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National Labor Relations Board
Office of Inspector General



Office of the Chief Information Officer

Procurement Functions

Report No. OIG-AMR-57-08-01

March 2008

INSPECTOR GENERAL



NATIONAL LABOR RELATIONS BOARD

WASHINGTON, DC 20570

March 14, 2008,

I hereby submit a review of the National Labor Relations Board Office of the Chief Information Officer Procurement Functions, Report No. OIG-AMR-57-08-01. This audit was conducted to determine whether controls over procurement actions by the Office of the Chief Information Officer (OCIO) are sufficient to ensure compliance with the Federal Acquisition Regulation and are operating as intended.

We initiated this review because the General Counsel and his managers repeatedly raised concerns that providing warrant authority to an individual who is supervised by the Chief Information Officer (CIO) is inconsistent with long-standing Federal procurement principles regarding internal controls of fiscal matters. To support this position, the General Counsel and his managers pointed to Office of Management and Budget guidance, Federal procurement policy, and an audit report by the Department of Labor's Office of Inspector General.

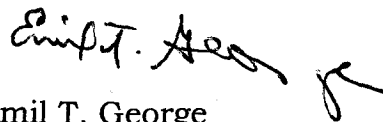
The internal controls that were put in place to address the General Counsel's concerns were generally insufficient to prevent violations of the Federal Acquisition Regulation and Antideficiency Act. These violations include the failure to properly plan and compete procurement actions, inappropriate use of contract types, exercising a nonexistent option, executing contract actions without proper authority, and taking affirmative action that obscured an unauthorized commitment. We also found violations of the Antideficiency Act involving indemnification clauses. The violations are summarized as an attachment to this report.

The internal controls also failed to meet Government Accountability Office standards. The internal controls were not properly documented and the employees involved did not know what procedures to follow. The controls that were in place were not always followed. The findings of this report show that these internal controls failed to prevent, detect, and correct errors and abuse.

This failure in the internal controls for the OCIO procurement function was likely most attributable to the OCIO contracting officer's dual roles and inability of the OCIO and Procurement and Facilities Branch (PFB) staffs to establish an appropriate working relationship. The disagreement in what the internal control procedures required hindered the independent review of the OCIO procurement actions by PFB. The requirement that PFB approve the OCIO procurement action prior to execution was not sufficient to prevent the OCIO contracting officer from acting outside the scope of his authority. Had the OCIO contracting officer not been so deeply involved in and with the management of the CIO function, he may have taken a different course of action in executing his procurement functions. Likewise, had there been a good working relationship between the OCIO and PFB staffs, many problems would likely have been resolved.

The primary recommendation of this report is that the Senior Procurement Executive, who is the Director of Administration, remove the warrant authority for the Associate CIO for Program Management. We also recommend, however, that the Senior Procurement Executive and CIO work together to establish procedures for ensuring that OCIO procurement needs are met. In doing so, they should discuss their experiences with the pilot program and other procurement issues with the Board and the General Counsel.

An exit conference was held on February 1, 2008, with representatives of the OCIO, Division of Administration, and Solicitor's Office. A draft report was sent to the CIO and the Senior Procurement Executive on February 6, 2008, for their review and comment. The CIO generally agreed with the findings and recommendations made in the draft report. The Senior Procurement Executive had no comments with respect to the findings and agreed in principle with the recommendations made in the draft report. Their separate responses are included in their entirety as appendixes to this report.



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APPENDIXES

- A. Memorandum from the Chief Information Officer, Draft Report
OIG-AMR-57, dated March 7, 2008

- B. Memorandum from the Director of Administration (Senior
Procurement Executive), Comments on Draft Report "Office of
Chief Information Officer Procurement Functions" (OIG-AMR-57),
dated March 7, 2008

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) 2008 appropriation authorized 1,690 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 \$256,238,000 for FY 2008, less a rescission of 1.747 percent, leaving a net spending ceiling of \$251,762,000.

Between FY 2005 and FY 2007, the Agency spent approximately \$10 million each year for information technology (IT) related supplies and services. These items included computer equipment, system development, maintenance on existing systems, and IT security efforts. In August 2005, the Chairman approved the Chief Information Officer's (CIO) request to reestablish a contracting officer in the Office of the Chief Information Officer (OCIO). In March 2006, an Associate CIO for Program Management was hired. This position included the contracting officer function.

From April through June 2006, the General Counsel and his managers met with and exchanged correspondence with the Chairman and the Board regarding the appropriateness of having a contracting officer in OCIO. In several internal memoranda, the General Counsel asserted that placing significant fiscal authority in one person without traditional checks provided by the procurement process presents serious and unnecessary risks for the Agency. As a result of that exchange, procedures that included a review of OCIO contracts by the Procurement and Facilities Branch (PFB) were developed to ensure compliance with the Federal Acquisition Regulation (FAR) and Agency procurement practices.

A 6-month pilot program to test internal control procedures related to the contracting officer position in the OCIO began on May 15, 2006, when the Senior Procurement Executive, who is the Director of Administration, issued a warrant to the Associate CIO for Program Management. The warrant authority continued past the pilot program's scheduled completion date.

Despite these efforts to provide for internal controls, the General Counsel and his managers continued to express concern regarding OCIO's procurement function. The Director of Administration raised this issue with both the Office of Inspector General (OIG) staff and contract auditors conducting the audit of

the Agency's annual financial statements. We initiated this audit because of the importance of the Agency's procurement process.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this audit was to determine whether controls over procurement actions by the OCIO are sufficient to ensure compliance with the FAR and are operating as intended.

We reviewed guidance regarding internal controls including the Government Accountability Office's (GAO) Standards for Internal Control in the Federal Government, dated November 1999. We reviewed The Constitution of the United States, applicable sections of Federal statutes and regulations, Office of Management and Budget guidance, and Comptroller General decisions to determine the laws and regulations affecting the procurement of goods and services. 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.

We interviewed employees in the Office of the General Counsel, OCIO, Division of Administration, and the Division of Operations-Management to identify the standard operating procedures for procurements handled by the OCIO contracting officer. We evaluated this information to determine whether the policies and procedures were designed to provide reasonable assurance that improper actions or noncompliance with laws or regulations are prevented or detected in the normal course of business.

We judgmentally selected a sample of 10 procurements from FY 2007 and October 2007. This included all purchase orders over \$100,000 and 5 of 20 purchase orders less than \$100,000. Our sample included \$1.6 million of the \$2.2 million obligated by the OCIO contracting officer in FY 2007 and October 2007. We also reviewed additional actions that were not in our sample that came to our attention during the audit. We interviewed employees from the General Services Administration (GSA), Office of the Executive Secretary, OCIO, Division of Administration, and the Division of Operations-Management and reviewed applicable documents to determine whether established controls were followed and whether contract actions were in compliance with laws and regulations.

We obtained approval data from the Agency's procurement system to determine whether a purchase order or modification was signed prior to obtaining proper

approvals. We also compared the information on the contract documents to the electronic information in the procurement system.

We reviewed the license agreements for 14 software purchase orders to determine whether they were in compliance with the Antideficiency Act and other laws and regulations.

This audit was performed in accordance with generally accepted government auditing standards during the period October 2007 through March 2008. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We conducted this audit at NLRB Headquarters in Washington, DC.

FINDINGS

Internal control is an essential part of managing an organization. It comprises the plans, methods, and procedures used to meet missions, goals, and objectives and, in doing so, supports performance-based management. Internal control also serves as the first line of defense in safeguarding assets and preventing and detecting errors and fraud. In short, internal control, which is synonymous with management control, helps Agency program managers achieve desired results through effective stewardship of public resources.

The internal controls that have been put in place for the OCIO procurement function were generally insufficient to prevent violations of the FAR and Antideficiency Act. Internal controls were not properly documented, the employees involved did not know what procedures to follow, and the controls that were in place were not always followed. The violations are summarized as an attachment to this report.

DOCUMENTATION OF INTERNAL CONTROLS

Standards for internal control state that procedures and all transactions and other significant events need to be clearly documented, and the documentation should be readily available for examination. The documentation should appear in management directives, administrative policies, or operating manuals.

Internal Control Procedures

The internal control procedures are set out in a memorandum. Those procedures require review of the OCIO's procurement actions by PFB. The procedures, however, lacked sufficient detail to satisfy the documentation requirement. The memorandum does not reference a requirement for legal review, the processing of solicitations, how the reviews will be documented, or what items will be provided to PFB to be reviewed for an individual procurement action.

In June 2006, the OCIO staff created a flowchart of the OCIO procurement process. OCIO staff stated that they obtained PFB input when they created the flowchart. PFB stated that they did not have any input into the flowchart. The Contracts and Procurement Section Chief, who started in that position in August 2007, stated that she had not seen the flowchart created by OCIO prior to reviewing the copy provided by the OIG in November 2007. In response to PFB's assertion, the CIO stated that the flowchart was created for his benefit.

As a result of the lack of internal control documentation, PFB's and OCIO's understanding of the procedures are different. OCIO believes that PFB only reviews solicitations over \$100,000. PFB believes that they review all solicitations. OCIO also believes that although PFB reviews the solicitations, PFB approval of solicitations is not necessary. If all solicitations are not reviewed and approved before they are publicized, there is no control to ensure that the solicitations comply with applicable laws and regulations.

Supporting Documentation

Recordkeeping was not sufficient to document that the OCIO procurement review process was complete. Evidence was not available to ascertain which supporting documents were supplied by OCIO and relied upon by PFB and legal counsel in determining that the procurement was appropriate and lawful. For example, we were unable to determine whether the OCIO contracting officer forwarded the market research conducted for the purchase of EMC software. We were also unable to determine whether the OCIO contracting officer forwarded a copy of the winning proposal received in response to the Agency's solicitation for network storage devices. Without this documentation, the reviewer would not be able to determine whether the proposal conformed to the Agency's solicitation.

APPLICATION OF PROCEDURES

According to a flowchart prepared by the OCIO, PFB is required to review all solicitations over \$100,000 and approve all contract actions, regardless of dollar value, that are completed by the OCIO contracting officer. PFB approval of purchase orders and modifications is documented in the Agency's procurement system. PFB procedures require a legal review for all solicitations, purchase orders, and modifications over \$100,000.

Solicitations

OCIO and PFB procurement procedures were not followed for solicitations over \$100,000. Two of the three solicitations that were valued over \$100,000 were not reviewed by PFB or legal counsel. The one time that a review was conducted, the OCIO contracting officer posted the solicitation prior to receiving PFB's comments, thus bypassing internal controls. The OCIO contracting officer told PFB that the procurement was very urgent and could not wait until comments were resolved.

Modifications

PFB procurement procedures requiring legal review were not followed for a modification over \$100,000. Modification 001 for the Project Performance Corporation purchase order for the period March 5 to September 27, 2007, was not reviewed by legal counsel. This modification added \$378,528 to the value of the contract.

EFFECTIVENESS OF INTERNAL CONTROLS

Internal controls should provide reasonable assurance that the Agency complies with applicable laws and regulations. The controls that were in place for the OCIO procurement actions that we reviewed did not meet that standard and were generally ineffective in preventing violations of the FAR and the Antideficiency Act. Although it may not be possible to perfectly execute every purchase order or modification, the number of violations we identified are too extensive to excuse as minor imperfections in an otherwise well-controlled procurement program.

Competition

The Agency did not comply with the FAR when it limited competition for 3 of the 10 purchase orders in our sample and another related purchase order. In another purchase, the Agency created the appearance of competition for an

item that had only one source. The purchase orders with Project Performance Corporation for the period of September 28 to November 23, 2007, and November 26, 2007, to February 29, 2008, were inappropriately sole sourced. The Agency posted the request for EMC software to e-Buy and transmitted the posting to three vendors even though the contracting officer knew that immixTechnology, Inc. was the only source for the software on the Federal Supply Schedule (FSS). Required brand name justifications were not posted for Agency purchase orders with Mythics, Inc. for Oracle-Siebel software and T-Mobile USA for BlackBerry services.

Limiting Competition

Section 8.405-6 of the FAR states that an ordering activity must justify its action when restricting competition for orders placed against FSS contracts. Circumstances that may justify restriction include: only one source is capable of responding due to the unique and specialized nature of the work; the new work is a logical follow-on to an original FSS order provided that the original order was placed in accordance with the applicable FSS ordering procedures; or an urgent and compelling need exists, and following the ordering procedures would result in unacceptable delays. For a logical follow-on order, the original order must not have been previously issued under sole source or limited source procedures.

The purchase orders placed against Project Performance Corporation's FSS contract for the period of September 28 to November 23, 2007, and November 26, 2007, to February 29, 2008, were both inappropriately limited to a sole source. Both justifications for other than full and open competition cite the statutory authority for this purchase as section 6.302-2 of the FAR – unusual and compelling urgency. Section 6.302-2 is the wrong regulatory authority because both orders were placed against Project Performance Corporation's FSS contract. FSS orders are covered by subpart 8.4 of the FAR and are exempt from the requirements of Part 6. The OCIO contracting officer agreed that Part 8 should have been referenced, but he stated that PFB insisted that he use a particular form that did not include FSS justifications. PFB stated that they have always had separate justification forms for Part 6 and Part 8 of the FAR.

Given that the work by Project Performance Corporation appears to have been adequately monitored, justifying these orders is difficult under an urgent and compelling need analysis because the Agency should have been able to foresee the continued need for services and taken appropriate steps to initiate a competitive procurement action. Although the second purchase order for the period of performance from March 5 to September 27, 2007, could have been

justified as a logical follow-on, the third purchase order for the period of performance from September 28 to November 23, 2007, was prohibited under that authority because the Agency cannot limit competition for a second logical follow-on.

Appearance of Competition

Section 3.101-1 of the FAR states that Government business shall be conducted in a manner above reproach and that the expenditures of public funds require the highest degree of public trust. Section 1.102 of the FAR provides two of the FAR's guiding principles are to conduct business to minimize administrative operating costs and with integrity, fairness, and openness.

A purchase of EMC software from immixTechnology, Inc. had the appearance of competition, but was in fact a sole source purchase order against immixTechnology, Inc.'s FSS contract that involved a third party agreement with EMC.

The Agency determined that it would procure additional licenses for EMC software to meet a need for all users of the Next Generation Case Management System. A limited amount of the software licenses had been purchased from EMC at an earlier date. After that purchase, EMC ceased selling the software directly to end users. EMC also made certain changes to the software that could have arguably required the Agency to repurchase the initial licenses that it obtained. In an effort to avoid repurchasing the licenses, an OCIO manager negotiated a deal with EMC that would allow the initial licenses to be converted to the updated software if the Agency purchased the additional licenses.

The Agency procured the additional licenses for the EMC software from immixTechnology, Inc., the only available FSS source. In doing so, the OCIO procurement officer requested information from immixTechnology, Inc. that was then used verbatim in the Agency's solicitation that was posted to the e-Buy system. In addition to sending the solicitation to immixTechnology, Inc., the OCIO procurement officer sent it to two vendors that could not supply the software licenses. immixTechnology, Inc. submitted the only quote that was then accepted by the Agency.

This procurement was not conducted in a manner that was consistent with the requirement for instilling a high degree of public trust, minimizing administrative operating costs or with integrity, fairness, and openness. The agreement with EMC was not memorialized in any procurement document and there is no documentation that it was approved by the OCIO contracting officer

or reviewed and approved by PFB. The result of this process was to obscure the fact that it was a sole source procurement, thereby creating the appearance that it was within the OCIO contracting officer's warrant authority. Because of this appearance of competition, this action did not have the safeguards that are normally in place for sole source procurements.

Brand Name Justification

Sections 8.405-6 and 11.105 of the FAR require that all agencies prepare justifications when brand name specifications are used in the solicitation. Agencies are required to post the brand name justification or documentation to: the Governmentwide Point of Entry system at www.fedbizopps.gov with the solicitation; or the e-Buy system at www.ebuy.gsa.gov with the request for quotation when using a GSA FSS. The posting requirement applies to acquisitions exceeding \$25,000 that use brand name specifications, including simplified acquisitions, sole source procurements, and orders placed against a FSS contract.

Brand name justifications were not posted for two of the three solicitations over \$25,000 that required a specific brand name. Those purchase orders were with Mythics, Inc. for Oracle-Siebel software and T-Mobile USA for BlackBerry services.

Additional FAR Requirements

Acquisition Plans

Section 7.102 of the FAR requires acquisition planning for all acquisitions in order to promote and provide for acquisition of commercial items and full and open competition. Also, section 7.105 of the FAR outlines the contents of written acquisition plans, which must address all technical, business, management, and other significant considerations that will control the acquisition. The specific content of plans will vary, depending on the nature, circumstances, and stage of acquisition.

Acquisition plans were not documented for any of the 10 purchase orders in our sample. The OCIO contracting officer stated that acquisition plans are generally documented for larger service contracts. The OCIO contracting officer also stated that generally anything over \$100,000 should have an acquisition plan with the exception of hardware purchases. We found no regulatory authority for these assertions made by the OCIO contracting officer.

According to PFB, one significant issue regarding the OCIO procurement function is the lack of acquisition planning. The OIG recently issued an audit with similar findings with regard to other procurements by the Agency.

At the exit conference, both the OCIO and Division of Administration questioned the usefulness of acquisition plans for routine purchases. We believe that the use of some type of plan would have gone a long way in preventing some of the errors detailed in this report. For example, the required brand name justifications may have been posted, the OCIO contracting officer may not have exceeded his warrant authority, and the requirements for including options in purchase orders might have been met.

Market Research

Section 10.001 of the FAR states that agencies must ensure that legitimate needs are identified and trade-offs evaluated to acquire items that meet those needs and conduct market research appropriate to the circumstances:

1. Before developing new requirements documents for an acquisition by that agency;
2. Before soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold;
3. Before soliciting offers for acquisitions with an estimated value less than the simplified acquisition threshold when adequate information is not available and the circumstances justify its cost.

Market research was not documented for three of the purchase orders in our sample. Market research was not documented for the Agency's purchase order with Project Performance Corporation for the period of March 5 to September 27, 2007, which was above the simplified acquisition threshold. The Agency's purchase orders with Project Performance Corporation for the period of September 28 to November 23, 2007, and FormSoft Group LTD were sole source purchases, and market research should have been conducted to justify the cost of the acquisitions.

The market research conducted for the Agency's order placed against the Securities and Exchange Commission's Blanket Purchase Agreement (BPA) with Dell Marketing L.P. for computers was not appropriate to the circumstances. The Agency limited their research to only suppliers of Dell computers. Although it may be administratively convenient or even desirable to procure only Dell computers, there is nothing unique to those computers that would have required that the Agency only procure that specific brand. Given that the Agency's managers continually state that the Agency has

extreme fiscal constraints, we believe that the OCIO should have conducted broader market research.

Contract Type

A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing services. Section 16.603-2 of the FAR states that a letter contract may be used when (1) the Government's interests demand that the contractor be given a binding agreement so that work can start immediately and (2) negotiating a definitive contract is not possible in sufficient time to meet the requirement. Section 16.603 provides that a letter contract may be used only after the head of the contracting activity or a designee determines in writing that no other contract is suitable.

The Agency inappropriately entered into a letter contract with Project Performance Corporation for a follow-on period of March 5 to September 27, 2007. The contract file did not contain any documentation that the Senior Procurement Executive, the head of the contracting activity, approved the use of a letter contract. The documentation that was in the contract file, including a memorandum completed by the contracting officer, did not support the use of a letter contract. The contract file contained no explanation as to why time was of the essence.

It is likely that time was not of the essence because the original solicitation provided 14 days to respond, and that is without any knowledge of the project. The March 5 to September 27, 2007, period of performance contract was awarded as a sole source procurement action against a FSS contract. The statement of work for this purchase order is dated February 23, 2007, and the letter contract was awarded on March 1, 2007. This amount of time should have been sufficient for the vendor to prepare a proposal for the Agency's consideration. We note that the Agency entered into another sole source purchase order with Project Performance Corporation for the period of November 26, 2007, to February 29, 2008, and the vendor was able to submit its proposal 1 day after receiving the statement of work. The Agency should have been able to foresee this need and complete the full procurement process rather than entering into a letter contract.

The letter contract did not receive legal review and the issues regarding contract type were not identified by PFB. A letter contract poses a greater risk to the Agency because work begins before the terms and conditions are defined.

Option Clauses

Subpart 17.2 of the FAR states that the contracting officer may include options in contracts when it is in the Government's interest. Solicitations shall include appropriate option provisions and clauses when resulting contracts will provide for the exercise of options. The contract shall state the period within which the option may be exercised. The contracting officer shall justify in writing the quantities or the term under option; the notification period for exercising the option, and any limitation on option price; and shall include the justification document in the contract file.

The Agency's contract files for Mythics, Inc., Unisys Corporation, and T-Mobile USA did not include the contracting officer's written determination that the use of options was in the Government's best interest. The solicitations and purchase orders for Mythics, Inc. for technical support and T-Mobile USA did not include any of the necessary option clauses. Both of these purchase orders also failed to include the period within which the option may be exercised.

The software license and support agreement for Pointsec software has a provision for automatic 1-year renewals of the term of the support provisions of the agreement unless one of the parties terminates the agreement 60 days prior to the end of the then current term. This provision does not meet the requirements of the FAR for options and is inappropriate in Government procurement actions.

Exercising Options

Section 17.207 of the FAR states that 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, the need for continuity of operations, and potential cost of disrupting operations. 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 and the FAR itself.

The Agency exercised an option for technical support that was not available from Mythics, Inc. because the purchase order failed to include the required options clauses. Nevertheless, this nonexistent option was exercised on September 28, 2007, after being reviewed by both legal counsel and PFB.

The contract file for Mythics, Inc. did not contain the required contracting officer's written determination that the option was the most advantageous

method of fulfilling the NLRB's need. The modification exercising the option did not cite the option clause as authority. Although the option was contingent on the availability of funds, the contracting officer failed to record the obligation of funds once funds were available.

When the Agency entered into its purchase order with Unisys Corporation for network storage devices for the Agency's East Coast server, the purchase order stated, "the West Coast storage solution option will be exercised in FY 2008 (subject to availability of fund)." This statement was not necessary and created needless ambiguity. Because the period of performance of the East Coast network server storage device did not extend into FY 2008, this option is not available to the Agency.

Federal Supply Schedules

Section 8.402 of the FAR states that for administrative convenience, an ordering activity contracting officer may add items not on the FSS (also referred to as open market items) to a FSS BPA or an individual task or delivery order only if:

- (1) All applicable acquisition regulations pertaining to the purchase of the items not on the FSS have been followed (e.g., publicizing, competition requirements, acquisition of commercial items, contracting methods, and small business programs);
- (2) The ordering activity contracting officer has determined the price for the items not on the FSS is fair and reasonable;
- (3) The items are clearly labeled on the order as items not on the FSS; and
- (4) All clauses applicable to items not on the FSS are included in the order.

The Agency inappropriately awarded a purchase order against Unisys Corporation's FSS contract. Unisys Corporation responded to the NLRB's solicitation for East and West Coast network storage solution data centers with a submission that was non-conforming because 26 of the 36 items for the devices were not on its FSS. The FSS items were valued at \$33,961, and the non-FSS items were valued at \$121,486. The contract file did not document that the requirements of section 8.402 of the FAR were met. As such, the proposal should not have been considered. Nevertheless, the contracting officer signed the price evaluation stating that all items were from the FSS contract.

The Agency did not follow the FAR when it awarded a purchase order against FormSoft Group LTD's FSS. This purchase order included one item that was on the FSS, FormFinder for the Web (Single Server edition) annual

maintenance and support, and two items that were not on the FSS, FormFinder for the Web (Enterprise edition) – one time upgrade fee and annual maintenance and support for the upgrade. Because FormSoft Group LTD is the only supplier of these items, the purchase could have been sole sourced. However, there was no documentation that prices for items not on the FSS were fair and reasonable. Additionally, the OCIO contracting officer failed to complete a justification for other than full and open competition, properly publicize items not on the FSS, clearly label the open market items on the purchase order, and include all clauses applicable to items not on the FSS.

Ratification

Section 1.602-3 of the FAR states that an unauthorized commitment is an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into the agreement on behalf of the Government. Ratification is the act of approving an unauthorized commitment by an official who has the authority to do so. The head of the contracting activity, unless a higher level official is designated by the Agency, may ratify an unauthorized commitment. Legal review is required prior to ratification. At the NLRB, the ratification authority resides with the Senior Procurement Executive.

Contractor Performance

The Agency's purchase order with FormSoft Group LTD for FormFinder software was an unauthorized commitment that was not properly ratified. The Agency continued using the FormFinder software after the purchase order expired on March 6, 2007. The next purchase order for the maintenance and support of the FormFinder software stated that the period of performance was from April 6, 2007, to March 6, 2008, and the cost was the amount that would be due for a 12-month period of use and support.

In their initial review, PFB commented that ratification was required for this purchase order because the period of performance started on March 7, 2007. The OCIO contracting officer responded by changing the period of performance to begin on April 6, 2007. The result of this alteration was to obscure the 1-month lapse between the performance periods while ensuring that the contractor received the full amount due for a 12-month period of maintenance and support. The contractor billed and the Agency paid for the full 12 months for maintenance and support.

Availability of Funds

Section 32.702 of the FAR requires that before executing any contract, the contracting officer obtain written assurance from responsible fiscal authority that adequate funds are available or expressly condition the contract upon availability of funds. Section 43.105 of the FAR states that the contracting officer shall not execute a modification that will cause an increase in funds without first obtaining a certification of funds availability or conditioning the modification upon availability of funds. The responsible fiscal authority at the NLRB is the Budget Branch (Budget), whose assurance that adequate funds are available is documented by their approval in the Agency's procurement system.

The OCIO contracting officer entered into a purchase order with CT Summation for software before assurance that funds were available and it was not contingent on the availability of funds. Performance began on October 1, 2007, but the purchase order was not approved by Budget until October 3, 2007. Because the OCIO contracting officer did not have authority to sign the purchase order until after the performance period began, this was also an unauthorized commitment that required ratification.

Two of the six modifications in our sample that caused an increase in funds were executed without first obtaining a certification that funds were available. Both of these modifications were to the Agency's purchase order with Project Performance Corporation for the period of March 5 to September 27, 2007. Modification 001 was signed by a contracting officer in PFB on April 10, 2007, but Budget's approval was not received until April 11, 2007. Modification 004 was first memorialized in a June 14, 2007, e-mail to the vendor by the OCIO contracting officer; however, this modification was not approved by Budget until August 9, 2007. Neither the PFB nor OCIO contracting officer had authority to sign these modifications and in doing so they created unauthorized commitments that required ratification.

Clauses

Section 16.603-4 of the FAR states that the contracting officer shall include in each letter contract the clauses for the type of definitive contract contemplated and any additional clauses known to be appropriate for it. Section 16.506 of the FAR states that certain clauses must be included for requirements contracts.

Two of the purchase orders in our sample did not include all of the appropriate clauses based on contract type. The Project Performance Corporation purchase

order for the period of March 5 to September 27, 2007, failed to include two of the three required clauses for letter contracts. The T-Mobile USA purchase order did not include two of the three required clauses for a requirements contract. Although the T-Mobile USA purchase order was not identified as a requirements contract, it is one because it provides for filling all actual purchase requirements of the Agency for mobile e-mail devices, with deliveries and performance to be scheduled by placing orders with T-Mobile USA.

The Agency's purchase order with Project Performance Corporation for the period March 5 to September 27, 2007, did not include a clause that would have allowed the Agency to unilaterally extend the contract within the limits and at the rates specified in the purchase order. If this clause had been included, the Agency could have extended the term of the purchase order and avoided awarding two subsequent sole source purchase orders.

Central Contractor Registration

The Central Contractor Registration (CCR) is the primary Government repository for contractor information required for the conduct of business with the Government. According to subpart 4.11 of the FAR, prospective contractors shall be registered in this database prior to award of a contract or agreement. Unless the acquisition is exempt, the contracting officer shall verify that the prospective contractor is registered in the CCR database before awarding a contract or agreement.

The Agency awarded two purchase orders to a vendor that was not eligible because the vendor's CCR had expired. CT Summation's registration in the CCR database expired on April 27, 2006, and the Agency executed purchase orders with CT Summation on October 3, 2006, and October 1, 2007. The contract files contained no evidence that CT Summation's registration in the CCR database was confirmed.

COTR

Section 1.602-1 of the FAR provides that a contracting officer has the authority to enter into, administer, and terminate contracts. The appointment memorandum for a Contracting Officer's Technical Representative (COTR) states that the COTR represents the contracting officer in the technical phases of the contract, but that the contracting officer is the exclusive agent of the Government with the authority to enter into and administer the contracts. The COTR's appointment memorandum specifically states that the COTR does not have the authority to award, agree to, or sign a contract or contract modification.

The OCIO contracting officer and the COTR both received an e-mail from Project Performance Corporation's contract specialist with a price quote for a modification. The COTR responded to the e-mail by forwarding it to the OCIO contracting officer and Project Performance Corporation's contract specialist with a message that the Agency had decided to "accept Option 1" and directing the OCIO contracting officer to work with Project Performance Corporation on the required modification. Because the COTR did not have the authority to agree to a modification, he did not have the authority to send the e-mail message to Project Performance Corporation.

T-Mobile USA Invoices

According to section 8.402 of the FAR, FSS contracts require all schedule contractors to publish an "Authorized Federal Supply Schedule Pricelist." The pricelist contains all supplies and services offered by a schedule contractor. The amount charged by T-Mobile USA was not consistent with their FSS pricelist. For the two monthly invoices we reviewed, the Agency overpaid \$773 for voice and data services. If all options are exercised, we estimate that the Agency could put more than \$13,000 to better use if the correct amounts were paid over 36 months.

Contract Dates

Subpart 4.8 of the FAR states that the head of each office performing contracting, contract administration, or paying functions shall establish files containing the records of all contractual actions. The documentation in the files shall be sufficient to constitute a complete history of the transaction for the purpose of: providing a complete background as a basis for informed decisions at each step in the acquisition process; supporting actions taken; proving information for reviews and investigations; and furnishing essential facts in the event of litigation or congressional inquiries.

For the contract files in our sample, documentation was not sufficient to constitute a complete history because the dates for purchase orders and modifications were incorrect. Seven of the 10 purchase orders in our sample had a date of order that was prior to the date that the OCIO contracting officer actually signed the document. Two of the nine modifications also had an incorrect effective date. The OCIO contracting officer acknowledged that these dates are the dates that he initiated the action in the Agency's procurement system, rather than the date he signed it. He also stated that having an incorrect date should not be a problem. Although the OCIO contracting officer stated that this information is not important, he is responsible for ensuring that the contract records are accurate, including the date the action is actually signed and approved.

Accessibility Standards

According to subpart 39.2 of the FAR, unless an exemption exists, agencies must ensure that Federal employees and members of the public with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees and members of the public who are not individuals with disabilities.

None of the purchase orders had a valid exception to the accessibility standards and the contract files contained no documentation regarding accessibility. The OCIO contracting officer stated that items on FSS contracts comply with accessibility requirements. GSA disagreed and stated that the Agency is responsible for determining whether what it is ordering meets its accessibility requirements.

Antideficiency Act

The courts and GAO have ruled that an agency may not enter into an open-ended indemnification clause because such agreements violate the Antideficiency Act. By entering into an agreement to indemnify where the Government's liability is indefinite, the Agency exposes itself to a liability in excess of its appropriation. The exceptions to this prohibition that apply to situations involving risks that are unusually hazardous or nuclear do not apply to the Agency's procurements.

Three of the purchase orders for software included open-ended indemnification clauses in the licensing agreements. These clauses generally provided that the Agency will indemnify the software provider against claims resulting from the use of the software. We note that one of the agreements occurred prior to the initiation of the pilot program.

State Laws

Because Federal contracts are governed by Federal law, agreeing to allow state law to govern or to subject the Agency to state court jurisdiction is improper. Twelve of the 14 software purchase orders we reviewed included provisions in the licensing agreement that purported to make the Agency subject to jurisdiction of state courts or state laws. On one contract, this issue was brought to the attention of the OCIO contracting officer by legal counsel, but it was not corrected.

RECOMMENDATIONS

We recommend that the Senior Procurement Executive:

1. Withdraw the warrant authority from the Associate CIO for Program Management.
2. Coordinate with the CIO to work with Four Points Technology on the software license and support agreement for Pointsec software to remedy the automatic renewal provision.
3. Provide guidance to the contracting officers regarding the proper means to exercise options.
4. Coordinate with the CIO to arrange for T-Mobile USA to correct future invoices and refund overcharges.

We recommend that the CIO:

5. Develop procedures to plan and initiate procurement actions with sufficient time to obtain adequate competition.

We recommend that the Senior Procurement Executive and CIO:

6. Work together to establish procedures for ensuring that OCIO procurement needs are met. In doing so, they should discuss their experiences with the pilot program and other procurement issues with the Board and the General Counsel. This would include formalizing the requirement for legal review of OCIO procurement actions. At a minimum, the requirement should include a review of all licensing agreements.
7. If the warrant authority remains with the OCIO official, establish well documented internal controls that provide a step-by-step process for reviewing procurement actions. The procedures should identify what documents are necessary when reviewing procurement actions and how to document the review.

ATTACHMENT

	Purchases Greater than \$100,000				
	Dell Marketing L.P.	immix Technology, Inc.	Mythics, Inc.	Project Performance Corporation for the period 3/5/07 to 9/27/07	Unisys Corporation
Sole source issues.		√			
Brand name justification not posted.			√*		
Acquisition plan not documented.	√	√	√	√	√
Market research not documented.				√	
Market research conducted was not appropriate for the circumstances.	√				
Inappropriate use of a letter contract.				√	
Option requirements not met.			√		√
Option inappropriately exercised.			√		
Improper inclusion of open market items on orders placed against FSS contracts.					√
Unauthorized commitment not ratified.				√	
Contract did not contain the appropriate clauses for the contract type utilized.				√	
COTR acted outside of authority.				√	
Date for purchase order was not correct.		√		√	√
Accessibility requirements not addressed.	√	√	√	√	√
License agreement violated the Antideficiency Act.			√		
License agreement agreed to allow state law to govern.			√*		√

√ - Identified during the OIG review.

* - Identified by PFB or legal counsel during their review process.

	Purchases Less than \$100,000				
	Carahsoft Technology Corp	CT Summation	FormSoft Group LTD	Project Performance Corporation for the period 9/28/07 to 11/23/07	T-Mobile USA
Sole source issues.				√	
Brand name justification not posted.					√
Acquisition plan not documented.	√	√	√	√	√
Market research not documented.			√	√	
Option requirements not met.					√
Improper inclusion of open market items on orders placed against FSS contracts.			√		
Unauthorized commitment not ratified.		√	√*		
Contract did not contain the appropriate clauses for the contract type utilized.					√
CCR expired.		√			
Invoices did not comply with the contractor's FSS.					√
Date for purchase order or modification was not correct.	√	√	√	√	
Accessibility requirements not addressed.	√	√	√	√	√
License agreement agreed to allow state law to govern.	√	√	√		

√ - Identified during the OIG review.

* - Identified by PFB or legal counsel during their review process.


	Software Contracts
License agreement violated the Antideficiency Act.	3
License agreement agreed to allow state law to govern.	12
Automatic renewal.	1

**UNITED STATES GOVERNMENT
National Labor Relations Board
Office of the Chief Information Officer**

Memorandum

March 7, 2008

To: Emil T. George
Assistant Inspector General for Audits

From: Richard D. Westfield 
Chief Information Officer

Subject: Draft Report OIG-AMR-57

I have reviewed your draft report, dated February 6, 2008.

As an initial matter, I am disappointed that the issues identified in your report were not brought to my attention as they arose so that we could address them in a timely fashion. As initially envisioned, the pilot program granting procurement responsibilities to my office anticipated that issues would be identified and procedures would be modified to insure compliance with the FAR and agency procurement standards. It is now apparent that did not occur. Rather, problems were identified and reported to your office.

In general, I agree with your findings and, as further explained below, your recommendations. The primary recommendation assigned to the OCIO is to work with PFB to "develop procedures to plan and initiate procurement actions with sufficient time to obtain adequate competition." As is noted in the report, the working relationship between the OCIO and PFB contributed to the procurement issues identified. Recognizing this, it is my belief that the best course of action is for the CIO and DOA to develop and execute a plan to divest the OCIO of all procurement responsibilities. It will remain incumbent on the OCIO to provide source selection authority for technical procurements, and to provide PFB with adequate notice to insure competition is possible.

If you have any questions or concerns, please feel free to contact me at 273-0222.

cc: The Board
General Counsel
Gloria Joseph

UNITED STATES GOVERNMENT
National Labor Relations Board
Division of Administration
Memorandum

APPENDIX B



TO: Emil T. George
Assistant Inspector General for Audits

FROM: Gloria Joseph
Director of Administration
(Senior Procurement Executive)

DATE: March 7, 2008

SUBJECT: Comments on Draft Report "Office of Chief Information Officer Procurement Functions"
(OIG-AMR-57)

This is in response to your memorandum dated February 6, 2007, in which you requested comments on the draft report covering the audit of the Office of the Chief Information Officer's (OCIO) procurement function. While the draft audit report was addressed to me as the NLRB's Senior Procurement Executive, and to Richard Westfield, Chief Information Officer (CIO), the comments provided herein are solely my own as Mr. Westfield has indicated that he preferred to provide his comments separately.

With respect to the findings of the report, I have no comments.

In keeping with your request that I indicate my agreement or disagreement with each of the report's recommendations, I have provided a response to the recommendations addressed to the Senior Procurement Executive as well as to the ones addressed to me and to the CIO jointly. However, I reiterate that the responses to the joint recommendations are mine alone as, again, Mr. Westfield has indicated that he preferred to provide his comments separately.

RECOMMENDATIONS

We recommend the Senior Procurement Executive:

- 1. Withdraw the warrant authority from the Associate CIO for Program Management.**

I agree with this recommendation. As the Agency's Senior Procurement Executive, I am the individual who has the ultimate responsibility for ensuring that the Agency's contracts and purchases are in conformance with law and regulation. During the pilot program,

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Emil T. George

numerous problems arose with the OCIO's procurement function which indicated that the checks and balances, which were put into place to ensure that this decentralized procurement process did not present internal controls problems, were not being followed. Many of those problems were detailed in the Office of Inspector General's (OIG) audit report.

Based upon our experiences during the pilot program, and the numerous issues raised in the OIG's report, I believe that to continue this arrangement is contrary to the principles of a sound risk management program and is an internal control issue for the NLRB. Therefore, as the NLRB's Senior Procurement Executive, I intend to withdraw the procurement warrant from the Associate CIO for Program Management, Madan Kar. However, we will work with the OCIO to ensure that all existing contractual matters have been resolved prior to revoking the OCIO warrant. Also, Mr. Kar will retain his government-issued VISA Purchase Card and can continue to make appropriate purchases through the Agency's Small Purchase Program and within his established credit limit. However, his purchase card limit will be re-established to be in line with the single purchase and monthly purchase limits for other non-warranted employees.

Furthermore, the Procurement and Facilities Branch (PFB) is updating its training requirements for all Agency purchase card holders and the Associate CIO for Program Management will be required to take refresher training to maintain his purchase card and to ensure that his use of the card is in conformance with applicable laws and regulations.

- 2. Work with Four Points Technology on the software license and support agreement for Pointsec software to remedy the automatic renewal provision.**
- 3. (Revised recommendation): Provide guidance to the contracting officers regarding the proper means to exercise options.**
- 4. Arrange for T-Mobile USA to correct future invoices and refund overcharges.**

I am responding to these three recommendations as one. While I agree in principle that these recommendations should be implemented, I believe that, since the errors and overcharges were the result of actions directly taken by the OCIO, and in keeping with our response to Recommendation #1, the OCIO should undertake to correct any contracting errors or recover any overcharges that resulted directly from its actions. Any actions taken to resolve these issues, however, should be coordinated with PFB.

This will allow PFB to resume responsibility for a unified procurement function with a clean slate.

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Emil T. George

We recommend the CIO:

- 5. Develop procedures to plan and initiate procurement actions with sufficient time to obtain adequate competition.**

Response to be provided by the CIO.

We recommend that the Senior Procurement Executive and CIO:

- 6. Work together to establish procedures for ensuring that the OCIO procurement needs are met. In doing so, they should discuss their experiences with the pilot program, and other procurement issues with the Board and General Counsel. This would include formalizing the requirement for legal review of the OCIO procurement actions. At a minimum, the requirement should include a review of all licensing agreements.**

I agree with this recommendation in pertinent part. Currently, PFB has in place procedures for processing purchase orders and contracts. These procedures are designed to not only meet law and regulation, but to also to meet the customers' needs. However, since the Agency spends approximately \$10 million a year on information technology procurements, PFB will review its current procedures, in conjunction with the OCIO, and develop whatever additional ones are necessary to ensure that the OCIO's procurement needs are met. Furthermore, implementation by the OCIO of Recommendation #5 will also assist PFB in meeting the OCIO's procurement needs as it will provide PFB with the necessary information and plans in a timely manner in order to ensure that the OCIO's procurements needs are met.

All Agency contracts must go through the appropriate channels for review and approval (and legal review, if necessary) and the OCIO's contracts will be treated in a manner consistent with all other procurements. The current dollar thresholds that trigger the requirement for a legal review will be applied to the OCIO's procurements and they will be submitted by PFB for legal review by Special Counsel.

Special Counsel will be requested to review all current licensing agreements as well as future licensing agreements prior to the Agency purchasing such licenses.

- 7. If the warrant authority remains with the OCIO official, establish well documented internal controls that provide a step-by-step process for reviewing**

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Emil T. George

procurement actions. The procedures should identify what documents are necessary when reviewing procurement actions and how to document the review.

In light of our responses to Recommendations # 1 and 6, we consider this recommendation moot. However, whatever procedures are developed in relation to recommendation # 6 should include identification of the documents PFB will require to process the OCIO's procurement requests.

Thank you for the opportunity to comment on the draft report. If you have any questions, please do not hesitate to contact me.

cc: General Counsel
Board Members