

Nassau County Office of the Inspector General



Overview of DPW's On-Call Contracts

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Introduction

The Nassau County Office of the Inspector General (OIG) received a letter from the Minority Leader of the Nassau County Legislature, which requested that OIG explore several topics relative to Department of Public Works (DPW) contracts. OIG commenced certain reviews and this report communicates the results of one of these reviews.¹

Objectives and Scope of this Review

The objectives of this review were to ascertain:

- The distribution of task order dollars among consultant firms under on-call contracts.
- How DPW establishes on-call contract dollar caps.
- How DPW determines the contingency amounts added to task orders.
- How DPW calculates amended cap amounts for on-call contracts.

The scope of this review included all four professional service categories for which DPW had an on-call professional services contract at the end of the fourth quarter of 2020. OIG selected a judgmental sample of two categories—Civil Site Design and Construction Management and Inspection²—and reviewed the 14 associated contracts in these categories issued to consultant firms selected during the RFP process. OIG also examined each of the 35 task orders issued under these contracts in 2019 and 2020.

Methodology

OIG obtained from DPW and reviewed documents pertaining to on-call task orders, including recommendations for award, correspondence, and calculations. OIG also reviewed relevant portions of the Countywide Procurement & Compliance Policy. OIG spoke with the Commissioner of Public Works, the department's counsel, and the County's Chief Procurement-and-Compliance Officer. OIG thereafter spoke with additional DPW officials including a deputy commissioner, a project manager, and the manager in charge of budgeting.

OIG received and is greatly appreciative of the cooperation of DPW's commissioner and staff at all times throughout the course of this review.

¹ Other topics raised in the Minority Leader's request will be addressed by OIG separately in other reports.

² Construction Management and Inspection here refers to civil construction management and inspection (e.g., roads and bridges), as opposed to building-related construction management and inspection.

On July 30, 2021, OIG provided the DPW Commissioner with a draft copy of this report. On August 27, 2021, the Commissioner provided OIG with comments suggesting certain clarifications or rewording. OIG concurred with virtually all comments, and this final report incorporates corresponding language revisions.

On August 28, 2021, the Commissioner advised OIG that DPW accepted OIG's recommendations.

Background

On-Call Contracts, Task Orders

In Nassau County's Department of Public Works (DPW), the term on-call contracts refers to agreements in which consultant firms (vendors) are retained to provide professional services, including architectural, engineering, construction management, inspections, or other technical services, on an as-needed basis.³ These contracts are awarded on a competitive, "best-value" basis, following the issuance of a Request for Proposal (RFP). The RFP selection process is based on an evaluation of vendor technical and cost proposals prior to recommendation of award.

Unlike many other contracts, the award of an on-call contract by DPW to a vendor firm is not initially for any project-specific scope of work, nor does it guarantee the firm any work. Rather, it essentially shortlists the firm for possible award of work assignments in a given professional services category. These work assignments are called Task Orders (TOs). An on-call contract thus provides the framework enabling DPW to assign TOs to consultant firms.

To respond to a needed service, DPW develops a scope of work that is incorporated into a TO, which it emails to each firm holding an on-call contract in the relevant professional services category. Only firms having an existing on-call contract are eligible to propose on the TOs. Several firms generally submit a proposal in response to each TO. From each set of proposals, DPW then selects one or more firms whose proposal(s) is/are deemed to offer the best value and ultimately awards to such firm(s) the work in the TO.

During the period falling within the scope of this review, DPW managed 23 active on-call contracts, awarded to 12 firms, as the result of four RFP processes. Some firms held contracts in two or more professional service categories.

³ DPW also awards and manages a series of contracts for as-needed construction, maintenance, and repair work, which DPW refers to as "requirements contracts." The Countywide Procurement & Compliance Policy uses the term "requirements contract" more broadly, classifying on-call contracts as a *subset* of requirements contracts. Requirements contracts as defined by DPW are outside the scope of this review.

The provisions of these contracts specify their durations, as well as their dollar caps.⁴ Under these contracts, the consultant may be assigned work and be paid accordingly but is not guaranteed award of any work or monetary amount. The total work assigned may not result in payment exceeding the consultant firm's cap.⁵ The contracts' durations typically consist of base terms, such as three years, plus optional renewal periods that can be exercised by the DPW commissioner.

Procurement Process

DPW procures architectural, engineering, management, and technical services through a competitive RFP process which leads to contract awards to firms. Approximately every five years, the County issues an RFP for each category of services needed. Such categories include civil site design, construction management and inspection, and traffic engineering. The RFP process requires that interested firms provide the County with both technical⁶ and cost proposals for a specified category of services.

A Selection Committee (SC) composed of County employees is convened for each RFP.⁷ The SC reviews the submitted proposals and scores them according to criteria specified in the RFP document. The SC ranks the firms based on their technical scores and then opens the cost proposals of the firms ranked above a cutoff score determined by the SC. The RFP method of procurement differs from other formal sealed bidding methods in that cost is not the sole basis for selection. The objective of the RFP process is to obtain the "best value" for the County. The SC is responsible for determining best value by evaluating technical scores as well as the associated cost proposals.

Each RFP for on-call services typically results in the award of multiple contracts, each to a different firm but for the same category of service. As a result, DPW has a group of firms under contract to draw upon for any given TO. For example, DPW may issue an RFP for on-call construction management (CM) services and receive proposals from a number of (e.g., 15) firms. Based upon the firms' technical and cost proposals, DPW may select a smaller sub-group (e.g., eight firms), for contract award. As each of those firms enters into a separate contract with the County, multiple (e.g., eight) contracts result from the one RFP.

⁴ During the course of this review, OIG encountered numerous terms, including "maximum payable amount," "contract ceiling," and "not to exceed amount" which are also used to represent this concept. OIG decided to use the term contract cap (cap) for this report, as it is the term used in DPW's internal records and staff summaries submitted to the legislature.

⁵ The DPW Commissioner suggested rewording this sentence to read: "The total work assigned may not result in payment reaching the consultant firm's cap."

⁶ Technical proposals include the proposing firm's project understanding, experience, qualifications, ability to perform the work in a timely manner, and experience specific to the project.

⁷ Consultants who are not County employees may serve as non-voting advisors to selection committees.

Each contract awarded through a particular RFP process will have the same dollar cap amount and duration.

When asked why DPW awards on-call contracts to multiple firms rather than a single, most qualified firm, the DPW commissioner explained that the multiple awards are driven by capacity issues; a single firm could not perform the full quantity of work anticipated for award during the contract term.

Reasons for Use of On-Call Contracts

The Chief Procurement-and-Compliance Officer advised OIG that having an on-call contract for services, such as design and engineering work, allows for quick access to vendors to perform assessments of on-going projects that run into unforeseen issues, as well as avoiding or shortening delays often associated with an RFP process. The DPW commissioner explained to OIG that using on-call contracts was advantageous in that they tackle simpler projects; projects requiring fast turnaround (via the use of TOs). According to the commissioner, the decision of whether to use an on-call TO versus a project-specific RFP is mainly driven by the size and scope of the work and/or the need for expediency.

Issuance of Task Orders

DPW assigns work to its on-call consultant firms by means of TOs, awarded via a mini-proposal process. DPW notifies the firms that have been awarded an on-call contract of the available TOs scope, and generally invites all of them to submit technical and cost proposals.

A group of DPW personnel, similar to a SC, but referred to as a Technical Review Committee (TRC) reviews the technical and cost proposals received and selects the proposing firm, or firms, which will be assigned the TO. As in the original RFP evaluation process, considerations other than cost may come into play.

DPW awards TOs to one or more proposing firms based on their technical and cost proposals. As in the RFP process, DPW documents its decision to award a TO to a firm by means of a Recommendation of Award (ROA) memorandum. This memorandum requires approval by the Deputy County Executive for Parks and Public Works.

Budgetary Treatment

As noted, on-call contracts are mechanisms for awarding work via TOs. The resulting TOs are generally funded out of individual DPW project budgets. When a TO is issued, DPW

encumbers funds in the appropriate project budget.⁸ At the same time, the amount encumbered is counted against the awarded firm's contract cap, for contract management purposes.

DPW officials explained to OIG that prior to issuing an RFP for on-call services, they estimate the total funding needed based on past expenditures and their projections for future projects in the relevant service category. This estimate is reflected in the contract cap.

County procurement policy provides that TO encumbrances shall not exceed the dollar cap stated in the contract. If a TO requires an increase in the contract cap, DPW processes an amendment, which is submitted to the Legislature.

All DPW on-call contracts in a given service category are awarded with the same cap amount. However, as TO work is often distributed unevenly among firms, some firms will reach their cap prior to contract term expiration. Reaching the cap would preclude the use of these firms for further TO work; accordingly, DPW may seek cap increases for those firms nearing or reaching their caps.

An increase of an on-call contract cap does not in itself permit spending beyond the existing project budget appropriation. Although encumbrances count against the contract caps, the funds are budgeted under specific DPW projects. Thus, TO encumbrances draw upon funds already appropriated to various projects.

An on-call contract cap increase also does not necessarily mean any additional payments will be made to that firm. For example, the firm could unsuccessfully propose on each subsequent TO issued for the remaining duration of their on-call contract, and not be awarded work, or DPW could choose to not issue any additional TOs for the duration of the on-call contract.

Overview of On-Call Contract Utilization

Universe of On-Call Contracts

As of the end of 2020, DPW had 23 active on-call contracts issued as the result of four RFPs, for the following professional service categories:

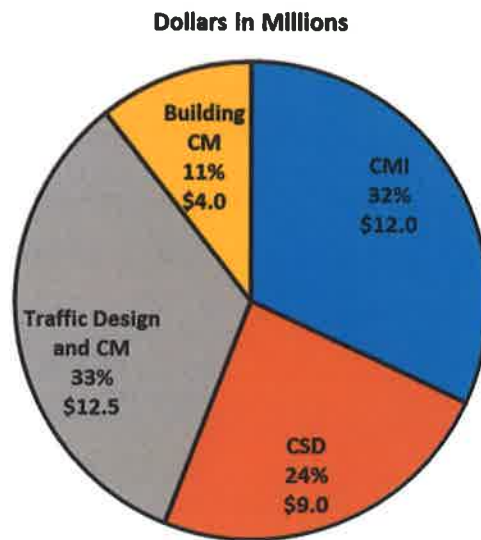
- Civil construction management and inspection (CMI).
- Civil site design (CSD).

⁸ As noted in the Countywide Procurement & Compliance Policy, because TOs have not yet been issued at the time of the base contract award, the on-call contract is awarded with only a token encumbrance, typically one cent.

- Traffic design and associated construction management.
- Building construction management.

As shown in Figure 1 below, the base not-to-exceed caps for these contracts as awarded totaled \$37.5 million.

Figure 1: DPW On-Call Contracts by Service Category



Sample of 14 CSD and CMI Contracts

OIG selected 14 on-call contracts for review—six CSD contracts with original aggregate caps totaling \$9 million, and eight CMI contracts with original aggregate caps totaling \$12 million, as shown in the table below.

Service	Firm	Execution	Original Cap	Amended Cap
CSD	Firm A	2/14/2019	\$1,500,000	N/A
CSD	Firm B	4/16/2019	\$1,500,000	N/A
CSD	Firm C	2/14/2019	\$1,500,000	\$5,500,000
CSD	Firm D	2/14/2019	\$1,500,000	\$5,500,000
CSD	Firm E	2/21/2020	\$1,500,000	N/A
CSD	Firm F	2/14/2019	\$1,500,000	\$5,500,000
CMI	Firm A	7/17/2019	\$1,500,000	N/A
CMI	Firm B	5/27/2019	\$1,500,000	\$3,500,000
CMI	Firm C	5/10/2019	\$1,500,000	\$3,500,000
CMI	Firm D	5/10/2019	\$1,500,000	N/A
CMI	Firm F	5/10/2019	\$1,500,000	\$3,500,000
CMI	Firm G	9/16/2019	\$1,500,000	N/A
CMI	Firm H	9/16/2019	\$1,500,000	\$3,500,000
CMI	Firm I	5/10/2019	\$1,500,000	N/A

Observations Regarding Task Order Allocation

Task Orders for Sampled Contracts Were Unevenly Distributed Among Firms

As shown in Figures 2 and 3 below, not all firms were awarded the same dollar value of work, although the distribution by dollars has been somewhat more even under the CMI contracts than under the CSD contracts.

Figure 2: Civil Site Design Task Order Dollar Allocation by Firm

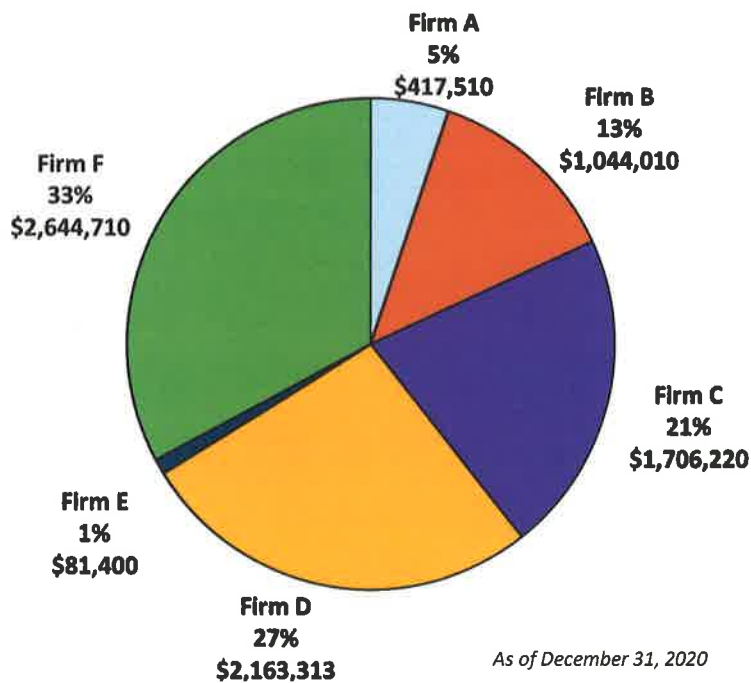
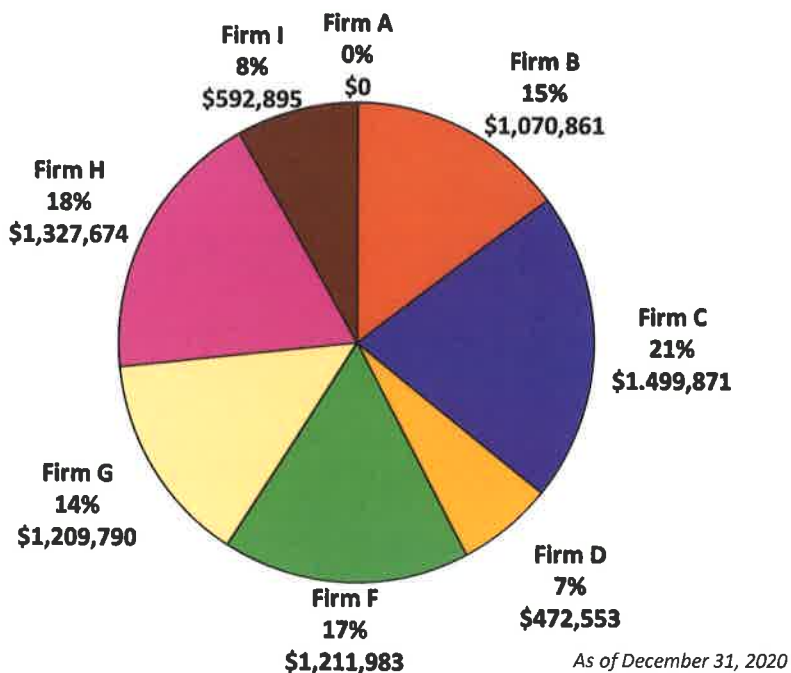


Figure 3: Construction Management/Inspection Task Order Dollar Allocation by Firm



When asked about the uneven distribution of TOs and concomitant cap increases, a project manager noted that different firms offer better value on certain types of jobs. The manager added that while any firm awarded an on-call contract can theoretically perform the scope of work for any TO, DPW also needs to determine the value each firm can offer for each scope of work. For example, assigning a TO requiring certain technical expertise to a firm that possesses little of that expertise would probably lead to that firm subcontracting all the work related to that expertise, which would not provide a good value to the County.

Eligible Firms Did Not Submit a Proposal on the Majority of Sampled Task Orders

DPW officials indicated that solicitation through a TO is generally quicker than an RFP process. However, the pool of firms for a TO is limited to just those firms already awarded an on-call contract in that category. Given the limited pool of firms, DPW officials stated that it is important that each firm awarded an on-call contract submit a proposal for all or most TOs in their given category. As such, DPW expects firms with an on-call contract to regularly submit proposals for TOs.

OIG nonetheless found that in 20 of the 27 CSD TOs reviewed, not all eligible firms submitted proposals. Moreover, in two of these instances, DPW received a proposal from

only one of the five eligible firms.⁹ In the CMI service category, none of the eight CMI TOs received proposals from the full universe of eligible firms. OIG saw evidence, however, that DPW made good-faith efforts to obtain more robust participation from the consultant firms.¹⁰

Some Task Orders Awarded Without Mini Solicitation Process

Among the 35 TOs OIG reviewed, DPW awarded 33 via the standard mini-solicitation process. In the other two cases, DPW instead awarded the TO directly to an eligible firm. In both instances, OIG found documentation which explained that DPW did this because the firm was already at the job site under an existing contract.

When asked why DPW has awarded TOs without conducting a competitive mini-solicitation, the DPW commissioner stated that while generally this is not done, there are some situations where DPW awards a TO without competition. He related that there have been a “handful of occasions” where DPW has selected a firm for the next phase of work because it already had an intimate knowledge of the project. He stated that DPW realized cost benefits by avoiding the duplication of certain design work on a project.

The Chief-Procurement-and-Compliance Officer indicated that it is acceptable to award directly in this situation so long as the rationale for the decision and how it benefits the County is documented in writing. In both instances observed by OIG, it was noted that memoranda on file documented the rationale and benefits to the County of the decisions.

Observations Regarding Contract Caps and Contingency Amounts

Some On-Call Contracts Required Amendments to Increase Their Cap

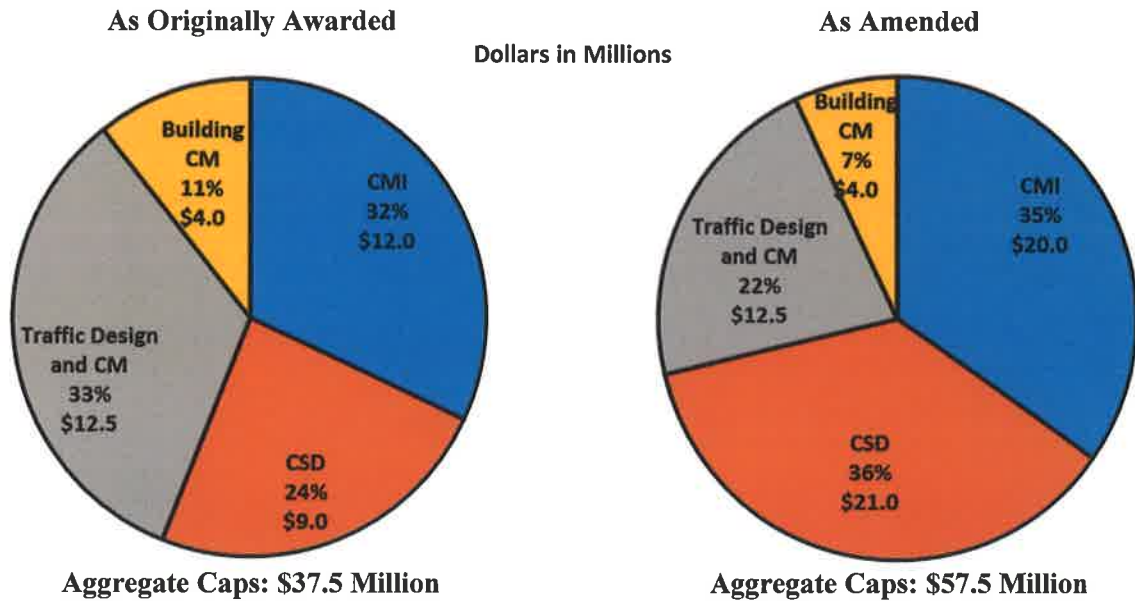
Contract amendments requested by DPW and approved by the Legislature increased the dollar caps of some firms’ on-call contracts, in the sampled categories, CSD and CMI. In four instances, three in the CSD category and one in the CMI category, DPW requested cap increases while the contracts were still in progress (i.e., had not yet run the course of their base terms). Consequently, as of year-end 2020, the total maximum amounts payable

⁹ A sixth firm had not yet been added to the group of eligible vendors.

¹⁰ In the sample of TO documentation provided by DPW, OIG observed some email correspondence concerning firms who declined to submit proposals, including DPW inquiries as to why no proposal was submitted, and statements by firms that they did not possess the staffing capacity to perform the work. OIG also saw instances where DPW conveyed its expectation that a firm holding an on-call contract should submit proposals on task orders and warned that failure to submit proposals on task orders could negatively impact DPW’s evaluation of a firm, which may in turn impact whether a firm is awarded on-call contracts in the future.

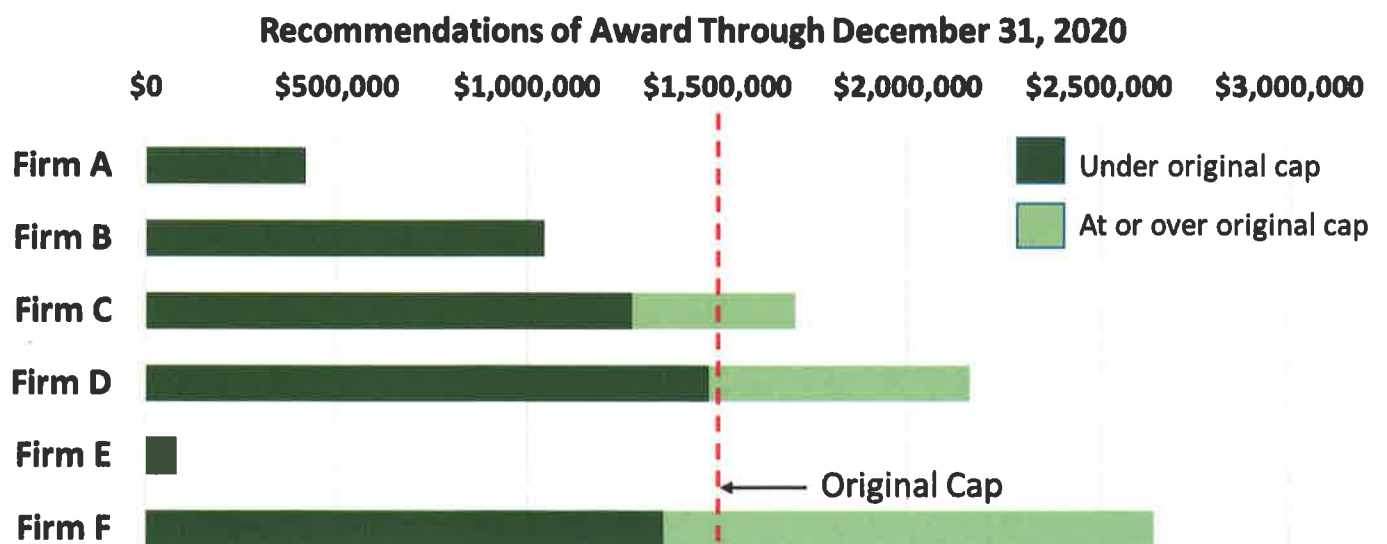
for these sets of contracts increased by \$20 million, from \$37.5 million to \$57.5 million (Figure 4).

Figure 4: DPW Contracts by Service Category (As Awarded and As Amended)



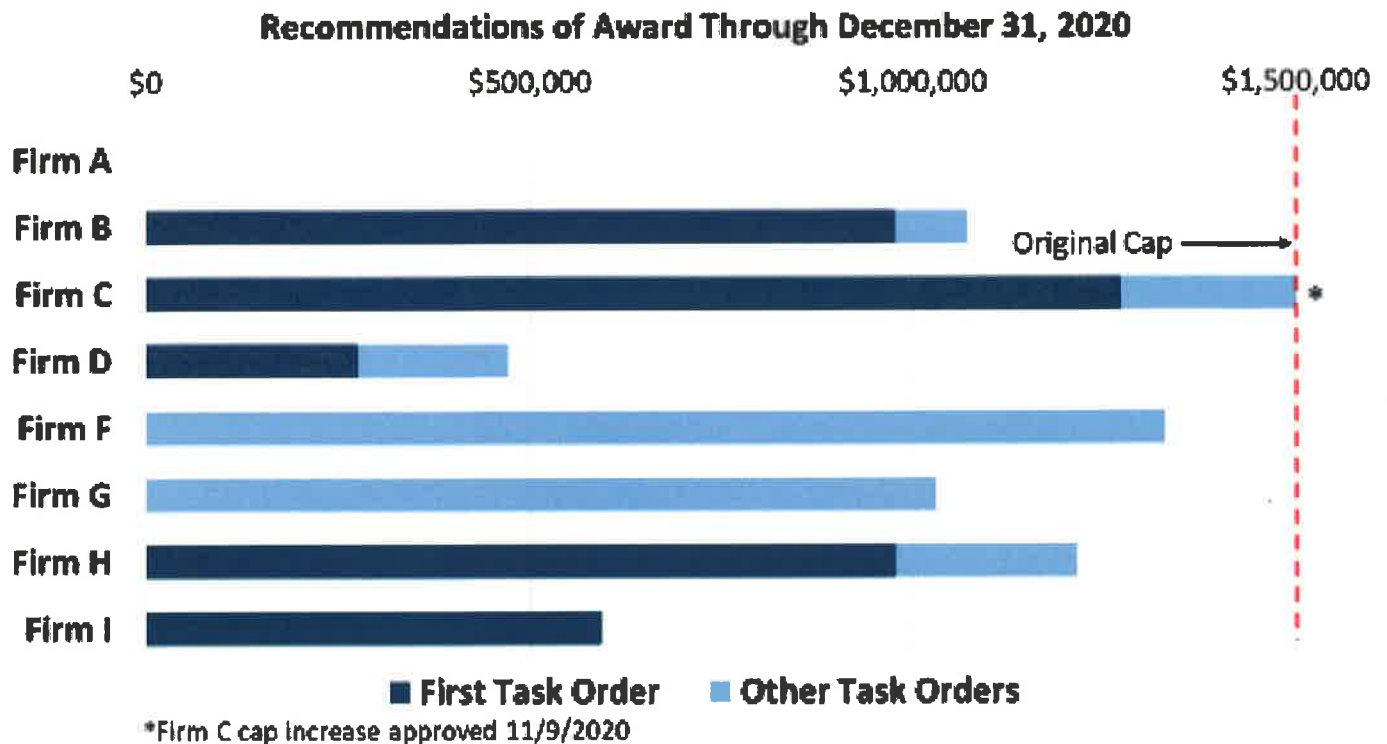
For CSD contracts, task order awards to three consultant firms required raising those firms' caps (Figure 5).

Figure 5: Civil Site Design Task Orders



For CMI contracts, OIG observed that DPW increased the dollar cap for one firm. OIG also observed that DPW may also need to increase the caps for three other firms, based on the amounts already awarded and time remaining on the contracts. (Figure 6).

Figure 6: Construction Management & Inspection Task Orders



Impact of Firms Reaching or Nearing Their Caps

OIG observed that the impact of on-call consultant firms reaching or nearing their caps varied by contract. In the case of one CMI TO, competition was reduced as DPW would not accept proposals from three firms which were nearing or had already reached their caps.

In the case of seven CSD TOs, DPW did not exclude consideration of these firms' proposals, but awarded the TOs with only partial encumbrances. That is, some firms were awarded work for certain dollar amounts, but DPW could not encumber the full amounts because doing so would have exceeded the firms' caps.

OIG observed that, in each such case, the ROA memoranda documented the partial encumbrances and indicated that the remaining funds would be encumbered after the Legislature approved a contract amendment to increase the cap for the firm's on-call contract. DPW's commissioner advised OIG that, except in emergencies, when DPW

awards a task order with a partial encumbrance, DPW will initially assign the firm only as much work as the partial encumbrance will cover.

OIG did not find any budgetary or fiscal impact resulting solely from increasing the cap of a firm's on-call consulting contract. As noted above, and as pointed out by DPW's budget manager, TOs are funded out of individual project budgets. An increase of a firm's cap only allows for potential future encumbrances against project budgets; it is not in itself a budget increase.

DPW Calculations of Contract Cap Amendments

During the course of this review, OIG analyzed a DPW cap amendment calculation. While DPW's commissioner told OIG that amended cap calculations cover the contract duration, but not the optional renewal(s), OIG noticed that the calculation in this instance included the optional renewal period.

Additionally, OIG observed that elapsed time was mistakenly included in this calculation. This caused the amended cap amount presented to the Legislature for approval to be higher than it should have been. When asked, a project manager told OIG that the inclusion of elapsed time in the calculation was a mistake.

OIG cannot generalize beyond this one example. Moreover, it is not clear that such miscalculation would have a budgetary impact. OIG nonetheless believes that all amended cap amounts presented to the Legislature should be free of error.

DPW's commissioner advised OIG that, in connection with a 2021 RFP for program management services, he asked his staff to formally memorialize the reasoning underlying the contract cap dollar amount. In the course of the discussion with OIG, the commissioner agreed that this would also be a desirable practice with respect to cap amendments. OIG believes that formal documentation of cap amendment calculations could serve to reduce the likelihood of errors in the calculations.

Drivers of Cap Increases

As noted, prior to issuing an RFP for on-call services, DPW determines the contract dollar cap by estimating the funding needed based on past expenditures and projections for future projects in the relevant service category.

OIG noted a number of factors which may drive the cap increases of some on-call contracts:

Issuance of a Large Task Order

As shown in Figure 6 above, the very first TO issued under the CMI contracts consumed 85% of Firm C's cap, and 65% of Firm B and Firm F's caps, respectively. This TO was for CMI services to support road resurfacing countywide. According to a deputy commissioner, as this was only the first TO issued, it was evident to him that DPW would need to seek an amendment to increase the cap for this contract to avoid reaching the contract cap, and to keep considering proposals submitted by these firms on other CMI TOs.

Best Value Determinations

TRCs evaluate TO proposals from a "best value" perspective. "Best value" does not always mean lowest price. Eleven of the 27 CSD TOs OIG reviewed entailed awards to a firm that did not submit the lowest price proposal.

DPW officials explained to OIG that, although any firm holding an on-call contract could theoretically perform the scope of work of each TO in the relevant service category, some firms have special expertise in particular areas within that service category that results in better technical proposals for that kind of work. Thus, if a particular type of work (e.g., bridges) figured more prominently in the scope of TOs issued, then firms specializing in that work were more likely to be awarded those TOs. This may help explain the uneven distribution of TO award dollars, as illustrated in Figures 2, 3, 5, and 6, above.

Adjusted Infrastructure Goals

According to a deputy commissioner, two major factors which contributed to DPW's need to amend on-call contract caps within OIG's sample were bridge rehabilitation and augmented road resurfacing. The deputy commissioner explained that although the original capital plan specified a goal of resurfacing 125 lane miles annually, the Administration expressed concern over the condition of many County roads and asked DPW to undertake a more aggressive resurfacing plan. DPW's commissioner accordingly set a revised goal of 200 lane miles to be resurfaced in 2019. Reaching this goal required additional construction management and civil design work.

As noted earlier, the first TO of the CMI contracts consumed a significant portion of several firms' caps. This TO entailed construction management and inspection services to support priority road resurfacing throughout the County. Additionally, the deputy commissioner told OIG that a survey of the condition of the County's 45 bridges revealed that about half of them required immediate attention. This further increased DPW's need for CMI services.

Eligible Firms Did Not Submit a Proposal on the Majority of Sampled Task Orders

As noted earlier, all eligible firms did not submit a proposal on the majority of sampled TOs. Since each on-call contract in a given service category is awarded with an identical cap amount, if some firms participate more often than others, the more active firms would likely need their caps increased in order for DPW to continue considering their proposals.

Contingency Funds May Constitute a Portion of Encumbered Dollars

In some instances, DPW augments the TO award amount with additional funds, called contingency, to cover unforeseen costs. OIG observed in its sample that a contingency amount was added to most CSD TO awards. According to DPW officials, the contingency amount reflects perceived risks, such as unknown site conditions, which could require additional design work. The contingency amount selected is, as a project manager put it, a best guess, based upon the project manager's professional judgment. For the sampled CSD TOs that had contingency amounts added to them, contingency averaged 13% of the TO award amount.

The contingency amount added to TO awards is significant in that it counts toward contract caps and represents potential expenditure.¹¹ DPW officials told OIG that they do not typically document the basis for these amounts. As such, OIG was unable to determine from examination of records the rationale for how DPW calculated these contingency amounts.

The cognizant DPW officials were, however, able to provide OIG with reasonable explanations as to how selected contingency amounts were determined.¹² Nonetheless, the absence of such explanations in the record of decision (the ROA memorandum) does not provide transparency as to why contingency funds were encumbered. Additionally, if any of these officials were to leave the County, their knowledge of the procurement history would be lost to the County. Given the subjective nature of contingency determinations and their potential financial impact, OIG believes that DPW should document its reasoning underlying TO contingency amounts.

¹¹ DPW officials explained to OIG that unexpended contingency funds are disencumbered during contract closeout.

¹² A common explanation was that the contingency funds allow DPW to award additional work to address unforeseen project conditions without delaying the project to secure funding. DPW officials advised that before contingency funds are spent, the firm must submit a detailed scope for the additional work and cannot begin the work until DPW approves the scope of work and cost.

Recommendations

1. DPW should formally document its cap amendment calculations to help prevent errors.
2. DPW should document its reasoning for on-call task order contingency amounts to preserve institutional knowledge and foster transparency.

Department Response to Recommendations

The Commissioner provided OIG with an email stating that:

“The Department accepts both of the recommendations and is in the process of putting them in place.”
