

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Information Technology Procurement Actions

Report No. OIG-AMR-51-06-02

June 2006

INSPECTOR GENERAL



NATIONAL LABOR RELATIONS BOARD

WASHINGTON, DC 20570

June 29, 2006

I hereby submit a review of the *Information Technology Procurement Actions*, Report No. OIG-AMR-51-06-02. This audit was conducted to evaluate the acquisition process for information technology (IT) related services at the National Labor Relations Board

A total of \$13,000,000, including a \$2.4 million year-end supplement made possible by savings generated in other accounts, was apportioned for Fiscal Year (FY) 2005 IT procurements. Of this amount, \$8,443,933 (65 percent) was obligated for professional services. A majority of that amount was allocated to the five contracts in our sample: BearingPoint, LLC (BearingPoint), Computer & Hi-tech Management, Inc. (CHM), Electronic Data Systems Corporation (EDS), and Optimus Corporation (Optimus) for the periods ending September 28, 2005, and September 28, 2006.

The Agency placed sole source orders for three of the five contracts in our review: BearingPoint, CHM, and EDS. Two contracts, BearingPoint and CHM, were not appropriately sole sourced. The Agency did not properly document the justification for the BearingPoint contract.

The Agency improperly entered into two time-and-materials contracts with Optimus to provide information technology and end-user support. Information was available to estimate the extent and duration of the work and anticipate costs for these services. Time-and-materials contracts are not to be used when such information is available.

The vendors for four contracts were selected from either a General Services Administration Federal Supply Schedule (GSA Schedule) or a Government-Wide Acquisition Contract. These contract vehicles were not used correctly for two of the contracts. For the BearingPoint contract, the Agency utilized the wrong GSA Schedule. We estimate that the Agency could have saved approximately \$41,000 if the correct GSA Schedule with lower labor rates was utilized. For

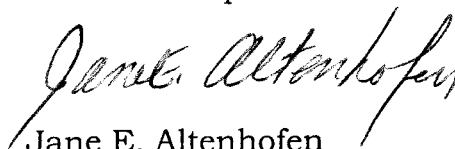
the Optimus contract for the period September 29, 2005 through September 28, 2006, the contractor provided labor categories did not agree with the labor categories requested in the statement of work. We estimate that the Agency could put over \$500,000 to better use for the base period and four option years if the correct labor categories were utilized.

The Agency did not perform several contract administration functions in accordance with the Federal Acquisition Regulation. The Agency was not entering data into the Federal Procurement Data System (FPDS) in a timely manner. Also, none of the contract options exercised in FY 2005 contained evidence that the contracting officer determined that funds were available; whether the requirement covered by the option fulfills an existing Government need; and whether the exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered.

Issues relating to obligating and monitoring funds were identified in three contracts. The Agency obligated \$758,875 in FY 2005 funds for a contract with EDS for services occurring entirely in FY 2006. The Agency did not deobligate \$40,000 identified as not being needed for the CHM contract. Also, the Agency paid \$6,721 in travel related costs to Optimus that were either unsupported or were not allowed by regulation.

An exit conference was held on April 18, 2006, with representatives of the Office of the Chief Information Officer and Division of Administration. A draft report was sent to the Procurement and Facilities Branch Chief on April 28, 2006 for review and comment. The response generally agreed with most findings and recommendations. The Procurement Warrant Manual was updated in response to a recommendation in our draft report. We deleted this recommendation from the final report, although we think the clarified policy negates control benefits of having sole source thresholds.

The response disagreed with three recommendations: to recompete the IT support services contract to obtain a fixed-price contract, to enter data into FPDS simultaneously with making an award, and to correct recording of the EDS contract obligation so that \$758,875 is recorded against the FY 2006 appropriation. These items are addressed in the applicable sections of this report. Other comments were integrated as appropriate. The response is presented in its entirety as an appendix to this report.



Jane E. Altenhofen
Inspector General

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Memorandum from the Procurement and Facilities Branch Chief,
Response to Draft IG Report, "Information Technology Procurement
Actions," dated June 1, 2006

BACKGROUND

The National Labor Relations Board (NLRB or Agency) administers the principal labor relations law of the United States, the National Labor Relations Act (NLRA) of 1935, as amended. The NLRA is generally applied to all enterprises engaged in interstate commerce, including the United States Postal Service, but excluding other governmental entities as well as the railroad and the airline industries. The Fiscal Year (FY) 2006 appropriation authorizes 1,840 full-time equivalents that are located at Headquarters, 51 field offices throughout the country, and 3 satellite offices for administrative law judges. NLRB received an appropriation of \$252,268,000 for FY 2006, less an across-the-board rescission of 1 percent, leaving a net spending ceiling of \$249,745,320.

A total of \$13,000,000, including a \$2.4 million year-end supplement made possible by savings generated in other accounts, was apportioned for FY 2005 information technology (IT) procurements. Of this amount, \$8,443,933 (65 percent) was obligated for professional services. A majority of that amount was allocated to the five contracts in our sample: BearingPoint, LLC (BearingPoint), Computer & Hi-tech Management, Inc. (CHM), Electronic Data Systems Corporation (EDS), and Optimus Corporation (Optimus) for the periods ending September 28, 2005, and September 28, 2006.

Currently, the Procurement and Facilities Branch (PFB), Contract and Procurement Section, which is in the Division of Administration (DOA), is responsible for the purchase of all furniture, equipment, supplies, and services for the Agency. The Director of Administration is the Agency's Senior Procurement Executive. The Office of the Chief Information Officer (OCIO) had its own contracting officer from July 2001 through February 2005. Contracting officers have the authority to enter into and administer contracts.

Contracting officer's technical representatives (COTR) are delegated the authority to monitor the technical effort being performed under the contract. The Deputy Executive Secretary was the COTR for the BearingPoint Contract. The former Judicial Case Management Section Chief and the Information Systems Chief were the COTRs for the CHM contract. Employees in OCIO are COTRs for the other three contracts in our sample.

Time-and-materials or labor-hour contracts were utilized for all of the contracts in our sample. Time-and-materials contracts provide for acquiring supplies or services on the basis of direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, profit, and materials. A labor-hour contract is a variation of the time-and-materials contract, differing only in that materials are not supplied by the contractor.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this audit was to evaluate the acquisition process for IT related services.

We reviewed applicable sections of Federal statutes and regulations, Office of Management and Budget Circulars, and Comptroller General Decisions to determine the laws and regulations affecting the procurement of IT. We reviewed Agency policies and procedures including Administrative Policies and Procedures Manual, Chapter CON-1, Contract and Procurement, dated August 12, 2004, and the NLRB Procurement Warrant Manual, effective on November 30, 2001, and revised on January 10, 2002. We interviewed employees in OCIO and PFB to identify the standard operating procedures for the procurement of IT services.

We reviewed reports prepared by OCIO and Finance Branch (Finance) and interviewed members of these branches to determine the universe of IT acquisitions and spending related to IT procurement actions.

We selected a sample of five IT procurement acquisitions from FY 2005 for review. These five service contracts accounted for 93 percent of the total amount obligated for IT professional services. We interviewed members of the Office of the Chairman, Office of Executive Secretary, OCIO, Division of Operations-Management, DOA, PFB, Finance, and Budget Branch and reviewed applicable documents to determine whether acquisition planning, contract administration, and contract oversight were conducted in compliance with laws and regulations.

We reviewed Internal Revenue Bulletin 2005-22 and Department of the Treasury Internal Revenue Service (IRS) Form 8596, Information Return for Federal Contracts, and reviewed contracts entered in the Federal Procurement Data System (FPDS) to determine whether contracts were entered in accordance with IRS deadlines.

We interviewed OCIO and PFB staff, and Optimus contractor employees to evaluate travel expenses submitted by Optimus in connection with field office computer deployments.

This audit was performed in accordance with generally accepted government auditing standards during the period October 2005 through April 2006. We conducted this audit at NLRB Headquarters in Washington, DC.

CONTRACT DESCRIPTIONS

| Contractor | Service Description | Period of Performance | FY 2005 Obligations | Award Type |
|------------------------------------|--|--|----------------------------|-------------------|
| BearingPoint | Technical support and commercial off the shelf (COTS) application customization services | 3/1/2005 through 2/28/2006 | \$1,134,560 | Sole source |
| CHM | New systems development, maintenance of existing systems and databases, conversion of legacy systems, and data downloads | 4/1/2001 through 3/31/2002 with options through 9/30/2015 | \$980,035 | Sole source |
| EDS | On-going maintenance and development support for the Case Activity Tracking System (CATS) | 10/1/2001 through 9/30/2002 with options through 9/30/2015 | \$2,077,006 | Sole source |
| U.S. Small Business Administration | Contractor support for information technology help desk services, end-user support, and network operational support from Optimus | 1/1/2000 through 12/31/2000 with options through 9/28/2005 | \$2,135,648 | Competed |
| Optimus | Information technology and end-user support | 9/29/2005 through 9/28/2006 with options through 9/28/2010 | \$1,484,202 | Competed |

FINDINGS

The Agency awarded two sole source contracts under circumstances that did not meet criteria in the Federal Acquisition Regulation (FAR) and the justification for another contract was not properly documented. The Agency utilized time-and-materials contracts in situations that did not meet FAR requirements. Two contracts utilized General Services Administration (GSA) contracting vehicles incorrectly. Also, sole source contracts were awarded by contracting officers in excess of their sole source authority.

The Agency did not perform several contract administration functions in accordance with the FAR. The Agency is not entering data into FPDS in a timely manner. Also, none of the contract options exercised in FY 2005 contained evidence that any required factors were considered.

Issues relating to obligating and monitoring funds were identified in three contracts. The Agency obligated \$758,875 in FY 2005 funds for a contract to provide services occurring entirely in FY 2006. The Agency lost the use of \$40,000 because funds that were identified as not being needed for the contract were not deobligated. Also, the Agency paid \$6,721 in travel related costs that were either unsupported or were not allowed by the Federal Travel Regulation (FTR).

The PFB Chief noted that the draft report did not address the OCIO having its own contracting officer. During a meeting with the Director of Administration, the Counsel to the Inspector General stated the OIG position that dividing a function, such as procurement, among various parts of the Agency is generally inappropriate. Nevertheless, the Counsel stated numerous times that placing a contracting officer within OCIO would not violate a law or regulation.

ACQUISITION PLANNING

Competition

The FAR requires, with certain limited exceptions, that contracting officers promote and provide for full and open competition in soliciting offers and awarding Government contracts.

From February 25, 2000 through July 18, 2004, the FAR required that orders placed against a Multiple Award Schedule (MAS) must follow specific procedures to be considered using full and open competition. Specifically, before placing an order, the Agency must consider reasonably available information about the supply or service offered under MAS contracts by using

the GSA Advantage! on-line shopping service, or by reviewing the catalogs or pricelists of at least three schedule contractors.

Beginning on July 19, 2004, the FAR stated that an ordering activity must justify its action when restricting consideration of schedule contractors.

Circumstances that may justify restriction include:

1. Only one source is capable of responding due to the unique or specialized nature of the work;
2. The new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order is placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order must not have been previously issued under sole source or limited source procedures;
3. The item is peculiar to one manufacturer. A brand name item, whether available on one or more schedule contracts, is an item peculiar to one manufacturer; or
4. An urgent and compelling need exists, and following the ordering procedures would result in unacceptable delays.

The Agency placed sole source orders for three of the five contracts in our review: BearingPoint, CHM, and EDS. Two contracts, BearingPoint and CHM, were not appropriately sole sourced. PFB reportedly reviewed all contracts involving exercising an option to identify the origin of the sole source and is amending those contracts, where necessary, to reflect sole source as a continuation of the base year contract.

BearingPoint

The Agency contracted with BearingPoint in FY 2002 to conduct an Enterprise Architecture study. The Agency then placed sole source contracts with BearingPoint in FY 2004 and FY 2005. The sole source justification for each was BearingPoint's "institutional knowledge and information on the Agency's business process" obtained in a prior contract that provided it with the ability to continue to assist the Agency.

The sole source awards to BearingPoint do not meet the regulatory justifications. Whatever knowledge BearingPoint acquired as part of the Enterprise Architecture study, creating a Board case management system does not logically follow. Additionally, BearingPoint produced a detailed report as part of its Enterprise Architecture study with the knowledge and information it

possessed, and the report was available to other companies had the process been competitive.

Also noteworthy is that the prior Enterprise Architecture work by BearingPoint was not of a sufficient detail to avoid additional work in determining the Board's processes as part of the FY 2004 contract. Had BearingPoint been awarded the FY 2004 contract through a proper competitive process, the FY 2005 sole source contract would have been proper as a logical follow-on to the original contract.

CHM

The Agency contracted with CHM in FY 1999 to develop systems related to the Agency's payroll and personnel system. In FY 2001, the Agency awarded CHM a sole source contract to provide development and maintenance services for unspecified Agency systems. The contract contained a base year and four option years, and was later extended with options to run through September 30, 2015. This contract was used to develop systems for the Judicial Case Management Systems Section, Division of Judges, Case Records Unit, Regional Advice Branch, Injunction Litigation Branch, and the Office of Appeals.

The contract files had no evidence that GSA Advantage!, three catalogs, or pricelists of schedule contractors were reviewed, as was required. Our recent search of GSA's Web site identified 3,980 potential contractors available under the appropriate schedule.

Management responded that inasmuch as a sole source acquisition is, by definition, not competed, but rather justified, and since the report does not question the justification, there is no basis for concluding that the Agency did not comply with competition procedures. The issue this part of the report is addressing is not whether there was a justification, but that regulations in effect when this contract was awarded did not provide authority to restrict consideration of schedule contractors to fewer than required.

Justification

Beginning on July 19, 2004, agencies were required to prepare justifications when limiting competition for orders placed under GSA Federal Supply Schedules (GSA Schedule). The justification must contain certain information including a description of the product or service being purchased, the estimated value, and determinations by the ordering activity contracting officer that the order represents the best value and that the justification is complete and accurate to the best of the contracting officer's knowledge and belief.

The BearingPoint contract contained an incomplete justification. The justification was missing the estimated value, identification of the statutory authority permitting other than full and open competition, the contracting officer's determination that the anticipated cost to the Government will be fair and reasonable, and that the information was complete and accurate. PFB commented that the Agency does not go through the full-blown justification. PFB has since reportedly been working on procedures to make it easier for program managers to provide more complete justifications.

Contract Type

Time-and-materials and labor-hour contracts may be used only when it is not possible at the time of placing the contract to estimate the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. These types of contracts may be used only after the contracting officer executes a determination and findings that no other contract type is suitable and must include a ceiling price that the contractor exceeds at its own risk. The contracting officer is required to document the contract file to justify the reasons for and amount of any subsequent change in the ceiling price.

The Agency entered into two time-and-materials contracts even though information was available to estimate the extent and duration of the work and anticipate costs. The first contract was with the U.S. Small Business Administration for Optimus to provide information technology and end-user support for the period October 1, 2004 through September 28, 2005. The second contract was directly with Optimus to perform similar services for the period September 29, 2005 through September 28, 2006. Also, a determination and findings was not completed for contracts with BearingPoint, CHM, EDS, or the Optimus contract for the period October 1, 2004 through September 28, 2005. All of these contracts, except for the BearingPoint contract, contained a ceiling price.

The determination and findings for the Optimus contract for the period September 29, 2005 through September 28, 2006, stated that a time-and-materials contract is necessary because it is not possible to estimate accurately the extent of the work or to anticipate costs with any reasonable degree of confidence. The determination and findings also stated that the use of any other contract type would hamper the Chief Information Officer's (CIO) efforts and flexibility for procuring the required supplies or services in support of NLRB. According to the determination and findings, the potential for change in technology and applications and the Agency's mix of applications makes it impossible to predict the extent of work and costs required under the contract.

As part of the prior contract, Optimus had been providing IT support services and providing monthly reports detailing the number of service calls placed, the location of the calls, the duration of the calls, and the resources used during the month. These reports provide sufficient information to accurately estimate the work required under the contract. Under these circumstances, the determination and findings prepared by the contracting officer that was based on OCIO's information lacks credibility and is without merit.

The CIO acknowledged that the Agency could accurately estimate the core service needed and effectively monitor contract performance. Although the CIO conceded that the FAR prefers firm fixed-price contracts, he stated that he has not been provided any good business reason for not using a time-and-materials contract. We note that an inherent risk of contractor's employees wasting time exists as demonstrated by three Office of Inspector General (OIG) investigations involving such allegations during the past year.

Management's Comment

PFB had strong reservations about using a contract vehicle that is generally viewed as not advantageous to the Government, but agreed to use a time-and-materials contract in an effort to be responsive to the new CIO's desire to make program changes. PFB does not want to recompetete the contract because a bona fide contract is currently in place but agreed to negotiate with Optimus to use labor rates for the labor categories identified in the SOW.

OIG Response

A time-and-materials contract when required services can be clearly defined is not the correct type of contract. We affirm that the corrective action should be implemented to use the appropriate contract type. The Optimus contract will expire in September 2006 and the Agency is free not to exercise the option to extend it.

GSA Schedule/Government-Wide Acquisition Contract

Four of the contracts in our sample utilized either a GSA Schedule or a Government-Wide Acquisition Contract (GWAC). Two of the contracts did not utilize those contract vehicles correctly. For the BearingPoint contract, the Agency utilized the wrong GSA Schedule. For the Optimus contract for the period September 29, 2005 through September 28, 2006, the contractor provided labor categories that did not agree with labor categories requested in the statement of work (SOW).

BearingPoint

Several GSA contracting vehicles are available to agencies when contracting for services. One option is the GSA Mission Oriented Business Integrated Services (MOBIS) schedule. BearingPoint's MOBIS schedule covers consulting, facilitation, surveying, and training services. This schedule does not cover COTS customization services. COTS customization services are covered under GSA Schedule 70 which is an authorized IT schedule pricelist for general purpose commercial information technology equipment, software and services. The Agency awarded a contract to BearingPoint utilizing the MOBIS schedule, but should have used GSA Schedule 70 to perform COTS customization services. The hourly rates for the MOBIS schedule are higher than for GSA Schedule 70. We estimate that the Agency could have saved approximately \$41,000 if the correct GSA Schedule was utilized. PFB stated that ensuring that the correct GSA Schedule is used requires coordination with the COTR and the vendor.

Optimus

The labor categories in the contract awarded to Optimus for IT and end-user support between September 29, 2005 and September 28, 2006 did not match labor categories requested in the Agency's SOW. Contract files contained no evidence that these rates were reviewed or questioned at the time of award. The COTR acknowledged that the labor categories in the SOW did not match the categories in the contract awarded to Optimus.

We estimate that the Agency could put over \$500,000 to better use for the base period and four option years if the correct GWAC labor categories were utilized. PFB stated that they have started a review of labor categories.

CONTRACT ADMINISTRATION

Sole Source Authority

The NLRB Procurement Warrant Manual, effective January 10, 2002, granted sole source authority for awards of \$500,000 and above to the Director of Administration, who is the Agency's Senior Procurement Executive. For the PFB Chief, the sole source authority was up to \$500,000, and the Contracts and Procurement Section Chief was provided sole source authority for awards up to \$100,000.

The PFB Chief awarded BearingPoint a sole source contract in excess of the contracting officer's sole source authority. The total contract award was

\$1,138,360. This consisted of an original award of \$60,000 in FY 2005, followed by 5 amendments, all of which were below \$500,000, adding \$1,074,560 in FY 2005 and another \$3,800 in FY 2006. The PFB Chief stated that the intent of the NLRB Procurement Warrant Manual was not for the limitations to apply to the cumulative total for a contract. Rather, these limitations were intended to be applied to individual contract actions.

The Contracts and Procurement Section Chief also exceeded her authority by awarding BearingPoint a sole source contract for \$505,000 in FY 2004. The PFB Chief acknowledged that the Section Chief exceeded her authority.

Our draft report recommended that the PFB Chief clarify the policy on sole source authorization levels. In response, the Agency updated the NLRB Procurement Warrant Manual, effective May 31, 2006. The updated manual states that sole source authority limits are for individual procurements. The Agency is within its authority to set this policy, but the control benefits from setting a limit are negated by applying it to individual procurement actions instead of the total contract value.

Federal Procurement Data System

FPDS is the central repository of statistical information on Federal contracting that contains detailed information on contract actions of more than \$25,000. The FAR requires that agencies enter applicable contract data into FPDS. The Director of FPDS stated that data is to be submitted in real-time. The Agency stated that they also use FPDS to meet quarterly IRS reporting requirements for contracts in excess of \$25,000. Reporting to the IRS is required by the end of the month following the end of the quarter.

The Agency is not entering data in FPDS in a timely manner. As of January 30, 2006, contract data for awards to BearingPoint, CHM, and EDS for FY 2005 was not entered into FPDS. FPDS included only \$162,647 of the \$1,976,761 Optimus contract for the period October 1, 2004 through September 28, 2005. PFB stated that only one person is responsible for entering data in FPDS and it is impossible to do real-time entering. As of April 25, 2006, all contracts in our sample were entered into FPDS.

Management's Comments

The Agency does not have the software module that would allow for "real time" data entry and does not plan to purchase it because upgrades are planned to the Agency's accounting and procurement systems for FY 2008. These upgrades will more easily interface with "real time" software. Actions are planned to have FPDS data entered within 4 weeks of the transaction.

OIG Response

The alternative actions planned are sufficient and we modified our recommendation accordingly.

Evaluation of Options

The contracting officer may exercise options only after determining that funds are available; the requirement covered by the option fulfills an existing Government need; and the exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered. In addition, the FAR requires that before exercising an option, the contracting officer shall make a written determination for the contract file that exercising the option is in accordance with the terms of the option.

None of the contract options exercised in FY 2005 (CHM, EDS, and the Optimus contract for the period October 1, 2004 through September 28, 2005) contained evidence that any of the required factors were considered. Also, none of these contract files contained the required written determination. PFB stated that usually the only document required is the Requisition for Furniture, Equipment, Supplies, or Services. This document, however, is completed by the requesting office, not the contracting officer. In addition, it does not include information that the requirement covered by the option fulfills an existing Government need and the exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered.

Contract File

Agency regulations require that employees cooperate fully with any audit or investigation conducted by the OIG. This regulation states that such cooperation shall include, among other things, responding to requests for information and affording access to Agency records and/or any other Agency materials in an employee's possession.

PFB did not provide all Optimus contract documents in a timely manner. Information regarding the missing documents was brought to the attention of PFB on January 26, 2006. PFB stated that they would forward the amendments or modifications that they found to the OIG. PFB was contacted two additional times about the documents. At the exit conference on April 18, 2006, PFB stated that these documents were available and offered to provide them by the close of business that day. The documents were provided to the OIG on April 20, 2006.

Contract Oversight

EDS Funding

The FY 2006 EDS contract for maintenance and support of CATS from October 1, 2005 through September 30, 2006, was funded with FY 2005 appropriations. These services were obtained from EDS by the Agency exercising option year 4 of the 2001 EDS contract. The date of the order for services is September 30, 2005. The amount allocated to the contract from FY 2005 funds was \$758,875. The CIO's requisition request for these services has a required delivery date of September 30, 2005. Although the Agency and EDS made modifications to the option year 4 contract terms, the dates of the performance period were not modified. The CIO appears to have intended that services under the FY 2006 EDS contract cross fiscal years thus allowing for use of FY 2005 funding.

Under the bona fide needs rule, an appropriation that is limited in time may be obligated only to meet a legitimate need of the time period for which Congress provided in the appropriation. For NLRB, Congress limits the appropriation to a single fiscal year. Because all services provided by EDS under the FY 2006 contract option are for maintenance and support in FY 2006, the funding should not be charged to the Agency's FY 2005 appropriation. Any needs for CATS maintenance that arose in FY 2005 would have been met by EDS' prior contractual obligation and not under the FY 2006 contract option. Despite the CIO's intent, the factual circumstances that could allow for cross fiscal year funding were not present.

Agency managers are at risk of an Anti-Deficiency Act violation if action is not taken to correct the improper obligation of the FY 2005 funds. The Anti-Deficiency Act prohibits an officer or employee of the United States Government from making or authorizing an expenditure or obligation that exceeds the amount available in an appropriation. If the Agency does not properly record its obligations against the correct appropriation, its managers cannot reasonably know the amount of remaining funds available for expenditures.

Agency managers have suggested that a possible remedy of this situation would be to amend the performance periods so that the FY 2005 option year terminates on September 29, 2005, and the FY 2006 contract option begins on September 30, 2005. The managers believed that the FAR allows for the modification of the FY 2005 and FY 2006 contract performance periods and that they can obtain EDS' agreement for the modification. PFB subscribed to services from Acquisition Solutions, Inc. in March 2006 for \$12,500 and then requested an opinion on this issue. The opinion supported PFB's position.

We believe that the Agency cannot modify an expired contract. The FAR states that the term "contract" means "a mutually binding legal relationship obligating the seller to furnish the supplies or services . . . and the buyer to pay for them." The FAR does allow for bilateral modifications of contracts to reflect agreements of the parties modifying the terms of the contract. Once the FY 2005 EDS contract option for maintenance and support of CATS expired, the obligation of EDS to furnish services under that option ceased to exist. Because the obligation to furnish the services under the FY 2005 EDS contract option no longer exists, it is not possible for the parties to reach a legal agreement to modify an expired obligation of EDS to furnish services in FY 2005 and the FAR's provisions for allowing contract modifications are no longer applicable.

Management's Comments

No precedent has been cited that definitively indicates that the errors made cannot be corrected. Accordingly, PFB believes that switching the funding for the contract from FY 2005 to FY 2006 is unwarranted and is not in the best interest of the Agency or the Government.

OIG Response

We disagree with the opinion obtained by PFB from Acquisition Solutions, Inc. We believe our analysis is consistent with an opinion issued by the Comptroller General. We formally submitted the question to GAO for a Comptroller General Decision on June 27, 2006.

Deobligation

Since NLRB operates under a single-year appropriation, so that the maximum funds are available for use to accomplish the Agency's mission, a periodic review is needed to determine whether obligated funds are still needed for the identified purpose. If not needed, the funds can be deobligated and used to satisfy other Agency needs.

The Agency lost the use of \$40,000 because funds that were identified as not being needed were not deobligated. This occurred even though OCIO developed an estimate of the funds needed and requested that PFB deobligate the funds.

OCIO contacted CHM on September 7, 2005 to request information regarding unbilled amounts so that they could develop an estimate of the funding needed for the remainder of FY 2005. CHM provided the total amount of the August 2005 invoice and an estimate of the amounts needed for September 2005. OCIO used this information to determine that \$40,000 could be deobligated.

These estimates were very accurate. The invoice received by the Agency for August was for the exact amount provided by CHM and the September estimate was \$1,726 higher than the invoice received. Therefore, the \$40,000 deobligation request was a conservative estimate.

OCIO submitted a request to deobligate \$40,000 from the CHM contract on September 15, 2005. PFB did not process the deobligation request because they were waiting for invoices to be paid. Around the same time, PFB was authorized to deobligate funds from other IT contracts, only to find later that those contracts did not have sufficient unobligated balances to cover invoices that arrived later. PFB claims that under these circumstances, their reluctance to deobligate funds from a particular contract was not only understandable, but prudent.

Waiting for a final invoice to be liquidated before deobligating any funds would make reviewing obligated amounts for contracts ending close to the year-end pointless because excess amounts would not be available for new obligations. Also, prudent action for a situation in which the validity of an estimate is questioned would include evaluating the basis for estimates and working with program officials to resolve the question.

Travel

The Agency issued a task order to Optimus for upgrading and deploying workstations. This effort required Optimus employees to travel to field offices. The task order provided for travel costs to be reimbursed in accordance with the FTR.

The FTR require that receipts be provided for lodging and either a receipt for any authorized expenses incurred costing over \$75, or a reason acceptable to the agency explaining why a traveler is unable to provide the necessary receipt. Travelers must use coach-class accommodations, except in limited circumstances. Taxis may be used for local travel when the Agency authorizes the use of a taxi for the following:

1. Between places of business at an official or temporary duty location (TDY) station;
2. Between a place of lodging and a place of business at a TDY duty location; and
3. To obtain meals at the nearest available place where the nature and location of the work at a TDY are such that meals cannot be obtained there.

The Agency paid \$6,721 in travel related costs to Optimus that were either unsupported or were not allowed by FTR. This represents 12 percent of the travel charges. These charges include a 17 percent charge by the contractor for various administrative fees charged on the travel costs. PFB stated that as long as the individual had receipts for the expense it was approved for payment. Some of the questioned costs include:

- \$2,433 for airline tickets and lodging without proper receipts.
- \$1,268 for a first class ticket with no justification.
- \$1,250 in inappropriate taxi charges.
- \$896 for incorrect or inappropriate per diem amounts and improper mileage reimbursements.
- \$874 for administrative fees related to inappropriate travel charges.

PFB reportedly contacted Optimus to obtain reimbursement for the travel costs in question.

RECOMMENDATIONS

We recommend that the PFB Chief:

1. Implement stricter internal controls, such as checklists or additional supervisory review, to ensure that sole source awards and time-and-materials contracts are properly justified and executed.
2. Recompete the IT support services contract to obtain a fixed-price contract. If the contract is not recompeted, negotiate with Optimus to use labor rates for labor categories identified in the SOW.
3. Implement procedures to enter data into FPDS in a timely manner.
4. Institute procedures to consider and document required factors before awarding contract options.
5. Correct the recording of the EDS contract obligation so that the \$758,875 is recorded against the FY 2006 appropriation.

6. Coordinate with COTRs and Finance to develop procedures to review contractor travel claims.
7. Obtain reimbursements for unsupported or unallowed travel costs.

APPENDIX

UNITED STATES GOVERNMENT
National Labor Relations Board
Division of Administration
Memorandum



TO: Jane Altenhofen
Inspector General

FROM: Angela Crawford, Chief
Procurement and Facilities Branch

A handwritten signature in black ink, appearing to read "Angela Crawford", written over the printed name in the "FROM" field.

DATE: June 1, 2006

SUBJECT: Response to Draft IG Report, "Information Technology Procurement Activities"

This responds to your draft audit report of April 28, 2006, subject as above. We welcome the opportunity to address the findings and recommendations in the report and the opportunity to provide background and context to same. Throughout the response, the Procurement and Facilities Branch will be referred to as "PFB" or "Procurement". The Information Technology Office will be referred to as "OCIO" or "IT", and the head of the Office as the "CIO" or "Acting CIO". The CIO's Contracting Officer's Technical Representative will be referred to as the "COTR". The Office of the Inspector General will be referred to as the "IG".

TRANSMITTAL MEMORANDUM

We note that the IG's discussion document, which was a precursor to the draft report to which these comments are directed, was addressed to Richard Westfield, CIO, and to the undersigned, as Chief, Procurement and Facilities Branch. Mr. Westfield and the undersigned, and our respective staffs were also invited to the exit conference where the results of the audit were discussed. The draft audit report, however, is addressed solely to the undersigned. In view of the fact that OCIO personnel were involved or responsible, in whole or part, for some of the actions addressed herein, it would have been appropriate to maintain both original addressees, as well as to make recommendations regarding the appropriate responsibilities of OCIO personnel, including COTRs.

COVER LETTER

With regard to the referenced \$13 million in "budgetary resources" provided for non-personnel IT costs for FY 2005, \$2.4 million represents the year-end supplementation of the IT budget, made possible by savings generated in the

Agency's non-IT accounts. This allowed for the funding of certain IT purchases in FY 2005 that otherwise would have been paid for out of FY 2006 funds.

BACKGROUND SECTION

The report notes that the OCIO had its own contracting officer from July 2001 to February 2005. On March 29, as part of the audit, IG personnel advised the undersigned and the Director of Administration that such an arrangement was inappropriate and the contract officer should have been in PFB. However, the report does not address this issue.

CONTRACT DESCRIPTIONS

It should be noted that the contractor secured through the Small Business Administration (SBA) was Optimus Corp.

FINDINGS

ACQUISITION PLANNING/Competition

We agree with the stated principles of full and open competition and the description of the circumstances that must be present to justify a restricted (sole source) competition. In view of the fact that a successful procurement requires the collaboration of the program office, which defines its needs, and the procurement office, which acquires the needed goods or services, the IG's emphasis on those principles should help PFB in the future to secure the necessary information from program managers in order to better adhere to those principles.

ACQUISITION PLANNING/Bearing Point

We note that there is no finding that the original Bearing Point contract, awarded in FY 2002, was not appropriately competed. We also agree that the FY 2004 and 2005 sole source contracts for Bearing Point have a questionable basis. We are pleased that the IG has emphasized the importance of an adequate sole source justification if full and open competition is not used. This will aid PFB in securing such information from program offices that wish to use sole source vendors, but are sometimes reluctant to provide the necessary information to justify same.

This particular acquisition transpired during a time of transition in the OCIO and in PFB. OCIO had 4 CIOs or Acting CIOs within the space of 17 months between August 2003 and December 2004. (Louis Adams, Les Heltzer (Acting), Dave Parker (Acting), and Rich Westfield). PFB lost its long-serving Chief of the Procurement Section, Paula Roy, in December 2004, and the position was not filled until September 2005. The two sole source contracts in question took place when there were Acting CIO's. They also occurred during a time when there was

a contracting officer in the OCIO, which resulted in a split procurement function and fractured contracting actions rather than a unified function where information could be more centrally maintained, knowledge about specific contract actions more easily shared, and contract developments more readily tracked.

ACQUISITION PLANNING/CHM

The original CHM contract was awarded in 1999 through SBA's 8(a) program, pursuant to which three companies were evaluated before the award was given to CHM. Thereafter, in 2001, CHM was awarded a sole source contract for continued work on Agency systems. A sole source justification was provided by IT in support of the award. Inasmuch as a sole source acquisition is, by definition, not *competed*, but rather *justified*, and since the IG does not question the justification, there is no basis for concluding that the Agency did not comply with competition procedures.

ACQUISITION PLANNING/Justification

We agree that PFB should be provided with more complete justifications for sole source awards by the program managers, and PFB has been working on procedures to make it easier for program managers to provide such justification and to assure that it is provided.

ACQUISITION PLANNING/Contract Type

The choice of contract vehicle for the Optimus contract was discussed at length with the CIO, who very strongly believed that a "time and materials" contract was the best contract vehicle, based on his experience at another agency. He also has stated that he has saved significant resources by using that vehicle. While expressing strong reservations about a contract vehicle that is generally viewed as not advantageous to the government when the required services can be defined clearly, PFB nevertheless agreed to use a "time and materials" contract in an effort to be responsive to the new CIO's desire to make program changes and his belief that a "time and materials" contract would facilitate that process. Accordingly, PFB prepared the requested contract and the documentation to support it, when it was not provided by the CIO.

CONTRACT ADMINISTRATION/Federal Procurement Data System

The Agency does not enter data into the FPDS system in "real time" because it does not have the software module that would allow "real time" data entry. The Agency currently does not have the funds to purchase this very expensive software, which we estimate to cost approximately \$200,000. Moreover, inasmuch as the Agency will be moving to an upgraded version of its accounting and procurement systems (Momentum) in FY 2008, with which the "real time" software interfaces more easily than with the current version of Momentum, it would not be cost-effective to purchase such software at this time.

In the interim, PFB has utilized the services of employees in the Finance Branch to help it enter data into the FPDS system and the data is now being entered in a timelier manner, although not entered in “real time”. While the entry of data into the government-wide FPDS system is a requirement for transactions over \$2,500, the transactions entered into by *all* of the small agencies combined represents less than 1% of the total data reported. It is for this reason that the Small Agency Council has been pressing OMB and GSA to exempt small agencies from the mandatory FPDS reporting requirements and the attendant costs of this requirement, given the limited number of entries involved relative to the rest of government.

Nevertheless, inasmuch as it is still a government-wide requirement, PFB, working with Finance, will ensure that the data will be entered within four weeks of the transaction and all deadlines for the use of the data by external entities will continue to be met.

CONTRACT ADMINISTRATION/Contract File

It is true that some of the Optimus contract documents were not provided until several weeks after the IG’s request for them. The documents in question were not in the possession of the PFB staff, but had to be retrieved from the OCIO because they dated back to a time when there was a contract officer in the OCIO and not all contract documents were centrally maintained as they would have been with a unified procurement function.

CONTRACT OVERSIGHT/EDS Funding

Management’s intent was to enter into a contract that crossed fiscal years, as evidenced by the inquiry to Agency counsel regarding the structuring of the contract in this fashion, the request to OMB to reprogram FY 2005 Category A funds into Category B, the inquiry to counsel with procurement expertise at another agency, and the e-mail traffic between Agency personnel involved in the transaction. Also, the Form 12 completed by the OCIO and forwarded to PFB contained a September 30, 2005, delivery date, further supporting the intent to bridge fiscal years. Unfortunately, the labor rates cited in the body of the Form 12, which normally track the period of performance, had a start date of October 1, instead of September 30, and it was the former date that was inadvertently used by the contract staff.

It is clear from the deliberations leading to the 1994 Federal Acquisition Streamlining Act (FASA) that FASA was meant to relieve some of the burdensome requirements that were unique to federal government procurement. In passing FASA, Congress gave agencies more flexibility in contracting by eliminating some of the funding restrictions and problems caused by the “bona fide need” rule. The National Performance Review (“reinventing government” procurement initiative), as well as GAO specifically assessed the difficulties that

the “bona fide need” rule was causing agencies and recommended changes, which were subsequently adopted in the legislation. These changes in the legislation allow for the “bridging” of fiscal years that was done in the instant matter, which would not have been permitted in these circumstances prior to 1994. Accordingly, management’s intended actions were not only fully in tune with the flexibilities that Congress wanted agencies to have, but it is precisely what Congress, GAO, NPR, and the federal procurement community intended when the statutory changes were promoted and adopted. Given that management’s *intended* actions were within the letter of the law and the *actual* actions were within the spirit of the law, it would seem to elevate form over substance to insist that a mistake must not be corrected, when it is clear that all actions taken in this matter have been in the utmost good faith, transparent, well-intentioned, and the correction of which is lacking in any harm to either party. In this latter regard, EDS has indicated its willingness to adjust the period of performance to reflect the September 30 start date.

In view of the fact that: the mistake was not a cardinal error; EDS is willing to accept a modification to reflect the intended period of performance; procurement experts whom we have consulted have advised that the mistake can be easily corrected and that it is not uncommon for this to occur in the federal procurement community; and that no precedent has been cited that definitively indicates that such an error cannot be corrected, we believe that switching the funding for the EDS contract from FY 2005 to FY 2006 is unwarranted and is not in the best interest of the Agency or the Government. Reference FAR 1.102(d):...”In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that strategy, practice, policy or procedure is a permissible exercise of authority.”

CONTRACT OVERSIGHT/De-obligation

The Finance Branch routinely and carefully examines Agency accounts to ascertain whether funds can be de-obligated and used for other purposes, such as to cover unanticipated costs in other areas. The ability to recover the maximum amount possible from these accounts depends on the diligence of the program manager responsible for the account (normally the COTR for expenditures on contracts) carefully monitoring invoices and spending, reconciling the budget for the particular project, responding to inquiries from Finance, Budget or PFB in this regard, and, finally, providing accurate information regarding what can appropriately be de-obligated.

In this case, the COTR indicated that \$40,000 could be de-obligated from the CHM contract, which turned out to be an accurate prediction of unneeded funds. However, it is also true that around the same time, PFB was authorized to de-obligate funds from other IT contracts, only to find later that those contracts did

not have sufficient unobligated balances to cover invoices that arrived later, requiring funds to be shifted from other IT contracts to pay these invoices.

In determining whether funds can be de-obligated, especially at the end of the fiscal year, Finance and PFB have to consider a number of factors, including their historical knowledge of the de-obligation process and the reliability of past information from the program offices. Under these circumstances, the reluctance of PFB to de-obligate funds from a particular contract was not only understandable, but under the circumstances, prudent.

In general, Finance, Budget and Procurement offices will follow a conservative, fiscally prudent path so as to best protect an agency by taking all steps necessary to cover all legal financial obligations, and to preclude Anti-deficiency violations. However, despite this conservative approach, it is important to note that the NLRB, through the efforts of the above branch chiefs, particularly the Finance Officer, operates quite effectively, efficiently, and within the bounds of appropriated funding, with a reserve that, over the years, has consistently been less than ½ of 1 percent, a margin that is far less than the 1 to 3 percent reserves held by other agencies. In short, maximum use is made of every dollar appropriated, to an extent unsurpassed by the rest of the federal government. Accordingly, examining a single transaction out of context does not present a realistic picture of how effectively funds are tracked, recovered, and put to better use because of the actions of the Finance Officer. In fact, as noted above, the IT budget has been the primary beneficiary of this diligence.

RECOMMENDATIONS

- 1. Implement stricter internal controls, such as checklists or additional supervisory review, to ensure that sole source awards and time and materials contracts are properly justified and executed.**

We agree with this recommendation. PFB has already reviewed all contracts that involved exercising an option period in order to identify the origin of the “sole source” and is amending those contracts, where necessary, to reflect “sole source” as a continuation of the base year contracts. PFB will also carry forward a copy of the “sole source” justification from the initial contract award to the successor files when option periods have been exercised. Unless the sole source justification includes all of the option years, a new sole source justification must be submitted every year by the COTR. PFB will annotate all future purchase orders to indicate the type of contract that is being awarded and will ensure that contracts designated as sole source are within PFB’s delegated authority prior to signature.

PFB has already instituted a procedure where a *Determination and Findings* (D&F) document is required for contracts that are other than firm-fixed price contracts. It will develop a written policy requiring that D&Fs be prepared by the

program manager and approved by the contract officer for any non firm-fixed price contract. A sample format has already been developed and utilized.

2. Re-compete the IT support services contract to obtain a fixed-price contract. If the contract is not re-competed, negotiate with Optimus to use labor rates for labor categories identified in the SOW.

We disagree with the recommendation to re-compete the Optimus contract to obtain a fixed-price contract. There is a bona fide contract currently in place based upon labor rates. However, PFB will work with the COTR to review the cost proposal submitted by Optimus and compare it against the Schedule of Rates contained in the SOW to determine if there may be potential cost savings there.

3. Clarify policy on sole source authorization levels.

We agree with this recommendation. Revisions have been made to the Procurement Warrant Manual to clarify sole source authorization levels. Previous purchase orders were signed based upon individual task orders and not aggregate amounts. If the task order did not exceed the Contract Officer's warrant level, the task order was appropriately signed under previously followed procedures. However, PFB has clarified its Manual to indicate that, once the total amount of the sole source task orders exceeds a Contract Officer's warrant level, then it must be signed by a different Contract Officer with the next appropriate warrant level.

4. Train all contracting officers on how to enter data into FPDS and adopt a policy that data be entered simultaneously with making the award.

We disagree with the recommendation. "Real time" data entry can only be accomplished with the purchase of the aforementioned software module, which will not be purchased until FY 2008, *if* determined to be cost-effective to do so. Moreover, the data in FPDS will be entered within four weeks of the transaction utilizing the arrangement we have made with the Finance Branch to assist in data entry.

5. Institute procedures to consider and document required factors before awarding contract options.

We agree with this recommendation. PFB will establish a checklist of requirements and issues that must be considered by Program Managers, Contract Officers, and COTRs prior to making a determination that it is appropriate to exercise a contract option.

6. Correct the recording of the EDS contract obligation so that \$758,875 is recorded against the FY 2006 appropriation.

We disagree with this recommendation. The obligation is appropriately charged to the FY 2005 appropriation. However, the final decision regarding this recommendation will be made by the Board and General Counsel.

7. Coordinate with the COTRs and Finance to develop procedures to review contractor travel claims.

We agree with this recommendation. In January 2006, PFB provided guidance to OCIO Program Managers and COTRs on the Federal Travel Regulations (FTR) that stipulates that contracts that include travel requirements by contractor employees must have the appropriate contract language in accordance with the Federal Travel Regulations and this requirement must be made clear during the process of solicitation and award. PFB is further revising the COTR appointment memorandum that outlines the responsibility of the COTR in the administration of contracts, including COTR obligations to verify travel. In addition, PFB and Finance are developing procedures to review contractor travel claims.

8. Obtain reimbursements for unsupported or un-allowed travel costs.

We agree that any unsupported travel payments should be recovered. The contract officer will coordinate with the COTR and the contractor to obtain reimbursement for unsupported or un-allowed travel costs.

cc: The Board
General Counsel
Chief Information Officer
Director of Administration