

IG-1

INFORMATION: Report on the "Inspection of Power Purchase Contracts at the Western Area Power Administration"

TO: The Secretary

BACKGROUND:

The subject final report is provided for your information. The Office of Inspector General received an allegation regarding possible irregularities in certain power purchase contracts awarded by the Western Area Power Administration. Based on our survey of Western's power purchase procedures, we expanded our allegation based inquiry to include several management issues. Thus, the purpose of this inspection was to review the specific allegation as well as to evaluate Western's power purchase contracting procedures relating to competition, the documentation of the solicitation, negotiation, and award processes, and the determination of the reasonableness of the rates negotiated by the Western Area Power Administration.

DISCUSSION:

The Western Area Power Administration has awarded individual power purchase contracts that range in value from a few thousand dollars to more than \$1 billion, and Western's power purchase costs averaged more than \$250 million per year during Fiscal Years 1991 and 1992. We found that Western awards long and short term power purchase contracts without the use of full and open competition, even though more than one source of supply exists and individual contracts can be worth hundreds of millions of dollars. In place of formal competitive procedures, Western uses informal screening methods to identify potential suppliers of power.

We found that the Western Area Power Administration has not developed any written internal policies and procedures for the solicitation, negotiation, award, or documentation of power purchase contracts. We found that Western does not maintain formal written documentation in the official contract files of its market searches, contacts with potential suppliers, the decisions leading to contract negotiations with a single source, or the justification for contracting without the use of full and open competition. In addition, we found no documentation to describe the price negotiation process, the pricing information considered during negotiations, or any certification or determination of the reasonableness of negotiated rates.

We could not find any Federal contracting requirements, including requirements for competition, which were recognized by the Western Area Power Administration or the Department's Office of Procurement and Assistance Management as being applicable to the Western Area Power Administration's power purchase program. Western believes that they are exempt from Federal competition and contracting requirements for power purchase contracts. The

Office of Procurement and Assistance Management believes that Western's power purchase program is not part of the procurement system and, thus, is not covered by the Federal contracting requirements. We believe the issue of the applicability of the Federal Acquisition Regulation to purchase power contracts needs further review. After reviewing a draft of this report the Office of the Assistant General Counsel for Procurement and Financial Assistance stated in a memorandum that this issue needs further review.

In commenting on this report, the Office of Procurement and Assistance Management and the Administrator, Western Area Power Administration, concurred with eight of our nine recommendations. Action on one recommendation was deferred pending the results of the analysis to determine whether or not power purchases are part of the procurement system and covered by the Federal Acquisition Regulation and the Competition in Contracting Act.

John C. Layton
Inspector General

Attachment

cc: Deputy Secretary
Under Secretary
General Counsel
Deputy Assistant Secretary for Procurement and
Assistance Management
Administrator, Western Area Power Administration
U.S. DEPARTMENT OF ENERGY

OFFICE OF INSPECTOR GENERAL

REPORT ON THE
INSPECTION OF POWER PURCHASE CONTRACTS
AT THE WESTERN AREA POWER ADMINISTRATION

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Report No. DOE/IG-0372
Date Issued: May 9, 1995

Office of Inspections
Washington, D.C. 20585

REPORT ON THE
INSPECTION OF POWER PURCHASE CONTRACTS
AT THE WESTERN AREA POWER ADMINISTRATION

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OFFICE OF INSPECTOR GENERAL
OFFICE OF INSPECTIONS
WASHINGTON, D.C. 20585

REPORT ON THE
INSPECTION OF POWER PURCHASE CONTRACTS
AT THE WESTERN AREA POWER ADMINISTRATION

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I. INTRODUCTION AND PURPOSE

The Office of Inspector General received an allegation regarding possible irregularities in certain power purchase contracts awarded by the Western Area Power Administration (WAPA). Based on our survey of WAPA's power purchase procedures, we expanded our allegation based inquiry to include several management issues. Thus, the purpose of this inspection was to review the specific allegation as well as to evaluate WAPA's power purchase contracting procedures relating to competition, the documentation of the solicitation, negotiation, and award processes, and the determination of the reasonableness of the rates negotiated by WAPA.

II. SCOPE AND METHODOLOGY

This inspection included a review of (i) selected long term and seasonal power purchase contracts awarded by WAPA; (ii) selected long term and seasonal contract files; (iii) the competition and contracting requirements of the Federal Acquisition Regulation (FAR), (iv) the competition requirements of the Competition in Contracting Act (CICA); (v) the Code of Federal Regulations (CFR), the United States Code (USC), and Presidential Executive Orders regarding Power Marketing Administration (PMA) operations; (vi) WAPA policies and procedures; and (vii) Department of Energy (DOE) Delegation Orders, memoranda, and Secretary of Energy and DOE Notices regarding the management oversight of Power Marketing Administrations.

As part of our review, inspectors obtained information at WAPA Headquarters, Denver, Colorado, and at the Sacramento Area Office (SAO), Sacramento, California, from August 1992 through September 1994. Inspectors interviewed officials from the Sacramento Area Office, WAPA Headquarters, DOE Headquarters, and certain staff elements of the General Services Administration (GSA), the Federal

Energy Regulatory Commission (FERC), and various utility industry companies between August 1992 and January 1994.

This inspection was conducted in accordance with "Quality Standards for Inspections" issued by the President's Council on Integrity and Efficiency.

III. SUMMARY RESULTS OF INSPECTION

The Office of Inspector General (OIG) Hotline received an allegation from an anonymous complainant who said that two multimillion dollar power purchase contracts awarded by WAPA's Sacramento Area Office were awarded without being publicly advertised and without receiving bids from other companies. The contracts referenced in the allegation included a contract awarded to PacifiCorp in September 1992 for the purchase of 75 megawatts (MW) to 150MW of firm power for 20 years, and a contract awarded to Portland General Electric in August of 1987 for the purchase of 65MW of firm power for 25 years. The complainant alleged that the award of the PacifiCorp contract resulted in a dramatic increase in costs to DOE, and ultimately the customer, of two to three times what those costs should have been. The anonymous complainant was concerned about the propriety of the process for entering into these contracts, and alleged that, at the very least, these contracts may have been entered into because of a conflict of interest.

The inspection found that, as alleged, WAPA had not publicly advertised its power purchase requirements or formally solicited bids from other companies in the two instances cited in the allegation. WAPA takes the position that their power purchase program is exempt from Federal competition and contracting requirements. However, even though WAPA did not apply these requirements, WAPA had not developed any other written internal policies and procedures for the solicitation, negotiation, award, or documentation of power purchase contracts.

We were unable to determine whether the rates negotiated under the PacifiCorp contract were the best rates available to WAPA because of the absence of formal competition in the award of this contract and the absence of documentation of the negotiation and award processes. However, the inspection found no evidence that, as alleged, the award of the PacifiCorp contract resulted in costs to DOE and WAPA's customers of two to three times what they should have been. We found that, based on documentation provided by WAPA, the rates included in the PacifiCorp contract were comparable to the rates under other existing contracts. The PacifiCorp rates were higher than some existing contracts but lower than others. An independent consultant, who had reviewed certain aspects of this contract for WAPA, showed that exercising an additional long term purchase option under this contract would exceed the cost of the best short term option for the period 1995 through 1997. However, the independent consultant stated that exercising this option would result in substantial savings on an annual basis after 1998. A WAPA official acknowledged that this contract would cost more in the early years than other sources, and said that the impact of this contract on WAPA customers would be an increase in rates of approximately two percent during the period 1993 through 1998.

The inspection found no evidence to support the allegation of a possible conflict of interest.

The inspection identified several management issues regarding

WAPA's power purchase program: the lack of formal competition; the absence of internal policies and procedures; the absence of Federal regulations regarding power purchases; and, the absence of management oversight of WAPA's power purchase program.

Lack of Formal Competition

Our inspection found that WAPA awards long and short term power purchase contracts without the use of full and open competition, even though more than one source of supply exists and individual contracts can be worth hundreds of millions of dollars. WAPA has awarded individual power purchase contracts that range in value from a few thousand dollars to more than \$1 billion. WAPA's power purchase costs averaged more than \$250 million per year during Fiscal Years 1991 and 1992. In place of formal competitive procedures, WAPA uses informal screening methods to identify potential suppliers of power.

Therefore, the reasonableness of rates for power purchase contracts is not established through full and open competition. Rather, WAPA officials stated that they use comparisons of previous contract rates, budget analysis, cost projections, FERC review, and the public rate process to assure that power purchase contract rates are reasonable. However, we found that the FERC review does not assure that the rates under individual power purchase contracts are the best rates available to WAPA. We also found that the public rate process does not address the reasonableness of rates included in individual power purchase contracts. In addition, we found that WAPA did not prepare documentation such as Price Negotiation Memoranda or certifications of the reasonableness of negotiated rates which would normally incorporate any analyses or comparisons performed by WAPA in establishing the reasonableness of rates.

Our inspection found that the public utility industry in the West is moving toward the use of formal competitive procedures, such as Requests for Proposals, when purchasing power. WAPA, although aware of this trend, had only used formal competitive procedures under its power purchase program on a limited basis. However, in commenting on a draft of this report, the WAPA Administrator stated that WAPA is committed to issuing Requests for Proposals in the future to meet long term resource needs.

Absence of Internal Policies and Procedures

Our inspection found that WAPA has not developed any written internal policies and procedures for the solicitation, negotiation, award, or documentation of power purchase contracts. We found that WAPA does not maintain formal written documentation in the official contract files of its market searches, contacts with potential suppliers, the decisions leading to contract negotiations with a single source, or the justification for contracting without the use of full and open competition. In addition, we found no documentation to describe the price negotiation process, the pricing information considered during negotiations, or any certification or determination of the reasonableness of negotiated rates.

Absence of Federal Regulations Regarding Power Purchases

We could not find any Federal contracting requirements, including requirements for competition, which were recognized by WAPA or the Department's Office of Procurement and Assistance Management as being applicable to WAPA's power purchase program. WAPA does not apply the competition requirements of CICA, which are implemented in the FAR, to its power purchase contracting program. WAPA's General Counsel told us that he believes that WAPA is exempt from these requirements because of specific language in FAR Part 8, REQUIRED SOURCES OF SUPPLIES AND SERVICES. FAR Part 8 directs that GSA will be used as the required source of utility services for Federal agencies. Also, FAR Part 8 excludes Federal power marketing agencies from the requirement to use GSA as the required source of utility services. WAPA's General Counsel interprets this exclusion as a broad exclusion of all the provisions of the FAR in relation to its power purchase program, including the competition requirements of CICA.

An official from the Office of Procurement and Assistance Management told us that he believes that WAPA's power purchase program is not part of the procurement system and, thus, is not covered by the FAR. This official said that the Office of Procurement and Assistance Management has believed that the FAR does not apply to the power purchase programs of the Power Marketing Administrations because the purchase of power involves the buying and selling of a commodity rather than the purchase of power for direct use. He said that he did not believe that the buying and selling of a commodity meets the definition of supplies or services by and for the use of the Federal Government under the FAR. In addition, he said he did not believe that this understanding had been documented nor had the applicability of CICA to the power purchase programs of the PMAs been addressed by DOE.

We believe that the applicability of Federal contracting requirements, including the requirements for competition, to WAPA's power purchase program should be reviewed by the Department. In our view, the exclusion cited by WAPA in FAR Part 8 may only apply to that specific section of the FAR without providing a broader exclusion to include all of the competition and contracting requirements of the FAR. Further, if power purchases are not a part of the procurement system as stated by the Office of Procurement and Assistance Management, it is not clear to us why there is a need for an exclusion in FAR Part 8 concerning power purchases.

An Attorney-Advisor under the Assistant General Counsel for Procurement and Financial Assistance also expressed the opinion that this issue needs further review. As a follow-up to a draft of this report, the Attorney-Advisor reviewed the issue of the applicability of the FAR and CICA to the power purchase program of WAPA. In a memorandum to the Office of Procurement and Assistance Management, the Attorney-Advisor stated that FAR Part 8 does not specifically exclude WAPA's power purchasing program from FAR requirements, and that it would seem inappropriate to interpret

FAR Part 8 as an exemption from CICA or the FAR competition requirements. The Attorney-Advisor also found no support for the view that WAPA's power purchases were not part of the Department's procurement system. The Attorney-Advisor suggested that WAPA prepare a draft legal opinion as a first step in the resolution of this issue.

In addition, we believe that a portion of the power purchased by WAPA for resale may meet the definition of an acquisition "of supplies and services . . . by and for the use of the Federal Government" under the FAR because some of WAPA's customers are Federal agencies. We also believe that the Department should consider the applicability of CICA separate from the applicability of the FAR since the applicability provisions of CICA to procurements by executive agencies are not the same as the applicability provisions of the FAR. Whereas the FAR applies to "the acquiring by contract with appropriated funds of supplies or services . . . by and for the use of the Federal Government," CICA applies to "an executive agency in conducting a procurement for property or services" without reference to the Federal Government being the user.

Absence of Management Oversight

Our inspection found that DOE Headquarters has no program to periodically review WAPA's power purchase program. The Procurement Management Reviews of the Office of Procurement and Assistance Management have not addressed the power purchase contracting programs of the PMAs because the purchase of power has not been viewed as a procurement under the FAR. In addition, the former Office of Assistant Secretary for Conservation and Renewable Energy, which had responsibility for the management oversight of the PMAs, did not conduct any reviews of WAPA's power purchase contracting program. Oversight management of the PMAs was transferred to the Office of the Deputy Secretary on June 10, 1993. On June 16, 1994, the Deputy Secretary testified before the Subcommittee on Oversight and Investigations, Committee on Natural Resources, U.S. House of Representatives, regarding WAPA's Energy Planning and Management Program which sought to promote long-term energy planning and efficient energy use. In the area of power purchases, this testimony included a statement that Requests for Proposals will be issued to meet long-term resource needs.

IV. BACKGROUND

Inspection Initiation

The Office of Inspector General (OIG) Hotline received an allegation from an anonymous complainant who said that two multimillion dollar power purchase contracts awarded to PacifiCorp and Portland General Electric by WAPA's Sacramento Area Office were awarded "without going through the public process and without receiving bids from other companies." The complainant alleged that the award of the PacifiCorp contract resulted in a dramatic increase in costs to DOE, and ultimately the customer, of two to three times what those costs should have been. The complainant

also alleged that these contracts may have been entered into because of a conflict of interest. The complainant said that the PacifiCorp contract was for the purchase of 150 MW, and had a value of approximately \$100 million a year for 25 years. The Portland General Electric contract was alleged to have been for the purchase of 65 MW with no specific dollar value or length of contract provided.

Our review determined that the contracts in question were:

1. Contract Number 92-SAO-30006 between WAPA and PacifiCorp for the purchase of 75MW to 150MW of firm capacity for 20 years with an approximate value of \$1 billion dollars (Note: Subsequent to our initial review, WAPA elected not to exercise their option to purchase 75MW of the total 150MW available under this contract, reducing its value to approximately \$600 million); and,
2. Contract Number 87-SAO-30002 between WAPA and Portland General Electric for the purchase of 65MW of firm power for 25 years with an approximate value of \$1 billion dollars.

Creation of Western Area Power Administration

The Western Area Power Administration was created in 1977 with the establishment of the Department of Energy under the Energy Organization Act (42 U.S.C. 7101), and is one of five Power Marketing Administrations. The other four PMAs--Alaska, Bonneville, Southeastern, and Southwestern--had previously been formed under the Department of the Interior. The Energy Organization Act consolidated the marketing of federal power and the PMAs under DOE, including the power marketing functions of the Bureau of Reclamation.

WAPA markets and transmits federally produced power in 15 central and western states, including California, Oregon, Nevada, Montana, Arizona, Utah, New Mexico, Texas, North Dakota, South Dakota, Iowa, Colorado, Wyoming, Minnesota and Nebraska. WAPA's power marketing function is divided among five area offices, including Billings, Montana; Loveland, Colorado; Phoenix, Arizona; Sacramento, California; and Salt Lake City, Utah.

WAPA's Power Purchase Program

WAPA's Power Marketing Policy Guidelines and Procedures state that the power marketing program can include, in addition to the sale of power from Federal generating facilities, a program to purchase capacity and/or energy.

WAPA purchases power under three categories. These include long term purchases, purchases through short term agreements, and spot purchases. These types of purchases are defined as follows:

- Long Term: Generally represents purchases of energy and/or capacity for periods greater than a year.

- Short Term: Generally represents purchases of energy and/or capacity for a period of less than one year (including seasonal purchases).
- Spot: Generally represents purchases of energy for a very short term (from a few hours to two weeks).

WAPA Appropriations

WAPA finances its power purchase and wheeling (transmission) activities through congressional appropriations and alternative financing arrangements such as bill crediting, net billing, reimbursements, and nonappropriation transfers. As shown in the Department of Energy FY 1993 Budget Justification, WAPA's FY 1993 power purchase and wheeling budget request of \$258,716,000 is financed as follows:

Method of Financing	FY 1993 Request
Appropriations	\$115,293,000
Bill Crediting	82,000,000
Net Billing	14,713,000
Reimbursements	44,350,000
Nonapprop. Transfers	2,360,000
Total	\$258,716,000

These methods of financing are defined by WAPA as follows:

- Appropriations represent funds appropriated directly from Congress.
- Bill Crediting is a contractual arrangement that allows for the netting of transactions among at least three parties. The parties agree in advance that amounts owed to one party from a second party can be paid directly to a third party. The third party would then credit the first party's bill for services provided by the third party.
- Net Billing is a result of services rendered between two parties within a common period with an offset in expense on the net bill between the two.
- Reimbursements: There are two types of reimbursable financing: Federal and non-Federal. The cost of services performed for other Federal agencies is reimbursable from those agencies. For non-Federal entities, the cost of services performed can also be reimbursable; however, the funds must be provided in advance of the expenditures.
- Non-appropriation Transfer (NAT): Non-appropriated funds (i.e. receipts) are transferred to another Federal supplier for payment of services rendered by that other Federal supplier.

Cost of WAPA's Power Purchase Program

For Fiscal Years 1991 and 1992, WAPA incurred total costs of \$503,830,652 for the purchase of power. As shown below, long term power purchase contracts represented 67 percent of the total, while short term and spot purchases accounted for 15.4 percent and 17.6 percent respectively:

CATEGORY	FY 91	FY 92	TOTAL	PERCENT
Long Term	\$148,896,320	\$189,464,722	\$338,361,042	67
Short Term	33,283,666	44,772,959	78,056,625	15.4
Spot	44,635,964	42,777,021	87,412,985	17.6
Total	\$226,815,950	\$277,014,702	\$503,830,652	100.0

The majority of power purchase costs in FY 91 and FY 92 were incurred by WAPA's Sacramento Area Office. SAO incurred costs of \$173,166,167 in FY 91 (or 76 percent of WAPA's total incurred power purchase costs for FY 91) and \$213,261,998 in FY 92 (or 77 percent of WAPA's total incurred power purchase costs for FY 92).

Long Term Purchases by WAPA

Long term power purchase contracts can range from one year to 30 years. These contracts are based on WAPA's determination of capacity and energy needs considering the future availability of resources from Federal hydroelectrical facilities, future demand, and the statutory authority to purchase up to 400 megawatts of power to meet Central Valley Project customer needs in California.

WAPA has awarded eight long term power purchase contracts to six suppliers since 1982. The total value of these contracts is \$3,596,017,000. The following table shows the contract number, contractor, date awarded, and the contract amount for each of these contracts.

CONTRACT NUMBER	CONTRACTOR	DATE AWARDED	CONTRACT AMOUNT
DE-MP65-82WP-19001 (5 + Years)	Basin Electric	4/15/82	\$ 243,658,000
2D07D70-P2087 (30 Years)	Shoshone Irrigation	3/82	\$ 6,500,000
DE-MS65-83WP-59068	Longview Fiber	10/31/83	\$ 297,828,000
DE-MP65-85WP-59106 (20 Years)	Longview Fiber	01/31/86	
DE-MP65D84WP-59099 (20 Years)	City of Tacoma	1/1/85	\$ 376,960,000
87-SAO-30002 (25 Years)	Portland General	8/25/87	\$1,037,191,000
91-SAO-30005 (20 Years)	PacifiCorp	10/01/91	\$1,031,908,000

92-SAO-30006 (20 Years)	PacifiCorp	9/17/92	\$ 601,972,000
		Total	\$3,596,017,000 MMMMMMMMMMMMMMMM

In addition to these eight long term contracts, SAO has a contract with Pacific Gas and Electric (PG&E), Contract No. 14D06D200D2948A (2948A), for the purchase of energy and capacity which is estimated by an SAO official to be worth \$1,122,841,000 (from January 1991 through December 2004). This contract was awarded under the U.S. Department of Interior on July 31, 1967. SAO makes a distinction between the long term contracts identified above and the contract with PG&E. SAO refers to the long term contracts as Interconnection Agreements which they described as independent agreements where one party provides services to meet the needs of the other party. SAO refers to the PG&E contract as an Integration Agreement which they described as a co-dependent agreement where both parties to the contract have certain services and resources that can complement each other.

Short Term Purchases by WAPA

Short term purchases can range from agreements that are entered into for a week to two, to seasonal Letters-of-Agreement that cover energy purchases up to a year. These purchases are made to satisfy capacity and energy requirements that cannot be met using the resources of the Federal hydroelectric facilities.

Spot Purchases by WAPA

Spot purchases are "real time" agreements made the day before or the same day the power is needed. These purchases are made to take advantage of low-priced, non-firm energy, or to support capacity during times when required generation levels cannot be met. At SAO, spot purchases do not result in a specific written contract. Spot purchases at SAO are verbal agreements between schedulers/dispatchers of WAPA and the supplier.

V. RESULTS OF INSPECTION

The results section of this report is divided as follows:

- A. WAPA POLICIES, PROCEDURES AND PRACTICES
- B. COMPETITIVE TRENDS IN THE POWER INDUSTRY
- C. APPLICABILITY OF THE COMPETITION REQUIREMENTS OF CICA AND THE FAR
- D. DOE HEADQUARTERS' MANAGEMENT OVERSIGHT OF THE POWER PURCHASE PROGRAMS OF THE POWER MARKETING ADMINISTRATIONS

- A. WAPA POLICIES, PROCEDURES AND PRACTICES

Our inspection found that WAPA has not developed any written internal policies and procedures for the solicitation, negotiation, award, or documentation of power purchase contracts. In addition, WAPA awards long and short term power purchase contracts without the use of full and open competition, even though more than one source of supply exists and individual contracts can be worth hundreds of millions of dollars. Therefore, the reasonableness of rates for power purchase contracts is not established through full and open competition.

This section reviews WAPA's power purchase contracting policies and procedures, the solicitation practices used by WAPA for power purchase contracts, and the practices used by WAPA to determine the reasonableness of rates under individual power purchase contracts.

WAPA's Power Purchase Contracting Policies and Procedures

WAPA has not developed any written internal policies and procedures for the solicitation, negotiation, award, or documentation of power purchase contracts. WAPA's internal policies and procedures relating to power purchase contracts are contained in a handbook titled WESTERN AREA POWER ADMINISTRATION, POWER MARKETING, POLICY AND GUIDELINE PROCEDURES. The purpose of this handbook includes the documentation of existing WAPA policy and the promotion of power marketing practices and procedures throughout WAPA. However, this handbook provides no internal policies, procedures, or guidance that govern the specific manner in which power purchase contracts are solicited, negotiated, awarded, or documented.

WAPA officials said that WAPA Orders and Directives do not provide detailed policies and procedures for the power purchase contracting process. These officials said that power purchase contracting procedures are very broad, and that, for example, there are no formal policies on contract documentation relating to Findings and Determinations, Analysis of Offers, or Record of Negotiations. The SAO Assistant Manager, Power Marketing, said that the power purchase contracting process follows WAPA's general contracting provisions and WAPA Order 6120.1, POWER MARKETING POLICY, FUNCTIONS, AND DELEGATIONS. Our review of this order found that it defines the Western Area Power Administration's (WAPA) functions, responsibilities, practices, and delegations of authority for the development of power marketing policy and for the negotiation, review, execution, and administration of power marketing contractual documents. However, consistent with the statements of other WAPA officials, this document was found to be very broad and lacking in any specific policy or procedural guidance in areas such as contract solicitation, negotiation, award, or documentation.

Solicitation Practices used by WAPA for Power Purchase Contracts

WAPA awards long and short term power purchase contracts without the use of full and open competition, even though more than one source of supply exists and individual contracts can be worth

hundreds of millions of dollars. WAPA has awarded individual power purchase contracts that range in value from a few thousand dollars to more than \$1 billion. WAPA's power purchase costs averaged more than \$250 million per year during Fiscal Years 1991 and 1992. In place of formal competitive procedures, WAPA uses informal screening methods to identify potential suppliers of power.

We found that SAO power marketing personnel generally solicit and screen the power industry using informal methods, and that the methods used to identify, select, and negotiate with a particular supplier are not consistent from purchase to purchase. For example, we found that suppliers are identified using methods that include informal screenings, dispatcher contacts with suppliers, WAPA Headquarters knowledge of the availability of power from a single source or a limited number of sources, and the use of a written request for quotes in at least one instance. SAO officials said that their methods are dependent on the timing and need of the purchase, and unlike procurement purchases, SAO needs to follow-up on a lead as quickly as possible in order not to lose the opportunity to another purchaser. SAO officials said that if they missed the opportunity, they may end up paying more for the needed power from another supplier.

We did find evidence of limited competition in one instance involving a short term purchase by SAO, and we found two instances where the Salt Lake City Area Office (as discussed in Section B of this report) used a "Request for Proposal." However, WAPA's long and short term contracting actions often give the appearance of sole source procurements. For example, we found that WAPA does not generally advertise its power purchase requirements. In addition, we found that key pieces of documentation including documented Market Searches, Analysis of Offers, Records of Negotiation, Findings and Determinations, Contracting Officers Decisions, minutes of key meetings, and Justifications for Other Than Full and Open Competition, normally associated with acquisitions and negotiated contracts performed under the requirements of the FAR, are not prepared by WAPA's power marketing personnel. The SAO Assistant Manager, Power Marketing, said that workload has a negative impact on SAO's ability to formally document contracting actions and that SAO "can't make good documentation without staff."

Long Term Power Purchase Contracts

WAPA has awarded eight long term power purchase contracts to six suppliers since 1982 with a total value of \$3,596,017,000. Long term power purchase contracts represent purchases of energy and/or capacity for periods greater than a year. Long term power purchase contracts have generated 67 percent of all power purchase costs incurred by WAPA in FY 91 and FY 92 (\$148,896,320 in FY 91 and \$189,464,722 in FY 92). The two long term contracts specifically included in our review were the PacifiCorp contract (No. 92-SAO-30006), and the Portland General Electric contract (No. 87-SAO-30002). These contracts were for terms of 20 and 25 years with values exceeding \$600 million and \$1 billion respectively. These contracts were selected for review because of

allegations that they were awarded without going through the public process and without receiving bids from other companies. The complainant was concerned about the propriety of such actions, and alleged that these contracts may have been entered into because of a conflict of interest.

Our inspection found that the PacifiCorp and Portland General Electric contracts were awarded without the use of full and open competition or other formal competitive procedures. We found that WAPA did not synopsise the proposed acquisitions in the Commerce Business Daily and did not use any other form of public notice. We also found that WAPA did not use a Request for Proposal (RFP), relying instead on informal screenings and contacts with potential suppliers. These contacts were often in the form of telephone calls, and were not documented in the official contract files. However, we found no evidence to support a conflict of interest as suggested in the allegation.

D PacifiCorp Contract

With regard to the PacifiCorp contract, the Director, Contracts and Conservation Division, SAO, said that SAO dispatchers contacted sources who might have had power resources available. He said that there were only six or seven suppliers who could meet WAPA's requirements and that some of these suppliers may have made presentations to WAPA after being contacted. He said that formal negotiations were only conducted with PacifiCorp, and that the decision to open negotiations with PacifiCorp was made by SAO management, but that no record of this decision was prepared.

We found no documentation in the official contract file that described WAPA's market search, WAPA's analysis of any presentations made by other potential suppliers, the process used to eliminate other potential suppliers, or the decision to negotiate solely with PacifiCorp (e.g. a Sole Source Justification, or a Justification for Other Than Full and Open Competition). WAPA did maintain copies of unsolicited offers and minutes of discussions with various suppliers from November 26, 1991, to July 24, 1992, but these documents were not part of any official contract file, and could not be associated with a specific request for power or a specific power purchase.

An SAO official said that WAPA Headquarters officials may have suggested that PacifiCorp had power to sell and that SAO should "check it out." This official said that SAO power purchase staff contacted several suppliers to determine who may have had power to sell. This official said that SAO staff presented comparisons and spreadsheets to describe SAO's purchase options. However, these documents were not part of the contract file and could not be produced during our inspection.

D Portland General Electric Contract

Our review of the Portland General Electric (PGE) contract also found no evidence of full and open competition or other formal competitive procedures. The contract file did not include any documentation describing the solicitation process, contacts with

any other suppliers, or the decisions leading to negotiations with PGE. The Director, Contracts and Conservation Division, SAO, said that the solicitation process used by SAO for long term contracts was informal, and that this was consistent with WAPA practices.

Short Term Power Purchase Contracts

WAPA awards numerous short term power purchase contracts each year which range in value from a few thousand dollars to several million dollars. Short term purchases can range from agreements that are entered into for a week to two weeks, to seasonal agreements that cover purchases up to a year. WAPA's short term power purchase contracts have generated 15.4 percent of all power purchase costs incurred by WAPA in FY 91 and FY 92 (\$33,283,666 in FY 91 and \$44,772,959 in FY 92). At SAO, short term purchases fall into two categories: (i) short term purchases initiated by SAO Power Marketing personnel, and (ii) short term purchases initiated by SAO dispatchers.

Our review of a sample of short term purchases initiated by SAO Power Marketing personnel found that short term power purchase contracts are awarded without the use of full and open competition. For example, our review of Contract No. LAO 90-SAO-10059, awarded to Basin Electric Power Cooperative (Basin) with a value of \$15,600,000 (for 600,000 megawatt hours (MWh) of energy purchased between November 1, 1990, through October 31, 1991), found no evidence of any form of public notice, and no evidence of the use of a Request for Proposal (RFP). The official contract file contained no documentation to describe the process used to identify Basin as a supplier, no documentation to describe the analysis of any other offers, and no documentation to describe the process or reasoning used in the decision to award a contract to Basin.

We found one instance where SAO issued a written request for quotes dated June 26, 1992, to the members of the Northern California Power Pool (NCP) relating to a need for 440 MW of capacity and 227,000 MWh of energy. The contract files did not contain any written responses from the members of the NCP, but did contain a spread sheet titled "Preliminary Responses to Western SAO's Needs in Support of PDC of 1010 MW" which presented energy and pricing information from five suppliers. The request for quotes resulted in the award of four short term contracts to three of these suppliers. However, the contract files did not describe the process used to eliminate the other three suppliers and did not contain any documentation (such as an analysis of offers) describing the decision to negotiate with the suppliers to which the four contracts were awarded. The Director, SAO Division of Power Resource Planning, said that there is no requirement to keep contract documentation and that the documentation that does exist was kept on the Director's own initiative.

Short term power purchases initiated by dispatchers are solicited without the use of full and open competition, but limited competition may be achieved. The SAO Director, Power Systems Operations and Scheduling, said that, when a short term need is identified, dispatchers ask those sources that they know and do

business with to submit bids by a certain date. He said that suppliers of short term power were identified by talking to Northwestern power suppliers, talking to power pool suppliers, and looking for the cheapest power. He said that the dispatchers usually have time to survey every company that SAO is doing business with, and that the lead time on these purchases is normally 1 to 15 days. These initial requests for bids are verbal and all conversations are tape recorded. He said that the typical response to SAO's request for bids is also verbal, and that a letter reflecting the agreement is issued at a later date.

Spot Purchases

WAPA's spot purchases have generated 17.6 percent of all power purchase costs incurred by WAPA in FY 91 and FY 92 (\$44,635,964 in FY 91 and \$42,777,021 in FY 92). Spot purchases are "real time" agreements made the day before or the same day the power is needed. At SAO, spot purchases are initiated through informal/verbal contacts between schedulers and potential suppliers, and include suppliers who have a pre-existing agreement with SAO. SAO officials said that they have entered into such agreements with nearly every supplier that has the capability of meeting SAO's needs.

The SAO Director, Power Systems Operations and Scheduling, said that spot purchases are "real time" or day before purchases and may cover a two week period. He said that SAO schedulers contact the potential suppliers, and that these contacts are tape recorded. He said that taping is standard in the industry and is WAPA policy. The schedulers verbalize the need, obtain rate quotes and accept rates at, or below, those established by the SAO Power Marketing group. He said that spot purchases are made with suppliers who have an existing letter agreement with WAPA. He said that spot purchases do not result in written agreements for each spot purchase, but are recorded at the time in a dispatcher's log. In the case of spot purchases, we do not believe that the use of full and open competition would be applicable due to the short time frame between the identification of the need for the power and the actual use of that power.

WAPA's Explanation for Limited Competition

As a matter of policy, WAPA (as discussed in Section C of this report) does not believe that they are bound by the requirements of the Federal Acquisition Regulation or the Competition in Contracting Act to seek competition in the solicitation and award of power purchase contracts. As a matter of practicality, WAPA officials believed there was no need to use formal solicitations since they were aware of the availability of power resources throughout the power industry, and knew which suppliers could meet WAPA's power purchase requirements.

The SAO Director, Contracts and Conservation Division, said that the informal process used to solicit offers from potential suppliers was consistent with WAPA historical practices. The SAO Deputy Area Manager said that these practices evolved from industry tradition. He said that WAPA did not see any need to

formally advertise power purchases because formal advertising would result in a lot of potential suppliers bidding single units (i.e. only one source of generation). He said that suppliers of this type would not meet WAPA's needs since WAPA requires suppliers with redundant capabilities (i.e. suppliers that could meet contractual commitments even if a portion of their generating capability went down for some unforeseen reason).

The SAO Deputy Area Manager said that SAO contacted sources they knew could fill WAPA needs. He said that prospective suppliers were screened by considering (i) their potential for long term system sales, (ii) whether they had surplus power, and (iii) whether they had transmission rights. He said that SAO, through formal and informal knowledge and constant dealings with power suppliers, knew who had power, who wanted to sell power, and which suppliers could meet WAPA requirements. He also said that WAPA contracting policy is very broad, that WAPA did not have formal power purchase contracting procedures, and did not create a lot of documentation. One WAPA official said that WAPA's power purchase contracting procedures were written to be broad so as to allow their power marketing personnel flexibility to take advantage of power purchase opportunities when those opportunities presented themselves.

One WAPA official said that, from the experiences of Sacramento Municipal Utility District and Northern California Power Agency, formal solicitations often resulted in "flaky or high risk" proposals from independent power producers who were looking for a contract to use for financing the construction of private power projects. This official noted that WAPA has a requirement for firm power resources which could only be met by a hand-full of suppliers in the industry, and that WAPA knows who these suppliers are and when they have power to sell. This official noted that formal solicitations could result in numerous responses which would take an excessive number of staff days to review.

Contract 2948A Constraints

WAPA officials said that a contract with Pacific Gas and Electric (PG&E) contained constraints which limited WAPA's capability to seek competition when purchasing power. This contract, referred to as 2948A, provides for the sale, interchange, and transmission of electric capacity and energy between WAPA and PG&E. WAPA officials said that the 2948A contract with PG&E contains two impediments to competition when purchasing power for the Central Valley Project (CVP) in California. WAPA officials said that these include a requirement that WAPA must look to purchase power from the Northwest, and that the power purchased must represent a "System Purchase" where the supplier has redundant generation capability, as opposed to a "Unit-Contingent" purchase where the supplier has only one source of generation.

WAPA officials said that due to these constraints, and given WAPA's knowledge of available power resources and transmission possibilities, the number of power suppliers capable of meeting WAPA's power needs during the time period of the PacifiCorp purchase was limited. WAPA officials said that in no way should

these constraints and limited number of suppliers capable of meeting WAPA's needs be equated with a lack of competition. WAPA officials believe that under the terms and conditions of 2948A, WAPA's realistic resource options "are limited to Pacific Northwest suppliers capable of selling power on a system basis." WAPA officials said that "access to cost-effective transmission to anywhere other than the Pacific Northwest was limited during the time period of the PacifiCorp negotiations." They also said that "Unit-contingent sales, given the capacity credit feature of 2948A, were not cost-effective if available at all."

WAPA's Practices for the Determination of the Reasonableness of Rates under Individual Power Purchase Contracts

The reasonableness of rates for power purchase contracts is not established through full and open competition. Rather, WAPA officials stated that they use comparisons of previous contract rates, budget analysis, cost projections, FERC review, and the public rate process to assure that power purchase contract rates are reasonable. However, we found that the FERC review does not assure that the rates under individual power purchase contracts are the best rates available to WAPA. We also found that the public rate process does not address the reasonableness of rates included in individual power purchase contracts. In addition, we found that WAPA did not prepare documentation such as Price Negotiation Memoranda or certifications of the reasonableness of negotiated rates which incorporated any analyses or comparisons performed by WAPA in establishing the reasonableness of rates.

Practices for Determining the Reasonableness of Rates

The practices relevant to the establishment of the reasonableness of rates for power purchase contracts were described by WAPA Headquarters officials at the outset of our inspection as including:

- comparison of rates with other resources;
- review of individual power purchase contracts by the FERC; and,
- the public rate process.

We were told that these practices include a mixture of comparisons of rates with prior contracts, budget considerations, and assumptions and projections as to future prices of gas, oil and coal used in energy producing plants during the term of the particular contract. However, these practices do not necessarily assure that the rates under individual power purchase contracts are the best rates available to WAPA, and do not represent a formalized process for determining and documenting the reasonableness of rates for individual power purchase contracts. By comparison, the FAR provides specific procedures for the pricing of negotiated contracts and the documentation of the principle elements of the price negotiation. However, WAPA claims an exemption to the FAR and has not instituted these, or similar, procedures. WAPA officials said that "Western believes that

comparison of rates, quoted by suppliers with knowledge that several utilities are being asked about power availability, embodies competitiveness and can determine the reasonableness of the rates."

FAR Procedures for Contracting by Negotiation

For contracts awarded under FAR procedures, there are specific requirements for contracting by negotiation. The FAR Part 15, CONTRACTING BY NEGOTIATION, Subpart 15.8, PRICE NEGOTIATION, prescribes the cost and price negotiation policies and procedures applicable to initial and revised pricing of negotiated contracts. The FAR requires the contracting officer to request cost or pricing data and evaluate this data using techniques such as cost analysis, price analysis, technical analysis, and/or field pricing support. The contracting officer is then required to prepare a Price Negotiation Memorandum outlining the principle elements of the price negotiations.

Our inspection found that WAPA has not developed any system similar to the FAR for documenting their determination of the reasonableness of rates negotiated under individual power purchase contracts. We found no documentation describing the price negotiation process, no documentation that described the pricing information considered during the negotiations, no documentation that presented any differences between WAPA's pricing position and that of the supplier, no Price Negotiation Memoranda, and no certification or determination of the reasonableness of rates.

Reasonableness of Rates in the PacifiCorp Contract

The OIG Hotline allegation stated that the PacifiCorp contract awarded by WAPA's Sacramento Area Office resulted in a dramatic increase in cost to DOE and ultimately the customer of two to three times what those costs should have been. We found no evidence that the PacifiCorp contract resulted in costs to DOE or WAPA customers of two to three times what they should have been. We found that, based on documentation provided by WAPA, the rates included in this contract were comparable to the rates under existing contracts, with the rates being higher than some existing contracts but lower than others. We did find that the cost of this contract was questioned by WAPA customers, and that the rates included in this contract may have been higher during the initial period of the contract than the rates available from other sources. However, we were unable to determine whether the rates negotiated under this contract were the best rates available to WAPA because of the lack of formal competition in the award of this contract and the lack of documentation of the negotiation and award processes.

Our inspection found that there was some customer dissatisfaction with regard to the cost of the long term contract awarded to PacifiCorp in September 1992. WAPA's customers include Preference Customers established by statute (including 43 U.S.C. 522, 43 U.S.C. 485h(c), and 16 U.S.C. 825s) such as public bodies, cooperatives, and nonprofit organizations, and nonpreference customers such as investor-owned utilities. In a letter dated

October 16, 1992, from the Sacramento Municipal Utility District (SMUD) and the Northern California Power Agency (NCPA), SMUD and NCPA registered their "objection to Western's execution last week of a twenty year power contract with PacifiCorp. Not only do the scope of the services and costs seem excessive, Western has ignored its agreement with us to jointly evaluate such major resource decisions." A WAPA official stated that Western's Central Valley Project customers were verbally notified of the purchase arrangements.

An independent consultant was commissioned by WAPA to compare the costs and risks associated with various power supply alternatives to a purchase of an additional 75 MW from PacifiCorp. This additional 75 MW purchase represented an option under the PacifiCorp contract. The consultant's report, dated December 1992, said that the comparison of the cost of the PacifiCorp contract's 75 MW option with other sources was "intended to assist in the go/no-go decision with respect to the purchase of the additional 75 mw" In the report summary, the consultant concluded that "power and energy purchased pursuant to the PPL (PacifiCorp) contract will provide least cost capacity and energy generally after about the year 2000. Short term purchase options however may be less expensive until that time."

The report's financial analysis (base case) showed that the unit cost of the 75 MW option under the PacifiCorp contract would exceed the cost of the best short term option for the period of 1995 through 1997 by an average of 63 percent per year, or approximately \$12 million per year. However, the report also noted that "if firm capacity and energy is required, the long term option results in substantial savings on an annual basis after 1998 and is substantially better on a present value basis" The report's Present Value Summary shows that the present value of the PacifiCorp contract was approximately \$30 million greater than the least cost short term alternative for the period 1993 to 2000,

but that the difference in the present value of these same two options was less than \$1 million for the period 1993 to 2010.

The objections of SMUD and NCPA were later rescinded after SAO agreed not to exercise the option in the PacifiCorp contract to purchase the second 75 MW of the total 150 MW available under the contract. SAO officials said that "SAO withdrew from the purchase of the second 75 MW because we did not have full support from all the customers," and that "SAO's purchase procedure was not questioned, only its opinion on what will be available in the future" However, our inspection found that there was no documentation in the contract file describing the price negotiation process, the specific pricing information considered during the negotiations, or a determination of the reasonableness of the negotiated rates under the contract for either the initial 75 MW or the additional 75 MW. The contract file did not document WAPA's evaluation of factors and assumptions similar to those considered by the consultant (i.e. risk, reliability, reserve capacity, fuel escalation, or the present value of other options).

An SAO official acknowledged that the PacifiCorp contract would

cost more in the early years than other sources, such as short term purchases or depletion of WAPA's Energy Account No.2 (EA-2) with PG&E. WAPA's EA-2 account represents a limited amount of low cost energy which is the result of surplus energy sold to PG&E by WAPA during the months when WAPA's resources (CVP hydrogeneration and purchases) exceed CVP energy load requirements. This official said that, if one compared the cost of the PacifiCorp contract in the first year (approximately 38 mills/KWh) to the cost of energy in the EA-2 account (approximately 14 mills/KWh), it may appear that the PacifiCorp contract was costing two to three times more than it should. However, this official said that the impact of this contract on WAPA customers would be an increase in rates of approximately two percent during the period 1993 through 1998. This official said that the EA-2 account has a limited amount of energy available at low rates, and once it is depleted, WAPA must replace this source with purchases at higher rates.

Prior to the award of the PacifiCorp contract, SAO Resources Division did a comparison of rates with other existing power purchase contracts. This information was then conveyed to SAO Management in the form of a comparison chart. This chart showed that the rates included in the PacifiCorp contract were comparable to the rates under existing contracts, with the rates being higher than some existing contracts but lower than others. However, this chart did not include any certification of reasonableness, and the contract file did not include any analysis of rates or other type of reasonableness determination. SAO officials confirmed that there is no formal procedure for certifying the reasonableness of rates, and there is no formal documentation to evidence this reasonableness determination. SAO officials said that "due to the infrequent need for purchase of long-term power resources, and the give and take common to contract negotiations, Western has not developed detailed pricing procedures to date."

Other Examples of WAPA's Practices for Determining the Reasonableness of Rates

Similar to the PacifiCorp contract, our inspection found other examples where the contract files lacked documentation of the negotiation and award processes. Our inspection identified a short term purchase with Basin Electric Cooperative (No. LAO 90-SAO-10059) where the Letter of Agreement was awarded at a rate higher than the documented pricing recommendation. In a draft document titled "Principles of a Purchase from Basin Electric," dated April 25, 1990, the recommendation on price was as follows:

"The price of energy delivered and accepted at Malin shall be 25 mills per KWH (do not compromise this because this offer is at the maximum and this purchase will result in no savings to the SAO at this price, a higher price will result in a loss compared to other likely available sources in the NW and Canada)."

However, the Letter of Agreement, dated September 10, 1990, states that "Western shall pay Basin Electric 26 mills per kWh for all energy scheduled and delivered to the Point of Delivery." The difference of 1 mill per KWh on this letter agreement was worth

approximately \$600,000. During our inspection we found no documentation that described WAPA's rationale for exceeding the recommended maximum mill rate, nor any documentation to suggest that the pricing principles identified in the draft document were changed. SAO officials said that this document did not represent SAO management's position on the rates that should have been paid under this contract. However, SAO officials did not provide any other documented position on rates for this Letter of Agreement.

Our inspection also identified four short term Letters of Agreement awarded by SAO during a one month period in 1992 (as a result of the same written request for quotes) where the negotiated rates for capacity and energy were significantly different, with Capacity Cost ranging from \$4.90/kilowatt month (KWm) to \$7.50/KWm, and Energy Cost ranging from \$29.30/MWh to \$34.00/MWh (On Peak) and \$22.40/MWh to \$32.00/MWh (Off Peak). The contract files did not contain any documentation describing the analysis of the agreed-to-rates, the factors that may have caused variances in rates (such as transmission/wheeling, load factor, seasonal adjustments, or point of delivery) from supplier to supplier, or the rationale for paying significantly different rates under the same request for quotes.

FERC Rates Review

As noted above, one of the practices relevant to the establishment of the reasonableness of rates for power purchase contracts described by WAPA Headquarters officials was the review of individual power purchase contracts by the FERC. We found that the PacifiCorp long term power purchase contract was subject to FERC review as described under Section 5, TERM AND TERMINATION, Paragraph 5.2, REGULATORY APPROVAL, of their contract. However, our inspection found that FERC only deals with regulation of public utilities by reviewing the rates established by the utility that it will charge the buyer, and that FERC does not determine if rates under individual contracts are competitive with other sources.

The Section Chief, Rate Filing Branch, Federal Energy Regulatory Commission, said that under the Federal Power Act, the FERC only determines the reasonableness of the rate proposed in the contract. He said they do not determine if there are other sources of power at lower rates available to the customer, whether other sources have cheaper rates, or that the customer is getting the "best deal" available.

The Section Chief said that FERC seeks to determine (i) whether or not a particular rate is monopolistic, (ii) whether or not that rate far exceeds the utility's cost, and (iii) whether that rate is not so low as to be subsidized by the seller's other customers. He said that FERC looks at the submitter's fixed cost and its variable cost in determining reasonableness of the sale rates, and does not care if this rate is more or less than other utilities may be charging.

Public Rate Review Process

WAPA Headquarters officials indicated that the Public Rate Review process was one of several controls used to assure the reasonableness of rates negotiated on power purchase contracts. WAPA is normally required to issue Federal Register notices and conduct public comment forums for all Power Marketing Plans, allocations, and rates. However, our inspection found that the Public Rate Review process does not apply to specific power purchase contracts or agreements prior to award. The Public Rate Review process only applies to composite rates developed from all power sources available to WAPA (i.e. long term contracts, power provided by the Bureau of Reclamation projects, and other contracted power sources).

Conclusion

We believe that WAPA needs to develop and implement internal policies and procedures that govern the manner in which power purchase contracts are solicited, negotiated, awarded, and documented. WAPA believes that power purchase contracts are not subject to the requirements of the FAR or CICA, and, therefore, WAPA does not apply the contracting requirements of the FAR (including the requirements for documentation) to its power purchase program. However, WAPA has not developed any other written procedures that would provide for the control and accountability of its power purchase program. WAPA's power purchase program costs more than \$250,000,000 per year, and individual contracts can range in value from a few thousand dollars to more than \$1 billion. We believe that a program of this size warrants specific procedural guidance on the solicitation, negotiation, and award of power purchase contracts.

In this regard, we believe that WAPA needs to develop policies and procedures that require documentation of the power purchase contracting process, and documentation to support the analysis of rates and the determination of the reasonableness of rates prior to the award of all short and long term power purchase contracts. As discussed in this section, WAPA does not document the key elements of the power purchase contracting process which include market searches, notifying potential suppliers of WAPA's requirements, screening potential suppliers, evaluating offers, selection of a supplier, and negotiation with that supplier. Under WAPA's current practices, documentation is not developed to support the pricing recommendations developed by WAPA for individual power purchase contracts, the pricing information relied on during negotiations, or the reasons for any pertinent variances from WAPA pricing recommendations. In addition, WAPA does not prepare documentation such as Price Negotiation Memoranda or certifications of the reasonableness of negotiated rates which incorporate any analyses or comparisons performed by WAPA in establishing the reasonableness of rates. We believe that WAPA should develop specific standards for the documentation of these key elements of the power purchase contracting process.

B. COMPETITIVE TRENDS IN THE POWER INDUSTRY

Our inspection found that the public utility industry in the West is moving toward the use of formal competitive procedures, such as Requests for Proposals, when purchasing power. WAPA, although aware of this trend, has only used formal competitive procedures under its power purchase program on a limited basis. This includes the use of the "Request for Proposal" process in two instances, and the use of a written request for quotes in one instance. WAPA officials have indicated that a serious impediment to competition is transmission access. However, we found that the Energy Policy Act of 1992, Public Law 102-486, contains provisions that are intended to improve transmission access within the power industry. In commenting on a draft of this report, the WAPA Administrator stated that WAPA is committed to issuing Requests for Proposals in the future to meet long term resource needs.

This section reviews the current trends in the utility industry and the opportunities for competition created under the Energy Policy Act of 1992.

Trends in the Public Utility Industry in the West

The electric utility industry in the West is moving toward the use of more formal competitive procedures in the purchase of electrical power. Our inspection found that entities such as the Sacramento Municipal Utility District (SMUD) and the Modesto Irrigation District (MID) are currently utilizing competitive procedures in the form of Request for Proposals (RFP). The City of Redding Utilities (RU) and Northern California Power Agency (NCPA) said that they would use the Request for Proposal (RFP) process if the transmission line access problem is solved.

WAPA has only used formal competitive procedures under its power purchase program in limited situations. The Salt Lake City Area Office (SLCAO) has used the "Request for Proposal" process on two occasions. These include an August 29, 1990, solicitation expressing SLCAO's interest in purchasing long-term firm amounts of energy up to approximately 400,000 MWh annually (beginning January 1, 1991, and remaining in effect through September 30, 1999); and a May 18, 1993, solicitation expressing SLCAO's interest in purchasing energy up to 400 gigawatt hours (GWh) annually (starting October 1, 1993, and a latest ending date of September 30, 1999). In addition, SAO issued a written request for quotes dated June 26, 1992, to the members of the Northern California Power Pool (NCP) relating to a need for 440 MW of capacity and 227,000 MWh of energy.

Some SAO officials have agreed that there are advantages associated with the use of formal competitive procedures. One SAO official said that "large public bodies" have used RFPs when looking to purchase power, and that this seems to be the new way to do business in the power industry. This official said that SMUD and NCPA have found it easier to negotiate power purchases when they have used the competitive process, and that RFPs and competitive bids are becoming requirements because customers are demanding more accountability from public utilities. Another SAO

official said that competition is becoming more appropriate and more of an alternative. This official said that the RFP could be used for initial screening of sources and would enhance WAPA's credibility with its customers.

However, WAPA has also stated that the use of formal competitive procedures would not have been appropriate for the purchase of power in the past, and that WAPA's ability to use formal competitive procedures may be constrained by their Integration Agreement with PG&E and their access to transmission capabilities. SAO management said that "Under certain conditions competitive bidding procedures may be appropriate in the future, but it would not have been appropriate for the power purchases investigated" as part of this report. SAO management also said that competitive processes may be easier for entities such as SMUD and NCPA because of their arrangements with PG&E (i.e. Interconnection Agreements vs. the Integration Agreement that SAO currently has with PG&E). As stated in Section A of this report, SAO management believes that their Integration Agreement with PG&E limits their competitive options by restricting their access to power suppliers located in the Northwest, and to those suppliers with system capabilities. In addition, some WAPA officials have indicated that transmission access is an impediment to competition. The SAO Director, Power Systems Operations and Scheduling, said that transmission access is the biggest barrier to competition in the power industry. However, Public Law 102D486, dated October 24, 1992, and referred to as the Energy Policy Act of 1992, contains provisions that are intended to improve transmission access within the power industry.

Opportunities for Future Competition

WAPA officials agree that the opportunity for competition in power purchase contracts has been enhanced by the Energy Policy Act of 1992 which addresses power transmission line right-of-way/access, and contains provisions that could make transmission access easier to obtain. The General Counsel for WAPA said that, as a result of the Energy Policy Act of 1992, competition is more likely, and that competition is more of an opportunity now than it was in the past. The Associate Administrator, West Coast Affairs (formerly the SAO Area Manager), said that, in theory, the Energy Policy Act of 1992 looks good with the intent to break the transmission monopolies, and that competition would be enhanced depending on what happens within each region. The SAO Area Manager (formerly the SAO Deputy Manager) said that the Energy Policy Act of 1992 gives Independent Power Producers the edge by enhancing transmission possibilities and moves the power industry toward more open competition.

However, even with the increased opportunity for competition created by the Energy Policy Act, WAPA believes that other constraints on competition may continue to exist. SAO officials said that because most Independent Power Producers are unit-contingent and do not have redundant capabilities, they may not be able to meet the firm-power requirements of SAO under their existing contract with PG&E (2948A) over the next 10 years. These officials said that transmission capability in California and

costs associated with transmission, which is part of the transmission constraints when considering power purchases, will be key. These officials also said that even if transmission access is more open, competition will still be limited if there is not sufficient cost-effective surplus power available to meet SAO needs.

Conclusion

We believe that WAPA needs to evaluate the opportunities for increasing the use of formal competition in their power purchase program based on the current trends in the utility industry and the changes under the Energy Policy Act of 1992. We also believe that WAPA needs to develop procedures for the use of formal competition in solicitations for long term and short term power purchase requirements where competitive constraints may no longer exist. As discussed in Section A of this report, WAPA uses informal processes for soliciting, negotiating, and awarding power purchase contracts. We believe that WAPA's practice of not using full and open competition, and WAPA's use of informal processes in the screening and selection of suppliers for the award of power purchase contracts, opens WAPA to charges of favoritism and excessive cost in the award of power purchase contracts.

C. APPLICABILITY OF THE COMPETITION REQUIREMENTS OF CICA AND THE FAR

We could not find any Federal contracting requirements, including requirements for competition, which were recognized by WAPA or the Department's Office of Procurement and Assistance Management as being applicable to WAPA's power purchase program. WAPA does not apply the competition requirements of CICA, which are implemented in the FAR, to its power purchase contracting program. WAPA's General Counsel told us that he believes that WAPA is exempt from these requirements because of specific language in FAR Part 8, REQUIRED SOURCES OF SUPPLIES AND SERVICES. An official from the Office of Procurement and Assistance Management told us that he believes that WAPA's power purchase program is not part of the procurement system. However, for the reasons discussed below, we believe that the applicability of Federal contracting requirements, including the requirements for competition, to WAPA's power purchase program should be reviewed by the Department.

This section reviews the applicability of the requirements of the FAR, the applicability of the requirements of the Competition in Contracting Act, and the positions of WAPA, the DOE Office of Procurement and Assistance Management, and Office of General Counsel on the applicability of the competition requirements of the FAR and CICA to WAPA's power purchase program.

Applicability of the Requirements of the FAR

FAR Part 1 discusses the applicability of the requirements of the FAR, and FAR Part 2 defines the term "acquisition." FAR Part 1, Subpart 1.103, states that the FAR "applies to all acquisitions as defined in Part 2 of the FAR except where expressly excluded [Emphasis Added]." FAR Part 2 defines an acquisition as:

". . . the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, or evaluated. . . . "

The FAR states that "acquisition" includes the description of the agency requirements, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

Applicability of the Requirements of CICA

The Competition in Contracting Act of 1984 contains specific provisions for exclusions of particular sources of supply, and allows for procedures other than competitive procedures in specific cases. The Competition in Contracting Act resulted in amendments to the Federal Property and Administrative Services Act of 1949, and the Office of Federal Procurement Policy Act of 1974. Title VII, COMPETITION IN CONTRACTING, U.S. Code, Section 2701, CICA of 1984, Subtitle A - Amendments to the Federal Property and Administrative Services Act of 1949, Sec. 303.(a)(1), COMPETITION REQUIREMENTS, states:

"Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services D

(A) Shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

(B) Shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances for the procurement."

The subsections cited above as exceptions to the provisions of CICA do not apply to power purchase contracts. Subsection (b) allows for exclusions of particular sources of supply in order to develop or maintain an alternative source, and provides for the restriction of a solicitation to address small business concerns.

Subsection (c) allows for procedures other than competitive procedures (1) in cases where only one source of supply exists, (2) in cases of unusual and compelling urgency, (3) in cases of national emergency or industrial mobilization, and in cases where it is necessary to maintain an essential research and development effort, (4) in cases involving international agreement or treaty, (5) in cases involving a statute authorizing procurement from a specified source, and (6) in cases of national security. Subsection (g) allows for special simplified procedures for small purchases of property and services.

We note that the CICA provisions do not contain the wording "by and for the use of the Federal Government" as is contained in the FAR definition of an acquisition.

WAPA's Position on the Applicability of the FAR and CICA

WAPA does not apply the competition requirements of CICA or the FAR to its power purchase program. WAPA claims an exemption to these competition requirements, citing a specific exclusion found in Subpart 8.3 of the FAR, ACQUISITION OF UTILITY SERVICES. WAPA believes this exemption excludes their power purchase program from all the provisions of the FAR.

FAR Part 8, REQUIRED SOURCES OF SUPPLIES AND SERVICES, Subpart 8.3, ACQUISITION OF UTILITY SERVICES, prescribes policies and procedures for the acquisition of utility services, and states that "GSA has statutory authority to enter into long-term contracts for utility services for periods not to exceed a term of 10 years (40 U.S.C. 481)." Section 8.302, APPLICABILITY, contains an exclusion pertaining to the acquisition of utility services. This section, under subsection (b), states:

"This subpart does not apply to - (1) Utility services produced, distributed or sold by a Federal agency, . . . ; or (2) Utility services (other than those required for administrative purposes) obtained by purchase, exchange, or otherwise by a Federal power or water marketing agency incident to that agency's marketing or distribution program."

WAPA's General Counsel, in a letter dated December 28, 1992, to the Office of Inspections, stated that "Western complies fully with the FAR in acquiring supplies or services, including construction." However, the General Counsel said that FAR Subpart 8.3 provides the "express exclusion" from the applicability of the FAR (as required by FAR 1.103, supra) to Western's power purchase program.

WAPA's General Counsel said that the "express exclusion" is found in FAR Subpart 8.302(b). It is WAPA's position that "The plain language of □ 8.302(b)(1) excludes Western's sale of Federal power from FAR coverage," and that "The plain language of □ 8.302(b)(2) excludes Western's purchase or exchange of power from FAR coverage, so long as the purchase or exchange is 'incident' to Western's power marketing program." WAPA's General Counsel said that "this exclusionary language" first appeared in a December 23,

1966, Federal Register notice. WAPA's General Counsel said that "There is no explanation of the reasoning behind the exclusion in the 1966 notice, nor was public comment taken on the notice."

WAPA treats the exclusion referenced in FAR Part 8 as a total exclusion from any requirement of the FAR with regard to WAPA's power purchase contracting program. WAPA does not follow or implement any portion of the FAR in connection with its power purchase program. WAPA's General Counsel said that "The Administrator of GSA has established regulations to implement the Competition in Contracting Act at Part 6 of the FAR. Since the purchase power program is excluded from FAR coverage . . . it follows that the CICA FAR requirements do not apply." The General Counsel concluded by stating that "since 1966 [the year when the exemption cited by WAPA first appeared in the Federal Register] power marketing administration power sales and purchases have been excluded from coverage under the Federal procurement regulations. Similarly, the CICA requirements do not apply to such purchases."

However, in our view, FAR Part 8 may not provide a broad exemption to include all of the competition and contracting requirements of the FAR. The exclusion in FAR Part 8 clearly pertains to "This subpart", but does not address other FAR parts such as Part 6, COMPETITION REQUIREMENTS, and Part 15, CONTRACTING BY NEGOTIATION. The exclusion cited by WAPA under Subpart 8.3 clearly states that the PMAs, when purchasing utility services, are exempt from using the "Required Sources of Supplies and Services" (i.e. GSA, the agency with statutory authority to enter into long term contracts for utility services), but a broader exclusion is not specifically stated.

We noted that FAR Part 8, Section 8.304-5, AGENCY ACQUISITION, allows other agencies to acquire utility services on their own in cases where there is no GSA area-wide contract or other local arrangements. However, this authority requires the contracting agency to determine the appropriate contracting method in accordance with the instructions of Part 6, COMPETITION REQUIREMENTS, Part 13, SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES, and Part 15, CONTRACTING BY NEGOTIATION. Agency contracting officers are required to determine if more than one supplier can furnish the needed utility services, and when such competition exists, the contracting officers are required to solicit bids or competitive proposals for the services.

We looked at other sections of the FAR related to competition and we did not find any specific exclusion for the purchase of power. For example, FAR Part 6, COMPETITION REQUIREMENTS, Subpart 6.001, APPLICABILITY, states that this part applies to all acquisitions except contracts awarded using small purchase procedures, contracts awarded using procedures that are expressly authorized by statute, contract modifications, orders placed under requirements contracts or definite quantity contracts, or orders placed under indefinite quantity contracts. These exclusions do not include or address WAPA or WAPA's power purchase program.

We also looked at FAR Part 15, CONTRACTING BY NEGOTIATION, which prescribes policies and procedures governing the contracting for

supplies and services by negotiation. The Subparts of FAR Part 15 only exclude small purchases and two-step sealed bidding. These exclusions do not specifically address the PMAs or their power purchase programs.

Office of Procurement and Assistance Management Position on the Applicability of the FAR and CICA

An official from the Office of Procurement and Assistance Management told us that the understanding within his office has always been that the power purchase programs of the PMAs are not part of the procurement system. He said that, as such, the PMAs do not have to follow the requirements of the FAR in conducting these programs. He said that it had been generally felt by the Office of Procurement and Assistance Management that the FAR does not apply to the power purchase programs of the PMAs because the purchase of power involves the buying and selling of a commodity. He said that he did not believe that the buying and selling of a commodity meets the FAR definition of an acquisition of supplies or services by and for the use of the Federal Government. He said that, in his mind, the key issue is that the purchase of power for resale makes the transaction a purchase of a commodity, whereas the purchase of power for direct use and consumption makes the transaction a purchase of supplies or services under the FAR. He said that the DEAR does not specifically exempt the PMAs from the FAR and other requirements, but rather does not mention the PMAs. In addition, he said he did not believe that this understanding had been documented nor had the applicability of CICA to the power purchase programs of the PMAs been addressed by DOE.

In our view, a portion of the power purchased by WAPA for resale may meet the definition of an "acquisition" included in the FAR. As previously stated, the FAR defines an "acquisition" as the acquiring by contract with appropriated funds of supplies or services by and for the use of the Federal Government through purchase or lease. WAPA's power purchase program may come under this definition since WAPA is a Federal entity which uses appropriated funds to purchase power for both Federal and non-Federal customers. WAPA's Federal customers include the Department of Energy, National Aeronautics and Space Administration, the United States Air Force, the United States Navy, the United States Army, and the United States Fish and Wildlife Service.

The Competition in Contracting Act contains specific provisions for exclusions of particular sources of supply, and allows for procedures other than competitive procedures in specific cases. However, in our view, none of these provisions apply to WAPA or WAPA's power purchase program. The official from the Office of Procurement and Assistance Management said that, since it had always been felt that the power purchase programs of the PMAs did not fall under the requirements of the FAR, the issue of the applicability of CICA to the power purchase programs of the PMAs has not been addressed by DOE. We believe that the Department should consider the applicability of CICA separate from the applicability of the FAR since the applicability provisions of CICA to procurements by executive agencies are not the same as the

applicability provisions of the FAR. Whereas the FAR applies to "the acquiring by contract with appropriated funds of supplies or services . . . by and for the use of the Federal Government," CICA applies to "an executive agency in conducting a procurement for property or services" without reference to the Federal Government being the user.

Office of General Counsel Memorandum on the Applicability of the FAR and CICA

An Attorney-Advisor under the Assistant General Counsel for Procurement and Financial Assistance expressed the opinion that FAR 8.3 does not exclude WAPA from other provisions of the FAR. As a follow-up to a draft of this report, the Attorney-Advisor reviewed the issue of the applicability of the FAR and CICA to the power purchase program of WAPA. In a memorandum dated November 22, 1994, from the Attorney-Advisor, through the Deputy Assistant General Counsel for Procurement and Financial Assistance, to the Director of the Office of Policy, Office of Procurement and Assistance Management, the Attorney-Advisor wrote that "The plain language of FAR 8.302 (b)(2) does not specifically exclude WAPA's power purchasing program from FAR requirements." The Attorney-Advisor also stated that "In fact, the plain language of this provision would appear to limit not expand the scope of the exemption set forth at FAR 8.302 (b)(2)." In addition, the Attorney-Advisor stated that a literal reading of this provision would seem to imply that the scope of this exemption is limited to FAR Subpart 8.3, and that it would seem inappropriate to interpret FAR 8.3 as an exemption from CICA or the FAR competition requirements.

The Attorney-Advisor also found no support for the view that WAPA's power purchases were not part of the Department's procurement system. In the November 22, 1994, memorandum, the Attorney-Advisor stated that no direct support could be found in a review of General Accounting Office decisions for the view of the then Acting Deputy Assistant Secretary for Procurement and Assistance Management that WAPA's power purchases were not part of the Department's procurement system because a "commodity" was being purchased.

However, the Attorney-Advisor stated that the Federal Property and Administrative Services Act (Property Act) may provide WAPA with some flexibility in carrying out its power purchase program. In the November 22, 1994, memorandum, the Attorney-Advisor referred to the "no impairment" provisions of the Property Act. The Attorney-Advisor cited the Property Act at 40 U.S.C. § 474(2) which states that nothing in the Act shall impair or affect any authority of:

"(2) any executive agency with respect to any phase . . . of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments, or foreign aid, relief, or rehabilitation: Provided, That the agency carrying out such program shall, to the maximum extent practicable, consistent with the fulfillment of the purposes of the

program . . . , coordinate its operation with the requirements of this Act and the policies and regulations prescribed pursuant thereto;"

The Attorney-Advisor took the position that 40 U.S.C. § 474(2) may be relevant to WAPA's power purchase program. The Attorney-Advisor stated that it appears that WAPA's power purchase program "contains elements of what may be characterized as a resale program." The Attorney-Advisor also stated that "As such, although 40 U.S.C. § 474(2) is a limited exemption to the Property Act, it may provide WAPA . . . with some flexibility in carrying out its power purchasing program."

The Attorney-Advisor concluded the November 22, 1994, memorandum by suggesting that WAPA prepare a draft legal opinion as a first step in the resolution of this issue. The Attorney-Advisor stated that, in view of the significance and uncertainty of this issue and its potential impact on WAPA and other affected power marketing agencies, WAPA should thoroughly research the issues identified in the November 22, 1994, memorandum. We understand

that WAPA's General Counsel has begun a dialogue with the Office of General Counsel on this issue.

Delegation of Acquisition Authority to WAPA

WAPA's delegation of acquisition authority from the Office of Procurement and Assistance Management does not exclude power purchases from the requirements of the FAR or other applicable laws. In a memorandum dated April 25, 1986, the Director, Office of Procurement and Assistance Management Directorate (currently the Office of Procurement and Assistance Management), delegated acquisition authority to the Administrator, Western Area Power Administration, under the Department of Energy Redefinition Order 0204-98.1. This memorandum delegated specific acquisition authority for WAPA to:

"Approve, enter into (award/execute), administer, modify, close out, terminate, and take such actions as may be necessary and appropriate with respect to any contractual arrangement (including interagency and other funds-out agreement) committing DOE to the obligation and expenditure of public funds: provided, the execution of such actions conforms with applicable laws, regulations, orders, and procedures including those determinations and decisions as required or described in the Department of Energy Acquisition Regulation [Emphasis Added]"

Also, this delegation exempts the purchase of power from the requirement to have the Director's prior approval, or waiver, for acquisitions of \$2,500,000 or more. In our view, it would not be necessary to exempt the purchase of power from the requirement to have the Director's prior approval, or waiver, if the purchase of power by WAPA is not part of the procurement authority, and thus the procurement system, being delegated to WAPA. With regard to this exemption, the delegation memorandum states:

". . . any such action (other than: (1) funding modifications and (2) purchase of power [Emphasis Added] relating to power marketing functions) of \$2,500,000 or more, including the value of all priced options or estimates of unpriced options and any contractor cost share or in-kind contributions shall have the prior approval, or waiver thereof, of the Director or designee, except that in the case of a subcontract consent/approval action this amount shall be \$5,000,000; provided further, that any competitive solicitation intended to result in award of a contract or multiple contracts having a total value of \$2,500,000 or more shall also have the prior approval, or waiver thereof, of the Director or designee."

This delegation also required WAPA to "Designate Competition Advocates" for each installation that has delegated contracting authority "to perform those duties required by the Competition in Contracting Act of 1984, 98 Stat 1175 et. seq. (Public Law 98-369)." However, WAPA's General Counsel has taken the position that the provisions of CICA, while applicable to the acquisition of supplies and services such as construction, do not apply to the power purchase program of WAPA.

Conclusion

We believe that the applicability of Federal contracting requirements, including the requirements for competition, to WAPA's power purchase program needs further review by the Department. Our inspection found no Federal contracting requirements, including requirements for competition, which have been recognized by WAPA or the Department's Office of Procurement and Assistance Management as being applicable to WAPA's power purchase program. In our view, the exemption to the FAR and CICA requirements cited by WAPA in FAR Part 8 may only apply to that specific section of the FAR without providing a broader exemption to include all of the competition and contracting requirements of the FAR. In addition, we believe that a portion of the power purchased by WAPA for resale may meet the definition of an "acquisition" included in the FAR.

We also believe that the provisions of the Property Act at 40 U.S.C. § 474(2) should be fully considered in the Department's review of this issue. An Attorney-Advisor under the Assistant General Counsel for Procurement and Financial Assistance stated that, although 40 U.S.C. § 474(2) is a limited exemption to the Property Act, it may provide WAPA with some flexibility in carrying out its power purchase program. We believe that, if it is determined that 40 U.S.C. § 474(2) is applicable to WAPA's power purchase program, WAPA should comply with 40 U.S.C. § 474(2) by coordinating its operation with the requirements of the Property Act, and the policies and regulations prescribed pursuant thereto, to the maximum extent practicable.

In addition, we believe that in reviewing the applicability of Federal contracting requirements to WAPA's power purchase program,

the Department should consider the applicability of CICA separate from the applicability of the FAR. In our view, a determination on the applicability of CICA to procurements by executive agencies may not be the same as a determination on the applicability of the FAR. As discussed in this section, CICA applies to "an executive agency in conducting a procurement for property or services," where as the FAR applies to "the acquiring by contract with appropriated funds of supplies or services . . . by and for the use of the Federal Government." This may suggest that CICA has an application broader than the use of appropriated funds for supplies or services "by and for the use of the Federal Government."

D. DOE HEADQUARTERS' MANAGEMENT OVERSIGHT OF THE POWER PURCHASE PROGRAMS OF THE POWER MARKETING ADMINISTRATIONS

Our inspection found that DOE Headquarters has no program to periodically review WAPA's power purchase program. The Procurement Management Reviews of the Office of Procurement and Assistance Management have not addressed the power purchase contracting programs of the PMAs because the purchase of power has not been viewed as a procurement under the FAR. In addition, the former Office of Assistant Secretary for Conservation and Renewable Energy, which had responsibility for the management oversight of the PMAs, did not conduct any reviews of WAPA's power purchase contracting program. Oversight management of the PMAs was transferred to the Office of the Deputy Secretary on June 10, 1993.

This section reviews the DOE Headquarters' management oversight of the power purchase programs of the PMAs.

DOE Headquarters' Oversight Responsibilities

Oversight Responsibilities of the Office of Procurement and Assistance Management

Procurement oversight in DOE is the responsibility of the Office of Procurement and Assistance Management. The then Acting Deputy Assistant Secretary for Procurement and Assistance Management said that the power purchase programs of the PMAs, in his opinion, are not part of the DOE procurement system. As such, he said that power purchase contracts are not included in the Procurement Management Reviews performed by the Office of Procurement and Assistance Management. He said that he was not aware of who, if anyone, within DOE provided oversight of power purchase contracts. He said that he did not know who was setting the rules under which power purchase contracts could be awarded. He said that his office was not setting such rules, and that the only other possibility was that (before June 1993 when management oversight of the PMAs was transferred to the Office of the Deputy Secretary) the then Office of Conservation and Renewable Energy provided some type of guidance or oversight to the power purchase programs of the PMAs.

Delegated Oversight Responsibilities

Since the creation of DOE, the oversight responsibility of the PMAs has been defined in Delegation Orders, a Secretary of Energy Notice (SEN), a DOE memorandum, and a DOE Notice. The Delegation Orders have dealt primarily with the authority to develop, approve, and place in effect power and transmission rates. DOE memoranda and the SEN have dealt primarily with administrative oversight of the PMAs.

By Delegation Order 0204-33, December 1978, the Secretary of Energy delegated the Assistant Secretary for Resource Applications (RA), authority to develop, acting by and through the administrators, power and transmission rates for the PMAs, and the authority to confirm, approve, and place in effect these rates. This order also delegated and assigned to FERC the authority to confirm and approve on a final basis, or to disapprove, rates developed by RA.

On February 25, 1981, the Power Marketing Administrations were transferred from the Assistant Secretary for Resource Applications to the Assistant Secretary for Conservation and Renewable Energy. On March 19, 1981, the interim ratemaking authority was also redelegated to the Assistant Secretary for Conservation and Renewable Energy from the Assistant Secretary for Resource Applications by an amendment to Delegation Order 0204-33.

Delegation Order 0204-33 was superseded by Delegation Order 0204-108 effective December 1983, and delegated to the Deputy Secretary of DOE the authority to confirm, approve, and place in effect on an interim basis, power and transmission rates for Alaska, Southeastern, Southwestern, and Western Area Power Administrations. Effective May 30, 1986, Delegation Order 0204D108, was amended and delegated to the Under Secretary of DOE all authority which was previously delegated to the Deputy Secretary of the DOE.

From 1986 to 1991, for administrative oversight purposes, DOE's five PMAs were reporting to different senior DOE officials. BPA and WAPA reported directly to the Deputy Secretary, and the Southwestern Power Administration (SWPA), the Southeastern Power Administration (SEPA), and the Alaska Power Administration (APA) reported to the Assistant Secretary, Conservation and Renewable Energy. As stated in an attachment to a memorandum from the Office of Conservation and Renewable Energy to the Secretary dated March 20, 1991, and titled "Proposed Reporting Relationships for Bonneville and Western Area Power Administrations," the Deputy Secretary (in the summer of 1990) concluded it was no longer desirable to have BPA and WAPA report directly to him. The Deputy Secretary reached this decision because his office was unable to devote sufficient resources to managing these two PMAs.

The Deputy Secretary believed that since SWPA, SEPA and APA reported to the Assistant Secretary, Conservation and Renewable Energy (currently Energy Efficiency and Renewable Energy), consolidation of all PMAs under the Office of Conservation and Renewable Energy would provide more effective oversight of the PMAs. On April 4, 1991, the realignment of BPA and WAPA to report

to the Assistant Secretary, Conservation and Renewable Energy, was approved. SEN-6D-91, dated May 16, 1991, stated that "The Assistant Secretary for Conservation and Renewable Energy (CE-1) is responsible for management oversight of the Bonneville Power Administration (BPA) and the Western Area Power Administration (WAPA)." Under this realignment, the Deputy Secretary was to continue to provide management guidance in resolving significant or politically sensitive PMA issues, but withdrew from day-to-day oversight of BPA and WAPA. This realignment assigned new functions to the Office of Conservation and Renewable Energy, such as:

"Review of Major PMA Issues D D The PMA Administrators and the AS/CE will confer to resolve major PMA-specific or crosscutting PMA issues. On particularly sensitive or contentious issues, the AS/CE, in conjunction with the Administrators, will consult with the Deputy Secretary to determine the appropriate course of action."

However, our inspection found that the Office of Conservation and Renewable Energy did not provide any type of guidance or oversight of the PMA power purchase programs. The former Office of Conservation and Renewable Energy Staff Coordinator for the PMAs said that the Assistant Secretary did not get involved in the day-to-day operations of WAPA. He said that the primary relationship between the Office of Conservation and Renewable Energy and WAPA involved interim approval of utility rates and the WAPA Administrator's annual performance appraisal. He also said that WAPA interfaced with this office in the area of full time equivalencies, environmental issues, and audits, but that the Office of Conservation and Renewable Energy did not make policy for or tell WAPA what to do or how to do it. He said that, to his knowledge, the Office of Conservation and Renewable Energy had not performed any reviews of WAPA's power purchase program.

As a result of DOE Notice 1100.32A, dated June 10, 1993, the management oversight of the PMAs was again redelegated. This notice, under the section titled "Reporting to the Deputy Secretary - Energy Programs," states that "The Alaska, Bonneville, Southeastern, Southwestern, and Western Area Power Administrations will report to the Office of the Deputy Secretary which will provide management oversight."

On June 16, 1994, the Deputy Secretary testified before the Subcommittee on Oversight and Investigations, Committee on Natural Resources, U.S. House of Representatives, regarding the development of new power marketing policies by WAPA. In this testimony, the Deputy Secretary discussed WAPA's Energy Planning and Management Program which sought to promote long-term energy planning and efficient energy use. In the area of power purchases, the Deputy Secretary stated that resources needed to firm up WAPA's hydroelectric commitments will be considered in accordance with existing laws and Integrated Resource Planning (IRP) principles in the future. The Deputy Secretary further stated that Requests for Proposals will be issued to meet long-term resource needs, with solicitations including

conventional supply-side resources as well as competition on an equal basis for cost-effective renewable, energy efficient, and demand-side resources.

Conclusion

DOE Headquarters has no program to periodically review WAPA's power purchase program. The procurement management reviews of the Office of Procurement and Assistance Management do not address the power purchase contracting programs of the PMAs. In addition, the management oversight responsibility vested in the Assistant Secretary for Energy Efficiency and Renewable Energy, formerly the Assistant Secretary for Conservation and Renewable Energy, did not result in any specific program reviews of WAPA's power purchase contracts. We believe that DOE needs to establish a program to periodically review the power purchase programs of the PMAs to assure that PMA internal policies and procedures provide adequate control and accountability over the solicitation, negotiation, award, and documentation of power purchase contracts.

VI. RECOMMENDATIONS

We recommend that the Deputy Assistant Secretary for the Office of Procurement and Assistance Management, in coordination with the Office of General Counsel and the Administrator of WAPA:

1. Develop a formal determination as to the applicability of the requirements of the FAR, DEAR, and CICA to WAPA's power purchase program.

We recommend that the Deputy Assistant Secretary for the Office of Procurement and Assistance Management:

2. Identify and recommend to the Deputy Secretary an appropriate DOE organization responsible for establishing a program to periodically review the power purchase programs of the PMAs to assure that PMA internal policies and procedures provide adequate control and accountability over the solicitation, negotiation, award, and documentation of power purchase contracts.

We recommend that the Administrator, Western Area Power Administration:

3. Coordinate with the Office of Procurement and Assistance Management, and the Office of General Counsel, to develop a formal determination as to the applicability of the requirements of the FAR, DEAR, and CICA to WAPA's power purchase program.
4. Develop and implement policies and procedures for the solicitation, negotiation, award, and documentation of power purchase contracts. These procedures should include the

processes actually used by WAPA when entering into a purchase agreement, such as (i) conducting market searches, (ii) notifying potential suppliers of WAPA's requirements, (iii) screening potential suppliers, (iv) evaluating offers, (v) selecting a supplier, (vi) negotiating with that supplier, (vii) awarding a power purchase contract, and (viii) documenting the solicitation and award processes.

5. If it is determined by the Office of Procurement and Assistance Management, and the Office of General Counsel, that the requirements of the FAR, DEAR, and CICA apply to WAPA's power purchase program, assure that all policies, procedures, and directives are updated to incorporate these requirements.
6. Evaluate the opportunities for increasing the use of formal competition in WAPA's power purchase program based on the current trends in the utility industry and the changes under the Energy Policy Act of 1992, and develop procedures for the use of formal competition in solicitations for short and long term power purchase requirements as appropriate.
7. Develop policies and procedures that require documentation to support the analysis of rates and the determination of rate reasonableness prior to the award of all short and long term power purchase contracts.
8. Determine the appropriate level of review for rates under short and long term power purchase contracts to assure that all relevant rate information is considered and evaluated by the appropriate power marketing staff prior to the award of all short and long term power purchase contracts.
9. Provide training to all power marketing personnel involved in the award of short and long term power purchase contracts which focuses on policies and procedures developed for (i) conducting market searches, (ii) notifying potential suppliers of WAPA's requirements, (iii) screening potential suppliers, (iv) evaluating offers, (v) selecting a supplier, (vi) negotiating with that supplier, (vii) awarding a power purchase contract, and (viii) documenting the solicitation and award processes.

VII. MANAGEMENT COMMENTS

In commenting on an earlier draft, the Director of Procurement, Assistance and Property, Office of Procurement and Assistance Management, concurred with recommendation 1 and said that his office, in conjunction with WAPA and the Office of General Counsel, will develop a formal position as to the applicability of the requirements of the FAR, DEAR, and CICA to WAPA's power purchase program. The Director also concurred with recommendation 2 and stated that the Office of Procurement and Assistance Management will identify and recommend to the Deputy Secretary an appropriate DOE organization responsible for establishing a program to periodically review the power purchase programs of the PMAs.

In comments dated September 22, 1994, the Administrator of WAPA said that WAPA made the decision earlier in the year to use integrated resource planning principles in purchasing power. The Administrator said that, as announced in an August 9, 1994, Federal Register Notice for WAPA's Energy Planning and Management Program, WAPA has made the commitment to issue requests for proposals to meet long term resource needs in the future.

In his September 22, 1994, comments, the Administrator concurred with recommendation numbers one, three, four, six, seven, eight, and nine. The Administrator did not provide a response to recommendation number five, stating that no response was required.

With regard to recommendation numbers one and three, the Administrator provided additional comments, stating that the development of a formal determination as to the applicability of the requirements of the FAR, DEAR, and CICA to WAPA's power purchase program is underway.

With regard to recommendation number four, the Administrator provided additional comments, stating that WAPA is developing "reasonable documentation policies."

The Administrator did not provide any additional comments with regard to recommendations six, seven, eight, or nine.