

U.S. DEPARTMENT OF COMMERCE
Office of Inspector General



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OFFICE OF THE SECRETARY

*Interagency and Other Special
Agreements Require Better
Management and Oversight*

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Office of Inspections and Program Evaluations



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EXECUTIVE SUMMARY

Commerce bureaus have a variety of missions, such as promoting U.S. exports, developing innovative technologies, gathering and disseminating statistical data, measuring economic growth, granting patents and trademarks, promoting minority entrepreneurship, predicting the weather, and monitoring the nation's atmospheric and oceanic resources. Some federal agencies and non-federal organizations have complementary missions or require information or services from Commerce bureaus to fulfill their own unique missions. Interagency agreements, memoranda of understanding, memoranda of agreement, and other special agreements are some of the methods used by these parties to formally agree to share information, provide needed services, or coordinate their programs to optimize the benefits from each party's efforts. These agreements establish the terms of the relationship so that the greatest return is realized from similar or complementary programs.

In late 1993, the Office of Inspector General was concerned that departmental offices were using, or could use, agreements to circumvent procurement regulations or to improperly inflate their budgetary resources. Over the next two years, we performed reviews of four departmental bureaus, finding significant deficiencies, such as improper accounting of project costs and undercharging for reimbursable activities. Because of these deficiencies, in 1997, we began a Department-wide review of interagency and other special agreements.

In fiscal year 1997, Commerce had more than 4,700 agreements, involving approximately \$1.1 billion in funds received for reimbursable activities, obligated to acquire goods or services from other parties, or committed to joint project agreements.¹ We have analyzed more than 250 of those agreements and found that many of them appear to serve important and appropriate functions, given Commerce's varied missions. While most of these agreements may be appropriate, we found that they are frequently not written, approved, and executed properly. Considering that a significant amount of Commerce resources are committed to agreements, we believe it is important to bring some of these problems and issues to the attention of the Department now.

Section I of this report addresses some of the common issues we found during our review of several Commerce bureaus and includes recommendations about how the Office of the Secretary (OS), having oversight responsibility for all Commerce bureaus, can address the problems. Section II identifies specific findings from our review of OS agreements and includes

¹The number of Commerce agreements and the associated funding are estimates based on the best information available to us at the time of this review. As discussed on page 24, neither the Department nor the bureaus have a database or other record-keeping system that has complete and reliable information about all types of agreements.

recommendations about how OS can improve its internal practices and procedures. We are also issuing separate reports on the handling of agreements by other Commerce bureaus. After we complete our Department-wide review of agreements, we will issue a report that summarizes all of the cross-cutting issues we identified, making further recommendations as needed.

As discussed in Section I of this report, we made the following common observations during our reviews of Commerce agreements:

- **Departmental process for preparing and monitoring agreements should be improved**—During the initial stages of our Department-wide review, it became evident that the Department did not have a comprehensive set of policies and procedures to guide its bureaus in undertaking and formulating agreements. Because of this lack of guidance, many agreements are improperly or haphazardly assembled. Often, they (1) cite the wrong authority or fail to cite any authority, (2) are not adequately justified, (3) have incomplete budget information, (4) lack the signatures of authorized officials, and/or (5) have unclear or undefined termination dates or review periods (see page 7).

In addition, agreements often do not receive adequate budget, procurement, legal, and programmatic review. Each Commerce agreement should, for example, receive a thorough budget review to ensure that federal resources are available and their use justified. Federal regulations also require that contracting officers or other designated officials review and approve the justifications supporting agreements between federal agencies and authorized by the Economy Act in order to verify that this statutory authority is properly used. Legal counsel then needs to determine whether agreements comply with legislative and regulatory requirements, cite appropriate legislative authority, and include all necessary terms. Finally, each agreement should, as appropriate, receive initial and periodic programmatic reviews to evaluate the project's necessity and propriety (see page 16).

Most of these problems with Commerce agreements can be attributed to a lack of guidance for preparing and reviewing agreements. Thorough policies and procedures would assist officials responsible for agreements by providing such information as when an agreement is necessary, what level of approval is required, and what specific language is needed. The Department should prepare formal guidance, such as a Department Administrative Order or handbook, outlining the types of agreements that can be entered into by Commerce bureaus; the minimum necessary content and steps for preparing agreements; standard language or form agreements; and the review, approval, and renewal policies and procedures that should be followed by all Commerce bureaus (see page 21).

Finally, we found that few Commerce bureaus are able to adequately track and control their agreements. Frequently, bureaus keep lists of agreements for their individual operating units, but most bureaus do not have a complete listing of all their agreements and no comprehensive departmental inventory exists. As a result, there is no consistent and reliable source of information about all departmental agreements. We believe that a Department-wide database of agreements would be a useful management and administrative tool. The Department and its bureaus could use the information stored in a database to provide input into strategic planning and to help administer and maintain agreements (see page 24).

We also reviewed how OS prepares, reviews, and administers its own agreements. OS has 19 offices that provide executive direction, policy planning, budget, financial, legal, personnel, and other administrative services to Commerce bureaus. Like other departmental offices, OS offices undertake special projects, reimbursable activities, and programmatic efforts with other governmental and non-governmental entities. As discussed in Section II of this report, we made the following observations during our review of OS's agreements:

- **OS should improve its own process for preparing, reviewing, and administering agreements**—During our OS inspection, we focused on assessing the effectiveness and efficiency of OS's process for entering into monetary and non-monetary agreements with departmental offices and outside parties. We found that OS agreements (1) supported OS's mission, (2) were appropriate funding mechanisms, and (3) did not constitute a substantial proportion of OS's overall budgetary resources (see page 30).

However, we found several examples of incomplete agreements that did not comply with federal and departmental requirements. In particular, agreements often (1) failed to cite any legal and/or funding authority; (2) were not supported by written justifications; (3) lacked full project descriptions, definitions of key terms, disclaimers for funding availability if future funding is indicated or implied, and provisions for resolving disagreements or negotiating amendments; (4) did not include sufficient budget information; or (5) were not properly signed (see page 32).

In addition, we found that OS's review process for agreements was inadequate, resulting in poor oversight, incomplete agreements, and other deficiencies. OS offices follow an inconsistent and mostly undocumented process for preparing and reviewing agreements with the result that only some agreements are reviewed by OS's budget, procurement, and/or legal offices (see page 32).

OS has not developed and implemented policies and procedures to ensure that agreements are consistently and properly prepared and reviewed. In the absence of adequate

guidance, OS officials stated that the primary basis for preparing agreements is using a previous agreement as a model. Obviously, any problems with previous agreements are then perpetuated through new agreements. To help correct the deficiencies we found, OS should prepare internal guidance for OS offices that is in compliance with the forthcoming Department-wide guidance we discuss above (see page 34).

Finally, we found that no OS office has established a database for tracking its agreements. While each office was able to provide us with a basic list of its current agreements, we found that OS lacks a comprehensive inventory. As a result, cataloging past and present OS agreements was extremely difficult. We believe that OS should develop a tracking system that is consistent with the Department-wide database we are recommending in order to help OS better manage and control its agreements (see page 35).

On page 38 of this report, we offer recommendations to the Chief Financial Officer and Assistant Secretary for Administration and the General Counsel to address our concerns about Department-wide and OS internal management and oversight of agreements.



In their responses to our draft report, the Chief Financial Officer and Assistant Secretary for Administration and the General Counsel generally agreed that the Department's agreements require better management and oversight, including better written guidance on how agreements should be drafted and reviewed. Both the Chief Financial Officer and General Counsel had specific comments on the format of the new departmental guidance and the roles of the Department and individual bureaus. They also suggested some changes to the body of the report. We have taken these comments into consideration and have made changes as appropriate. A copy of both responses are included in their entirety as appendixes to this report.

INTRODUCTION

Pursuant to the authority of the Inspector General Act of 1978, as amended, the Office of Inspector General conducted an inspection of the Office of the Secretary's (OS) management of interagency and other special agreements. The inspection was conducted as part of a larger, Department-wide review of these agreements.

Fieldwork was performed during the period from September 10, 1997, through November 7, 1997, in accordance with the *Quality Standards for Inspections* issued by the President's Council on Integrity and Efficiency. At the conclusion of the inspection, we discussed our observations and recommendations with the Chief Financial Officer and Assistant Secretary for Administration, the directors of the Department's Office of Executive Budgeting and Assistance Management and Office of Acquisition Management, and the Assistant General Counsel for Administration.

Inspections are special reviews that the OIG undertakes to provide agency managers with timely information about operations, including current and foreseeable problems. Inspections are also done to detect and prevent fraud, waste, and abuse, and to encourage effective, efficient, and economical operations. By highlighting problems, the OIG intends to help managers move quickly to address those identified during the inspection and avoid their recurrence in the future. Inspections may also highlight effective programs or operations, particularly if they may be useful or adaptable for agency managers or program operations elsewhere.

PURPOSE AND SCOPE

Interagency and other special agreements are mechanisms for federal agencies to define terms for performing work for others (reimbursable agreements), acquiring work from others (obligation agreements), or coordinating complementary programs (memoranda of understanding or agreement). These agreements can be between Commerce entities; or between one Commerce unit and another federal agency, a state or local government agency, a university or other educational institution, a not-for-profit organization, or a private party. They involve a significant amount of federal resources, but control processes for these agreements are largely a matter of agency discretion, unlike those for procurement contracts, grants, or cooperative agreements.

We defined interagency and other special agreements as those agreements that are *not* procurement contracts, grants, or cooperative agreements.² For simplicity, we use the term “agreement” to refer to the various types of interagency or other special agreements within our scope. Agreements can include memoranda of agreement, memoranda of understanding, joint project agreements, interagency purchase orders that document both parties’ acceptance, or any other document that details the terms of an agreement and the parties’ acceptance. Agreements can transfer funds from one party to the other, bind one or both parties to commit funds or resources to a project, or not involve any resources.

In 1994, we examined agreements for reimbursable work performed by the National Telecommunications and Information Administration, finding several problems, including more staff than necessary for its mission because of its over-reliance on reimbursable funding.³ That same year we issued letter reports to the International Trade Administration and National Oceanic and Atmospheric Administration on their respective agreements. Our report to ITA cited the fact that it had not provided a complete and timely accounting of all agreement costs and expenditures to other parties to its agreements.⁴ In our report to the NOAA Comptroller, we expressed our concerns about NOAA’s ability to produce a concise, credible inventory of interagency agreements.⁵ Then, in 1995 and 1996, respectively, the OIG reported that NOAA’s National Marine Fisheries Service (NMFS) and Office of Oceanic and Atmospheric Research (OAR) consistently undercharged for services they provided under agreements.⁶ Due in part to the concerns raised in these reports, we began our current Department-wide review of agreements.

²The Federal Grant and Cooperative Agreement Act of 1978 defines these types of agreements: **Procurement contracts**—legal instruments “reflecting a relationship between the United States Government and a State, a local government, or other [non-federal] recipient when . . . the principal purpose . . . is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government” (31 U.S.C. § 6303); **Grants**—legal instruments used when “(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States . . . and (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement” (31 U.S.C. § 6304); **Cooperative agreements**—differ from grants only in that they are to be used when substantial involvement by the executive agency is expected (31 U.S.C. § 6305).

³*NTIA Interagency Agreements, Institute for Telecommunication Sciences, IRM-5723, January 1994.*

⁴*Interagency Agreements Conducted by the International Trade Administration, IRM-6290, September 1994.*

⁵*Preliminary Findings Regarding Inspection Work on NOAA Interagency Agreements, IRM-6291, September 1994.*

⁶*NMFS Cost Recovery for Sponsored Research Needs Improvement, STL-6528, May 1995; OAR’s Cost Recovery for Sponsored Research Needs Improvement, STL-7658, June 1996.*

This is one report in a series to be issued as part of our Department-wide review of agreements. The purpose of our inspection was to assess the effectiveness and efficiency of OS's processes for undertaking monetary and non-monetary agreements with other departmental bureaus and outside parties. The scope of our inspection included determining: (1) the appropriateness and advisability of OS agreements as funding mechanisms for specific projects; (2) the extent to which OS offices are supported through and rely on these agreements; (3) the relevance of agreements to departmental goals and objectives; and (4) whether OS agreements possibly circumvented procurement or financial assistance regulations. In addition, we evaluated OS administrative, managerial, and programmatic oversight of its agreements. Because our other reviews of Commerce bureaus had similar purposes and scopes, we were able to identify some issues that the Department, in its oversight capacity, should address. Therefore, this report will also discuss several of the issues listed above, but from a Department-wide perspective.

We reviewed background documentation relating to the relevant laws and departmental policies and procedures pertaining to these agreements, including the Economy Act, Commerce's joint project authority, the Intergovernmental Cooperation Act, relevant Department Administrative Orders, and the *Department of Commerce Accounting Principles and Standards Handbook*. We also conducted telephone and/or personal interviews with OS staff to further evaluate certain agreements.

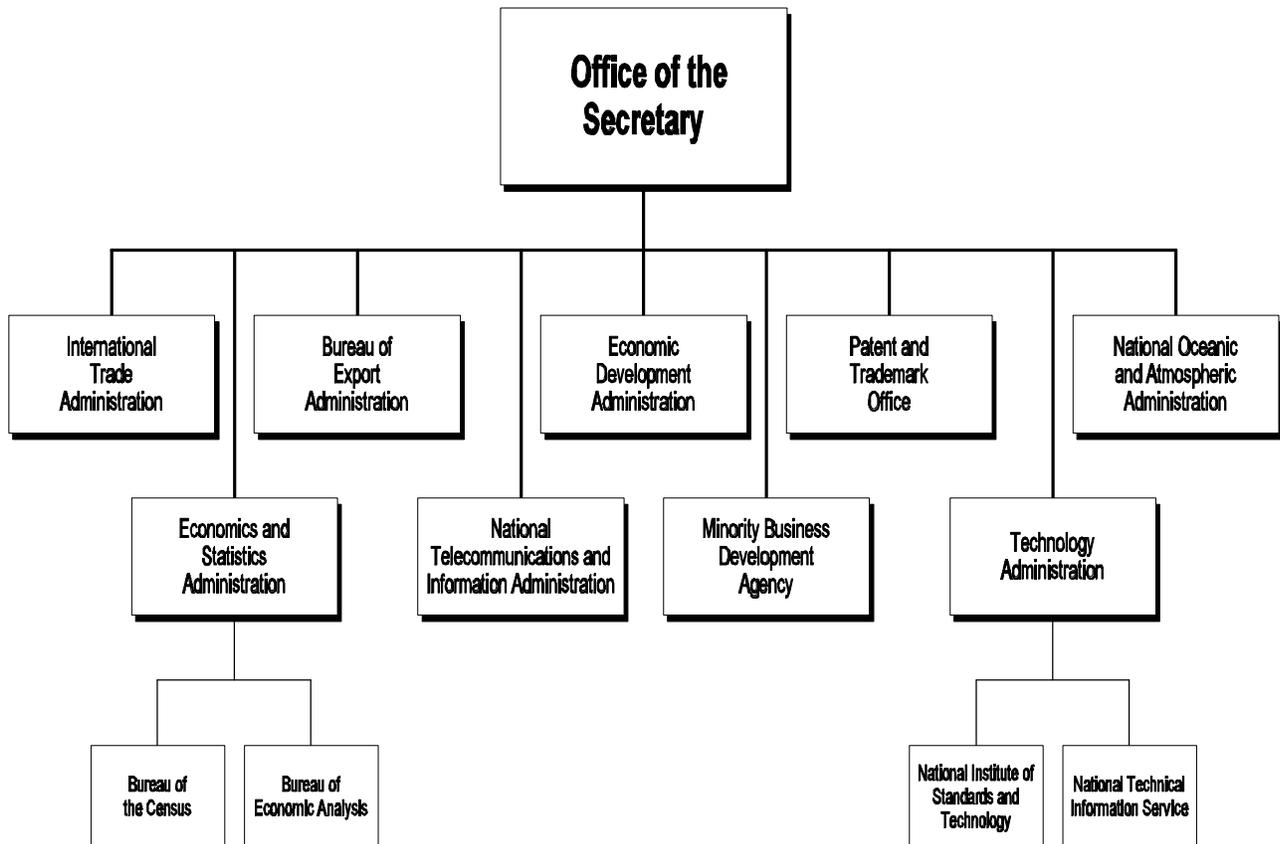
Although the OIG is functionally organized within OS, we excluded OIG agreements from the scope of this review. In order to ensure independence within the Department, the OIG has a separate administrative staff, handling procurement, budget, legal, and human resources issues, and its own internal administrative policies and procedures. Accordingly, the way in which OS processes agreements is not necessarily the same as the way the OIG handles agreements, nor would changes to OS procedures necessarily affect OIG procedures. While we did not feel that it was appropriate to include OIG agreements in this report, we recognize the need to ensure that our own agreements meet the same high standards we have set for others. Therefore, we separately reviewed several OIG agreements for compliance with federal and departmental requirements. We plan to address any deficiencies and to revise our internal guidance to conform with the recommendations made in this report.

In addition, because we performed a prior inspection of OS's Office of Computer Services, and plan a follow-up review, we did not include its agreements in the work performed for this review. Therefore, for the purposes of this report, we selected a sample of 32 of 80 agreements from the remaining OS offices that were effective in fiscal year 1997.

BACKGROUND

Commerce bureaus have a variety of missions, such as promoting U.S. exports, developing innovative technologies, gathering and disseminating statistical data, measuring economic growth, granting patents and trademarks, promoting minority entrepreneurship, predicting the weather, and monitoring the nation's atmospheric and oceanic resources. Some federal agencies and non-federal organizations have complementary missions or require information or services from Commerce bureaus to fulfill their own unique missions. Agreements are one method for these parties to formally agree to share information, provide needed services, or coordinate their programs to optimize the benefits from each agency's efforts.

Figure 1: Department of Commerce Organizational Chart



In fiscal year 1997, Commerce had more than 4,700 agreements, involving approximately \$1.1 billion in funds received for reimbursable activities, obligated to acquire goods or services from other parties, or committed to joint project agreements (see Table 1 below).⁷ Additional Commerce resources were committed to performing activities under memoranda of understanding or agreement, which involved no transfers of funds. The distribution of agreements ranges from 15 for the Bureau of Export Administration to more than 2,000 for NOAA.

Table 1: Summary of Department of Commerce Agreements (Fiscal Year 1997)

| Department of Commerce Bureau | Interagency and Other Special Agreements | |
|--|--|-------------------|
| | Estimated Value | Number Identified |
| Bureau of Export Administration | \$2,342,000 | 15 |
| Economic and Statistics Administration | 213,509,000 | 756 |
| Economic Development Administration | 14,929,000 | 33 |
| International Trade Administration | 36,209,000 | 109 |
| Minority Business Development Agency | 3,591,000 | 23 |
| National Oceanic and Atmospheric Administration | 470,015,000 | 2,038 |
| National Telecommunications and Information Administration | 30,780,000 | 120 |
| Office of the Secretary | 23,970,000 | 206 |
| Patent and Trademark Office | 49,215,000 | 55 |
| Technology Administration | 267,070,000 | 1,400 |
| Total | \$1,111,630,000 | 4,755 |

⁷The number of Commerce agreements and the associated funding are estimates based on the best information available to us at the time of this review. As discussed on page 24, neither the Department nor the bureaus have a database or other record-keeping system that has complete and reliable information about all types of agreements.

OS provides programmatic and administrative oversight to these varied bureaus. In particular, the Office of the Chief Financial Officer and Assistant Secretary for Administration sets departmental policy on all administrative matters, including budget, procurement, human resources, and information technology. The Office of General Counsel, also organized within OS, is responsible for rendering all legal services for the Department. These OS offices, therefore, have primary responsibility for establishing policies and procedures for all Commerce agreements.

OBSERVATIONS AND CONCLUSIONS

I. Departmental Process for Preparing and Monitoring Agreements Should Be Improved

The Office of the Secretary has managerial responsibility for all Commerce bureaus. The Chief Financial Officer and Assistant Secretary for Administration is responsible for all departmental administrative matters and exercises general supervision over the operating units. In addition, the Office of General Counsel (OGC) advises the Department and its bureaus on all legal matters. Despite these responsibilities, OS has not fulfilled its oversight duty of ensuring that all agreements comply with federal requirements and receive necessary programmatic, administrative, and legal review. As a result, the Department cannot be certain that its bureaus are entering into legal and fully justified agreements that are consistent with Commerce's mission and protect it from all associated risks.

A. *Commerce agreements do not consistently comply with federal requirements*

We found that departmental policies for preparing agreements are incomplete. Specifically, the Department lacks centralized guidance on when and how bureaus should enter into agreements and what approval or review processes apply. The *Department of Commerce Accounting Principles and Standards Handbook* provides basic guidelines on performing reimbursable services and entering into joint projects. OS's Office of Management and Organization is responsible for maintaining departmental directives. However, officials in this office stated that departmental guidelines for agreements have never been a priority.

Because of this lack of adequate guidance, many agreements are improperly or haphazardly assembled. Often, they (1) cite the wrong legal authority or fail to cite any authority, (2) are not adequately justified, (3) lack the signatures of proper authorized officials, (4) have incomplete budget information, and/or (5) have unclear or undefined termination dates or review periods. As discussed below, these deficiencies have serious consequences.

Some agreements fail to cite applicable legal authorities

We found that several Commerce bureaus, including OS, fail to consistently cite the applicable legal authority that is used as the basis for their agreements. Legal authorities typically cited in agreements include: Economy Act of 1932 (31 U.S.C. §§ 1535-1536), Commerce's joint project authority (15 U.S.C. §§ 1525-1526), Intergovernmental Cooperation Act (31 U.S.C. § 6505), Federal Technology Transfer Act of 1986 (15 U.S.C. §§ 3710a-3710d), and general user fee authority under 31 U.S.C. § 9701 and Office of Management and Budget (OMB) Circular A-25.

Program authority may also exist as a result of congressional action. For example, specific authority for another federal agency to transfer funds to a Commerce agency may be contained in program statutes (*e.g.*, the Clean Water Act, 42 U.S.C. § 7403(b)(4), or the National Sea Grant College Program Act, 33 U.S.C. § 1123(d)(6)).

Citation of proper legal authority is important because the type of authority chosen for a particular agreement affects the treatment of funds transferred under the agreement, including the timing or disposition of receipts. For example, the Economy Act requires that all payments for work or services performed be deposited to the appropriation or fund against which the charges have been made. Under the joint project authority, all payments are deposited into a separate account that may be used to directly pay the costs of work or services performed, to repay advances, or to refund excess sums when necessary. All receipts for furnishing specialized or technical services authorized under the Intergovernmental Cooperation Act may be deposited in the appropriation or funds from which the cost of providing such services has been paid or is to be charged. In contrast, amounts collected as user fees must be returned to the U.S. Treasury in full unless existing statutes specifically provide otherwise. Without an accurate citation, Commerce bureaus cannot be certain that they are properly depositing and handling funds associated with agreements.

The type of legal authority used also affects the period of availability for funds transferred under an agreement. For Economy Act agreements, the period of availability of funds transferred may not exceed the period of availability of the source appropriation. Accordingly, one-year funds transferred by the requesting agency must be returned at the end of that fiscal year and deobligated by that agency, to the extent that the performing agency has not performed or incurred valid obligations under the agreement. When the agreement is based on some statutory authority other than the Economy Act, the funds will remain payable in full from the appropriation initially charged, regardless of when performance occurs. The funds are treated the same as contractual obligations, subject, of course, to the “*bona fide* needs” rule⁸ and to any restrictions in the legislation authorizing the agreement. Therefore, it is necessary to determine the correct statutory authority for any agreement, in order to apply the proper obligational principles.

The current practice of not directly citing a legal authority in all agreements is generally inappropriate. Any departmental guidance must address what legal authorities Commerce bureaus may rely on for their agreements and the need to cite the appropriate authority used for each agreement.

⁸The *bona fide* needs rule states that a fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation is made.

Agreements are not always adequately justified

In order to construct a valid agreement, requirements defined in each applicable statutory authority must be met. Additionally, for user fee agreements subject to OMB Circular A-25, bureaus must ensure that relevant criteria are met before citing specific legal authorities that are the basis for their agreements. These criteria range from ensuring that necessary funds are available, to determining that the service a government entity will provide does not compete with the private sector.

On the following page, Table 2 lists some relevant legal citations and includes factors that must be considered when creating agreements. While the table contains a list of key legal authorities and criteria, it is not intended to be inclusive with respect to all legal authorities and requirements.

Table 2: Summary of Key Legal Authorities and Criteria

| Legal Authority | Applicable Criteria |
|--|---|
| Economy Act of 1932 (31 U.S.C. § 1535) | a. Other party to the agreement is another government agency. |
| | b. Funds are available. |
| | c. The head of the ordering agency decides the order is in the best interest of the government. |
| | d. The agency filling the order is able to provide the goods or services. |
| | e. The head of the ordering agency decides whether or not the ordered goods can be provided as conveniently or cheaply by a commercial enterprise. |
| Joint project authority and User fee authority (15 U.S.C. § 1525) | a. Other participants are eligible entities, including non-profit organizations, research organizations, or public organizations or agencies. |
| | b. Matters are of mutual interest. |
| | c. The total costs (sum of costs for all participants in the joint project) for such projects must be apportioned equitably. |
| | d. Joint projects may be performed only if (1) the project cannot be done at all or as effectively without the participation of all parties to the project and (2) the project is essential to the furtherance of a departmental program. |
| Intergovernmental Cooperation Act (31 U.S.C. § 6505) | a. Agencies may provide specialized or technical services for state or local governments that the agency is especially competent and authorized by law to provide. |
| | b. The services must be consistent with and further the government's policy of relying on the private enterprise system to provide services reasonably and quickly available through ordinary business channels. |
| | c. Services may be provided only when there is a written request for those services made by the state or local government. The requestor must also pay all identifiable costs incurred by the agency in rendering the service. |

| Legal Authority | Applicable Criteria |
|--|---|
| General user fee authority (OMB Circular A-25) | a. Agencies may impose a fee for an activity that conveys special benefits to its recipient(s) beyond those accruing to the general public. |
| Federal Technology Transfer Act (15 U.S.C. § 3710a) | a. Agency program missions shall be advanced. |
| | b. Special consideration shall be given to small businesses and to businesses that agree to manufacture any products in the United States. |

Written justifications addressing these factors, although logical, are not always required. The *Federal Acquisition Regulation (FAR)* prescribes the policies and procedures applicable to interagency acquisitions only under the Economy Act. When a government agency purchases a good or service from another government agency, the requesting agency must prepare a determination and finding (D&F). D&Fs document that “(1) use of an interagency acquisition is in the best interest of the Government; and (2) the supplies and services cannot be obtained as conveniently or economically by contracting directly with a private source.”⁹ Additional matters must be addressed in the D&F if the Economy Act agreement requires contracting by the servicing agency.¹⁰ According to the *FAR*, a D&F “shall be approved by a contracting officer of the requesting agency with authority to contract for the supplies or services to be ordered, or by another official designated by the agency head.”¹¹ Specifically, a contracting officer ensures that authorities and funding are adequate (see section I, subsection B, below for a discussion of what review is required).

The Economy Act also applies to orders between major organizational units within an agency, but the *FAR* specifies that agency regulations will govern these intra-agency transfers.¹² Commerce does not have any internal guidance implementing this section of the *FAR*. Therefore, there is no standard for documenting that transfers within Commerce are the most economical or convenient solution and are not in competition with the private sector. The Department should ensure that a

⁹*FAR* § 17.503(a).

¹⁰*FAR* § 17.503(b).

¹¹*FAR* § 17.503(c).

¹²*FAR* § 17.500(a).

standard method of documenting this determination is developed and that documentation of the determination is required for all intra-agency Economy Act transfers.

In addition, to the extent that the Department is engaging in a commercial activity, an economic analysis in accordance with OMB Circular A-76 must be completed.¹³ Circular A-76 prohibits the government from starting or continuing activities to provide a commercial product or service if the product or service can be procured more economically from a commercial source. Unless the transaction lies within certain exceptions outlined in the circular and its supplement,¹⁴ an agency that wishes to procure goods or services from another federal agency must prepare an analysis of its requirements to determine that use of another agency's resources is necessary.

The *FAR* requirement for a D&F for Economy Act transfers appears to be the only regulation that explicitly requires a written justification addressing relevant legal criteria.¹⁵ Yet, for all types of agreements regardless of the legal authority cited, written justifications, which demonstrate that the legal criteria have been met, represent a good management practice. Several of the criteria listed in Table 2 are complex, such as the joint project authority requirement that the project cannot be done at all or as effectively without the participation of all parties. Without the aid of a written justification, it may be difficult to show that the criteria for some agreements have been met. In addition, managers or other officials who review agreements that they did not negotiate need sufficient written documentation to determine that all relevant criteria have been met.

We found that often only limited supporting documentation was included with agreements to indicate that Commerce officials had considered the factors required to support the agreements' legal citations. In particular, for those agreements where Commerce pays for services from other federal agencies under the Economy Act, the bureaus do not consistently prepare D&Fs in compliance with the *FAR*. We also found that for intra-agency transfers Commerce agencies often do not document their determination that ordered goods and services cannot be provided by procurement contract as conveniently or cheaply by a commercial enterprise.

While the applicable statutory authorities do not necessarily require written justifications addressing the applicable criteria, non-systematic review of complex issues and determinations, many of which are not documented, often results in insufficient consideration being given to many

¹³*FAR* § 17.502(c), citing *FAR* § 7.3.

¹⁴OMB Circular A-76 Supplement (March 1996), Part I, Chapter 1, section C.

¹⁵In addition to a D&F, the *FAR* requires that Economy Act agreements include specific provisions, such as a description of the supplies or services required, delivery requirements, a funds citation, payment terms, and acquisition authority, as may be appropriate (*FAR* § 17.504(b)).

of the criteria that must be met for these authorities to be used. The Department should review existing laws, including those listed in Table 2, and determine what requirements should be supported by written justifications. Then, the Department should provide adequate guidance and oversight to the bureaus to ensure that agreements include appropriate written documentation to prove that the relevant criteria have been met. Generally, a written justification should be incorporated into the agreement. Otherwise, a copy must accompany the agreement through the review process and be kept on file with the final agreement.

Many agreements are not signed by the appropriate official

During our review of agreements throughout the Department, we found that many agreements were not approved and signed by an appropriate official. In some cases, bureau officials expressed confusion over various informal delegations of authority and admitted that they did not know the appropriate approval procedures. Some, but not all, bureaus have express delegations of signature authority for agreements. There are varying criteria for who can approve and sign reimbursable, obligation, and unfunded agreements. Often, a dollar threshold or programmatic priorities determine who should sign an agreement, but there is no consistent policy.

The Department should ensure that each agreement receives the appropriate level of approval and is signed by an authorized official. For each type of agreement (reimbursable, obligation, or unfunded), criteria should be established for Department-level approval and delegations to the bureaus. All relevant information for each agreement should also be provided to the designated official, including justifications and budget documentation. These officials could then be held accountable for ensuring that all agreements are consistent with Commerce's mission and involve an appropriate use of resources.

Agreements often have incomplete budget information

Commerce agreements do not always include total project costs combined with acceptable budget summaries. Agreements should include total project costs to ensure full cost recovery as required by federal laws, OMB Circular A-25, the *Department of Commerce Accounting Principles and Standards Handbook*, and bureau-level guidance, such as the *NOAA Budget Handbook*. In addition, estimating total project costs, including the performing agency's contributions, and budget summaries may be necessary to comply with other applicable legal authorities. For example, if a project is performed under the joint project authority, the agreement should indicate the contributions of each organization and demonstrate that the costs are apportioned equitably in relation to the benefits received.

In practice, some programs, such as NOAA's Office of Oceanic and Atmospheric Research, often rely on research proposals to define and justify reimbursable projects. In addition to a statement

of work, proposals include total project costs and budget summaries. However, OAR only recently began requiring its laboratories to forward proposals with the formal agreement for review by the officials responsible for signing the agreement. In addition, the proposals are not always referenced in the agreements. Incorporating the proposals by reference and attaching the proposal to the agreement or including proposal cost information in the actual agreement would greatly improve the quality of Commerce agreements.

When agreements do not identify total project costs, managers and reviewers cannot accurately determine whether full costs are being recovered or if costs have been apportioned equitably for joint projects. Also, if total project costs are not identified, an agreement may not receive approval at an appropriate level within the organization. Accurate, detailed budget summaries also assist managers and reviewers in assessing an estimate of the full cost of an agreement. Therefore, Commerce officials reviewing agreements should ensure that total project costs and budget summaries, including Commerce's contributing share, are defined in the agreement. If that information is provided in a proposal exclusively, Commerce should require that the proposal be expressly incorporated by reference in the agreement.

Termination dates or review periods are not always defined

Some Commerce agreements we reviewed did not define a termination date or review period. While there is no departmental guidance on termination dates and review periods, some bureaus have internal policies. For example, the *NOAA Budget Handbook* requires that reimbursable agreements include terms stating (1) when and under what circumstances the agreement is to be terminated and (2) that the agreement must be reviewed periodically, but not less than annually. NOAA Administrative Order 201-105 requires Assistant Administrators and line office directors to (1) ensure that each memorandum of understanding or agreement includes mandatory start and termination dates and (2) periodically review each agreement to determine whether the agreement should be renewed, amended, updated, or canceled and whether the provisions and objectives are being met. In addition, the National Weather Service issued a policy in June 1994 requiring that each of its agreements be reviewed every three years.

Defining these relevant dates or time periods is important to ensure that agreements are properly administered and kept up-to-date. When the stated performance period is undefined or indefinite, it is difficult to determine whether the agreement is still valid and whether reassessment of the agreement ever occurred. In addition, even if a need still exists, as time passes, critical features of the project, such as the level of funding or other resources, may need modification. An ill-defined performance period may ultimately result in the performance of work that is no longer mission-related, the waste of funds and personnel, or the inequitable apportioning of project costs.

All agreements should have a defined performance period with a stated effective date and when possible, a specific termination date. For agreements that continue over an extended term where it is not feasible to define a termination date, the agreement should have a provision for a periodic review and amendment by mutual consent of the parties.

Agreement negotiation process should be improved

As part of any new policies and procedures for agreements, the Department should include a more formal method of ensuring that agreements prepared by other parties are complete before they are signed by Commerce officials. During our review of other Commerce bureaus, we found that agreements are often deficient due in part to the fact that other parties prepared the agreements and the Commerce bureau failed to negotiate with the other party to make necessary changes before the agreements were signed. This is most often the case when the Commerce bureau performs reimbursable work for others, rather than purchasing services.

In one case, OAR officials are making some effort to identify missing terms and notify the other parties of what those terms should be. Currently, OAR prepares a cover letter that is sent to the other party with the signed agreement. The letter, signed by the OAR official who signed the agreement, acknowledges receipt and acceptance of the attached agreement and includes several standard items, such as the amount of the agreement, legal citation, termination date, and billing terms, whether or not those terms are stated in the agreement. However, this practice may raise legal issues because the additional terms in the letter are not formally agreed to by the other party.

We suggest that the Department work with the bureaus to establish a formal procedure for ensuring that agreements prepared by other parties contain all necessary information. Standard language should be developed and sent to the sponsoring party when negotiations on a project first begin. The standard language would inform the other party of basic elements that must be included in any formal agreement, including legal citation, termination date or performance period, and total project costs. This notice could be incorporated into any initial correspondence or be presented as a brief standard form. Forms of this nature, such as those used by the Census Bureau or the Environmental Protection Agency, would be useful resources for developing a standard form.

As a second step, if a final agreement is still incomplete, Commerce bureaus should prepare a formal modification or amendment that specifies missing terms and is signed by both parties. The bureaus could use the same standard form used during negotiations. To ensure full compliance, the programs should not be permitted to begin work on a project until the agreement and any modifications or amendments needed to include missing terms are signed. With the common and persistent deficiencies found throughout the Department, a procedure that formally notifies other agencies and/or parties of necessary terms and subsequently modifies or amends incomplete

agreements is essential to ensure future compliance and to protect Commerce from any risks associated with these deficiencies.

————— ❦ —————

In his response to our draft report, the Chief Financial Officer responded to our statement on page seven that “officials in this office stated that departmental guidelines for agreements have never been a priority.” The Chief Financial Officer agreed that such guidelines have not yet been established, but he said that they will now receive the attention of his office. He also provided examples of how the Department has “been tangentially involved in the effort to better understand and manage the use of these agreements within the Department for some time.”

B. Oversight process for reviewing departmental agreements is inadequate

There is an opportunity for the Department to create a process that could greatly improve the review of agreements throughout Commerce. Because the Department is in the unique position of overseeing many administrative details for departmental bureaus and offices, it naturally follows that it is in a position to ensure that agreements contain all required elements before they are finalized. There are four specific areas of review that the Department should consider: budget, procurement, legal, and programmatic.

Agreements do not always receive adequate budget review

Agreements involve a significant amount of resources—either the transfer of funds or the commitment of funds or resources to a project. Each Commerce agreement should then receive a thorough budget review to ensure that federal resources are wisely and justifiably used. It would be neither essential nor efficient for the budget review to take place at the Department level for all agreements. In any departmental guidance on agreements, the Department therefore should state what budget documentation and detail are necessary for the bureau budget offices to approve the obligation of resources to a performing agency or entity, or to receive reimbursable or advance funding from a sponsoring agency or entity. Individual bureaus would then be responsible for reviewing their own agreements for compliance with departmental and bureau-level guidance.

Contracting officers do not regularly review and approve agreements

With regard to procurement review, the *FAR* provides that D&Fs, which support agreements that transfer funds under the Economy Act, should “be approved by a contracting officer of the requesting agency with authority to contract for the supplies or services to be ordered, or by another official designated by the agency head.”¹⁶ However, throughout Commerce, we found that contracting officers or designated officials are neither asking for D&Fs nor not always reviewing D&Fs. While OGC stated that they currently require bureaus to provide a copy of the D&F when they review Economy Act agreements, we found examples of agreements approved by OGC that did not have D&Fs.

Officials in OS’s Office of Acquisition Management (OAM) were aware of the *FAR* requirements, but acknowledged that they currently do not review most Economy Act agreements and supporting D&Fs. We believe that OAM contracting officers should approve all Economy Act fund transfers and D&Fs that exceed a specific dollar threshold. OS should then instruct the bureaus to designate contracting officers or other qualified officials to approve all Economy Act fund transfers that fall below that threshold. This review is critical to meet the *FAR* requirements and also to ensure that the Economy Act is not being used to acquire goods and services by circumventing the procedures, time, and cost of open competition.

Agreements do not always receive legal review

We found that many Commerce agreements do not receive any legal review before becoming effective. If an agreement has not been reviewed by legal counsel, it may (1) not comply with legislative and regulatory requirements, (2) not cite appropriate legislative authority, or (3) include terms unacceptable to or unnecessary for a federal agency. Currently, there is no Department-wide order or regulation that establishes criteria for when legal review of agreements is required. Although an April 1994 memorandum from Commerce’s General Counsel states that Economy Act and joint project agreements “should” be sent to OGC for review, bureau-level personnel have interpreted this memorandum as allowing some amount of discretion. Even though OGC officials told us that they expect to review all funded and unfunded agreements unless a specific delegation has been granted, they were not aware of the large number of agreements that they do not review. Similarly, most of the bureaus do not have clear policies on when bureau-level and/or OGC legal review is required for agreements.

There needs to be a clear policy that details when agreements should be submitted for legal review. Because it may not be practical or necessary for all agreements to be reviewed by OGC,

¹⁶*FAR* § 17.503 (c).

we recognize that there should be some criteria developed to assist bureaus and offices in determining which agreements must be reviewed by OGC and which should have bureau-level legal review. For example, the Department could require OGC review of agreements that are over a certain dollar threshold, commit significant funding or other resources, include irregular terms and conditions, involve a private or foreign party, are signed at the line office level or higher, or potentially involve significant departmental liability.

OGC also recognizes the need for criteria and has worked with at least one departmental office, the National Marine Fisheries Service, to develop thresholds for legal review of agreements.¹⁷ OGC would like to develop similar thresholds for other departmental offices—an initiative that we support. OGC should first determine whether there are some generic standards for legal review that should apply to all departmental offices. Exceptions could then be granted, allowing a certain level of discretion for requiring a legal review in well defined situations. Any generic thresholds should be incorporated into the forthcoming departmental guidance on agreements with the condition that other more tailored criteria could be issued to supplement the Department-wide standards.

With new guidelines for legal review, we are concerned that OGC's workload could significantly increase, affecting its ability to complete reviews within a reasonable amount of time. Currently, OGC reviews only about 30 agreements per month. Commerce bureaus had over 4,700 agreements in place in fiscal year 1997. As these agreements are renewed or reviewed and new agreements are created, a requirement for regular legal review could significantly impact OGC. OGC officials stated that they could handle the review of additional agreements, but they had not evaluated the potential workload increase. Program officials are already concerned about the negative effects of delays caused by lengthy legal reviews and fear that a significant increase in agreements being reviewed by OGC would further delay the process.

We agree with departmental and bureau officials that only certain bureau agreements need to be reviewed by OGC. Consequently, departmental managers and OGC should balance any new requirements for legal review against the potential workload increase. In order to alleviate some of the concerns about lengthy delays, the policy should state how much lead time is required to obtain legal review. The bureaus must then provide agreements to OGC or bureau counsel in sufficient time for legal review to be completed before a project is expected to start.

¹⁷The new NMFS guidelines state that OGC will review all NMFS agreements except (1) Economy Act agreements where less than \$100,000 is being transferred or (2) unfunded agreements with other federal agencies that are for the period of five years or less. However, if personal property is being transferred or loaned under an unfunded agreement, OGC review must be obtained. Furthermore, all joint project agreements, regardless of funding, must continue to be cleared by OGC.

Legal counsel should also periodically contact the program office to inform program officials about the status of legal review. Program officials can then better anticipate when legal review will be completed. We were told that OGC currently requires its attorneys to contact the relevant program office within two days of receiving an agreement. We encourage OGC and the bureau counsels to also provide feedback to program officials when their review will not be completed within their deadline.

To implement this type of feedback policy efficiently and to properly manage their workload internally, OGC and the bureau counsels need systems to track the progress of legal review on specific agreements. OGC's current system of tracking projects, including the review of agreements, records a due date and other relevant information, but cannot be queried to determine what projects are coming due. OGC should consider upgrading or changing the format of its tracking system to better manage this information. Similarly, bureau counsels should implement or update their tracking systems accordingly. Program offices should also be provided a central point of contact in both OGC and bureau counsel offices for determining the status of legal review on any particular agreement.

In addition to a clear policy on legal review, OGC should develop some standard language or form agreements for use by Commerce bureaus. We understand that some form agreements have been developed in the past. For example, in 1990, NOAA Counsel provided OAR a prototype agreement for orders from non-federal parties. The *NOAA Budget Handbook* and *NOAA Administrative Order 201-105* on memoranda of understanding or agreement also include some standard language. OGC recently distributed a sample joint project agreement during a NMFS training session on agreements. OGC noted in its response that the NOAA sample agreements we mention above may require revision. We maintain, however, that pre-approved language that is regularly reviewed and updated should be encouraged in order to facilitate the process by making agreements easier to draft and to review.

Programmatic review should be formalized

Finally, the Department should ensure that Commerce bureaus conduct adequate programmatic review of their agreements. We found that agreements receive various levels of programmatic review, but often these review processes are undocumented. As discussed on page 9, some legal authorities that authorize agreements include complex criteria that must be met. In addition to determining what written justifications should be prepared for these criteria, the Department should require the bureaus to determine the appropriate level of review. Designated offices or officials could then be held accountable for the appropriateness of agreements.

The Department should also require the bureaus to periodically reevaluate the necessity and appropriateness of individual agreements. As discussed on page 14, many of the agreements we

reviewed contained indefinite duration provisions, often stating that the agreement is valid until terminated by one or both parties. Even when provisions for annual or periodic reviews were included, we found that most agreements were never reevaluated. Without a periodic reassessment, there is no assurance that agreements continue to, among other things, (1) comply with legislative and regulatory authority, (2) meet legislative criteria, (3) be mission-related, or (4) protect the government's interests. In addition, significant departmental funds may be wasted if due diligence is not exercised. We believe that the Department needs to ensure that agreements are reviewed and revised or renewed as appropriate, at least every three years.

We recommended that OGC's and the bureau counsels' tracking systems be upgraded or changed to help facilitate timely legal reviews of agreements and to provide information about the status of legal reviews. However, the General Counsel strongly objected to our recommendation that OGC's system be changed. The General Counsel stated that OGC's system was effective and efficient and specifically designed to meet OGC's requirements—a word processing-based system containing opinions and comments made by OGC attorneys covering all legal issues that OGC reviews for the Department—and it should not be analyzed from the limited perspective of the Department's need to track agreements.

Although OGC's system is meeting OGC's needs, it is not meeting the needs of departmental personnel. Based on our Department-wide review of agreements, we found that bureau-level personnel have two major problems with OGC legal reviews. First, because OGC cannot readily query its system to determine what projects are coming due, bureau personnel stated that they are frequently unable to get information about the status of legal reviews. OGC stated that they have a designated person for bureau personnel to contact to determine the status of reviews, but some bureau personnel did not know there was a contact and some could not get adequate status information.

Second, and more importantly, bureau personnel are concerned about lengthy legal reviews and delays. The General Counsel stated that because we did not review OGC's system, we “did not find a single instance of a deficiency in that system which resulted in untimely review of agreements or the inability to obtain status information.” While we recognize that there may be appropriate reasons for delays in the legal review process, we also believe that there is room for improvement in the review process given the complaints we received. We interviewed numerous bureau-level personnel to determine their satisfaction with OGC's system and the legal review process. Personnel from five bureaus provided numerous examples of lengthy reviews and two bureaus stopped sending agreements to OGC because of lengthy legal reviews. Bureau personnel stated that some reviews took one to six months, which they felt was excessive and severely impacted their operations. In fact, bureau personnel told us that they had to cancel some

agreements because of lengthy OGC review and that they were generally discouraged about the legal review process.

The General Counsel is correct that OGC's and the Department's systems should be analyzed separately. We recommended that the Department establish a new Department-wide database of all agreements. However, the Department's database will not ensure timely legal reviews and identify the status of legal reviews. These tasks remain with OGC and the bureau counsels' systems. Even if there are valid reasons for lengthy legal reviews of some agreements, bureau personnel should expect timely feedback when there are legal questions about an agreement being reviewed. As a result, we reaffirm our recommendation that OGC and the bureaus modify their tracking systems to (1) provide on-line status information and (2) ensure timely legal reviews.

C. *Departmental policies and procedures for agreements are clearly needed*

A thorough policy on agreements is a necessary resource for officials preparing and reviewing agreements, by providing such information as when an agreement is necessary, what level of approval is required, and what specific language is needed. Considering the problems discussed above, the Department should prepare formal policies and procedures, such as a Department Administrative Order or handbook, outlining the types of agreements that can be entered into by Commerce bureaus; the minimum necessary content and steps for preparing agreements; standard language or form agreements; and the review, approval, and renewal policies and procedures that should be followed by all Commerce bureaus.

This guidance should be comprehensive, specifying how each type of agreement should be prepared and reviewed. For example, unfunded agreements may only require programmatic and legal review, while obligation agreements should be reviewed by procurement, budget, legal, and program offices. At a minimum, the new directive should:

- Require all Commerce agreements to include at least the following items: citation of legal authorities, applicable written justifications, signatures by the appropriate bureau and departmental officials, total project costs, budget summaries, and termination dates and/or review periods. There should also be formal procedures that ensure agreements prepared by external parties contain all necessary information.
- Require bureaus to prepare D&Fs for interagency transfers authorized by the Economy Act. For all intra-agency Economy Act transfers, require bureaus to prepare justifications that support their determination that purchasing from a federal entity is cheaper or more convenient than purchasing from a commercial entity.

- Direct bureaus to establish appropriate internal review processes for each type of agreement. Explicitly state the responsibilities of the various offices, the minimum path of review and approval, and thresholds for review.
- Direct the bureau budget offices to review budget documentation for every agreement and to approve the obligation of resources to a performing agency or entity or the receipt of reimbursements/advances from a sponsoring agency or entity.
- State that Economy Act orders and supporting D&Fs, above a specific threshold, must be reviewed by OAM contracting officers. Economy Act orders below that threshold should be delegated to bureau contracting officers or other designated officials for review.
- Provide generic, Department-wide standards for which agreements require OGC and/or bureau counsel review. For those bureaus that require greater oversight, OGC should negotiate more specific criteria for legal review of their agreements.
- Require the bureaus to perform initial and periodic review of programmatic justifications for every agreement. Reviews should be at least every three years.

Some bureaus and line offices, including Census, the National Institute of Standards and Technology, and NOAA, already have or recently prepared guidance on some types of agreements. NOAA prepared a directive for its agreements not including a transfer of funds in October 1992, and Census prepared guidelines for its obligation agreements in July 1997. NOAA's directive outlines agreement responsibilities and policies of each NOAA office, and Census's guidelines provide the contents and steps for preparing agreements of each Census office. For example, Census's guidelines require a citation of legal authority, a statement of work, financial information, termination provisions, and authorizations. OGC stated that it is working with Census and NOAA to revise their guidelines, and it must review NIST guidelines to determine their adequacy. Once guidelines of these bureaus are finalized, they can be used as examples for other bureaus.

In addition to NOAA's directive, NMFS and OAR have developed checklists to follow while preparing agreements. OAR's checklist includes basic information about the agreement (such as type of sponsor and period of performance), substantive justifications, applicable legal authority, strategic plan elements, budget information, billing basis and cycle, and waiver justification for not seeking advance funding from non-federal sources. The official preparing an agreement must mark certain boxes to identify which option in each section applies. Once completed, the checklist will remain on file with the agreement and serve as an assurance that each of the required elements has been addressed. If consistently applied and regularly updated, the checklist should improve compliance with federal requirements for agreements.

We intend to evaluate the individual bureau guidance in separate reports on those bureaus. However, the Department should evaluate the usefulness of these and other bureau guidance in preparing departmental guidance on agreements. OGC noted in its response that it has found problems with some existing bureau guidance and that existing guidance should be fully reviewed and cleared.

To be effective, any new or updated policies and procedures should be widely distributed. The Department should encourage the bureaus to provide training on how to prepare and process agreements. We note that OGC has recently taken a more active role in bureau training programs by making presentations on agreements and other relevant subjects. The Department should also make all information relevant to preparing and processing agreements easily accessible by posting documents on its intranet and presenting this information at any relevant departmental conferences. Any subsequent changes in federal, departmental, or agency regulations or procedures and applicable laws should also be widely distributed.

In its response to our draft report, the Chief Financial Officer and General Counsel agreed that uniform Department-wide policies and procedures for use by all bureaus should be established. The Chief Financial Officer agreed to establish uniform Department-wide policies and procedures using a handbook format that, once issued, would be broadly disseminated and electronically accessible. Both believe that bureaus should be allowed discretion in designing policies and procedures that meet their individual needs. OGC believed that the bureaus should be responsible for preparing detailed guidance, subject to departmental review and approval.

We agree that a new departmental handbook is necessary and bureau guidance should supplement departmental guidance and be more detailed in establishing who exactly should review agreements and describing any special authority a bureau might have. However, we have two concerns about the Chief Financial Officer's and General Counsel's responses. First, although the new handbook will comprise "basic elements" to document an agreement and "circumstances" under which departmental review will be required, we want to ensure that the handbook includes the seven items we outlined in Recommendation 1. We provided these very specific items to enhance the Department's review and approval process. Second, we disagree with the General Counsel's recommendation that the Department only prescribe a very general requirement for bureau procedures on agreements. This approach would require each bureau to develop its own guidance, unnecessarily duplicating effort and perhaps leading to inconsistencies in the procedures. The Department should follow the format of other departmental guidance, including the financial assistance handbook, for the appropriate level of detail and consistency.

D. Department-wide database for agreements is needed

During our review of Commerce bureaus and the systems and processes they have for managing agreements, we found that few bureaus are able to adequately track and control their agreements. Frequently, bureaus keep lists of agreements for their individual operating units, but most bureaus do not have a complete listing of all their agreements and no comprehensive departmental inventory exists. As a result, we found inconsistent reporting of agreements among Commerce bureaus. The bureaus had different ways of classifying agreements, and frequently overlooked agreements between their bureau and another Commerce agency. In some cases, bureaus still record expired agreements and some record open but inactive agreements. Consequently, we experienced significant difficulty collecting an accurate inventory of agreements by agency or, in the case of NOAA, by major line office.

A central database of agreements would be a useful management and administrative tool. The Government Performance and Results Act requires federal agencies to describe coordination and planning with other agencies on shared or similar functions and programs. In July 1997, the House Science Committee criticized Commerce's strategic plan for failing to adequately discuss coordination of cross-cutting programs. The Department has since included more information about program "linkages" in its strategic plan for 1997-2002. For each strategic theme (economic infrastructure, science/technology/information, and resource and asset management and stewardship), the Department describes linkages with other federal and non-federal parties that support these strategic themes. Basic information from a departmental database of agreements could be used to further develop these linkages.

From an administrative perspective, a central database of agreements would help Commerce bureaus in administering and maintaining their agreements. The Federal Assistance Awards Data System requires that the Department maintain centralized files for procurement contracts, grants, and cooperative agreements in order to provide better control and oversight.¹⁸ We believe that there is nothing unique about agreements that would preclude them from being similarly reviewed and maintained. By having relevant dates in the system, programs could easily identify which agreements are due for renewal, termination, or review. Also, officials could quickly respond to inquiries on particular agreements by accessing the system by identifying number, project title, or contact name.

¹⁸31 U.S.C. § 6102a.

During our review, OS officials agreed that a database of summary information for each agreement should be established and maintained, allowing OS and the bureaus to quickly obtain agreement information and determine what agreements exist. We believe that at least the following summary information on each agreement should be stored in an electronic database: purpose or title, parties, termination date, review period, funding information, legal authority, and contact person or office. The database should also identify the type of agreement, such as memoranda of understanding or agreement, reimbursable agreement, or obligation agreement. This system could also be used to establish a document numbering system. Each entry would be assigned a unique number, which would then be placed on the actual agreement and any related documents. Commerce bureaus could then better identify and track the physical documents.

Given the large number of agreements and their importance to achieving Commerce's mission, a comprehensive database of agreements would help management and other responsible officials better control and maintain their agreements. OS officials suggested to us that the Department's Risk Management Team evaluate the composition of a Department-wide database of agreements. Because a Department-wide database would be a major effort and possibly involve significant resources to develop, we agree that the Department should carefully consider what approach to take in creating a central database of agreements.

We have identified two options for creating a central list of agreements. First, the Department could develop one standard system or database program that each bureau can access to add, modify, or delete agreements. Alternatively, each bureau could maintain its own database that is compatible with requirements specified by the Department. The Department would define which data elements are required for a centralized list and then require the bureaus to periodically provide the information electronically to be uploaded into the central list at the Department level. We request that the Department inform us of its final decision on how it will implement this recommendation.

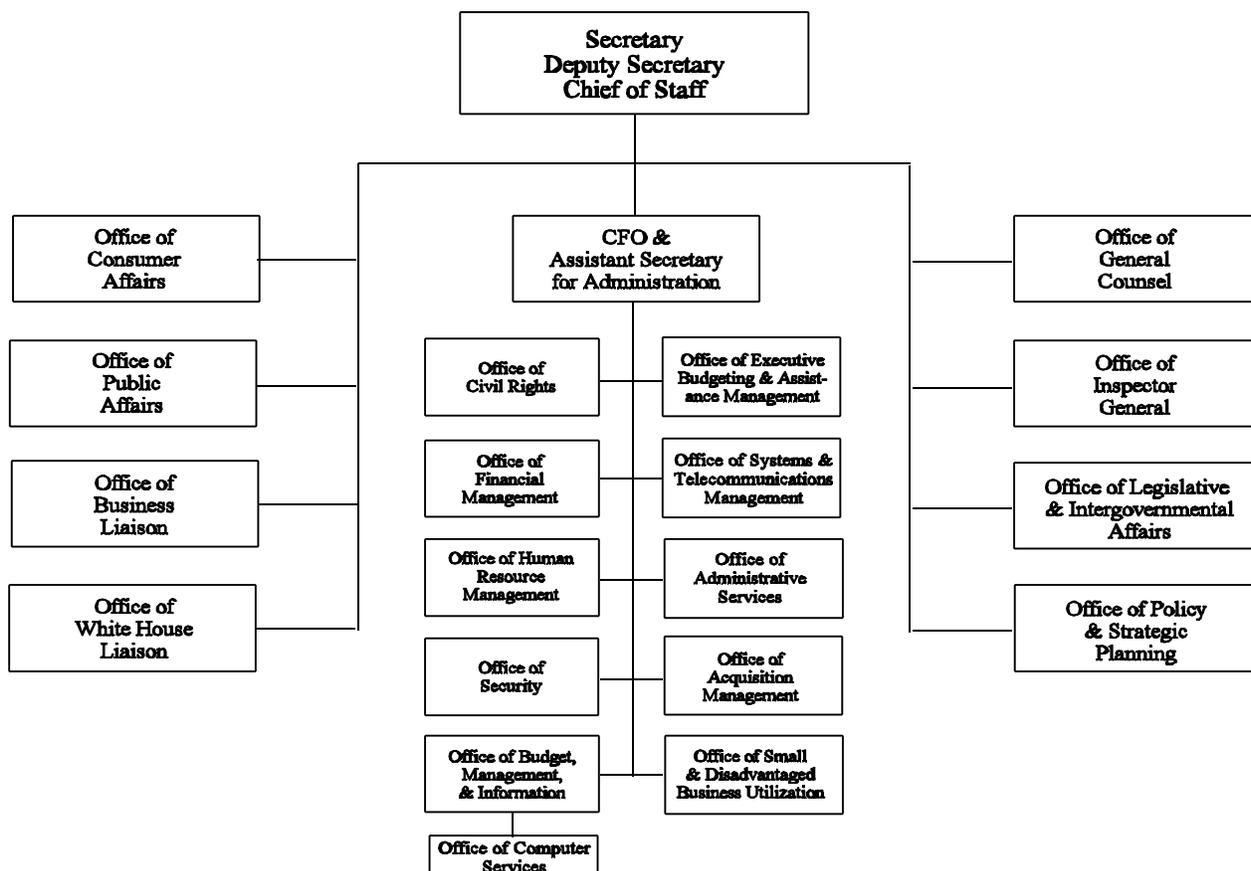


In his response to our draft report, the Chief Financial Officer agreed with our recommendation that consistent and reliable data should be maintained and readily accessible for all agreements administered by the Department and its bureaus. The Chief Financial Officer stated that the second option identified under our recommendation, a "bureau-maintained feeder system," appears to be the most workable. However, the Chief Financial Officer agreed that departmental personnel will determine whether one standard system or multiple bureau systems should be developed. The General Counsel agreed that a database should be developed to help catalog and

track agreements, but the General Counsel thought that the bureaus should be responsible for developing databases that are designed to meet their own needs. The General Counsel also stated that the Chief Financial Officer should then determine whether maintenance of a central database, in addition to bureau databases, will provide sufficient benefits to justify the resources that will be required to maintain it.

II. The Office of the Secretary Should Improve Its Own Process for Preparing, Reviewing, and Administering Agreements

As part of our Department-wide review of agreements, we selected OS as one of 11 Commerce bureaus or line offices to review in depth. As shown below, OS consists of 19 staff offices that provide executive direction, planning, budget, financial, legal, human resources, and other administrative services to Commerce bureaus. Many of these offices either have agreements of their own or have some responsibility for reviewing or approving agreements.



OS had 207 agreements that were effective in fiscal year 1997. Table 3, on the following page, shows the number of agreements by OS office. Many of the agreements are within the Office of Computer Services (OCS). Because we performed a prior inspection of OCS, and plan a full-scale follow-up review that will include a look at OCS agreements, we did not include its 109 agreements in the work performed for this review. We also excluded OIG agreements from our sample. However, we separately reviewed several OIG agreements for compliance with federal

and departmental requirements. We will address any deficiencies in those agreements and revise our internal guidance to conform with the recommendations made in this report. Having made these exclusions, we selected a sample of 32 of the 80 agreements from the remaining OS offices.

Table 3: Summary of OS Agreements (Fiscal Year 1997)

| OS office | Interagency and Other Special Agreements | |
|---|--|---------------------|
| | Number | Value |
| Office of Computer Services | 109 | \$8,046,641 |
| Office of Inspector General | 18 | 1,304,848 |
| Office of Human Resources Management | 16 | 5,185,620 |
| Office of Executive Budgeting and Assistance Management | 14 | 1,550,533 |
| Office of Administrative Services | 13 | 1,507,066 |
| Office of Systems and Telecommunications Management | 9 | 104,378 |
| Office of General Counsel | 8 | 1,896,455 |
| Office of Civil Rights | 7 | 146,100 |
| Office of White House Liaison | 6 | 62,723 |
| Office of Acquisition Management | 2 | 40,000 |
| Office of Financial Management | 2 | 3,875,071 |
| Office of Security | 2 | 251,000 |
| Office of Consumer Affairs | 1 | 0 |
| Office of Budget, Management, and Information | 0 | 0 |
| Office of Business Liaison | 0 | 0 |
| Office of Legislative and Intergovernmental Affairs | 0 | 0 |
| Office of Policy and Strategic Planning | 0 | 0 |
| Office of Public Affairs | 0 | 0 |
| Office of Small and Disadvantaged Business Utilization | 0 | 0 |
| Total | 207 | \$23,970,435 |

We found three different types of OS agreements. First, obligation agreements were for administrative services or goods provided by another departmental office or outside agency. Conversely, reimbursable agreements provided funding to OS units for personnel details and administrative services, and for implementing the Commerce Administrative Management System. Finally, unfunded agreements (OS did not pay or receive funds) were primarily for non-reimbursable personnel details and a joint project between the Minority Business Development Agency and OS's Office of Consumer Affairs.

We found that the 32 OS agreements we reviewed (1) were nearly evenly divided between departmental bureaus and external agencies, such as the State Department and the General Services Administration; (2) were primarily obligation agreements for information or services; (3) averaged about \$495,000 for the 26 funded agreements; and (4) largely lacked any stated legal authority. Table 4 summarizes OS agreements by source, type, legal authority, and average dollar amount.

Table 4: Sample of 32 OS Agreements by Source, Type, Legal Authority, and Average Dollar Amount

| | |
|--|-------------------------------------|
| Agreements by Source | <u>Number of Agreements</u> |
| External agencies | 18 |
| Internal agencies | 14 |
| Agreements by Type | <u>Number of Agreements</u> |
| Obligations | 18 |
| Reimbursables | 8 |
| Unfunded agreements | 6 |
| Agreements by Legal Authority | <u>Number of Agreements</u> |
| No authority cited | 19 |
| Economy Act (31 U.S.C. §§ 1535-1536) | 5 |
| Joint project authority (15 U.S.C. § 1525) | 2 |
| Other authority cited | 6 |
| Agreements by Average Dollar Amount | <u>Average Dollar Amount</u> |
| Obligations (18 agreements) | \$531,000 |
| Reimbursables (8 agreements) | 413,000 |
| Unfunded agreements (6 agreements) | 0 |

While OS agreements seem to be appropriate funding mechanisms and support OS's mission, we found that (1) many OS agreements are not properly prepared, (2) OS's process for reviewing agreements is inadequate, (3) OS should develop internal policies and procedures for preparing and reviewing agreements, and (4) OS does not sufficiently track and control its agreements. As discussed below, there are several actions OS should take to address these concerns.

A. *Agreements are appropriate funding mechanisms and support OS's mission*

Based on our review of 32 OS agreements, we found that although 19 of the agreements did not cite a legal authority, they covered appropriate activities that could be funded by an agreement. We found that OS offices did not use agreements to circumvent procurement or financial assistance guidelines and that none of the 32 agreements should have been a procurement contract, grant, or cooperative agreement. In addition, all of the 32 agreements were properly funded under applicable laws and legal authorities.

In addition, OS offices used the 32 agreements to support their specific mandates, by providing mission-related services to Commerce bureaus and other agencies or in receiving services needed to perform their mission. OS offices primarily provide financial, accounting, and personnel services to Commerce and other agencies. OS offices also use agreements to obtain financial and accounting services, printing, warehouse storage, and overseas security services. Without these services, OS offices would not operate effectively.

Finally, because each OS office averaged only five agreements and the average agreement dollar value per employee is only about \$9,800 (see Table 5 below), we believe that OS offices did not rely on reimbursable agreements for a substantial proportion of their resources. We calculated the average agreement dollar value per employee to determine whether an office relied on agreements for a substantial proportion of its resources, because the Department's fiscal year 1997 budget did not separately identify the funding for each OS office. Although OS had some offices with more than five agreements and the Office of Financial Management (OFM) had a reimbursable agreement for a substantial proportion of its resources, these were the only exceptions. OFM receives all of its reimbursable funding from an agreement with the Patent and Trademark Office for implementing PTO's version of the Commerce Administrative Management System. Because this system may eventually be implemented and used by all departmental offices and OFM's mission is to provide financial management services to all departmental offices, reimbursable services to PTO for this project are clearly mission-related.

Table 5: Analysis of OS Reimbursable Agreements by Total Dollar Value and Dollar Value Per Employee

| OS Office | Number of Employees | Dollar Value of Agreements | Dollar Value per Employee |
|--|---------------------|----------------------------|---------------------------|
| Office of Financial Management | 35 | \$3,858,071 | \$110,231 |
| Office of White House Liaison | 4 | 62,724 | 15,681 |
| Office of General Counsel | 184 | 2,021,455 | 10,986 |
| Office of Civil Rights | 28 | 146,100 | 5,218 |
| Office of Administrative Services | 117 | 282,550 | 2,415 |
| Office of Systems and Telecommunications Management | 33 | 69,879 | 2,118 |
| Office of Acquisition Management | 23 | 40,000 | 1,739 |
| Office of Human Resources Management | 62 | 9,500 | 153 |
| Office of Budget Management and Information | 64 | 0 | 0 |
| Office of Executive Budgeting and Assistance Management | 38 | 0 | 0 |
| Office of Security | 30 | 0 | 0 |
| Office of Public Affairs | 18 | 0 | 0 |
| Office of Legislative and Intergovernmental Affairs | 7 | 0 | 0 |
| Office of Policy and Strategic Planning | 6 | 0 | 0 |
| Office of Business Liaison | 5 | 0 | 0 |
| Office of Small and Disadvantaged Business Utilization | 5 | 0 | 0 |
| Office of Consumer Affairs | 3 | 0 | 0 |
| TOTAL | 662 | \$6,490,279 | \$9,804 |
| Note: Excludes OCS and OIG; see Purpose and Scope for an explanation of these exclusions. The number of employees is based on the actual number employed as of October 27, 1997. | | | |

B. OS agreements are not always properly prepared

We reviewed the sample of 32 OS agreements to determine whether the agreements were properly prepared and justified. Many of the agreements lacked (1) citations to legal authority, (2) written justifications, (3) necessary contract details, (4) signatures of authorized officials, or (5) sufficient budget information. We believe these deficiencies could expose OS offices to legal liability, misunderstood responsibilities, and excessive costs.

Nineteen of 32 OS agreements—primarily those between OS and departmental bureaus—failed to cite any legal and/or funding authorities. As discussed on page 7, the legal authority affects the treatment of funds transferred under the agreement and the period of availability of those funds. In addition, many of the agreements were not adequately supported by written justifications. Eight agreements also lacked necessary contract details, such as full project descriptions, definitions of key terms, disclaimers for funding availability, and provisions for resolving disagreements or negotiating amendments. Each of these provisions is necessary to make certain that the terms of the agreements are fully understood by all parties.

We also found that 25 percent of the agreements we analyzed were not signed by one or both of the authorized agreement representatives. While these agreements generally covered personnel details, the lack of signatures raises the fundamental question of whether an agreement exists at all. If an agreement is not valid, the other party may not be required to fulfill all terms and conditions, thus putting the Department's resources and credibility at risk.

Finally, 13 of 32 OS agreements did not include sufficient budget information. Most of these agreements provided an overall cost estimate, but did not breakdown the estimate by major cost categories. Without a cost estimate and budget summary, the parties and outside reviewers cannot easily determine how agreement funds are to be spent, whether full costs will be recovered, or whether joint projects are equitably apportioned.

OS officials should be more diligent about drafting agreements that adequately protect Commerce's interests. OS agreements should also provide sufficient information about the proposed project to show that they are wise uses of Commerce resources and to ensure that each party's responsibilities are well understood.

C. Oversight process for reviewing OS agreements is inadequate

We found that OS's review process was inadequate, resulting in poor oversight, incomplete agreements, and a wide range of other deficiencies. Currently, OS offices follow an inconsistent and mostly undocumented process for preparing and reviewing agreements. In addition, only some agreements are reviewed by OS's budget, procurement, and/or legal offices, despite the

critical need for these offices to review agreements before they are signed by all parties. Therefore, we believe that OS's agreement review process—from budget to procurement to legal to the appropriate program office—needs to be improved and documented.

OS budget review of agreements should be improved

The budgetary review of OS agreements should be performed by the Office of Executive Budgeting and Assistance Management (OEBAM) to ensure that federal resources are wisely and justifiably used. OEBAM would also determine that funds are available for obligation agreements. Although OEBAM currently receives the annual budgets from all OS offices, it does not receive a break-out of agreement funds included in those budgets. If OEBAM requests documentation to better understand an OS office's budget, the office might supply an agreement in reply, and OEBAM then keeps the agreement on file. As a result, OEBAM does not have a complete understanding of what resources are committed to agreements.

OEBAM should be reviewing budget documentation for all agreements before the agreements are signed. OS's internal guidance on agreements should state what budget documentation and detail are necessary for OEBAM to approve the obligation of resources to a performing agency or entity, or to receive reimbursable or advance funding from a sponsoring agency or entity. OEBAM should be formally delegated the responsibility to (1) determine whether funds are available for OS obligation agreements, (2) review budget documentation of every OS reimbursable and obligation agreement for appropriateness, and (3) maintain a detailed summary of OS obligations through agreements.

Procurement review of OS agreements is inadequate

We found that OS offices rarely prepare a D&F for interagency obligation agreements citing the Economy Act and do not have D&Fs reviewed by a contracting officer. In the absence of review by contracting officials, these agreements may be in violation of the *FAR*. The *FAR* requires agencies that obtain goods or services from other agencies through Economy Act agreements to prepare a D&F justifying that the purchase is in the best interests of the government and that the supplies or services cannot be obtained as conveniently or economically from a private source. A contracting officer or other official designated by the agency head must approve and sign the D&F. We believe that contracting officers, who have training and experience in obtaining goods and services, should conduct this review. Those OS offices, such as the OIG,¹⁹ that have their own procurement functions should have their contracting officers review agreements. For all

¹⁹As discussed in the Purpose and Scope section of this report, the OIG has a separate administrative staff, including contracting officers, to ensure its independence within the Department.

other OS offices, OAM contracting officers should review and provide the necessary approval for Economy Act agreements.

OS offices also do not prepare D&Fs and do not have D&Fs reviewed by a contracting officer for Economy Act transfers within Commerce. Because there is no OS or departmental guidance on preparing and justifying intra-agency Economy Act transfers, there is no standard for documenting that the transfer complies with the Economy Act. OS should ensure that a standard method of documenting and approving this determination is developed and that documentation of the determination is required for all OS intra-agency Economy Act transfers.

Most OS agreements do not receive legal review

OS currently does not require or ensure that its agreements receive legal review. We could only verify that two out of the 32 agreements we sampled were reviewed by OGC. As discussed on page 17 of this report, according to an April 1994 OGC memorandum, Economy Act and joint project agreements “should” be sent to OGC for review. However, bureau personnel have interpreted this memorandum as allowing some amount of discretion. As a result, with no clear procedure defining which agreements require legal review, some established or recurring agreements do not receive the scrutiny, review, and oversight necessary to ensure that the government’s best interests are protected. OS program officials, therefore, should work with OGC to establish reasonable criteria for which OS agreements require legal review.

OS should formalize its programmatic review of agreements

OS also should develop a policy of when and how often an agreement should be reevaluated to determine if the project is still fully justified and if it continues to be consistent with both OS and Commerce missions. Currently, there is no established practice for reviewing OS agreements after they are implemented. OS should ensure that its agreements are reviewed, and revised or renewed as appropriate, at least every three years. Any policy should also indicate which officials or offices are responsible for this review.

D. OS should develop internal policies and procedures for preparing and reviewing agreements

We found that OS has not developed and implemented policies and procedures to ensure that agreements are consistently and properly prepared and comply with the specific agreement authorities. As discussed on page 21, there is also limited Department-wide guidance on agreement preparation. In the absence of adequate guidance, OS officials stated that the primary basis for preparing agreements is using a previous agreement as a model. Obviously, any problems with previous agreements are then perpetuated through new agreements.

As discussed above in section II, subsections B and C, we are concerned about how OS drafts and reviews agreements. To help correct these deficiencies, OS should prepare internal guidance for OS offices that outlines when an agreement is appropriate, the content and steps for preparing and implementing agreements, and the provisions necessary for compliance with the forthcoming Department-wide guidance we discuss above. In particular, the guidance should list and explain relevant legal authorities, require sufficient justifications for the legal authority cited, provide for necessary contract details and authorized signatures, and require agreements to include adequate budget information.

The OS guidance should also establish the necessary review processes for agreements. Thresholds and criteria for OGC review should be developed and clearly stated. In addition, the guidance should specifically state which OS offices are responsible for budget, procurement, legal, and programmatic review of OS agreements.

Once completed, OS should distribute this guidance and other information relevant to preparing and processing agreements through its intranet and present the information at OS conferences. Any subsequent changes in federal, departmental, or agency regulations or procedures and applicable laws should also be widely distributed. Finally, OS should provide training on how to properly prepare and process agreements to program and administrative staff responsible for agreements.



The Chief Financial Officer agreed with our recommendation that specific Office of the Secretary policies and procedures should be developed and implemented as needed to supplement the Department-wide guidelines. The Chief Financial Officer also agreed that Office of the Secretary policies and procedures will be broadly disseminated and made electronically available, and that training will be provided to Office of the Secretary personnel involved in developing and administering agreements.

E. Database to track and control OS agreements is needed

During our review of OS agreements, we found that no OS office has established a database for tracking its agreements. While each OS office was able to provide us with a basic list of its current agreements, we found that OS lacks a comprehensive inventory. As a result, cataloging past and present OS agreements was extremely difficult. In the end, we had to contact 19 different OS offices to request and obtain agreement information.

Even after obtaining information from each office, we were not certain whether we had received all OS agreements. Some OS offices stated that they had no agreements, while others believed

they had provided all agreements. However, after reviewing agreement information and interviewing OS personnel, we found that some OS agreements were not initially provided to us. This occurred because OS offices do not track and control their agreements, thus creating inconsistent reporting of agreements between OS offices. In addition, we found that each office has a different way of classifying agreements, resulting in some agreements frequently being overlooked. Finally, some offices are still tracking expired agreements and others record open, but inactive agreements. Consequently, we question the reliability of OS's information on agreements.

We evaluated three existing alternatives for tracking OS agreements. However, none of the databases or tracking systems were adequate to manage and administer OS agreements.

- OGC's tracking system is a word processing-based system containing opinions and comments made by OGC attorneys on various legal matters, including review of agreements. Because this system contains textual information, such as agreement description, number, and attorney comments, attorneys are able to research prior opinions and related issues to help in reviewing current agreements. While this information is useful, a word processing file makes data searches and extractions time-consuming tasks. OGC cannot determine which agreements its system contains without painstakingly searching through the file on a chronological basis. OGC's word processing system also does not reflect whether its suggested changes were made or whether an agreement has been signed.
- OS's accounting system receives and computes OS and departmental financial information for various purposes. The system records total reimbursements from departmental bureaus and offices for rent, telephones, and support, but not reimbursables by individual agreement or office. The system was not designed to function as a database, meaning it cannot receive and compile voluminous agreement information. In addition, OS's accounting system will eventually be replaced by the Commerce Administrative Management System. Therefore, changes to the existing accounting system would not be practical.
- The Commerce Procurement Data System and the Commerce Small Purchase System are databases that compile and track procurement awards above and below \$100,000, respectively. However, departmental officials stated that both databases have been extensively modified for procurement awards and, therefore, would need major enhancements to include agreements. In addition, the Commerce Administrative Management System will likely replace these systems.

Because the three existing alternatives mentioned above are not appropriate tools to document OS agreements, OS needs to establish a new centralized system to adequately inventory, track, and control its agreements. This system should be compatible with the Department-wide database for agreements that we are recommending. Including key elements (such as unique numbers, project titles, parties, and contact names or offices) in the database, would allow users to quickly respond to inquiries on particular agreements, identify the extent and nature of OS agreements, and facilitate the cross-checking of agreements between OS offices. An OS database would also help OS offices administer and manage their agreements by identifying which agreements are due for renewal, termination, or review. As a result, OS agreements would be recorded and appropriately reviewed, thus reducing potential problems.



The Chief Financial Officer agreed with our recommendation that a centralized system should be established to more effectively inventory, track, and control OS agreements. He is committed to working with appropriate parties within the Department to determine the best method to accomplish this. The General Counsel agreed that each bureau should develop its own database designed to meet its own needs but the Department should specify the type of information that each bureau's database should contain. The General Counsel stated that the Chief Financial Officer may then determine whether maintenance of a central database, in addition to bureau databases, will provide sufficient benefits to justify the resources that will be required to maintain it.

RECOMMENDATIONS

We recommend that the Chief Financial Officer and Assistant Secretary for Administration and the General Counsel direct appropriate officials to take the following actions for the Department of Commerce and the Office of the Secretary:

Department of Commerce

1. Prepare formal policies and procedures, such as a Department Administrative Order or handbook, outlining the types of agreements that can be entered into by Commerce bureaus; the minimum necessary contents and steps for preparing agreements; standard language or form agreements; and the review, approval, and renewal policies and procedures that should be followed by all Commerce bureaus. The new directive should:
 - Require all Commerce agreements to include at least the following items: citation of legal authorities, applicable written justifications, signatures by the appropriate bureau and departmental officials, total project costs, budget summaries, and termination dates and/or review periods. There should also be formal procedures that ensure agreements prepared by external parties contain all necessary information.
 - Require bureaus to prepare D&Fs for interagency transfers authorized by the Economy Act. For all intra-agency Economy Act transfers, require bureaus to prepare justifications that support their determination that purchasing from a federal entity is cheaper or more convenient than purchasing from a commercial entity.
 - Direct bureaus to establish appropriate internal review processes for each type of agreement. Explicitly state the responsibilities of the various offices, the minimum path of review and approval, and thresholds for review.
 - Direct the bureau budget offices to review budget documentation for every agreement and to approve the obligation of resources to a performing agency or entity or the receipt of reimbursements/advances from a sponsoring agency or entity.
 - State that Economy Act orders and supporting D&Fs, above a specific threshold, must be reviewed by OAM contracting officers. Economy Act orders below that threshold should be delegated to bureau contracting officers or other designated officials for review.

- Provide generic, Department-wide standards for which agreements require OGC and/or bureau counsel review. For those bureaus that require greater oversight, OGC should negotiate more specific criteria for legal review of their agreements.
 - Require the bureaus to perform initial and periodic review of programmatic justifications for every agreement. Reviews should be at least every three years.
2. Disseminate all formal guidance and other information relevant for preparing and processing agreements through the Department's intranet and at departmental conferences. Any subsequent changes in federal, departmental, or agency regulations or procedures and applicable laws should also be widely distributed.
 3. Upgrade or change the format of OGC's and the bureau counsels' tracking systems to ensure that legal reviews of agreements are timely and to provide information about the status of legal review. Also, designate central points of contact in OGC and bureau counsel offices for determining the status of legal review on any particular agreement.
 4. Establish a new Department-wide database of all agreements. The Department should determine whether it will (1) develop one standard system or database program that each bureau can access to add, modify, or delete agreements; or (2) allow each bureau to maintain its own database that is compatible with requirements specified by the Department and periodically provide the information electronically to be uploaded into a central list at the Department level.

Office of the Secretary

1. Consistent with any forthcoming departmental guidance, prepare internal policies and procedures for OS offices that outline the contents and steps for preparing and implementing agreements. In particular, the OS guidance should:
 - Require all OS agreements to include at least the following items: citation of legal authorities, applicable written justifications, signatures by the appropriate officials, total project costs, budget summaries, and termination dates and/or review periods. There should also be formal procedures that ensure agreements prepared by external parties contain all necessary information.
 - Direct OEBAM to review all OS agreements to ensure funding availability and compliance with the federal, departmental, and OS guidelines.

- Direct OAM contracting officers to review all OS agreements and supporting D&Fs before an agreement is signed.
 - Establish reasonable criteria for which OS agreements require legal review.
 - Ensure that OS agreements are reviewed, and revised or renewed as appropriate, at least every three years.
2. Distribute relevant information for preparing and processing agreements through OS's intranet and at OS conferences. Any subsequent changes in federal, departmental, or agency regulations or procedures and applicable laws should also be widely distributed.
 3. Provide training on how to properly prepare and process agreements to all OS program and administrative staff responsible for agreements.
 4. Establish a centralized system to adequately inventory, track, and control OS's agreements. This system should be compatible with the proposed Department-wide database for agreements.

APPENDIX A-OFFICE OF ADMINISTRATION'S RESPONSE TO REPORT



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

SEP 21 1998

MEMORANDUM FOR Jill Gross
Acting Assistant Inspector General
for Inspections and Program Evaluations

FROM: W. Scott Gould *WSG*
Chief Financial Officer and
Assistant Secretary for Administration

SUBJECT: Draft Inspection Report: *Office of the Secretary - Interagency and
Other Special Agreements Require Better Management and Oversight
(IPE-10418)*

Thank you for the opportunity to comment on the subject draft inspection report. We regret the delay in responding and appreciate the additional time provided by your office to complete our review. We were pleased that evaluation of Office of the Secretary (O/S) agreements found that they are used to support appropriate activities, are properly funded under applicable laws and legal authorities, do not inappropriately circumvent requirements relating to procurement or financial assistance transactions, and, generally, enhance the effectiveness with which O/S carries out its mission.

We are in general agreement with the findings and recommendations made in the report, and anticipate taking action to enhance existing management practices as described below.

Department of Commerce

1. We agree with the recommendation to establish uniform Department-wide policies and procedures for use by all bureaus, and will work in consultation with the Office of Inspector General (OIG), the Office of General Counsel (OGC), and other interested stakeholders on their development. To facilitate updates and revisions, we anticipate using a handbook format to issue comprehensive guidelines, which will include:
 - the basic elements needed to properly document an agreement;
 - circumstances under which Departmental review by either this office or OGC will be required; and
 - requirements for periodic review of agreements once executed.

With respect to the development of bureau-specific guidelines, we believe that bureaus should be allowed discretion in designing policies and procedures that will meet their individual needs effectively and efficiently. This flexibility is essential to ensuring that the process through which each bureau will administer its agreements is appropriately suited to its unique mission, program requirements and organizational structure.

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We anticipate establishing an intra-Departmental framework similar to that used in managing the Advisory Committee Management Program. Each bureau or, in the case of larger bureaus such as the National Oceanic and Atmospheric Administration, each line office will be required to establish a central liaison with responsibility for coordinating matters relating to interagency agreements, including the establishment of internal operating procedures.

2. We agree that, once issued, Departmental guidance should be broadly disseminated and electronically accessible.
3. We defer to OGC on this recommendation.
4. We agree that consistent and reliable data should be maintained for all agreements administered by the Department and its bureaus, and that it should be readily accessible by Departmental management. Although the second option identified under this recommendation (a bureau-maintained "feeder system") appears to be most workable, we will consult with the appropriate parties, e.g., technical support personnel, to determine the best method for meeting this objective.

Office of the Secretary

5. We agree that O/S-specific policies and procedures should be developed and implemented as needed to supplement the Department-wide guidelines discussed under recommendation 1.
6. We agree. Consistent with recommendation 2, information on O/S policies and procedures will be broadly disseminated and made electronically available.
7. We agree that training should be provided to O/S personnel involved in developing and administering agreements.
8. We agree that a centralized system should be established to more effectively inventory, track and control O/S agreements.

Additionally, we would like to comment on two observations made in the body of the report:

1. On page 7, in section I.A., the report states that officials in one office indicated that the issuance of Department-wide guidelines for agreements has not been a priority. While such guidelines have not yet been established, you may be aware that we have been tangentially involved in the effort to better understand and manage the use of these agreements within the Department for some time. My office has had extensive discussions with the OIG on this subject beginning in the mid-1980s when, I understand, questions were raised in connection with a financial assistance program review which we were then conducting. We encouraged and supported a complete review of the status of these agreements then as we welcome it now. We were also recently involved in assisting the Minority Business

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Development Agency in redesigning the Minority Business Opportunity Committees Program to use financial assistance awards rather than joint project agreements as had been the practice.

We appreciate the myriad complicated issues surrounding these agreements and the thoroughness of the OIG's inspection. The results of this study will greatly assist in better defining the appropriate use of these agreements and establishing management controls for their administration.

2. On page 21, in the third paragraph under section I.D., the report mentions that the Federal Acquisition Regulations (FAR) requires the centralized collection and maintenance of data relating to the Department's financial assistance awards and procurement transactions. We are not aware of a FAR requirement for this data, however, the Federal Assistance Awards Data System is legislatively required under 31 USC 6102a.

Thank you again for the opportunity to respond to the draft report. We look forward to working with you to ensure that the opportunities for improving our management practices as identified in the report are addressed appropriately. I have asked Sonya Stewart, Director for Executive Budgeting and Assistance Management, and Bob Welch, Director for Acquisition Management, to coordinate this undertaking within my office. Please do not hesitate to contact either myself, Ms. Stewart or Mr. Welch to discuss these comments or the broader effort in additional detail.

cc: Andrew J. Pincus

APPENDIX B-OFFICE OF GENERAL COUNSEL'S RESPONSE TO REPORT



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

AUG 19 1998

MEMORANDUM FOR: Johnnie E. Frazier
Acting Inspector General

FROM: Barbara S. Fredericks *BSF*
Assistant General Counsel
for Administration

SUBJECT: Draft Inspection Report No. IPE-10418 on Interagency Agreements

This provides our comments on the Office of Inspector General (OIG) draft report on Interagency and Other Special Agreements.¹ The report finds that these agreements require better management and oversight. We agree.

The report coincides with our own recent efforts with some of the bureaus to improve the preparation and review of these agreements. We have come across many of the problems identified in the report during the course of our legal review of Department agreements.

We note the review did not reveal any case where the problems identified in the report resulted in harm to the Department. This fact is significant as the Department attempts to balance the need for new requirements with the continued need for flexibility in carrying out the wide variety of activities and functions among all Department bureaus and offices.

We hope our comments assist you in making your final report as accurate and effective as possible. Our comments are of two types. First, we address the recommendations set forth at the end of the report, in particular with respect to key policy issues. Second, we set forth page-by-page editorial comments in detail, which include discussion of minor policy issues.

We are happy to assist in improving Department policies and procedures concerning the review and management of agreements. We appreciate your office's efforts in attempting to attain that goal. Of course, the ultimate responsibility for compliance with all requirements will rest with the agency official who signs an agreement. Therefore, we believe the primary goal of any plan for improvement should be to ensure that managers fully understand both the requirements in the law and their responsibility. We will continue to work with your staff in this effort.

¹ Draft Inspection Report No. IPE-10418/June 1998, Office of the Secretary, "Interagency and Other Special Agreements Require Better Management and Oversight."

I. Recommendations for the Department of Commerce.

We address in turn the formal recommendations for the Department contained in the draft report (pages 33-34).

Recommendation 1: "Prepare formal policies and procedures . . ."

We generally agree with this recommendation. In particular, we support the concept of a new Department Administrative Order (DAO) to provide Department-wide guidance on agreements.

The main goal of the DAO should be to make each bureau or operating unit responsible for developing an appropriate process for managing its agreements. At the same time, the DAO must allow sufficient flexibility to reflect the wide variety of functions, activities, and authorities among offices throughout the Department. While we recognize the oversight role of the Office of the Secretary (OS), each bureau or operating unit is in the best position to establish a specific process which will work for that organization.

To balance these goals, we recommend the new DAO require review and management procedures to be addressed at the bureau or operating unit level, while providing substantive guidance applicable to agreements Department-wide.

We recommend the DAO establish the following new requirements:

- (1) Each bureau or operating unit shall establish an internal directive on agreements, subject to approval by the Office of the Secretary. The internal directive shall contain the following information:
 - (a) specific review and approval procedures, including thresholds for review by other offices (e.g., the Office of General Counsel, budget offices, and the Office of Acquisitions Management);
 - (b) applicable delegations of authority for signing agreements; and
 - (c) provisions for periodic review of agreements with terms exceeding one year.
- (2) Each bureau or operating unit shall establish a database tracking system for its agreements, consistent with requirements to be established by the Office of the Secretary.

The DAO should also provide substantive guidance on those statutes which are commonly used throughout the Department as authority for agreements (e.g., the Economy Act and the joint project statute). This guidance would include information about the conditions required by each statute and any existing implementing regulation.² The DAO may also include model agreements

² For Economy Act transactions, the applicable Federal Acquisition Regulation sections may be included as a convenient reference. In addition, as a policy decision, the DAO may provide that intra-Department Economy Act transactions, which are not subject to the FAR requirements, be treated as inter-agency orders for the purposes of all documentation, review, and

for each statute as appropriate.³

This approach will allow each bureau or operating unit to address its specific review and clearance needs, without creating unnecessary burdens or limitations throughout the Department.⁴ The National Marine Fisheries Service (NMFS) has successfully used this approach, with assistance from the Office of the Assistant General Counsel for Administration (AGC/Admin) and your office, to create a policies and procedures directive which specifically addresses the needs of NMFS. AGC/Admin is currently working with the National Ocean Service (NOS) to address that agency's needs.

The new DAO should set forth core elements which generally are necessary to make an agreement legally effective. It should also include a list of common elements which are desirable for all Department agreements. The DAO should make it clear that individual agreements must meet all the specific requirements of the statute which authorizes the agreement (and any regulations which implement that statute), and that these requirements cannot be completely outlined in any DAO. For example, the joint project statute has specific requirements which differ from the requirements of an Economy Act order. At the same time, there are certain agreements in the Department, such as high level "agreements to agree," where inclusion of the usual common elements within the agreement is not desirable and, from a legal standpoint, is not necessary, provided proper authority exists and any necessary determinations are reflected in the files.⁵ Requirements under the DAO must be flexible to allow Department officials to retain

approval requirements.

³ For example, the Office of the Assistant General Counsel for Administration (AGC/Admin) has developed a model agreement for joint projects. However, model form agreements are just that--models; the format should not be mandatory. A model form will not be appropriate for every situation, and the Department should maintain flexibility to meet specific needs. In addition, a mandatory standard form may encourage a "fill-in-the blank" approach at both the preparation and review stages, which may lull officials into the false belief that an agreement is sufficient if it simply follows the model, and that thorough review and analysis are not necessary in each case.

⁴ For example, we generally support the concept of factors which trigger additional clearance requirements. However, bureaus may determine that different factors apply in their specific situations. For example, all bureaus may require Economy Act orders above a dollar threshold amount to receive additional clearances, but the appropriate dollar amount may vary in proportion to the bureau's total budget. In addition, it may be appropriate for threshold or clearance requirements to vary depending on whether the type of transaction is routine for that bureau, and on the specific statutory authority which authorizes the agreement.

⁵ For example, there is no legal requirement for a joint project agreement to cite the joint project statute or to recite the necessary determinations within the agreement itself. AGC/Admin

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discretion in the content and form of agreements, without the need to seek special exemptions or waivers.

The new DAO would include AGC/Admin as the contact to assist with the threshold determination of the appropriate legal authority for the proposed relationship, and to provide guidance in preparing the agreement. Where the relationship is a grant, cooperative agreement, or a procurement, the DAO would reflect that the contact for these relationships is the Office of the Assistant General Counsel for Finance and Litigation (AGC/F&L).⁶ It would also include the contact within each bureau or operating unit who has responsibility for coordinating the internal clearance and approval process. Because this approach would encourage appropriate contacts at the initial stages, it is likely to result in greater compliance with applicable requirements.

Recommendation 2: "Disseminate all guidance and any other information relevant for preparing and processing agreements through the Department's intranet and at departmental conferences. Any subsequent changes in federal, departmental, or agency regulations or procedures and applicable laws should also be widely distributed."

We agree with this recommendation.⁷ In particular, we would encourage active dissemination of the new, informational DAO, as described in our comments on Recommendation 1, above.⁸ The main goal should be to make managers aware that requirements for agreements do exist and to

generally requests officials to include this information in their agreements, in order to demonstrate that they have considered applicable requirements and to facilitate any subsequent review. However, on occasion, a memorandum to the file which contains this information is sufficient, and, in some cases, AGC/Admin has cleared agreements formed by the simple exchange of letters, in particular where there is no transfer of funds. Our role as legal counsel is to attempt to accommodate the needs of Department officials where possible, and to exercise legal judgment based on the particular case at hand.

⁶ In our experience, a simple reference to "OGC" is not sufficiently clear to distinguish AGC/Admin and AGC/F&L, which have the responsibility in these areas, from programmatic bureau counsel.

⁷ We recommend the language of this recommendation be altered slightly, to replace "all guidance and any other information" with more limited language, such as "all formal guidelines and other information." This change reflects that it is not possible to widely disseminate "all guidance" in advance, such as advice on legal issues which may arise, due to the wide variety of authorities, activities, and issues involved in agreements throughout the Department.

⁸ The usefulness of a new DAO depends on the effectiveness of the DAO system. We are aware the system is currently being put on-line, to allow greater access by employees and to facilitate amendments and updating of the orders. We strongly encourage the continued investment of resources to complete this project.

provide an easy, helpful reference as a starting point.⁹

Recommendation 3: “Upgrade or change the format of OGC’s and the bureau counsels’ tracking systems to ensure that legal reviews of agreements are timely and to provide information about the status of legal review. Also, designate central points of contact in OGC and bureau counsel offices for determining the status of legal review on any particular agreement.”

We strongly object to the report containing any recommendation for changes to OGC database systems, in particular with respect to AGC/Admin’s system, which we understand is the primary target of this recommendation. The report’s recommendation is not the result of any actual investigation or review of OGC’s systems, and, therefore, is not supported by findings of fact and thorough analysis. The scope of the report is limited to agreements. AGC/Admin’s database is designed to cover all legal issues which that office reviews for the Department, and should not be analyzed from the limited perspective of the Department’s need to track agreements. AGC/Admin’s database system is specifically designed to meet the needs of that office, and it is effective and efficient for that offices’ purposes. As far as we understand, OIG did not find a single instance of a deficiency in that system which resulted in untimely review of agreements or the inability to obtain status information.¹⁰

The point of contact for AGC/Admin review of agreements is the Chief of the General Law Division, who has primary responsibility for assigning and overseeing the review of all joint project and Economy Act agreements sent to AGC/Admin for clearance. The Chiefs of the Federal Assistance Law Division and the Contract Law Division review grants and cooperative agreements, and contracts, respectively, for AGC/F&L.

4. Recommendation 4. “Establish a new Department-wide database of all agreements. The Department should determine whether it will (1) develop one standard system or database program that each bureau can access to add, modify, or delete agreements; or (2) allow each bureau to maintain its own database that is compatible with requirements specified by the

⁹ We actively support the concept of training programs which cover agreements issues. A new program could be created for this specific purpose, or existing programs could be expanded. For example, AGC/Admin, in conjunction with its annual ethics training, has developed a special training program for managers which addresses issues relevant to agreements as well as other important issues within the purview of the General Law Division. AGC/F&L also provides training for agency personnel on grants, cooperative agreements, and contracts.

¹⁰ Generally, the length of time it takes for legal clearance depends on such factors as the existence of a complicated transaction, the time required to coordinate suggested changes with outside parties (who have their own internal clearance process), or the time required to educate a bureau client who has not considered the ramifications of certain terms that are present in the draft agreement. Delays are never occasioned by the inability of AGC/Admin to locate or track the status of an agreement under review in that office.

Department and periodically provide the information electronically to be uploaded into a central list at the Department level.”

Consistent with our discussion of the new DAO under Recommendation 1, we believe each bureau should be responsible for maintaining its own database, which should be designed to meet its specific needs. The Department should specify the type of information which each bureau database must contain. The Department’s Office of Administration should determine whether maintenance of a central database in addition to bureau databases will provide sufficient benefits to justify the resources that will be required. It would keep its oversight role by requiring periodic status reports.

II. Editorial comments.

Although we present many editorial comments, some are more important than others. Our overriding concern is the legal and factual substance of the report, not merely the form in which it is presented.

Page i, ¶ 3: The first sentence refers to “funds received for reimbursable activities or obligated to acquire goods or services from other parties.” As written, this excludes joint projects, which may involve expenditures of funds or resources without a transfer of funds between parties, or may involve a transfer of funds to pay a share of costs for a joint undertaking, rather than for reimbursable activities or to acquire goods or services. If the exclusion of joint projects is not intended, this sentence must be revised.

Page i, ¶ 3: The third sentence states, “While many of these agreements may be appropriate” We understand the review revealed that most agreements were appropriate; we believe the report should reflect that finding.

Page ii, ¶ 2 after bullet: The third sentence states, “Federal regulations also require that contracting officers review and approve” In fact, the Federal Acquisition Regulation requires approval by a contracting officer or “another official designated by the agency head.” FAR 17.503(c).

Page iii, ¶ 2 after bullet: Item (3) refers to agreements lacking “disclaimers for funding availability.” In fact, disclaimers are only required with respect to future funding availability.

Page 1, Purpose and Scope section: The first sentence sets forth three categories of agreements, the third being those for “coordinating complementary programs without the transfer of funds (memoranda of understanding or agreement, also referred to as unfunded agreements).” However, agreements in this category, such as joint projects, may involve a transfer of funds. In addition, the use of the term “unfunded agreement” is misleading because agreements which do not involve the transfer of funds generally will involve some commitment of Department funds or resources to the project.

Page 1, Purpose and Scope section: The last sentence states that these agreements "are not subject to the same controls as traditional procurement contracts, grants, or cooperative agreements." We think it is misleading to base the premise for your review upon the fact that these agreements do not have the same administrative controls found with procurements and assistance. In fact, the administrative process associated with each type of agreement is different. Controls on these agreements do exist, even though they are not the same controls--just as the controls for procurements differ from controls that apply to financial assistance. Requirements that have been instituted for one type of agreement are not necessarily applicable to another type of agreement. Congress did not intend to subject these agreements to the awards processes required for procurements and assistance. We recommend the sentence be revised to omit the comparison to procurements and assistance. We suggest the following as an alternative: "They involve a significant amount of federal resources, but control processes for these agreements are largely a matter of agency discretion. The OIG has not previously reviewed the Department's internal control system for these agreements as a group."

Page 2, ¶ 1: The first sentence defines agreements covered by the review as those agreements which are not traditional procurement contracts, grants, or cooperative agreements. The use of the word "traditional" implies that the agreements covered by the review are procurement contracts or financial assistance agreements, but which, for some reason, have been processed in a way that is contrary to the laws and regulations that govern "traditional" procurements or financial assistance. This is not the case. For the reasons noted in the preceding comment, comparisons with procurements and assistance agreements are inappropriate. For example, joint projects are neither acquisitions nor assistance. While an Economy Act agreement is an alternative way to acquire goods or services, it is, of course, a well established and longstanding type of transaction--dating back to the enactment of the Economy Act in 1932, and even further to its roots in a 1915 statute--which cannot be characterized as nontraditional. Likewise, the joint project authority has been available to the Department for 28 years, and is based on authorities available to several Department bureaus well before 1970; agreements under that authority cannot be fairly characterized as nontraditional. The report should omit the word "traditional" and define covered agreements simply as agreements which are not procurement contracts, grants, or cooperative agreements.

Page 2, ¶ 1: The third sentence includes "purchase orders." This reference should distinguish the specific type of agreement intended here from purchase orders in the procurement context.

Page 6: The third sentence states the OGC "is responsible for supervising and coordinating all legislative, regulatory, or other legal issues for the Department." Department Organization Order (DOO) 10-6 authorizes OGC to render all legal services for the Department. It also sets forth certain supervisory responsibility for OGC with respect to the Department's legislative program. However, OGC is not responsible for "supervising" all "legal issues." The report's use of the term "supervising" is too broad. OGC renders advice on all legal issues, but does not supervise the performance of a bureau program that implicates legal issues. We recommend this paragraph be revised to read as follows: "The Office of General Counsel, also organized within OS, is

responsible for rendering all legal services for the Department."

Page 7, ¶1: The fourth sentence concerns OS's oversight duty. However, it is misleading in that it immediately follows a reference to OGC--OGC advises, as that reference states, but we do not have the oversight role. Because the paragraph concerns managerial duties which do not involve OGC, the reference to OGC here is not relevant and should be omitted.

Page 8, last ¶: The first sentence is generally true, but there are exceptions, as we note above at footnote 5. This sentence should be revised to state, "The current practice of not directly citing a legal authority in all agreements is generally inappropriate."

Page 9, ¶ 1: The second sentence refers to OMB Circular A-25. This circular concerns user fees, and does not apply to all agreements within the scope of this report. This sentence should be revised to read: "Additionally, for user fee agreements subject to OMB Circular A-25, bureaus must ensure that"

Page 10, Table 2: Under legal authorities, the table omits the user fee authority under 15 U.S.C. 1525. This authority is also omitted from the report's discussion. While your review may have revealed few agreements actually executed under this authority, it would be useful to include it because it authorizes the Department to retain the fees, and, thus, provides an exception to the "miscellaneous receipts" statute. Under Applicable Criteria, the factors listed are incomplete. For example, for an Economy Act transaction, the threshold criterion is that the other party must be a Government agency. The existence of various "quasi-Government" entities, such as the Graduate School of the Department of Agriculture, frequently leads to confusion, and this criterion should not be taken for granted. In addition, under the joint project authority, there are two important criteria omitted from the table: there must be a mutual interest, and the partner must be an eligible entity. While the table heading indicates it is a summary, it would be more accurate if the heading read "Summary of Key Legal Authorities and Criteria" with a note that the table is not intended to be comprehensive with respect to legal authorities and requirements. Finally, under criteria b. for joint projects, the "or" between (1) and (2) should be an "and."

Page 11, ¶ 2: The second sentence refers to documenting that transfers are "the most economical solution." Both the Economy Act and the FAR provision provide that convenience is an alternative factor to consider (e.g., the FAR provides "as conveniently or economically").

Page 11, ¶ 3: This paragraph does not accurately reflect the applicability of OMB Circular No. A-76 to Economy Act orders. The FAR provision cited in this paragraph (17.502(c)) states that "Acquisitions under the Economy Act are not exempt from the requirements of Subpart 7.3, Contractor Versus Government Performance. Subpart 7.3 implements A-76 and its Supplement. The Supplement provides several situations where a cost comparison is not required, in addition to those listed in the report, such as "core capability" activities, research and development, and functions involving few full time equivalents (FTEs). The report's discussion of A-76 as written suggests that cost comparison procedures, including obtaining solicitations from private

contractors, must be followed in all Economy Act transactions which do not fall within the exceptions listed in this paragraph, which is not correct. Rather than attempt to set forth precisely when cost comparisons are required, this paragraph should be more general so as not to imply that cost comparisons are required in cases where the requirements do not apply.

Page 12, ¶ 2: The last sentence refers to the "determination that the government can provide the needed goods or services more cheaply or conveniently than a commercial enterprise." Use of the Economy Act language would be more precise: the determination should be that "ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise."

Page 12, ¶ 3: We suggest the following sentence be added to the end of this paragraph: "Generally, a written justification should be incorporated into the agreement."

Page 15, first ¶ (partial): The last sentence should be revised to state, "However, this practice may raise legal issues because the additional terms in the letter are not formally agreed to by the other party." We recommend this change because, in some cases, terms in the letter may have legal effect even though they are not formally included in the agreement.

Page 16, second full ¶: We recommend that this paragraph reflect that OGC requires a D&F before clearing Economy Act agreements, and that providing these agreements to OGC for review will resolve the problem of D&Fs not being prepared and approved as required. With respect to a dollar threshold amount for OAM review, clearance requirements will vary based on the specific activities and authorities of the bureaus and offices. As we discussed above under Recommendation 1, review and clearance requirements should be addressed at the bureau or operating unit level.

Page 16, last ¶, third sentence: This sentence should be revised to read, "Currently, there is no Department-wide formal order or regulation which establishes criteria for when legal review of agreements is required." This change reflects that there are certain directives within the Department which establish such criteria, such as the NMFS policies and procedures directive. It also reflects the issuance of the April 1994 General Counsel memorandum.

Page 16, last ¶, fourth sentence: This sentence states the 1994 OGC memorandum's use of "should" implies some level of discretion. This interpretation is incorrect. It is clear from the content of the entire memorandum that the General Counsel, the third ranking official of the Department, was directing that all agreements be reviewed by OGC. (We note the report employs the same device on page 17, the first sentence, which reads: "There needs to be a clear policy that details when agreements should be submitted for legal review.") Also, the report should describe the 1994 memorandum as a General Counsel memorandum rather than an OGC memorandum, to reflect that it was signed by the General Counsel.

Page 17, first ¶: The second sentence states that "it is simply not practical or necessary for all

agreements to be reviewed by OGC” It is difficult to determine whether it is practical for OGC to review all agreements because, as the report indicates, the Department does not have accurate information concerning how many new agreements are executed each year. We generally agree that it is not necessary for OGC to review all agreements, such as routine Economy Act agreements under a certain dollar threshold, particularly where they are for services similar to those previously provided and OGC has cleared the prior agreement. However, the determination of whether OGC review is necessary will vary depending on such factors as the authority for the type of agreement and on the usual activities of the particular bureau or office. Rather than make assumptions, we recommend the sentence be revised to read “it may not be practical or necessary”

Page 17, first ¶: The second sentence also states that “there should be some programmatic criteria and dollar thresholds developed to assist bureaus and other offices in determining which agreements must be reviewed by OGC and which should have bureau-level legal review.” However, it is not clear what is meant by “programmatic criteria.” Criteria which are not program-specific, such as the authorizing statute (e.g., joint project statute), may also be appropriate. Also, a dollar threshold may not be appropriate; for example, AGC/Admin generally should review all joint project agreements regardless of whether funds are being transferred or of the amount of resources committed. This sentence should be revised to state “there should be some criteria developed, such as dollar thresholds, to assist”

Page 17, second ¶, third, fourth, and fifth sentences: In our comments above under Recommendation 1, we discussed why the Department should not set forth “generic standards for legal review that should apply to all departmental offices.” While all agreements should receive legal clearance, each bureau or office may have its own need for specific exceptions, depending on its activities and authorities, and should be considered separately. It may be misleading or confusing to set forth generic clearance standards in a DAO, when those standards will not apply to all departmental offices. It will be more useful and convenient to include all clearance requirements and exceptions applicable to a bureau or office within a single directive for that organization.

Page 17, third ¶: The third sentence refers to over 4,700 agreements “in place.” However, the relevant number to consider is how many new agreements are executed in a year, since agreements only need legal review when they are executed. (Most agreements will not need review upon renewal if the agreement provides for renewal and all conditions are satisfied.)

Page 17, third ¶: The last sentence refers to the concern of program officials over “delays caused by lengthy legal reviews” (emphasis added). We have not, nor do we think OIG has, uncovered any evidence of such delays. Because this sentence is misleading and is not supported by factual findings, it should be omitted.

Page 18, first full ¶ and second full ¶: As discussed above under Recommendation 3, the scope of the report did not include a thorough review and analysis of OGC's policies and database

systems. We are not aware of any problem in providing status information to clients, and this discussion should be omitted from the report.

Page 18, third full ¶: The third and fourth sentences cite two examples where NOAA has provided standard language. The report should omit these examples because we have identified problems with each of them, and are working with NOAA to obtain necessary revisions. As an alternative, the report may refer to the sample joint project agreement which we developed for the NMFS policies and procedures directive.

Page 20, first ¶ after bullets: This paragraph refers to guidance issued by three bureaus: Census, NIST, and NOAA. In the case of Census and NOAA, we have identified several problems with each of them and are in the process of working with the bureaus to obtain necessary revisions. The report should reflect that problems have been identified and that neither of these should be relied upon until they are fully reviewed and cleared. With respect to NIST, the report does not identify the specific guidelines. In response to our question, your office provided to us a copy of a chapter from a 1981 National Bureau of Standards Administrative Manual, which is outdated. NIST's bureau counsel advised us the current guidelines are on NIST's intranet system, which cannot be accessed outside NIST. Until we can obtain and review the current guidelines, we cannot be certain whether problems exist with them as well.

Page 30, second ¶. As discussed above in our comment concerning page 16, last ¶, fourth sentence, the 1994 General Counsel memorandum established the requirement that all agreements be reviewed by OGC. This paragraph should be revised to reflect this requirement.

Page 31, last paragraph, and page 32, first bullet: This entire discussion of OGC's database must be omitted from the report. This discussion contains several inaccuracies, and is misleading with respect to OGC's performance of our responsibilities, in particular with respect to the purposes for which AGC/Admin uses its database. As discussed above under Recommendation 3, the scope of the review did not include a thorough evaluation of our database system, there are no factual findings of any problems with our system, and it is not OGC's function to track or manage Department agreements. Therefore, this discussion is not relevant.