilities Management Transition

Our goal is for all facilities management projects that must continue to indeed continue without delay, but to have them performed under the authority of contracts which allow them, with money that can legally be used to pay for them. **It is imperative that no genuine health and safety project are delayed - and that schools open in excellent condition and on time for SY 2002 -** as we move forward to correctly fund and provide contract authority for existing and upcoming projects.

To accomplish these goals**, the people listed in the "To" list above are hereby members of the Facilities Management Transition Task Force. We will meet Friday, April 27, at 11:00 a.m.** (location TBA) to review the products of the assignments given below. **Please email copies of your products to all on the "To" list above as soon as they are ready, and bring 20 copies with you to the Friday meeting.**

The assignments given below are intended to provide an interim solution to be used during our transition from where we are now to where we need to be on these issues.

Veleter:

1. Please create defensible definitions that can be used by facilities management, procurement, finance and others for the following items - and any other such items as may be necessary to accomplish our overarching goals.
   - Capital vs. Operating & maintenance
   - Energy conservation vs. Non-energy conservation (in the Washington Gas contract).

1. Once these definitions are created, please work with others on the Task Force to determine which current or soon-to-initiated projects are either incorrectly funded or outside the scope of their authorizing contract.

2. Please work with everyone necessary to assure that all projects become correctly funded and authorized by contract.

3. Please work with Dee and Kathy to develop and implement a new legal review process that assures all contracts and other work of the Procurement Department meets the high standards we are now making explicit about operating within the scope imposed by all relevant contract instruments, guidelines and laws.

4. Please work with Eugene to develop and finalize whatever contract and scope of work are necessary with the outside auditor provided by the Inspector General.

1

5. Please advise others on the Task Force as needed to assure that all products meet appropriate legal standards.

Dee and Kathy:

1. Please identify or create contracts that can be used to do any current or soon-to-be underway facilities management work that is not currently authorized by a contract.

2. Please work with Veleter to develop and implement a new legal review process that assures all contracts and other work of the Procurement Department meet the high standards we are now making explicit about operating within the scope imposed by all relevant contract instruments, guidelines and laws.
   - Accomplishment of this task will assure your careful review of all future requests for purchase orders on major facilities contracts to assure that they fall within the definitions of the relevant contract - and to assure that capital funds are not used for operations and maintenance.

Eugene:

1. Please serve as our point of contact with the Inspector General to identify the outside auditor(s) we will be using to conduct performance and recovery audits examining acceptance of service, invoice receipt and approval, and payment processing activities and procedures for our major facilities contracts.

2. Please work with Veleter to finalize whatever contract and scope of work are necessary with this outside auditor.

Don, Kathy & Jonathan:

1. Please identify the costs of all current or soon-to-be underway facilities management work that is not currently funded appropriately (e.g. operations & maintenance work that is being illegally funded with capital money) - or is not currently authorized by a contract.

2. Please identify appropriate funding sources to pay for the costs of all facilities management work not currently funded appropriately.

3. Describe the new review process you have implemented to assure that no current or future payments are made outside the scope of any major facilities contract and that capital funds are not used for operations and maintenance.

Sarah and Dreck:

1. Please institute a new tracking and review process that assures no payments are requested for facilities management work unless:
   - A clear connection can be made between work orders, proposals, contacts, invoices, and other relevant documents;
   - You are sure the work meets our high standards for quality assurance and timeliness;
   - The work is within the scope of the authorizing contract; and
   - Capital funds are drawn on only for capital work.

1. Please prepare a list of all projects that are underway or impending using the categories identified by each cell in the grid below - and other such categories that you may consider appropriate.

2. Please prepare a corrected version of this list that puts projects in the appropriate category - with those projects that changed places between the two lists highlighted in some clear way.

2

1. Please prepare a separate list of those projects highlighted on the corrected list (i.e. **the target list of projects for which changes in either funding source or authorizing contract must be made).**

2. Work with other Task Force members to assure that all projects on the target list are funded properly under an appropriate contract.

Washington Gas	**Capital**	**Operating & Maintenance**
Energy Conservation		
Underway		
Scheduled to start within 12 months		
Non-Energy Conservation		
Underway		
Scheduled to start within 12 months		
Army Corps of Engineers	**Capital**	**Operating & Maintenance**
Underway		
Scheduled to start within 12 months		
Other	**Capital**	**Operating & Maintenance**
Underway		
Scheduled to start within 12 months		

Tracking:

Recipient	Message Status
Mazyck, Veleter (OGC)	Read: 4/23/01 10:16 AM
Wilson, Dreck (OFM)	Read: 4/22/01 12:29 PM
Woodhead, Sarah (OFM)	Read: 4/22/01 9:07 AM
Rickford, Donald (CFO)	Read: 4/23/01 8:41 AM
Harris, Norma (CFO)	Read: 4/23/01 8:35 AM
Travers, Jonathan (CFO)	Read: 4/22/01 7:33 PM
Smith, Eugene (OOS)	Read: 4/23/01 9:44 AM
Chambers-Dupuy, Delores (OCP)	Not Read: 5/23/01 1:49 PM
Hatcher, Kathy (OCP)	Read: 4/23/01 9:28 AM
Vance, Paul (OOS)	
Seleznow, Steven (OOSUP)	Read: 4/22/01 7:37 AM
Boyd, Linda (OPR)	
Lattimore, Patricia (HRM)	Read: 4/23/01 9:33 AM
Fiel, Patrick (OSS)	Read: 4/23/01 10:14 AM
Sanders, Mona (OOS)	Read: 4/23/01 8:59 AM
Simms, Karen (OOSUP)	Read: 4/23/01 9:26 AM
'Louis J. Erste'	
Gaston, Almaria (OPE)	Read: 4/23/01 7:38 AM
Pradier, Regina (OOS)	Read: 4/23/01 3:37 PM

3

Capital and Energy Conservation Definitions

Final
June 15, 2001

Definition: Capital Project [i]

A capital expenditure is an outlay for the construction or purchase of an asset that is expected to provide services over a considerable period of time. Additionally, an expenditure on a capital project is large when compared to operating expenses. Capital improvement projects should have a useful life of at least three years and a minimum cost of $250,000. In general, with the exception of planning studies and capital program overhead, projects should be site-specific.

(a) any physical public betterment[ii] or improvement and any preliminary studies and surveys relate thereto;

(b) the acquisition of property of a permanent nature; or

(c) the purchase of equipment for any public betterment or improvement when first erected or acquired.

Examples of capital projects include:

(a) construction or acquisition of a new school or other facility;

(b) large-scale replacement and rehabilitation of existing facilities;

(c) study or design work directly relating to the capital improvement program, including master planning, facility assessment, and design/engineering work relating to individual capital projects;

(d) land purchased for building sites and other public purposes;

(e) replacement or rehabilitation of major building systems (such as mechanical or structural components of existing facilities);

(f) alteration of an existing facility to make it more functional for a new use;

(g) equipment associated with construction or major modernization of a facility; or

(h) staffing and overhead associated with the management of the capital program.

The following categories of projects and support work are examples of projects that are not eligible for capital financing:

- Items that are not of a permanent nature;
- Items that generally are not affixed to a facility;

- Items often involving recurring maintenance and/or frequent repairs;
- Items that occupy floor space but require no permanent connection to utilities or structure;
- Items not requiring floor space but that sit on top of other equipment and will require special outlets.

Definition: Operations and Maintenance

Maintenance is defined as those activities concerned with keeping the grounds, buildings, and fixed equipment in their original condition of completeness or efficiency, whether through repairs or by replacement during the life expectancy of the building. Maintenance may be performed by maintenance staff, custodial staff, or contracted personnel.

Maintenance vehicles, machinery, and automated maintenance management systems are included in the maintenance program.

Excluded from Maintenance is the maintenance of equipment used for education programs, including furnishings and instructional equipment. Also excluded is movable food service equipment.

Excluded from Maintenance are those activities concerned with building operations. These include but are not limited to mowing, refuse and snow removal, and custodial services. All initial installations of building equipment and modifications to buildings or sites are also excluded.

Definition: Energy Management Service as it pertains to Washington Gas:

The term energy management services means any one or more of the following services: Any specific service intended to provide energy savings, efficiency improvements, and/or demand reductions, whether or not it involves financial incentives and/or rebates, specifically including (but not limited to): energy audits and energy conservation measures such as lighting control and boiler control improvements, cooling tower retrofits, solar air preheating systems, demand side management initiatives, fuel cell installation, and water conservation device installation.

This definition permits: Most mechanical and electrical work (including HVAC, plumbing, light fixtures, etc.), work installing or repairing mechanical or electrical equipment; window replacement; re-roofing projects where the roof is insulated; other building envelope improvements.

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[i] Sources include Section 1-203 of the D.C. Code and Mayor's Memorandum 3-71.
[ii] The D.C. Controller's instructions for the Annual Financial Closing define "betterments" as "projects/expenditures which add to future benefit" of the facility, by accomplishing one or more of the following:

1. increase the physical dimensions of the facility
2. increase the productive capacity of the facility
3. increase the life of the facility
4. increase revenues derived from the facility
5. reduce operating cost of the facility

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS

Planning, Design and Construction
Lemuel Penn Center
1709 3rd Street, N.E. – 3rd Floor
Washington, D.C. 20002
Office (202) 576-7718
Fax (202) 576-6662

Date: July 11, 2001

Memo to: Louis Erste
Chief Operating Officer

From: Sarah Woodhead
Deputy Director of Facilities

Re: Update on Capital Program Control Measures

Following are highlights of selected measures implemented and in development to ensure appropriate use of capital funds and improved delivery of capital projects to our schools.

Compliance with regulations and directives governing use of capital:

- The approved definitions for capital eligibility, maintenance, and energy management have been finalized, distributed, and explained to PD&C and O&M staff.
- All current and proposed projects have been and will continue to be reviewed for eligibility in accord with the approved definitions for capital projects.
- Any work proposed for the Washington Gas contract is reviewed for alignment with approved definition for energy management work.
- All invoices received for work previously authorized are screened for compliance with definitions of capital eligibility. If previously approved work was incorrectly authorized for capital funding, the contract amount is tallied and DCPS Finance is notified of the amount so that the capital budget can be reimbursed. No additional work has been initiated out of compliance with the appropriate use of funding.
- All work must be assigned to competitively selected contractors. For any work directed to Washington Gas, the subcontractors will not be selected by DCPS. Instead, at least three competitive proposals will be sought through Washington Gas.
- Washington Gas has been directed to ensure that no work that has not been authorized by both Washington Gas and DCPS is going forward under their contract.
- All work is evaluated for estimation of probable cost independently by DCPS or our agents prior to being issued to contractors for bids or cost proposals.

Quality Control Measures:

- PD&C and O&M staff members have participated in training on cost estimating and scope development.
- All projects are well-defined by detailed written scopes of work prior to implementation.
- All invoices are reviewed by project management staff for acceptance of work and accuracy of financial information prior to approval for payment. This entails sign-off by a project manager with direct knowledge of the subject work.

- PD&C and O&M have instituted a series of on-site school meetings to improve decision-making regarding scoping and balancing short and mid-term needs and to ensure open communication with principals and other school-based personnel and to reduce scope creep.
- We are redefining capital project typologies to better align with conditions in our aging facilities and to support better value for capital investment and compliance with capital budget guidelines.
- We are ensuring that all projects are school-specific, or contain school-specific data, to support outside monitoring and continual updating of facilities data.

Program Management Procedures:

- All projects are tracked via a simple DCPS project identification system to improve monitoring of contracts and synthesis of building-based database.
- We have adopted and are implementing a uniform project filing system.
- Every O&M and PD&C project, regardless of size, is assigned a DCPS project manager.
- DCPS is hiring construction inspectors to ensure compliance with contract documents and DCPS quality requirements.
- We are improving our capacity to subject work managed by the COE to the same controls and scrutiny as work managed in-house or through other program management mechanisms.
- We are bringing on key staff members with a wealth of experience in school design and construction.
- We are beginning our capital budget development process for FY '03 now, to allow for a better plan and broader review.

Key Recommendations and Planned Activities for the Short Term

- We recommend that DCPS negotiate with Washington Gas to reduce the current overhead factor for previous invoices as well as for current and possible future work.
- We will improve use of technology in project management, project accounting, and reporting.
- We are developing improved project reports for technical and non-technical users.

If you have any questions, please call or e-mail. Thanks for your continued support for our efforts to build a world-class capital improvement program.

DC PUBLIC SCHOOLS
OFFICE OF THE CHIEF FINANCIAL OFFICER
CAPITAL PROJECTS MONITORING PROCEDURES

- OCFO will identify all current Capital projects that are encumbered
- Will request relevant contracts and supporting documents related to current projects
- Will verify the appropriateness of Capital fund usage per Capital Improvement Program
- Prior to encumbering funds we will verify that the contract has been reviewed by the Legal Counsel's office
- Will work with the Procurement Office to ensure that all contracts contain a retainage policy
- All contract amounts must be within the project/sub- project budget amount
- Will require usage of Capital funds exclusively for Capital projects. No O&M jobs will be performed under Capital project contracts.
- OCFO will encumber funds based on fund availability and contract and supporting documents
- Will require Facilities to review and certify invoices as to the satisfactory completion of the job invoiced
- OCFO will review invoices for accuracy and compliance with the contract and purchase order
- OCFO will process payment

OCFO will continue to review the adequacy of current and contemplated controls for improvement.

To: David Groves, grovescd@gao.gov
General Accounting Office

From: Louis J Erste, Chief Operating Officer
District of Columbia Public Schools

Re: DCPS answers to questions raised by GAO during Exit Conference with D.C. Public Schools regarding DCPS Use of Washington Gas Contract for School Renovations, August 6, 2001

On August 6, 2001, the GAO met with senior representatives of the District of Columbia Public Schools for an exit conference on the GAO's audit of the use by DCPS of the GSA area-wide contract with Washington Gas for school renovations. The GAO discussed its findings and asked for input on DCPS actions regarding findings within each of GAO's four objectives. This memo summarizes DCPS actions discussed at the Exit Conference.

General Response of DCPS to Washington Gas Issues

Once contract improprieties were brought to the attention of DCPS management in April 2001, COO Louis J. Erste established a Facilities Management Transition Task Force to work through solutions to each of the issues that had been raised in the initial DCPS investigation of the problems (see Attachment A-Facilities Management Transition Task Force).

A meeting was conducted with my senior staff and Washington Gas senior representatives (the Vice President and an attorney) during the week of July 22, 2001. Discussions centered on the Washington Gas perspective of the old process for executing work and what DCPS future expectations are. Outstanding work and future billing issues were also discussed. The redefined DCPS-WGL execution process was forwarded to the Office of Contracts and Acquisitions and the Office of Facilities Management.

Specific Responses of DCPS to Numbered GAO Washington Gas Issues

The responses below are numbered according to the numbering system used in the document shared with DCPS by GAO prior to the Exit Conference. The answers below are numbered to correspond directly with the numbering in the advance document.

I. DCPS actions regarding GAO finding under Objective I: **DCPS Did Not Follow Contract Review Process**. **DCPS has proposed changes to review process?**

A. Contract actions under WGL and other facilities contracts are now being reviewed by the DCPS Office of Facilities Management (OFM), the DCPS Office of Contracts and Acquisitions (OCA), and the DCPS Office of the Chief Financial Officer (OCFO) to determine whether all actions fall within a strict definition of the legally defined scope of whatever contract applies and within strict definitions of capital vs. non-capital spending (see Attachment B-Superintendent's Letter to Dreck Wilson and Sarah Woodhead; Attachment C-

1

Superintendent's Letter to Dee Chambers; Attachment D-Superintendent's Letter to Don Rickford; Attachment E-Capital and Energy Conservation Definitions; Attachment F-Update on Capital Program Control Measures, Attachment G-OCFO Capital Project Monitoring Procedures).

B. The DCPS Office of Contracts and Acquisitions will work with the DCPS Office of the General Counsel to determine what review of contract actions greater than $50,000 against a federal supply schedule contract are now required (post October 1, 2000) and begin complying immediately with such requirements.

C. The new DCPS Chief Financial Officer Bert Molina is now reviewing the revised facilities contract review procedures implemented in response to the Superintendent's Letter to former CFO Don Rickford (see again Attachment G-OCFO Capital Project Monitoring Procedures).

D. The DCPS Office of the General Counsel will now review all facilities contracts of $25,000 and above.

E. The DCPS Office of Facilities Management and the DCPS Office of Contracts and Acquisitions have discontinued the practice of bundling projects into groups of $950,000 each. Contrary to what WGL may have said, OCA did not instruct WGL to bundle contracts under $950,000.

F. The DCPS Office of Contracts and Acquisitions will obtain Control Board approval for all contracts for which it required.

G. DCPS worked with the Army Corps of Engineers to develop and successfully establish in July 2001 a procurement cell within the Office of Facilities Management whose primary responsibility is to develop and implement DCPS procurement capacity for all facility functional areas. They are responsible for assuring the continued and high quality implementation of the following steps that have already begun: well-defined proposals, independent cost estimates, and negotiated contractor fees (see again Attachment F-Update on Capital Program Control Measures).

- The DCPS Office of the General Counsel will assist the new construction contracting group as it assumes responsibility for projects previously designated for assignment to the Army COE. OGC will also assist in developing solicitations and conducting procurements that will result in award of multiple contracts that can be used effectively and efficiently for facility repair and renovation

- In addition, Office of Facilities Management staff members have participated in training on cost estimating and scope development, all projects are now well-defined by detailed written scopes of work prior to implementation, and all invoices are reviewed by project management staff for acceptance of work and accuracy of financial information prior to approval for payment (this entails sign-off by a project manager with direct knowledge of the subject work)

2

II. DCPS actions regarding GAO finding under Objective II: **Work Did Not Fall Under Scope of Contract and Competition Was Not Sought**. DCPS is taking the following corrective actions?

A. As mentioned above, contract actions under WGL and other facilities contracts are now being reviewed extensively by OFM, OCA, OCFO and OGC to determine whether all actions fall within a strict definition of the legally defined scope of whatever contract applies and within strict definitions of capital vs. non-capital spending (again, see Attachment E-Capital and Energy Conservation Definitions)

B. DCPS intends to discontinue the use of WGL as a contracting source for construction. We have at our disposal contract capacity for numerous types of construction projects (see section I, Subsection G above).

C. All DCPS facilities work must be assigned to competitively selected contractors (see again Attachment F-Update on Capital Program Control Measures). Until the use of WGL is ended, any work directed to Washington Gas, the subcontractors would not be selected by DCPS. Instead, at least three competitive proposals would be sought through Washington Gas.

D. The only WGL activity in which DCPS is now engaging is to resolve old and active delivery orders. We are considering working to pay subcontractors directly for any life safety work that is already underway.

III. DCPS actions regarding GAO finding under Objective III: **Insufficient Internal Controls Were in place to Administer Contract**. DCPS corrective actions?

A. DCPS will formally provide limited COTR authority to Office of Facilities Management project managers.

B. All facilities work must be assigned to competitively selected contractors. For any remaining life safety work directed to Washington Gas during the close-out of our relationship with them, the subcontractors will not be selected by DCPS. Instead, at least three competitive proposals will be sought through Washington Gas. Washington Gas has been directed to ensure that no work that has not been authorized by both Washington Gas and DCPS is going forward under their contract. All work is evaluated for estimation of probable cost independently by DCPS or our agents prior to being issued to contractors for bids or cost proposals (see again Attachment F-Update on Capital Program Control Measures).

C. As mentioned above, all facilities contract actions are now being reviewed by OCA.

D. As mentioned above, DCPS intends to discontinue the use of WGL as a contracting source for construction (see section II, Subsection B).

E. DCPS has hired construction inspectors to ensure compliance with contract documents and DCPS quality requirements (see again Attachment F-Update on Capital Program Control Measures).

3

IV. DCPS actions regarding GAO finding under Objective IV: **Washington Gas Did Not Function as Prime Contractor and Its Fee Was Not Negotiated**. DCPS is taking corrective action?

A. The DCPS Office of the General Counsel will explore appropriate action including possible legal recourse against Washington Gas, for overpayments under the contract.

B. As mentioned above, all facilities work must be assigned to competitively selected contractors and, also as mentioned above, for any remaining life safety work directed to Washington Gas during the close-out of our relationship with them, the subcontractors will not be selected by DCPS. Instead, at least three competitive proposals will be sought through Washington Gas.

C. As mentioned above, DCPS intends to discontinue the use of WGL as a contracting source for construction. In addition, DCPS has discontinued the practice of bundling projects into groups of $950,000 each -- and DCPS has hired construction inspectors to ensure compliance with contract documents and DCPS quality requirements (see again Attachment F-Update on Capital Program Control Measures).

D. As mentioned above, the DCPS Office of the General Counsel will explore appropriate action including possible legal recourse against Washington Gas, for overpayments under the contract.

E. As mentioned above, the DCPS Office of the General Counsel will explore appropriate action including possible legal recourse against Washington Gas, for overpayments under the contract.

F. As mentioned above, the DCPS Office of the General Counsel will explore appropriate action including possible legal recourse against Washington Gas, for overpayments under the contract.

4

The following are GAO's comments on the District of Columbia Public Schools' letter dated September 21, 2001.

GAO Comments

1. In an e-mail follow-up to its letter, the school system clarified that the contracting officer and the Office of Facilities Management are currently conducting an analysis of unauthorized work orders that were sent to Washington Gas to determine which, if any, have been executed and which have not. In addition, the school system responded to our third recommendation by stating that it did not cancel contracts for which purchase orders had been issued because the majority of the work was deemed necessary to fulfilling life/health/safety requirements or was critical to the opening of schools in the fall. The school system stated that there was insufficient time to stop the work in progress without running the risk of essential work being completed in time and the school system's incurring substantial penalties and potential liability.

2. The statement is based on several discussions with the then-Chief Facilities Officer.

Appendix III: Comments from the Washington Gas Light Company

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

Washington Gas

1100 H Street, N.W.
Washington, D.C. 20080

Beverly J. Burke
Vice President and
General Counsel
(202) 624-6177
(202) 624-6188 FAX
bburke@washgas.com

September 17, 2001

Mr. David E. Cooper
Director
Acquisition and Sourcing Management
United States General Accounting Office
441 G Street, NW, Room 4A48
Washington, DC 20548

Dear Mr. Cooper:

Enclosed please find Washington Gas Light Company's comments on the GAO's draft report entitled "District of Columbia: D.C. Public Schools Inappropriately Used Gas Utility Contract for Renovations" (GAO-01-963). We appreciate the opportunity to comment on the draft, and the courtesy shown to Washington Gas personnel by GAO in the course of its investigation.

If you have any questions, please call me at (202) 624-6177.

Sincerely,

Beverly J. Burke

Enclosure
cc: David Groves
Michele Mackin

COMMENTS OF WASHINGTON GAS LIGHT COMPANY TO THE GAO DRAFT REPORT, DISTRICT OF COLUMBIA: D.C. PUBLIC SCHOOLS INAPPROPRIATELY USED GAS UTILITY CONTRICT FOR RENOVATIONS

Washington Gas is proud of its four-year partnership with the District of Columbia Public Schools ("DCPS"), which has resulted in the efficient procurement of more than one thousand individual renovations and repairs at public schools throughout the District of Columbia. Together, DCPS and Washington Gas have responded to the community demand for improved school facilities, by repairing failing heating and cooling systems, improving energy efficiency throughout the schools, and addressing thousands of fire code violations and other facility deficiencies at virtually every one of the schools within the DCPS system. As evidenced by the widespread praise and gratitude from principals and other personnel working in these school facilities, the schools are a safer, better environment for teachers, children and staff than in the fall of 1997, when Washington Gas first began providing services to DCPS.

Scope of Services

In October 1997, in response to an emergency need for boiler repairs and temporary boiler rentals, General Becton and General Williams asked Washington Gas to serve as the prime contractor to DCPS by contracting with boiler repair and rental companies who would provide the equipment and services necessary to heat the schools in the fast approaching winter months. DCPS had been unable to contract directly with these contractors, apparently as a result of its history of untimely payments to its vendors.

Washington Gas responded to the call, and the relationship has expanded over the years to include a variety of electrical, heating, cooling, and other types of renovation projects. Many, but not all, of these projects were directly related to the provision of energy management services. Throughout the relationship, Washington Gas responded to DCPS requests for services, in the good faith belief that its actions were helping DCPS provide better, safer facilities for students.

See comment 1.

The GAO report wrongly argues that ***none*** of the work performed for DCPS under the areawide utility agreement was within the appropriate scope of that contract. GAO's interpretation of that agreement is contrary to the express language of the agreement, contrary to the mutual intent of the General Services Administration and Washington Gas Light Company as parties to the agreement, and contrary to the supporting statutes and regulations which authorize the use of areawide utility agreements to achieve the energy efficiency objectives of the federal and D.C. government.

Price of Services

See comment 2.

See comment 3.

See comment 4.

See comment 5.

The GAO report also criticizes the fees charged by Washington Gas under the areawide agreement. Specifically, GAO argues that the fees were not "negotiated", that they were excessive for the work done, that fees were charged by both Washington Gas and its affiliate, ACI, and that there were overcharges. GAO speculates that DCPS could have procured the same or better quality work at lower prices had it instead procured the services under the Army Corps of Engineers contract with DCPS. None of these assertions is correct.

First, the argument about whether the fee was "negotiated" appears to be an internal DCPS issue regarding which DCPS personnel took control of the relationship with Washington Gas since DCPS was indisputably aware of and approved of the pricing arrangement. Washington Gas is not privy to what considerations went into DCPS decision to accept the proposed rates, but certainly the emergency nature of the badly needed repairs, coupled with the fact that these are fairly standard rates within the industry, support the schools' decision.

In any event, Washington Gas's fees were fully disclosed to DCPS before services were rendered under the agreement and again as part of each proposal and invoice submitted for approval to DCPS. The fees were set at a flat percentage mark-up over the contractors' price. The original markup of 20% was first agreed upon in 1997, after it was discussed and approved with Control Board procurement personnel. Thereafter, the mark-up was discussed from time to time, and again, was stated on each proposal and each invoice to the schools.

Later, in July 2000, after DCPS began assigning more complicated and labor intensive projects, requiring additional services such as multiple inspections, CADD drawings, engineering design and equipment sizing, the fee was increased to 25%. Again, this fee increase was proposed to and accepted by DCPS. As before, for each task, proposals and invoices provided to DCPS listed the subcontractor price to Washington Gas, as well as the price to DCPS (reflecting the 25% markup). The DCPS contracting officer and the facilities management personnel were aware of the pricing at all times. The 20 or 25% mark-up is well within the normal commercial range, even considering the company's actual responsibilities.

From time to time, Washington Gas suggested to DCPS that more long range planning and less crisis management procurement could result in better value for the schools. For example, Washington Gas more than once expressed a willingness to discuss a change in the markup percentage, if the schools could estimate the volume and type of work to be directed to Washington Gas over the next period of weeks or months. Perhaps because of personnel changes or perhaps because personnel were simply overwhelmed with the number and scale of emergency improvements needed at the schools, DCPS never followed up on such overtures. Washington Gas remains willing to discuss fees with DCPS, including on the basis of the type of work involved, and has re-communicated this willingness to the current DCPS administration.

2

See comment 6.

In any event, the draft report glosses over the fact that Washington Gas's mark-up does not equate to its profit under the contract. Project management, inspection, engineering, administrative services, as well as overhead items such as lease and equipment expenses, insurance and taxes all are paid out of the mark-up. Uniquely among areawide customers, DCPS regularly demanded a 24-hour emergency response capability, which also imposed costs and burdens on the company. Moreover, Washington Gas remained responsible to pay its subcontractors, regardless of whether and when DCPS paid Washington Gas.

Role as "Prime Contractor"

See comment 7.

The GAO is also critical of the scope of services Washington Gas provided as the "prime contractor." However, Washington Gas again responded to the requirements of its customer in this regard, performing those services it was asked to perform on a project by project basis. The needs of an individual project or task varied widely. For some projects, DCPS developed the scope of work, selected the contractors, and determined the price that was to be paid. In such instances, Washington Gas was responsible for assembling accepted (by DCPS) proposals into funding packages, submitting the packages for funding, giving the contractors notice to proceed after funding was encumbered, inspecting the work, paying the contractors, and billing DCPS. On other projects, Washington Gas selected the contractor(s), co-ordinated with the contractors and the school administration (both the headquarters facilities management and personnel at the individual schools), performed engineering design and CADD drawings, sized equipment, and/or arranged for emergency repairs, as well as the associated administrative, inspection, payment and billing work.

Billing Issues

See comment 8.

GAO also wrongly contends that Washington Gas improperly marked up sales to DCPS by its affiliate, American Combustion Industries (ACI). However, the areawide agreement has no contractual or regulatory requirement prohibiting Washington Gas from billing DCPS on the basis of ACI's price to Washington Gas. GAO cites to no source for this argument, nor can it. Even if government contracting cost principles were hypothetically deemed to apply to the areawide agreement, ACI would fall within the regulatory exceptions for commercial items or services charged at established market prices. ACI followed the same estimating and pricing practices for other prime contractor "customers" as it did with Washington Gas. ACI's services on the DCPS contract were similar to work it performs in an ordinary commercial context. As a contractor for DCPS since at least 1985, ACI followed the same estimation and pricing practices for such work before and after its 1998 acquisition by Washington Gas. Throughout the years, ACI has priced its DCPS work consistent with its normal commercial pricing for similar work, which of course included a mark-up on its predicted costs.

See comment 9.

The draft report also identifies alleged overbillings by Washington Gas. The company is presently reviewing all of its billings to DCPS for the more than 1,000 individual subcontractor

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See comment 10.

tasks performed under the areawide agreement. As the company has already advised Superintendent Paul Vance, confirmed overbillings promptly will be credited to DCPS. Washington Gas already has identified improvements in internal controls and billing procedures, which are expected to improve communications with the schools about the authorized scope of work and prevent duplication, calculation or timing errors in the bills to DCPS.

In summary, in these comments Washington Gas has addressed GAO's concerns with the Company's relationship with DCPS under the areawide utility agreement. As stated earlier, Washington Gas views the partnership as having been successful in addressing the near dire state of District of Columbia Public School facilities, for the benefit of school personnel and students.

4

The following are GAO's comments on the Washington Gas Light Company's letter dated September 17, 2001.

GAO Comments

Washington Gas claims that some of the work performed for the school system under the areawide contract was within the contract's scope and asserts that several of our statements, such as those concerning fees and overcharges, are incorrect. We disagree with Washington Gas on each point, as discussed below.

1. We disagree with Washington Gas on the issue of the scope of the areawide utility contract. We stand by our position that none of the services provided by Washington Gas to the school system fell within the contract's scope. These were not regulated services, but rather work that could have been performed by heating, plumbing, or general contractors. We address this issue further in our response to GSA's comments (app. IV).

2. Contrary to Washington Gas' response, our report does not state that the fee was excessive. However, because the school system did not use competitive procedures, prepare cost estimates or pricing analyses, or negotiate the fee, it had no way of knowing whether Washington Gas' prices were fair and reasonable. We rightly point out that Washington Gas charged the school system a flat fee for each project, despite the fact that the scope of work varied widely by project.

   Further, we are correct in stating that fees were not negotiated, that fees were charged by Washington Gas and its affiliate, and that there were overcharges (see comments 4, 8, and 9 below).

3. We do not speculate that the Army Corps of Engineers would have provided better quality work at lower prices. Rather, we point out that existing Army Corps contracting mechanisms provided an option to using the sole-source Washington Gas contract.

4. The fees were not, in fact, negotiated. The school system inappropriately paid the fee without undergoing the normal negotiations with the contractor. Merely accepting the fee is not equivalent to negotiating it.

5. Washington Gas incorrectly states that its fees were fully disclosed as part of each proposal and invoice submitted to the school system.

Washington Gas indicated on its proposals and invoices the base cost and, in a separate column, the final price, which incorporated Washington Gas' fee. However, the fee itself did not appear explicitly on the documents. The school system's contracting officer was unaware that the fee had increased to 25 percent. Only by calculating the difference between the base cost and the final price would one realize that the fee had increased.

Further, the Control Board approved only one contract action, for emergency boiler work in 1997. As we note in the report, the school system failed to submit all subsequent orders to the Control Board for review, contrary to the Board's requirements. Any implication that the Control Board was aware of—or approved—Washington Gas' fee for any other than the initial contract action is misleading.

6. Our report outlines the elements included in Washington Gas' mark-up, based on documents provided by Washington Gas. Further, we do not refer to the mark-up as a "profit," but rather as a "fee."

7. We recognize that the school system asked Washington Gas to provide a limited amount of services on certain projects. However, we point out that Washington Gas charged a flat 25-percent fee—and that the school system paid this fee—for every project, even though the needs of each project varied widely.

8. Contrary to Washington Gas' statement, our report does not contend that the company improperly marked up sales by its affiliate, American Combustion Industries, Inc. We correctly point out that both Washington Gas and its affiliate charged a fee to the school system and that, in addition to paying Washington Gas' 25-percent fee, the school system paid an additional fee to American Combustion Industries, Inc.

9. Washington Gas refers to "alleged" overbillings. In fact, overbillings did occur and Washington Gas has explicitly acknowledged them. After we identified $243,174 in duplicate billings from Washington Gas to the school system from August 2000 through March 2001, Washington Gas hired an independent audit firm to confirm our findings. The firm discovered that Washington Gas had double-billed the school system in the amount of $482,915. In an August 13, 2001, letter to the school system's superintendent, Washington Gas stated that it would credit the school system for the duplicate billings. Given this situation, we fail to understand how Washington Gas can imply that overcharges did not occur.

10. During our audit, we provided Washington Gas a list of projects, totaling $1.7 million, where it appeared that Washington Gas had billed the school system before work had been completed. As of the time of this report, the accounting firm hired by Washington Gas had not completed its review of these projects to determine whether these improper billings had occurred and, if so, the extent of the errors.

Appendix IV: Comments from the General Services Administration

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

GSA Public Buildings Service

SEP 19 2001

Mr. David E. Cooper
Director
Acquisition and Sourcing Management
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Cooper:

The General Services Administration (GSA) received a draft report, entitled *District of Columbia: D.C. Public Schools Inappropriately Used Gas Utility Contract for Renovations* (GAO-01-963), for review and comment. GSA appreciates the opportunity to respond to the draft report.

GSA does not take issue with the primary finding of the report: that the D.C. Public School system improperly used the GSA area-wide Contract with the Washington Gas Light Company to accomplish general construction. Although GSA has not had access to, nor reviewed, all the information provided to GAO in its investigation, from the information that has been made available to GSA, it is clear that some of the work accomplished under the area-wide contract is beyond the scope of the area-wide contract. GSA also takes no exception to GAO's findings with regard to the internal contracting practices of the D.C. Schools.

See comment 1.

GSA does take exception to GAO's determination that the use of the area-wide contract to acquire services that are not unique to a monopolistic utility company violates the Competition in Contracting Act of 1984 (CICA). One of the exceptions to CICA provides that other than competitive procedures may be used when "a statute expressly authorizes or requires that the procurement be made . . . from a specified source". 41 U.S.C. § 253(c)(5). *See* FAR 6.302-5(a). GSA has determined that § 152 of the Energy Policy Act (EPACT) 42 U.S.C. § 8256(c) provides such authorization.

The Department of Energy (DOE), the agency with the primary responsibility to implement EPACT, issued a legal opinion on this issue on July 7, 1994 (copy attached). In that opinion, DOE determined that the plain language of EPACT provided an exception to CICA. Section 152 of EPACT states that:

> (1) Agencies are authorized and encouraged to participate in programs to increase energy efficiency and for water conservation or the management of electricity demand conducted by gas, water, or electric utilities and generally available to customers of such utilities.

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
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-2-

(2) Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.

(3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.

Based on a reading of the plain language of EPACT, DOE determined that Section 152 provided an express authorization for an agency to participate in energy management contracts and accept financial incentives directly from a utility without competition. The EPACT authorization is not limited to only those services that are regulated or that could only be performed by the utility. Instead, the agency is authorized to participate in any program or service "generally available to customers" of the utility.

DOE also referenced an opinion issued by the Naval Facilities Engineering Command (NAVFAC) in January 1993.[1] This opinion relied on language in the FY 1993 Defense Authorization Act almost identical to the EPACT language. Navy, and the other military services, found that the language was an express authorization to obtain energy management services without full and open competition. After reviewing the determinations of Navy and DOE, GSA reversed an earlier determination and found that EPACT did provide an express exception to CICA.

GSA believes that the area-wide contracts are proper vehicles for carrying out the goals of the EPACT. Therefore, GSA does not believe the scope of the area-wide contracts are limited to only those services and programs that the utilities are uniquely authorized to provide. As long as the program or service is "generally available to customers" of the utility, then we believe it to be properly within the scope of the GSA area-wide contract and, under EPACT, an exception to CICA.

See comment 2.

Similarly, the draft report suggests that the work must be performed by the utility itself to properly be within the scope of the area-wide contract. That limitation has never been applied by GSA and in fact flies in the face of the Small and Small Disadvantaged Subcontracting Plan requirements imposed on federal agencies and their contractors. The public utility industry has been required to file subcontracting plans and their compliance with these plans has resulted in a large percentage of GSA's overall subcontracting goals. The utility industry uses subcontractors for all aspects of the provision of service – from generation of energy itself, to construction of substations and connection services, to the provision of energy management services. GSA does not know of any legal restriction that would limit the coverage of the area-wide contracts, or the application of EPACT, to only those services that the utility itself provides, and such a limitation would be impossible to enforce.

[1] DOE also referenced a GAO opinion which, in interpreting language in the Solid Waste Disposal Act similar to the language in EPACT, found that the plain language permitted sole source contracting. See Monterey City Disposal Service, Inc., 85-2 CPD ¶ 261, aff'd, B-218624-2, B-218880.2, 85-2 DPD ¶ 306; aff'd Parola v. Weinberger, 848 F.2d 956 (1988).

-3-

The draft report also notes that the area-wide contract with Washington Gas Light defines "Energy Management Services" as those services "within the knowledge and/or supervision" of the Commission. GSA has reviewed this requirement in the contract and has determined that the requirement may no longer be consistent with current industry practice. At the time the area-wide contract was awarded, most if not all demand-side management or energy conservation projects were regulated activities. Utility companies generally had rebate programs, or otherwise expected the costs of such programs to be covered by ratepayers through the determination of rates. More recently, that manner of handling energy management services is no longer consistently handled between jurisdictions. In many instances, as it is in the District, such services are not regulated and therefore the Commission does not expect – and in fact has no forum for – the utility to provide information on such services. GSA is currently reviewing its area-wide contracts to determine what modification may need to be made to conform with industry standards on a jurisdiction by jurisdiction basis. We do not, therefore, believe this language in the contract should be used to call into question contacting activities that otherwise would be found within the scope of the area-wide contract.

See comment 3.

In referring to guidance issued by GSA on the use of the area-wide contract, the draft report refers to such guidance as "insufficient and unclear." We believe the language specifically referred to in the draft report is sufficiently clear and consistent with the language of EPACT. We do not believe it is reasonable for a contracting officer to interpret our guidance as authorizing general construction activity, since the language in the guidance and in EPACT is clearly tied to energy management and demand-side management projects. However, GSA will review its guidance to determine if it gives sufficient detail to contracting officers who are ordering services under the area-wide contract.

Finally, the draft report states that a separate letter is going to be sent to GSA regarding our oversight of the use of the area-wide contracts. Once GSA receives the referenced letter and has an opportunity to review the specific recommendations contained therein, GSA will comment on the recommendations.

Thank you for the opportunity to comment on the draft report. If you have any questions regarding our comments, please contact Mr. Richard Butterworth in the Office of General Counsel, (202) 501-4436, or Mr. Mark Ewing, Director, GSA's Energy Center of Expertise, (202) 708-9296.

Sincerely,

F. Joseph Moravec
Commissioner

Enclosure

Department of Energy
Washington, DC 20585

July 7, 1994

MEMORANDUM TO: Mr. Philip Winter
General Services Administration (GSA)

THROUGH: Mary Ann Masterson
Deputy Assistant General Counsel for Procurement and Financial Assistance

FROM: Anne Troy
Office of Procurement and Financial Assistance
GS 61

SUBJECT: Statutory Exception From The Competition In Contracting Act's Full and Open Competition Requirement In Demand Side Management Utility Contracts

You asked for assistance in determining whether the language in § 152 of the Energy Policy Act, Public Law 102-458, (EPACT) provides this agency with the authority to "sole source" utility service contracts to obtain demand side management (DSM) services. We conclude that the language contained in § 152 does meet the criteria of one exception to the Competition in Contracting Act of 1984 (CICA). CICA requires, with certain limited exceptions, full and open competition in government contracting. One of the exceptions to that requirement is contained in 41 U.S. C. § 253 (c) (5), which provides that a civilian agency may use other than competitive procedures when "a statute expressly authorizes or requires that the procurement be made . . . from a specified source." See also the Federal Acquisition Regulation, FAR 6.302-5 (a) (2).[1]

Section 152 of EPACT provides as follows:

(c) UTILITY INCENTIVE PROGRAMS – Agencies are authorized and encouraged to participate in programs to increase energy efficiency and for water conservation or the management of electricity demand

[1] The Federal Acquisition Regulation requires that contracts awarded using this authority will be supported by a written Justification and Approval (J&A).

conducted by gas, water, or electric utilities and generally available to customers of such utilities.

(2) Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.

(3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.

Plain Language. In our opinion, § 152's plain language contains an express authorization for an agency to participate in DSM contracts and permits them to accept any financial incentive or to enter into negotiations regarding these incentive programs. This language appears to provide express authority for an agency to directly approach a utility concerning DSM services, including the capability to award a noncompetitive contract to that utility without the use of full and open competition.

Navy Concurrence. Moreover, of some significance, our opinion is shared by the Naval Facilities Engineering Command (NAVFAC) which, with the other military service departments, relies upon virtually identical language in the FY 93 Defense Authorization Act[2] (attachment 1) to obtain DSM services directly from gas or electric utilities. In a legal opinion (attachment 2) discussing this issue, the counsel from NAVFAC states, ". . . [c]hanges made to 10 U.S.C. 2865 by the FY 93 Defense Authorization Act . . . clearly authorize military departments to obtain DSM services directly from gas or electric utilities. . . . We need only execute a J&A citing 10 U.S.C. 2865 (d) (3) as authority. FAR 6.302-5 provides that full and open competition is not required where a statue expressly provides that an acquisition be made from a specified source, i.e., the servicing gas or electric utility."

[2] Public Law 102-484 at section 2801, states:

(d) The Secretary of Defense shall permit and encourage each military department . . . to participate in programs conducted by any gas or electric utility for the management of electricity demand or for energy conservation.

(2) The Secretary may authorize any military installation to accept any financial incentive, goods, or service generally available from gas or electric utility, to adopt technologies and practices that the Secretary determines are cost effective for the Federal Government.

(3) The Secretary of Defense may authorize the Secretary of a military department having jurisdiction over a military installation to enter into agreements with gas or electric utilities to design and implement cost-effective demand and conservation incentive programs (including energy management services, facilities alterations, and the installation and maintenance of energy saving devices and technologies by the utilities) to address the requirements and circumstances of the installation.

Statutory Intent. In a recent telephone conversation with the NAVFAC counsel who authored the attached opinion, he stated that NAVFAC continued to adhere to the above stated position and that a NAVFAC field office, SOUTHWESTDIV, had used the statutory exception to sole source a contract for DSM services from a San Diego utility. The counsel also reminded me that the language contained in EPACT had been purposefully adopted from the language in the Defense Authorization Act for the same reasons that the military services had earlier advocated, i.e., they wanted broad authority to obtain DSM services from utilities without using time-consuming and complex competitive procurement procedures. As the counsel stated to me, the purpose of the language was to facilitate and ease the process. If read any other way, the provisions would serve no purpose since agencies are compelled to use competitive procedures in any case.

General Accounting Office Opinions. Lastly, we rely upon certain General Accounting Office (GAO) opinions which have interpreted the specified source exceptions and permitted agencies to use other than competitive procedures. For instance, in Monterey City Disposal Service, Inc., 85-2 CPD ¶ 261, aff'd, B-218624-2, B-218880.2, 85-2 DPD ¶ 306,[3] the Comptroller General concluded that the specified source exception to CICA was applicable where, under the Solid Waste Disposal Act, 42. U.S.C. § 6961, federal agencies were required to comply with local requirements respecting the control and abatement of solid waste "in the same manner, and to the same extent, as any person is subject to such requirements." In that case, the city of Monterey required that all inhabitants of the city have their solid waste collected by the city's franchise. The Navy argued that there was no express congressional intent in section 6961 of the Solid Waste Disposal Act to permit sole source contracting. The Comptroller General rejected this argument and appeared to rely primarily on interpreting the plain language of the Solid Waste Disposal Act.

If you have any further questions on this matter, please contact this office at 202-586-1900.

[3] The GAO opinion was affirmed in Parola V. Weinberger, 848 F.2d 956 (1988).

"(E) Any other factor which the Secretary determines will result in the greatest amount of energy and cost savings to the Federal Government.

"(4) There are authorized to be appropriated, to remain available to be expended, to carry out this subsection not more than $10,000,000 for fiscal year 1994, $50,000,000 for fiscal year 1995, and such sums as may be necessary for fiscal years thereafter.

"(c) UTILITY INCENTIVE PROGRAMS.—(1) Agencies are authorized and encouraged to participate in programs to increase energy efficiency and for water conservation or the management of electricity demand conducted by gas, water, or electric utilities and generally available to customers of such utilities.

"(2) Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.

"(3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.

"(4) If an agency satisfies the criteria which generally apply to other customers of a utility incentive program, such agency may not be denied collection of rebates or other incentives.

"(5)(A) An amount equal to fifty percent of the energy and water cost savings realized by an agency (other than the Department of Defense) with respect to funds appropriated for any fiscal year beginning after fiscal year 1992 (including financial benefits resulting from energy savings performance contracts under title VIII and utility energy efficiency rebates) shall, subject to appropriation, remain available for expenditure by such agency for additional energy efficiency measures which may include related employee incentive programs, particularly at those facilities at which energy savings were achieved.

(B) Agencies shall establish a fund and maintain strict financial accounting and controls for savings realized and expenditures made under this subsection. Records maintained pursuant to this subparagraph shall be made available for public inspection upon request.

"(d) FINANCIAL INCENTIVE PROGRAM FOR FACILITY ENERGY MANAGERS.—(1) The Secretary shall, in consultation with the Task Force established pursuant to section 547, establish a financial bonus program to reward, with funds made available for such purpose, outstanding Federal facility energy managers in agencies and the United States Postal Service.

"(2) Not later than June 1, 1993, the Secretary shall issue procedures for implementing and conducting the award program, including the criteria to be used in selecting outstanding energy managers and contributors who have—

"(A) improved energy performance through increased energy efficiency;

"(B) implemented proven energy efficiency and energy conservation techniques, devices, equipment, or procedures;

"(C) developed and implemented training programs for facility energy managers, operators, and maintenance personnel;

"(D) developed and implemented employee awareness programs;

Codified in 42 USC 8254(b)

The following are GAO's comments on the General Services Administration's letter dated September 19, 2001.

GAO Comments

1. We agree with GSA that areawide contracts may be appropriate vehicles for carrying out the federal energy management goals of the Energy Policy Act. However, we continue to believe that any exception to the government's competitive contracting requirements for agency participation in utility incentive programs is limited to regulated services or to services for which the utility is the only available source. None of the arguments or information GSA has provided in its comments is inconsistent with our position or convinces us otherwise.

As we will more fully discuss in our forthcoming letter to GSA, our view is further supported not only by the Energy Policy Act itself, but by the definition of "utility" in an Executive Order requiring agencies to reduce energy usage and cost through use of alternative financing and contracting mechanisms. Indeed, the language "generally available to customers" that GSA refers to itself appears to indicate that the utility incentive programs in which federal agencies are authorized to participate are subject to applicable public utility regulatory authority. Accordingly, we stand by our position that the government's competitive contracting requirements limit the use of GSA areawide contracts to utility services, including energy efficiency services, subject to public utility regulatory authority or for which the utility is the only available source.

2. GSA misconstrues our position. The language to which GSA refers was not meant to signify that only the regulated utility could perform regulated services. We are not aware of any prohibition on a utility company's subsidiaries or subcontractors performing such services if approved or authorized under regulatory authority. Instead, our point was that, in the case of the school system, the subsidiaries and subcontractors were providing unregulated services not authorized under the areawide contract rather than services that could be authorized under the contract if subject to public utility regulatory authority. Further, as we pointed out, Washington Gas was acting as a general contractor by performing a project management role over its unregulated subsidiaries and subcontractors, a role that was not authorized under the GSA contract.

3. GSA acknowledges that the areawide contract with Washington Gas is for regulated utility services, as we maintain. Because of deregulation in the utility industry, GSA states that it is now reviewing its areawide contracts for possible modification in light of "current industry practice."

We also recognize that deregulation may limit the services that may be ordered under an areawide contract because certain services may no longer be subject to regulation (but are available from more than one source in the marketplace).

Since areawide contracts are entered into without competition due to the regulated nature of the utility industry, we reiterate our position that the contracts remain limited to regulated services or services for which the utility is the only available source. As we have indicated, we believe the government's competitive procurement requirements are violated if an areawide contract is used for utility services, including energy efficiency services, that are not subject to public utility regulatory authority or for which the utility is not the only available source. To the extent utility services are available from more than one source, the acquisition of such services should be through competitive procedures, as already required under the Federal Acquisition Regulation. In modifying any areawide contracts to reflect "current industry practice," GSA must ensure that it complies fully with the government's competitive procurement requirements.

Appendix V: None of the School System's Orders Fell Within Scope of the GSA Contract

In determining whether an order is beyond the scope of a contract, GAO looks to whether there is a material difference between the task order and the contract.[1] Here, there is a material difference between GSA's contract with the Washington Gas Light Company for gas utility and energy management services and the orders placed by the school system under the contract.

The GSA Contract

On April 17, 1996, GSA executed an areawide utility services contract with the Washington Gas Light Company for federal agencies to use in obtaining natural gas, gas transportation, and energy management services. The contract is the master contract for acquisitions of these utility services by all federal agencies from Washington Gas for a period of 10 years (through April 16, 2006). Washington Gas has an exclusive franchise from government regulatory bodies (including the District of Columbia Public Service Commission) to provide natural gas service to customers in Washington, D.C., and adjoining areas of Maryland and Virginia. Due to the regulated nature of this public utility company, GSA entered into the contract with Washington Gas without competition.

The GSA contract with Washington Gas authorizes agencies to order gas, gas transportation, and/or energy management services directly from the contractor. The contract defines "Energy Management Services" as:

> "any one or more of the services provided or to be provided by the Contractor pursuant to an Authorization in the form of EXHIBIT "C", which services are within the knowledge and/or supervision of the [Public Service] Commission. Such services include any specific service intended to provide energy savings, efficiency improvements and/or demand reductions in Federal facilities, whether or not it involved financial incentives and/or rebates, specifically including (but not limited to): energy audits and energy conservation measures such as lighting control and boiler control improvements, cooling tower retrofits, solar air preheating systems, demand side management initiatives, fuel cell installation, and water conservation device installation."

To obtain energy management services from the contractor, the ordering agency files an Exhibit "C" "Authorization for Energy Management

[1] This is the same standard used in GAO bid protest cases in considering whether a task order exceeds the scope of the underlying contract. See for example Ervin and Assocs., Inc., B-278850, March 23, 1998, at 8; Makro Janitorial Services, Inc., B-282690, August 18, 1999, at 3.

Service" form with the contractor. The form, which is included in the contract, states that energy management service is required to be provided consistent with the

> "[c]ontractor's applicable tariffs, rates, rules, regulations, riders, practices, and/or terms and conditions of service, as modified, amended or supplemented by the Contractor and approved, to the extent required, by the Commission, and in the event that specific approval is not required by the Commission, service provided is required to be within the knowledge and/or supervision of the Commission."

Exhibit "C" listed the following energy management services that could be ordered if approved by or within the knowledge and/or supervision of the Public Service Commission: "Preliminary Energy Audit"; "Energy Conservation Project (ECP) Installation"; "ECP Feasibility Study"; "ECP Engineering & Design Study"; "Demand-Side Management (DSM) Project"; "Special Facilities"; and "Other". If the "Other" box was checked, the ordering agency was to describe the service(s) purchased in the "Remarks" section of the form.

School System's Use of the GSA Contract

The school system issued more than $43 million worth of orders to Washington Gas under the GSA areawide contract, all on Exhibit "C," ostensibly as "energy management services" and all under the "Other" category of services. The school system would then list the nature of services ordered in the "Remarks" section of each Exhibit "C."

The school system first started issuing orders at the end of calendar year 1997 for emergency boiler repairs, rental of temporary boilers, purchase and installation of replacement boilers, and repair, replacement, and maintenance of heating, ventilation, and air conditioning (HVAC) equipment. Beginning in 1999, the nature of the work or services the school system ordered from Washington Gas began shifting to general maintenance, repair, construction, and to the procurement of other work related to building operations such as carpet installation and flooring repairs, painting and ceiling work, electrical and lighting upgrades, the purchase and installation of window air conditioning units, elevator renovations and upgrades, the purchase and installation of new public address and clock systems, generator replacement, replacement of security lights, installation of bathroom partitions, and plumbing work.

Contract Did Not Contemplate the Work Ordered

The GSA areawide contract with Washington Gas makes no reference whatsoever to any of these types of work or services or even to the general issue of boiler repair, rental, and replacement, or HVAC maintenance or repairs.[2] This is not surprising, because the contract is specifically for the provision of regulated utility services, not the type of work that can otherwise be performed by a general contractor, maintenance firm, or licensed plumbing or heating contractor. We do not view the GSA contract as contemplating the type of boiler and HVAC repair and replacement, minor construction and building maintenance, and other work and services that could be provided competitively by many available sources. Indeed, Federal Acquisition Regulation (FAR) part 41, which establishes procedures for federal agencies to acquire utility services, states that its provisions, including those related to GSA areawide utility contracts, do not apply to construction and maintenance of government-owned facilities.[3] To the extent that school system orders involved construction and maintenance, these orders are clearly contrary to the governing regulation.

The GSA contract also requires than an "Energy Management Service" provided by the contractor must be within the knowledge and/or supervision of the Public Service Commission having jurisdiction over the contractor's service area. Specifically, the contract defines the term "Service" as:

> "any commodities, financial incentives, goods, and/or services generally available from the Contractor pursuant to its tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service, as may be modified, amended, or supplemented by the Contractor and approved from time to time by the [Public Service] Commission, and the rules and regulations adopted by the Commission."

As we read the GSA contract, if the contractor has not notified the Public Service Commission of its intention to provide the service (which then may be subject to Commission regulation/approval), the service cannot

[2] The GSA contract does mention "boiler control improvement" as a possible energy management service. However, the school system did not order mere "boiler control improvement," that is, improvements to controls for boilers, but rather, through the GSA contract, had the boilers themselves repaired, overhauled, or replaced, and rented temporary boilers from a Washington Gas subsidiary.

[3] FAR 41.103(b)(6).

properly be provided under the GSA contract.[4] Based on our reading of the contract and our discussion with representatives of the District of Columbia Public Service Commission, we believe that any energy management services provided by Washington Gas to the school system under the GSA areawide contract would have to have been "within the knowledge and/or supervision" of the Public Service Commission.

However, there is no indication that any of the work or specific services provided by Washington Gas to the school system were "within the knowledge and/or supervision" of the Public Service Commission, through a tariff filing or otherwise. Rather, the only services relevant here that could have been construed as related to "Energy Management Services" that the Public Service Commission had on file from Washington Gas were "non-residential full scale conservation programs" that included a municipal boiler/furnace installation assistance program for space and water heating. These programs were considered by the Commission to be a "least cost planning program," the costs of which were included in the rate base passed on to ratepayers. Since these programs affected rates paid by Washington Gas customers, the programs were described in a tariff filed by Washington Gas with the Public Service Commission. The Commission provided us a copy of the relevant portion of the tariff.

Under the tariff, effective for service rendered after March 1994, the municipal boiler/furnace installation assistance program provided for cash incentives to the District Government for replacing boilers, furnaces, and hot water heaters with new gas-fired high efficiency equipment. The tariff did not indicate that Washington Gas itself was to provide the equipment replacement but merely that upon verification of the installation of the equipment, Washington Gas was to provide a cash incentive to the District for each eligible replacement of equipment. The tariff also authorized Washington Gas to conduct energy surveys of the buildings of customers participating in the programs at no cost to the customer. Because these services were provided in a tariff effective when the GSA areawide contract with Washington Gas was executed in 1996,[5] these limited services could be the only "Energy Management Services" contemplated by the contract as being within the knowledge or supervision of the Public Service Commission.

[4] This would be the case even if the service were specifically listed in the above definition of "Energy Management Service" or on the Exhibit "C" Authorization (which provide examples of services that could be provided by the contractor).

[5] The contract required Washington Gas to furnish GSA a complete set of its tariffs in effect as of the date of execution on the contract.

Beginning in 1999, even these limited "Energy Management Services" were no longer authorized by the Public Service Commission in Washington Gas's capacity as a regulated public utility. In an order dated December 21, 1998, the Commission approved the elimination of least-cost planning costs from the utility rate base, thus terminating filing requirements related to least-cost planning, including the municipal boiler/furnace installation assistance program. The Commission does not have on file from Washington Gas any other energy management service programs applicable to the GSA contract. Accordingly, since December 1998, there have been no authorized energy management services "within the knowledge and/or supervision" of the Public Service Commission that Washington Gas can provide under the GSA contract. Thus, all the orders issued by the school system to Washington Gas for "energy management services" after that date were for work and services not "within the knowledge and/or supervision" of the Public Service Commission, and thus outside the scope of the GSA contract.

The orders issued by the school system to Washington Gas prior to December 21, 1998, also are outside the scope of the GSA contract. Based on the information provided to us, these orders were primarily for boiler (heating) repairs, temporary boiler rentals, new boilers, and chiller (air conditioning) repairs. None of these goods and services are authorized under the GSA contract because none of Washington Gas's energy management services on file with the Public Service Commission included heating and air conditioning repair services, renting temporary boilers, and selling and installing new boilers. Because these services were not within the knowledge or supervision of the Public Service Commission, they could not be obtained under the GSA contract, and the school system's orders for these services were beyond the scope of the GSA contract.

Orders Not Performed by Regulated Utility

Another indication that the work ordered by the school system fell outside the scope of the GSA contract was the fact that in no instance was any of the work ordered actually performed in the schools by Washington Gas Light Co. itself. For every order, Washington Gas Light Co. either had the work performed by a subsidiary[6] (such as American Combustion Industries, Inc) or a subcontractor, usually at the behest of school system personnel (who specifically requested Washington Gas to subcontract with certain firms). These subcontractors included general contractors and heating and plumbing contractors.

[6] In one instance, the school system actually entered into a written agreement under the GSA contract for temporary boilers, boiler assessment and repairs directly with a subsidiary (Washington Gas Energy Systems, Inc.) of Washington Gas Light Co.

The significance of the involvement of these subsidiaries and subcontractors is that the school system was not ordering from or having the worked performed by the regulated utility provider (Washington Gas Light Co.) but by unregulated subsidiaries or subcontractors. Because these subsidiaries or subcontractors were providing unregulated services rather than the energy management services authorized to be performed by the regulated utility (that is, by Washington Gas Light Co. itself) the services performed by the subsidiaries and subcontractor fell outside the scope of the GSA contract.

Further, Washington Gas representatives and school system officials with whom we spoke characterized the services provided by Washington Gas employees as "project management." The project management role was more akin to the responsibilities of a general contractor over its subcontractors rather than to any provision of actual utility services. Indeed, Washington Gas representatives told us the school system officials had requested the company to play the role of project manager for the renovations to the schools. Such project management services primarily involved Washington Gas personnel aggregating work requested by the schools into orders for the school system's contracting officer to issue and administrative oversight of the subsidiaries and subcontractors actually performing the ordered work at the schools. Nowhere in the GSA contract is "project management" listed or otherwise contemplated by the contract as an "energy management service."

Areawide Contracts Limited to Regulated Utility Services

We believe our conclusion that only a very limited scope of services can be provided under the GSA contract with Washington Gas is warranted because of the unique nature of GSA areawide utility contracts in the context of the federal government's competitive procurement requirements.

Under the Federal Acquisition Regulation, GSA's areawide contracts are limited to regulated utility services, or at least to utility services for which there is no other source within the service area. This is because GSA enters into areawide utility contracts without competition due to the fact that competition for the utility services is not available within the geographic area (the "franchise territory") covered by an areawide contract because provision of the services is based upon a franchise, a

certificate of public convenience and necessity, or other legal means.[7] Agencies needing utility services within an area covered by an areawide contract are required to use the contract to acquire those services unless service is available from more than one supplier. If service is available from more than one supplier, agencies are required to procure the service using competitive acquisition procedures.[8]

In our opinion, allowing agencies to order services under an areawide contract for which the utility provider is not the only available source would run counter to the requirements of the Competition in Contracting Act of 1984,[9] which requires federal agencies, including GSA, to conduct procurements using full and open competition. Competition requirements are evaded if areawide contractors, which are awarded their contracts by virtue of their status as regulated utilities, are allowed to provide unregulated services to ordering agencies that are available from other sources using competitive procedures. Further, utility providers could take advantage of their status by marketing these unregulated services (typically provided by subsidiaries) to agencies required or authorized to use an areawide contract. We view this as contrary to the basic competitive contracting rules applicable to the Federal and District of Columbia government.

Conclusion

We conclude that all the orders placed by the school system under the GSA areawide utility contract with Washington Gas improperly exceeded the contract's scope. It appears that all of the work ordered by the school system is not of the type of that only Washington Gas Light Co. itself could have provided as a regulated utility. Rather, the work ordered is of the type that could be performed by competent general contractors, maintenance firms, or licensed plumbing, electrical or heating contractors. Where a task order is beyond the scope of the underlying contract, the work covered by the order would otherwise be subject to the statutory requirements for competition. Here, because all of the work ordered was beyond the scope of GSA's contract with Washington Gas, more than $43

[7] Because utility services may not necessarily be regulated or monopolistic, GSA's statutory authority to contract for utility services for other agencies (the Federal Property and Administrative Services Act of 1949 as amended, 40 U.S.C. 481(a)) and the procedures in FAR part 41 for agencies to acquire utility services, are not limited to the regulated utility services for which GSA areawide contracts are used.

[8] FAR 41.204(c)(i) and 41.202(a), (b).

[9] 41 U.S.C. 253.

million worth of work was acquired by the school system without competition.

Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

Michele Mackin (202) 512-4309

Acknowledgments

In addition to the name above, Cristina T. Chaplain; Robert Davis, Jr.; Charles D. Groves; John D. Heere; William Petrick, Jr.; Christopher Pothoven; and Adam Vodraska made key contributions to this report.

Ordering Information

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