



U.S. Department of Agriculture



Office of Inspector General
Great Plains Region

Audit Report

Animal and Plant Health Inspection Service Wildlife Services Aircraft Acquisition

Report No. 33099-1-KC
September 2004



UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF INSPECTOR GENERAL
Washington D. C. 20250



DATE: September 30, 2004

REPLY TO
ATTN OF: 33099-1-KC

SUBJECT: Animal and Plant Health Inspection Service Wildlife Services
Aircraft Acquisition

TO: W. Ron DeHaven
Administrator
Animal and Plant Health Inspection Service

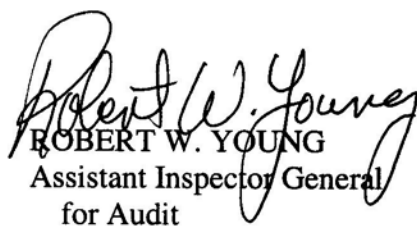
ATTN: William J. Hudnall
Deputy Administrator
Marketing and Regulatory Programs Business Services

This report presents the results of our review of Animal and Plant Health Inspection Service (APHIS) Wildlife Services (WS) Aircraft Acquisition. APHIS' August 31, 2004, response to the draft report is included as exhibit B with excerpts and the Office of Inspector General's (OIG) position incorporated into the Findings and Recommendations sections of the report, where applicable.

The APHIS response sets forth planned or completed corrective actions sufficient for us to accept management decision for Recommendations Nos. 1, 8, and 9. Please follow your agency's internal procedures in forwarding documentation for final action to the Office of the Chief Financial Officer. Based on the information in the response, management decision could not be reached for Recommendations Nos. 2, 3, 4, 5, 6, 7, and 10. In order for us to consider the management decisions for these recommendations, we need additional information or action by your agency. The additional information and/or actions needed are outlined in the report sections OIG Position.

Please furnish a reply within 60 days describing corrective actions taken or planned and the timeframes for implementing the corrective actions on the recommendations where management decisions have not yet been reached. Please note that Departmental Regulation 1720-1 requires a management decision to be reached on all findings and recommendations with a maximum of 6 months from report issuance, and final action should be completed within 1 year of management decision.

We appreciate the courtesies and cooperation extended to our staff during the review.


ROBERT W. YOUNG
Assistant Inspector General
for Audit

Executive Summary

Animal and Plant Health Inspection Service, Wildlife Services Aircraft Acquisition (Audit Report No. 33099-1-KC)

Results in Brief

At the request of a U.S. Senator, we enquired into allegedly improper financial arrangements between the Animal and Plant Health Inspection Service (APHIS) Wildlife Services (WS) and an industry group. A constituent of the senator complained after learning that the financial arrangements in question affected a contract he had with the WS for lease of an aircraft.

WS uses a variety of lethal and non-lethal means to control livestock predation. WS provides the services of aircraft that have been specifically modified to hunt livestock predators. WS may buy, borrow, or lease in order to acquire the aircrafts' services.

We determined that WS personnel acted inappropriately in facilitating the industry group's purchase of an aircraft for use in WS' wildlife predation program in Wyoming. The WS executed an improper financial arrangement with an aircraft repair company (company) to pay for modifications that had already been made to the plane totaling over \$25,000, as well as provided an engine valued at \$20,000, when it did not have a binding agreement with either the company or the industry group. The WS entered into a cooperative agreement with the industry group at a later date to use this plane in its wildlife predation program.

WS May Have Violated Appropriations Law

WS officials obligated funds in order to pay for modifications made to the plane in prior fiscal years, at a time when WS did not have a legally binding agreement with the company. When the industry group ultimately purchased the plane from the company, the purchase price was discounted for the modifications that WS paid for and an engine that WS provided. Without a binding agreement between WS and the company to pay for these modifications, WS may have violated appropriations law by obligating Federal funds where no bona fide need existed. The WS did not have a valid contract with the company to acquire either goods or services for the Government. We concluded that the WS executed these transactions simply to facilitate the purchase of the aircraft by the industry group. Federal law¹ requires that obligations be made for payment of expenses properly incurred or for contracts properly made within the period of appropriation availability; the agency

¹ 31 U.S. Code (U.S.C.) 1501 and 1502.

acquiring the goods or services must have a bona fide need for the goods or services in that fiscal year.

In fiscal year 1999, an aircraft repair company made modifications to a Piper Super Cub that brought the plane up to the standards required for use in WS' wildlife predation program. WS did not have a written agreement with the aircraft company to obligate Federal funds to pay for the modifications. Instead, the company made the modifications in anticipation of leasing the plane to the Government.

During fiscal year 2000, the company negotiated the sale of the plane to the industry group. On August 1, 2000, the company drew up a buy/sell agreement which specified that the sale of the aircraft was contingent on WS paying \$15,050 for equipment and modifications, some of which were installed the previous fiscal year (fiscal year 1999). The buy/sell agreement did not include WS as a signatory. However, when a WS Regional official received the company's bill for \$15,050, he urged WS to pay it, explaining that, due to short timeframes and the need to initiate aircraft modifications, a request for a purchase order was previously overlooked. Marketing and Regulatory Programs Business Services personnel approved the request and issued a purchase order and check the next day.

On November 2, 2000, fiscal year 2001, the company billed for additional modifications totaling over \$10,000, made in October 2000. Again, no binding agreement existed between the company and WS to authorize payment for modifications made to the plane. Also, the cooperative agreement between the WS and the industry group still had not been finalized. To pay these expenses, a WS budget analyst split the \$10,000 bill into five invoices of less than \$2,500 each. Each of these smaller invoices was then paid using multiple purchase cards to avoid using a warranted purchase officer to ratify the transaction.

The Federal Acquisition Regulation (FAR)² and the U.S. Department of Agriculture (USDA) Micro-Purchase Guide governing the use of purchase cards expressly forbids splitting purchases merely to stay within the single purchase limit. Since the five separate invoice payments represented two larger purchases that exceeded the cards' limits, WS personnel violated procurement regulations. In addition, WS personnel circumvented controls designed to ensure that the agency's funding is appropriately obligated.

² FAR Part 13.103(c).

WS Did Not Establish Ownership of the Aircraft

After the aircraft repair company had been paid, WS entered into a cooperative agreement with the industry group that now owned the plane. Although WS had contributed over half the plane's purchase price in monies and an engine,³ the cooperative agreement did not protect the agency's ownership interests. WS personnel originally stated that paying for the modifications constituted ownership of the parts used to modify the plane (e.g., a shooting window, extended landing gear, etc.). A representative of the industry group countered that, excepting the engine, there were no provisions or understanding that APHIS maintained ownership.

WS officials argued that the agency would eventually recoup the costs, since the group provided the services of the plane to WS at a rate below that of a previous contractor (the complainant). However, neither the terms of the cooperative agreement and/or subsequent lease of the aircraft by WS supported the WS' contention that this transaction was cost justified.

WS Does Not Have Clear Policies Regarding Its Aerial Acquisition Program

WS uses considerable resources to effect its aviation program but lacks a cohesive management structure to control decisions to acquire aircraft. In particular, WS does not have written policies and procedures regarding the use of cooperative agreements or the procurement process in its aerial acquisition program. Also, there is insufficient management oversight; full authority and responsibility for aircraft acquisition is delegated to the Regional level. The aggregate effect of WS' acquisition strategies in this case gives the appearance that the agency intended to acquire the services of aircraft owned only by the industry group.

As a program under the parent agency APHIS, WS and its Regions rely on the APHIS Agreements Management Manual⁴ to govern their aircraft acquisition processes. However, the manual was meant to apply to all APHIS programs; the manual is broadly worded and does not set policy for acquiring aircraft. The manual, for example, does not make clear whether the delivery of an airplane for its aerial hunting activities would warrant a contract, or if WS' engagement in

³ The group paid \$34,500, the engine was worth approximately \$20,000, and APHIS contributed over \$25,000, for a total of \$79,500. The group's contribution, then, represents over 43 percent of this total, leaving WS' contributions valued at 57 percent.

⁴ APHIS Agreements Management Manual, dated July 1997.

aerial hunting in a third party's plane should rise to the level of a cooperative agreement. Without WS-specific policy, but with full authority for acquiring aircraft, WS Regional personnel did not exercise prudent discretion in obligating and expending Federal funds.

During the course of our enquiry, we also determined that WS did not properly process a Freedom of Information Act (FOIA) request. WS personnel released a copy of at least one record to the complainant without consulting the agency's FOIA Coordinator. The release of information related to an entity engaged in a cooperative arrangement with the USDA could constitute violation of a court injunction limiting such disclosures.

Recommendations In Brief

We are recommending that APHIS request a written legal opinion from the Office of the General Counsel (OGC) as to whether financial and equipment contributions, exceeding 50 percent of the purchase price for the fixed-wing aircraft and paid without a binding agreement or a bona fide need, constitute a violation of appropriations law. If a violation has occurred, determine whether disciplinary action is appropriate.

We are also recommending that WS develop policies and procedures specific to WS' aerial acquisition program, including the establishment of management controls to ensure compliance.

We are further recommending that WS consult with the OGC regarding whether the WS personnel violated the court injunction limiting distribution or release of information pertaining to cooperative entities.

APHIS Response

APHIS provided a written response, dated August 31, 2004, to the draft report. In its response, APHIS did not generally dispute the presentation of facts and transpired events; however, APHIS provided explanations for their decisions and actions for terminating its contract with the complainant. APHIS acknowledged that WS provided an engine maintained in inventory for the aircraft purchased by the industry group. APHIS further acknowledged that providing the engine was critical to the purchase of the aircraft by the industry group. APHIS disagreed that the engine should be considered a contribution toward the industry group purchase of the aircraft as WS maintains ownership of the engine.

APHIS also disagreed with the audit position related to bona fide need. APHIS stated that the audit focused too exclusively on financial ramifications and did not adequately consider the safety issues that

served as basis for the WS decision to replace the aircraft under contract. APHIS agreed to request a legal opinion from OGC as to whether the WS contributions of funding and equipment to support the industry group purchase of an aircraft constituted a violation of Federal Appropriations Law.

The APHIS response, however, was generally responsive to the audit recommendations. Excerpts from the APHIS response are incorporated into the Findings and Recommendations section of the report, where appropriate. The APHIS response is included in its entirety as exhibit B of this report.

OIG Position

This report focused solely on the propriety of the financial arrangements between APHIS and the industry group in the purchase of an aircraft for use in WS' wildlife predation program in Wyoming. APHIS' actions in terminating its contractual relationship with the complainant were addressed by the Government Accountability Office (GAO) and the U.S. Court of Federal Claims. The determination as to whether any APHIS officials may have violated Federal Appropriations Law will be made by the OGC.

We consider the APHIS response adequate to reach management decision for Recommendations Nos. 1, 8, and 9. Additional information or clarification is needed from APHIS before management decision can be reached for Recommendations Nos. 2, 3, 4, 5, 6, 7, and 10. Details of the information or clarification needed to reach management decision for the remaining recommendations are included in the Findings and Recommendations section of the report.

Abbreviations Used in This Report

APHIS	Animal and Plant Health Inspection Service
BPA	Blanket Purchase Agreement
CFR	Code of Federal Regulations
Company	Aircraft Repair Company
Contractor	Complainant
FAR	Federal Acquisition Regulation
FOIA	Freedom of Information Act
GAO	Government Accountability Office
MRPBS	Marketing and Regulatory Programs Business Services
OGC	Office of the General Counsel
OIG	Office of Inspector General
PCMS	Purchase Card Management System
U.S.C.	U.S. Code
USDA	U.S. Department of Agriculture
WS	Wildlife Services

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Background and Objectives

Background

The Animal and Plant Health Inspection Service (APHIS) offers programs to control livestock predation through its program office, Wildlife Services (WS). WS uses a variety of lethal and non-lethal means to carry out this mission. WS provides the services of aircraft that have been specially modified to hunt livestock predators. Aerial operations have been part of the WS since the 1940s. In 1972, Congress banned the use of toxicants for predator control and increased the funding for WS aerial operations, thus increasing the number of aircraft flying hours.

WS has experienced five fatal accidents since 1972; three of which occurred in 1997 and 1998. In January 1998, three accidents involving contract helicopters (rotary aircraft) raised concerns regarding low bid contracting procedures, and aerial hunting operations were stopped, pending review. On January 27, 1998, a task force met to review WS' aerial safety policies and training programs. A short-term strategy was adopted to conduct a formal review of the contract pilot training program and contracting procedures.

In March 1998, a fatal accident involving a fixed wing aircraft occurred, resulting in a complete shutdown of WS' aerial operations pending a preliminary report of the National Transportation Safety Board and development of a plan for outside review of the aerial operations program. The planned review of aerial operations was to focus on five primary areas, including human factor, aircraft, aerial hunting procedures, training for pilots, and contracting. The review team then prepared a report of its findings and recommendations. Based on available funding, WS implemented recommendations set forth by the review team over the following years.

WS may buy, borrow, or lease in order to acquire aircraft services. WS also has used cooperative agreements and contracts to provide aerial hunting services. Cooperative agreements transfer things of value in order to carry out a public purpose authorized by law. When the Government and a group find it convenient to share resources for the public good, they may trade things of value to effect that good. Within WS, the authority for entering into cooperative agreements has been delegated to the Regional level.

The APHIS Agreements Management Manual generally distinguishes between contracts, grants, and cooperative agreements, but does not set specific policy for WS use of cooperative agreements. WS commissioned an aviation information firm to evaluate the

cost-effectiveness of various types of arrangements under which WS operates aircraft (e.g., lease, purchase, etc.). The 1999 internal study concluded, among other things, that it was most cost effective for WS to lease the planes used for aerial hunting.

Whichever means it uses to acquire services, WS must obligate funds in order to pay for the equipment and/or services it procures. The U.S. Code (U.S.C.) below specifies requirements for Federal obligations.

Subsection (a)(1) of 31 U.S.C. 1501 requires that all obligations for contracts have a binding agreement and that the binding agreement be executed before the end of the fiscal year. The agreement must be in writing and executed before the end of the period of availability for obligation for specific goods to be delivered, real property to be bought or leased, or work or service to be provided. As expressed by the Comptroller General, a “contract imposing [an] obligation must be made within the fiscal year sought to be charged and must meet a bona fide need of that fiscal year.”

31 U.S.C. Section 1502(a) also provides that an appropriation is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made.

WS must enter into a binding agreement with the entity from which it buys, borrows, or leases during the same fiscal year that funds are obligated to pay for the services. Without a binding agreement, WS has no bona fide need for the services and, thus, cannot obligate funds to pay for them.

Objectives

In September 2002, the Office of Inspector General (OIG) received a congressional inquiry requesting an evaluation of alleged improprieties in the leasing of airplanes by APHIS WS and potentially inappropriate financial arrangements between WS and an industry group. In October 2002, we initiated a review to (1) examine potential violations of appropriations and procurement laws and (2) evaluate the control structure APHIS WS had in place to guide its acquisition of aircraft services. During the course of our audit, it came to our attention that Freedom of Information Act (FOIA) provisions may have been violated as part of WS’ dealing with a complainant. Accordingly, we assessed these potential violations.

Findings and Recommendations

Section 1. Violations of Law

WS acted inappropriately in facilitating an industry group's purchase of an airplane. Lacking a binding agreement that established a bona fide need to obligate Federal funds, the payments may have violated Federal appropriations laws. In addition, WS used purchase cards to pay for costs in order to keep the payment approval at the Regional level. Because the costs exceeded the \$2,500 limit of any one purchase card, the WS Region split the charges among five purchase cards, thereby violating procurement regulations. We concluded the questionable actions by the WS were made to facilitate the purchase of an aircraft by a future cooperator⁵ (industry group).

Finding 1

WS' Payments for Aircraft Repairs May Have Violated Appropriations Law

WS executed an improper financial arrangement with an aircraft repair company (company) to facilitate the purchase of an aircraft by a future cooperator for use in its wildlife predation program. WS allowed the company to bill for repairs that had already been made, totaling over \$25,000, and provided an engine valued at about \$20,000 when it did not have a binding agreement with the company. The responsible WS official believed the ex post facto expense was appropriate because it was linked to an intended cooperative arrangement with an industry group with whom WS shared mutual interests related to the protection of livestock. WS officials also believed that actions they took in payment of funds that assisted the industry group in acquiring an airplane to replace the complainant's aircraft were justified due to structural and safety concerns regarding the complainant's aircraft. Because WS did not authorize the expenditures at the time the repairs occurred and because there was no binding agreement with the company or the industry group, we question whether WS properly exercised its discretion in obligating and expending Federal funds.

Subsection (a)(1) of 31 U.S.C. 1501 requires that all obligations for contracts have a binding agreement and that the binding agreement be executed before the end of the fiscal year. The agreement must be in writing and executed before the end of the period of availability for obligation for specific goods to be delivered, real property to be bought or leased, or work or service to be provided. As expressed by the Comptroller General, a "contract imposing [an] obligation must be

⁵ The industry group subsequently entered into a cooperative agreement with APHIS to provide the services of the aircraft for use in APHIS' aerial hunting programs.

made within the fiscal year sought to be charged and must meet a bona fide need of that fiscal year.”

31 U.S.C. Section 1502(a) also provides that an appropriation is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made.

When WS contracts for an aircraft for its aerial hunting program, it requires the supplier to have made all the modifications needed to render the aircraft suitable for the specialized purposes to which the agency will put it. The supplier can recover the cost of the modifications by including them in the rate it charges WS for the use of the aircraft.

In February and March 1999 (fiscal year 1999), an aircraft repair company made modifications to a Piper Super Cub that brought the plane up to the required standards for the WS wildlife predation program. WS leased the plane from the company in June 1999 and paid the company \$6,511, for use of the plane for July and August 1999. Beginning in August 2000 (fiscal year 2000), however, WS began issuing payments to the company to cover the cost of modifications made in the prior fiscal year.

By December 2000, WS had made over \$25,000 in payments to invoices submitted by the company based on a July 2000 understanding by the industry group that WS would contribute about \$30,000 in the form of a loan or grant and an engine (for a total of about \$50,000 in money and equipment) toward the purchase of the aircraft by the industry group. A buy/sell agreement from the company, dated 4 months earlier (August 1), showed that the sale was contingent on WS’ compensating the aircraft repair company for \$15,050, furnishing an engine, or compensating the repair company for a complete 180-horsepower conversion of the engine.

No Binding Agreement

WS had no written agreement with the aircraft company in February 1999 to obligate Federal funds to pay for the cost of modifications made to the Piper Super Cub to ready it for use in WS’ wildlife predation program. The company made the modifications in the anticipation of leasing the plane to the Government. When WS leased the plane from the company in June 1999, it issued a Blanket Purchase Agreement (BPA)⁶ to authorize and pay for services rendered.

⁶ According to the APHIS Purchasing Handbook, dated May 2002, a BPA is not a contract. The Government is not obligated to place any orders and the vendor is not obligated to accept any orders.

This BPA included no commitment on WS' part to pay for any extra charges beyond the lease rate. The BPA shows that the plane would be leased for \$65 per hour, as needed. Additional WS records show that payments were made to the company on July 31, 1999, for leased aircraft for \$4,457 and on August 31, 1999, for \$2,054.

During the summer of 2000, the aircraft repair company negotiated the sale of the Piper Cub to the industry group. On August 1, 2000, the company drew up a buy/sell agreement which specified that the sale of the plane was contingent on WS paying \$15,050 for installed equipment and modifications to bring the aircraft into compliance with WS requirements for aerial hunting planes. The buy/sell agreement did not include WS as a signatory to recognize and obligate WS to pay for the modifications.

On August 9, 2000, the seller forwarded an invoice for \$15,050 to a WS official. On August 28, 2000, this official forwarded the invoice to Marketing and Regulatory Programs Business Services (MRPBS), which handles financial transactions for the WS. He included a memorandum explaining that, due to short timeframes and the need to initiate aircraft modifications, a request for a purchase order was previously overlooked.⁷ The memorandum apologized for the oversight and requested payment. MRPBS approved the request and forwarded the invoice for payment. One day later, a purchase order and check for payment were both issued by MRPBS for \$15,050.

No Bona fide Need

By issuing payments in August 2000 (fiscal year 2000) for aircraft modifications that were made in February and March 1999 (fiscal year 1999) without a written agreement, WS demonstrated that there was no bona fide need to pay for those modifications when it did. According to 31 U.S.C. 1502 (a), known as the "bona fide needs" statute:

The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title [which requires the binding agreement noted above]. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

⁷ Advance requests for purchase orders are the official request for MRPBS to initiate the procurement process and obligate funds.

Since funding was not obligated in February 1999 by any binding agreement, the expenses paid in August 2000 represented an unauthorized commitment and a possible violation of appropriations law, as set forth in 31 U.S.C. 1502. We concluded that under the circumstances, MRPBS should not have agreed to, and paid for, the expenditure request.

We also found nothing to demonstrate that WS needed to acquire an additional (fourth) aircraft for use in Wyoming in fiscal year 1999.⁸ In fact, to implement the cooperative agreement with the industry group, WS notified an aircraft supplier (complainant) in August 2000 that it was not going to exercise an option on a Piper Super Cub for fiscal year 2001 (October 2000 through September 2001). The plane was under contract as of November 1999, for fiscal year 2000 (October 1999 through September 2000). Although WS officials expressed concerns over the structural integrity of the aircraft under the contract, they continued flying the plane under a modification to the contract until December 2000 when the industry group's Piper Super Cub was brought into the program by the signing of the cooperative agreement on November 20, 2000.

Additional invoices totaling \$10,157.92 were billed by the aircraft repair company on November 2, 2000, (fiscal year 2001) for modifications made in October 2000. These invoices were paid in December 2000. For details about these payments, see finding 2.

WS' combined contributions to the modifications to the Piper Super Cub totaled \$25,207.92 in monies and approximately \$20,000 in equipment (an engine). These contributions well exceeded the \$34,450 contributed by the industry group to purchase the aircraft. We question this transaction as an apparent means of facilitating the industry group's purchase of the aircraft.

Ownership

We also question WS' actions insofar as they did not provide an ownership interest in the aircraft. WS officials maintain that the agency owns the engine and, therefore, the contribution should not be counted towards monetary interest in the aircraft. We note, however, that had WS not contributed the engine, the industry group would have had to pay at least \$33,450 more (per the seller's correspondence) to bring the aircraft up to required standards. At a minimum, WS' equipment and monetary contribution allowed the group to pay about

⁸ WS began discussing that a fourth plane could be used in Wyoming in 2002 during the same timeframe that the industry group acquired a second airplane.

half as much as they would have if they had to provide the engine on their own.⁹

WS personnel originally stated that, as with the engine, paying for the aircraft modifications constituted the agency's ownership of the modified aircraft parts, with associated rights to remove such parts should the aircraft be sold or removed from service. A representative of the industry group, however, stated that, with the exception of the engine, there were no provisions or understanding that WS maintained ownership and the right to remove other parts of the aircraft.

In addition, WS did not treat the equipment as if it were part of its inventory. The modified aircraft parts, excepting the engine, were not recorded or tracked as accountable property. Because there was no binding agreement for the modifications and because the cooperative agreement recognizes only the group's ownership of the aircraft, WS may not be able to recover any of its investment. Since fiscal year 2003, the industry group now supplies aircraft under contract (lease) with WS.

WS personnel subsequently argued that funding provided for aircraft modifications was indirectly recovered through retained lower lease rates and increased flight hours associated with the cooperative agreement. We question this assertion because the hourly rate for aircraft use from the industry group is renegotiated from year to year. WS held no guarantee that the group would continue to charge them a low hourly rate. In any case, WS did not analyze the lease rate to determine whether the amount it would save during the course of the lease would equal or exceed the amount of money and equipment it had contributed to the aircraft's purchase.

The Piper Super Cub supplied by the aircraft repair company under the BPA was leased for \$65 per hour; the aircraft supplied under the contract by the complainant was \$88 per hour for the 335 minimum guaranteed hours and \$20.50 for any additional hours in the first year. The complainant's aircraft would subsequently lease for \$77.25 per hour for 400 minimum guaranteed hours and \$20.50 for any additional hours in the second and third years. The industry group's hourly lease rate was \$55.00 per hour for 500 estimated hours.

⁹ The group paid \$34,450, the engine was worth approximately \$20,000, and APHIS contributed over \$25,000, for a total of \$79,500. The group's contribution represents 43 percent of this total, leaving WS' contributions valued at 57 percent.

Anticipated Lease Payments to Contractor Compared to Industry Group

We further question the APHIS contention that a cooperative agreement with the industry group allowed the agency to indirectly recover the costs of aircraft modifications through the agency's ability to secure additional flying hours based on a lower hourly lease rate. For fiscal year 2002, the guaranteed lease payment to the contractor (the complainant) was \$30,900, based on 400 hours at \$77.25 per hour. Assuming an additional 100 hours of flying time (to equal the number of hours estimated for operation by the industry group) at \$20.50 per hour, the lease payments to the contractor would have totaled \$32,950. The estimated lease payment to the industry group was \$27,500, based on 500 hours of flying time at \$55 per hour. The difference of \$5,450 (\$32,950 less \$27,500) would be insufficient to recover the APHIS payments totaling \$25,207.92 during the first year. In fact, it would have taken nearly 5 years to fully recoup the APHIS payments if the aircraft was supplied at \$55.00 an hour based on 500 hours as estimated on the FY 2001 work plan developed for the industry group. Based on 672.8 hours actually flown during this timeframe, APHIS would have paid the contractor less (\$36,492) than they paid the industry group (\$37,004).

It should also be noted that upon submitting a competitive bid for the fiscal year 2003 contract, the industry group increased its lease rate to \$70 per hour for 450 guaranteed hours and \$30 per hour for each additional hour. Proposed lease rates by the industry group for optional years of the contract were set to increase \$2.50 per hour for each subsequent year, reaching \$80 per hour for 450 guaranteed hours and \$40 per hour for each additional hour effective for fiscal year 2007. Therefore, it appears little, if any, benefit actually accrued to WS through the industry group's cooperative arrangement.

We concluded that WS should seek a legal opinion from the Office of the General Counsel (OGC) as to whether the agency's contributions to the purchase price for the fixed-wing aircraft, paid without a binding agreement or a bona fide need, constitute a violation of appropriations law. WS also should consider appropriate disciplinary actions against all personnel involved in this transaction.

Recommendation No. 1

Request a written legal opinion from the OGC as to whether financial and equipment contributions, exceeding 50 percent of the purchase price for the fixed-wing aircraft and paid without a binding agreement or a bona fide need, constitute a violation of appropriations law.

APHIS Response.

APHIS disagreed that the WS contribution to the industry group aircraft exceeded fifty percent of the purchase price as the engine remains WS property. APHIS also disagreed that no bona fide need existed. Nonetheless, APHIS stated that WS will request a legal opinion from OGC on whether financial and equipment contributions constituted a violation of appropriations law. The request for legal opinion was to be initiated by August 31, 2004.

OIG Position.

OIG does not question the need for WS to operate an aircraft in the designated geographical location. Rather, OIG questions whether Federal funds were obligated for payment of expenses properly incurred or for contracts properly made within the period of appropriation availability; whether a bona fide need existed for the services in that fiscal year.

We accept the management decision that WS will request a legal opinion by August 31, 2004, from OGC as to whether financial and equipment contributions constitute a violation of appropriations law.

Recommendation No. 2

If it is determined that WS personnel violated appropriations law, initiate appropriate disciplinary actions.

APHIS Response.

APHIS responded that if it is determined WS personnel violated appropriations law, the WS Deputy Administrator will initiate appropriate disciplinary action.

OIG Position.

While the APHIS response indicates positive corrective action, we are unable to accept management decision until disciplinary action specifics are known and an actual or estimated timeframe for completion of the agreed to action is provided to us.

Recommendation No. 3

Consult with the OGC as to the actions WS can and should take to rectify this questionable transaction, including ownership of the plane, recovering the APHIS funds, and protecting the Government's interest.

APHIS Response.

APHIS responded that WS will consult with appropriate USDA and APHIS officials by September 30, 2004.

OIG Position.

The APHIS response provides for WS consultation with USDA and APHIS officials, but does not specify whether representatives of OGC will be included. We are unable to accept the management decision without clarification being provided to us that WS will consult with OGC regarding appropriate actions that can and should be taken with respect to the WS contributions of funding and equipment relative to the aircraft purchase transaction.

Finding 2

WS Violated Procurement Regulations by Splitting Invoice Amounts Into Five Separate Payments to be Paid by Purchase Cards

WS covered the cost of two invoices totaling over \$10,000 by splitting the amount into five invoices of less than \$2,500 each and using a purchase card to pay each invoice. WS resorted to this expedient because the \$10,000 costs resulted from an unauthorized commitment made in the previous fiscal year to pay for aircraft modifications (see finding 1). As a result, the holders of the WS purchase cards violated procurement regulations that forbid splitting invoices in order to allow purchase card payments that exceed \$2,500.

The USDA Purchase Card Management System (PCMS) Micro-Purchase Guide establishes a \$2,500 maximum dollar amount that may be delegated to a cardholder for a single purchase. Convenience checks are used for purchases when the vendor or merchant is not willing or able to accept the purchase card. The PCMS Micro-Purchase Guide expressly forbids splitting purchases merely to stay within the single purchase limit.¹⁰ The Federal Acquisition Regulation (FAR) states that the micro-purchase threshold shall not be broken down into several purchases that are less than the applicable

¹⁰ PCMS/Micro-Purchase Guide, Single Purchase Limit, p. II-2.

threshold merely to permit use of simplified acquisition procedures or to avoid any requirements that apply to purchases exceeding the micro-purchase threshold.¹¹

On November 2, 2000, the aircraft repair company submitted an invoice to the WS for \$7,662.92 in additional aircraft modifications. As no advance request for a purchase order was submitted to MRPBS, this invoice represented an unauthorized commitment subject to ratification per regulation. Documentation shows that the aircraft repair company certified these items were completed in October 2000.

Since the invoice represented alleged commitments from the previous fiscal year (2000), a WS officer indicated that WS could not pay the invoice using that fiscal year's (2001) funds. The officer suggested splitting the invoice into separate invoices so that payment could be made using purchase cards. Below a \$2,500 threshold, purchase cards allow payments to be made without prior authorization through advance purchase channels. Given the relatively small amount of a sub-threshold purchase, these individual purchases are not subject to the same level of control as purchases above the threshold.

The invoice was subsequently split into four separate invoices, with a fifth invoice for \$2,495 in labor being added. At request of the WS officer, five different WS personnel, who were not involved in the original acquisition, issued convenience checks through their purchase cards in payment of the five invoices, together totaling over \$10,000.

By splitting the purchase amount to stay within the single purchase limit, WS personnel circumvented controls designed to ensure that the agency's funding is obligated appropriately.

Recommendation No. 4

Initiate disciplinary actions based on employees' roles and responsibilities related to unauthorized funding ratification and consider revocation of purchase card authorizations of all employees who directed the orders be split and those who made the payments.

APHIS Response.

APHIS provided details of implemented controls designed to strengthen the integrity of the procurement process, including personnel changes to allow for more checks and balances within financial and procurement processing operations, scheduled reviews of credit card

¹¹ FAR Part 13.103(c).

transactions at the WS State and Regional office levels, and required training for WS State office personnel related to Federal Appropriations Law and APHIS Agreements. APHIS further responded that by August 31, 2004, the WS Deputy Administrator would request a MRPBS audit of employees' roles and responsibilities with regard to aerial-related credit card transactions and accountability. Based on MRPBS recommendations, the WS National office will implement necessary and appropriate actions.

OIG Position.

While APHIS has instituted a wide range of controls to provide better accountability over the procurement process, management decision cannot be accepted until further clarification is provided to us on the MRPBS audit. To reach management decision, we need to know whether this review will include an evaluation of the specific actions of WS employees with respect to improper requests for ratification of unauthorized procurement actions and improper payments for split invoices identified in the audit report. APHIS' internal review should not simply focus on the processes/procedures currently in place. APHIS must clarify whether implementation of necessary and appropriate actions will include a determination as to whether personnel actions will be taken, as deemed appropriate.

Section 2. Management Controls Over WS Aerial Acquisition Program are Lacking

WS lacks a cohesive management control structure to ensure that its aircraft resources are acquired appropriately. In particular, WS has not developed written policies governing the acquisition of aircraft and does not provide management oversight of aircraft acquisition. WS senior management has delegated full authority and responsibility for aircraft procurement to the Regional level with only general APHIS acquisition policy to guide particular WS aircraft procurements. Without established procedures that demonstrate how to apply general APHIS acquisition policy to specific WS procurement situations, WS Regional personnel are left to implement APHIS guidelines as they see fit.

Finding 3

WS Management Did Not Provide an Adequate Control Structure

WS did not provide an adequate control structure to ensure that aircraft acquisitions made to combat livestock predation were carried out by the Regions in a manner that maintained the integrity of the program. Specifically, WS senior managers, who had delegated acquisition authority to the WS Regions, provided no oversight to ensure the authority was used appropriately and issued no WS-specific policies or procedures that governed aircraft acquisitions. As a result, APHIS obtained aircraft in a manner so questionable that the acquisition itself circumvented procurement regulations, and may have violated appropriations law.

WS records showed that in fiscal year 2002, WS leased and operated 10 aircraft for a total of \$262,472 in variable lease commercial costs. WS also obtains aircraft for the program through surplus, purchase, and borrowing. The total WS cost in fiscal year 2002 for aircraft operated by WS personnel approached \$1.8 million. In addition, WS records showed that the agency paid \$420,486 for 32 contracted aircraft (not operated by WS).

These figures show the expenditure of significant resources by WS to provide aircraft services within its aviation program and indicate the need for a cohesive management control structure and management oversight. However, we found that WS did not have written policies regarding the acquisition of aircraft and did not provide management oversight of those acquisitions.

Lack of Management Oversight

By authorizing the payment of funds to an aircraft repair company for modifications to an airplane that would be sold to an industry group and made available to WS through a cooperative agreement, WS may have violated provisions of the Federal appropriations law. Specifically, the WS payments were made about 1 year after the modifications had been completed, WS was essentially reimbursing the aircraft seller for modifications that were made in the absence of any binding agreement on WS' part that it would fund the modification (see findings 1 and 2).

WS' investment in an aircraft that would be purchased by the industry group for future lease to WS, its failure to document any ownership in the plane, either through the cooperative agreement or any other procurement instrument, and its determination to supplant a procurement contract with a cooperative agreement, raises questions about the Region's unrestrained exercise of the delegated authority. We concluded that WS senior managers need to be more closely involved in the aerial acquisition program and in the decision-making process.

Written Policies

The one guide that the WS issues concerning aircraft, the Aviation Operations Manual, prescribes the minimum safety standards for aircraft use. It does not provide any guidance on the acquisition of aircraft. For this guidance, WS personnel turn to the APHIS Agreements Management Manual, which sets forth policy on the acquisition of assets by all procurement officers managing programs in six APHIS divisions, including those in the WS. WS itself has not produced any written policy of its own for those specific assets, like aircraft, that it acquires routinely over the years.

APHIS manual policy is necessarily general and reflects, as nearly as it can, the language of 31 U.S.C. 6301-6308 that distinguishes between contracts, grants, and cooperative agreements. However, the manual was meant to apply to all APHIS programs and is worded broadly rather than narrowly. For example, the manual specifies that a contract is the proper instrument of acquisition when APHIS is going to get a "deliverable," such as "equipment or supplies for APHIS' use." Conversely, the manual also provides among its examples of situations calling for cooperative agreements those "wildlife damage activities where APHIS wants to participate in the project." The manual does not make clear that the delivery of an airplane for wildlife damage activities would warrant a contract or that WS' engagement in aerial hunting in a third party's plane would not rise to the level of a cooperative agreement.

There are no WS-specific procedures for acquiring aircraft for wildlife damage control; WS Regions have been delegated the authority for acquiring aircraft. We concluded that WS should issue written policy and procedures regarding the acquisition of aircraft. Such policy should address the decision points that result in selection of the proper instrument (contract or agreement) to acquire aircraft and prevent the kinds of arrangements Regional personnel made with the industry group. Specifically:

- 1) *WS should not pay for modifications to an aircraft without having a binding agreement in place.* The party that sold the aircraft to the industry group made modifications to the plane beginning in February 1999, months before the WS began paying for the modifications in the absence of a written commitment and over a year before the cooperative agreement with the industry group was signed.
- 2) *As a general rule, WS should not use an agreement when procurements are justified.* Public law and the APHIS manual make clear that competitive contracts are the preferred instrument for acquisitions and that agreements should not be entered into if they are in direct competition with commercial vendors. To initiate cooperative agreements to acquire aircraft, the WS Region abandoned a contract method of procurement it had been using for at least 3 years in Wyoming and patterned this effort after a cooperative agreement used in Idaho.
- 3) *WS should ensure competition for agreements to the maximum extent practicable.* The APHIS manual makes this clear and requires justification for agreements entered into without competition. The WS Region offered no acceptable justification for entering into the noncompetitive agreement with the industry group.

WS policy should also offer guidance on preparing a cooperative agreement to ensure the instruments meet the appropriate criteria. Specifically:

- 1) *Cooperative agreements need to acknowledge WS' ownership of any assets WS contributes, giving WS the option of recovering these assets when the agreement terminates.* The cooperative agreement with the industry group makes no reference to the WS funds used to pay for the plane's modifications and the engine. Although WS personnel stated the Government owned part of

the plane, the industry group would not acknowledge any Government ownership outside of the engine.

- 2) *Cooperative agreements need to specify the activities the cooperator will engage in as its part of the participation.* The cooperative agreement with the industry group shows that the group was not participating in the aerial hunting, only making the aircraft available.

Recommendation No. 5

Develop a cohesive management control structure for aircraft to include management decision processes and models to properly evaluate ownership/operating options, and terminate all inappropriate cooperative agreements used to obtain aircraft.

APHIS Response.

APHIS responded that MRPBS hired a full-time warranted Contracting Officer in April 2003, to oversee all procurement activities for the aviation program. The Contracting Officer will provide guidance to the National Aviation Manager and oversight of all procurement activities for the aerial program to ensure compliance with procurement regulations. In addition, WS will monitor cooperative agreements and contracts for aerial activities at the National level beginning October 1, 2004.

OIG Position.

We cannot accept management decision until APHIS fully describes its management control structure for aircraft management decision processes and its guidance regarding ownership/operating options to be approved by the WS National office. In addition, APHIS' response did not address the termination of all inappropriate cooperative agreements used to obtain aircraft. To reach management decision, APHIS needs to provide a description of its controls and guidance, as well as what actions will be taken, with timeframes, to review the propriety of its agreement and contracts for aircraft acquisition.

Recommendation No. 6

Require the WS to develop and issue acquisition guidelines that are based on the decision processes and models described in Recommendation No. 5 and that set forth in terms specific to the WS mission and its programs the requirements entailed in acquiring aircraft and other high-value assets through the procurement process. These

guidelines should be in harmony with the appropriate Federal procurement regulations and the APHIS manual, and should be in sufficient detail to clarify the decision process in situations peculiar to the WS.

APHIS Response.

APHIS responded that WS believes FAR subpart 7.4 contains sufficient acquisition procedures and sees no need for additional informal guidelines. WS will move management responsibility for these acquisition activities to the National office, while continuing to analyze each individual need for aircraft and matching the appropriate tool to the need for successful accomplishment of the mission.

OIG Position.

We agree that the WS should follow provisions of the FAR as these regulations set forth policy and procedure for the procurement of goods and services via purchase or lease throughout the Government. However, the FAR does not address or provide specific agency controls and operational procedures to ensure that appropriate regulatory authorities are followed. To reach management decision, WS needs to provide a description of the controls and procedures that will be established to ensure compliance with established policy and regulatory authorities, as well as the target date for implementation.

Finding 4

WS Senior Management Did Not Ensure That Acquisition Decisions Complied With Internal Study Results

In its decisions about acquiring aircraft, WS inconsistently applied its own internal evaluation of the most cost-effective means to procure services. WS' decision making wavered because senior management did not ensure that the results of the evaluation were used consistently to make acquisition decisions. As a result, in one instance, WS' personnel used the study to justify leasing aircraft for its aerial hunting program, while in another instance the study's recommendation that aircraft be leased rather than purchased was ignored. This inconsistency further showed that WS was determined to secure the services of an industry group's airplanes, as each decision appeared to work to the advantage of the group's attempt to provide aircraft services for aerial hunting.

An aviation information firm performed an Aviation Services Study to evaluate the cost effectiveness of various types of arrangements under which WS operates aircraft (e.g., lease, purchase, etc.). The 1999 study

concluded, among other things, that it was most cost effective for WS to lease the planes used for aerial hunting.

WS personnel originally referred to the internal study as support for their decision to execute a cooperative agreement with the industry group. After the agreement was terminated, following a suit filed by a complainant, WS opened the lease to competitive bidding. The industry group submitted the winning bid and continued to provide its plane to WS, although under a lease rather than a cooperative agreement.

While under this lease arrangement, the group acquired a second plane (using the first as collateral). Subsequently, WS published pre-solicitation notices notifying vendors of its intent to purchase three planes suited for aerial hunting. Two of the planes WS proposed to purchase were similar to those analyzed in the internal study, but no explanation was given for why the agency chose to ignore the internal study (which recommended leasing).¹²

The advertisements also showed that two of the planes were identical to those owned by the industry group (one under lease with WS and one just purchased). The aggregate effect of WS' acquisition strategies gives the appearance that the agency intended to acquire the services of aircraft owned only by the group. When one means failed, the cooperative agreement, WS appears to have employed other instruments (lease, purchase) to enhance the likelihood that the group continued to provide the agency with aircraft.

This impression is strengthened by WS' having published the pre-solicitation notices in the incorrect part of the Federal Business Opportunities for Vendors—section 99 rather than section 15. The Federal Business Opportunities for Vendors includes section 15, Aircraft and Airframe Structural Components, and section 99, Miscellaneous.¹³ Incorrect placement and publication of pre-solicitation notices limit vendor access to information for potential bids since they may not see the notices, thus narrowing the field of potential offers and potentially weakening the competitive bidding process.

The study WS commissioned to determine the most cost-effective options for acquiring aircraft should have guided decision making. However, WS lacked management controls to ensure that the internal

¹² The third plane was a new model of a previously used aircraft that WS wanted to test and evaluate for use in providing aerial hunting services.

¹³ Federal Supply Codes/Product Service Codes, sections 15 and 99.

study's recommendations were applied consistently in its aircraft acquisition decisions for its aerial hunting program. This inconsistency opened WS' acquisition decisions to question and evoked the appearance of favoritism.

Recommendation No. 7

Require that the WS senior management ensure aircraft acquisition decisions are consistent with its internal study results and in the best interests of the Government.

APHIS Response.

APHIS discounted the internal study as an effective management tool, citing flaws in the information and approach used by the contracted aviation firm. APHIS stated that WS acquisition decisions are made to accomplish the program mission, and as such, WS will follow the FAR, subpart 7.4 and any other appropriate information to determine if a lease or buy is the best option for the mission.

OIG Position.

APHIS officials cited the internal study during this audit as criteria for establishing consistency in the decision process for the lease or purchase of aircraft. In addition, the study results were initially identified by WS Western Region management as support for their decision to execute a cooperative agreement with the industry group to lease the subject aircraft. The WS Western Region management identified the internal study as fulfilling the requirements for periodic review under Office of Management and Budget Circular A-76; an assertion later disputed by WS Headquarters personnel. Our audit reported that WS personnel originally used the internal study as support for their position to lease aircraft, while subsequently adopting a philosophy that purchasing was a preferred procurement option; a position contrary to the results of the internal study.

A contracted study is generally designed around parameters and specifications provided by the agency. If the study was flawed, as now asserted by APHIS officials, it raises questions as to why the study was offered as support for any aircraft acquisition decision, including the decision to use a cooperative agreement to lease the aircraft.

To reach management decision, APHIS must clarify what process will be used to determine if a lease or buy option best fulfills the mission.

Recommendation No. 8

Develop controls to ensure that pre-solicitation notices to purchase aircraft appear in section 15 of the Federal Business Opportunities for Vendors.

APHIS Response.

APHIS responded that MRPBS hired a Contracting Officer in April 2003, who will ensure that all pre-solicitation notices appear within the correct classification code of the Federal Business Opportunities for Vendors.

OIG Position.

We accept the management decision.

Finding 5

APHIS WS Policies and Procedures for Processing of FOIA Requests Were Not Always Followed

Management procedures for processing FOIA requests for records were not always followed to assure proper processing and release of records. Although controls were in place, a Regional official decided that documentation requested by the complainant did not come under FOIA's provisions. After two requests for records filed on behalf of the complainant were rescinded, WS personnel provided a copy of at least one record to the complainant without clearing the release through the FOIA Coordinator. The responsible official commented that, in his opinion, the document was not privileged.

FOIA provides that each agency, in accordance with published rules, has to make records available for public inspection.¹⁴ Departmental regulations require, though, that each agency develop and maintain a record of all written requests and appeals for records received by the agency.¹⁵ In addition, APHIS (WS' parent agency) procedures further require that requests for records have to be made in writing and submitted to APHIS' FOIA Coordinator.¹⁶

On August 10, 2001, the complainant's attorney filed two separate requests with the WS Region for records relating to cooperative agreements between WS and the industry groups providing leased aircraft for aerial hunting. Documentation maintained by the complainant supported a telephone contact initiated by a WS official to discuss future options for use of the complainant's fixed-wing aircraft and a request for the complainant to allow WS the opportunity to work the situation out internally. The WS official held that he did not ask the complainant to terminate the FOIA requests for records.

Following this call, the complainant said that he told his attorney to rescind the FOIA requests for records. Correspondence from the attorney to the complainant, dated August 16, 2001, indicated that all work on the protest, related to the industry group providing leased aircraft for aerial hunting in Wyoming, was stopped at the complainant's request.

Our interview with the complainant indicated his understanding that future considerations for placement of fixed-wing aircraft would be

¹⁴ 5 U.S.C., part 1, chapter 5, subchapter II, section 552(a)(2).

¹⁵ 7 Code of Federal Regulations (CFR), part 1, subpart A, section 1.5(h).

¹⁶ 7 CFR, chapter III, sections 370.1 and 370.5(a).

forthcoming in exchange for termination of the formal FOIA requests for records. The complainant further disclosed that WS personnel subsequently provided a copy of at least one record related to the cooperative arrangement between WS and the industry group. A WS Regional official confirmed that he provided a copy of at least one document to the complainant and explained that the document was not privileged or confidential.

While WS has discretionary authority to release information when not specifically prohibited from doing so, the decision to release information should be made in consultation with the APHIS FOIA Coordinator and documented. The release of information by WS personnel may have violated a court injunction filed November 15, 1999, by the United States District Court for the Western District of Texas, Waco Division, limiting the release of information related to entities participating in cooperative arrangements with USDA. Discussions with OGC attorneys disclosed the existence of an ongoing court injunction that, interpreted on a broad basis, restricts the release of information related to USDA cooperating entities to sources outside the USDA.

Recommendation No. 9

Counsel WS Regional personnel as to the requirements associated with agency processing of FOIA requests for records.

APHIS Response.

APHIS responded that on July 7, 2004, the WS National office issued an official reminder to all WS personnel of the requirements associated with agency processing of FOIA requests for records.

OIG Position.

We accept the management decision.

Recommendation No. 10

Consult with the OGC as to whether the actions taken by WS Western Region personnel violated the court injunction limiting distribution or release of information pertaining to cooperating entities and take appropriate administrative action to admonish responsible personnel for any inappropriate actions.

APHIS Response.

APHIS responded that WS would consult with OGC by August 31, 2004, and take appropriate actions by December 1, 2004, to ensure compliance with the court injunction by WS personnel.

OIG Position.

We cannot accept management decision because the APHIS response is not clear whether intended actions will be directed towards WS personnel associated with the referenced release of records. To reach management decision, WS needs to clarify what actions will be taken if personnel have been found to have violated the court injunction through the specific release of records referenced in the audit report.

Scope and Methodology

To accomplish the review objectives, we gained an understanding of the aviation program administered by APHIS WS. We reviewed applicable laws, regulations, policies, and procedures developed by APHIS at the headquarters and field level related to WS aerial hunting and procurement operations and activities. We also reviewed Federal procurement regulations and procedures. We conducted our review through interviews of personnel from APHIS WS, MRPBS, OGC, the industry group from which the subject aircraft was leased, the aircraft company responsible for performing aircraft modifications, the complainant, and his attorney. We also reviewed records provided by each respective source to substantiate or refute verbal statements and to establish the sequence of transpired events. We performed the audit fieldwork for the review during the period October 2002 through May 2004.

Within WS, we interviewed officials and reviewed records at the Headquarters level in Washington, D.C., the Western Regional Office in Fort Collins, Colorado, and the Wyoming State office in Casper, Wyoming. We obtained background information on the establishment and administration of the aerial hunting program, numbers and types of aircraft operated by WS, arrangements by which WS acquires aircraft for use, and specific details related to the events in question. We analyzed the types of aircraft operated by WS from fiscal years 1999 through 2002, and the arrangements under which these aircraft were secured, to identify similarities and differences in operation of aircraft in various States and to evaluate establishment of a normal practice.

At MRPBS, we interviewed current and former personnel regarding the processes for solicitation and award of bids for procurement of aircraft services, as well as the procedures for processing payment for invoiced modifications to the aircraft in question. We reviewed records related to the procurement actions associated with these events.

Interviews with representatives of the industry group from which the airplane was leased and the company responsible for performing the aircraft modifications were conducted to obtain second-party verification of transpired events and to identify agency personnel involved in the decision-making processes. We interviewed the complainant and one of his attorneys, whose protests served as the basis for the congressional inquiry, and reviewed complainant-provided records to evaluate the legitimacy of the protest allegations.

The review was performed in accordance with Government Auditing Standards.

Exhibit A – Summary of Monetary Results

Finding Number	Recommendation Number	Description	Amount	Monetary Results
1	3	Federal funds used to facilitate purchase of an aircraft by a industry group.	\$25,208	Questionable Costs/Loans, Recovery Recommended

Exhibit B – APHIS Response

Exhibit B – Page 1 of 11



United States
Department of
Agriculture

AUG 31 2004

Marketing and
Regulatory
Programs

Animal and
Plant Health
Inspection
Service

Washington, DC
20250

SUBJECT: Response to OIG Audit Report No. 33099-1-KC
Wildlife Services Aircraft Acquisition

TO: Stephen V. Fowkes
Director, Food and Marketing Division
Office of Inspector General

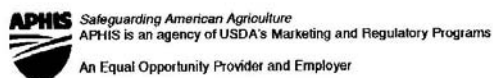
In reference to the Office of the Inspector General's (OIG) official draft report (No. 3309-1-KC) dated June 8, 2004, the Animal and Plant Health Inspection Service, Wildlife Services provides the enclosed comments and responses.

If you have any questions, please contact Bill Hudnall, Deputy Administrator for Marketing and Regulatory Programs Business Services at 202-720-5213 or Bill Clay, Wildlife Services Deputy Administrator, at 202-720-2054.

A handwritten signature in black ink that reads "W. Ron DeHaven".

W. Ron DeHaven
Administrator

Enclosure



Executive Summary

Animal and Health Inspection Service, Wildlife Services Aircraft Acquisition
(Audit Report No. 33099-1-KC)

OIG Recommendations in Brief

The OIG recommends that APHIS request a written legal opinion from the Office of the General Counsel (OGC) as to whether financial and equipment contributions, exceeding 50 percent of the purchase price for the fixed-wing aircraft, and paid without a binding agreement or a bona fide need, constitute a violation of appropriations law.

If a violation has occurred, determine whether disciplinary action is appropriate.

The OIG also recommends that APHIS develop policies and procedures specific to WS' aerial acquisition program, including the establishment of management controls to ensure compliance.

In addition, the OIG recommends that WS consult with OGC regarding whether WS personnel violated the court injunction limiting distribution or release of information pertaining to cooperative entities.

APHIS Response: APHIS will consult with OGC by August 31, 2004 and request a written legal opinion whether WS personnel violated appropriations law while procuring aerial services and equipment for the aerial activities in Wyoming that are under question. WS will develop any additional internal policies and management controls needed to ensure compliance with appropriations laws, and; will continue to seek guidance from OGC to ensure compliance with the John Doe Permanent Injunction.

Background and Objectives

Comment: WS believes that the OIG may not have adequately considered and discussed the circumstances that lead to the need for a cooperative agreement in the Audit Report. As the Audit Report states in Paragraph 4, page 1, "*...when the government and a group find it convenient to share resources for the public good, they may trade things of value to effect that good...*" Therefore, under a cooperative agreement, the Government is not bound to recoup its costs as long as the cooperative relationship continues and is positively affecting the outcome. In addition, a contract should be used whenever the principal purpose of the award is to acquire goods and services for the Government while the contractor's only benefit is the revenue from the sale of these goods and services. A cooperative agreement should be used in situations where the Federal Government and a cooperator share the cost of an activity or the transfer of something of value is involved, while both the government and the cooperator have significant involvement in the project and receive mutual benefit in the outcome of the cooperative relationship. *In this case, both WS and the [] benefited from this cooperative arrangement in that WS was able to operate safe aircraft to conduct its aerial activities; while, at the same time, WS livestock cooperators in Wyoming, including those belonging to the [], had their livestock resources protected.* If the intent of the cooperative agreement is to recoup the Government's portion of the costs, it would no longer be a cooperative agreement because the sharing of resources would no longer pertain.

In addition, WS and [] were establishing the parameters for the cooperative agreement under good faith to provide association members (many of whom are WS cooperators) and the livestock industry with a safe and cost effective aerial service.

WS is responsible for aviation and employee safety and for obtaining the best value for the services provided. The cooperative agreement would have allowed WS exclusive use of the aircraft, management of maintenance and repairs, and safe and reliable aircraft. When safety and best value are in conflict, WS will continually choose safety over cost.

Page 2, Paragraphs 1 through 4:

Comment: WS agrees a contract should be in place before funds can be used to procure equipment and services. The employee tasked with obtaining a purchase order failed to request one. The fact that the employee failed to request the purchase order before the close of fiscal year activities, however, does not mean there was not a bona fide need for the services as the Audit Report contends.

FINDINGS AND RECOMMENDATIONS

Finding 1 WS' Payments for Aircraft Repairs May Have Violated Appropriations Law

Page 3 and 4, paragraph 1 - 6

Comment: So noted, however, WS has a long standing relationship with the []. WS has had cooperative agreements to facilitate work in protecting livestock from predation with the Wyoming livestock industry since the Congress passed the WS program's authorizing language in 1931. There was no reason to doubt the [] integrity through the negotiation process even though a formal cooperative agreement was not signed at the time. WS and [] were operating under good faith until all costs could be determined. It is unfortunate that the cooperative agreement negotiations spanned over 2 fiscal years.

WS did not give the engine in question to the []; the engine belongs to WS. The WS Aviation Program maintains a data base and record tracking system that accounts for all capital property. It can be clearly demonstrated that WS was, and continues to be, in control of this property and can identify where it is located, its serial number, and its source of funding. Therefore, WS allowed the company to bill for repairs totaling \$25,207.92.

Page 4, No Binding Agreement

Comment: It should also be noted that the purchase order that was provided by APHIS, Marketing and Regulatory Programs Business Services (MRPBS), on August 29, 2000, was not the purchase order requested in the mentioned memo, but rather it was issued on a purchase order that charged the expenses to the Contracting Officer's VISA credit card; these types of purchase orders cannot be amended to include additional expenses. The employee was

instructed during the first week in August to secure a purchase order to cover all expenses that would be received as a result of the agreement; for unknown reasons, this did not occur.

Page 5, No Bona Fide Need

Comment: WS does not agree that there was no bona fide need for the cooperative agreement. As explained above, the need was to obtain an aircraft that would mutually benefit both the Government and the livestock industry in a safe and cost-effective manner. Specific direction was provided by the Under Secretary of Agriculture, Mike Dunn, on March 20, 1998, to review the aviation safety program and make necessary changes to avert accidents to the maximum extent possible. Congress has appropriated funds to WS for aircraft safety since 1999.

The Rock Springs aircraft supplied by the vendor was substandard (a safety risk), and overpriced. In 1998, WS had existing contracts for three aircraft in Wyoming from a company in Casper for \$48.00 on 300 guaranteed hours, and \$26.00 per hour thereafter. The duration of the contracts was four years with annual options to renegotiate the price and/or discontinue the contracts. The contracts were expiring in September of 1999 and the State Director of Wyoming had been working with MRPBS on new contracts to replace them. The same company that had had the contract was the sole bidder on the new contracts. To the State Director's surprise and dismay, the new contract prices per hour about doubled. There was no clear explanation as to the sharp increase. Additionally, the bidder had purchased two of the aircraft from the previous contractor and brought in a third airplane for the Rock Springs contract. This particular aircraft had previously been leased to WS in California by the bidder. The National Aviation Manager (NAM) had grounded it twice for safety hazards. The bidder had replaced several parts that were defective and claimed it would meet WS safety standards. While in Rock Springs, the NAM grounded the airplane again due to engine problems. The engine was replaced; however, the frame appeared to be bent causing it to pull to one side (similar to a car out of alignment). This latest problem surfaced in the spring of 2000. This alone demonstrates the need for a replacement aircraft, and was in line with the direction given by the Under Secretary and APHIS management to improve the safety of WS aircraft.

WS established the cooperative agreement with the [] to address safety concerns. WS had intended to use the cooperative arrangement with [] for as long as WS is charged with protecting livestock from predation. The long-range benefit far outweighs the perceived short-term return on which the Audit Report focuses. WS planned to have the [] aircraft in place at the beginning of FY 2000, and had notified the contractor that WS would not exercise the renewal option on the Rock Springs contract. It was only after WS determined that the [] aircraft could not be delivered until December 2000 that WS approached the contractor to extend the existing contract. This was a mutual agreement between the contractor and WS.

Page 6, Ownership, Paragraph 1 and 2

Comment: WS maintains ownership of the engine in question. It is true that without the agreement to provide the engine, the [] would not have been able to afford the aircraft; however, under the terms of what a cooperative agreement is used for, "... *to transfer things of value in order to carry out a public purpose...*," providing an engine, along with the labor and

parts, is within the scope of the cooperative agreement. At the time when the cooperative agreement was negotiated, it was not necessarily the intention of WS to recoup costs during the first year as the Audit Report implies. WS has over 500 cooperative agreements for various programs that have been renewed annually for time periods in excess of 20 years. The advantage of having exclusive rights to the aircraft, oversight of maintenance and repairs, and having the use of a reliable safe aircraft over several years far outweighs recouping costs over a one year period.

The Congress provided specific authority to WS under section 776 of the Consolidated Appropriations Act of 2004 to enter into cooperative agreements with other entities to lease aircraft if it is determined that the objectives of the agreement will serve a mutual interest of the parties to the agreement in carrying out the programs administered by WS, and that all parties will contribute resources to the accomplishment of these objectives.

Page 7, Ownership, Paragraph 3

Comment: Recovery on investments would have been made up over a longer period of time than the Audit Report indicates. The Audit Report presumed that the cooperative arrangement was for one year; however, WS often renews cooperative agreements for multiple years. WS never intended to recoup the costs in one year, but rather to realize savings to both the Government and the public over a longer period of time. Conservatively speaking, the cooperative agreement would have saved the taxpayers about \$100,000 over 20 years, not to mention the benefits of safety to WS employees. With the express authority given by Congress in 2003, WS can enter into cooperative agreements that mutually benefit the Government and the livestock industry.

APHIS' property policy requires that WS track items with an original acquisition cost over \$5,000, or are considered sensitive (e.g., firearms) on official property inventories. Therefore, none of the parts, with the exception of the engine, constitute "accountable property" according to APHIS policy, and WS is not required to track them on an official basis.

Page 7 and 8, Anticipated Lease Payment...

Comment: A factor that urged the WS State Director to move away from the contract in Rock Springs was the condition of the existing aircraft provided by the contractor. It had been grounded in FY 1999. The Audit Report is focused only on lease payments. After a series of accidents and fatalities in 1996 – 1998, WS was mandated to review the safety planning and implementing procedures that would focus on safety first. WS has moved away from low cost bidders to best value in the aircraft procurement process. Although cost is a factor in procurement decisions, employee safety is paramount.

Recommendation No. 1

The OIG recommends requesting a written legal opinion from OGC as to whether financial and equipment contributions, exceeding 50 percent of the purchase price for the fixed-wing aircraft

and paid without a binding agreement or a bona fide need, constitute a violation of appropriations law.

APHIS Response: WS disagrees that the contribution to the [] aircraft exceeded 50 percent of the purchase price; the engine is still WS property, as indicated in the audit. The comparison should be the difference of what WS provided (\$25,207.92), and what [] provided (\$34,450.00). WS also disagrees there was no bona fide need. Nonetheless, WS will request a legal opinion from OGC by August 31, 2004 on whether financial and equipment contributions constitute a violation of appropriations law.

Recommendation No. 2

If it is determined that WS personnel violated appropriations law, initiate appropriate disciplinary actions.

APHIS Response: If it is determined that WS personnel violated appropriations law, the WS Deputy Administrator will initiate appropriate disciplinary action.

Recommendation No. 3

Consult with the OGC as to the actions WS can and should take to rectify this questionable transaction, including ownership of the plane, recovering the APHIS funds, and protecting the Government's interest.

APHIS Response: WS will consult with appropriate USDA and APHIS officials by September 30, 2004.

Finding 2 WS Violated Procurement Regulations by Splitting Invoice Amounts Into Five Separate Payments to be Paid by Purchase Cards

Comment: The invoice was clearly split, and WS has since taken actions to prevent such actions from occurring again in the future (please refer to APHIS response to Recommendation No. 4 below).

Recommendation No. 4

Initiate disciplinary actions based on employees' roles and responsibilities related to unauthorized funding ratification and consider revocation of purchase card authorizations of all employees who directed the orders be split and those who made the payments.

APHIS Response: In October 2000, APHIS began utilizing a new financial system that allows for better accountability and enhanced APHIS' abilities to produce different financial reports. In addition, the WS Western Regional Office hired a higher level Budget Analyst to replace the previous Budget Analyst, and created another Budget Analyst position to work solely on WS aviation accounts. In addition, MRPBS hired a certified Contracting Specialist (who is supervised by the APHIS, MRPBS, contracting group in Minneapolis and funded by WS), who

is responsible for utilizing proper contracting and procurement processes for the WS aviation program. These personnel changes have allowed for many more checks and balances in our financial and procurement processing. In addition, the WS Western Region Administrative Officer is overseeing the financial reports for all accounts.

In processing VISA credit card charges, the following procedures have been implemented: the Western Region Assistant Regional Directors review all State Director charges each month; the Western Region Administrative Officer reviews a new quarterly report that displays all Western Region VISA credit card charges by cardholder; the Western Regional Director reviews the reports for all card holders for whom he supervises; the number of employees authorized to write VISA convenience checks has been reduced; and VISA convenience checks can only be used on a limited basis, mostly for small businesses, and state and local governments who do not accept the VISA credit card.

In addition, the Western Regional Director has required all Western Region State Directors, Budget Analysts, and Budget Technicians attend Federal Appropriations Law training. The Budget Analysts were also required to attend an APHIS Agreements training course designed especially for WS, and WS is currently working with the APHIS, MRPBS, Agreements Services Center to develop and conduct another cooperative agreements training course designed for its State Directors, which also will be a required course.

The WS Deputy Administrator also will request by August 31, 2004 that APHIS, MRPBS, Human Resources Division, Employee Misconduct Investigations Branch, conduct an audit of employees' roles and responsibilities with regard to aerial operations-related credit card transactions and accountability. Based on the recommendations, the National office will implement necessary and appropriate actions.

Section 2. MANAGEMENT CONTROLS OVER THE WS AERIAL ACQUISITION PROGRAM ARE LACKING

Finding 3 WS Management Did Not Provide an Adequate Control Structure

Page 11, Paragraph 1 - Integrity Claim

Comment: WS' integrity is continually supported and reinforced via a dedicated Senior Contracting Officer that ensures the Federal Acquisition Regulation (FAR) and Agriculture Acquisition Regulations (AGAR) are followed and adhered to. Competition is highly valued and supported by the Senior Contracting Officer. WS has always been concerned with the integrity of its programs and providing the best value to its customers and taxpayers. Budgetary constraints did not allow for the position of Contracting Officer to exist until April 2003.

Page 11, Paragraph 1 - WS senior managers...issued no WS specific policies or procedures that governed aircraft acquisitions.

Comment: No WS specific policies or procedures to govern the acquisition of aircraft are necessary as the Federal Acquisition Regulation (FAR) and the Agriculture Acquisition

Regulation (AGAR) govern the acquisition of equipment. FAR subpart 7.4, Equipment Lease or Purchase, provides the guidance pertaining to the decision to acquire equipment by lease or purchase. This subpart applies to both the initial acquisition of equipment and the renewal or extension of existing equipment leases.

Per FAR subpart 7.401, “agencies should consider whether to lease or purchase equipment based on a case-by-case basis evaluation of comparative costs and other factors.” One internal study should not be the sole resource to guide each procurement decision.

Page 12, Paragraph 2 - *“WS’ determination to supplant a procurement contract with a cooperative agreement”*

Comment: WS was not determined to supplant a contract with a cooperative agreement. WS is accountable to support its mission in providing the best value to WS’ customers and taxpayers. Utilizing the cooperative agreement tool was in the best interests of the Government.

Page 12, Paragraph 5 - *Such policy should address the decision points that result in selection of the proper instrument (contract or agreement) to acquire aircraft.*

Comment: The selection of the proper instrument to acquire aircraft is conducted on a case-by-case decision. WS is tasked with a mission of managing wildlife damage to agricultural resources, which includes managing a safe aerial program for protecting livestock, big game, and other wildlife from predators; depopulating wild deer and elk for disease testing; protecting agricultural crops from birds; capturing wolves and other threatened and endangered species for relocation to other areas; assisting with search and rescue operations; conducting wildlife surveys and censusing; and, distributing rabies vaccines and acetaminophen baits. It is WS’ role and responsibility to determine the most appropriate tool to utilize to successfully accomplish its mission. WS’ objective is not to profit from operations, but rather to provide cooperators with effective results while providing WS employees with safe working conditions.

Page 13, No. 3. *WS should ensure competition for agreements to the maximum extent practicable.*

Comment: Noted. WS will ensure competition for aerial services to the maximum extent practicable, and document rationale for sole source decisions for agreements.

Recommendation No. 5

Develop a cohesive management control structure for aircraft to include management decision processes and models to properly evaluate ownership/operating options, terminate all inappropriate cooperative agreements, and to obtain aircraft.

APHIS Response: MRPBS hired a full-time warranted Contracting Officer in April 2003 to oversee all procurement activities for the aviation program. This individual provides guidance to the National Aviation Manager and ensures compliance with all procurement regulations. In addition, while the WS Western Regional Office manages the acquisition of aerial services and

equipment to provide close coordination with recipients of the service, WS will now monitor cooperative agreements and contracts for the aerial activities at the national level, beginning October 1, 2004, to improve processes for acquiring aerial services and equipment.

Recommendation No. 6.

Require the WS to develop and issue acquisition guidelines that are based on the decision processes and models described in Recommendation 5 and that set forth in terms specific to the WS mission and its programs the requirements entailed in acquiring aircraft and other high-value assets through the procurement process. These guidelines should be in harmony with the appropriate Federal procurement regulations and the APHIS Manual, and should be in sufficient detail to clarify the decision process in situations peculiar to the WS.

APHIS Response: WS believes that FAR subpart 7.4 contains sufficient acquisition procedures and sees no need for additional informal guidelines. WS, however, will move management responsibility of these acquisition activities to the national office. In addition, WS will continue to analyze each individual need and match the appropriate tool to the need to successfully accomplish our mission.

Finding 4 WS Senior Management Did Not Ensure That Acquisition Decisions Complied With Internal Study Results

Comment: Airplanes flown by WS would be identical (make and model) to that of the special interest group as WS operates only two airplane makes and models, the Piper Super Cub and Aviat Husky. WS has operated Piper Super Cubs for over 30 years.

The 1999 internal study conducted by Conklin and DeDecker is simply one tool that WS uses to determine the most appropriate approach in accomplishing WS' mission. The 1999 internal study is just that, a study – it is not law, nor a mandated document. The FAR is the mandated regulation that the Federal Government shall use to determine whether a piece of equipment should be leased or purchased. WS considers other factors such as budget, length of need, reliability, availability, safety, and the best value to the mission and taxpayers when analyzing the best approach to satisfy aviation requirements.

The internal study was never accepted by Agency officials. One of the contributing factors as to why the study was never accepted was because it did not accurately capture the reality of WS' aviation mission. For instance, an agency-owned aircraft is generally operated for a period of 17 years, not 5 years as indicated in the 1999 internal study.

Page 15, Paragraph 3 - *The advertisements also showed that two of the planes were identical to those owned by the interest group. (Piper PA-18 Super Cub)*

Comment: Forty four percent of WS' leased aircrafts are Piper PA-18 Super Cubs. Ninety three percent of WS' owned aircrafts are Piper PA-18 Super Cubs. It is no surprise that WS

advertised for a Piper PA-18 Super Cub, as the Super Cub is the mainstay of the fleet. The fact that the special interest group owned Super Cubs is not evidence of bias.

Recommendation No. 7

Require that the WS senior management ensure aircraft acquisition decisions are consistent with its internal study results and in the best interest of the Government.

APHIS Response: WS acquisition decisions are made to accomplish the programs mission and not to benefit a contractor or special interest group. WS acquires its aircraft on a case-by-case basis rather than under one-size-fits-all approach. The study WS commissioned to determine the most cost-effective options for acquiring aircraft was based on a five year projection and not the average lifetime of a WS airplane, which is seventeen years. Cost analysis indicates that the Aviation Study results were obtained from incorrect information acquired. Also, the internal study results do not reflect intangibles such as customer confidence in long term commitment, tighter control of maintenance, or lack of vendor competition. The internal study is used as one of many tools in the decision-making process; however decisions are not based entirely on the internal study but rather a summation which will best accomplish the program mission.

WS will continue to follow the Federal Acquisition Regulations, subpart 7.4, and any other appropriate information to determine if a lease or buy is the best option for the mission.

Recommendation No. 8

Develop controls to ensure that pre-solicitation notices to purchase aircraft appear in section 15 of the Federal Business Opportunities for vendors.

APHIS Response: MRPBS hired a Senior Contracting Officer to work full time on the WS aerial operations in April 2003. This individual ensures that all pre-solicitation notices appear in the correct classification code. Interested parties have eight ways to search FedBizOpps to locate potential opportunities. WS recommends that interested parties utilize all available tools to ensure they identify all opportunities.

Finding 5 APHIS WS Policies and Procedures for Processing of Freedom of Information Act (FOIA) Requests Were Not Always Followed

Recommendation No. 9

Counsel WS Regional personnel as to the requirements associated with agency processing of FOIA requests for records.

APHIS Response: WS' National Office sent out on July 7, 2004 an official reminder to all WS personnel of the requirements associated with agency processing of FOIA requests for records.

Recommendation No. 10

Consult with the OGC as to whether the actions taken by WS Western Region personnel violated the court injunction limiting distribution or release of information pertaining to cooperating entities and take appropriate administrative action to admonish responsible personnel for any inappropriate actions.

APHIS Response: WS will consult with OGC by August 31, 2004 and take appropriate actions by December 1, 2004 to ensure compliance with the John Doe permanent Injunction by WS personnel.

Informational copies of this report have been distributed to:

Administrator, APHIS

Attn: Deputy Administrator for Marketing Regulatory Program Business
Services

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Government Accountability Office

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Office of Management and Budget

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Office of the Chief Financial Officer

Director, Planning and Accountability Division

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