

FLRA INSPECTOR GENERAL INTERNAL REVIEW OF FLRA COURT REPORTING PROCUREMENT

I. REFERENCES

Federal Acquisition Regulation 16.500 -Indefinite-Delivery, Contracts; Federal Acquisition Regulation 16.201 - Fixed-Price Contracts;

Federal Acquisition Regulation 13.303, Blanket Purchase Agreements;

Federal Acquisition Regulation 19.501, Set-Asides for Small Businesses;

U.S. Department of Labor Bureau of Labor Statistics Occupational Outlook Handbook; Court Reporters and

FLRA Instruction 4410.1B, Procurement Policy and Procedures

II. METHODOLOGY

This internal review of FLRA procurement of court reporting and transcription services was conducted pursuant to government auditing standards. Interviews were conducted with the General Counsel, Deputy Counsels, Office of the General Counsel, Regional Directors, Regional Office Managers, Chief, Administrative Law Judge, and the Solicitor.

III. BACKGROUND

As part of FLRA's statutory mission, the Office of the General Counsel, Office of Administrative Law Judges, the Authority, Federal Services Impasse Panel, and the Office of the Solicitor are involved in court litigation, which requires court-reporting services. Since its inception, the FLRA has outsourced such services required by the Headquarters and Regional Offices. FLRA has never used its own employees for this requirement.

IV. FACTS

Based upon the availability of FY 2001 funds, FLRA issued a Request for Proposal(RFP), which included a detailed statement of work for court reporting and transcription services. The RFP solicited per page rates and other allowable firm fixed prices. The procurement opportunity was set aside for small businesses. The resulting contract provided FLRA the unilateral right to exercise options for continued performance in FY 2002 and FY 2003.

The Inspector General review of this FY 2001 solicitation affirmed that it set forth the requirements for outsourcing court reporting and transcription service with adequate specificity and detail.

The statement of work pertained to both court reporting and transcription services. It set mandatory fees to compensate the contractor for on-site cancellation, late cancellation, and additional services. The statement of work also described the required format for transcripts and exhibits, authorized the sale of duplicate transcripts, identified packaging and delivery requirements, stipulated payment procedures, and imposed confidentiality standards.

In response to the solicitation, and based upon stated award criteria, contracts were awarded to four offerers to provide court reporting and transcriptions services. The following selections were based, in part, on geographical time zones:

- **NEAL R. GROSS & CO. INC. (Washington, DC).**
Washington Regional Office
Boston Regional Office
- **JACKSON & ASSOCIATES (Santa Rosa, CA).**
Denver Regional Office
- **ON THE RECORD REPORTING (Austin, TX)**
Atlanta Regional Office
Dallas Regional Office
Chicago Regional Office
- **VARs (Sacramento, CA)**
San Francisco Regional Office

Toward the end of 2003, the FLRA Contracting Officer prepared a new court-reporting contract for court reporting services and notified management that the current contract would expire December 31, 2003. FLRA management did not approve the contract by the end of the year and, instead, extended the existing 2003 contract for 90 days (expiration on March 30, 2004). The incumbent contractors continued to provide services.

The Inspector General review of the FLRA 2001- 2003 Court Reporting Statement of Work identified a few important issues that were not addressed by the FLRA 2004 Statement of Work submitted to FLRA management for approval. These include:

Contract Administration (should address what happens when there is inaccurate preparation of transcripts, failure of the court reporter to show up or show up late for a hearing.)

Method and Requirements for billing and payment (should include reductions if contracted court reporters fail to show up, improperly prepare transcripts, and cancellation of cases etc.).

Court Reporting Certification & Requirements The previous FLRA 2001-2003 Master Requirement Contract for court reporting services also addressed liquidated damage charges against the contractor for late transcripts, failure of the reporter to appear on time or not come at all, and the methods of submitting invoices and payments. It also addressed confidentiality of information and reimbursement for travel, lodging and meal costs (payment only for outside of the 48 contiguous states of the U.S.) The FLRA allocated \$50,000.00 per year to each of the four contractors selected by the FY 2001, 2003 contract. The actual expenses for court reporting were less than the total yearly allocation of \$200,000.00.

At the end of FY 2003, the three-year option court reporting contract with Neal Gross & Company, OTR, Incorporated, VARS, Incorporated and Jackson & Associates ended. The Contracting Officer created a draft statement of work and advised management that the GSA Multiple Award Schedule was the most viable source for the contract. Although a new statement of work was prepared before the end of the 2001-2003 contract, FLRA management extended the contract for 90 days which would expire on March 31, 2004. At the end of the 90-day extension, FLRA management decided to use a GSA Multiple Awards Schedule for contracting the court reporting services, but there was insufficient time left to use a competitive procurement process. Since several FLRA hearings requiring court-reporting services were scheduled for early April. FLRA management then decided to issue blanket purchase agreements (PBP) for the remaining months of FY 2004. FLRA used the previous court-reporting contractors, Neal Gross & Company for the Washington and Boston Regional Offices, OTR, Incorporated for the Atlanta, Dallas and Chicago Regional Offices and Jackson & Associates, Incorporated for the Denver and San Francisco Regional Offices.

V. Costs

Based upon maximum workload requirements, FLRA projected costs of \$200,000 per year for court reporting during FY 2000-2003, however, the expenditure for actual requirements was substantially less.

	Expended	Budget
FY 2000	\$31,981.65	\$45,798.35

FY 2001	\$88,633.68	\$109,386.95

FY 2002	\$88,682.23	\$106,337.50

FY 2003	\$96,144.94	\$125,000.00

OGC	\$46,691.62	\$75,000.00
FSIP	\$565.80	\$565.80
ALJ & AUTH	\$0.00	\$0.00
FY 2004 (September 30,2004)	\$75,997.93	\$75,565.80

The total amount spent during FY 2004 under contract was \$37,581.15. The amount spent during FY 2004 under the BPA was \$38,416.78 even though \$85,000.00 was allocated for remainder of the fiscal year.

During FY 2004, the FLRA Regional Offices required the following amount of court reporting.

Atlanta Regional Office	7 times
Boston Regional Office	6 times
Chicago Regional Office	6 times
Dallas Regional Office	4 times
Denver Regional Office	8 times
San Francisco Regional Office	4 times
Washington Regional Office	10 times
FSIP	1 time

VI. Procurement Options

GSA Multiple Award Schedule

FY-2004

This investigation affirmed that in early March 2004, the Contracting Officer recommended that FLRA management execute a multiple-award contract pursuant to the current GSA Multiple Award Schedule (Solicitation Number.7FCM-N6-03-0736-B). This type of contract would have provided the required court recording and transcription services for the FLRA. The contract would also have implemented cancellation fees and additional services, including approved overtime and weekend work. By the time FLRA management accepted the FLRA Contracting Officer's recommendation, sufficient lead-time to satisfy competition had become problematic and another alternative was necessary to ensure that scheduled hearings in the first part of April 2004 would have court reporters.

Blanket Purchase Agreement

FY-2004

On April 2, 2004, FLRA Director of Administrative Services Division, directed the FLRA Contracting Officer to prepare a Blanket Purchase Agreement (BPA) for court reporting to cover the remaining six months of FY 2004.

The BPA authorized FLRA Regional Office managers to place orders with the vendors listed on that document. However, because Office Managers procurement authority is limited to the \$2,500 micro-purchasing threshold, any order exceeding that dollar value had to be submitted to the Director, Administrative Services Division who forwarded it to the FLRA Contracting Officer or Purchase Agent. This process was later modified to allow Regional Offices to submit a form to the Office of the General Counsel who then processed it through the Administrative Services Division. The Regional Offices were required to maintain monthly logs of court reporting requests, which were submitted to the Director, Administrative Services Division.

The BPAs set forth the FLRA's technical court reporting requirements in a fashion similar to the statement of work included in the previous court reporting contracts, including general specifications for transcripts, exhibits, fees, and timeliness.

However, BPAs do not cite appropriations or commit funds (FAR 16.702(c)). The BPAs were merely written instruments of understanding between FLRA and the vendors, which contemplated the terms of some future service or product, if the vendor accepted the task. A blanket purchase order is not a contract FAR 16.702(a)).

BPAs are not contracts but are purchase orders, which are not enforceable. Each time a court reporting BPA is issued, the FLRA has to send out the order and the companies must respond each time. Since BPAs are not contracts, the companies cannot be held responsible for performing all of the stated duties on the agreement or be held responsible

for not showing up to the hearing on time. BPAs do not prevent the companies from raising fees or have the obligation to standardize the costs. The FLRA BPAs related to court reporting services list general specifications.

The use of BPAs for court reporting by FLRA Regional Offices began in April 2004. Although the FLRA Office of General Counsel Regional Directors stated that initially there was much confusion over how to obtain service under the BPA, there were apparently no significant problems other than one submission issue involving the Atlanta Regional Office. This occurred while the FLRA Contracting Officer was on leave and did not respond to the Atlanta Regional Office request for court reporting services on time. Otherwise, it appeared that the blanket purchase process worked well even though it required much more paperwork than the previous contracts and had more potential vulnerabilities.

BPAs can only be processed by the FLRA Contracting Officer and Purchase Agent if they exceed \$2,500.00. The BPAs currently being used have \$10,000.00 on each requisition to commit FLRA funds for court reporting services. If a dispute issue arises using a BPA, there is no enforceable agreement. While contracts require the contractor to accept related task orders, contractors do not have to accept BPAs and can even increase their rates for each new Regional Office BPA submission for court reporting services. The FLRA Office of General Counsel management and staff stated a strong preference for reinstating a formal contract for court reporting and transcription services because performance can be monitored better, service is more responsive, and costs are better controlled.

The FLRA Contracting Officer and Purchase Agent stated that FLRA's reliance on BPAs yields too much independence to vendors who are not obligated to accept individual assignments. Unlike an enforceable contract, which provides specific duties for timeliness, BPAs "start from scratch" each time a vendor is called upon to accept or reject an assignment. Initially, approximately 7 days were involved in the processing of BPAs because the purchase orders had to be approved by the Regional Office Directors before the purchase order could be processed. As previously stated, an appropriate change was made to the BPA process so that the form had to be submitted to the FLRA Office of the General Counsel as well as the Administrative Services Division.

Currently, the FLRA Office of General Counsel and the FLRA Administrative Law Judges are the FLRA components that are regularly using court reporters. The FLRA Authority, FSIP, and Office of the Solicitor only use them occasionally. Generally, if the FLRA Authority is involved in a circuit court issue, reporting services are provided by the court and the FLRA Solicitor normally does not have the responsibility to arrange for the court reporter. If the Solicitor gets involved in depositions and needs to obtain a court reporter, he does so through the Administrative Services Division.

VII. In-House Alternative

Because court reporting and transcription is not considered an “inherently governmental function”, there is no requirement that a Federal agency deploy its own employees in this capacity. Also, the President’s Management Agenda states a preference for outsourcing such commercial activities.

In August 2004, FLRA Inspector General contacted the National Court Reporting Association (NCRA) to evaluate the costs and feasibility of training incumbent employees to assume in-house control of overall court reporting and transcription functions. Over 70 various NCRA programs are approved for public and private training for court reporters. The prices range from \$8,000 to \$20,000 per trainee. The entire training process requires approximately 33 months.

Based upon preliminary budget estimates it was obvious that training eight regional employees and two headquarters employees was not a feasible alternative to outsourcing court reporting, and is not a cost productive option. Notwithstanding the prohibitive direct labor costs, it was equally impractical to divert these employees from their substantially time consuming regular duties.

Discussions with FLRA paralegal but the majority stated that legal technicians revealed that most would be interested in training to assume such duties, they would only do so if their grade levels were increased. All FLRA Regional Office Directors stated that performing such duties in-house would cause the appearance of a conflict of interest, shift too much additional work to other administrative employees, and unacceptably increase travel costs to hearings outside the FLRA Regional Office locations. Most of the FLRA Regional Office managers were not interested in pursuing the new duties of court reporting.

A questionnaire sent to the Regional Office Managers by the FLRA IG revealed that the majority of Office Managers did not like the current BPA method because it required much more paperwork. The current BPA Regional Office method for obtaining court reporting services requires the FLRA Regional Office Manager to complete an authorization form which requires the Regional Director’s approval, submit the form to the FLRA Office of General Counsel and to the Administrative Services Division if the request amounts to \$2,500.00 or more and submit additional paperwork to the vendor.

VIII. CURRENT ACTION

On September 27, 2004, the FLRA Inspector General was informed that FLRA management had made an interagency agreement with the Department of Treasury FedSource to contract court- reporting services for the FLRA. Management planned for this to be effective on October 1, 2004 after the Blanket Purchase Agreements ended on September 30, 2004. However, the contract award through the Department of Treasury FedSource has not yet taken place by the FLRA because of the high price submitted by the Contractor, Esquire Deposition Service. FLRA had informed FedSource that they wanted a contract not more than \$100,000.00. FLRA management has extended the use

of the BPA until December 31, 2004 because an acceptable contract had not been provided. This contract is currently under cost negotiation between the Department of Treasury FedSource and the Esquire Deposition Service contractor. Management has stated that if the contract price cannot be negotiated to the \$100,000.00 level, they would continue using the BPA and reconsider contracting these services through GSA. The Inspector General affirmed on December 23, 2004, management canceled the FEDSOURCE contract because the price wasn't competitive. BPAs will be utilized for FY 2005.

XI. CONCLUSION

- **Mission Requirement**

Court reporting and transcription services are essential mission-oriented services, which primarily impact the duties of FLRA Administrative Law Judges and the Office of the General Counsel. Court reporting services are on occasion, required by the Federal Services Impasse Panel, the Authority, and the Office of the Solicitor. Because this requirement is essential and cannot be conducted by FLRA employees, it is important for the FLRA to contract out for these services.

- **In-House**

Although most FLRA paralegal or legal assistants considered court reporting training would be useful, time, workload, and travel requirements, and the appearance of non-independence of the court reporter are negative results, which do not support consideration of this alternative. Workload and training time/costs supports the contracting of these services for the FLRA. While court reporting and transcription services are essential agency services, such commercial activities are not inherent governmental functions, and should be properly outsourced.

- **Outsourcing: Blanket Purchase Agreement**

The use of BPAs instead of contracts for court reporting and transcription services was a viable alternative at the end of March 2004 and is currently necessary because the contract obtained through the Department of the Treasury has not been approved because of its extensive pricing. The ad hoc process of BPAs provided an essential service while FLRA management explored how to implement a more permanent solution. FLRA management's decision to contract out for court reporting services through the Department of Treasury FedSource has resulted in taking more time costing more money than feasible.

While the BPA system has worked satisfactorily for the FLRA, the process is not in the best interest for the FLRA and Federal government for services (better for material purchases) because it does not promote competition; it creates redundant paperwork, and can cause risks such as untimely delivery of essential services and an increase in costs.

An increase in costs for court reporting services through BPA's actually occurred by the Neal Gross, Inc. contractor.

- **Outsourcing: FedSource**

Federal Acquisition Regulation 16.500-Indefinite-Delivery Contracts; Federal Acquisition Regulation 16.201- Fixed-Price Contracts; and Federal Acquisition Regulation 19.501, Set-Asides for Small Businesses prescribe authority and procedures for outsourcing FLRA's requirement for court reporting and transcription services. Prior to the release of this report, FLRA management reconsidered the procedure for outsourcing court reporting and transcription services. In order to eliminate the use of BPAs for court reporting procurement and contract for these services, the FLRA executed an inter-agency agreement with the FedSource, an entity of the Department of Treasury. The Department of Treasury FedSource performed contract administration functions for the FLRA.

The Department of Treasury's FedSource does have a proven record of reliable inter-agency contracting.. Such action is not inconsistent with the initial recommendation contemplated by the Inspector General to eliminate the use of BPAs and contract out this function. While it was not an inappropriate decision for management to enter into an agreement with another Federal Agency for contracting services, processing the contract with GSA within house through GSA would have probably involved much less time and more reasonable proposal submissions. The task order initially submitted to the Department of Treasury FedSource was the statement of work previously written by the FLRA Contracting Officer, which had not been routed, to the Office of General Counsel for input when created in March 2004. Nor was this statement of work provided to the Office of General Counsel before it was submitted to the Department of Treasury FedSource on September 9, 2004.

Since the Office of General Counsel was not included in the creation of the statement of work process, management denied itself useful input from the primary user of court reporting services. Such initial input could have improved the task order submission before it was released to the Department of Treasury FedSource contractor, the Esquire Deposition Service. Esquire Deposition Service would not submit its task order proposal until several related questions were addressed. The Esquire Deposition Service, provided the Department of Treasury FedSource, with these questions and the need of more explicit information from the FLRA regarding court reporting services before they could issue the task order proposal and the cost for providing court reporting services. The Department of Treasury FedSource contacted the FLRA Director of Administrative Services Division to provide this additional information. The FLRA Director, Administrative Services Division directed the FLRA Contracting Officer to provide answers to the FedSource's contractor's questions. The FLRA Contracting Officer stated he could not provide this information without contact with the FLRA's Office of General Counsel and the FLRA Regional Offices which he then did .

On September 28, 2004, the FLRA Contracting Officer e-mailed the FLRA Office of the

General Counsel requesting the needed information. This information was provided to the FLRA Contracting Officer and then to the FLRA Director, Administrative Services Division and forwarded to the Department of Treasury FedSource. The Department of Treasury FedSource contractor, Esquire Deposition Service issued their proposal, which was not accepted by the FLRA because its costs were excessive.

IX. FINDINGS AND RECOMMENDATIONS

Finding 1: FLRA management has not properly executed court reporting contracting services to minimize time, costs and problems.

Recommendation 1: FLRA should improve its contracting services for both internal and external contracting and should involve input from managers who will be affected by the outsourced actions prior to submitting proposals.

Finding 2: While the use of BPAs for contracting services over the last nine months has not, caused any major problems, it is normally used for material purchases, not long term Federal services because it does not protect an Agency from changes (increase in costs, failure to provide services properly, etc.)

Recommendation 2: FLRA management should contract court reporting services.