

LEGISLATIVE AUDIT COMMISSION



Management Audit
The Department of Central Management Services'
2008 Joint Procurements of Bulk Rock Salt

June 2009

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**Management Audit
Department of Central Management Services'
2008 Joint Procurements of Bulk Rock Salt**

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RECOMMENDATIONS - 8

**Implemented – 7
Under Study - 1**

Background

On June 20, 2008, CMS issued its first solicitation for bids for the 2008 joint procurement of bulk rock salt for State agencies and other local governmental units. The bids were opened July 16, 2008. Unlike in previous years, some parts of the State did not receive bids, while other participants experienced significant increases in their bid price. Parts of the State that did not receive bids included local governments, Illinois Department of Transportation locations, and Illinois State Toll Highway Authority locations in Cook, Lake, McHenry, and Boone counties. The Statewide average price for the first solicitation was \$67.63 per ton. However, bid prices ranged from a low of \$46.78 per ton for St. Clair County to \$140.61 per ton for Effingham County.

A second solicitation was issued by CMS on July 25, 2008, and bids were opened on August 12, 2008. Although more locations received bids for salt, the prices averaged \$117.29 per ton and ranged from a low of \$96.18 to a high of \$168.03 per ton. There were also locations in McHenry County and Lake County that still did not receive bids. CMS eventually procured \$8.6 million of rock salt through an emergency purchase for these remaining locations at a price of \$138.52 per ton.

In addition to CMS' procurements, the Illinois Department of Transportation (IDOT) and the Illinois State Toll Highway Authority (ISTHA) each issued emergency purchases. IDOT, through two emergency procurements, purchased an additional \$9.6 million of rock salt at \$138.52 per ton. The Tollway through two more emergency procurements purchased an additional \$2.8 million of rock salt at \$138.52 and \$151.52 per ton.

CMS' 2007 joint procurement of bulk rock salt totaled \$57 million. In all, the 2008 CMS joint procurements and emergency purchases entered into by CMS, IDOT, and ISTHA resulted in nearly \$129 million in contracts with salt vendors or a 126% increase over the previous year. The average price per ton increased from \$41.06 for 2007 to \$67.63 for the first solicitation in 2008 or a 65% increase.

On December 11, 2008, the Legislative Audit Commission adopted Resolution Number 138 directing the Auditor General to conduct a management audit of the Department of

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Central Management Services' joint purchasing procurements of bulk rock salt in 2008. The resolution asks the Auditor General to determine:

- Whether the procurements complied with applicable State laws and rules;
- Whether the procurements were done in a timely manner; and
- Whether the prices paid as a result of the procurement process were significantly higher than those paid by neighboring states or local governments that did not participate in the CMS joint procurement process.

Report Conclusions

Auditors concluded that some actions taken by CMS for the 2008 joint procurement of bulk rock salt were not in accordance with the Illinois Procurement Code and CMS' administrative rules.

- CMS allowed one vendor (Cargill) to **significantly** change the terms and conditions of its bid **after** the bid opening. The price per ton bid by Cargill was significantly lower than those bid by the other vendors. Changing these terms reduced the potential amount of salt the vendor would be required to provide pool participants by approximately **300,000 tons or \$16.5 million**. Other bidders were not afforded the opportunity to change their terms and conditions.
- A public record of the bid opening was not contained in the procurement files for the first solicitation.
- For the second solicitation there was no written determination in the procurement files regarding decisions to allocate salt alternatives.

CMS did not hold vendors to some requirements contained in the terms and conditions of the Invitations for Bid. These included submitting proof of stockpiling and performance bonds.

CMS should consider changes to the procurement process including:

- Issuing the joint procurement Invitation for Bid earlier.
- Changing the basis of award.
- Changing guaranteed percentage requirements.
- Extending the deadlines for stockpiling.
- Holding a bidder's conference.
- Requiring bid bonds and reviewing performance bond requirements.
- Reviewing delivery requirements and times.
- Reviewing the liquidated damages provisions.

CMS also needs to improve its communications with local government participants by providing full disclosure of terms and conditions, providing accurate information in communications and memos, and giving local governments adequate time to make decisions.

RECOMMENDATIONS

- 1. CMS should not make changes to the terms and conditions of an Invitation for Bid after bids are opened.**

Findings: Auditors found that CMS did not comply with some requirements in the Illinois Procurement Code and its administrative rules. These included changing the terms and conditions of the Invitation for Bid after bids were opened for the first solicitation, keeping a record of the bid opening in the procurement files for the first solicitation, and having a written determination of the basis of award for the second solicitation.

Changes to Terms and Conditions After Bid Opening

CMS allowed one vendor (Cargill) to significantly change the terms and conditions of its bid after the bid opening. Other bidders were not afforded the opportunity to change their terms and conditions. When bids for the first solicitation were opened on July 16, 2008, Cargill won the majority of bids for the State totaling approximately 1.3 million tons of salt at the 130% maximum. The price per ton bid by Cargill was significantly lower than those bid by the other vendors. On July 25, 2008, Cargill officials, through an e-mail and letter to CMS officials, expressed concern regarding the tonnage that they were awarded and stated that it may be difficult to succeed unless CMS and Cargill work together to reach a compromise on the final contract.

When auditors contacted Cargill, officials stated that they were concerned that they could not meet the awarded commitment. From CMS e-mails, Cargill's concern was the 130% requirement for the low bid total tonnage as well as the potential for delivery damages. Cargill's July 25, 2008 letter lists the issues of most concern as the January 1st inventory requirement, the 130% maximum for 1 million tons of salt, and late delivery penalty implications. Cargill also made recommendations to CMS that would give it a "greater comfort level as it pertained to the tonnage." These recommendations included changing the maximum tonnage supplied to 1 million tons. Cargill also stated that it would be "willing to supply salt to areas where the State received no-bids," with the understanding that tons designated for no bid areas would be subtracted from the 1 million overall tonnage. Cargill also recommended extending stockpiling dates and wanted the State to waive all late delivery penalties.

CMS and Cargill negotiations on changes to terms and conditions continued throughout the end of July and early August. The Cargill contract containing the new terms and conditions was signed by CMS on August 29, 2008. Exhibit 2-2 shows examples of the changes made to the terms and conditions, which are discussed in the following sections.

Quantities and Guaranteed Purchases Revised

One of the changes CMS made to the terms and conditions of the Cargill contract was revising the maximum amount that could be purchased under the contract. Salt contracts

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are guaranteed purchase contracts that involve a minimum amount that will be purchased but also contain provisions for purchasing additional amounts (Min/Max Contracts). For instance, the CMS 2008 joint procurement of bulk rock salt Invitation for Bid contained a min/max provision of 70/130. This means that the purchaser (State or local government pool participants) agreed to purchase at least 70% of the amount bid but reserved the right to purchase up to 130% of the amount bid.

CMS changed the maximum in the Cargill contract terms to 100%, in effect giving up claim to 30% of the most reasonably priced salt in the State. Cargill was awarded 1,000,919 tons of salt for the first solicitation. Auditors determined that changing these terms reduced the potential amount of salt the vendor would be required to provide pool participants by approximately 300,000 tons or \$16.5 million. Had CMS held Cargill to the original terms of its bid, this salt could have potentially been used by entities that did not receive bids. According to correspondence between Cargill and CMS, Cargill was willing to provide salt to the areas with no bids but wanted the total tonnage for the contract limited to one million tons. CMS neither held Cargill to the original terms of the Invitation for Bid nor was able to utilize Cargill to obtain salt for areas of the State that did not receive bids.

For the 2008 CMS joint procurement of bulk rock salt, Cargill won over 1 million tons at an average price of \$54.99 per ton. Even though Cargill expressed concerns to CMS regarding tonnage and supply, the company continued to bid on and win salt contracts in other states even after bids were opened in Illinois on July 16, 2008.

Ordering and Delivery Dates Revised

CMS changed the ordering and delivery dates in the Invitation for Bid to extend delivery dates for Cargill by approximately six weeks. The Invitation for Bid and the contracts with other vendors required that State agencies and local governmental units could purchase up to 50% of their estimated order requirements prior to October 31, 2008. Cargill's contract terms changed this date to December 15, 2008.

Stockpiling Requirements Revised

CMS also extended stockpiling requirements from the original terms contained in the Invitation for Bid giving Cargill approximately three additional months to meet the 100% requirement. The Invitation for Bid required vendors to have stockpiles of rock salt in Illinois or near its boundaries in sufficient quantities to satisfy 100% of the contractual requirements by December 1, 2008, and January 1, 2009, depending on the location in the State. Cargill's contract terms were changed so that 100% of the amount was not required to be stockpiled until March 1, 2009.

Liquidated Damages

Seasonal ordering guidelines affected the application of delivery timelines and assessment of liquidated damages. Cargill was also given a longer timeline for ordering compared to

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the Invitation for Bid and other bidders. The Invitation for Bid and all contracts, including Cargill's, included ordering guidelines. However, Cargill's contract terms added new provisions for ordering guidelines and because the ordering guidelines were extended, liquidated damages could not be assessed beyond those parameters. A provision was also added to Cargill's contract that allowed CMS to mitigate application of liquidated damages imposed against the vendor, in the event of orders exceeding the maximum percentages.

Other Items

Auditors could not find a signed written decision memo in the procurement files to show why these changes were made for only this vendor. In addition, auditors could not find an agreement signed by both Cargill and CMS containing these same provisions, only e-mails. Although Cargill had signed the bid document that contained the original terms and conditions, only CMS signed the final contract with the final terms and conditions containing the changes.

Auditors asked CMS officials for any written analysis or legal opinion documenting why these changes were necessary and how the changes were in accordance with the Illinois Procurement Code. For the contract signed August 29, 2008, CMS officials provided a legal opinion dated February 25, 2009. The legal opinion stated that "the Invitation for Bids gave clear authority to make a limited award if needed to prevent a potential contract default and that circumstance was present in this situation."

Although the Invitation for Bid did contain provisions for limiting awards, State law and CMS' administrative rules do not allow for changing terms and conditions after bid opening. Giving up claim to 300,000 tons of the lowest priced salt may not have been in the State's best interest. Changing the terms and conditions for only one of the four vendors that won bids and was awarded a contract under the solicitation may have also been prejudicial to the other bidders.

DCMS Response: CMS agrees that changes to terms and conditions of an Invitation for Bids should not be made after bids are opened.

In the instance of the first rock salt bid, reasonable people may differ whether CMS changed the terms and conditions of the Invitation for Bid after bid opening, or instead simply followed a term and condition contained in the Invitation for Bid.

The advertised Invitation for Bid clearly disclosed to all interested parties that we might issue a limited award if needed to prevent a potential contract default; and that is what CMS did.

That advertised language in the Invitation for Bids contained the following award reservation:

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Section J68120--“The State of Illinois reserves the right to limit awards to a bidder when in the opinion of the State it is evident that such awards may put the bidder in a position of high probability of default.”

After attending the bid opening and learning of the scope of their potential awards but before award, Cargill provided CMS with written notice of its concern over their ability to fulfill awards exceeding more than 1,000,000 tons. CMS felt that the documentation supplied by Cargill and the information provided in subsequent conversations with Cargill indicated a high probability of default by Cargill at some point during the winter season. Had that occurred, CMS could not have reasonably expected to replace the Cargill salt (and certainly not at a comparable price) due to nationwide industry supply issues. Salt was known to be in limited supply (as evidenced by the unprecedented “no bid” locations the bid revealed), the price offer presented by Cargill was seen to be at or below market price, and it was determined to be in the best interests of the State and public at large to seek to preserve as much of the potential Cargill award as possible.

CMS was well aware that potential damages in the distant future from Cargill for any default occurring during the winter season would never compensate for a potential extreme public safety problem in the making. Cargill indicated to CMS that it could meet 100% of the requirement for every location on which it had bid, but not 130%. Rather than let Cargill withdraw or engage in potentially protracted adversarial actions, either one of which would have had severe financial and public safety consequences to Illinois communities, CMS made a restricted award of 100% at each of those locations to Cargill. This was not the optimum result but it did maximize the amount of salt from that source, was within the terms of the Invitation for Bid and preserved the favorable price—a good result in a time of national shortage.

It is correct that the reduction in required quantity from 130% to 100% was made only for Cargill. Cargill was the only vendor that raised and documented a position of a high probability of default and was thus susceptible to a revision pursuant to Section J68120 of the Invitation for Bids. As supply issues were known to be a nationwide concern, adjusting other vendor commitments downward from 130% to 100% was not deemed necessary nor in the best interests of the State nor allowable under the terms of the Invitation for Bids.

To the best of CMS' knowledge, salt is the only commodity that has the award reservation described above. Acting upon that provision was a case of first impression for CMS and it acted in good faith in order to protect the public interest in safety and fiscal terms. However, given the rarity of the provision and the potential for abuse, CMS does not consider such a clause to be a best practice for future procurements.

Auditor Comment: CMS' response indicates that Cargill submitted documentation indicating a high probability of default if it were awarded all of the areas in which it was the low bidder. However, the documentation provided to the auditors contained only general assertions that were not supported by specific details, such as financial resources, available salt supply, etc. From this documentation, we do not agree that CMS could have concluded that there was a high probability that Cargill would default if it were held to its

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bid. Furthermore, as discussed in the audit report, Cargill continued to bid in other states after the CMS bid opening.

Finally, even if Cargill had submitted documentation demonstrating a high probability of default if it were held to its bid, we do not believe that Section J68120 permitted CMS to change the terms and conditions of the solicitation in violation of the Procurement Code.

Updated Response: Implemented. CMS maintains that language within the solicitation allowed for a limitation of awards in accordance with protecting the best interests of the State. CMS also feels that the unprecedented supply issues the State faced during the 2008-2009 season warranted action to protect the interests and citizens of the State.

In acknowledging the opinion of the Auditor General and in reacting to the finding, CMS took multiple actions relating to the solicitation for the 2009-2010 season.

1. CMS strengthened the language within the solicitation for the 2009-2010 season to ensure all vendors fully understood their responsibilities when offering a bid.
2. CMS drew attention to this strengthened language in a pre-bid meeting, emphatically stating that vendors needed to contemplate the flexibility the contract would allow and their responsibility under any contract derived as a result of the competitive bid process to ensure vendors fully understood their responsibilities when offering a bid.

No issue with any similarity was raised during the 2009-2010 competitive bid process.

2. CMS should ensure that a written public record of all bid openings, as is required by the Illinois Procurement Code, is kept in the procurement files.

Findings: A public record of the bid opening, as is required by the Illinois Procurement Code and CMS' administrative rules was not contained in the procurement files for the first solicitation. The bid opening record is required to show the name of each bidder, the bid price, and the name of the witness present at the opening.

According to CMS officials, bids are date stamped and a log is kept of the bid opening record. Because this document did not exist, auditors could not determine if all bids were received prior to opening and whether the opening was witnessed by a State employee as is required.

The procurement files for the second solicitation contained a record of the bid opening including the date each bid was received, the date and time of the opening, and who attended.

DCMS Response: CMS agrees with the recommendation. CMS does maintain a written public record of all bid openings in the bid file. A record was completed for the 11:00 a.m. opening on July 16, 2008. Unfortunately, the bid file for this procurement has been

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reviewed and copied numerous times by personnel from several different agencies, and the record of this opening is now unable to be found. This is recognized to be a CMS responsibility, and corrective instructions have been given to minimize the risk of any possible re-occurrence.

Updated Response: Implemented. CMS does maintain a written record of all bid openings. The record mentioned in the finding was unfortunately misplaced during the numerous file reviews that occurred relative to this procurement. No re-occurrence has occurred.

- 3. CMS should document all decisions in writing regarding awarding of bids, including allocations to pool participants. This written documentation should be contained in the procurement files.**

Findings: In order to encourage bids, the second solicitation allowed potential vendors to offer an approved salt alternative. One of the vendor's alternatives was accepted by CMS; however, the bid was a lump sum of 95,000 tons which required CMS to determine the allocation to pool participants. According to CMS officials, pool participants were first surveyed to determine if the alternative was acceptable. Because there was more demand than supply for the offer, CMS had to allocate the product. The salt alternative was allocated so that IDOT locations received 100% of their requested amounts while local participants received approximately 27% of their requested amounts. The procurement files for the second solicitation did not contain a written determination regarding the basis of the award, including how this allocation was determined, the methodology used, and who made these decisions.

DCMS Response: CMS agrees with the recommendation that decisions be documented, and does so within the Remedy system as a matter of standard process. In regard to the allocation issue, we agree that the documentation of the decision-making process was not complete. Decisions of such magnitude deserve extra review and documentation of the decision (for example, use of a separate decision memo may be appropriate), and such documentation must be in the file.

Updated Response: Implemented. No allocation issues arose in the 2009-2010 bid process, as all location requirements were met through the first bid offering. In addition to the documentation within the Remedy system that is standard practice, CMS has also elected to document significant decisions in a decision memorandum format when deemed appropriate. This did occur prior to the issuance of awards following the 2009-2010 competitive bid process.

- 4. CMS should ensure that vendors comply with the terms and conditions included in the Invitation for Bid and should monitor contracts to ensure that vendors are meeting all requirements and submitting required reports in a timely manner.**

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Findings: Auditors reviewed the procurements to determine if CMS and the vendors complied with the terms and conditions of the Invitation for Bid. There were terms and conditions that CMS did not hold the vendor to performing. CMS did not receive evidence of stockpiling as was required. Vendor sales reports also were not filed in a timely manner.

DCMS Response: CMS agrees with the recommendation that vendors must comply with terms and conditions in the Invitation for Bid, and that CMS should monitor contracts to ensure compliance.

CMS agrees that the "Evidence of Stockpiling" and the "Six Month Report of Sales" were not received within the timelines defined within the Invitation for Bid.

Language related to both of these requirements was revised in the 2009-2010 Invitation for Bid to better define CMS requirements and to improve the utility these reports afford the State.

Updated Response: Implemented. CMS changed language related to both of these requirements was revised in the 2009-2010 Invitation for Bid to better define CMS requirements.

5. CMS should secure a performance bond for all awards as is required by the Invitation for Bids.

Findings: Like the first solicitation, the terms and conditions of the second solicitation contained a provision that the successful bidder was required to furnish a performance bond for 20% of the estimated dollar amount of the contract executed by a surety company licensed to do business in Illinois. For the first solicitation, vendors submitted \$13,368,165 in performance bonds to CMS as was required to ensure performance of the contracts.

For the second solicitation, however, procurement files did not contain proof that bonds were submitted by any of the successful bidders. The second solicitation resulted in total contracts of \$16,586,206, none of which were secured in accordance with the terms of the Invitation for Bid. According to CMS officials, the bond submissions that were part of the contracting process for the first bid were mistakenly thought to satisfy this requirement. Two of the three awarded vendors through the rebid had submitted bonds as part of the initial bid. However, because the second solicitation's Invitation for Bid included requirements for posting performance bonds after the award, and because this was a separate solicitation with separate contracts, each vendor should have posted a bond with CMS as part of the award.

DCMS Response: CMS agrees that a performance bond for all awards should be secured, and will ensure full compliance going forward.

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As stated, as part of the first solicitation vendors submitted bonds appropriately for all salt tonnage contracted as a result of the first solicitation. This represented 87% of the total salt contracted through all procurement efforts for the 2008-2009 season.

For the second solicitation, representing 9% of the total salt contracted, CMS did not secure bonds for the contracted salt. This was the result of an oversight by CMS.

Updated Response: Implemented. CMS secured appropriate performance bonds for all awards resulting from the 2009-2010 competitive solicitation.

6. CMS should compile appropriate electronic data sufficient to conduct analysis of bids and work with local communities to make the most cost effective decisions in jointly procuring bulk rock salt.

Findings: According to the CMS Procurement Division overview, mission statement, and goals and objectives, the Joint Purchasing Program allows units of local government to participate in State negotiated contracts, and thereby take advantage of State contract pricing which generally results in a substantial procurement savings to local governments.

CMS could have saved two local governments in McHenry County over \$137,000 by rejecting bids received for the second solicitation and procuring salt for these entities through the emergency purchase. The award notice of emergency procurement was published September 4, 2008, the same day the second solicitation's final award was published. The emergency purchase contract offered salt at a price of \$138.52 per ton.

One local government (Deerfield) rejected its bid received from the second solicitation of \$143.82 for 4,000 tons of enhanced salt and procured 2,000 tons of salt through the emergency purchase at \$138.52. By doing this Deerfield saved \$10,600. Examples of other communities that could have realized a savings by rejecting their bid received under the second solicitation and received better pricing through the emergency purchase are listed below.

- The city of Woodstock paid \$148.94 per ton for 3,200 tons of enhanced salt. If CMS would have used the emergency procurement to purchase salt for Woodstock, the city would have paid \$443,264 as opposed to \$476,608, a savings of \$33,344.
- The McHenry County Highway Department paid \$148.94 per ton for 10,000 tons of enhanced salt. If CMS would have used the emergency procurement to purchase this salt, the McHenry County Highway Department would have paid \$1,385,200 as opposed to \$1,489,400, a savings of \$104,200.

When auditors first met with CMS, electronic files with all award information related to the 2008 joint procurement solicitations were requested. Although CMS attempted to provide auditors with this information, the files and data provided were incomplete and inaccurate. The bid tabulations provided by CMS were simply printouts which showed the lowest bidder circled using a marker. Although the winning bidder is input into CMS' IBIDS

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computer system, the information does not include such items as the number of bidders, county, type of entity (State or local government), or the total dollar amount for each line. Auditors were forced to compile an electronic database for each of the three solicitations in order to conduct data analysis by using information posted on the IllinoisBID system and in the bid tabulation.

The emergency procurement conducted by CMS was only for Lake County and McHenry County. Using the databases compiled by auditors, auditors were able to identify the two local governments discussed above in McHenry County that paid more per ton than the emergency purchase price.

DCMS Response: CMS agrees that having procurement data in an electronic format is an effective means to analyze bid data and contributes to effective decision making.

CMS uses a legacy mainframe system - the Illinois Governmental Purchasing System (IGPS). This system is more than 20 years old, and is limited in its flexibility and in the ability to electronically analyze the data it contains.

An updated system would greatly enhance CMS' ability to analyze data and would more easily fulfill audit needs should they arise. To date there are no funds available for a system upgrade.

Updated Response: Under Study. The IGPS system continues to be utilized by the Equipment & Commodities Portfolio as a procurement tool. No funds have as yet been identified for a system upgrade.

7. CMS should consider making changes to its joint procurement process for bulk rock salt in order to encourage competition and bidding and to protect the interest of participants.

Findings: CMS has used the same general cycle over the past three years to conduct its joint procurement of bulk rock salt. The date of first offer for the Invitation to Bid was almost identical for the 2006 and 2007 procurements as it was for 2008. For the 2008 joint procurement, CMS began collecting information regarding entities that wanted to participate and the amount that each entity wanted procured on February 14, 2008. These requests were originally due April 30, 2008. However, CMS extended the time for local governments to respond to May 31, 2008. Not extending this deadline may have allowed them to issue the procurement at an earlier date in 2008. Although CMS could have issued the solicitation earlier, it is unclear what impact that would have had on pricing. Several of the states in the Midwest sent their Invitations for Bid for rock salt out prior to Illinois (Iowa, Missouri, and Indiana).

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COMPARISON OF CMS JOINT PROCUREMENTS OF BULK ROCK SALT			
Calendar Years 2006 - 2008			
	2006	2007	2008
Date First Offered	June 22, 2006	June 21, 2007	June 20, 2008
Date Bids Due	July 19, 2006	July 17, 2007	July 16, 2008
Notice of Award	August 18, 2006	September 12, 2007	August 21, 2008
Number of Bidders	6	5	4
Total Tons of Salt	1.39 million tons	1.34 million tons	1.35 million tons
Total Contract \$	\$52,963,802	\$57,018,000	\$91,227,637
Average Price/Ton	\$39.79	\$41.06	\$67.63
Source: Solicitation #219461, #221774, #222600, and summaries of contract information.			

The Attorney General's testimony to the Legislative Audit Commission alluded to the fact that the CMS joint procurement occurred relatively late in the season. This put Illinois on a schedule that made it more likely supplies would not be available and even then only at higher prices. However, a relatively late bid may not always be bad. In a year when demand is down, bidding later in the year can yield lower prices as the bidding season progresses. However, in 2008, demand was considerably higher, so conducting the process in July meant that Illinois saw higher prices than some neighboring states.

Auditors reviewed the terms and conditions of the 2008 CMS joint procurement to identify potential changes that could be made. They also surveyed other states about their practices for procuring salt. Auditors also spoke with vendors to get their perspective as to whether certain requirements of the CMS joint procurement process have an effect on bidding certain locations and the bid price. On March 23, 2009, auditors met with CMS officials to discuss audit issues identified during fieldwork and possible changes to the procurement process. Below is a list of suggested changes that CMS should consider.

- **Timing** – For the 2008 joint procurement, Illinois was one of the last states in the Midwest to issue an Invitation for Bid. By that time, much of the rock salt supply had been committed to other states. CMS should issue the Invitation for Bid earlier and also monitor when other states are issuing their invitations for bid in order to avoid going out for bid after the supply has been committed to others.
- **Basis of Award** – For the first 2008 solicitation, the basis of award was on a county-wide basis (except Cook and DuPage counties). This meant that the vendor must bid on all locations within that county in order to receive the award for that county. Because of limited supply, requesting this large of an amount on a county-wide basis may have had a negative effect on bidding. CMS changed the basis of award to location by location for the second solicitation. CMS should review all counties and consider changing the basis of award for counties requesting large

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amounts to a location by location basis. CMS should also consider whether combining smaller counties would also be beneficial.

- **Guaranteed Percentages** – The 2008 joint procurement of rock salt Invitation for Bid contained a 70/130 min/max requirement for both the first and second solicitations. This meant that the purchaser (State or local governments) agreed to purchase at least 70% of the amount bid by a certain date but reserved the right to purchase up to 130% of the amount bid. One of the changes that CMS made to the Cargill contract after bid opening was to reduce the maximum amount to 100%. The emergency purchase CMS entered into had no minimum or maximum but simply required 100% purchase of the amount. Vendors that were contacted said that the minimum and maximum requirements are an issue that is taken into account during bidding. CMS should consider whether the minimum and maximum requirements are a deterrent to bidding and should consider the feasibility of changing these to a smaller range to lessen the risks to vendors.
- **Stockpiling Requirements** – Another provision that CMS changed in the Cargill contract and the second solicitation Invitation for Bid was the requirement for stockpiling. CMS should review the deadlines and percentage requirements for stockpiling to determine if extending these deadlines or changing the percentage requirements would encourage bidding or better pricing.
- **Bidder's Conference** – Although CMS' administrative rules allow for a Pre-Bid Conference, none was held as part of the 2008 joint procurement of bulk rock salt. Because CMS is considering making several changes to the procurement's terms and conditions, CMS may want to consider holding a bidder's conference to speak with all potential vendors in order to identify any potential problems prior to bidding or to review significant changes from the prior year's Invitation for Bid.
- **Bid and Performance Bonds** – As a result of the first solicitation, one vendor was initially awarded over one million tons of salt. According to CMS e-mails, it was clear that there was concern that CMS needed to "keep" the vendor. Although usually used for projects such as road construction, bid bonds help guarantee that a potential bidder will proceed with the contract. Other states (Missouri and Iowa) included provisions for bid bonds in their salt procurements in 2008. IDOT also uses bid bonds for its construction contracts. CMS should consider requiring bid bonds in order to ensure that vendors honor their bids. CMS should also review the 20% performance bond requirement to ensure that it is sufficient to protect the State's interest.
- **Delivery Requirements** – CMS' Invitations for Bid for the first and second solicitation included provisions for delivering orders within seven calendar days. Vendors spoken to by auditors said that this can affect pricing and during a weather event it can be difficult to meet the demand in the required timeframes. One of the changes CMS made for the emergency purchase was to change the order and delivery requirement to working days instead of calendar days. Vendors said that

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delivery days (within 7 days from ordering) make it difficult during major weather events. Requirements for delivery times (from 7:30 am to 3:30 pm Monday through Friday) may also make delivery more difficult for vendors. CMS should review ordering and delivery requirements to determine if changes are needed. CMS should also review the flexibility of delivery times for possible changes.

- **Liquidated Damages** – CMS' Invitations for Bid for the first and second solicitation included provisions for assessing liquidated damages if vendors do not deliver orders within seven calendar days. The Invitations for Bid also contained liquidated damages provisions for moisture content and out-of-specifications. Several of the other states surveyed also include provisions for liquidated damages in their salt contracts. CMS should review the liquidated damages provisions for delivery and out-of-specifications to determine if these are appropriate and set levels sufficient to protect the State and pool participants without discouraging competition.
- **Multi-Year Contracts** – CMS' contracts with vendors are single year contracts which include provisions for renewal upon mutual agreement. Some other state and local governments use multiple year contracts or renewal provisions which resulted in lower prices for 2008. The state of Wisconsin was able to renew contracts for 66 of its 72 counties. The city of Chicago signed two-year contracts with vendors which also resulted in much lower pricing (between \$34.81-\$41.27 per ton). CMS should consider entering into multiple year contracts or more aggressive renewal provisions that allow the State to control the renewal process.
- **Fuel Adjustment Clauses** – The price of diesel fuel in June 2008 when CMS posted the first Invitation for Bid was more than \$4.00 a gallon. Vendors talked to said that the price of fuel definitely had an impact on their bid price because vendors would have to account for any future price increases. Including a fuel adjustment clause would allow the risk for future increase in fuel to be shared between the purchaser and the vendor. Other states surveyed included fuel adjustment clauses in their salt contracts. CMS should consider adding a fuel adjustment clause to the Invitation for Bid for bulk rock salt. This may also include provisions for escalation (price increase) and de-escalation (price decrease) in the price of fuel.
- **Establishing Delivery Points with Optional Pick-up for Local Governmental Units or Bidding Transportation Separately** – According to discussions with vendors, one of the reasons that some locations did not receive bids for rock salt was because of stockpile locations and the logistics involved in trucking and delivery. According to one vendor, transportation may account for as much as 50% of the cost per ton. Pick-up instead of delivery was not an option in the 2008 joint procurements. Another state surveyed (Iowa) issued a bid with established delivery points. CMS should consider provisions for optional pick-up by participants or establishing general delivery points or requiring additional stockpile locations of vendors.

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DCMS Response: CMS agrees that several unprecedented circumstances surfaced during the 2008-2009 bulk road salt procurement that required that changes be considered.

CMS sought input from vendors, various other governmental entities who purchase salt, local governmental entities, the Office of the Attorney General, and the Office of the Auditor General. Upon consideration of input received, CMS made significant changes to the 2009-2010 Invitation for Bid.

Relative to the suggested changes made within this report:

Timing –The 2009-2010 season's bid was due roughly 8 weeks earlier.

Basis of Award – In the Invitation for Bid for the 2009-2010 season, opportunities for awards for both higher aggregation of multiple counties, group awards on the basis of minimum commitment percentages, and de-aggregation to individual location awards are all allowed for under the "Method of Award". Our belief is that this will allow for highly competitive landscape, and for more vendor participation from a variety of sources. The changes in structure of the bid were derived considering participant responses during the survey and requisition process.

Guaranteed Percentages – The State's Invitation for Bid for 2009-2010 allows for both 80% and 100% minimum commitment percentages at the participant's choice. Maximum commitment percentages are at 120%. Last year, the minimum percentage in the initial solicitation was 70%, and the maximum percentage was 130%. While limiting a degree of flexibility, these tighter ranges of flexibility appear to have encouraged vendor participation and competitive, less risk-based pricing.

Stockpiling Requirements – CMS reviewed stockpiling requirements and more clearly defined "Upper Mississippi" and "all other" stockpile requirements within the 2009-2010 Invitation for Bid. Moving these dates later into the season was deemed potentially problematic for the participants, as this past season Illinois waterways froze earlier than normal (making river transport difficult). Additionally, an abnormally high number of snow/ice events occurred throughout December and January.

Bidder's Conference – CMS did hold a Pre-Bid Conference on May 7, 2009 for the 2009-2010 Invitation for Bid. During this conference, the many changes to the bid were highlighted for the participating vendors.

Bid and Performance Bonds – CMS did consider both expanding the performance bond requirement, and whether a bid bond should be required.

In interests of seeking to drive a higher level of competition and encourage more vendor participation, it was decided to not require a bid bond nor to change the performance bond requirement at this time.

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Delivery Requirements – In the 2009-2010 Invitation for Bid delivery requirements were redefined to be measured in work days (previously calendar days), with the State holiday schedule being utilized. Changes to hours of delivery cannot be practically dictated due to the high number (several hundred) local participants involved in the State's procurement efforts for bulk road salt. Not all participants are able or willing to expand windows of delivery availability.

Liquidated Damages – CMS reviewed liquidated damages requirements and revised them to reflect work days rather than calendar days. Changes were not made to increase damage assessment values, believing that doing so would negatively impact vendor participation and likely increase offered pricing.

Multi-Year Contracts – The 2009-2010 Invitation for Bid contains an option for a 1-year renewal at the exclusive option of the State of Illinois.

Fuel Adjustment Clauses -- The 2009-2010 Invitation for Bid does not include a fuel adjustment clause. In considering this potential change and in reviewing other states' clauses in this area, it was determined that the extremely high number of entities participating in the road salt procurements conducted by CMS make a location specific adjustment difficult to administer with resource constraints. Nearly 700 governmental entities are participating in the 2009-2010 procurement efforts of the State of Illinois for bulk road salt, with many more delivery locations represented. As each delivery point is fulfilled from a vendor stockpile location, the impact of fuel by delivery point is difficult to measure. This potentially poses an obstacle in evaluation of vendor offers as well as different vendors would have differing pricing components related to distance and fuel utilization. CMS is open to a discussion of alternate ideas of how this might be implemented and administered for future bid efforts.

Establishing Delivery Points with Optional Pick-up for Local Governmental Units or Bidding Transportation Separately - CMS considered avenues for local governmental units to pick-up supply from general delivery points in formulating the 2009-2010 Invitation for Bid. Discussions were held with representatives within both Lake and McHenry Counties in this regard. CMS decided to not pursue the alternative of general delivery points at this time – as the logistics of managing independent stockpiles are not presently in place and would require a degree of local cooperation outside of the State's involvement and control.

Bidding transportation separately was also considered and discussed, and in the interests of getting the 2009-2010 Invitation for Bid out, the decision was made to not include that within that effort. This area is continuing to be considered for future bid efforts.

Summary –

CMS made significant changes to the 2009-2010 Invitation for Bid, and others continue to be considered for future bid efforts. The nuances of the salt market do change from season to season, requiring a dynamic approach each year.

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While the 2009-2010 bid process is underway, and specific comment relating to an open procurement is not appropriate, it appears that these changes have had a significant and favorable impact on the 2009-2010 bid effort.

Updated Response: Implemented. Changes described above were implemented. The competitive bid process for 2009-2010 yielded contracts for all quantities for which bids were requested at a weighted average price of \$60.35 per ton. The State continues to explore avenues to improve the bid process for this critical commodity.

8. CMS should:

- **Provide full detailed terms and conditions of the invitation for bid when surveying locals for participation;**
- **Confirm participant requests and non-participation with local governments;**
- **Provide accurate information in memos and not change terms after notification; and**
- **Give local government participants adequate time to make informed decisions.**

Findings: CMS needs to improve its communications with local government participants by providing full disclosure of terms and conditions, providing accurate information in communications and memos, and giving local governments adequate time to make decisions.

CMS did not provide the full terms and conditions of the Invitation for Bid to participants. Only the general or major terms were provided to participants for the 2008 joint procurement. According to information received from one local government participant, joint procurement participants do not see the complete bid specifications of the contract. In order to make an informed decision, potential participants needed to see the complete and detailed terms that will be included in the Invitation for Bid and contracts they will be using.

There were instances of CMS providing terms to local governmental participants in memos and then changing these terms. For instance,

- The February 14, 2008 survey for participation stated that the vendor would agree to furnish not less than 130% of the amount requested. For the majority of participants, this was changed to 100% when CMS revised the terms and conditions of Cargill's contract. There were also other changes to ordering guidelines and delivery dates that affect local participants. These changes were ultimately communicated to joint purchasing participants in counties won by Cargill in a CMS memo dated September 8, 2008.
- On August 20, 2008, CMS notified joint participants in a memo that an alternative offer had been received that would meet approximately 48% of their needs. Local government participants which accepted the alternative were notified in a

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September 2, 2008 memo from CMS of the tonnage of solar salt they had committed to procure for the participant. An analysis shows that only approximately 27% of the initial requests were supplied.

CMS gave local government participants very short timeframes to make decisions related to commitments for the procurement. In some instances local participants were given only a day to reply regarding whether they would commit to a certain price and what if any additional tonnage would be needed. Although CMS may have been operating under short timeframes with salt vendors, asking joint participants to agree to increases of 50% or more in a 24 hour period does not allow adequate time for notification of city councils or county boards.

Some local governments contacted by auditors were not aware they could participate (city of Carthage) while others claimed that they thought they were participating (village of Camp Point) or that CMS had lost or misplaced their requests to participate (city of Charleston).

DCMS Response: CMS agrees with the recommendation, with limited exception and with the following clarifications.

Provide full detailed terms and conditions of the Invitation for Bid when surveying locals for participation

We have historically provided summary information related to terms and conditions as part of the survey process. The information returned to us as a result of the survey process is instrumental and is utilized in defining the detailed terms to be included within the Invitation for Bid. As one example, quantities desired and geographic delivery locations need to be fully understood to define any possible aggregation of delivery points for purposes of defining "Method of Award" within the Invitation for Bid.

CMS greatly expanded the information provided to participants through the requisitioning process for the 2009-2010 season, providing retrospective information on the 2008-2009 process, an explanation of the procurement process including changes from 2008-2009, anticipated terms for the 2009-2010 season, and an explanation of the opt-in nature of the process as a whole.

Confirm participant requests and non-participation with local governments

We agree that this is a desirable practice, and we are continuing to explore avenues to accomplish it on a consistent basis.

Provide accurate information in memos and not change terms after notification

We agree that providing accurate and firm information provides the best relationships.

Give local government participants adequate time to make informed decisions.

CMS did impose shortened timelines on local entities as part of the second solicitation and the emergency procurement. In these cases, vendors had imposed timelines for acceptance upon CMS, which, if not met, would have allowed the offer to be withdrawn.

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Updated Response: Implemented. CMS did revisit and made many changes to the previous formats for written communication to the participating Joint Purchasing communities that are part of the competitive bid process. Efforts were made through these communications to better educate joint purchasing users, and to even solicit their input. While this seems to have been effective during the solicitation phase of the 2009-2010 bid process, efforts continue to seek improvement with this complex and time sensitive process.