



OFFICE OF  
INSPECTOR GENERAL

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

MEMORANDUM

August 10, 2009

**TO:** Sharon Sheehan, Associate Executive Director, Office of Administrative Services

**FROM:** H. David Kotz, Inspector General, Office of Inspector General *HDK*

**COPY:** Kayla Gillan, Deputy Chief of Staff, Office of the Chairman  
Diego Ruiz, Executive Director, Office of the Executive Director

**SUBJECT:** Management Alert - *Microsoft Premier Support Services Contract*, Report No. 469

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The Securities and Exchange Commission's (SEC), Office of Inspector General (OIG) received an anonymous complaint through the Government Accountability Office's (GAO) automated complaint system, FraudNET, regarding a sole source contract for Microsoft Premier Support Services (Contract No. SECHQ1-06-P-0176), that the Office of Acquisitions (OA) awarded to Microsoft Corporation (Microsoft) in May 2006. Specifically, the complaint raised concerns regarding the method that was used to award the contract and OA's subsequent issuance of contract modifications that the complainant believed were outside the scope of the original contract.

Based on the allegations in the FraudNET complaint, OIG auditors met with several OA contracting officials to discuss the allegations, obtained pertinent information about the complaint, and reviewed the contract file. The OIG determined that the FraudNET complaint has merit, and we identified several issues that warrant your immediate attention. OIG auditors verbally relayed these concerns to Norbert Doyle, Assistant Director, OA and other OA staff on or about May 1, 2009. We also provided to you a draft of this Management Alert on July 16, 2009 and received and reviewed the comments you provided to us on our draft on July 29, 2009.

The purpose of this Management Alert is to present our concerns to you in writing. We ask that you respond within five business days of receipt of this letter and identify the actions your office has taken, or plans to take, to address five significant areas related to the award of the Microsoft Premier Support Services contract and the subsequent modifications as follows:

1. Issuance of the Sole Source Contract to Microsoft
2. Sole Source Justification and Approval
3. Microsoft Premiere Support Services Contract Award

4. Contract Modification Option Year 2
5. Price Reasonableness Determination

This review was not conducted in accordance with government auditing standards.

## **BACKGROUND**

On March 27, 2006, Microsoft provided OA with a proposal pertaining to the acquisition of software support services (termed Microsoft Premier Support Services), based on its understanding of OA's requirements and past experience working with the SEC. On April 27, 2006, the SEC Office of Information Technology (OIT) and OA approved a justification and approval (J&A) for other than full and open competition and awarded the Microsoft Premier Support Services, contract SECHQ1-06-P-0176, to Microsoft, citing as statutory authority "41 U.S.C. 253(c)(1) FAR 6.302-1(a)(2) – "Only one responsible source." On that same day, OA publicized its intent to award the sole source contract for Microsoft software support services to Microsoft on the Federal Business Opportunities website (FedBizOpps). While this notice was not a request for quotations, interested contractors were allowed to submit their capabilities and qualifications to perform the effort in writing to OA by May 4, 2006. On May 5, 2006, OA awarded a contract to Microsoft for \$227,400 for the software support services. The award document stated that the period of performance consisted of a base year (from June 1, 2006 to May 31, 2007) and three option years. The total contract value, including all option years, amounted to \$1,009,643.

On May 10, 2007, OA issued a modification to exercise and fully fund Option Year 1 of the contract. On May 22, 2008, the SEC issued a modification to exercise and fully fund Option Year 2 of the contract, which also incorporated an attached amendment. The amendment expanded the scope of the contract by enhancing the existing software support options, adding consulting services to the contract's scope on a Firm Fixed Price Indefinite Delivery Indefinite Quantity basis, and including language to incorporate 96 agencies that are members of the Federal Small Independent Agency (FSIA) Chief Information Officer Council as "affiliates" to the contract.

## **CONTRACT AWARD AND MODIFICATION PRACTICES**

### **Summary**

We identified five significant practices related to the award of the Microsoft contract that are problematic. Specifically, we found that OA's basis for awarding the sole source contract to Microsoft was not clearly supported. Additionally, OA's Justification and Approval for Other than Full and Open Competition (J&A)

was not signed by the competition advocate as required by FAR 6.304(a)(2). Also, the actual award document is in the form of a purchase order signed only by the United States Government rather than a contract signed by both parties. Further, we found that after the contract was initially awarded, on May 22, 2008, a modification was executed that improperly expanded the scope of the contract by adding consulting services and including 96 agencies as affiliates to the agreement. Lastly, the price reasonableness determination performed at the time of the initial contract award improperly cited FAR 13, *Simplified Acquisition Procedures*, as its basis for determining the fairness and reasonableness of Microsoft's proposed price.

### **1. Issuance of Sole Source Contract to Microsoft**

We found that OA's J&A did not support purchasing the Microsoft Premier Support Services directly from Microsoft as opposed to obtaining those services from Microsoft resellers. Additionally, the OIG determined that any future SEC procurements for Microsoft Premier Support Services should allow Microsoft resellers to compete for the contract. By sole sourcing the requirement for these services, OA excluded resellers, many of which are small businesses.

FAR Part 6, *Competition Requirements*, requires contracting officers to provide for full and open competition through the use of competitive procedures that are best suited to the circumstances of the contract action and are consistent with the need to fulfill the Government's requirements efficiently.<sup>1</sup> Contracting for services without providing for full and open competition is a violation of statute, unless permitted by an exception. One of the exceptions applies when an agency requires supplies or services that are available from only one responsible source, and no other type of supplies or services will satisfy the agency's requirements.

The contract for Microsoft Premier Support Services was awarded as a sole source contract to Microsoft based on the statutory authority permitting other than full and open competition, per FAR 6.302-1, *Only one responsible source and no other supplies or services will satisfy agency requirements*. FAR 6.302-1 (b)(1)(i) states that the authority granted under this exception may be appropriate in situations such as when there is a reasonable basis to conclude that the agency's minimum needs can only be satisfied by unique supplies or services available from only one source or only one supplier with unique capabilities. FAR 6.302-1 (c) provides that "[a]n acquisition that uses a brand name description or other purchase description to specify a particular brand name, product, or feature of a product, peculiar to one manufacturer does not provide for full and open competition regardless of the number of sources solicited. It shall be justified and approved in accordance with FAR 6.303 and 6.304." FAR 6.303 specifies

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<sup>1</sup> See FAR 6.101(b).

the requirements for a justification for a contract award without providing for full and open competition, while FAR 6.304 specifies the approval required for justifications based upon the dollar value of the proposed contract.

Although we found that OA sole sourced the contract to Microsoft using the aforementioned authority (FAR 6.302-1), evidence found in the contract file suggests that Microsoft resellers also provide Microsoft Premier Support Services. Further, while the J&A supports buying Microsoft Premier Support Services, it does not demonstrate why Microsoft resellers should have been excluded from participation in the procurement.

Further, e-mails in the contract file between the former contract specialist who was assigned to work on the 2006 contract and OIT indicate that Microsoft resellers could provide the required services. More specifically, the contract specialist stated in an April 18, 2006 email:

I think the J&A supports buying Microsoft Premier Support. But Microsoft and their licensed resellers all sell Microsoft Premier Support. They are all available sources. I don't think the J&A supports buying premier support from Microsoft instead of a licensed Microsoft reseller.

Question...do you want to buy premier support from Microsoft only, or would you consider competing this purchase between Microsoft and their licensed resellers.

A reseller resells Microsoft premier support, for example our current vendor for our premier support is GTSI. Theoretically, the reseller marks up the Microsoft premier support to cover the reseller's profit margin. Microsoft should be able to sell premier support to us cheaper than any of their resellers, but that is not a valid reason to sole source this to Microsoft. Do you have a requirement to buy premier support from Microsoft and not any resellers? [Emphasis supplied.]

In response to the contract specialist's e-mail, it appears that OIT prepared another J&A to support competing the Microsoft Premier Support Services contract through resellers on the General Services Administration schedule. However, this second J&A was never utilized, and, in fact, the contracting officer subsequently sent an e-mail to OIT, stating that the first J&A was acceptable and apologized for the confusion. The contracting officer's e-mail, however, provided no further explanation of the decision to sole source the contract to Microsoft versus opening up participation to Microsoft resellers.

Additionally, the April 2006 J&A, paragraph 5, states:

**Demonstration that the proposed contractor's unique qualifications or nature of the acquisition requires use of the authority cited:**

SEC is currently using Microsoft products including NTWS, Active Directory, Windows XP, Windows 2003, SQL server, Systems Management Server, MS Exchange, and Microsoft Office Suite. The SEC currently has a contract with Microsoft Premier Support to provide technical support to various Microsoft products. Our experience with this vendor has been excellent. The account management team provided personnel to manage the support services, facilitate the relationship between SEC and the vendor. Technical workshop was provided with experts from Microsoft professional which is available only through Microsoft Premier Support. Also, Microsoft Premiere allows SEC technical personnel to access to Microsoft Premiere Support web site for self-service and access to advance technical knowledgebase. No other support vendor can provide such an option. Microsoft Premiere has access directly to the Microsoft Product development team to resolve advance technical issues, and alerts the SEC problems and most importantly, the upcoming security patches prior to the public release, No other support vendor has that option to offer. The renewal of the support for these products will ensure the SEC's ability to continue to meet the needs of the SEC staff. The Microsoft Premier Support product is a proprietary product of Microsoft Corporation. [Emphasis supplied.]

The OIG determined that although the J&A supports buying Microsoft Premier Support Services, it does not adequately justify sole sourcing the requirement to Microsoft versus allowing Microsoft and its resellers to participate in a competition for the contract services. Notably, the SEC's existing contract for these services was through a Microsoft reseller, GTSI. Moreover, despite the apparent confusion over whether it was acceptable to sole source the requirement, there is no evidence in the contract file, or based on our interviews of OA personnel, that OA sought legal assistance prior to awarding the contract to ensure compliance with the FAR. Further, we noted that Microsoft itself acknowledged in a May 2008 price quote to the SEC that Microsoft Premier Support Services are available through resellers. Microsoft stated, "Please note that the above pricing is valid only when a governmental agency contracts directly with Microsoft. If the agency elects to purchase Premier via a reseller or other existing contract vehicle, the price of these services may increase."

On May 7, 2009, after the OIG brought the issue of the propriety of the sole source award to OA's attention, OA publicized its intent to exercise Option Year 3

of the sole source Microsoft contract by placing a notice on <http://www.fedbizopps.gov>. OIT and OA also prepared a new J&A pertaining to Option Year 3 of the contract. Our review of this document indicated that it did not specifically state why Microsoft resellers could not provide the Microsoft Premier Support Services.

On May 22, 2009, one contractor, [REDACTED] responded to the notice. [REDACTED] expressed interest in providing Microsoft Premier Support Services to the SEC and stated that it currently provided the same services to various other Federal government agencies. On May 29, 2009, OA exercised Option Year 3 of the Microsoft contract. OA responded to [REDACTED] on June 2, 2009, stating that one of the key requirements in the FedBizOpps notice was that the SEC "needed direct access to the Microsoft's product development team" and that [REDACTED]'s submitted technical capabilities did not adequately respond to this requirement. Additionally, OA stated that [REDACTED]'s submission was 3.5 hours late and was, therefore, untimely. [REDACTED] responded back to OA on June 2, 2009 noting that it provides Microsoft Premier Support Services directly through Microsoft and that, if the SEC awarded the contract to [REDACTED], it would have direct access to the Microsoft development team. Per our discussions with the contracting officer, we understand that OA did not provide any further response to [REDACTED].

The OIG determined that [REDACTED]'s response to the SEC's FedBizOpps notice provides further support that the Microsoft Premier services sought by the SEC are available from Microsoft resellers. Accordingly, we believe that OA's justification to sole source this requirement to Microsoft is not adequately supported and future procurements should allow reseller participation, unless OA provides sufficient documentation clearly demonstrating why resellers cannot adequately provide the needed services.

## **2. Sole Source Justification and Approval**

The OIG found that the J&A for the Microsoft contract was not approved by the appropriate contracting official level.

FAR 6.304, *Approval of the Justification*, requires justifications for other than full and open competition for proposed contract actions over \$550,000, but not exceeding \$11,500,000, to be approved by the competition advocate designated pursuant to FAR 6.501, or an official described in paragraph a(3) or a(4) of FAR 6.304. FAR 6.502, *Duties and Responsibilities*, states that one of the duties of a competition advocate is to review the contracting operation of the agency and identify and report to the agency senior procurement executive "[a]ny condition or

action that has the effect of unnecessarily restricting the acquisition of commercial items or competition in the contract actions of the agency . . . .”<sup>2</sup> In a memorandum for Chief Acquisition Officers and Senior Procurement Executives from Paul A. Denett, Subject: Enhancing Competition in Federal Acquisition, dated May 31, 2007, the Administrator of the Office of Federal Procurement Policy requested that agencies “reinvigorate the role of the competition advocate.”

We found that the April 27, 2006 J&A erroneously reflected only the base year contract value of \$228,100 and was not signed by the competition advocate, although the total contract value was in excess of \$1,000,000. The contract file contained a proposal that Microsoft had provided to OIT on March 27, 2006, which showed a proposed total contract price of \$1,009,643, consisting of a base year and three option years. The J&A, however, only contained the dollar amount for the base year and was signed only by the contracting officer. Had the J&A been signed by the competition advocate as required by the FAR, this individual may have discovered the aforementioned deficiencies regarding the sole source statutory authority before the contract was awarded.

On or about May 8, 2009, after the OIG brought these deficiencies to OA’s attention, OIT, in conjunction with OA, prepared another J&A that covered Option Year 3 of the contract. Both the contracting officer and competition advocate signed this document.

### **3. *Microsoft Premiere Support Services Contract Award***

We determined that the type of contract vehicle that was used to procure the Microsoft Premiere Support Services was improper. The contract was awarded using Optional Form 347, *Order for Supplies and Services*, and is marked on its face as a delivery order, although it is referred to elsewhere in the document as a contract. The requirement was then reported to the Federal Procurement Data Center as a purchase order. Lastly, the award is only signed by the contracting officer and not by a Microsoft representative. Accordingly, it is questionable whether the award even constituted a properly-executed and binding contract.

FAR 53.213, *Simplified Acquisition Procedures*, prescribes Optional Form 347, as well as certain other specified forms, for (1) use under simplified acquisition procedures (which apply to acquisitions of \$100,000 or less, see FAR 2.101); (2) orders under existing contracts or agreements; and (3) orders from required sources of supplies and services. Because the value of the Microsoft contract is in excess of \$100,000, and OA is not ordering under an existing contract or agreement or from a required source, simplified acquisition procedures were not appropriate for this procurement.

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<sup>2</sup> See FAR 6.502(b)(1)(iv).

The OIG concluded that OA should have established a contract using Standard Form 1449, *Solicitation/Contract/Order for Commercial Items*, as prescribed by FAR 53.212, for use in solicitations and contracts for commercial items. Unlike Optional Form 347, Standard Form 1449 requires the signature of both the contractor and the government contracting officer.

#### **4. Contract Modification Option Year 2**

We found that OA improperly expanded the scope of the original contract when it exercised Option Year 2, essentially violating the FAR's competition requirements.

FAR Part 5, *Publicizing Contract Actions*, requires any contract actions for additional supplies or services outside the existing contract scope to be publicized to the Governmentwide point of entry (GPE) in order to increase competition, broaden industry participation in meeting Government requirements, and to assist small business concerns in obtaining contracts and subcontracts.<sup>3</sup> The GPE may be accessed via the Internet at <http://www.fedbizopps.gov>.

On May 22, 2008, OA modified the original Microsoft contract by exercising Option Year 2 and amending the terms and conditions of the contract. The amendments, which were drafted by Microsoft, clearly expanded the scope of the contract by (1) enhancing existing software support options (Premier Support Services by Microsoft), (2) adding consulting services to the scope of the contract on a Firm Fixed Price Indefinite Delivery Indefinite Quantity basis, and (3) including language to add 96 agencies that are members of the FSIA Chief Information Officer Council as affiliates to the contract. A May 6, 2008 email from a Microsoft sales representative to the SEC contract specialist stated:

The amendment provides for the following:

- Identifies all current and future FSIA council members as "affiliates" to the Agreement;
- Each member will enter into a Task Order with Microsoft which will identify the level of services and its associated cost;
- Defines 4 models an affiliate (council member) can purchase various levels of Premier Support services (refer to the Supplement made part of the Amendment);
- Establishes a base line cost for services in an option year; and
- Introduces Microsoft Consulting Services as another Microsoft services offering.

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<sup>3</sup> See FAR 5.002.

