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**Report of Investigation**

**FILE NO:** 20-0003-I

**DATE:** July 29, 2020

**SUBJECT:** Disputed Contract Pricing

**STATUS:** Final

**INVESTIGATOR:** Peter Pacheco

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Chief Procurement Officer  
Aviation Director  
File

## Executive Summary

The Office of Inspector General (OIG) for the City of Albuquerque (COA) received information that a vendor was overcharging the COA based on the price list the complainant had. Aviation employee, AV1 contacted the OIG stating that there was a situation regarding a vendor to which Aviation “piggybacked” off of for services. AV1 stated the State of New Mexico Purchasing Division awarded a Price Agreement to Industrial Water Engineering (IWE) off of a Federal, General Services Administration (GSA) schedule. According to AV1, this vendor for years has charged “other” local agencies a different (slightly) higher cost than what was awarded on their GSA schedule.

From information gathered during the review process, the OIG wanted to determine the following:

- Was the COA charged the correct price based on the contract’s current price list?
- If IWE charged the COA higher prices than provided for under the GSA, was this allowable?
- Did IWE invoice the COA for only allowable items and service stipulated by the contract?

The OIG determined that the pricing AV1 was referring to was from the State of New Mexico Contract and that AV1 did not have the most recent pricelist based on the sixth and most recent Amendment six. The price list utilized by AV1 was from the third Amendment that was from April 6, 2012 – January 31, 2017. Based on the OIG’s review as of June 17, 2020, the COA contract with IWE is correct and includes the updated pricing list. IWE’s Price List effective July 1, 2018 does match department invoices that contained parts and service charges.

Under the terms of the State Purchase Agreement contract, IWE is allowed to charge the COA the Most Favorable Customer (MFC) pricing which is slightly higher by one percent or less.

During the invoice review the OIG found that IWE was charging Aviation for “Monthly Water Treatment” which is not in accordance with the contract terms. The former COA Energy & Sustainability Program Manager requested that IWE bill Aviation an annual amount at a flat monthly rate. Other departments were also found to be invoiced for “Monthly Water Treatments” at different pricing. Based on the COA contract price list, and to be transparent, the COA should require IWE itemize services to ensure correct billing. Any item or service not on the price list should not be used.

The OIG makes the following recommendations:

- The COA should require IWE itemize all COA invoices to ensure proper billing.
- The Procurement Division should ensure contracts, amendments and new price list changes are updated in a timely manner and departments utilizing the contracts are notified of the changes.
- The COA should inform departments that contracts should not deviate from contract price lists. If the department needs to change or add an item to the contract, they should contact the Chief Procurement Officer (CPO).
- The Procurement Division require departmental invoice approvers notify the CPO when State contract or price lists utilized by the COA are out of date.

## **Introduction**

The Office of Inspector General (OIG) for the City of Albuquerque (COA) received information from an Aviation employee (AVI), that a vendor was overcharging the COA based on the price list the complainant had. AVI contacted the OIG stating there was a situation regarding a vendor to which Aviation “piggybacked” off of for services. AVI stated the State of New Mexico Purchasing Division awarded a Price Agreement to Industrial Water Engineering (IWE) from a Federal, General Services Administration (GSA) schedule. According the AVI, this vendor for years has charged “other” local agencies a different (slightly) higher cost than what was awarded on their GSA schedule.

## **Scope**

The OIG’s review focused on the contract between the COA and IWE to determine if the COA was overbilled for services. The scope of the review consists of the following:

- Reviewing the Contract and any pertinent documents;
- Reviewing invoices detailing the alleged overcharge;
- Consulting with the COA Procurement Division;
- Reviewing relevant statutes, policies and procedures;
- Communicating with pertinent COA Staff; and
- Communicating with contractor.

## **Investigation**

### **COA Contract ID #: SHR000021307**

The COA has a contract with IWE that several departments utilize for water treatment services and chemicals. IWE maintains the Heating, Ventilation and Air Condition (HVAC) systems for several COA department buildings. The contract is piggybacked off a Federal GSA and New Mexico State Contract.

The New Mexico State contract with IWE began on April 6, 2012. It has had six price agreement amendments with the first dating back to July 27, 2012 and the latest being February 7, 2017.

### **Piggybacking**

The National Institute of Government Purchasing (NIGP) defines Piggyback as *“a form of intergovernmental cooperative purchasing in which an entity will be extended the same pricing and terms of a contract entered into by another entity. Generally, the originating entity will competitively award a contract that will include language allowing for other entities to utilize the contract, which may be to their advantage in terms of pricing, thereby gaining economies of scale that they would otherwise not receive if they competed on their own.”*

## Invoice Review

The OIG reviewed IWE invoices for several COA departments and determined pricing was higher than the pricing list AV1 had provided. However, the pricelist provided by AV1 was outdated and was from the State of New Mexico contract third Price Agreement. It covered the period of April 6, 2012 – January 31, 2017 and had a total of 6 amendments.

Invoices provided by AV1 were dated from June 31, 2018 through February 29, 2020. There were 20 invoices in the amount \$2,433.57 for “Monthly Water Treatment”. However, “Monthly Water Treatments” are not listed on the contract price list as an allowable expense. Four invoices reviewed were for parts or chemicals that were an allowable expense. The review also found that four other departments were being invoiced for “Monthly Water Treatments” at various prices with no service breakdown. Aviation was using the New Mexico State contract to verify pricing of labor, services and a wide variety of chemicals.

The review of the other department invoice prices correlated with the Most Favorable Customer (MFC) pricing.

## Most Favorable Customer Pricing (MFC)

It was also found IWE uses the MFC price list in charges to the COA which are slightly higher than GSA pricing. The MFC clause is a common arrangement in many commercial contracts intended to ensure the customer receives the best price the company provides to its other customers.<sup>1</sup> MFC pricing is what GSA uses to negotiate pricing in order to possibly get lower pricing than the MFC.

The OIG reviewed the GSA website to review the GSA Schedule (Contract) for IWE and GSA Advantage which is the pricelist.<sup>2</sup> The only published pricelist was for GSA pricing. There was not an MFC pricelist published, but it is not required by § 5-5-33 (A) (2), although it is required by the COA Code of Ordinances § 5-5-33 (A) (1). If the procurement was from the GSA and not the State Price Agreement, there would be the requirement of the federal government price schedule.

### § 5-5-33 PURCHASING FROM GOVERNMENT CONTRACTS.

**Goods, services, including professional or technical services, or construction may be purchased from a business, or its authorized representative, under contract with a public agency or cooperative procurement agency at prices which are equal to or less than the prices of goods, services or construction meeting the same specifications or standards of those purchases, if the following conditions are met:**

(A) Prices are from:

- (1) A nationally published federal price schedule or a "federal government price schedule" published by the business under contract with the federal government;

<sup>1</sup> <https://govcontractassoc.com/most-favored-customer-clause/>

<sup>2</sup> [https://www.gsaadvantage.gov/ref\\_text/GS07F0190Y/0UX82I.3QNL4A\\_GS-07F-0190Y\\_GSASUPPLYSCHEDULE102019.PDF](https://www.gsaadvantage.gov/ref_text/GS07F0190Y/0UX82I.3QNL4A_GS-07F-0190Y_GSASUPPLYSCHEDULE102019.PDF)  
[https://www.gsaadvantage.gov/advantage/ws/search/advantage\\_search?db=0&searchType=1&q=19:5GS-07F-0190Y&src=elib](https://www.gsaadvantage.gov/advantage/ws/search/advantage_search?db=0&searchType=1&q=19:5GS-07F-0190Y&src=elib)

(2) A current contract has been awarded after notice and publication and in accordance with the requirements of the New Mexico Procurement Code, §§ 13-1-28 et seq. NMSA1978; or

(For more details referring to purchasing requirement for the State of New Mexico and the COA refer to Exhibit 1)

### **Industrial Water Engineering Employee (IWE1)**

IWE1 was contacted via email and asked to provide information regarding the contract COA has with IWE (SHR000021307). The following was requested:

The Office of Inspector General is conducting a review of the contract IWE has with the City of Albuquerque. Information regarding the contract is listed below.

City Contract ID #: SHR000021307  
State of New Mexico Contract #: 20-000-00-00089  
GSA Contract #: GS-07F-0190Y

Please provide the latest GSA contract and pricing list pertaining to the contract.

IWE1 provided PDF's of the price lists, one which took effective July 1, 2018 and the other on July 1, 2020. Also provided was a PDF of an Amendment of Solicitation/Modification of contract, GSA Form SF30. The SF30 Form contained wording pertaining to the MFC pricing. IWE1 also provided the MFC Price List 2020 that was effective July 1, 2020

IWE1 correspondence stated the following:

*We recently revised our GSA contract to add a few additional items. Other than that pricing remains the same as 7/1/2018 when we did an Economic Price Adjustment. The final approval is so new that I have not had time to send it over to the City.*

*From the Purchasing Guide, State Purchasing Division regarding use of GSA contracts:*

*The Procurement Code does not allow the state of New Mexico to utilize these contract vehicles directly. It does allow the State Purchasing Division to "mirror" the GSA contracts, by issuing an exact duplicate of the GSA agreement for the State of New Mexico. The New Mexico "mirror" contracts are required to include all terms, conditions, and pricing included in the GSA agreement on which it is based. There is no ability to extend a New Mexico contract beyond the scope or expiration date of the GSA agreement.*

*Based on the terms of our contract GS-07F-0190Y, local government users receive Most Favored Customer pricing (MFC). Attached is the SF30 form from GSA and this information has been highlighted. We were able to negotiate a 1% over GSA prices for MFC customers. When the Industrial Funding Fee is included with GSA as required the difference become ¼ to 1%.*

*Attached are the MFC price lists for 7/1/2018 which should already be on file with the City and the newest price list which takes effect on 7/1/20.*

During the review of IWE invoices the OIG noticed that IWE was charging Aviation “Monthly Water Treatment” fees which were not on IWE’s pricelist. Information from IWE1 regarding the monthly reoccurring service fees was requested.

IWE1 responded with the following:

*Years ago, when COA’s Energy & Sustainability Program Manager was still at the Airport, he asked if we could change our quote and billing method to an annual amount billed at a flat monthly rate. The amount quoted is based on a review of the previous year’s chemical use and labor hours at the current dollar price then amortized over the 12 months. We have continued to quote and bill the airport this way ever since.*

*Attached is this year’s quote sent in May. It reviews the yearly activity and details what is included in the monthly water treatment amount and what needs to be purchased outside of the annual PO.*

*The pricing for City of Albuquerque is based on Citywide Contract #SHR000021307, Expires 1/31/22. Chemical for the loops at DE/SAMS is only invoiced if used. If chemical is needed at this facility, we will continue to send a quote and wait for approval before adding to the systems.*

**Procurement Division Senior Buyer (PD1)**

PD1 stated that in 2018, she created the COA contract (SHR000021307) that piggybacked off the New Mexico State contract. The contract went into effect January 5, 2018. PD1 was asked to send the most current price listing for Industrial Water Engineering.

PD1 forwarded an email she had received on October 9, 2019 from IWE1.

*Our City contract is based on our State Purchase Agreement (SPA) which is based on the terms of our GSA. GSA recently approved the addition of a few new chemical products effective 10-1-19, some of which we will be quoting the City.*

*The State Purchase Agreement just refers you to our GSA contract number. They quit attaching the price lists several years ago.*

PD1 stated on the date of the email she was not in Procurement and she had been transferred to the COA Warehouse and did not have authorization to make updates to the contract. PD1 stated she had forwarded the email, but cannot remember to whom and she does not believe the update to the contract happened. PD1 stated she has been back in the Procurement Division since May and she would work with her boss on the completion of the updates.

PD1 was asked if it is the responsibility of the vendor to notify the COA of any price increases before they go into effect if the COA is pigging backing off another entity’s contract? PD1 replied that yes, vendors send a copy of the updated State Price Agreements and any additional paperwork needed. PD1 stated that IWE1 was good in providing updates.

**COA Chief Procurement Officer (CPO)**

CPO was asked the following:

In review of Aviation invoices, IWE is charging a flat monthly fee of \$2,433.57 for monthly water treatment. The price list for IWE does not contain a price for “Monthly Water Treatment” and there is no breakdown of the cost on the invoice. Is the monthly charge to Aviation allowed by the contract and should there be a breakdown of services provided?

*It is difficult for me to tell whether the monthly charge to Aviation is allowed under the contract, because there is not an itemization of what the "monthly payments" charges are, as you pointed out. They could just be named too generally, but are priced as provided in the contract. Should there be a breakdown? It seems that would be beneficial to the end users review and approval process. The way the process works now is that end users (in this case Aviation) order off of City Contracts by way of Purchase Order Requests (POR) submitted in Peoplesoft. The detail in the POR entered by end users is what goes to the vendor. Following completion of services, the end users should be reviewing and approving the invoices by checking back to the agreement and making sure the prices match. Without a breakdown both in what they are ordering and what is being invoiced, I think that may be difficult for them to accomplish a thorough and accurate review.*

Are there any other discrepancies that should be noted regarding the contract between the City and Industrial Water Engineering?

*The current City Contract is attached, and directly references the SPA. The end users that are using the contracts for services should be using the process described above, and checking the pricing against this contract. If end users are checking pricing before approving invoices, there should be no discrepancy, or if there is, the invoice should not be approved.*

Regarding the MFC prices IWE invoices the COA, CPO stated that this SPA is not very well put together and its intent leaves it up to interpretation it seems. She will be taking a thorough look at this contract and talking to the city end users to see if COA is getting reasonable pricing. Even with the allowance of the use of the MFC, we need to make sure we are getting good pricing for the city just as a good business practice. We are not purchasing directly through the GSA, we are purchasing off the SPA. If the COA were purchasing directly from GSA, she would have to look at each individual purchase before she could say whether a procurement was authorized.

**IWE GSA SF30 Form:**

C. The Most Favored Customer (MFC) remains Preferred Commercial Customers, including Educational Institutions, State and Local Governments (to exclude the State of New Mexico only), and contractors whose end users is a governmental agency or facility (when no letter authorizing use of GSA schedules) are their MFC.

D. Industrial Water Engineering s Most Favored Customer (MFC) and the Basis of Award(BOA) for this contract is Preferred Commercial Customers, including Educational Institutions, State and Local Governments (to exclude the State of New Mexico only), and contractors whose end users is a governmental agency or facility (when no letter authorizing use of GSA schedules). The price/discount relationship between the Government and the MFC will never be less favorable to the Government than at the time of award, that is: For the life of the contract, the Government s basic discounts will never be less than 10.35% to 26% and will always be at least 1% greater than the 9.35% to 25% basic discounts granted to the MFC which are Preferred Commercial Customers, including Educational Institutions, State and Local Governments (to exclude the State of New Mexico only), and contractors whose end users is a governmental agency or facility (when no letter authorizing use of GSA schedules).



The CPO stated the Procurement Division is working on the following:

- Procurement and Accounts Payable, along with the Department of Technology and Innovation have been in discussions about proper Purchase Order (PO) setup (what should be in a PO), and the questions that arise from POs that have little or no detail about the order. We have prepared a how to set up a quality PO guide that was shared with fiscal managers. We had intended to have a whole panel on this topic during our procurement summit, but unfortunately had to postpone the summit because of the COVID-19 outbreak. It is still on our worklist to distribute this information.
- For this contract, and future contracts, we can prepare and add language that the end user must itemize its Purchase Order Requests and the vendor must itemize its invoices, or some similar language to put users on notice that they need to know what they're ordering and paying for.
- Procurement must remain cognizant of how the whole order to payment system is affected by how this process is established. Some of these changes, if done without the proper clear messaging, may result in delayed payments to vendors.

CPO provided the updated COA contract which she stated reflects pricing from the State Price Agreement.

#### **States Purchasing Division, IT Procurement Specialist (SPD1)**

SPD1 was contacted and provided the following information:

SPD1 stated that he facilitated the sixth Price Agreement Amendment. He stated that technically, IWE cannot charge anything not listed on the GSA library. SPD1 stated the contract and Price Agreement Amendments no longer lists GSA pricing updates, but the Price Contract Amendment refers to GSA for details.

Prior to speaking with SPD1 the OIG emailed the approved GSA SF30 Form which has wording regarding MFC pricing. After discussion, SPD1 agreed that the MFC pricing was acceptable under the term of the GSA SF30 Form.

SPD1 stated the State Purchasing Division would be happy to work with the COA in working on the procurement for a new contract under the State if the COA provided someone to help write the specs.

#### **GSA Senior Contracting Officer (GSA1)**

The OIG contacted GSA1 regarding MFC pricing and to verify they had the documentation that IWE1 had provided the OIG.

GSA1 stated that he only has responsibility for a GSA contract as it effects eligible users. A GSA contract is not going to speak to anything about pricing extending to another contract. He understands they use the GSA vehicle as a piggyback, but once it is in the hands of the other

entity, that contracting officer has the responsibility to rule on the pricing that is being charged based on that contract.

GSA1 stated in this case the GSA pricing is going to be 1% lower than the companies identified as MFC's

Information provided by IWE, GSA1:

*The SF30 provided to you is accurate and current and reflects the approved terms and conditions of the GSA MAS contract. The Price Reductions Clause upon which the Discount Relationship Statement is based identifies the customer or class of customers upon which the discount term or terms is/are based and must be maintained. The language only dictates the discount relationship that must be maintained between the Federal Government or Authorized Users of the Schedule contract and the contract holder which is based upon the MFC discount.*

## **Conclusion**

The OIG determined the pricing AV1 was referring to was from the State of New Mexico Contract which did not have the most recent pricelist to go with Price Agreement Amendment six. The last price list was from the third Price Agreement from April 6, 2012 – January 31, 2017. As of June 17, 2020, the COA contract with IWE had been updated with IWE's MFC price list. IWE's Price List effective July 1, 2018 does match department invoices that contained parts and service charges.

Under the terms of the SPA contract, IWE is allowed to charge the COA the MFC pricing that is up to one percent higher.

The former COA Energy & Sustainability Program Manager should not have requested IWE bill Aviation an annual amount billed at a flat monthly rate. In order to comply with the COA contract price list and for transparency, the COA should require IWE itemize services invoiced. Only allowable items and services specified in the contract should be invoiced to the COA.

The OIG makes the following recommendations:

- The COA should require IWE itemize all COA invoices to ensure proper billing.
- The Procurement Division should ensure contracts, amendments and new price list changes are updated in a timely manner and departments utilizing the contracts are notified of the changes.
- The COA should inform departments that contracts should not deviate from contract price lists. If the department needs to change or add an item to the contract, they should contact the Chief Procurement Officer (CPO).
- The Procurement Division require departmental invoice approvers notify the CPO when State contract or price lists utilized by the COA are out of date.

## **Exhibit 1**

### **State Procurement Code**

#### **1.4.1.65 PROCUREMENT UNDER EXISTING CONTRACTS AUTHORIZED:**

The state purchasing agent or a central purchasing office may contract for services, professional services, construction, or items of tangible personal property without the use of competitive sealed bids or competitive sealed proposals as follows:

1.4.1 NMAC 18A. at a price equal to or less than the contractor's current federal supply contract (GSA), providing the contractor has indicated in writing a willingness to extend the contract's pricing, terms and conditions to the state agency and the purchase order adequately identifies the contract relied upon; or B. with a business which has a current price agreement with the state purchasing agent or a central purchasing office for the item, services, or construction meeting the same standards and specifications as the items to be procured, if the following conditions are met: (1) the total quantity purchased does not exceed the quantity which may be purchased under the applicable price agreement; and (2) the purchase order adequately identifies the price agreement relied upon; C. other than Subsection A and B of this section and cooperative procurements as authorized by statute (and described in 13-1-135 NMSA 1978) or the state procurement card program (described in 6-5-9.1 NMSA 1978), no other procurement under existing contracts is authorized; no central purchasing office of a state agency or any other governmental entity may utilize a contract entered into by a different state agency or other governmental entity if not involved in the procurement itself (i.e., so-called "piggybacking" of contracts; the practice of "piggybacking" is not allowed under the Procurement Code); purchases under contracts developed through cooperative procurement authorized under 13-1-135 NMSA 1978 or contracts which qualify under 13-1-129 NMSA 1978 is permitted and does not constitute "piggybacking." [1.4.1.65 NMAC - Rp, 1.4.1.65 NMAC, 08-30-13]

#### **1.4.1.66 LIMITATION ON SUBSECTION A OF 1.4.1.65 OF THIS RULE RELATING TO GSA CONTRACTS:**

It should be understood; the state is not authorized to utilize a GSA contract per se. It is imperative, therefore, that the contractor, not a dealer or distributor, who has a current GSA contract indicate in writing a willingness to extend the contract's pricing, terms and conditions to the state of New Mexico. Therefore, a state agency shall not procure services, construction or items of tangible personal property directly under a general services administration (GSA) contract. Rather, a state agency must procure pursuant to a state purchasing agent price agreement which reflects the prices, terms and conditions of the respective GSA contract. If no such state purchasing agent price agreement exists, a state agency may make a written request to the state purchasing agent for the issuance of one. The request must be accompanied by a current copy of the applicable GSA contract, a letter from the contractor expressing a willingness to extend the contract's pricing, terms and conditions to the state of New Mexico and a letter from the state agency indicating a commitment to utilize the price agreement. The state purchasing agent will ascertain whether it is current and whether the proposed price is equal to or less than the federal supply contract price. If everything is in order, the state purchasing agent will issue a price agreement or purchase order reflecting the prices, terms and conditions of the GSA

contract. A state agency shall make no procurements from the GSA contractor until a state purchasing agent price agreement has been issued.

[1.4.1.66 NMAC - Rp, 1.4.1.66 NMAC, 8/30/2013]

## **COA Ordinance**

### **§ 5-5-33 PURCHASING FROM GOVERNMENT CONTRACTS**

Goods, services, including professional or technical services, or construction may be purchased from a business, or its authorized representative, under contract with a public agency or cooperative procurement agency at prices which are equal to or less than the prices of goods, services or construction meeting the same specifications or standards of those purchases, if the following conditions are met:

(A) Prices are from:

(1) A nationally published federal price schedule or a "federal government price schedule" published by the business under contract with the federal government;

(2) A current contract which has been awarded after notice and publication and in accordance with the requirements of the New Mexico Procurement Code, §§ 13-1-28 et seq. NMSA1978; or

(3) A valid contract which has been awarded by any public agency or cooperative procurement agency after notice and publication and in accordance with the requirements of the procurement laws and regulations applicable to that agency.

(B) The quantity purchased shall not exceed the quantity which may be purchased under the applicable contract.

(C) The goods, services or construction shall be purchased at the best obtainable price.

(D) The terms and conditions of the contract shall not be modified for the city purchase, unless the change is agreed to by the contracting business and is more favorable to the city than the original terms and conditions.

(E) The purchase order for the goods, services or construction purchased shall adequately identify the contract relied upon.

(F) The Central Purchasing Office or CIP shall retain for public inspection and internal use, official documentation, as required by the Chief Procurement Officer or CIP Official, whichever applies.