



OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Audit Report

Costs Claimed by the Tribal Association on Solid Waste and Emergency Response Under EPA Assistance Agreement No. CR827181-01

Report No. 2003-4-00119

September 19, 2003

This audit report contains findings that describe problems the Office of Inspector General (OIG) has identified and corrective actions the OIG recommends. The report represents the opinion of the OIG and findings contained in this report do not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

Report Contributors:

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Abbreviations

Association	Tribal Association on Solid Waste and Emergency Response
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CFR	Code of Federal Regulations
EPA	Environmental Protection Agency
FSR	Financial Status Report
OIG	Office of Inspector General
OMB	Office of Management and Budget
RCRA	Resource Conservation and Recovery Act



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

OFFICE OF
INSPECTOR GENERAL

September 19, 2003

MEMORANDUM

SUBJECT: Report No. 2003-4-00119
Costs Claimed by Tribal Association on Solid Waste and Emergency Response
Under EPA Assistance Agreement No. CR827181-01

FROM: */s/ Keith Reichard for*
Michael A. Rickey
Director, Assistance Agreement Audits

TO: Richard Kuhlman
Director, Grants Administration Division

As requested, we have examined the costs claimed by the Tribal Association on Solid Waste and Emergency Response (Association), located in Washington, DC, under Environmental Protection Agency (EPA) Assistance Agreement No. CR827181-01. The agreement was to provide a government-to-government mechanism through which tribes could be proactively involved in the policy discussions that effect implementation of environmental programs on their land.

We questioned the total Federal share claimed of \$2,357,376 as unsupported, because the Association did not comply with the Federal rules, regulations, and terms of the assistance agreement.

This audit report contains findings that describe problems the Office of Inspector General (OIG) has identified and corrective actions the OIG recommends. The report represents the opinion of the OIG, and findings contained in this report do not necessarily represent the final EPA position. The OIG has no objection to the release of this report to any member of the public upon request.

On July 1, 2003, we issued a draft report to the Association for comment, and on August 7, 2003, comments were provided. The Association did not agree with the report's findings. The Association's response is included in the report as Appendix B. We held a telephone exit conference on September 11, 2003, and informed the Association of the final results of our audit.

Action Required

In accordance with EPA Manual 2750, the action official is required to provide this office with a proposed management decision specifying the Agency's position on all findings and recommendations in this report. The draft management decision is due within 120 days of the date of this transmittal memorandum.

If you have questions concerning this report, please contact Keith Reichard, Assignment Manager, at (312) 886-3045.

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Independent Accountant's Report

We have examined the total outlay (costs) claimed by the Tribal Association on Solid Waste and Emergency Response (Association) under the Environmental Protection Agency (EPA) financial assistance agreement, as shown below:

Assistance Agreement No.	Financial Status Report			Federal Share
	Date Submitted	Period Ending	Cumulative Total Outlays Claimed	
CR827181-01	2/27/03	12/31/02	\$2,357,376	\$2,357,376

The Association certified that the outlays reported on the *Financial Status Report*, Standard Form 269A, were correct and for the purposes set forth in the Agreement. The preparation and certification of each claim was the responsibility of the Association. Our responsibility is to express an opinion on the claim based on our examination.

Our examination was conducted in accordance with the *Government Auditing Standards*, issued by the Comptroller General of the United States, and the attestation standards established by the American Institute of Certified Public Accountants. Accordingly, on a test basis, we examined evidence supporting the claimed costs and performed such other procedures as we considered necessary in the circumstances (see Appendix A for details). We believe that our examination provides a reasonable basis for our opinion.

As discussed in the *Results of Audit* section of this report, the Association's financial management system was not adequate to account for claimed costs in accordance with Federal regulations. The Association also did not comply with Federal requirements when procuring contractual services.

In our opinion, because of the effects of the matter discussed in the preceding paragraph, claimed costs on the *Financial Status Report* do not present fairly, in all material respects, the allowable costs in accordance with the criteria set forth in the Agreement. As a result, the total costs claimed of \$2,357,376, are presently unallowable for Federal participation. The following sections provide details on our examination and conclusions.

/s/ *Keith Reichard*
Keith Reichard
Assignment Manager
Field Work End: April 14, 2003

Background

On September 25, 1998, EPA awarded Assistance Agreement No. CR827181-01 to the Association. The following table provides some basic information about the authorized project period and the funds awarded under the Agreement covered by this audit.

Assistance Agreement No.	EPA Share *	Local Share	Total Costs	Project Period
CR827181-01	\$3,100,000	\$0	\$3,100,000	09/25/98 - 08/31/03

* The EPA share is 100 percent of total costs.

This Agreement was authorized under section 8001 of the Resource Conservation and Recovery Act (RCRA) and section 311(c) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The Agreement provided financial support for the newly formed Association, headquartered in Washington, DC, to provide a government-to-government mechanism through which tribes could be proactively involved in the policy discussions that effect implementation of environmental programs on their land. Activities under the Agreement included education and training to Federally recognized tribes on all aspects of solid waste and emergency response. The Agreement also authorized the compilation of research on tribes, including the identification of existing services, problems, and needs. This research data was to be used to detail the human health effects associated with waste programs on tribes and their communities. The Federal share of the Agreement was 100 percent of total costs.

To assist the reader in obtaining an understanding of the report, key terms are defined below:

Claimed Costs:	Program outlays identified by the State on the <i>Financial Status Report</i> (Standard Form 269 or 269A).
Unsupported Questioned Costs:	Costs incurred and claimed that are not supported by adequate documentation and/or have not been approved by a responsible agency official.

Results of Audit

The Association's financial management and procurement systems did not comply with the requirements of 40 Code of Federal Regulations (CFR) Part 30 and Office of Management and Budget (OMB) Circular A-122.

The provisions of 40 CFR Part 30 establish uniform administration requirements for Federal grants and awards to non-profit organizations. OMB Circular A-122 establishes principles used by all Federal Agencies in determining the costs of work performed by non-profit organizations under grants and cooperative agreements. In accepting the grant award, the Association agreed that it would comply with 40 CFR Part 30 and OMB Circular A-122, and that all procurement transactions would be conducted in a manner to provide, to the maximum extent practical, open and free competition.

The Association's financial management system was inadequate in that the Association could not or did not: (1) provide a summary of claimed costs by cost element or reconcile claimed costs to its general ledger, (2) support its salaries and wages, (3) competitively procure contractual services or perform any of the required cost or pricing analyses, (4) provide a legal written agreement to support its subgrant, and (5) appropriately draw down cash. As a result of these deficiencies, we have questioned all \$2,357,376 in costs claimed under the Agreement. Details follow.

Claimed Costs Not Reconciled

The Association could not provide us with a summary of claimed costs by cost element and did not reconcile the total claimed costs with the general ledger. Accordingly, we attempted but were not able to reconcile the claimed costs on the financial status reports (FSRs) with the Association's general ledger.

Title 40 CFR 30.21(b) provides that the recipient's financial management system shall provide for accurate, current, and complete disclosure of the financial results of each Federally sponsored project or program in accordance with the reporting requirements set forth in 40 CFR 30.52. It also states the system shall provide for comparison of outlays with budget amounts for each award.

The Association's financial management system did not meet any of the above requirements for an adequate financial management system. Consequently, we have questioned, as unsupported, the claimed costs of \$2,357,376. The following table outlines the differences between costs claimed on the FSRs and the expenditures in the general ledger for the audited reporting periods:

Period	Date Submitted	Costs Claimed on FSR	Expenditures Per General Ledger	Difference
10/01/98 - 9/30/99	8/13/02	\$343,035	\$338,019	\$5,016
10/01/99 - 9/30/00	8/13/02	\$552,919	\$549,746	\$3,173
10/01/00 - 9/30/01	8/13/02	\$616,897	\$622,417	(\$5,520)
10/01/01 - 9/30/02	10/18/02	\$777,056	\$783,699	(\$6,643)
10/01/02 - 12/31/02	2/27/03	\$67,469	\$67,469	\$0
Cumulative Totals		\$2,357,376	\$2,361,350	(\$3,974)

Association's Response

The Association indicated it made a good faith effort to comply with 40 CFR30.21(b) and 40 CFR 30.52 during a startup period. While Association officials agreed that discrepancies between the FSRs and general ledger should be zero, they indicated the discrepancies were extremely close to zero, and they have every reason to believe the FSRs and the general ledger will be completely reconciled in the future. They said the Association for the first 2 years was working out of a paper checkbook and then converted to a computerized system. An outside accounting firm has been hired to prepare the FSRs. The FSRs in question were filled out retroactively, and there were adjustments from previous periods that may have not been reflected in the transition from checkbook to outsourced accounting services. The Association is now working with two outsourced accounting firms.

Auditor's Reply

While the Association does have two outsourced accounting firms (one is its OMB A-133 annual auditor and the other is performing the bookkeeping services) it still has not submitted an FSR that will reconcile total costs reported to its general ledger. The financial activity reported on the FSR for the period October-December 2002 could be reconciled to the general ledger; however, the Association still has not made a full accounting of its financial activity as required by 40 CFR 30.21(b). Without the ability to reconcile claim costs to the general ledger, the Association cannot identify the specific costs being claimed, and EPA cannot assure that claimed costs are allowable under the terms of the Agreement.

Unsupported Labor Costs

The Association did not maintain support for its salaries and wages required by OMB Circular A-122. As a result, we were unable to determine whether labor costs recorded in the general ledger were allowable in accordance with the Agreement.

The requirements of 40 CFR 30.27 provide that non-profit organizations shall follow the provisions of OMB Circular A-122 for determining allowable costs. That Circular requires that: (1) charges to awards for salaries and wages, whether treated as direct costs or indirect costs, will be based on documented payroll approved by a responsible official(s) of the organization; and (2) labor reports reflecting the distribution of activity of each employee must be maintained for all staff members (professionals and nonprofessionals) whose compensation is charged, in whole or in part, directly to awards. To satisfy these requirements, reports maintained by non-profit organizations must meet the following standards:

- The reports must reflect an after-the-fact determination of the actual activity of each employee. Budget estimates (i.e., estimates determined before the services are performed) do not qualify as support for charges to awards.
- Each report must account for the total activity for which employees are compensated and which is required in fulfillment of their obligations to the organization.
- The reports must be prepared at least monthly and must coincide with one or more pay periods.

OMB Circular A-122 also provides that charges for the salaries and wages of nonprofessional employees, in addition to the supporting documentation described above, must also be supported by records indicating the total number of hours worked each day maintained in conformance with Department of Labor regulations implementing the Fair Labor Standards Act.

Prior to November 9, 2002, there was no evidence that Association employees prepared timesheets. Without supporting time records, labor costs are not allowable under Federal regulations. On November 9, 2002, the Association's Board of Directors approved new time keeping policies for both exempt and nonexempt employees. This new policy and timesheet are sufficient for an organization with only one cost objective. However, this new policy and timesheet are not adequate for an organization with multiple cost objectives. OMB Circular A-122 requires time records to report on time worked on each cost objective. A cost objective is defined in OMB Circular A-122, as a particular award, project, service, or other direct activity of the organization.

Association's Response

The Association indicated the previous executive director evidently began using timesheets but discontinued the process. The amount paid to employees is fully documented in the records of the outsourced payroll entity. As part of the Corrective Action Plan timesheets have been reinstated.

The Association indicated that while OMB Circular A-122 technically requires labor documentation reports, given the fact the Association only has one award, they believed the objective of the requirement has clearly been met. They said the Association's payroll system technically satisfies the requirement of Item 7(m) of Attachment B of A-122 in several respects; e.g., after-the-fact determination of the actual activity of each employee, and the reporting of total activity no less frequently than monthly. The Association indicated that to take a literal reading of the requirement is not in keeping with the spirit/objective of ensuring allowability.

The Association believes that there is really no dispute over what the funding was being used for. As for the division between CERCLA and RCRA, funding this grant uses a predetermined percent to draw down funds; thus, there is not a need to identify time by cost objective.

Auditor's Reply

The only timesheets that the Association made available to us were the ones used after the Corrective Action Plan was instituted on November 9, 2002. Prior to this date, there were no timesheets available to support the hours claimed under the Agreement as required by Federal regulations. Consequently, the Association has not complied with the terms of the Agreement.

While the Association is correct in that it need not split time worked on CERCLA or RCRA projects, since this assistance agreement was awarded for one project, the Association needs to account for employees' indirect time (e.g., paid absences) as well as direct time to reflect after-the-fact determination of actual activities as future EPA assistance agreements will not be combined funding.

Improper Procurement Practices

The Association did not competitively procure contractual services, and did not perform the required cost or price analysis for the procurement of contractual services.

The provisions of 40 CFR 30.43 provide that all procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Further, 40 CFR 30.45 requires some form of cost or price analysis to be made and documented in the procurement files in connection with every procurement

action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices, and similar indicia, together with discounts. Costs analysis is the review and evaluation of each element of cost to determine reasonableness, allocability, and allowability.

In October 2000, the Association awarded a sole source fixed price research contract for a two-year period with an anticipated 1-year option, for a total contract price of \$750,000, to the University of Tulsa. The Association did not provide any support to demonstrate the selection process for this contract, or that a cost or pricing analysis was conducted. Our review disclosed that a former Association board member was instrumental in soliciting the University for this contract. Prior to the award of contract, the former board member was hired by the University. Accordingly, because of a lack of competition and a cost or pricing analysis, there was no assurance that the paid contract costs were reasonable. Therefore, these costs are not allowable under Federal rules.

As of December 31, 2002, the Association had paid the University \$500,000 of the \$750,000 contract amount (\$250,000 in advance in each of the first 2 years). The Association has not received a final accounting of the funds expended by the University during that second year or received a refund for any uncompleted work.

Association's Response

The Association reaffirmed that its current practices provide for a competitive bid process. As far as its past practices relating to the original University of Tulsa contract, the Association contends that it solicited bidders verbally, with only one proposal being received. Board members were asked on their own to investigate potential vendors.

Auditor's Reply

The Association has not provided any information related to a cost or pricing review to support the procurement for this contract. Title 40 CFR 30.45 requires that some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Although the Association contends that it solicited bidders verbally, there is no evidence to support this statement. Further, there is no documentation to show what organizations were contacted or how the contract price was determined.

Unsupported Subgrant

The Association made payments of \$121,185, as of December 31, 2002, to vendors for work performed under an apparent subgrant with the Cahto Tribe, but did not have a written agreement with the Cahto Tribe supporting this subgrant. The subgrant was for site assessment work and video documentation performed at the Laytonville Dump for the Cahto Tribe of Laytonville, California. According to 40 CFR 30.5, the provisions of

40 CFR Parts 30 and 31, as applicable, shall apply to subrecipients performing work under awards. The term subgrant is defined in 40 CFR 31.3 and includes financial assistance when provided by a contractual legal agreement. The Association has not provided any evidence it entered into a legal agreement with the Cahto Tribe, but made payments directly to the vendors procured by the Tribe.

It is our understanding that the Cahto Tribe received separate funding from EPA to develop an environmental office and to develop a water quality assessment program to investigate potential mitigation of contaminations from the Laytonville Dump. Without a legal agreement outlining the scope of work of the subgrant, we have no assurances that the contract services paid by the Association do not duplicate the same services provided for under the EPA grant provided to the Cahto Tribe. Since the vendor costs of \$121,185 were not paid in accordance with a binding legal agreement, the costs are not allowable under Federal rules.

Association's Response

The Association concurs that a written statement of award was lacking. Nonetheless, the Association believes that the award itself was justified and, in its opinion, allowable.

Auditor's Response

Without documentation to support award of this subgrant, we cannot determine if the costs are allowable under the Agreement.

Inappropriate Cash Drawdowns

The Association drew down EPA funds in advance of the actual need. This practice, which occurred due to the lack of written procedures, resulted in the Federal government incurring unnecessary interest costs on those funds, and can result in overpayments. In addition, the excessive draws were contrary to 40 CFR 30.22 (b), which states in part:

Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursement by the recipient organization for direct program or project costs and the proportional share of allowable indirect costs.

We reviewed the Association's average daily balances in its checking account per the monthly statement and as of the day of EPA funds deposit, and found that the checking account balances were often excessive. Of the 72 drawdowns that we tested, 26 were

made when the grantee had a checking account balance exceeding \$10,000, which we consider an appropriate threshold. These balances ranged from \$10,787 to \$26,195.

Association's Response

In the Association's response, the executive director states in part, "I do not know of the circumstances involving these drawdowns because I was not here." The executive director goes on to explain that current practice is to request drawdowns that represent a 2-week need per EPA's Grant Office.

Auditor's Reply

The U.S. Treasury's current system – Automated Standard Application for Payment – allows recipients to request daily drawdowns. EPA's fundamental requirement is for recipients to draw down immediate cash needs. Immediate cash needs have been determined by EPA to be that amount of funds needed to cover expenses for 3 business days. We believe that the past practice of cash drawdowns resulted in excess cash being drawn down.

Recommendations

We recommend that EPA:

1. Recover the \$2,357,376 that is not supported in accordance with 40 CFR Part 30 and OMB Circular A-122.
2. Suspend work under the current agreements and make no new awards until the Association can demonstrate that its accounting practices are consistent with Federal requirements (see recommendation number 3).
3. Require the Association to modify its financial management system and practices to meet the requirements of 40 CFR 30.21. At a minimum, the Association's system must:
 - a. Ensure that financial reports are current, accurate, complete, and supported by accounting records.
 - b. Include records that adequately identify source and application of funds for Federally-sponsored programs. These records should be in sufficient detail to allow a comparison of the budgeted grant costs by cost element with the actual incurred and claimed costs.
 - c. Include written procedures to determine reasonableness, allocability, and allowability of costs in accordance with the Agreement and OMB Circular A-122.
 - d. Include accounting records that are supported by adequate source documentation.
 - e. Require the Association to establish an adequate time distribution system that meets the requirements of OMB Circular A-122, Attachment B, paragraph 7. The system should account for total hours worked and leave taken, and identify the specific activities and final cost objectives that the employees work on during the pay period. It should also serve as the basis for charging labor costs to Federal grants and cooperative agreements.
 - f. Require the Association to follow all procurement standards under 40 CFR 30.40 through 30.48
 - g. Ensure compliance with cash draw requirements.

Scope and Methodology

EPA discovered a material weakness in the Association's financial management system during an on-site review conducted by Walker and Company LLP for the EPA. Consequently, the EPA requested the OIG to conduct an audit of the Association. We performed our examination in accordance with the *Government Auditing Standards*, issued by the Comptroller General of the United States, and the attestation standards established by the American Institute of Certified Public Accountants. We also followed the guidelines and procedures established in the OIG Audit Process Handbook dated November 5, 2002.

We conducted this examination to express an opinion on the claim, and determine whether the Association was managing its EPA assistance agreement in accordance with applicable requirements. To meet these objectives, we asked the following questions:

1. Is the Association's accounting system adequate to account for assistance agreement funds in accordance with 40 CFR 30.21?
2. Does the Association maintain an adequate labor distribution system that conforms to requirements of OMB Circular A-122?
3. Is the Association properly drawing down assistance agreement funds in accordance with the Cash Management Improvement Act?
4. Are the Association's procurement procedures for contractual services complying with 40 CFR 30.40 to 30.48?
5. Is the Association complying with its reporting requirements under 40 CFR 33.51 and 30.52?
6. Are the costs claimed/incurred under the Agreement adequately supported and eligible for reimbursement under the terms and conditions of the Agreement, OMB Circular A-122, and applicable regulations?

In conducting our examination, we reviewed the project files and obtained the necessary assistance agreement information for our examination. We interviewed the grants specialist to determine whether any concerns needed to be addressed during our examination. We also interviewed Association personnel to obtain an understanding of the accounting system and the applicable internal controls as they relate to the claimed costs. We obtained and reviewed the single audit reports, and the Financial Management System Review, conducted by an outside audit firm at the request of the EPA Grants Administration Division, Office of Grants and Debarment, to determine whether there were any reportable conditions and recommendations addressed in those reports.

We reviewed management's internal controls and procedures specifically related to our objectives. Our examination included reviewing the Association's compliance with OMB Circular A-122; Title 40 CFR Part 30; and the terms and conditions of the assistance agreement. We also examined the claimed costs on a test basis to determine whether the costs were adequately supported and eligible for reimbursement under the terms and conditions of the assistance agreement, OMB Circular A-122, and applicable regulations. We conducted our field work from March 3, 2003, to April 14, 2003.

Association's Response

Note: This letter is an electronic rendering of the official printed document. It has been formatted for electronic presentation. To request a printed version of this report please contact the Office of Congressional and Public Liaison at (202) 566-2391.

August 7, 2003

Mr. Michael A. Rickey
Director
Assistance Agreement Audits
U.S. Environmental Protection Agency
Washington, D.C. 20460

RE: Comments on July 1, 2003 Draft Audit Report of Costs Claimed by the Tribal Association on Solid Waste and Emergency Response (TASWER) under EPA Assistance Agreement No. CR8227181-01

Dear Mr. Rickey:

This letter is in response to your invitation to respond to the draft audit report referenced above. This letter contains comments under headings related to issues cited in the draft audit report.

1. **Corrective Actions.** TASWER wishes to reiterate and stress that, in response to the EPA Stop-Work Order of July 6, 2002 TASWER instituted corrective actions that resulted in procedures that are now in place that addressed all of the issues cited in your report. A copy of the corrective actions report is attached as Appendix A.
2. **Improper Procurement Practices.** One of the corrective actions taken was the institution of a fiscal management policy that includes a procurement policy. A concern of EPA's initial financial management review performed for EPA by Walker & Co. and the resulting stop-work order was that the agreement with the University of Tulsa (TU) should have been put out to competitive bids. This is also the focus of this issue in the draft audit report.
 - a. *Contract Has Been Put Out to Competitive Bids.* As part of its condition to lift the stop work order, the EPA grants office requested that TASWER put the third-year of the contract out for competitive bids. (Your draft report contains an incorrect statement, by the way: "However, this contract was terminated during the second year of the contract." The contract did not terminate during the second year of the contract. It was a two-year contract for a three-year project, which thus allowed for a review of the project before completion. The contract with TU naturally terminated on September 20, 2002.) When it received no response to its request of the award of the third-year of the contract from TASWER, which was under

the stop-work order, TU made the award solicitation directly to the EPA Grants Office, which resulted in EPA's request that TASWER put the third year out for competitive bids. In making this request, as EPA Administrator Christie Todd Whitman noted in her response to Rep. John Sullivan (D-OK), who, at TU's request, had asked EPA to award the third year of the agreement to TU without a competitive bid process, EPA's actions were in accordance with 40 CFR 30.44(e)(1) and (5). Ms. Whitman wrote, "[T]he grant regulations at 40 CFR 30.44(e)(1) and (5) allow us to review the procedures that TASWER will follow in exercising the option on the Tulsa contract to ensure that exercising the option would be consistent with competitive procurement procedures." One way, and we believe the correct way, of looking at this is that the system, under 40 CFR 30.44(e)(1) worked. TASWER made an awards decision for a two-year contract for a three-year project. In reviewing how the contract was awarded, EPA, based on its review under 40 CFR 30.44(e)(1), made a determination that it would be best if the third-year was put out for competitive bids, and therefore it was. Attached in Appendix B is a summary of the competitive bids procedure for the third year of the project agreement.

- b.** *TASWER Vigorously Affirmed the Competitive Bid Process.* In April 2003, the third year of the agreement was awarded to a bidder other than TU. TU filed a formal protest with the TASWER Board of Directors and a FOIA request with EPA to facilitate its further protests and potential litigation. The TASWER Board rejected TU's protest in June 2003, and TASWER responded that *it* would pursue litigation unless TU cooperated with the transition to the new vendor, stating that TU's protests were frivolous and were delaying the entire project. TU responded in turn by agreeing to drop its protest and to cooperate on a transition. Appendix C is a packet of materials presented to the TASWER Board of Directors at its July 2003 meeting; it mostly includes relevant correspondence with TU on this matter. On July 16, 2003 I, TASWER's grant specialist, representatives of the new vendor, and TU representatives met in Tulsa on the transition of vendors. The meeting was very successful. TU's work is being utilized by the new vendor, and TU is cooperating in the transition. The end result is that the project has been put out to competitive bids and the work of the first two years is being utilized by the third-year vendor. This has been done, to my understanding, to the satisfaction of the EPA Grants Office.
- c.** *Uncommitted Balances.* The draft audit mentions the issue of uncommitted balances of the TU agreement. On June 29, 2003, I called Richard M. Valliere of your office to say that he had mentioned the issue of uncommitted balances when he was here; I told him we were working out

a settlement agreement with TU and asked his advice. He indicated that I should talk to our grants officer, Jeanne Conklin, and work out an arrangement with her. Appendix C includes e-mails with her and with our projects officer, Felicia Wright, that resulted in Ms. Conklin's approval of our plan concerning these balances, which I then included in the settlement and release agreement. There was some continued dispute as to the amount of balances, which was resolved, as reflected in the correspondence included in Appendix. C.

- d. *Competitive Investigations.* TASWER has put the third-year of this research contract out to competitive bids and now has a formal procurement policy. The only explanation for why such a policy did not exist previously was that TASWER was a new organization and the TU project was its first service contract. But TASWER thinks it is important to point out that 40 CFR 30.43 does not require competitive bids but that competition for procurement transactions, "to the maximum extent possible," be "open and free." As the history of this project shows, there is evidence that a competitive investigation *was* performed by TASWER and that a good faith effort was made to solicit bidders, given the limited resources and the fact that the decision was almost the first major transaction of the association.

In February 2000, TASWER created a Board committee to determine how to utilize TASWER's CERCLA grant money. Committee Members were Board members Marcie Philips, Calvin Murphy, and Earl Hatley. The committee recommended that TASWER fund a risk assessment model for Tribes that included a map of hazardous waste sites. On April 18, 2000, the TASWER Board unanimously voted to fund the project. As Appendix D, a fax from TASWER's then-executive director Jeff Tomhave to TASWER's new project manager, Felicia Wright, indicates, Board members were asked on their own to investigate potential vendors, and they did. As the Board minutes document, finding vendors with Native American experience as well as sufficient technical expertise was a concern (and it, incidentally, still is.) Messers. Hatley and Tomhave both had experience with the University of Tulsa's National Energy-Environment Law and Policy Institute, which had mapping capabilities--it had purchased ArcView mapping software for other projects--and had relationships with various Tribes through its Native American Center. They both approached TU, and TU agreed to send TASWER a proposal. Although other Board members talked to potential bidders, none of these potential bidders submitted a proposal. On its own, TU approached Mr. Hatley about working on the project, and, as Appendix D indicates, Mr. Tomhave and the Board had concerns about this. Mr. Hatley resigned from the Board but not because of these concerns (of which he says he

was unaware and Appendix D shows he was not part of the meeting discussing this) or because of the project but because he was no longer employed by the Quapaw Tribe and therefore could not represent the Tribe on the Board. His letter of resignation, which is Appendix E, confirms this. He could not have remained on the Board, regardless. Once off the Board and unemployed, Mr. Hatley was hired by TU for various projects, one of which was, *potentially*, the TASWER research project.

The draft audit report contains another incorrect statement related to this, which has an unfortunate and negative connotation: "Further, this board member had resigned from the Association's board in July 2000 and was subsequently hired by the University in August of 2000 to conduct the research under the Association's contract." This is incorrect on several counts. Mr. Hatley resigned from the Board on June 23, 2000 for the reasons given in his letter, was hired by TU on July 10, 2000, but not to "conduct the research on the project," since the TASWER Board did not vote to award the contract to TU until September 14, 2000 and the contract was not executed until October 20, 2000. Mr. Hatley was available to work for TU not because he resigned from the TASWER Board to avoid a conflict of interest but because his employment was terminated by his Tribe; his actually working on the project was not assured until the Board vote in mid-September 2000, three months after his resignation from the TASWER Board. And the vote to give the contract to TU was not unanimous--7-1-1 abstention.

And so, nothing was handed on a platter to TU. Bids were solicited verbally. TU was the only bidder, but it did submit a detailed proposal that was reviewed by the Board as to its costs and effectiveness and voted on. And the Board could always have voted against TU--one Board member did and one abstained. There *was* a competitive process.

- e. *Conclusions* In short, notwithstanding the fact that EPA regulations specifically provide for instances where it is not practical or possible to award large procurements competitively,¹ the TASWER Board attempted to satisfy and arguably did satisfy in substance the competitive requirement. It solicited bidders verbally, one entity submitted a proposal, and that proposal was reviewed by the committee and Board and voted on by the Board.² The fax memo in Appendix D describing this process was

¹ See 40 CFR 30.44(e)(2); see also 40 CFR 30.44 (d), which specifically notes that "Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement," These criteria were clearly utilized during the TASWER Board's review of the TU proposal, and TU was eminently qualified and responsible.

² As such, it is not accurate to say that there was a lack of cost/pricing analysis; rather, the deficiency is more an issue of documentation.

sent to TASWER's EPA project manager on July 9, 2001 at her request and was in the material available to the OIG auditors when they were in our offices early this year, as were the Board minutes.³ (Mr. Hatley's letter of resignation was not made available to them because they did not ask to see Board appointment and resignation letters and because I did not know their inquiry was following this particular tact.) And, if that competitive process, however much in good faith, was inadequate, TASWER has attempted to rectify that by putting the third year out to competitive bids. Consequently, TASWER made a good faith effort at the time to comply with 40 CFR 30.43 through 40 CFR 30.45 and has made a vigorous effort to do so this year, as Appendices B and C illustrate.

3. **Claimed Costs Not Reconciled.** TASWER was formed in 1998 but its first board meeting was not until 1999 and until the Tulsa grant in 2000, which was its first big decision, it was basically in a startup mode. For the first two years, the executive director was working out of a paper checkbook and then a computer checkbook. In 2000, an outside accounting firm was hired, and a month-to-month general ledger is electronically available from then onward. The FSRs in question were filled out retroactively, and there were, of course, adjustments from previous periods that may have not been reflected in the transition from checkbook to outsourced accounting. We now have a fiscal management plan in place. We are also working with two outsourced accounting firms. One of the OIG auditors told me when he was here that the FSR for the period October-December 2002 tied in "to the penny." In retrospect, the previous executive director should have been more diligent in submitting FSRs and in reconciling any discrepancy. And yet, in spite of this and the transition from checkbook to outsourced accounting, the cumulative difference between the general ledger and the submitted FSRs was (\$3,974), which represents only .168% of the \$2,357,376 claimed on the FSRs. A good faith effort was made by TASWER to comply with 40 CFR 30.21(b) and 40 CFR 30.52 during a startup period, and while the discrepancies between the FSRs and general ledger should be zero, they are extremely close to zero, and, we have every reason to believe, the FSRs and general ledger will be completely reconciled in the future. To have such an insignificant difference (not to mention that the difference is in favor of EPA, which is to say that the claimed costs were less than the costs reported in the general ledger) as a justification for disallowing the entire award amount does not appear to us to be a reasonable conclusion.
4. **Unsupported Labor Costs.** The previous executive director evidently began using timesheets but discontinued the process, for reasons to be

³ Not to mention that TU's funding was clearly part of FY01 budget submitted to and agreed to by EPA.

discussed. The amount paid to employees is fully documented in the records of the outsourced payroll entity, Paychek. Timesheets are now in use. As far as the previous period during which timesheets were not used, it should still be noted that EPA was and is TASWER's sole source of funding and the activities described in its cooperative agreement are its only activities.

While OMB Circular A-122 technically requires labor documentation reports, given the fact that TASWER only has one award, the objective of this requirement has clearly been met. Furthermore, TASWER's payroll system technically satisfies the requirements of Item 7,m of Attachment B of A-122 in several respects; e.g. after-the-fact determination of the actual activity of each employee; the reporting of total activity no less frequently than monthly; etc. To take a literal reading of requiring a labor distribution report in this situation is not in keeping with the spirit/objective of ensuring allowability.

So there is really no dispute over what the money was being used for. As for the division between CERCLA and RCRA funding--the draft audit report says that even the current timesheet is inadequate because "it does not provide for the identification of time by cost objective"--that division is predetermined. Attached in Appendix F is the cost breakout between TASWER's CERCLA and RCRA funds provided to me in April 2003 by TASWER's project manager. As you can see, the previous executive director changed the percentages from year-to-year to reflect changing emphasis. No matter what actually happens, no matter how much time is spent on hazardous waste projects as opposed to RCRA projects, the grant for TASWER is drawn down entirely on the basis of these predetermined percentages. I have been told that "this is how Las Vegas is set up" when it comes to divided grants. I have also been told that since the remaining amounts of the divided grant funding will extend into FY04, EPA will continue the divided grant funding for one more year but no more. After that point, TASWER will apply for individual grants for specific projects. And so, the current timesheets with their lack of designation as to cost objective reflect the current situation whereby data about time spent on cost objectives would have no effect on the way the RCRA and CERCLA grant monies are drawn down. The previous executive director's discontinuance of the timesheets and his continual and frustrated changes of the grant percentages may also reflect this situation.

TASWER's accomplishments in Appendix G reflect the work that TASWER has done in conformity with its grants. And again, EPA has been TASWER's sole source of funding. EPA can have confidence that

the work paid was paid to accomplish the amounts budgeted and the work described.

To conclude, TASWER has met the substance of the requirements under OMB A-122 and in many regards the technical requirements as well.

5. **Inappropriate Cash Drawdowns.** The draft report states that 26 of the 72 drawdowns were made "when the grantee had a checking account balance exceeding \$10,000." I do not know of the circumstances involving these drawdowns because I was not here. I do know that when the drawdowns are made at the end of the month the executive director knows that he will have payroll and rent due and that amount alone exceeds \$10,000, not including other bills. Sometimes invoices that you count on being received on such and such a date do not come in--they come early or they come late. The current situation at TASWER is that we only ask for the amount that we believe we will use in the next two weeks, which is the directive we have received from the grants office. But there are dangers in this, and it could be that the previous executive director anticipated these dangers. I will tell you a recent relevant anecdote. On June 27, 2003, I made a drawdown request of \$28,000. Payroll had been approved, and that would leave us with \$1,981 in the bank. I knew I had other bills that had to be paid soon. These would leave us with \$518, and the rent would still have to be paid. So, I faxed in the drawdown request of \$28,000, anticipating that 48-hour turnaround Las Vegas promises. By July 1, the money had not been received by our bank. I called the Las Vegas Finance Center on July 2 and was told that there had been "electronic problems with Treasury" but that the money would be in our bank on July 2. When it didn't hit July 2, I called and was told there were still "problems with Treasury" and that because of the July 4th holiday the money would not be transferred until the next Tuesday, July 8! Further, it didn't come on July 8 and when I called Las Vegas I was told there was nothing more I could do--it would come when it comes. It arrived on July 9. During this 13-day period TASWER had \$518 in the bank and could not pay the rent. I paid it on the 10th and was billed for a late fee (which under OMB Circular A-122 item 16 of Attachment B is arguably an "allowable" cost). And this is not the first time this situation has happened in the 10 months I have been with TASWER. When I told the story to other people "in the know," they said, "Oh, you have to keep an emergency reserve." And of course the concept of an "emergency reserve" is what you have criticized. TASWER is trying diligently to conform with regulations and yet still be able to pay its bills, with the overall intent to achieve EPA's mandate for TASWER.

It is, incidentally, our understanding that this type of drawdown problem was also experienced by my predecessor.

6. **Unsupported Subgrant.** The draft audit report notes the lack of a written agreement between the Cahto Tribe and TASWER to award a subgrant to the Tribe whereby TASWER would pay the Tribe for the expenses of its subcontractor and also pay some other contractor expenses directly. This lack was pointed out to us late in the OIG auditors' stay with us. We contacted the Tribe and provided the auditors with the e-mails in Appendix G. After they left, we prodded the Tribe to provide us with the material also included in Appendix G. There is extensive documentation of what TASWER paid for and a detailed draft report and justification. The draft report to the Tribe continually refers to the award, and TASWER's actions and its documentation of its payments and its justifications in paying clearly indicate that a subgrant was made. What is lacking, as has been noted, is a written statement of award. The award itself was justified and, in our opinion, allowable.
7. **Response Conclusion.** To conclude our response, we firmly state that the occasional lack of documentation noted in the draft audit report does not justify the harsh response of disallowing the entire claim. TASWER's EPA project manager was fully informed, albeit sometimes informally, on all aspects of TASWER's operations.

We ask your office, in its final report, not to repeat the disallowance conclusion indicated in the draft audit report, since, as we have tried to show in this response, 1) TASWER's requirement of competitive procurement practices has been satisfied by the recent competitive bid and was satisfied by the competitive *investigation* of the initial award; 2) that the small--.168 % in favor of EPA--difference between the FSRs and TASWER's general ledger is too small to, in any way, justify an action of disallowance; 3) TASWER's labor costs reporting was in conformity with the substance and in many instances the technical requirements of the regulations; 4) the drawdowns were not inappropriate under the circumstances; and 5) the unsupported subgrant was supported by TASWER's actions, although, in this case, as in the other case of the other items noted, documentation could admittedly have been better. Our corrective actions have specifically addressed the documentation issue.

Sincerely,

John T. Aquino
Executive Director
TASWER

cc. TASWER Board of Directors

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