



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL



# The State of Colorado Did Not Fully Assure That Funds Intended to Treat Mining Wastes and Remove Contaminants from Water Were Effectively Spent

Report No. 14-R-0032

November 19, 2013



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## Abbreviations

A/E	Architectural Engineer
CA	Cooperative Agreement
CDPHE	Colorado Department of Public Health and Environment
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CFR	Code of Federal Regulations
CMGC	Construction Manager General Contractor
EPA	U.S. Environmental Protection Agency
IPA	Independent Public Accounting
RFP	Request for Proposal

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# At a Glance

## Why We Did This Review

The U.S. Environmental Protection Agency (EPA) awarded American Recovery and Reinvestment Act cooperative agreement (CA) 2S-97842001 to the Colorado Department of Public Health and Environment (CDPHE). The Office of Inspector General (OIG) contracted with Ollie Green & Company, an independent public accounting (IPA) firm, to audit the agreement. The objectives of the audit were to determine whether CDPHE's procurements and use of force account under the CA complied with the applicable federal requirements and whether the objectives of the CA were met.

## This report addresses the following EPA themes:

- *Making a visible difference in communities across the country.*
- *Protecting water: A precious, limited resource.*
- *Launching a new era of state, tribal and local partnerships.*

For further information, contact our public affairs office at (202) 566-2391.

The full report is at:  
[www.epa.gov/oig/reports/2014/20131119-14-R-0032.pdf](http://www.epa.gov/oig/reports/2014/20131119-14-R-0032.pdf)

## ***The State of Colorado Did Not Fully Assure That Funds Intended to Treat Mining Wastes and Remove Contaminants from Water Were Effectively Spent***

### What the IPA Auditor Found

The IPA found that CDPHE generally complied with Colorado's state procurement policies and procedures as required by Code of Federal Regulations (CFR) under 40 CFR §35.6550(a). The IPA also found that CDPHE substantially complied with 40 CFR Part 35, Subpart O. The IPA determined that CDPHE did not always comply with the cost or price analysis requirements and did not include language in bid proposals designating the date, time and place of bid openings, as required by State of Colorado Procurement Rule R-24-103-202a-08(b). In addition, the IPA found CDPHE did not always ensure that 40 CFR Part 35, Subpart O, required language was included in bid proposals and contracts.

**CDPHE did not fully comply with the CFR, resulting in \$2,593,495 of questioned costs claimed under the CA.**

The IPA is responsible for the content of the audit report. The OIG performed the procedures necessary to obtain reasonable assurance about the IPA's independence, objectivity, qualifications, technical approach and audit results. Having done so, the OIG accepts the IPA's conclusions and recommendations.

### Recommendations and Planned Corrective Actions

The IPA's report recommended that the Region 8 Regional Administrator recover the questioned costs of \$2,593,495, unless CDPHE provides documentation to demonstrate that the prices for the contracts and subcontracts in question are fair and reasonable. The IPA's report also recommended the region require CDPHE to implement written procedures and controls, to ensure compliance for all future request for proposals and contracts under 40 CFR, Subpart O, CAs, by requiring:

- A cost or price analysis is conducted in accordance with Subpart O requirements.
- The date, time and place of all bid openings are designated in accordance with state of Colorado procurement rules.
- Subpart O contract language is included.

In addition, the IPA's report recommended that the region require CDPHE to modify the construction manager contractor contract and the architectural and engineering contracts awarded under the CA to include the 10-year records retention requirement under 40 CFR §35.6705(b) and the contract language requirement under 40 CFR §35.6550.

CDPHE agreed with the finding regarding omission of required contract language, but has not proposed any corrective action. Region 8 did not provide a response to the draft report.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

November 19, 2013

**MEMORANDUM**

**SUBJECT:** The State of Colorado Did Not Fully Assure That Funds Intended to Treat Mining Wastes and Remove Contaminants from Water Were Effectively Spent  
Report No. 14-R-0032

**FROM:** Arthur A. Elkins Jr.

A handwritten signature in black ink, appearing to read "Arthur A. Elkins Jr.", is written over the printed name.

**TO:** Shaun McGrath, Regional Administrator  
Region 8

This memorandum transmits the final report for the audit of American Recovery and Reinvestment Act cooperative agreement 2S-97842001 awarded to the Colorado Department of Public Health and Environment.

The independent public accounting (IPA) firm Ollie Green & Company conducted this audit on behalf of the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). The audit was required to be conducted in accordance with *Government Auditing Standards*, issued by the Comptroller General of the United States. The IPA is responsible for the audit report and the conclusions expressed in that report. The OIG performed the procedures necessary to obtain a reasonable assurance about the IPA's independence, objectivity, qualifications, technical approach and audit results. Having done so, OIG accepts the IPA's conclusions and recommendations.

The IPA's full report is attached. The OIG also prepared a status of recommendations and potential monetary benefits table that summarizes the findings the IPA has identified and the corrective actions it recommends. The recommendations represent the opinion of the IPA and the OIG, and do not necessarily represent the final position of the EPA. EPA managers, in accordance with established audit resolution procedures, will make a final determination on matters in this report.

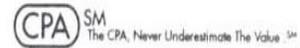
**Action Required**

In accordance with EPA Manual 2750, you are required to provide us your proposed management decision on the findings and recommendations contained in this report before you formally complete resolution with the recipient. Your proposed management decision is due in 120 days, or on March 19, 2014. To expedite the resolution process, please also email an electronic version of your management decision to [adachi.robert@epa.gov](mailto:adachi.robert@epa.gov).

Your response will be posted on the OIG's public website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final

response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal. We have no objection to the further release of this report to the public. This report will be available at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact Richard Eyermann, Acting Assistant Inspector General for Audit, at (202) 566-0565 or [eyermann.richard@epa.gov](mailto:eyermann.richard@epa.gov); or Robert Adachi, Product Line Director, at (415) 947-4537 or [adachi.robert@epa.gov](mailto:adachi.robert@epa.gov).



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**Audit of American Recovery and  
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Agreement No. 2S-97842001 awarded to the Colorado  
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September 19, 2013

**Mr. Robert Adachi, Director of Forensic Audits  
U.S. Environmental Protection Agency  
Office of Inspector General  
San Francisco, CA 94105**

**Mr. Adachi:**

Please find attached a copy of the final audit report of our Recovery Act audit of Cooperative Agreement No. 2S-97842001 awarded to Colorado Department of Public Health (CDPHE) on May 1, 2009. Our audit was conducted in accordance with the terms and conditions of Contract No. EP-G12H-00489 dated August 22, 2012 and Government Auditing Standards, Revised 2011.

We appreciate the opportunity to have worked with the U.S Environmental Protection Agency, Office of Inspector General. Please contact me with any questions you may have.

Sincerely,



**Ollie Green, MBA, CPA  
Managing Partner**

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# Introduction

## Purpose

The purpose of our audit was to determine whether the Colorado Department of Public Health and Environment (CDPHE) procurements and the use of force account under Cooperative Agreement (CA) 2S-97842001 complied with Title 40 Code of Federal Regulations (CFR) Part 35, Subpart O, requirements. The purpose also included determining whether the objectives of the cooperative agreement (CA) were met.

## Background

CDPHE was awarded CA No. 2S-97842001 for \$17 million by the U.S. Environmental Protection Agency (EPA) on May 1, 2009, for remediation of the Summitville Mine Superfund site. The total amount of the CA is \$18,888,888. The federal share is 90 percent or \$17 million funded with American Recovery and Reinvestment Act (Recovery Act) monies and the state contribution is 10 percent or \$1,888,888. The period of performance was from July 31, 2009, through September 30, 2012. Funding for this CA was part of the \$600 million Superfund hazardous site cleanup funded by the Recovery Act.

## Scope and Methodology

Our Recovery Act performance audit covered the period from July 31, 2009, through September 30, 2012. We conducted our fieldwork at CDPHE in Denver, Colorado, from October 1 to October 5, 2012, and from December 10 to December 13, 2012. The scope of our audit was limited to determining whether:

- CDPHE's procurements under the CA were conducted in accordance with Title 40 CFR Part 35, Subpart O.
- CDPHE's force account complied with Title 40 CFR Part 35, Subpart O;
- The objectives of the CA were met.

Our scope included the review of CDPHE's procurement processes and controls related to Recovery Act CA transactions. Our work included reviewing CDPHE's solicitation, evaluation, tabulation and award processes related to CA 2S-97842001 procurements. CDPHE used a Construction Manager General Contractor (CMGC) vehicle to administer and perform the work. CDPHE indicated that this contracting method was designed to increase the speed of project delivery and reduce inherent risk and increase flexibility for the recipient. When the CMGC method is used, the CMGC is allowed to bid on subcontract requirements. CDPHE staff said the CMGC is one of the Integrated Project Delivery methods approved by the Colorado State Legislature in 2007.

Our audit methodology included conducting structured interviews and discussions with personnel at CDPHE and the CMGC to gain an understanding about the internal controls, processes, systems and procedures used to capture measure and report CDPHE's procurements and force account activity and how CDPHE met the objectives of the CA.

We requested, received and reviewed documentation from CDPHE to assess CDPHE's procurement processes and force account activity. This documentation included the State's procurement policies and procedures and a written description of the internal controls that were in place during the audit period designed to detect and/or prevent potential errors related to the procurement process. We reviewed procurement documentation for the two prime contracts under the CA and 14 judgmentally selected subcontracts to ensure compliance with federal procurement regulations and state policies and procedures. We also requested, received and reviewed the Notice of Final Completion, Notice of Approval of Occupancy, contractor invoices and other documentation required to verify that the program objectives were met.

A performance audit includes gaining an understanding of internal controls considered significant to the audit objectives, testing controls, and testing compliance with significant laws, regulations and other requirements. For this engagement, we obtained an understanding of CDPHE's procurement processes and internal controls. The testing of internal controls over this process was not determined to be significant to our audit objectives.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provided a reasonable basis for our findings and conclusions based on our audit objectives.

# Results of the Audit

## Procurement

We found that CDPHE generally complied with Colorado's state procurement policies and procedures, as required by 40 CFR § 35.6550(a), which referenced 40 CFR § 31.36(a). We also found substantial compliance with 40 CFR Part 35, Subpart O. However, we found that:

- CDPHE did not always comply with cost or price analysis requirements.
- CDPHE did not include language in bid proposals designating the date, time and place of bid openings.
- CDPHE did not always ensure that required language was included in bid proposals and contracts.

### ***CDPHE Did Not Always Comply With Cost or Price Analysis Requirements***

CDPHE did not always comply with the federal and state requirements for cost or price analysis when awarding contracts, contract modifications and subcontracts. Our audit found that CDPHE awarded a follow-on contract for architectural engineering (A/E) services without documented cost or price analysis. CDPHE also issued two contract modifications to the CMGC contractor without cost or price analysis. In addition, CDPHE's CMGC contractor awarded a subcontract without cost or price analysis. These practices did not comply with the federal procurement requirements under 40 CFR Part 35, Subpart O and state regulations. These instances of noncompliance occurred because CDPHE did not have adequate controls to ensure compliance with both federal and state procurement requirements. In addition, CDPHE incorrectly determined that competition had been adequate for the contract modifications and subcontract. Due to the lack of cost or price analysis, CDPHE is unable to demonstrate that the prices for the contract, contract modifications and subcontract were fair and reasonable. As a result, we question \$2,593,495 claimed under the CA.

#### Architectural Engineer Contract

CDPHE awarded an \$806,250 follow-on contract for architectural engineering services in 2009 and did not maintain the required cost analysis documentation. CDPHE indicated that the contractor was originally awarded a competitive contract for A/E services for this project in 2002 and provided A/E services until funding ended in March 2004. CDPHE then awarded a follow-on contract to the same A/E firm for \$806,250 in 2009 with Recovery Act funding to complete this project. CDPHE indicated that it performed a perfunctory cost analysis for the 2009 A/E procurement to identify the benefits of the procurement but did not

maintain the documentation. Title 40 CFR § 35.6705 requires the recipient to maintain all records for 10 years following submission of the final Financial Status Report. As a result, we question \$806,250 claimed under the CA for A/E costs.

#### Modifications to the CMGC Contract

CDPHE issued two contract modifications with Recovery Act funding with a total amount of \$1,542,000 to the CMGC contract without cost or price analysis. This work was bid out as subcontract work and the CMGC contractor was permitted to compete. As the CMGC contractor was the only responsive bidder, a contract modification was issued to the CMGC contractor for the work. Title 40 CFR § 35.6585(a) and State of Colorado Procurement Manual Chapter III Sections 9 and 10 require the recipient to conduct and document a cost or price analysis in connection with every procurement action, including contract modifications. According to CDPHE, since there were multiple bidders, the work was considered competitively bid and cost analysis would not be necessary. We disagree with CDPHE. Even though bids were received from multiple sources, the only responsive bidder was the CMGC contractor. All other bids were incomplete; therefore, CDPHE and the CMGC could not have used those incomplete bids to justify the fairness and reasonableness of the price for the contract modifications. Title 40 CFR § 35.6565(d) (1) (iv) allows for noncompetitive procurement if competition is determined to be inadequate after solicitation from a number of sources. However, 40 CFR § 35.6565(d) (2) requires a cost analysis to be conducted for such procurement. As a result, we question \$1,542,000 claimed under the CA for modifications to the CMGC contract.

#### Subcontract

The CMGC contractor issued a subcontract with Recovery Act funding in the amount of \$245,245 to the only responsive bidder without cost or price analysis. Title 40 CFR § 35.6565(d) (2) requires a cost analysis to be conducted when using noncompetitive procurement. State of Colorado Procurement Manual Chapter III Sections 9 and 10 require grantees and subgrantees must perform a cost or price analysis in connection with every procurement action. According to CDPHE, since there were multiple bidders, the work was considered competitively bid and cost analysis would not be necessary. We disagree with CDPHE. Even though bids were received from multiple sources, the only responsive bidder was the winning subcontractor. All other bids were incomplete; therefore, CMGC could not have used those incomplete bids to justify the fairness and reasonableness of the price of the subcontract. Title 40 CFR § 35.6565(d) (1) (iv) allows for noncompetitive procurement if competition is determined to be inadequate after solicitation from a number of sources. However, 40 CFR § 35.6565(d) (2) requires a cost analysis to be conducted for such procurement. As a result, we question \$245,245 claimed under the CA for the subcontract costs.

***CDPHE Did Not Include Language in Bid Proposals Designating the Date, Time and Place of Bid Openings***

Our audit could not determine that CDPHE had included language in its Request for Proposals (RFP) designating the date, time and place where the Bids would be publicly opened. State of Colorado Procurement Rule R-24-103-202a-08 (b) specifies that “all bid openings shall be open to the public...after the time, and at the place, designated in the Invitation for Bids”. Our audit identified the CMGC contract, six subcontracts and eight contract modifications for which the RFPs did not include date, time and place of bid opening.

CDPHE indicated that advertisements and notifications included date and place to deliver the bid proposal but did not include the actual opening time. Our review of the RFP did not find the date, time or place of the bid opening. CDPHE provided no evidence that designated the date, time and place of the bid opening. These instances of noncompliance occurred because CDPHE did not have adequate controls in place to ensure that the date, time and place for bid opening are included in its bid proposals. As a result, bidders were uninformed as to the bid opening information and the required transparency in the procurement process was not achieved.

***CDPHE Did Not Always Ensure That Required Language Was Included in Bid Proposals and Contracts***

CDPHE did not ensure that language required by Title 40 CFR Part 35, Subpart O, was included in all bid proposals, prime and subcontracts. Our audit found five instances where required bid proposal and/or contract language were omitted. To conduct our work, we requested, received and reviewed a judgmental sample of bid proposals and contract awards to determine compliance with the language requirements of Title 40 CFR 35, Subpart O. Our audit found that language related to the following requirements was omitted from bid proposals and contracts:

- Potentially Responsible Party Relationships (40 CFR § 35.6550(b)(1)(i),(ii)&(iii))
- Contractor Data (40 CFR § 35.6550(b)(2)(ii)(A))
- Employment Language (40 CFR § 35.6550(b)(2)(ii)(B))
- Certification of Independent Price Determination (40 CFR § 35.6550(b)(3))
- Ten (10) Year Records Retention Requirement (40 CFR § 35.6705(b))

See detailed findings below:

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**Potentially Responsible Party Relationships language required by Title 40 CFR § 35.6550.**

Our audit found that bid proposals submitted by the CMGC contractor and the A/E contractor omitted the required Potentially Responsible Party Relationships language required by Title 40 CFR § 35.6550.

Title 40 CFR § 35.6550(b) (1) (i), (ii) and (iii) require the following disclosures in bid proposals:

- (i) Information on its financial and business relationship with all Potentially Responsible Parties at the site and with the contractor's parent companies, subsidiaries, affiliates, subcontractors, or current clients at the site. Prospective contractors under a Core Program Cooperative Agreement must provide comparable information for all sites within the recipient's jurisdiction. (This disclosure requirement encompasses past financial and business relationships, including services related to any proposed or pending litigation, with such parties);
- (ii) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and
- (iii) A statement that it shall disclose immediately any such information discovered after submission of its bid or proposal or after award. The recipient shall evaluate such information and if a member of the contract team has a conflict of interest which prevents the team from serving the best interests of the recipient, the prospective contractor may be declared non-responsible and the contract awarded to the next eligible bidder or offeror.

The CDPHE audit coordinator indicated that CDPHE concurs with this finding and said that it appears that CDPHE failed to include this language as part of the procurement. He also indicated that typically, the EPA grant funded contracts issued by CDPHE contain an exhibit outlining all of the federal grant requirements, including language regarding potentially responsible party relationships. Our audit found that this instance of noncompliance occurred because CDPHE did not have adequate controls in place to ensure that PRP language is included in all bid proposals. As a result of these omissions, CDPHE has no assurance that the two contractors had no potentially responsible party relationships under this CA.

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### **Contractor Data Language Required by 40 CFR § 35.6550(b) (2) (ii) (A).**

Our audit found that the contracts awarded to the CMGC contractor and the A/E contractor did not include contractor data language required by 40 CFR § 35.6550(b) (2) (ii) (A). Title 40 CFR § 35.6550(b) (2) (ii) (A) requires the following disclosure in contracts:

The contractor shall not provide data generated or otherwise obtained in the performance of contractor responsibilities under a contract to any party other than the recipient, the EPA, or its authorized agents for the life of the contract and for a period of five years after completion of the contract.

The CDPHE audit coordinator indicated that this language is typically included in the EPA grant funded contracts as an exhibit. However due to an oversight by CDPHE, the federal requirements exhibit was not included in the contract. He also indicated that CDPHE seems to have substituted an exhibit that outlines specific Recovery Act requirements rather than including both the federal requirements and Recovery Act requirements as separate exhibits. Finally, he indicated that this language has been included in past contracts and will be included in future contracts. Our audit found that this instance of noncompliance occurred because of a lack of internal controls to ensure that contractor data language is included in all contracts. As a result of this departure from the contractor data requirements of 40 CFR § 35.6550(b) (2) (ii) (A), CDPHE had no assurances that contractor data will not be provided to unauthorized parties.

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### **Employment Language Required by 40 CFR § 35.6550(b) (2) (ii) (B).**

Our audit found that contracts awarded to the CMGC contractor and the A/E contractor did not include the Employment Language required by 40 CFR § 35.6550(b) (2) (ii) (B). Our audit also found that this language was omitted from six subcontracts and eight modifications to the CMGC contract where the CMGC was competitively awarded subcontract work.

Title 40 CFR § 35.6550(b) (2) (ii) (B) requires the following contract disclosure:

The contractor shall not accept employment from any party other than the recipient or federal agencies for work directly related to the site(s) covered under the contract for five years after the contract has terminated. The recipient agency may exempt the contractor from this requirement through a written release. This release must include the EPA's concurrence.

The CDPHE audit coordinator indicated that this language is usually included in the EPA grant funded contracts but was not in this case due to an oversight. Our audit found that this instance of noncompliance was due to a lack of internal controls related to contract disclosure requirements. As a result, CDPHE had no assurances that the employment requirements of Title 40 CFR § 35.6550(b) (2) (ii) (B), will be followed.

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### **Certification of Independent Price Determination Language Required by 40 CFR § 35.6550(b) (3).**

Our audit found that the bid proposals for the CMGC contractor and the A/E contractor did not include the Certification of Independent Price Determination language as required by 40 CFR § 35.6550(b) (3).

Title 40 CFR § 35.6550(b) (3) requires the following:

The recipient must require that each contractor include in its bid or proposal a certification of independent price determination. This document certifies that no collusion, as defined by federal and state antitrust laws, occurred during bid preparation.

The CDPHE audit coordinator indicated that this requirement is usually included in a contract exhibit outlining federal requirements as opposed to being part of the requirements for bid proposals. He also indicated that this language was not included in either contract due to an oversight by CDPHE. Our audit found that this instance of noncompliance occurred because CDPHE did not have controls in place to ensure that independent price determination language was always included in bid proposals. As a result, CDPHE had no assurance that bid prices were determined independently without collusion.

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### **Ten (10) Year Records Retention Requirement Language Required by 40 CFR § 35.6705(b)**

Our audit found that CDPHE did not include the 10 year records retention requirement per 40 CFR § 35.6705(b) in the CMGC contract. Instead, the CMGC contract specified only a three (3) year records retention period. In addition, CDPHE did not include the records retention requirement in the A/E contract, contrary to 40 CFR § 35.6705(b).

Title 40 CFR § 35.6705(b) requires the following:

The recipient must maintain all records for 10 years following submission of the final Financial Status Report unless otherwise directed by the EPA award

official, and must obtain written approval from the EPA award official before destroying any records. If any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been started before the expiration of the ten-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular ten-year period, whichever is later.

The CDPHE audit coordinator indicated that this language is usually included in the EPA grant funded contracts but was not in this case due to an oversight by CDPHE. Our audit found that these instances of noncompliance occurred because CDPHE did not have controls in place to ensure that the 10-year records retention language is included in all contracts. As a result, CDPHE has no assurances that the two contractors are retaining their CA records for the required 10-year period.

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## **Force Account Activity**

Title 40 CFR § 35.6500(a) defines force account work as “the use of the recipient’s own employees or equipment for construction, construction-related activities (including architecture and engineering services), or repair or improvement to a facility.” Our audit found that CDPHE had no force account activity related to the CA.

## **Cooperative Agreement Objectives**

The objective of the CA was to construct the Summitville Water Treatment Facility. The period of performance was from July 31, 2009 to September 30, 2012. Our audit found that CDPHE completed the construction of the Water Treatment Plant in accordance with requirements of the CA.

## **Recommendations:**

We recommend that the Regional Administrator, Region 8:

1. Require CDPHE to reimburse the EPA \$2,593,495 (\$806, 250 + \$1,542,000 + \$245,245) for the A/E contract, two CMGC contract modifications and one subcontract where cost analyses were not provided for all procurements as required by Title 40 CFR § 35.6585(a) and 40 CFR § 35.6565(d) (2), unless CDPHE provides documentation to demonstrate that the prices for these contracts and subcontracts are fair and reasonable.
2. Require CDPHE to implement written procedures and controls to ensure that a cost or price analysis is conducted for each future noncompetitive contract awarded in accordance with the requirements of Title 40 CFR § 35.6585(a) and 40 CFR § 35.6565(d) (2) and to retain copies of all cost or

price analyses conducted and other CA records in accordance with the requirements of Title 40 CFR § 35.6705(b).

3. Require CDPHE to implement written controls and procedures to ensure that the date, time and place of all bid openings are designated in all future RFPs as required by of State of Colorado Procurement Rule R-24-103-202a-08 (b).
4. Require CDPHE to implement written controls and procedures to ensure that language is included in all future bid proposals and contracts as required by Title 40 CFR Part 35, Subpart O.
5. Require CDPHE to modify the CMGC and A/E contracts awarded under the CA to include the 10-Year Records Retention language as required by Title 40 CFR § 35.6705(b) and the contract language requirement under Title 40 CFR § 35.6550.

## **Agency and Recipient Comments**

OG&C issued a draft report on June 13, 2013 and provided copies to CDPHE, Region 8 and the OIG. We received comments on the draft report from CDPHE on July 29, 2013. Region 8 did not provide a written response. The exit conference was conducted with CDPHE, Region 8 and OIG on August 15, 2013 via teleconference.

CDPHE provided a general response to address multiple findings and also provided specific responses to other findings as appropriate to respond to other issues or to provide additional information. Out of the four findings and six recommendations, CDPHE concurred with only one finding and the related recommendations regarding missing required language in the bid proposals and contracts. CDPHE did not concur with the remaining findings and recommendations.

In its general response, CDPHE stated that the 40 CFR Part 35 regulations apply only to the recipient and not to the recipient's contractor. CDPHE stated that their procurement process ended when the CMGC contract was awarded.

In its response to finding 1a regarding the lack of a cost or price analysis for the A/E contract, CDPHE disagreed that a noncompetitive contract was awarded. In its responses to findings 1b, 1c, and finding 2, CDPHE referenced to its general response, which states that the requirements do not apply.

In its response to finding 3 regarding the lack of accident and catastrophic loss insurance by some subcontractors, CDPHE stated that CDPHE has no duty to require subcontractors to provide this insurance. CDPHE concurred with

finding 4 related to the omission of specific required language in some bid proposals and contracts.

The full text of CDPHE's written response is attached in Appendix A.

## **Ollie Green & Company Response**

We disagree with CDPHE's position that 40 CFR Part 35 regulations cited in the report apply only to the recipient and not to the recipient's contractor. Under the procurement system standards of 40 CFR § 35.6650(a)(1), the state is required to comply with some of the procurement requirements under Subpart O in addition to the basic procurement policies and procedures described in 40 CFR § 31.36(a), which allows the state to follow its own procurement policies. Some of these additional Subpart O requirements include 40 CFR § 35.6565(d) and 40 CFR § 35.6550(b), which requires the state to ensure that its contractors comply with the cost or price analysis requirements under 40 CFR § 35.6585. We do not agree with CDPHE's assertion that the procurement process ended upon award of the contract because CDPHE had the responsibility to ensure contractor compliance with applicable contracting and subcontracting requirements of 40 CFR Part 35, as detailed in Appendix A Notes 3 to 6.

Regarding CDPHE's response to finding 1a related to the lack of a cost or price analysis for the A/E contract, it is important to note that this finding does not take issue with the method of procurement for the contract. We acknowledge that the Federal and State regulations and statutes provide for use of the same engineer. The audit issue is the lack of a cost or price analysis. Title 40 CFR § 35.6585 (a) states that "the recipient must conduct and document a cost or price analysis in connection with every procurement action ..." Awarding a follow-on contract is a procurement action; therefore, cost or price analysis is required. During the audit CDPHE stated that it performed the cost analysis but did not retain it. The data provided in CDPHE's response is a justification for the use of the same engineer but is not a cost analysis. These costs were questioned in the report because CDPHE could not provide a cost or price analysis for the A/E contract, as required. No change is made to this audit finding.

We disagree with CDPHE on findings 1b and 1c that the cost or price analysis requirement does not apply to contract modifications and subcontract awards. Title 40 CFR § 35.6585 (a) states that "the recipient must conduct and document a cost or price analysis in connection with every procurement action including contract modification." In addition, 40 CFR § 35.6550(b) (4) states that the recipient must require its contractor to comply with the requirements in 40 CFR § 35.6610, which includes the cost or price analysis requirement under 40 CFR § 35.6585. Therefore, the cost or price analysis requirement applied to contract modification and subcontract award. No change has been made to this audit finding.

We disagree with CDPHE on finding 2 that the bid opening requirements do not apply. As stated in the draft report, State of Colorado Procurement Rule R-24-103-202b-08 specifies that “bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time and place designated in the Invitation for Bids.” CDPHE’s response did not resolve this issue.

We agree with CDPHE’s position on Finding 3 that they are not responsible for ensuring subcontractor insurance for accident and catastrophic insurance coverage. This finding and the related recommendation will be deleted from the report.

No change has been made to audit finding 4 regarding omission of specific required language in some bid proposals and contracts because CDPHE concurred with this finding.

Details of our responses to CDPHE’s comments are embedded as text boxes in Appendix A.

## CDPHE's Response to the Draft Report

# STATE OF COLORADO

John W. Hickenlooper, Governor  
Karin McGowan  
Interim Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department  
of Public Health  
and Environment

July 23, 2013

Mr. Ollie Green  
Ollie Green & Company  
1300 S. Fourth Street, Suite 100  
Louisville, Kentucky 40208

RE:      Audit of American Recovery and Reinvestment Act Cooperative Agreement No.  
            2S-97842001 Awarded to the Colorado Department of Public Health and  
            Environment - CDPHE Response to Draft Audit Report.

Dear Mr. Green:

Attached please find Colorado Department of Public Health and Environment's ("CDPHE") response to your June 13, 2013 Draft Report regarding the *Audit of American Recovery and Reinvestment Act, Cooperative Agreement No. 2SS-97842001, Awarded to the Colorado Department of Public Health and Environment*, EPA Recovery Act audit of Cooperative Agreement No 2S-97842001, for the Summitville Mine Superfund Site.

CDPHE appreciates the opportunity to respond and provide additional information and clarification before you finalize the audit report. CDPHE reserves the right to supplement this response as CDPHE further reviews the material or if additional information becomes available. If you have any questions regarding this response, please contact me at 303-692-3404.

Sincerely,

Douglas C. Jamison  
Superfund/Brownfields Unit Leader  
Hazardous Material and Waste Management Division

**Summitville Recovery Act Procurement Audit  
Cooperative Agreement No. 2S-97842001  
CDPHE Response to Draft Audit Report  
July 23, 2013**

In the draft report for the “*Audit of American Recovery and Reinvestment Act, Cooperative Agreement No. 2SS-97842001, Awarded to the Colorado Department of Public Health and Environment*”, the auditor acknowledges CDPHE generally complied with Colorado’s state procurement policies and procedures and substantially complied with 40 CFR Part 35 Subpart O. However, the draft audit report also identifies areas where the auditor concluded that CDPHE failed to comply with either State procedures and/or the Subpart O, requirements. The issues for which the auditor has determined non-compliance are listed below.

*Audit Findings*

***Finding 1: CDPHE Did Not Always Comply With Cost or Price Analysis Requirements***

- 1a) Architectural Engineer Contract***
- 1b) Modifications to the CMGC Contract***
- 1c) Subcontract***

***Finding 2: CDPHE Did Not Include Language in Bid Proposals Designating the Date, Time and Place of Bid Openings***

***Finding 3: CDPHE Did Not Ensure That the CMGC Required All Subcontractors to Have Accident and Catastrophic Loss Insurance Coverage***

***Finding 4: CDPHE Did Not Always Ensure That Required Language Was Included in Bid Proposals and Contracts***

Although CPDHE agrees that certain specific audit findings are correct, CDPHE also maintains that many of the audit findings are based on the auditors interpretation that the State’s procurement policies, as well as the 40 CFR Part 35 Subpart O, requirements (hereinafter referred to as Subpart O, requirements), are applicable not only to CDPHE as the grant recipient, but also to contractor’s that CPDHE has hired as the result of a valid procurement process. In our long experience of administering Federal CERCLA grants, CDPHE has not encountered this interpretation of the federal procurement requirements.

Since many audit findings seem based upon this incorrect interpretation, CDPHE has prepared a general response to address multiple audit findings, and specific responses as appropriate to respond to other issues or to provide additional information.

### ***CDPHE General Response***

It is CDPHE's position that the auditor has an incomplete and incorrect understanding of the contract vehicle used by CDPHE to deliver the goods and services necessary to construct the Summitville Water Treatment Facility. As a result, the auditor has incorrectly concluded that certain regulations are not only applicable to CDPHE as the grant recipient, but are also applicable to procurement activities conducted by the recipient's contractor. The specific regulations cited in the audit report, without exception, refer to requirements for the grant recipient only, and make no mention of these requirements applying to contractors. Because many of the audit findings refer to activities conducted by the contractor, CDPHE disagrees with these findings.

On page two of the draft report in the second paragraph under the section titled "Scope and Methodology". In this paragraph the auditor states, "*Because CDPHE used a Construction Manager/General Contractor (CMGC) vehicle to administer and perform the work required by the CA, most contract management responsibilities required by the CA were delegated to the CMGC.*" This statement incorrectly implies that CDPHE has delegated all of its authorities to the CMGC when it has not, and that the CMGC is, in effect, acting as the State's agent in performance of the work. This is also incorrect because the CMGC contract is simply another contract delivery mechanism, which CDPHE has maintained its contract management and oversight responsibilities and not delegated those responsibilities to the CMGC.

IPA Response 1. As there is no audit issue related to this information, we omitted the sections of this sentence in the report which were of concern to CDPHE.

Procurement of the CMGC followed the requirements of 40 C.F.R. §35.6565. CDPHE awarded a contract with guaranteed maximum price (essentially a fixed priced contract) as required by both 40 C.F.R. §35.6565(1) (iv) and §24-103-202(7) of the Colorado Procurement Code. Under the CMGC contract, the contractor was solely responsible for performing the required work. As with any contract, CDPHE maintained responsibility for overseeing the contractor and ensuring that the work was performed in compliance with the contract. CDPHE delegated none of its authority of responsibility by procuring the CMGC.

Once the contract was awarded, the contractor selected sub-contractors and purveyors best suited to assist with project delivery. The fact that the sub-contractors and purveyors were selected using a series of requests for proposal and competitive bids is a function of the contract vehicle, not of CDPHE conducting additional procurement actions. CDPHE's procurement process ended when Moltz Construction was awarded the CMGC contract. For the purposes of project construction, CDPHE's only contractual relationship was with Moltz. CDPHE did not have a contractual relationship with any of the sub-contractors identified in the audit report.

During the past 25 years that CDPHE has administered federal CERCLA grants and associated contracts, our experience has been that the 40 C.F.R. § 35 requirements apply only to the grant recipients. The auditor's interpretation that these federal requirements also apply to a contractor's procurement activities is inconsistent with our experience or any guidance or

instruction provided by EPA Region VIII. Furthermore, the State's procurement code, which is structured to comply with federal requirements, does not require State Agencies to direct the procurement activities that general contractors use to procure subcontractors and purveyors. While we expect that our general contractors will use sound procurement procedures in the selection of sub-contractors, this is not an area in which CDPHE dictates procurement procedures.

IPA Response 2. We disagree with CDPHE's position that the regulations cited in the report apply only to the recipient and not to the recipient's contractor. Under the procurement system standards of 40 CFR § 35.6650(a)(1), the state is required to comply with some of the procurement requirements under Subpart O in addition to the basic procurement policies and procedures described in 40 CFR § 31.36(a), which allows the state to follow its own procurement policies. Some of these additional Subpart O requirements include 40 CFR § 35.6565(d) and 40 CFR § 35.6550(b), which requires the state to ensure that its contractors comply with the cost or price analysis requirements under 40 CFR § 35.6585. These requirements will be further explained in the detailed sections in Note 3 through 6 below.

### ***CDPHE Response to Finding 1a***

#### Architectural Engineer Contract

CDPHE's general response is not applicable to this finding. However, for the reasons described below, CDPHE disagrees with the auditor's conclusion that a non-competitive contract in the amount of \$806,250 was awarded.

The auditor correctly notes that, in 2002, CDPHE conducted a qualification based selection process, which resulted in the selection of Resource Technologies Group (RTG) to design a water treatment plant to remove metals from mine water at the Summitville Mine Superfund Site. While under contract to CDPHE, RTG was purchased by Golder Associates Inc, causing Golder to become RTG's legal and contractual successor. Design was completed in 2004. Due to the lack of federal funds, project construction was delayed.

In 2009, in anticipation of potential future availability of construction funding, CDPHE began evaluating the need to procure engineering and design services to update the 2004 design and provide construction oversight. CDPHE performed cost analyses as part of our consideration of an appropriate process to procure the necessary services. The results of these analyses are documented in two internal memos previously provided to the auditor. However, during our evaluation of the procurement process for the 2009 A/E Contract, we discovered specific provisions within Colorado Statutes which state that there is no need for a competitive procurement process when using prior existing plans. Colorado Revised Statutes § 24-30-1407 states:

*“24-30-1407 Prior existing design plans. Notwithstanding any other provision of this part 14 or of part 13 of this article, there shall be no public notice requirement or utilization of the selection process as provided for in this part 14 or in part 13 of this article for projects in which the state agency is able to reuse existing drawings, specifications, designs, or other documents for a prior project.”*

Consistent with this statute, CDPHE program staff recommended contracting with Golder to revise the existing design and provide construction oversight. This recommendation was vetted and approved through a system of internal and external reviews. The specific memo outlining CDPHE's use of this provision of state statute and justifying our decision is included as Attachment A.

CDPHE's action comports with the plain language of the statute, that a valid competitive procurement process used to develop design plans remains applicable to subsequent contracts with the architect/engineer that produced the plans. In essence, subsequent contracts implementing the design produced under the original and valid selection process are allowable as a continuation of the original procurement process. Since CDPHE completed a valid selection for the original design contract, CDPHE has complied with applicable Colorado Procurement Code provisions and the federal regulations.

IPA Response 3. In response to CDPHE's position that this is not a noncompetitive contract, we have removed the noncompetitive contract language from the body of the report. This finding does not take issue with the method of procurement for this contract. We acknowledge that the Federal regulations and State statutes provide for use of the same engineer. The audit issue is the lack of a cost or price analysis for the A/E contract. Title 40 CFR § 35.6585 (a) states that "the recipient must conduct and document a cost or price analysis in connection with every procurement action ..." During the audit CDPHE stated that it performed the cost analysis but did not retain it. The data provided in CDPHE's response is a justification for the use of the same engineer, not a cost analysis. These costs were questioned in the report because CDPHE could not provide a cost or price analysis for the A/E contract, as required. No change is made to this audit finding.

### ***CDPHE Response to Finding 1b***

#### Modifications to the CMGC Contract

CDPHE disagrees with this finding for reasons outlined in our "General Response"

IPA Response 4. CDPHE's general response does not adequately address this finding which relates to requirements of the recipient when modifications are made to a contract. Title 40 CFR § 35.6585 (a) states that "the recipient must conduct and document a cost or price analysis in connection with **every procurement action including contract modification.**" Because CDPHE could not provide a cost or price analysis for the Moltz contract modifications, no change is made to this audit finding.

### ***CDPHE Response to Finding 1c***

#### **Subcontract**

CDPHE disagrees with this finding for reasons outlined in our “General Response”

IPA Response 5. We disagree with CDPHE’s general response that the cost or price analysis requirement cited in the draft report does not apply to these subcontracts. Under the procurement system standards of 40 CFR § 35.6650(a)(1), the state is required to comply with some of the procurement requirements under Subpart O in addition to the basic procurement policies and procedures described in 40 CFR § 31.36(a), which allows the state to follow its own procurement policies. One of these additional Subpart O requirements the state needs to follow is 40 CFR § 35.6550(b). Title 40 CFR § 35.6550(b) (4) states that the recipient must require its contractor to comply with the requirements in 40 CFR § 35.6610, which includes the cost or price analysis requirement under 40 CFR § 35.6585. The audit finding addressed the lack of a cost or price analysis for only those subcontracts which were non-competitive. As cost or price analysis was not done, no change is made to this finding.

### ***CDPHE Response to Finding 2***

CDPHE disagrees with this finding for reasons outlined in our “General Response”

IPA Response 6. Our position remains unchanged. Although CDPHE indicated that it used its general response to support its position on this finding, the general response is not applicable for this finding. As discussed in the draft report, we could not verify that CDPHE had included language in its Request for Proposals designating the date, time and, place where the Bids would be publicly opened. However, the criteria we used to support this finding in our draft report was not based on Subpart O provisions. We cited this finding based on State of Colorado Procurement Rule R-24-103-202b-08 that specifies that “bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time and place designated in the Invitation for Bids.” Our audit identified the CMGC contract, six subcontracts and, eight contract modifications where the RFPs did not include date, time and place of bid opening. CDPHE’s response did not resolve this issue.

### ***CDPHE Response to Finding 3***

The auditor references 40 C.F.R. § 35.6590(b) yet his comments seem to refer to 40 C.F.R. §35.6590(c), which reads as follows:

- (c) *Accidents and Catastrophic Loss.* The recipient must require the contractor (emphasis added) to provide insurance against accidents and catastrophic loss to manage any risk inherent in completing the project.

CDPHE submitted information to the auditor demonstrating the contractor provided the required insurance. Based on the clear reading of the regulation, CDPHE has no duty to require subcontractors to provide insurance against accidents or catastrophic loss. Rather, consistent with regulatory requirements, that relationship is between the contractor and its subcontractors, so long as the contractor fully insures the project, as has been demonstrated.

IPA Response 7. We concur that the requirement per 40 CFR § 35.6590 (b) is for the contractor and not the subcontractor. This finding and related recommendation have been deleted from the audit report.

#### ***CDPHE Response to Finding 4***

CDPHE agrees with the finding that certain specific required language was omitted from some bid proposals and contracts. As CDPHE has previously informed the auditor, CDPHE's typical process is to include, as part of proposals and contracts, an exhibit that outlines the Subpart O requirements. This exhibit is included with this response as "Attachment B". It appears as though the standard Exhibit was replaced by an Exhibit that outlined the American Redevelopment and Recovery Act" (Recovery Act) requirements for the contract. The Recovery Act exhibit contained many, but not all of the Subpart O requirements.

IPA Response 8. CDPHE concurred with the finding. No change has been made to this audit finding.

#### ***CDPHE Response to Recommendations***

Due to the disagreement with many of the audit findings, CDPHE also disagree with most of the auditor's recommendations. Specifically, we disagree with recommendations 1 – 4. Furthermore, regarding recommendation number one, it is important to point out that EPA's investment of funds for this project directly resulted in successful completion of the Summitville Water Treatment Facility, and related improvements to the long term operational efficiency of the Summitville Site. This project is also expected to result in long term improvements in water quality for the Alamosa River drainage basin. The cooperative agreement objectives have been met and the projects costs were consistent with the Engineer's estimate. Therefore, requiring CDPHE to reimburse EPA \$2.6 million would be inappropriate and improper since CDPHE met the project objectives and followed applicable requirements. Even if the auditor maintains the disputed findings, requiring reimbursement would be inappropriate considering Region VIII's full knowledge and agreement with CDPHE's actions.

As noted throughout this response, the extension of Subpart O requirements to include procurement activities conducted by the State's contractor is inconsistent with CDPHE's experience and standard practices over the last 25 years. However, because the auditor has

identified several issues where changes in grants administration and contract management could avoid potential ambiguities and uncertainties in the future, CDPHE welcomes the opportunity to meet with Region VIII to discuss potential methods for improving our overall grant administration.

IPA Response 9. Our position for five of the six recommendations remained unchanged. We agreed to delete the finding and related recommendation related to the catastrophic insurance issue. As discussed in Notes 2 through 6 above, CDPHE did not follow all applicable procurement requirements; therefore, we have continued to question the costs and recommend for cost recovery.

## **Status of Recommendations and Potential Monetary Benefits**

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status <sup>1</sup>	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	9	Require CDPHE to reimburse the EPA \$2,593,495 (\$806,250 + \$1,542,000 + \$245,245) for the A/E contract, two CMGC contract modifications and one subcontract where cost analyses were not provided for all procurements as required by Title 40 CFR § 35.6585(a) and 40 CFR § 35.6565(d) (2), unless CDPHE provides documentation to demonstrate that the prices for these contracts and subcontracts are fair and reasonable.	U	Region 8 Regional Administrator		\$2,593	
2	9	Require CDPHE to implement written procedures and controls to ensure that a cost or price analysis is conducted for each future noncompetitive contract awarded in accordance with the requirements of Title 40 CFR § 35.6585(a) and 40 CFR § 35.6565(d) (2) and to retain copies of all cost or price analyses conducted and other CA records in accordance with the requirements of Title 40 CFR § 35.6705(b).	U	Region 8 Regional Administrator			
3	10	Require CDPHE to implement written controls and procedures to ensure that the date, time and place of all bid openings are designated in all future RFPs as required by of State of Colorado Procurement Rule R-24-103-202a-08 (b).	U	Region 8 Regional Administrator			
4	10	Require CDPHE to implement written controls and procedures to ensure that language is included in all future bid proposals and contracts as required by Title 40 CFR Part 35, Subpart O.	U	Region 8 Regional Administrator			
5	10	Require CDPHE to modify the CMGC and A/E contracts awarded under the CA to include the 10-Year Records Retention language as required by Title 40 CFR § 35.6705(b) and the contract language requirement under Title 40 CFR § 35.6550.	U	Region 8 Regional Administrator			

<sup>1</sup> O = Recommendation is open with agreed-to corrective actions pending.  
 C = Recommendation is closed with all agreed-to actions completed.  
 U = Recommendation is unresolved with resolution efforts in progress.

## ***Distribution***

Regional Administrator, Region 8  
Deputy Regional Administrator, Region 8  
Director, Grants and Interagency Agreements Management Division,  
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