

U.S. DEPARTMENT OF COMMERCE
Office of Inspector General



*UNITED STATES PATENT
AND TRADEMARK OFFICE*

*PTO Has Improved its Management
Of Interagency Agreements*

Final Inspection Report No. IPE-10728/September 1999

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EXECUTIVE SUMMARY

The Patent and Trademark Office (PTO), like many other agencies, uses interagency agreements for obtaining goods and services from other federal agencies. From 1995 through 1997, PTO's use of interagency agreements increased dramatically in connection with its efforts to support the bureau's information technology (IT) requirements. This report addresses the problems that PTO experienced in managing those interagency agreements during the stated period. At the same time, we note that since 1997, PTO has significantly improved its handling of interagency agreements. Most notably, was PTO's issuance of its *Policy on Agreements with Other Federal Agencies* in June 1998. The policy addresses our observations regarding (1) the need for well-defined requirements, (2) the need to consider alternative options in placing an order, and (3) the expanded role of procurement professionals and legal counsel in the preparation and use of interagency agreements. Moreover, PTO has greatly reduced its use of interagency agreements to meet its IT requirements.

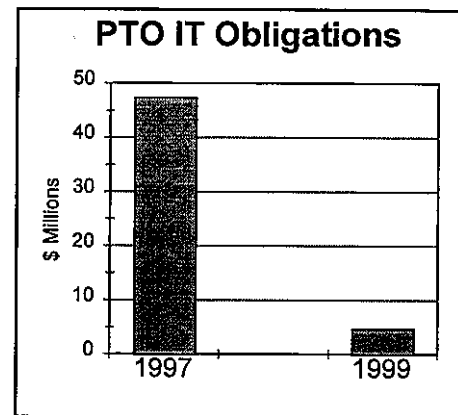
Interagency agreements, memoranda of agreement, and other special agreements are some of the methods used by federal agencies to define terms for performing work for others, acquiring work from others, or coordinating complementary programs to optimize the benefits from each party's efforts. These agreements involve a significant amount of federal resources, but are not subject to the same controls as contracts, grants, or cooperative agreements.

The Office of Inspector General has previously reported its concerns that certain departmental offices were improperly using agreements. These concerns included improper accounting of project costs, undercharging for reimbursable activities, and circumventing procurement regulations. Because of these concerns, in 1997 we began a Department-wide review of interagency and other special agreements, including those issued by PTO. This is one of several reports to be issued in conjunction with that Department-wide review. The purpose of this review was to evaluate policies, procedures, and practices that were followed at the time of our review in 1997 by PTO in its use of interagency agreements, multiagency contracts, multiple award schedule contract transactions, and other special agreements.

PTO has made extensive use of interagency agreements that are designed to streamline the acquisition of goods and services by using contracts established by other agencies. PTO used these interagency agreements, in large measure, to have other agencies use their contractors to

purchase both information technology (IT) and non-IT goods and services for PTO.¹ When used properly, multiagency contracts and multiple award schedule transactions tend to streamline the acquisition of IT goods and services.

For this inspection, we reviewed PTO's IT and non-IT interagency agreements issued from August 1994 to March 1997. These agreements totaled \$49.4 million in PTO obligations and only \$27,000 from other agencies in reimbursables. We found that PTO did not adequately plan and manage many of these earlier IT interagency transactions. We were subsequently able to observe that PTO has since taken steps to implement stricter procedures and better management for its agreements. It should also be noted that PTO has significantly reduced its use of interagency agreements, and currently has listed only about \$4.7 million in information technology interagency agreements.



- **PTO's information technology interagency agreements prior to March 1997 often did not comply with some procurement rules and regulations or promote best practices.** As we detail beginning on page 13,
 - PTO inappropriately specified a preferred source of supply when placing some orders under multiagency contracts and when using some multiple award schedule transactions.
 - PTO did not consistently prepare adequate planning budgets, or independent government estimates to establish the monetary resources necessary to meet its IT requirements.
 - PTO did not consistently prepare adequate statements of work to clarify its requirements.
 - PTO did not consistently specify its required delivery schedules on interagency task orders so that it could monitor the IT work in progress.

¹ Multiagency contracts" are actually interagency agreements between two federal agencies whereby a requesting agency obtains IT goods and services from another agency's already-established contract with the private sector. Throughout this report the term "multiple award schedule contract" will be used to describe GSA's contract with a multiple award schedule supplier, while "multiple award schedule transaction" will refer to an interagency agreement whereby a requesting agency gains access to supplies and services on such a contract through GSA

- PTO did not obtain required legal review on its interagency contract agreements and interagency task orders.
 - PTO did not prepare Economy Act determinations to confirm that those IT interagency agreement transactions subject to the Economy Act were in the best interest of the government.
- **Since 1997, PTO has significantly improved its compliance with applicable rules and regulations and best practices for its information technology interagency agreements.** As detailed on page 13,
 - PTO issued its *Policy on Agreements with Other Federal Agencies* in June 1998, which laid out the basic guidelines for the agency's use of interagency agreements.
 - PTO has established an internal interagency working group, including procurement professionals, to review and approve interagency agreements and ensure compliance with procurement laws and regulations.
 - PTO has integrated independent government estimates into its overall IT project management process to improve accountability.
 - PTO has consistently prepared adequate statements of work to clarify its requirements and has integrated these into its project management process.
 - PTO has greatly improved its development and enforcement of performance-based delivery schedules so that work against specific interagency task orders can be monitored.
 - PTO is now obtaining legal review on its interagency contract agreements and interagency task orders.
 - PTO is now preparing Economy Act determinations to confirm that those IT interagency agreement transactions subject to the Economy Act were in the best interest of the government.
- **Since March 1997, PTO has also improved other aspects of its management of information technology interagency agreements.** All of the IT-related interagency agreements issued before February 1997 that we reviewed were missing fundamental documentation, without which control over the IT agreements could not be maintained. In addition, without a formalized interagency agreement management process, PTO did not adequately control the activities of its largest multiagency contracts providing agency, GSA's Federal Systems Integration and Management Center (FEDSIM). In one instance, PTO had to seek alternative multiagency contract services after a FEDSIM delay in performance on a security systems agreement. On other occasions, FEDSIM charged excessive fees and unilaterally changed the underlying contracts, thereby materially altering PTO's IT work requirements. Since March 1997, PTO has taken steps to

improve its management of IT interagency agreements. These improvements include better documentation and more proactive management. In addition, the bureau has reduced its use of IT interagency agreements in favor of a competitively awarded multiple award task order contract (see page 27).

- **Prior to June 1998, PTO's non-information technology agreements were not supported by legal review and Economy Act justifications.** None of PTO's non-IT interagency agreements that we reviewed from 1994 through 1997 received legal review by the Department's Office of General Counsel for legal sufficiency. In addition, PTO had not conducted an adequate analysis under the Economy Act to determine whether or not it was in the best interest of the government to enter into an interagency agreement with another federal agency. PTO has subsequently implemented internal guidelines on interagency agreements, requiring Office of General Counsel review of agreements before issuance (see page 33).
- **Since June 1998, PTO has improved its database to track and control its interagency agreements.** Although PTO used a database to track both IT and non-IT interagency agreements, at the time of our review, this database was inadequate. We found that in certain instances the physical documents and related information regarding the agreements, such as funding and disbursements, could not be tracked. Subsequently, PTO established a comprehensive database of its interagency agreements (see page 38).

The Department needs policies and procedures for multiagency contracts and multiple award schedule actions. The Department should establish policies and procedures for the use and management of multiagency contracts and multiple award schedule interagency transactions. This guidance should specify qualitative standards of documentation and minimum review thresholds (see page 40).

Our recommendations to address the above concerns begin on page 43.



In response to our draft report, we received comments from PTO, the Office of the Chief Financial Officer and Assistant Secretary for Administration, and the Department's Office of General Counsel. PTO generally agreed with our report and reiterated the changes that the bureau has made in its policies and procedures. PTO reported that, as part of its new procedures, it has established an interagency working group including procurement professionals. This working group is responsible for ensuring that procurement laws and regulations are adhered to when the bureau uses interagency agreements, including the fair opportunity for schedule

suppliers to be considered for PTO work. In addition, the bureau's Office of Procurement now requires that the program offices explore alternative sources and conduct price analyses to ensure PTO receives the best value for the government.

With regard to the development of independent government estimates for budgeting and project management, PTO responded that the Technical Services Guidelines published by its Office of the Chief Information Officer require these to be developed for each project. These independent government estimates are then used as a basis for negotiations with the bureau's suppliers. Also in accordance with the Technical Services Guidelines, all task orders are required to be supported by a statement of work establishing the project requirements and specifications. The statement of work is also used to establish a project plan in the bureau's Cost Accounting Tool (CAT), which defines specific deliverables, schedules, and responsibilities. Further, management control over the host agencies is the responsibility of the Contracting Officer's Technical Representative who has the task of monitoring invoices and progress against the CAT schedules.

Also in response to our draft report, PTO responded that, in order to maintain adequate documentation over its IT interagency agreements, the CIO Office of Acquisition Management has established a special unit, the Infrastructure Acquisition Division, to manage all IT interagency agreements. This office is responsible for maintaining accurate and complete records of interagency agreements and managing activities associated with those agreements. This unit is also responsible for ensuring that the bureau receives the expected goods and services from the host agencies as stated in the interagency agreements.

With regard to proper authorization of IT interagency purchases, PTO responded that in accordance with the bureau's policy on interagency agreements, all such agreements must be approved by the head of the sponsoring or receiving program office. Thus, for IT-related interagency agreements, the approval of the Chief Information Officer is required.

In response to our draft report, the Office of General Counsel's (OGC) Chief, Contract Law Division agreed that better management, price analysis, and the necessity of OGC legal review are all in the government's best interest. However, his response made clear that, while multagency contracts entered into pursuant to §5124(a)(1) of the Information Technology Management Reform Act of 1996 (ITMRA) are subject to the Economy Act, agencies such as GSA which are authorized by the Office of Management and Budget (OMB) to act as executive agents for governmentwide IT acquisition programs under §5112(e) of the Act do not have to comply with the terms of the Economy Act. We agree that GSA's multiagency contracts are exempt from the requirements of the Economy Act. Absent evidence that non-GSA agencies are acting under a similar OMB designation and have statutory authority to fund the ITMRA-

authorized program, however, we believe that the Economy Act applies to non-GSA multiagency contracts.

The OGC's Chief, Contract Law Division also emphasized that only the host agencies are responsible for meeting competition requirements under the Competition in Contracting Act when initially establishing a host contract, with which we agree. Moreover, in accordance with Federal Acquisition Regulation (FAR) Part 16.505(b) (as well as 41 U.S.C. § 253j), each awardee under a multiple award contract must be provided a fair opportunity to be considered for any task order award in excess of \$2,500. The OGC's Chief, Contract Law Division stated that OGC interprets this requirement to mean that the host agency is solely responsible for ensuring that the multiple award contract awardees receive a fair opportunity to be considered. He pointed out that the typical FEDSIM agreement places responsibility for the awarding of task orders on the host rather than the requesting agency. Finally, he noted that he was not aware of anything that would prohibit a requesting agency from identifying known contractors who are capable of performing the agency's requirements. However, FAR 16.505(b)(3) specifies that although task order awards do not have to comply with full and open competition, methods such as allocation or designation in any way of any preferred awardee are prohibited. While we believe that the host agency has the primary responsibility for ensuring each awardee's fair opportunity to be considered, we also believe that the requesting agency has some responsibility to justify its need for a preferred or sole source, in that event.

In response to our draft report, OGC's Chief, General Law Division noted that the report discussed interagency agreements pursuant to the Economy Act and that departmental policy requires that all Economy Act agreements be reviewed by the Office of the Assistant General Counsel for Administration. The Chief also noted that the draft report's statement that only those Economy Act agreements valued at \$500,000 or greater must be reviewed by OGC was incorrect, as there is no Department-wide exception to the requirement that Economy Act agreements receive legal review. Finally, the Chief stated that because DAO 208-5 specifically states that it does not apply to "interagency transfers of funds," which include Economy Act transactions, the entire discussion of DAO 208-5 should be deleted from the report.

Although the Chief of the General Law Division is correct in noting that all Economy Act agreements must be reviewed by the Office of the Assistant General Counsel for Administration, in light of the comments made by the Chief of the Contract Law Division, we now recognize that not all of the interagency agreements discussed in the draft report were subject to the Economy Act. If these interagency agreements are not covered by DAO 208-5, then they might receive no legal review—a result which does not seem in the government's best interest, given the large dollar amounts involved. In addition, while the Chief is correct in saying that DAO 208-5 does not apply to interagency transfers of funds, what he fails to mention that the DAO defines

contracting (procurement) as “purchasing, renting, leasing or otherwise obtaining supplies or services from non-federal sources,” which is exactly what is occurring with these interagency agreements. We therefore believe that, because these interagency transactions are most similar to contract actions, it makes sense for them to be reviewed in accordance with DAO 208-5.

The Chief, General Law Division also emphasized that an analysis under Office of Management and Budget Circular A-76 is required for some Economy Act transactions, such as interagency agreements where the providing agency uses government personnel and resources to meet the requesting agencies’ needs. We agree.

In response to our draft report, the Department advised that the Office of Executive Assistance Management (OEAM) is leading an effort in conjunction with the Office of Acquisition Management (OAM) to prepare and issue formal departmental policies and procedures in the form of a handbook. This interagency agreement handbook will include procedures for appropriate preparation, review, and clearance of interagency and other special agreements. The handbook is also intended to cover multiagency contracts implemented through interagency agreements.

The handbook will also require that each interagency agreement entered into under the authority of the Economy Act be supported by a Determination and Findings in accordance with the Economy Act and FAR Part 17.5. In addition, the Determination and Findings will be required to be completed by a contracting officer.

INTRODUCTION

Pursuant to the authority of the Inspector General Act of 1978, as amended, the Office of Inspector General conducted an inspection of the Patent and Trademark Office's management and use of interagency agreements issued between August 1994 and March 1997, with emphasis on that bureau's information technology (IT) transactions. The inspection was conducted as part of a larger, Department-wide review of interagency agreements.

Inspections are special reviews that the OIG undertakes to provide agency managers with timely information about operational issues. One of the main goals of an inspection is to eliminate waste in federal government programs by encouraging effective and efficient operations. By asking questions, identifying problems, and suggesting solutions, the OIG hopes to help managers move quickly to address problems identified during the inspection. Inspections may also highlight effective programs or operations, particularly if they may be useful or adaptable for agency managers or program operations elsewhere.

This inspection was conducted in accordance with the *Quality Standards for Inspections* issued by the President's Council on Integrity and Efficiency. Our fieldwork was conducted at the PTO facilities in Crystal City, Virginia, and at departmental support and oversight offices in Washington, D.C. Our field work was conducted from July 1997 through November 1997. Subsequently, we returned to PTO from July through September 1999 to validate changes in the bureau's interagency agreements policies and procedures. During the review and at its conclusion, we discussed our observations with the Director of PTO's Acquisition Management Division. Finally, the work of other federal auditors has been useful and should be noted, especially the General Accounting Office's September 1998 report, *Acquisition Reform, Multiple-Award Contracting at Six Federal Organizations*.²

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 without the transfer of funds or property (also referred to as unfunded agreements). These agreements involve a significant amount of federal resources, but are not subject to the same controls as contracts, grants, or cooperative agreements.

² General Accounting Office, *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, GAO-NSIAD-98-215, September 1998.

We defined interagency and other special agreements as those agreements that are not contracts, grants, or cooperative agreements.³ 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, 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 to a project, or not involve any resources.

These agreements can be between two parts of the Commerce Department, or between a Commerce bureau and another federal agency, a state or local agency, a university or other educational institution, a not-for-profit organization, a private party, or any other party. Agreements are one method for agencies to formally agree to share information, provide needed services, or coordinate their programs to optimize the benefits from each agency’s efforts.

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 and an over-reliance on reimbursable funding.⁴ We also issued letter reports to the International Trade Administration and the National Oceanic and Atmospheric Administration. Our report to ITA cited the fact that ITA had not provided complete and timely accounting of all agreement costs and expenditures to other parties to its agreements.⁵ In our report to the NOAA Comptroller, we expressed our concerns about NOAA’s inability to produce an accurate inventory of its interagency agreements.⁶ Then, in 1995 and

³ The Federal Grant and Cooperative Agreement Act defined these types of agreements. **Contracts** are legal instruments with “the principal purpose . . . 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** are the legal instruments used when “(1) the principal purpose of the relationship is to transfer a thing of value to a 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; and **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.

⁴ *NTIA Interagency Agreements, Institute for Telecommunications Services, Boulder, Colorado, IRM-5723, January 1994.*

⁵ *Interagency Agreements Conducted by the International Trade Administration, IRM-6290, September 1994.*

⁶ *Preliminary Findings Regarding Inspection Work of NOAA Interagency Agreements, IRM-6291, September 1994.*

1996 respectively, the OIG found that NOAA's National Marine Fisheries Service (NMFS) and Office of Oceanic and Atmospheric Research (OAR) consistently undercharged for services they provided under agreements.⁷ Finally, in 1997, the OIG found that the National Technical Information Service (NTIS) used multiagency contracts and multiple award schedule (MAS) interagency agreements to circumvent the procurement process.⁸

The purpose of this review was to evaluate the effectiveness and efficiency of PTO's policies, procedures, and practices for undertaking agreements. Because of PTO's unusually high volume of IT agreements from 1994 through 1997, we focused our review on these agreements. The scope of our inspection included determining (1) the structure and adequacy of the agreements, and (2) the appropriateness of PTO's use of agreements, rather than contracts, for acquisitions.

To perform our review, we interviewed numerous PTO officials in the office of the Chief Information Officer (CIO), including the CIO, and the director and acquisition manager of PTO's Acquisition Management Division. We also interviewed PTO officials in the offices of procurement, finance, the comptroller and deputy chief financial officer, human resources, and patent automation. Interviews were also conducted with officials in the department's Office of General Counsel. We examined pertinent files and records relating to PTO's IT agreements. Finally, we examined several agreements not relating to IT transactions.

PTO identified 55 interagency agreements from the August 1994 to March 1997 time frame, totaling \$49.4 million. We reviewed 30 of these, of which 25 were IT agreements totaling \$44.2 million, and five were non-IT agreements totaling \$1.3 million. It should be noted that PTO has dramatically reduced its use of IT interagency agreements, and as of September 1999, the bureau has only \$4.7 million in open obligations for such agreements.

BACKGROUND

PTO's mission

PTO administers the laws relating to patents and trademarks and promotes industrial and technical progress to strengthen the national economy. Patent law encourages technological

⁷ *National Oceanic and Atmospheric Administration, NMFS's Interagency and Other Special Agreements Require Additional Improvements*, IPE-10775, September 1998 and *National Oceanic and Atmospheric Administration, OAR's Interagency and Other Special Agreements Require Additional Improvements for Compliance*, IPE-10310, May 1998.

⁸ *National Technical Information Service: Management and Procurement Deficiencies Related to the CyberFile Project*, IPE-9364, March 1997.

advancement by providing incentives to inventors to disclose their technology, and to potential investors to support that technology. Trademark law assists businesses in protecting the reputation of their goods and services, and safeguards consumers against confusion and deception in the marketplace. PTO's primary role in administering these laws is to examine patent applications and grant protection to qualified inventions. In addition, PTO is responsible for collecting, assembling, publishing, and distributing technical information disclosed in patent grants. PTO also examines trademark applications and grants federal registration to owners of qualified trademarks.

PTO's information technology acquisition plans

All of the IT agreements we reviewed fall under PTO's Strategic Information Technology Plan (SITP). During the FY 1997-2002 period, PTO plans to spend nearly \$1.0 billion to modernize, develop, maintain, enhance, and operate its automated information systems and the underlying technology infrastructure. The volume of PTO's workload supports the importance of modernizing information systems efficiently. In fiscal year 1996, PTO received more than 190,000 patent applications, 22,000 provisional patent application filings, and 200,000 federal trademark applications. The 1997 SITP states that "without highly skilled information technology staff, the PTO's long-range plans for improving its businesses processes and leveraging information technology will not be realized."

In turn, the Department's *Information Technology Manual* requires that planning documents, called Requirements Initiatives, be prepared to properly estimate the resources required for the effort and to determine that it is in technical compliance with any overall systems architecture in use or in development by the bureau.

PTO's organizational structure for IT planning and acquisition

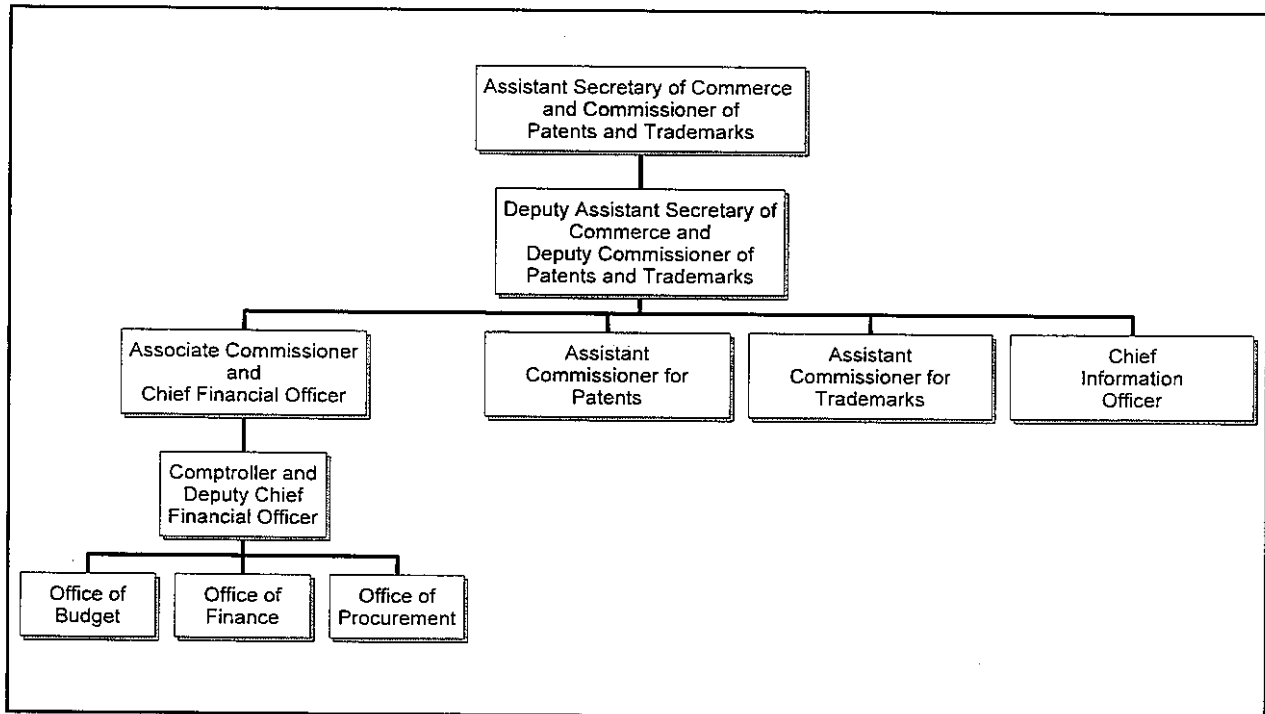
PTO has a distinct organizational structure for the planning and acquisition of its IT requirements, both through contracts and interagency agreements. The Chief Information Officer serves as the bureau's senior information resources management official and is the principal advisor to the Assistant Secretary on the architectural design and acquisition of supporting automated information systems and the underlying information technology infrastructure. In addition, the Chief Information Officer maintains PTO's automated information systems and operates its computer facilities, equipment, and telecommunications network.⁹ The Chief

⁹ Information Technology Management Reform Act of 1996 (ITMRA), Pub. L. No. 104-106, § 5125(b), 1996 U.S.C.A.N. (110 Stat.) 684.

Information Officer is also responsible for ensuring that IT acquisitions conform to the overall architecture and strategy outlined in the bureau's SITP.

PTO has two procurement offices—the Office of Procurement, which reports to the PTO Chief Financial Officer, and the Contracting Staff, which reports to the Chief Information Officer. Generally, neither of these offices had been directly involved in PTO's IT acquisitions through

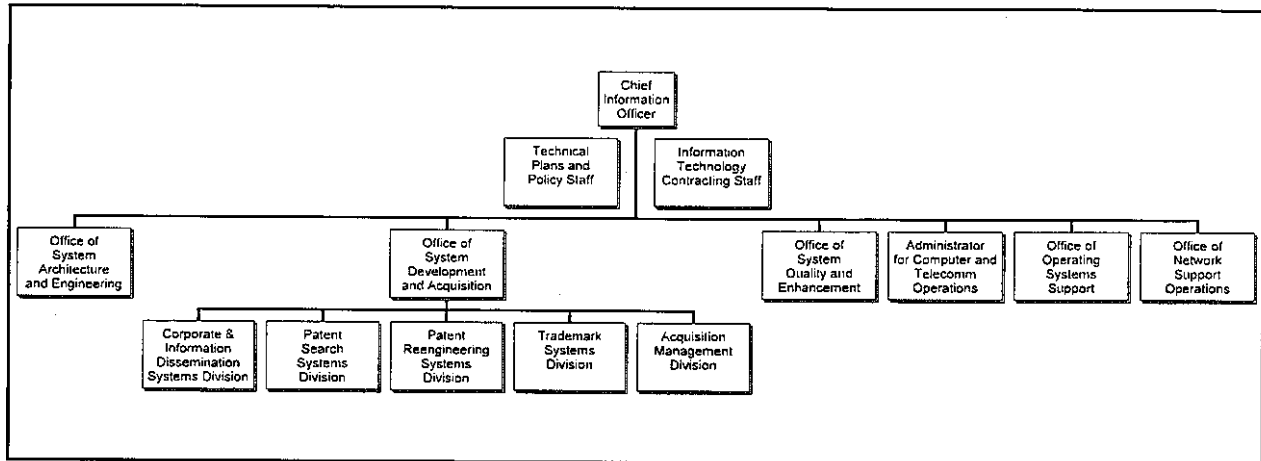
Figure 3



interagency agreements. PTO has subsequently restructured its interagency agreement procedures to provide for official procurement review.

At the time of our review, a third group, the Acquisition Management Division, which reported to the Chief Information Officer through the Office of System Development and Acquisition, was responsible for acquiring IT goods and services for PTO. AMD also evaluated the technical users' requirements and assisted in developing requirements initiatives and statements of work. The Acquisition Management Division directed the acquisition of IT hardware and software products and support services needed to develop, maintain, and operate PTO's major application information systems and the underlying technical support infrastructure. The division performed

Figure 4



contracting officer's technical representative functions for PTO-wide IT support service contracts and provided advice and assistance on the administration of other information technology contracts. Since our review, AMD was reorganized into the Office of System Development and Acquisition, but its functions remain roughly the same.

PTO had been placed into GSA's "Time Out" program for poor IT management

Prior to enactment of the Information Technology Management Reform Act in 1996, GSA managed the development and issuance of IT contracts. Each agency, including the Department of Commerce and PTO, received a delegation of procurement authority from GSA to conduct its IT procurement actions independent of GSA. GSA placed PTO in "Time Out" status in January 1995, because of concerns that PTO, at that time, had not been properly managing its IT systems development and because of very high turnover in the ranks of the bureau's top IT managers. GSA had been most concerned with the delay and cancellation of the Patent Automation Project (which was subsequently reestablished), and mounting delays in the Automated Patent System. Further, GSA believed PTO did not have clear objectives for its continuing IT activities.

Time Out status was developed by GSA for large and important IT acquisition programs that had experienced significantly increased costs and schedule delays. During the Time Out period, GSA required PTO to undergo a complete, independent assessment which was meant to identify flawed approaches and establish a strategy for restructuring its IT programs. In implementing the Time Out program, GSA reduced PTO's procurement authority to \$2.5 million for competitive, and \$250,000 for non-competitive, acquisitions. GSA amended the Delegation of

Procurement Authority for the Automated Patent System procurement to require an independent assessment. GSA also required PTO to update its Information Systems Plan to fully describe the scope of the bureau's modernization plans and develop an overall strategy for developing its patent search and automation efforts.

On April 28, 1995 the independent assessment review team issued its report and determined that PTO had gained experience and adapted to new technologies. The assessment review team further determined that PTO's systems development functions were getting stronger and that future systems development would be 'easier and surer.'¹⁰ The report also gave high marks to PTO for its IT managers, which were then new to the bureau.¹¹ On November 28, 1995 the Department and PTO jointly forwarded the PTO IT recovery plan to the GSA. This plan was later approved by GSA. Although the impact of Time Out caused further delay to PTO's IT projects, the goal was to ensure that the bureau's efforts were properly focused.

PTO emerged from Time Out in December 1995, with a new five-year IT plan and a \$500,000 IT review threshold. Shortly thereafter, in 1996, PTO's IT plans were approved by the Department and its IT procurement review threshold was raised to \$10,000,000. In 1995, individual IT procurement actions equal to or above the \$500,000 threshold still had to be approved by the Department and GSA. As PTO approached the lifting of its Time Out status, its management wanted to proceed expeditiously with its IT procurement actions. During a November 1995 PTO Business Council meeting, PTO management determined that immediate action was necessary to accelerate the Automated Patent System reengineering plan and IT procurement actions, activities that were on hold because of Time Out. The lifting of PTO's Time Out status coincided with the first of the interagency agreements, and explained PTO's desire for expediency.

Interagency agreements were intended to streamline the procurement process

The Department and its bureaus are authorized to employ several types of interagency agreements to meet their respective missions. Most of the interagency agreements entered into by the Department and its bureaus are in accordance with the Economy Act¹² or the Department's

¹⁰ U.S. Department of Commerce Independent Review Team (IRT), *An Independent Assessment of the Patent and Trademark Office of Information Technology Modernization Program*, April 28, 1995, page 52.

¹¹ IRT Report, pages 53 and 54.

¹² 31 U.S.C. § 1535 to 1536.

joint project authority.¹³ Other agreements include multiple award schedule (MAS) transactions and multiagency contracts.¹⁴ Most of the interagency agreements entered into by PTO were multiagency contracts and MAS transactions for the procurement of IT goods and services. The use of these agreements was intended by Congress to streamline the procurement process. PTO, however, was forced to use these agreements because of its Time Out status.

An agency requiring IT services may pursue two different types of interagency agreements to meet its needs. The first is a multiagency contract—an interagency agreement initiated under authority contained in the Information Technology Management Reform Act of 1996 (ITMRA) and entered into in accordance with the Economy Act.¹⁵ The second is a multiple award schedule transaction. By comparison, a multiagency contract is used when the providing agency has a contract in place which can satisfy not only its own requirements but requirements of other agencies as well, and the requesting agency wishes to use that contract to satisfy its needs. The Economy Act permits transactions between agencies that (1) are in the best interest of the government, (2) are not for the purpose of circumventing procurement laws and regulations, (3) do not interfere with limitations on funding, and (4) do not require the requesting agency to pay any amount over the servicing agency's costs. In addition, the Economy Act interagency agreement must result in a solution that is more economical and or efficient than using a private sector contract.

Multiagency contracts and MAS transactions employed by PTO have two things in common. First, they were all initiated for the purpose of obtaining IT goods and services. Second, these orders for IT goods and services were placed through other agencies to reach private sector contractors available through the schedule contracts operated by other agencies. The essential nature of these interagency agreements is that they were to have allowed PTO to follow a "streamlined" acquisition process in obtaining goods and services from the private sector, with the host agency acting as a contractual conduit. The use of these interagency agreements is encouraged by the Office of Management and Budget because of the streamlining effect on the procurement process.

Traditionally, federal procurement law and regulations require that, before the award of any contract, a number of procedural steps be followed by the government to ensure that proper

¹³ 15 U.S.C. § 1525.

¹⁴ Information Technology Management Reform Act of 1996 (ITMRA), Pub. L. No. 104-106, §5124, reprinted in 3(1996) U.S.C.C.A.N. (110 Stat.) 680. See also Executive Order No. 13011, July 16, 1996, reprinted at <<http://www.itpolicy.gsa.gov/mks/regs-leg/exo13011.htm>>

¹⁵ 31 U.S.C. § 1535.

planning and market analyses are completed and that the process is fair to potential offerors. Prior to the enactment of the Federal Acquisition Streamlining Act (FASA) in 1994 and ITMRA in 1996, an agency was required to satisfy the following steps in making a large software or systems development contract award (provided it had a procurement delegation from GSA):¹⁶

- develop an acquisition plan,
- define agency requirements—system specifications, statement of work, and the desired delivery schedule,
- prepare an independent government estimate of cost,
- prepare an Economy Act determination (if another federal agency is being considered),
- advertise the procurement action in the Commerce Business Daily,
- issue the solicitation for offers to potential offerors,
- receive and analyze offers,
- make a competitive range determination,
- make a responsibility determination,
- make a fair and reasonable price determination,¹⁷ and
- make the contract award.

Often, an additional step, litigating bid protests, would follow. Each of these steps would have to be planned for and have time allotted for it in the project schedule. Late deliveries and cost overruns became common. In an effort to deal with these problems, the Office of Federal Procurement Policy and Congress believed that a streamlined process for procuring IT hardware and services would be helpful. As a result, FASA and ITMRA were enacted.

FASA authorizes all federal agencies to award indefinite-delivery / indefinite-quantity multiple award contracts, where a number of contractors would compete among themselves for each task order issued by the agency. ITMRA authorizes federal agencies to obtain IT-related goods and services from other agencies through the use of interagency agreements. Taken together, the two laws allow federal agencies to award contracts and sell to other federal agencies much like the traditional role of GSA under the Brooks Act.¹⁸ The exception is that multiple award contracts

¹⁶ This listing is an example intended for discussion purposes only.

¹⁷ The price determination can be done through a showing of adequate competition, price analysis, or cost analysis, or a combination of all three.

¹⁸ Over a 30-year period, GSA established extensive multiple award schedule contracts for IT goods and services under its exclusive authority provided by the Brooks Automatic Data Processing Act of 1965. However, GSA did not require the completion of an Economy Act determination for these interagency transactions because its

from which the host agency is selling its goods and services must have been established primarily for the benefit of that agency itself and only its excess contractual capacity is made available to other agencies.

Through the use of multiagency contracts and MAS transactions, a requesting agency is able to acquire goods and services using contracts entered into by other agencies and schedule contracts established for government use. By doing so, the requesting agency is able to avoid a number of the steps described above, thereby shortening the procurement cycle and reducing administrative costs. For instance, with multiagency contracts, since the contract has already been awarded by the host agency there is no need to conduct a new full and open competition. When an order is placed under a multiagency multiple award contract, the solicitation of offers is limited to those contractors already under the host agency's multiple award contract. Further, this limited competition—or fair opportunity—among the schedule contractors is conducted by the host agency, easing the effort of the requesting agency. Since the offerors are already under contract, there is no need to make a responsibility or competitive range determinations. Moreover, disappointed offerors no longer have bid protest rights at the General Services Board of Contract Appeal, a process which used to add substantial time to some IT procurement actions. Finally, an Economy Act justification would not be required for MAS transactions, although it would be required for multiagency contracts.¹⁹

A multiagency contract host agency charges a fee to recover its cost of administering the requesting agency's task orders—the orders used to access multiagency contracts. The amount of fee varies from host agency to host agency, but typically ranges from .5 percent to 10 percent. Some observers have suggested that host agency fee structures may not reflect the true cost of managing these contract vehicles and host agencies need to improve their record keeping.²⁰ In theory, multiagency contracts are more expedient than standard contracts due to a shorter and less complicated procurement process and result in savings to the government because of purchases made on a greater economy of scale. However, in some cases multiple layers of subcontractors add their fees to the fees of the prime contractor and the host agency. Instances of such multiple layers of fees is often a problem where task orders are not adequately competed or the requesting agency allows a sole source task order to be issued.

Brooks Act authority was independent from the Economy Act.

¹⁹ ITMRA, Section 5124 (a)(1). See also, HOUSE COMM. ON APPROPRIATIONS, DEFENSE AUTHORIZATION ACT OF 1996, H. Rep. No. 450, 104th Cong., 2d Sess. (1996), *reprinted in* 4(1996) U.S.C.C.A.N. 238, 463.

²⁰ General Accounting Office, *Acquisition Reform, Multiple-Award Contracting at Six Federal Organizations*, GAO-NSIAD-98-215, September 1998, page 6.

MAS contracts are established by GSA for the interagency acquisition of goods and services. GSA has a long-standing history of providing all kinds of goods and services under the Federal Property and Administrative Services Act of 1949, and later, IT products under the Brooks Automatic Data Processing Act. MAS transactions operate similarly to multiagency contracts but have been in existence since GSA was granted exclusive authority to manage the federal government's IT procurement in 1965.²¹ As with multiagency contracts, MAS contracts also include a number of contractors who are pre-selected to offer their products as a standing offer that is accepted by the procuring agency through a task order. MAS contractors are often distributors of IT hardware products on behalf of the original equipment manufacturer.

PTO's use of multiagency contracts and MAS transactions

PTO issued 28 IT interagency agreements totaling \$47.3 million in value from August 1994 through March 1997. The earliest PTO multiagency contract transaction was an IT systems planning agreement for \$500,000, entered into in August 1994. All of PTO's other interagency transactions were entered into after June 1995. We reviewed 25 of these agreements. Of the 28 total agreements, 21 were multiagency contracts for IT services, and seven were MAS transactions for IT equipment or software. Of the 21 multiagency contracts issued for IT services, 14 were placed with GSA's Federal Systems Integration and Management Center (FEDSIM) and these totaled in excess of \$21.6 million.

FEDSIM is the largest multiagency contract host agency and its services are typical of those services provided by such agencies. FEDSIM provides assistance to federal officials in managing their IT needs by providing services in acquisition, systems integration, office systems, and software and data center management. FEDSIM awards and administers multi- and single-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts for those services, and maintains its own technical, management, and contracting staff.

Other multiagency contract host agencies used by PTO include the Defense Technical Information Center, the United States Air Force Hanscomb Air Force Base and I-CASE Program Office, the Defense Information Systems Agency, and the Defense Advanced Research Project Agency. PTO's MAS transactions were placed with various divisions within GSA, including FEDSIM.

²¹ The Brooks Automatic Data Processing Act, Pub.L. No. 89-306, (79 Stat.) 1127, § 111 (1965, *codified at 40 U.S.C. § 759*), *repealed by* Information Technology Management Reform Act of 1996 (ITMRA), Pub.L. No. 104-106, (110 Stat.) 680, Div. E Title LI, § 5101.

At the time of our review, approximately \$10 million of PTO's \$47.3 million in IT interagency agreements had not been spent and was in the process of being taken off multiagency contract interagency agreements because the bureau had not been satisfied with the overall service provided by some of the multiagency contract host agencies. Since then, PTO has further reduced its use of multiagency contracts, especially those with FEDSIM. Most of PTO's systems development work has been removed from these agreements and has been transferred to a multiple award contract that the bureau had awarded subsequent to our initial review and to other PTO-based contract actions.

OBSERVATIONS AND CONCLUSIONS

I. From 1994 to 1997, PTO Had Not Complied with Some Federal Procurement Laws, Regulations, and Best Practices in Its Use of IT Multiagency Contracts and Multiple Award Schedule Transactions

We found that PTO had not properly used its IT multiagency contracts and MAS transactions when buying IT goods and services. Many of the earlier transactions were poorly planned and did not have adequate specifications and statements of work. Some lacked defined delivery schedules and cost estimates. PTO did not consistently use an evaluation method—such as price analysis—to ensure that the best value was received by the government on its IT interagency transactions. Finally, we found several instances where PTO had directed the host agencies to make awards to pre-selected contractors and subcontractors, rather than giving the schedule contractors a fair opportunity to compete for the awards. Essentially, PTO had been skipping to the eleventh step—contract award—without having completed a number of steps that remain requirements notwithstanding procurement reforms.

Although the use of multiagency contracts and MAS transactions had streamlined PTO and other requesting agencies' procurement process, PTO should have adhered to a number of procurement laws, regulations, departmental policies and guidelines, and best practices. These procurement requirements and practices are meant to ensure that the requesting agency conducts sufficient planning, research and requirements definition such that the resulting contracts will yield the required goods and services. We found that PTO's use of these transactions from the initial 1995 through 1997 time frame did not consistently comply with a number of requirements, which are discussed in the sections below. At that time we found that PTO:

1. inappropriately identified preferred contractors when placing interagency task orders under providing agencies' multiple award contracts;
2. did not consistently use best practices techniques, such as price analysis and the pursuit of price reductions, to achieve the overall best value to the government on large multiagency contract and MAS task orders;
3. did not develop an independent government estimate for budgetary purposes;
4. did not prepare adequate statements of work describing the user's detailed requirements;
5. did not prepare unambiguous, performance-based delivery schedules against which the contractor's work product could be measured, preferably using milestone payments;

6. did not obtain legal review for its orders under multiagency contracts and MAS interagency transactions; and
7. did not prepare Economy Act determinations to confirm that those interagency agreements subject to the Economy Act were in the best interest of the government.

However, upon revisiting PTO in July through September 1999, we found that PTO has taken a number of steps that has dramatically improved its management of interagency agreements, addressing each of the areas identified as deficient.

A. PTO did not maximize competition and avoid identifying preferred contractors

Requesting agencies—such as PTO—and host multiagency contract agencies are required to comply with the competition requirements of FASA, which require that all contractors on a multiple award schedule be given a fair opportunity to compete. It is inappropriate for requesting agencies to interfere with the host agency's responsibility to ensure this degree of competition. Therefore, when placing multiagency contract interagency transactions, PTO may not specify a sole-source or preference in the selection of a contractor through the multiagency contract host agency. Likewise, multiagency contract host agencies are required to notify all potential offerors on their schedule contracts of an upcoming task order award. The identification of a preferred source for task orders by the requesting agency has a chilling effect on competition.²² Federal procurement law requires that contractors on multiple award contracts be provided with a fair opportunity for each task order in excess of \$2,500.²³ All of the interagency task orders issued by PTO have been in excess of this amount.

We observed specific instances where PTO used its interagency agreements as conduits to reach preferred, sole-source contractors for IT services. For example, two agreements involved the employment of a certain private sector corporation through separate interagency agreements with the Defense Information Systems Agency. The first example is interagency agreement IAG-94-999-06 dated August 16, 1994, valued at \$500,000, for systems architecture and design efforts. The statement of work specifically required a specific prime contractor and subcontractor to perform the required work. The second example is interagency agreement IA-95-941-017 dated July 31, 1995, valued at \$377,520, for work on a PTO security project. Again, the agreement specifically named the same prime contractor to perform the required work.

²² GAO Report No. GAO-NSIAD-98-215, pages 4-5.

²³ 41 U.S.C. § 253j (b).

B. PTO did not use price analysis and seek price discounts to obtain best value

PTO had not consistently conducted price analyses on its multiagency contract or MAS transactions for goods or services. Price analysis is a satisfactory method of reaching a pricing reasonableness determination where prices for standard units of work are available—such as with schedule contracts established by the host agencies. The purpose of a price analysis is to ensure the government receives the best value by comparing the offered prices against other alternatives, including prices from other multiagency contracts and MAS suppliers, and against the independent government estimate.²⁴ The price analysis is especially important when an open bid competitive process is not used, as with multiagency contracts and MAS agreements.

In most instances that we examined from the 1995 to 1997 time period, PTO considered only the pre-selected interagency agreement prices to satisfy its requirements, even for the largest transactions. This was true both for the purchase of services through multiagency contracts and for equipment and software acquired through MAS contracts.

When placing large orders against GSA MAS schedule contracts, the procurement regulations require the requesting agency to conduct price and best-value analyses and attempt to negotiate lower prices. At the time of these PTO MAS interagency task orders, the *Federal Acquisition Regulation* (FAR) required that a price analysis be conducted when using the GSA Federal Supply Schedule for purchases above \$2,500.²⁵ In our review of the interagency agreement files, we were unable to locate any evidence that such price analyses of possible alternate sources of supply were conducted. Moreover, the requesting agency is required to pursue additional price discounts for large schedule orders, especially those over the maximum order threshold of the MAS contract.²⁶ With the exception of one instance involving a software purchase, we found no evidence that PTO pursued these discounts or insisted that the host agencies pursue such discounts.

For example, PTO made a large procurement of desktop printers through interagency agreement IAG-95-401-0022, dated September 6, 1995, and valued at \$1.02 million. PTO's records indicate that the bureau purchased 1,232 printers without a volume discount, and without

²⁴ FAR 15.805-2. Price analysis, as opposed to best value analysis, is appropriate in comparing these large schedule transactions because the administrative cost of comparing alternate sources is minimal in relation to the cost of the goods and services procured. Best value analysis includes traditional price analysis, market surveys, and the consideration of efficiencies gained because of specific product features and reduced administrative efforts.

²⁵ FAR 8.404(a) and (b)(2).

²⁶ FAR 8.404 (b)(3).

considering other sources, especially going directly to the original equipment manufacturer. This purchase calculates to a unit price of \$828 per printer, the implied figure for the procurement because PTO's records did not reflect the final cost figures. Although \$828 for an *individual* printer may have seemed reasonable at the time, the reasonable price for a volume purchase of over 1,200 printers should have been researched more thoroughly. PTO should have considered other sources, and pursued a volume discount for this large hardware purchase.

We did observe one instance where PTO did pursue a price discount for a large software order conducted through an interagency agreement. Interagency agreement IAG-96-941-00012, dated June 17, 1996, with GSA and the U.S. Air Force I-CASE program office, was valued at \$1.12 million. The software products were purchased from GSA contract GS-35F-0082D, and were estimated to cost \$1,340,465. Because PTO purchased these products through the I-CASE program office, the bureau saved some \$220,178, or 16.4 percent. However, closer examination of the quote showed that all of the software products purchased were from one private sector software supplier, (the original software developer) for a commercially available software package. To make this software purchase, PTO paid a management fee to GSA, the U.S. Air Force, and the Air Force's I-CASE schedule contractor *in addition* to the prices charged by the software developer. We recognize that PTO appropriately performed price analysis in this case and received an apparently fair discount. We would caution, however, that PTO may have been able to achieve an even better price through a direct purchase of the software from the original software developer. This consideration falls into the realm of the tradeoff between a possible lower cost of going direct to the supplier as opposed to the administrative convenience of using a multiagency contract.

When the requesting agency considers alternate sources, schedules and other contract actions, substantial savings may be realized. By comparison, NOAA recently recognized a requirement for modems to upgrade the communications capability of 975 remote weather sensor stations for its Automated Surface Observation System program. A compliant modem was quickly found on a GSA MAS contract. The contracting officer determined, however, that since such a large quantity of modems was required and GSA MAS contracts are typically used for small quantities, the best method of procuring the 975 modems was through a normal contract action. As a result of pursuing a full and open competition, the government recognized a savings of 17.3 percent. While interagency contracts and MAS transactions are convenient, they do not always lead to the best value to the government.

The tendency—inappropriate as it is—to use multiagency contracts and MAS contractors as sole-source suppliers, underscores the need for price analysis and market research. Requesting agencies should conduct adequate price analysis and market surveys in order to arrive at a best value decision. The need for understanding the marketplace and the cost and capabilities of each

potential supplier is the driving force behind a best value analysis.²⁷ Unless the requesting agency conducts the price analysis, potentially less expensive or technically superior alternatives will not be explored. Rather, in some cases PTO determined in advance the contractors they desired for certain tasks and used multiagency contracts as a convenient conduit for placing orders with those contractors.

PTO has argued that multiagency contract transactions stand apart as a separate type of procurement action. Specifically, PTO believes that the host agency is responsible for satisfying procurement laws and regulations upon the establishment of the overall multiagency contracts which, in turn, guarantees that all orders placed under the multiagency contracts are themselves in compliance. According to this logic, once the multiagency contract is established, the requesting agency—in this case PTO—is responsible for nothing more than sending its IT requirements and funding to the multiagency contract host agency. While the multiagency contract host agencies may be in full compliance with procurement laws and regulations when they initially establish their multiagency contracts, each individual order issued by a requesting agency, such as PTO, must also be compliant with laws and regulations governing such orders.

Nonetheless, during our follow-up review in July through September 1999, we found that PTO is making much greater use of price analysis and other comparative selection methods for its current IT interagency agreements. Labor and hardware prices of suppliers on host agency schedules are being actively compared against each other and against the project budget. This represents a best practice in the use of interagency multiagency contracts.

PTO should continue to conduct price analysis between available host agency sources in addition to any price analysis that the host agency may conduct. Some host agencies charge a fee based on a percentage of cost—a practice that does not promote incentives for cost control. On its MAS contracts, GSA also receives a one percent Industry Finance Fee from the contractor based on the contractor's schedule sales. PTO and other departmental requesting agencies should have the final word on what prices they consider to be reasonable.

C. PTO did not consistently develop independent government estimates

Requirements Initiatives are planning documents for IT efforts required by the Department's *IT Management Handbook*, and the individual Requirements Initiatives are provided for in the PTO

²⁷ FAR 10.

Strategic Information Technology Plan.²⁸ PTO must prepare a Requirements Initiative for each contract action, including a project budget section for planning purposes. The budget section describes the monetary resources necessary for the effort. Since all of these interagency agreements required hiring a contractor through another agency, most include only a reference of the funding specified for contracted IT services. While this is certainly a necessary and proper element of the Requirements Initiative, a simple statement that funds were available did not contribute to the effective management of the project. The Requirements Initiative project estimate, or independent government estimate, would be more useful if it was based on a discrete, detailed, bottom-up calculation of effort.

For example, the Requirements Initiative for the Patent Application Location and Monitoring system migration included an OMB Circular A-11 "Concept Financial Summary" as the project budget, showing funding over four years totaling \$20.4 million. No further details as to how the funds would be spent was provided, other than \$2.75 million for hardware, \$8.65 million for software, and \$9 million for commercial services. The majority of the multiagency contract agreement task orders we reviewed similarly lacked cost detail describing the basis for the work and a detailed cost estimate.

One notable exception was the earliest of the multiagency contracts, agreement IA-94-999-006, dated August 16, 1994, with the Defense Information Systems Agency for systems infrastructure standards and support. In this case, a very detailed cost estimate was prepared describing the software development disciplines, technical level and the number of hours purchased for the budgeted amount of approximately \$500,000.

In addition, since the initial IT interagency agreements from the August 1994 to March 1997 time frame, the bureau has increased the use of independent government estimates as an element of its Cost Accounting Tool (CAT) program management tool. The CAT program management system has been used on IT projects since 1989. We believe that PTO should continue to embrace this level of detailed planning more consistently to better understand the tasks that it is initiating.

PTO should prepare all of its independent government estimates based on discrete, element-by-element calculations. Average contractor direct and overhead rates, or specific rates from schedule contracts, can be used in the estimate. Even if PTO's main concern lies with the total final cost of the effort, this method will estimate the number of staff man hours that can be obtained. These figures can also be compared to government full-time equivalent personnel

²⁸ Department of Commerce Information Technology Management Handbook, Revised October 1995, pages 1-1 and 3-11.

compensation rates to determine if it would be cost beneficial to employ some government resources.

D. PTO did not consistently prepare adequate statements of work

Many of PTO's early IT interagency agreements and their authorizing Requirements Initiatives did not include detailed statements of work describing the work to be performed. One example was PTO's interagency agreement IAG-96-941-00014 with FEDSIM, dated July 26, 1996, for work on PTO's "Year 2000 effort." The best description of the work required was on the funding document, which read, "Time and Materials Task Order to evaluate, recommend solutions, and to the extent feasible under the scope of this task order, correct USPTO's Year 2000 problem. Includes hours for Automated Information Systems Specialists." This interagency agreement was funded in the amount of at least \$1.17 million with no greater specificity of the required work (see page 28 for a discussion of the value of the Year 2000 interagency agreement).

The interagency agreement statements of work, especially at the task order level, should clearly define the services being procured. In addition, a performance-based statement of work should be prepared with measurable outputs and should answer five basic questions: what, when, where, how many or how much, and the applicable quality standard (how well). A well-written statement of work should describe the required goods and services while also describing the contractor's risk of performance.²⁹ An adequate statement of work should also describe the overall systems architecture in existence or to be developed. Absent such discrete descriptions of the required work, the effort may become uncontrollable and fail to yield useful results, thereby wasting government resources.

OMB and OFPP have promoted multiagency contracts and MAS contracts because these vehicles streamline the procurement process. However, even OMB apparently has concerns that requesting agencies are abusing multiagency contracts and other MAS contracts by using these service schedules as "body shops" to simply purchase labor hours without adequate statements of work.³⁰

²⁹ *Best Practices for Multiple Award Task and Delivery Order Contracting*, Office of Federal Procurement Policy, OMB, Interim Edition, July 1977, p.19, reprinted at <<http://www.arnet.gov/BestP/BestPMAT.html>>

³⁰ Brad Brass, *OMB: IT Service Orders Must Include Specifics*, Federal Computer Week, June 23, 1997, reprinted at <<http://www.fcw.com/pubs/fcw/1997/0623/fcw-polomb-6-23-1997.htm>>

Since 1997, PTO has improved its management of interagency agreements through the development of statements of work and their incorporation into the CAT program management tool. However, PTO should continue to consistently develop statements of work that adequately describe the bureau's requirements for each interagency agreement task order issued.

E. PTO did not consistently prepare performance-based delivery schedules

Many of PTO's early IT interagency agreements did not incorporate delivery schedules against which the providing agency or contractors' performance could be measured. However, PTO had begun to take corrective action prior to the time we began our initial review in 1997. As a result, we found that statements of work issued after February 1997, incorporated detailed work requirements that should enable PTO to control the work to be performed.

Agreements issued before February 1997 described the deliverables only in terms of level of development effort for a given period of performance. One example of such an inadequate delivery requirement was PTO's interagency agreement IAG-96-941-00012 with the U.S. Air Force I-CASE Systems Program Office, dated September 16, 1996. This agreement was valued at \$1.1 million, funded for the Trademark Reporting and Monitoring System software development tools. Throughout the agreement documentation, the only reference to a delivery schedule was a performance period to run "through September 30, 2001."

Another example involved a PTO interagency agreement with FEDSIM. In this case, the Requirements Initiative listed 27 separate activities and milestones as deliverables, but did not include a required delivery date for any of the 27 deliverables. Instead, the Requirements Initiative describes the performance period as "two years of system development, enhancement, and maintenance, with five one-year options to renew."

The incorporation of a valid delivery schedule into an interagency agreement, as well as a precise description of the deliverables, is critical in controlling the performance of both the providing agency and the contractors employed through the multiagency contract or MAS. The receipt of acceptable performance should form the basis for making payment on measurable deliverables such as performance milestones, software demonstrations or release dates, completed testing or other completed tasks. In this manner, PTO can control the contractor by authorizing payment to the contractor through the multiagency host agency only as progress is made. To do otherwise might result in payment being made without measurable progress and thus the wasting of government resources.

Over the course of the past two years, PTO has recognized performance problems with a number of its interagency agreements, particularly those hosted by FEDSIM. PTO began correcting

some of these problems by redefining existing work on some older interagency agreements and incorporating well-defined delivery schedules in more recent interagency agreements. Furthermore, PTO has since completed almost all of its systems development work from interagency agreements in favor of incorporation into multiple award contracts that it has recently awarded. The tasks to be transferred were released to potential offerors with well-defined statements of work, describing tasks, subtasks, and delivery dates.

F. PTO did not ensure that its multiagency contracts and MAS transactions received legal review

PTO issued 28 IT interagency agreements from August 1994 until March 1997. However, PTO did not receive legal review for any of these interagency agreements or the underlying orders issued against them. As a result, agreements purchasing in excess of \$47 million of goods and services were not reviewed by the Department's Office of General Counsel. Because these transactions ultimately led to the purchase of goods and services from the private sector they should be considered analogous to contract actions and should be reviewed in accordance with Departmental Administrative Order (DAO) 208-5.³¹ DAO 208-5, as amended, requires that all competitively awarded contract actions valued at \$500,000 or greater must be reviewed by OGC. Of the 28 interagency agreements mentioned above, 16 included task orders valued at \$500,000 or greater, totaling approximately \$43 million altogether. The legal review requirement also applies to delivery or task orders issued from indefinite-delivery/indefinite-quantity contracts such as multiagency contracts and MAS transactions.

It is important to obtain OGC legal review of a contemplated contract action, because it provides the Department with a review of legal sufficiency of the action before the government obligates funds. If an agreement has not been reviewed by counsel, it may (1) not comply with legislative and regulatory requirements, especially applicable procurement laws and regulations, (2) not cite appropriate legislative authority, or (3) include terms unacceptable or unnecessary for a federal agency. Therefore, PTO should have submitted all interagency agreements used to acquire goods and services for legal review in accordance with DAO 208-5.

Since the completion of our initial field work in 1997, PTO has implemented procedures which require that all interagency agreements be reviewed by the Department's OGC. PTO should continue to take steps necessary to insure that the bureau's interagency agreements receive such legal review.

³¹ 31 U.S.C. § 6303.

G. PTO did not prepare Economy Act determinations for its multiagency contracts that are subject to the Economy Act

There is a distinction between governmentwide contracts established pursuant to §5112(e) of ITMRA, which are not subject to the Economy Act, and multiagency contracts established pursuant to §5124(a)(1) of ITMRA, which are subject to the Economy Act. Of the interagency agreements we reviewed, those entered into with GSA were used to reach contracts, which, because GSA has been authorized pursuant to §5112(e) of ITMRA to act as an executive agent for governmentwide IT acquisition programs, were not subject to the Economy Act.

We reviewed 25 of 28 IT interagency agreements for IT goods and services, 7 of which were multiagency contracts placed with agencies other than GSA. These seven multiagency contracts totaled \$20.1 million in value, but not all of this amount was immediately obligated. These seven agreements should have been justified in accordance with the Economy Act determination process.

In passing the ITMRA legislation, the Congress intended that multiagency contracts be subject to the Economy Act.³² Economy Act interagency agreements permit transactions between agencies that (1) are in the best interest of the government, (2) are not for the purpose of circumventing procurement laws and regulations, (3) do not interfere with limitations on funding, and (4) do not require the requesting agency to pay any amount over the servicing agency's costs. In addition, the Economy Act interagency agreement must result in a solution that is more economical and or efficient than using a private sector contract.

In conducting Economy Act transactions, the requesting agency is required to prepare a government versus commercial source cost-benefit analysis³³ and an Economy Act Determination and Findings (D&F) to the effect that the interagency transaction is in the best interest of the government, and the supplies or services cannot be acquired as conveniently or economically by contracting directly with a private source.³⁴ The D&F must be executed by a responsible official,³⁵ although the Department has no guidelines specifying a particular

³² HOUSE COMM. ON APPROPRIATIONS, DEFENSE AUTHORIZATION ACT OF 1996, H. Rep. No. 450, 104th Cong., 2d Sess. (1996), *reprinted in* 4(1996) U.S.C.C.A.N. 238, 463.

³³ FAR 17.502(c) citing FAR 7.3.

³⁴ FAR 17.503.

³⁵ FAR 17.503(c) states: "The D&F shall be approved by a contracting officer of the requesting agency with authority to contract for the supplies and services to be ordered, or by another official designated by the agency

individual or position required to make the determination. The providing agency may require that the requesting agency submit an executed Economy Act D&F, but is not required to monitor the compliance of the requesting agency's procurement activities with controlling federal laws and regulations.³⁶

Because PTO used the interagency agreements to reach private sector contractors through other agencies' multiple award contracts, the question as to whether the government is offering goods or services more cheaply or efficiently than the private sector is moot. Therefore, an analysis of government versus private sector supply under Office of Management and Budget Circular A-76 is not required. A determination must still be made, however, that use of the Economy Act is in the government's best interest. We found that none of PTO's multiagency contract transactions had been determined to be in the best interest of the government prior to their issuance. In placing future multiagency contract transactions, PTO should analyze its multiagency contract transactions and proceed with those that meet the Economy Act's criteria as being in the best interest of the government.

As discussed previously, PTO's transactions conducted through GSA's MAS contracts are not subject to the Economy Act.

Prior to the conclusion of our fieldwork, PTO had taken action to positively address problems with managing its interagency agreements. The bureau has developed a procedure to ensure that all interagency agreements that are subject to the Economy Act are properly reviewed and managed. In June 1998, PTO issued its *Policy on Agreements with Other Federal Agencies*.³⁷ This policy is an excellent effort to regulate the bureau's interagency agreements. The policy addresses our concerns regarding the need for well-defined requirements, the need to consider alternative options in placing an order, and the expanded role of procurement professionals and legal counsel in the process. Central to this procedure is that all covered interagency agreements must be justified through the preparation of an Economy Act determination and coordinated through the bureau's procurement professionals.



head."

³⁶ FAR 17.504(a).

³⁷ Memorandum from the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, PTO to the PTO Executive Staff, dated June 5, 1998.

As a result of our draft report, we received responses from PTO, the Office of the Chief Financial Officer and Assistant Secretary for Administration, and the Department's Office of General Counsel. PTO generally agreed with our report and reiterated the changes that the bureau has made in its policies and procedures. PTO reported that, as part of its new procedures, it has established an interagency working group including procurement professionals. This working group is responsible for ensuring that procurement laws and regulations are adhered to, including the fair opportunity for schedule suppliers to be considered for PTO work. In addition, the bureau's Office of Procurement requires that the program offices explore alternative sources and conduct price analyses to ensure PTO receives the best value for the government.

With regard to the development of independent government estimates for budgeting and project management, PTO responded that the Technical Services Guidelines published by its Office of the Chief Information Officer require these to be developed for each project. These independent government estimates are then used as a basis for negotiations with the bureau's suppliers. Also in accordance with the Technical Services Guidelines, all task orders are required to be supported by a statement of work establishing the project requirements and specifications. The statement of work is also used to establish a project plan in the bureau's Cost Accounting Tool (CAT), which defines specific deliverables, schedules, and responsibilities. Further, management control over the host agencies is the responsibility of the Contracting Officer's Technical Representative who has the task of monitoring invoices and progress against the CAT schedules.

In response to our draft report, the Office of General Counsel's (OGC) Chief, Contract Law Division agreed that better management, price analysis, and the necessity of OGC legal review are all in the government's best interest. However, his response made clear that, while multiagency contracts entered into pursuant to §5124(a)(1) of the Information Technology Management Reform Act of 1996 (ITMRA) are subject to the Economy Act, agencies such as GSA which are authorized by the Office of Management and Budget (OMB) to act as executive agents for governmentwide IT acquisition programs under §5112(e) of the Act do not have to comply with the terms of the Economy Act. We agree that GSA's multiagency contracts are exempt from the requirements of the Economy Act. Absent evidence that non-GSA agencies are acting under a similar OMB designation and have statutory authority to fund the ITMRA-authorized program, however, we believe that the Economy Act applies to non-GSA multiagency contracts.

The OGC's Chief, Contract Law Division also emphasized that only the host agencies are responsible for meeting competition requirements under the Competition in Contracting Act when initially establishing a host contract, with which we agree. Moreover, in accordance with Federal Acquisition Regulation (FAR) Part 16.505(b) (as well as 41 U.S.C. § 253j), each awardee under a multiple award contract must be provided a fair opportunity to be considered

for any task order award in excess of \$2,500. The OGC's Chief, Contract Law Division stated that OGC interprets this requirement to mean that the host agency is solely responsible for ensuring that the multiple award contract awardees receive a fair opportunity to be considered. He pointed out that the typical FEDSIM agreement places responsibility for the awarding of task orders on the host rather than the requesting agency. Finally, he noted that he was not aware of anything that would prohibit a requesting agency from identifying known contractors who are capable of performing the agency's requirements. However, FAR 16.505(b)(3) specifies that although task order awards do not have to comply with full and open competition, methods such as allocation or designation in any way of any preferred awardee are prohibited. While we believe that the host agency has the primary responsibility for ensuring each awardee's fair opportunity to be considered, we also believe that the requesting agency has some responsibility to justify its need for a preferred or sole source, in that event.

In response to our draft report, OGC's Chief, General Law Division noted that the draft report discussed interagency agreements pursuant to the Economy Act and that departmental policy requires that all Economy Act agreements be reviewed by the Office of the Assistant General Counsel for Administration. The Chief also noted that the draft report's statement that only those Economy Act agreements valued at \$500,000 or greater must be reviewed by OGC was incorrect, as there is no Department-wide exception to the requirement that Economy Act agreements receive legal review. Finally, the Chief stated that because DAO 208-5 specifically states that it does not apply to "interagency transfers of funds," which include Economy Act transactions, the entire discussion of DAO 208-5 should be deleted from the report.

Although the Chief of the General Law Division is correct in noting that all Economy Act agreements must be reviewed by the Office of the Assistant General Counsel for Administration, in light of the comments made by the Chief of the Contract Law Division, we now recognize that not all of the interagency agreements discussed in the draft report were subject to the Economy Act. If these interagency agreements are not covered by DAO 208-5, then they might receive no legal review—a result which does not seem in the government's best interest, given the large dollar amounts involved. In addition, while the Chief is correct in saying that DAO 208-5 does not apply to interagency transfers of funds, what he fails to mention that the DAO defines contracting (procurement) as "purchasing, renting, leasing or otherwise obtaining supplies or services from non-federal sources," which is exactly what is occurring with these interagency agreements. We therefore believe that, because these interagency transactions are most similar to contract actions, it makes sense for them to be reviewed in accordance with DAO 208-5.

The Chief, General Law Division also emphasized that an analysis under Office of Management and Budget Circular A-76 is required for some Economy Act transactions, such as interagency

agreements where the providing agency uses government personnel and resources to meet the requesting agencies' needs. We agree.

Finally, we note the Chief, General Law Division's desire to distinguish between commonly used and precise terms when discussing interagency agreements.

Also in response to our draft report, the Department advised that the Department's Office of Executive Assistance Management (OEAM) is working with the Office of Acquisition Management (OAM) to establish a handbook governing the Department's use of interagency agreements. According to OEAM, the handbook will require OGC review of all interagency agreements, including interagency contracts and multiple award schedule transactions. This legal review is intended to verify that the correct legal instrument has been used and that each agreement meets the criteria that it: (1) is in compliance with legislative and regulatory requirements, (2) cites appropriate legislative authority, and (3) does not include terms that are unacceptable to or unnecessary for the Department.

II. Since 1997, PTO Has Improved Its Management of IT Interagency Agreements

A. *Documentation of IT-related agreements has been improved*

PTO's record keeping of its IT-related interagency agreements had been inadequate. During our review, we noted missing and incomplete documents, justifications, and cost records. This condition was especially true of PTO's interagency agreement transactions issued prior to 1997. However, we noted improvements in the record-keeping of agreements issued since the beginning of fiscal year 1997, particularly with regard to cost records.

Up until 1996, PTO interagency agreements were to include an individual Requirements Initiative. The threshold requiring departmental approval of IT actions was set at \$500,000 and greater. For individual IT procurement actions below the \$500,000 threshold, PTO was not required to obtain departmental or GSA approval. In 1996, shortly after emerging from Time Out, PTO's IT plans were approved by the Department and its IT procurement review threshold was raised to \$10,000,000.

Seven of PTO's Requirements Initiatives dated from 1995, and should have been prepared for review through the Department. However, most of the bureau's Requirements Initiatives were prepared after PTO's threshold was raised to \$10,000,000. Even after the review threshold was raised, PTO continued to use the Requirements Initiatives as planning documents, although there was no need for higher level review.

The principal issue had been a lack of documentation in the files. For instance, prior to 1997, many of the interagency transaction files had not even contained fully executed copies of the agreements and task orders. Two examples include interagency agreement IAG-95-941-00021 with GSA's ITS/6KE organization in the amount of \$573,919 for software tools, and two Defense Information Systems Agency agreements, IA-94-999-06 in the amount of \$500,000 and IA-95-941-017 in the amount of \$377,520 for procurement of software development services from a specific contractor. In all of these agreements, only PTO representatives had signed the agreements, and in the case of the Defense Information Systems Agency agreements, only PTO budget personnel had signed the agreements. This indicated that PTO had not received an executed original agreement back from the multiagency contracts host agency. Without an agreement signed by all parties, PTO may not have been able to enforce the terms of the agreement.

Another problem with insufficient documentation occurred when the exact value of the agreement was unclear. In PTO's interagency agreement IAG-96-941-00014 with FEDSIM, dated July 26, 1996, for work on PTO's "Year 2000 effort," there were references to two transactions of \$500,000 and \$670,000 for a total of \$1.17 million. However, there was a third reference for additional funding of \$850,000, which would have brought the total authorized to \$2.02 million. The file documentation offered an incomplete description of the transactions, their purpose, and the amounts authorized and spent. As a result, we were unable to determine precisely how much was actually authorized and spent on this interagency agreement.

PTO has explained that the remaining missing Requirements Initiatives were transactions below the Department's *IT Management Handbook* \$500,000 threshold, meaning that the Requirements Initiatives were actually included in the overall SITP. Nonetheless, the interagency agreements should have documented this fact and perhaps included the relevant pages from the IT plan in the transaction file so that the transactions could be traced back to the SITP. We acknowledge that during this time, PTO was in a state of great change because of the GSA Time Out and changes in leadership in the Chief Information Officer's organization.

PTO has also noted that given the nature of interagency contracts there is a diminished need for documentation at the requesting agency. This is because the program office ordering function is located in the requesting agency and the contracting officer and contracting officer's technical representative is located at the host agency. Since the formal contract records reside at the host agency, PTO has expressed a diminished need for documentation in their offices. We understand that it is unreasonable for a requesting agency—such as PTO—to obtain and maintain records of all transactions between the host agency and its contractors. However, the requesting agency should retain records of its requirements and planning documents, and cost and budget data as well as copies of the agreements themselves.

PTO should have maintained formal documentation, including Requirements Initiatives where appropriate, for its interagency agreements, approaching the formality required of contract actions. Only through such formal mechanisms could PTO have ensured that it had effective control over the activities of the providing agency, and that PTO had received full value for its obligated funds.

B. Management controls over IT-related agreements have been improved

The interagency agreement that concerned us the most was the previously mentioned \$1.02 million procurement for desktop printers. In this case, a PTO employee working in the patent automation group had placed the large order for 1,232 desktop printers through a GSA MAS schedule contract without conducting a best value analysis—which should have included a

market survey and a price analysis.³⁸ In addition, no legal review had been obtained for this printer purchase. Moreover, the printers did not function when received, as they required an additional circuit board to interface with PTO's network. As discussed above, we believe that PTO had the responsibility to conduct a price analysis to ensure that it received a fair and reasonable price. This was in addition to any steps that the host agency should have taken to reduce costs (see page 15).

Officials in the Chief Information Officer's (CIO) office later indicated that this printer purchase was conducted by the technical representative without fully considering hardware and software compatibility requirements. Any IT procurement action conducted outside PTO's SITP and outside the cognizance of the CIO runs the risk of similar systems architecture incompatibility. Complicating this purchase was the fact that the host agency delayed action on issuing its task orders for some eight months, resulting in an urgent situation. Such uncontrolled transactions occurred because of the lack, at that time, of formal controls on interagency agreements as opposed to those required for contract actions. With a contract action, the purchase has to be authorized by a contracting officer acting within delegated procurement authority. In the case of the printer purchase in particular, and multiagency contracts and MAS transactions in general, the internal user was able to use only a funding instrument to send money to the providing agency.

C. *Less reliance on GSA agreements should reduce excessive costs*

The majority of PTO's interagency agreements were placed through GSA's FEDSIM as the host agency. Of the 21 multiagency contract agreements placed for IT services, 14 were placed with FEDSIM, totaling in excess of \$21.6 million. We found that PTO had not effectively managed these agreements to ensure that it had received the maximum value in both cost and quality of goods and services. Some of these problems may have been related to the multiagency contract structure which requires PTO to send requests to discuss technical and contractual issues through the multiagency contract host agency, in this case FEDSIM. As a result, there is greater opportunity for delays and misunderstandings.

PTO has indicated that the FEDSIM management structure did not ease the bureau's procurement of IT goods and services. PTO was, at times, unable to communicate directly to contractors, and the bureau was bound to the terms and conditions of FEDSIM's contract with its

³⁸ FAR 8.404(b)(3). Price analysis, as opposed to best value analysis, is appropriate in comparing these large schedule transactions because the administrative cost of comparing alternate sources is minimal in relation to the cost of the goods and services procured. Best value analysis includes traditional price analysis, market surveys, and the consideration of efficiencies gained because of specific product features and reduced administrative efforts.

contractors. These problems contributed to PTO's decision to issue its own Systems Development & Maintenance (SDM) contract—itsself a multiple award contract under the Federal Acquisition Streamlining Act. In this manner, PTO felt it could better obtain critical terms and conditions vital to its requirements.

For example, in one instance FEDSIM had taken very little action against a large security system development task order. PTO had not become aware of GSA's inactivity for almost nine months, at which time FEDSIM was dismissed from the effort. PTO then entered into an interagency agreement with the Defense Technical Information Center to meet its security requirements. As a result of PTO having to change its multiagency contract source, PTO spent \$85,000 for FEDSIM to develop a statement of work and a solicitation which were never used. In addition, the security development project was delayed nine months.

In another example, GSA charged an apparent excessive fee for its task order management performed on behalf of PTO. GSA charges its actual costs of managing multiagency contracts and MAS orders for the requesting agencies. Typically, this fee does not exceed five percent of the underlying task. However, on one project GSA charged 17 percent in management fees because the underlying work was small compared to FEDSIM's management charges. FEDSIM tends to charge a fixed minimum level of effort, a practice that makes small tasks expensive.

In a final example, on PTO's Patent Application Location and Monitoring migration agreement, FEDSIM changed key contract terms in the underlying contract between FEDSIM and the contractor contrary to PTO's requirements and to the direct benefit of FEDSIM. PTO required a modular contract structure whereby the work would be authorized in phases, only after each preceding phase was successfully completed. This is an IT project management technique encouraged by statute to ensure that federal agencies plan and execute IT projects at a manageable pace while ensuring that technical specifications are met.³⁹ FEDSIM unilaterally changed the contract terms and immediately authorized four years of work without PTO's knowledge and at PTO's risk. This arrangement also would have guaranteed FEDSIM work under this program for four years. This effort has been reduced by PTO along with its other interagency agreement procurement actions in favor of PTO's own contract awards.

In the documents we reviewed, it appeared as if PTO had given FEDSIM certain allowances in the performance of its task orders. Only through effective management over its IT agreements, approaching the level of detail found in formal contracts, would PTO have been able to control

³⁹ Information Technology Management Reform Act of 1996 (ITMRA), Pub.L. No. 104-106, § 5202(a) 1996 U.S.C.C.A.N. (110 Stat.) 690.

FEDSIM's activities and ensure that the bureau is receiving the goods and services that it required, at a reasonable price.

To its credit, in 1997, PTO recognized that the use of interagency agreements did not present the bureau with a comprehensive solution for its IT requirements. The bureau found that complicated lines of communication, and the need for precision in contract terms and statements of work, meant that it had to devote as much effort to manage its multiagency contracts and MAS transactions as when using a private contractor. In fact, PTO officials have maintained that the interagency agreements were never intended to be a singular answer to its IT requirements. PTO said that the interagency agreements were intended as an interim funding and authorization measure until PTO's SDM contract was awarded.

As part of our follow-up field work, we found that PTO has improved its management over its interagency agreements. These improvements include better documentation and more proactive management to enforce the bureau's expectations from the host agency. In addition, in order to remedy PTO's management problems experienced in dealing with FEDSIM, PTO decided to remove its IT requirements from the FEDSIM agreements in favor of the SDM contract. As of June 1997, all new IT efforts were being authorized against the SDM contract, and by January 1998, PTO had moved most of the existing FEDSIM agreement work to contractors and subcontractors working on the SDM contract.

As discussed in this section, PTO has had considerable difficulty in managing its IT procurement activities through multiagency contracts and MAS transactions. Therefore, we believe that PTO should continue to transition its remaining IT requirements over to the SDM contract and other competitively awarded contracts.



In response to our draft report, PTO responded that, in order to maintain adequate documentation over its IT interagency agreements, the CIO Office of Acquisition Management has established a formal unit, the Infrastructure Acquisition Division, to manage all IT interagency agreements. This office is responsible for maintaining accurate and complete records of interagency agreements and managing activities associated with those programs. This unit is also responsible for ensuring that the bureau receives the expected goods and services from the host agencies as stated in the interagency agreements.

With regard to proper authorization of IT interagency purchases, PTO responded that in accordance with the bureau's policy on interagency agreements, all such agreements must be

approved by the head of the sponsoring or receiving program office. Thus, for IT-related interagency agreements, the approval of the Chief Information Officer is required.

Finally, PTO advised that it has continued to transfer its IT requirements from interagency agreements to competitively awarded contracts. Currently, PTO has open obligations of less than \$300,000 from past interagency agreements (outstanding obligations of the \$4.7 million total interagency agreement transactions remaining).

The OGC's Chief, Contract Law Division questioned our discussion of PTO's use of Requirements Initiatives pursuant to the Department's Information Technology Handbook. We agree that, in accordance with the October 1995 revisions, PTO is not required to obtain approval of individual Requirements Initiative for its projects. We mention PTO's use of its Requirements Initiatives only in the context of acquisition planning documents. Most of the PTO's early interagency agreements continued to use Requirements Initiatives as planning documents even though the requirement to do so ended when the bureau's review threshold was raised to \$10,000,000 in 1996.

III. PTO's Non-IT Agreements Were Not Supported by Legal Review and Economy Act Justifications

Most of PTO's non-IT related interagency agreements were used to obligate funds so that PTO could pay for goods or services, rather than provide them. At the time of our review, PTO had over \$3.5 million in current obligations from these agreements. Table 1 summarizes the amount and purposes of PTO's other agreements.

Table 1: PTO Non-IT Interagency Agreements

Purpose of Agreement	Number	Total Amount
Obligation	19	\$3,491,658
Reimbursable	1	25,000
Total	20	\$3,516,658

These non-IT agreements were for widely varying amounts and purposes. The amounts ranged from \$1,740 to \$538,607, while the purposes for agreements included PTO's purchase of services such as document imaging services, database search services, financial services, educational services, and an evaluation of PTO's organizational structure and base compensation systems.

A. *Agreements did not receive adequate legal review*

For our review, we examined five of PTO's other agreements in detail. Of these five agreements, three were with the U.S. Department of Agriculture, one was with the Department of Justice, and one was with the National Academy of Public Administration (NAPA), as shown in Table 2. We selected these agreements because each one was complex in nature and involved significant funding, in contrast to most of PTO's remaining non-IT agreements.

Table 2: OIG sample of non-IT agreements

Agency	Amount	Purpose	Period
NAPA	\$350,000	Review of PTO's organizational structure and base compensation system	September 1996 to March 1997
Department of Justice	189,603	Micrographic/document imaging services	September 1996 to September 1997
USDA	150,000	Patent examiner education	April 1996 to March 1997
USDA	243,399	Management and administration of programs	August 1994 to August 1999
USDA	394,909	PTO "university"—management and administration of programs	October 1996 to September 1998
Total	\$1,327,911		

In reviewing these five agreements, we found one major weakness in their execution—none had been reviewed and approved by OGC. As with its IT agreements, PTO had not sent any of the agreements through OGC for legal review. In accordance with departmental guidelines, all interagency agreements should have been reviewed by OGC to determine that legal sufficiency was met.⁴⁰ For instance, in the case of NAPA, a legal review might have determined that the agreement was improperly established. This agreement cited the Economy Act as PTO's authority to enter into the agreement. The Economy Act governs agreements between federal agencies or organizational units within an agency. NAPA is not a federal agency; rather, it is a non-profit, independent organization that advises the Congress, federal agencies, and state and local governments on such issues as public employee compensation, performance and management issues, and implementing strategies for change. Although NAPA was congressionally chartered in 1984, it cannot be considered a federal agency for the purposes of the Economy Act. Therefore, a contract action would have been the proper vehicle for the NAPA transaction.

⁴⁰ Memorandum from OGC, Department of Commerce General Counsel, dated April 8, 1994.

The agreement with the Department of Justice for micrographic/document imaging services also had not received legal review from OGC. A PTO official annotated the agreement documentation to show that because a previous, similar agreement received legal review and approval, this agreement did not need to be submitted to OGC. Because this relationship with the Department of Justice was a separate agreement with unique and distinct conditions, separate legal review was necessary to ensure that the interests of PTO and the taxpayer were protected.

As noted on page 21, we believe that it is important to obtain OGC legal review of a contemplated contract action, because it provides the Department with a review of legal sufficiency of the action before the government obligates funds. Therefore, we believe that PTO must put in place procedures to ensure that its agreements are sent to OGC for appropriate review and approval. Further, PTO should work with OGC to determine what types of agreements should be sent to OGC for review and then incorporate these new standards into PTO's policies and procedures.

With the exception of the NAPA agreement's improper authority, our review of PTO's non-IT agreements showed that other key procedural criteria were met. Specifically, the agreements we examined were properly defined as agreements, as opposed to a contract or grant. Federal agencies cannot make contracts with each other, so interagency agreements were the appropriate tool to formalize the relationship. In addition, the agreements we reviewed all cited the correct legal authority, such as the Economy Act, and were authorized and signed by the appropriate PTO program official.

As mentioned earlier, the PTO now has established procedures to require that its agreements are sent to OGC for appropriate review and approval. Further, PTO has delineated the types of non-IT agreements requiring OGC review and has incorporated these standards into its internal policies and procedures on interagency agreements. We encourage PTO to continue to obtain legal review on its interagency agreements.

B. PTO did not properly justify interagency agreements

PTO did not properly justify its non-IT interagency agreements because the bureau did not prepare a Determination and Findings (D&F) in accordance with the Economy Act. Of the five agreements we reviewed, none were supported by a D&F. The Economy Act was cited as legal authority for each agreement. However, in each case the file documentation did not meet the criteria for a D&F and did not contain a determination that the agreement was in the best interest of the government. In addition, the documentation did not discuss whether or not services were available from the private sector.

As noted previously on page 22, an Economy Act interagency agreement is used when the providing agency can provide the necessary goods or services more economically or conveniently than a private source. Economy Act interagency agreements permit transactions between agencies that (1) are in the best interest of the government, (2) are not for the purpose of circumventing procurement laws and regulations, (3) do not interfere with limitations on funding, and (4) do not require the requesting agency to pay any amount over the servicing agency's costs. In addition, the Economy Act interagency agreement must result in a solution that is more economical and efficient than using a private sector contract.

Moreover, as discussed on page 22, the requesting agency is required to prepare a government versus commercial source cost-benefit analysis⁴¹ and an Economy Act Determination and Findings (D&F) to the effect that the interagency transaction is in the best interest of the government, and the supplies or services cannot be acquired as conveniently or economically by contracting directly with a private source.⁴² The D&F must be executed by a responsible official,⁴³ although the Department has no guidelines specifying a particular individual or position required to make the determination. The providing agency may require that the requesting agency submit an executed Economy Act D&F, but is not required to monitor the compliance of the requesting agency's procurement activities with controlling federal laws and regulations.⁴⁴

In the case of these non-IT interagency agreements, PTO is using the interagency agreements to secure the use of the personnel and resources of another government agency. Therefore, an analysis of government versus private sector supply under Office of Management and Budget Circular A-76 is required. In addition, a determination must still be made that use of the Economy Act is in the government's best interest. We found none of PTO's non-IT interagency agreements were determined to be in the best interest of the government prior to their issuance, and none were analyzed in accordance with the OMB Circular A-76. In placing future interagency agreement transactions, PTO should analyze its transactions and proceed only with those that meet the criteria of OMB A-76 and the Economy Act not competing with the private sector and as being in the best interest of the government.

⁴¹ FAR 17.502(c) citing FAR 7.3.

⁴² FAR 17.503.

⁴³ FAR 17.503(c) states: "The D&F shall be approved by a contracting officer of the requesting agency with authority to contract for the supplies and services to be ordered, or by another official designated by the agency head."

⁴⁴ FAR 17.504(a).

Prior to the issuance of our draft report, PTO prepared a new policy and procedure addressing the use of all interagency agreements, including Economy Act transactions. The new policy also addresses OMB A-76 analysis requirements. PTO should justify its interagency agreements consistent with the bureau's new policy, OMB A-76, and the Economy Act (see page 13).



In response to our draft report, the Department advised that the Office of Executive Assistance Management (OEAM) is leading an effort in conjunction with the Office of Acquisition Management (OAM) to prepare and issue formal departmental policies and procedures in the form of a handbook. This interagency agreement handbook will include appropriate procedures for the preparation, review, and clearance of interagency and other special agreements.

According to OEAM, the Department's interagency agreement handbook will require OGC review of all interagency agreements. This legal review is intended to verify that the correct legal instrument has been used and that each agreement meets the criteria that it: (1) is in compliance with legislative and regulatory requirements, (2) cites appropriate legislative authority, and (3) does not include terms that are unacceptable to or unnecessary for the Department.

The handbook will also require that each interagency agreement entered into under the authority of the Economy Act be supported by a Determination and Findings in accordance with the Economy Act and FAR Part 17.5. In addition, the Determination and Findings will be required to be completed by a contracting officer.

IV. PTO Has Improved Its Database to Track and Control Its Interagency Agreements

Prior to 1998, PTO did not have an adequate central database for tracking and controlling its interagency agreements. Because of this, we had some difficulty in obtaining a comprehensive list of agreements and their total dollar amounts for this review. For example, in response to our initial request, PTO presented agreements and transactions identified only by a PTO purchase order number. While the data provided was useful, the agreements were not identified by their interagency agreement number, which made it difficult to determine whether we had obtained all active agreements.

PTO developed a listing of agreements in response to our review. We had great difficulty, as did PTO employees, in finding documents related to the agreements because the agreement numbers were not used consistently throughout the bureau. For example, some agreements were identified with the prefix "IAG" (Interagency Agreement) followed by a number, while others were identified by a purchase order number.

PTO's database of agreements included some key elements, including project title, parties to the agreement, responsible officials, termination date, review date, and funding information, and whether the agreement requires an outlay of funds or anticipates the receipt of funds, such as a reimbursable or obligation. However, we believe the database should also identify each agreement's 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 more precisely, such as memoranda of understanding, 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.

Given the large number of PTO agreements and their importance to achieving PTO's mission, a comprehensive database of agreements with relevant information would help management and program officials control and maintain their agreements. PTO could then better identify and track the physical documents. A well-managed central database of all PTO agreements would also 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. Basic information, such as how many agreements exist, what agencies and other parties are involved, and total funding through agreements, may prove useful in defining performance measures and demonstrating results.

From an administrative perspective, a central database of agreements would help PTO program managers in administering and maintaining their agreements. By having relevant dates in the

system, program managers could easily identify which agreements are due for renewal, termination, or review. Program managers could also quickly respond to inquiries on particular agreements by accessing the system based on the agreement's identifying number, project title, or contact name.

Prior to the issuance of our draft report, in part in response to our request for a listing of agreements, PTO took steps to establish a comprehensive database of its interagency agreements. We have confirmed that this new database is appropriately cross referenced so that important attributes of a given interagency agreement, including funding, cost, outstanding balance of funds, and agreement type are readily ascertainable. However, we have not verified that the interagency agreements included on the new database correspond to all of the bureau's active agreements. Separately, the Department's OEAM is working towards unifying the various Commerce agencies' interagency report databases into a single, comprehensive database. We recommend that PTO continue to maintain and use its database to manage its interagency agreements.



In response to our draft report, PTO reiterated that it has established a new comprehensive interagency agreement database to better manage its interagency agreements. In addition, PTO should ensure that its database will operate seamlessly with the interagency agreement database under development by the Department.

V. The Department Needs Policies and Procedures for Multiagency Contracts and Multiple Award Schedule Transactions

During the course of our review we noted a lack of consensus within the Department, and among the bureaus, as to the policies and procedures that exist or should exist relating to the use of multiagency contracts, MAS transactions, and Economy Act transactions. There are no PTO or Department-wide policies or procedures concerning who is responsible for large interagency IT transactions, what types of agreements are acceptable, what constitutes adequate supporting documentation, and whether or not these agreements must be reviewed by higher management or counsel. We have also observed that different bureaus within the Department treat similar types of transactions differently. As a result of this lack of adequate guidance, many multiagency contracts and MAS transactions have been improperly used and poorly managed by PTO.

The Department should establish policies and procedures to guide departmental offices in the use of multiagency contracts and MAS interagency agreements. These guidelines should include competition requirements, qualitative standards of documentation, and minimum procurement review thresholds. Most importantly, these guidelines should require that specific steps be taken to ensure that requesting agency officials conduct a market survey, which will promote an understanding of the nature of their requirements and the availability of alternatives. In addition, the guidelines should require that the requesting agency officials conduct adequate price analysis to compare viable alternatives and determine a best value solution. Finally, issuing competitive contracts should still be encouraged whenever the requirements can be precisely defined and delivery schedules provide ample lead time.

We found that greater use of price analysis and basic management techniques in PTO's IT interagency agreements should have resulted in substantial cost savings. Although this would have created more administrative cost, the benefits should have greatly outweighed the additional administrative burden. For example, if PTO achieved only half of the 17 percent savings realized by NOAA from its procurement of remote weather sensor modems, PTO would have saved over \$4 million based on its \$47.3 million outlays for IT interagency agreements (see page 16). Clearly, these projected savings would more than pay for a small staff to negotiate lower prices, or even compete certain items where procurement lead times can be managed within the required delivery.

Our principal concerns with multiagency contracts and MAS transactions are essentially management problems: the adequacy of planning for a given procurement action, adequacy of requirements, adequacy of the search for alternative solutions, and the need for review procedures. With adequate planning and proper articulation of requirements, a project budget, statement of work, and delivery schedule can be developed. Likewise, fair consideration of all

multiple award contractors, including a logical, proper price analysis, will assist in the consideration of alternatives and help determine the best value approach for meeting these requirements. The action should then be reviewed by the Department's or bureau's procurement office to ensure that these procedures are met. Finally, multiagency contracts and MAS transactions above an appropriate, designated threshold, should be reviewed by OGC for legal sufficiency. Departmental procedures and guidelines should address these concerns and require Commerce agencies to ensure that the necessary management, procurement and legal reviews are conducted for all proposed multiagency contracts and MAS transactions.

To the extent that the Department is engaging in a commercial activity, an economic analysis in accordance with Office of Management and Budget Circular A-76 must be completed.⁴⁵ 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,⁴⁶ 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 Department should establish policies and procedures governing Economy Act transactions, including a detailed OMB Circular A-76 analysis of requirements and a D&F prepared in accordance with FAR 17.5 by a designated official declaring that a given Economy Act transaction is in the best interest of the government. We believe that this D&F should be prepared by a cognizant contracting officer, or otherwise reviewed by the Department's or bureau's procurement structure. Finally, the Economy Act transaction should be reviewed by OGC for legal sufficiency, in accordance with departmental policy and guidelines.

In a separate report, we have made several recommendations to the Department about the need for policies and procedures for interagency agreements.⁴⁷ One of our recommendations is to establish of a Department-wide database of agreements. A central database of agreements would be a useful management and administrative tool, and would help Commerce bureaus in administering and maintaining their agreements. We have identified two options for creating a central list of agreements. First, the Department could develop one standard system or database

⁴⁵ FAR 17.502(c), citing FAR 7.3.

⁴⁶ OMB Circular A-76 Supplement (March 1996), Part I, Chapter 1, section C.

⁴⁷ *Office of the Secretary—Interagency and Other Special Agreements Require Better Management and Oversight*, IPE-10418, September 1998.

program that each bureau can access to add, modify, or delete agreements. Alternately, 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. PTO should closely coordinate with the Department to ensure that its agreements tracking system is consistent and comparable with the forthcoming departmental policy.



In response to our draft report, the Department advised that the Office of Executive Assistance Management (OEAM) is leading an effort in conjunction with the Office of Acquisition Management (OAM) to prepare and issue formal departmental policies and procedures in the form of a handbook. This interagency agreement handbook will include procedures for appropriate preparation, review, and clearance of interagency and other special agreements. The handbook is also intended to cover multiagency contracts implemented through interagency agreements.

RECOMMENDATIONS

We recommend that the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks take appropriate steps to:

1. Refrain from specifying or otherwise recommending a preferred source for multiagency contract transactions so that the providing agency is able to offer a fair opportunity for the schedule contractors to compete (see page 14).
2. Continue to consider alternative sources for its IT requirements, even among different multiagency contract and MAS schedules, including the use of price analysis techniques so that the government receives the best overall value (see page 15).
3. Continue to prepare detailed independent government estimates for work required under IT agreements to ensure that the efforts are well reasoned during the initial planning stages and that they are properly budgeted (see page 17).
4. Continue to develop detailed statements of work for IT agreements to ensure that the bureau's systems development work is clearly defined with measurable outputs (see page 19).
5. Continue to establish clearly defined delivery schedules for IT agreements to adequately control the activities of both the multiagency contract host agency and the contractor, and to ensure that payments are not made unless acceptable work has been received (see page 20).
6. Obtain legal review on all applicable interagency agreements before executing these agreements. PTO's IT interagency agreements should be reviewed in accordance with Departmental Administrative Order 208-5 in addition to the General Law Division review. PTO should work with the Department and Office of General Counsel to establish procedures to determine what types of non-IT agreements should be sent to the Office of General Counsel for review (see pages 21 and 33).
7. Prepare a Determination and Findings to demonstrate that Economy Act transactions are in the best interest of the government, pursuant to the Economy Act and federal procurement regulations (see pages 22 and 35).

8. Maintain adequate documentation over its IT agreements (e.g., describing the cost, agreement terms, and amounts paid), so that the bureau is able to properly manage its development activities (see page 27).
9. Ensure that all IT agreements have been entered into with the approval of the Chief Information Officer and in accordance with the bureau's systems architecture and IT plans (see page 29).
10. Effectively manage its IT agreement host agencies to ensure that the bureau receives the expected goods and services and contract terms as stated in PTO's agreements (see page 29).
11. Continue to transfer its remaining IT agreements to contract actions to reduce overhead and simplify the bureau's control over its IT development activities (see page 31).
12. Maintain a comprehensive database for all of PTO's interagency agreements in accordance with forthcoming departmental guidance (see page 38).

We recommend that the Chief Financial Officer and Assistant Secretary for Administration establish policies and procedures to ensure that:

13. Multiagency contracts and MAS actions are adequately planned, with articulated requirements, and coordinated through the Department's or bureau's procurement organization (see page 40).
14. A procurement process is used to take advantage of competition among the schedule contract offerors while at the same time maintaining the streamlining characteristics intended by the Federal Acquisition Streamlining Act and the Information Technology Management Reform Act (see page 40).
15. Multiagency contract actions are supported by a determination in accordance with the Economy Act and FAR 17.5, to the effect that the transaction is in the best interest of the government (see page 41).
16. Multiagency contracts, MAS transactions, and Economy Act interagency agreement transactions are reviewed by the Office of General Counsel for legal sufficiency (see page 41).

ATTACHMENT I

Patent and Trademark Office Response to the Draft Report



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

SEP 28 1999

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

FROM: Acting Assistant Secretary of Commerce and
Acting Commissioner of Patents and Trademarks

SUBJECT: Response to Draft Inspection Report No. IPE-10728,
"PTO Has Improved its Management of Interagency Agreements"

We have reviewed the observations and recommendations of your *Draft Inspection Report No. IPE-10728* dated September 1999 and entitled "*PTO Has Improved its Management of Interagency Agreements*." As you have validated in your return review and duly noted in your report, the PTO has established internal policies and procedures that have, since completion of the primary phase of your fieldwork, resulted in significant improvements that fully address your initial concerns. More specifically, the PTO's internal Interagency Agreement Policy issued in 1998 established a formal process and guidelines to effectively explore, issue, manage, and control the use of Interagency Agreements thereby ensuring the best overall value for the Government. Additionally, the vast majority of the tasking processed from those Interagency Agreements that you had reviewed has been completed and we are now using PTO issued contracts and delivery orders for our Information Technology initiatives.

Nonetheless, we wish to formally respond to your recommendations restating, in each instance, the corrective measures we have taken, and we invite you to return to the PTO at a future date to confirm that our management of interagency agreements continues to be strong and effective.

1. Refrain from specifying or otherwise recommending a preferred source for multiagency contract transactions so that the providing agency is able to offer a fair opportunity for the schedule contractors to compete.

Response: As noted in your report, all new Interagency Agreements are processed through PTO's Interagency Agreements Working Group and are reviewed by our procurement professionals. The Office of Procurement is responsible for ensuring that the Economy Act (U.S.C. 31), the Federal Acquisition Regulation, and the Commerce Acquisition Regulations are strictly followed. Consistent with standard procurement review and oversight practices, the Office of Procurement requires program offices to follow appropriate acquisition procedures for fair competition.

2. Continue to consider alternate sources for its IT requirements, even among different multiagency contract and MAS schedules, including the use of price analysis techniques so that the government receives the best overall value.

Response: As noted in your report, our Office of Procurement requires that Program Offices explore alternative sources and conduct detailed price analyses to ensure the best overall value for the Government.

3. Continue to prepare detailed independent government estimates for work required under IT agreements to ensure that the efforts are well reasoned during the initial planning stages and that they are properly budgeted.

Response: In accordance with the Technical Service Guidelines published by our Office of the Chief Information Officer (OCIO), all issued IT task orders must contain an independent Government estimate for the required effort. This estimate must be produced during the planning phase of all IT requirements and must also be used as the basis of negotiating task orders with the contractors.

4. Continue to develop detailed statements of work for IT agreements to ensure that the bureau's systems development work is clearly defined with measurable outputs.

Response: In accordance with the Technical Service Guidelines published by our Office of the Chief Information Officer, all issued IT task orders must contain a detailed Statement of Work (SOW). This SOW is the basis for establishing a project plan in PTO's Cost Accounting Tool (CAT), which defines specific deliverables, schedules, and responsibilities. Based on these definitions, the CAT system is used to measure performance against measurable outputs. The process is managed through CIO's Life Cycle Management (LCM) system that contains formal reviews and approvals from the Technical Review Board (TRB). This combination of formal task order development and project management controls ensures that SOWs are developed and managed effectively with clearly defined measurable outputs.

5. Continue to establish clearly defined delivery schedules for IT agreements to adequately control the activities of both the multiagency contract host agency and the contractor, and to ensure that payments are not made unless acceptable work has been received.

Response: The Contracting Technical Officer's Representatives (COTRs) are responsible for reviewing and approving all contractor invoices for both PTO contracts and Interagency Agreements. It is the COTR's responsibility to review work accomplished against CAT schedules, and to ensure that completed work is acceptable and is consistent with the stated expectations of the receiving office.

6. Obtain legal review on all applicable interagency agreements before executing these agreements. PTO's IT interagency agreements should be reviewed in accordance with Departmental Administrative Order 208-5. PTO should work with the Department and Office of General Counsel to establish procedures to determine what types of non-IT agreements should be sent to the Office of General Counsel for review.

Response: As noted in your report, the current PTO's Interagency Agreement Policy requires all Interagency Agreements to have legal review prior to issuance. The Interagency Working Group works closely with the Office of General Counsel in delineating the types of Interagency Agreements requiring legal review.

7. Prepare a determination and findings to demonstrate that Economy Act transactions are in the best interest of the government, pursuant to the Economy Act and federal procurement regulations.

Response: In accordance with PTO's Interagency Agreement Policy, the Office of Procurement is responsible for ensuring that a "determinations and findings" document is completed with sufficient detail to satisfy the requirements of the Economy Act and Federal Procurement regulations. This too is clearly stated in PTO's 1998 Policy on Interagency Agreements.

8. Continue to maintain adequate documentation over its IT agreements (e.g., describing the cost, agreement terms, and amounts paid), so that the bureau is able to properly manage its development activities.

Response: The CIO Office of Acquisition Management has established a formal unit within the Infrastructure Acquisition Division to manage all IT Interagency Agreements. This office is responsible for maintaining accurate and complete records of Interagency Agreements and managing activities associated with those agreements.

9. Ensure that all IT agreements have been entered into with the approval of the Chief Information Officer and in accordance with the bureau's systems architecture and IT plans.

Response: In accordance with PTO's Policy on Interagency Agreements, IAGs require the signature of the head of the sponsoring or receiving program office. Thus, for IT related Interagency Agreements, the approval of the Chief Information Officer is required.

10. Effectively manage its IT agreement host agencies to ensure that the bureau receives the expected goods and services and contract terms as stated in PTO's agreements.

Response: The CIO Office of Acquisition Management has established a formal unit within the Infrastructure Acquisition Division to manage all IT Interagency Agreements. This office is responsible for ensuring that the PTO receives the expected goods and services and contract terms as stated in the Interagency Agreements.

11. Continue to transfer its remaining IT agreements to contract actions to reduce overhead and simplify the bureau's control over its IT development activities.

Response: All IT efforts previously accomplished through Interagency Agreements have now been successfully transitioned to PTO awarded contracts. There is a remaining open obligation of less than \$300,000 from past interagency agreements. This remaining item will be completed within the next several months.

12. Develop and maintain a comprehensive database for all of PTO's interagency agreements in accordance with forthcoming departmental guidance. Resolved.

Response: As was submitted to your representative, the PTO maintains a comprehensive database for all of PTO's Interagency Agreements.

13. Multiagency contracts and MAS actions are adequately planned, with articulated requirements, and coordinated through the Department's or bureau's procurement organization.

Response: All new Interagency Agreements and MAS actions are processed through PTO's Office of Procurement. The Office of Procurement is responsible for ensuring that the Economy Act (U.S.C. 31), the Federal Acquisition Regulation, and the Commerce Acquisition Regulations are complied with at all times. Consistent with this procurement oversight and the established internal policies, the Office of Procurement requires the PTO program offices to participate in the acquisition planning and to provide detailed requirements.

14. A procurement process is used to take advantage of competition among the schedule contract offerors while at the same time maintaining the streamlining characteristics intended by the Federal Acquisition Streamlining Act and the Information Technology Management Reform Act.

Response: In accordance with PTO's Interagency Agreement Policy, the Office of Procurement is responsible for ensuring that a procurement process is used to take advantage of competition among schedule contract offerors. Further, as mentioned earlier, the PTO no longer uses the Interagency Agreements vehicle for procuring IT goods and services. Under any procurement vehicle, the Office of Procurement has lead responsibility for maintaining and streamlining the characteristics intended by the Federal Acquisition Streamlining Act and the Information Technology Management Reform Act.

15. Multiagency contract actions are supported by a determination in accordance with the Economy Act and FAR 17.5, to the effect that the transaction is in the best interest of the government.

Response: In accordance with PTO's Interagency Agreement Policy, the Office of Procurement is responsible to ensure that a determinations and findings study is completed and documented with sufficient detail to satisfy the requirements of the Economy Act and Federal Procurement regulations.

I look forward to working with you in the future on continued improvements to, and refinements of, the PTO Interagency Agreement program.



Q. Todd Dickinson

ATTACHMENT II


Office of General Counsel, Contract Law Division Response to the Draft Report



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

July 15, 1999

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

FROM: 
Jerry A. Watt
Chief, Contract Law Division

SUBJECT: Draft Report: "Patent and Trademark Office
-Improvements Are Needed in PTO's
Management of Interagency Agreements (IPE-
10728)"

You have requested our comments on the above cited *draft* report concerning PTO's management of Interagency Agreements for the procurement of information technology (IT). Although I am in general agreement with the substance of the report - that better management, price analysis, and the necessity of OGC legal review are all in the Government's best interest, there are a few issues which we wish to bring to your attention prior to issuance of a final report.

•Economy Act Applicability. The *draft* report takes issue with PTO's failure to justify interagency agreements entered into pursuant to the Clinger-Cohen Act, 40 U.S.C. §1412(e) (formerly known as the Information Technology Management and Reform Act of 1996 (ITMRA)), and specifically, GSA's Federal Systems Integration and Management Center, more commonly known as FEDSIM. According to the *draft* report, the Economy Act, 31 U.S.C. §1535, and the Federal Acquisition Regulation (FAR §17.503) require a justification or determination and finding prior to entering into a FEDSIM-type of multiple award task order contract. The draft report cites §5124(a)(1)

of ITMRA, as the statutory basis for Economy Act applicability. It is our understanding that the Economy Act is not applicable to FEDSIM contracts. Under § 5112(e) of the Clinger-Cohen Act, the Office of Management and Budget (OMB) is authorized to designate an agency as an executive agent to operate government-wide IT acquisition programs. Pursuant to such authority, GSA has been designated as an executive agent for FEDSIM as well as other government-wide IT programs. Thus, §5112(e) of Clinger-Cohen provides the independent statutory authority to enter into multiagency task order contracts without Economy Act applicability. The General Counsel of GSA in response to identical inquiries regarding Economy Act applicability from the Department of Defense, has opined that GSA's authority to act as an executive agent for IT programs such as the GSA's FEDSIM exempts it from the Economy Act requirements. I have attached a copy of this opinion for your review.

• **Requirements Initiative Necessity.** The draft report also cites PTO's failure to document its IT-related acquisitions, specifically, the lack of a Requirements Initiative for every contract. (*Draft IG Report*, p. 16) According to Department of Commerce Procurement Memorandum 96-04 (dated November 22, 1995) and the Information Technology Management Handbook (Revision October 1995), approval thresholds for IT acquisitions were raised and the review process streamlined. Under those streamlining measures, documents formerly known as Requirements Initiatives, Agency Procurement Requests and Acquisition Plans, have been consolidated into a single document, entitled "Consolidated Requirements and Acquisition Initiative." This document is only required for acquisitions in excess of \$10 million provided the operating unit has an approved IT plan. I understand that during the times in question, PTO did have an approved IT plan.¹ Although acquisition planning is always required, there is no formal requirement for a separate Requirements Initiative for every IT acquisition.

• **Maximizing Competition.** The *draft* report found that PTO identified preferred sources when procuring IT services through FEDSIM and that such preference violates the competition requirements of the Competition In

¹ If an agency lacks an approved IT plan, the threshold is \$500,000. IT Management Handbook, p. 3-12.

Contracting Act and other federal procurement laws and regulations. (Draft IG Report, p. 13) The FAR requires that in the case of a multiple award task order contract, each awardee under the contract be given a fair opportunity to compete for future task orders in excess of \$2,500. FAR §16.505(b). We have interpreted this to mean that the servicing agency, in this case, GSA, rather than the requesting agency, must ensure compliance. Furthermore, the typical FEDSIM interagency agreement which is executed by the two agencies, places responsibility for the awarding of task orders on the servicing agency (GSA) rather than the requesting agency (PTO). We are not aware of a prohibition against a requesting agency merely identifying known contractors who are capable of performing the agency's requirements and believe it is up to GSA/FEDSIM to ensure that it is in compliance with applicable laws and regulations.

As for the specific recommendations such as better management, proper documentation, and obtaining necessary approvals, the Department's recent initiative to draft a department-wide Handbook for the preparation and administration of all interagency agreements, will hopefully alleviate these concerns.



General Services Administration
Office of General Counsel
Washington, DC 20405

SEP 23 1996

The Honorable Judith A. Miller
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Dear Ms. Miller:

Recently, the General Services Administration (GSA) received several inquiries from Department of Defense (DOD) purchasing offices questioning whether the Economy Act, 31 U.S.C. § 1535, is the proper authority to support purchases of information technology (IT) resources by DOD and other agencies from GSA contracts and/or programs. These inquiries suggest there may be some confusion regarding the authority supporting an agency's purchase of IT resources from GSA. GSA's governmentwide IT programs include, but are not limited to, the Federal Systems Integration and Management Center (FEDSIM), the Federal Computer Acquisition Center (FEDCAC), the Federal Information Systems Support Program (FISSP) and the Multiple Award Schedule (MAS) program. In the hope of avoiding any further confusion, I am writing to describe the legal authority for governmentwide use of GSA's IT programs.

The proper authority supporting an agency's acquisition of IT resources from GSA's governmentwide IT programs is the Information Technology Management Reform Act of 1996 (ITMRA), Division E of Public Law 104-106, 110 Stat. 679.

ITMRA provides specific statutory authority for interagency acquisitions of IT resources. Specifically, subsection 5112 (e) of ITMRA authorizes the Office of Management and Budget (OMB) to designate an agency as an executive agent to operate governmentwide IT acquisition programs. Pursuant to that subsection, OMB designated the GSA Administrator as an executive agent for FEDSIM and FEDCAC as well as for other GSA governmentwide IT programs.¹

¹ The designation is contained in a letter dated August 2, 1996, from the Director of OMB authorizing GSA to continue to provide IT resources to other agencies. Independent of the OMB designation, GSA is provided specific statutory authority under Section 5401 of ITMRA to operate the MAS program. See also 41 U.S.C. § 259(b)(3).

The Economy Act applies to interagency acquisitions only when more specific statutory authority is absent. See 55 Comp. Gen. 1497 (1976); and General Accounting Office, Principles of Federal Appropriations Law, Volume II, Chapter 7, pages 7-22 to 7-24 (2d ed. 1992); see also Federal Acquisition Regulation (FAR) § 17.500(b). Since ITMRA provides specific authority for interagency acquisitions of IT, the Economy Act is inapplicable.

The administrative mechanism for funding GSA's ITMRA-authorized programs is Section 110 of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 757. Section 757 of Title 40 of the United States Code establishes the Information Technology Fund (IT Fund) and provides that it is "available for . . . efficiently providing information technology resources to Federal agencies . . ." See 40 U.S.C. § 757 (b)(2).² In establishing the scope of its executive agent designation to GSA, OMB cited the "programs which are funded on a reimbursable basis through the Information Technology Fund established at 40 U.S.C. § 757 . . ." The IT Fund is a revolving fund and is available to support GSA's ITMRA-authorized governmentwide IT activities.³

GSA received several inquiries from DOD personnel who found the reference to the Economy Act in the conference report to ITMRA, H. R. Conf. Rep. No. 104-450, 104th Cong., 2d Sess. (1996) (the Conference Report), confusing.⁴ Let me address a point of possible confusion. The Conference Report language regarding the applicability of the Economy Act refers to multifagency IT contracts pursuant to Section 5124 of ITMRA. Section 5124 of ITMRA addresses multifagency contracts and requires each executive agency covered by the contract to procure items under that contract or justify an alternative procurement of the item. In contrast, GSA's governmentwide authority for IT programs is based on OMB's designation pursuant to Section 5112(e) of ITMRA.

In summary, GSA continues to provide certain IT resources on a governmentwide basis, including the provision of IT resources by FEDSIM, FEDCAC and FISSP under interagency agreements. Interagency agreements for the use of these IT programs are entered into under the authority of ITMRA, funded through the IT Fund, and are not controlled by the Economy Act.

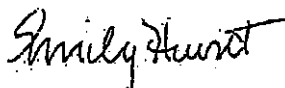
² Neither GSA's IT Fund nor the Economy Act is required to support an agency purchase order under a MAS contract. Purchase orders are issued directly to the MAS contractors by the customer agency. See FAR § 8.401. Purchase orders are funded by the customer agency and payment is made directly to the MAS contractor.

³ The Economy Act does not affect laws regarding the operation of revolving funds. See 31 U.S.C. § 1535(e)(2).

⁴ The Conference Report provides in pertinent part that "[t]he conferees intend that the requirements and limitations of the Economy Act, and other provisions of law, apply to these multifagency acquisitions." See Conference Report at 142 Cong. Rec. H735 (daily ed. January 22, 1996).

If you or your colleagues have any questions regarding GSA's IT programs, please do not hesitate to contact Vincent L. Crivella of my office at (202) 501-1156 or me. I can be reached at (202) 501-2200.

Sincerely,




Emily C. Hewitt
General Counsel

cc: F. Whitten Peters

ATTACHMENT III

Office of general Counsel, General Law Division Response to the Draft Report

	UNITED STATES DEPARTMENT OF COMMERCE Office of the General Counsel Washington, D.C. 20230
JUL 27 1999	
MEMORANDUM FOR:	Jill A. Gross Acting Assistant Inspector General for Inspections and Program Evaluations Office of the Inspector General
FROM:	Brian D. DiGiacomo <i>Brian D. DiGiacomo</i> Chief, General Law Division
SUBJECT:	Draft Inspection Report No. IPE-10728
<p>Below we are providing our comments to Draft Inspection Report No. IPE-10728 on interagency and other special agreements of the Patent and Trademark Office (PTO).¹</p> <p>As with Draft Inspection Report No. IPE-10418,² No. 10775,³ and No. IPE 10417,⁴ the PTO report coincides with our own recent efforts with PTO and other operating units to improve the preparation and review of agreements. We hope our comments will assist you in making your final report both accurate and effective, and we are glad to assist in improving policies and procedures concerning the review and management of agreements. We appreciate your office's efforts in attempting to attain that goal.</p> <p>Again, we would like to stress that the ultimate responsibility for compliance with all requirements will rest with the 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.</p>	
<hr/> <p>¹ Draft Report: <i>Improvements are Needed in PTO's Management of Interagency Agreements</i> (IPE-10728).</p> <p>² Draft Report: <i>Office of the Secretary, Interagency and Other Special Agreements Require Better Management and Oversight</i> (IPE-10418).</p> <p>³ Draft Report: <i>NMFS's Interagency and Other Special Agreements Require Additional Improvements</i> (IPE-10775).</p> <p>⁴ Draft Report: <i>NWS Requires Better Management and Oversight of Interagency and Other Special Agreements</i> (IPE-10417).</p>	

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While we agree with most of your recommendations, there are some comments in the PTO report with which we do not agree. The following are our comments to parts of the PTO draft report--these responses are intended to supplement our comments which we set forth in our response to Draft Inspection Report No. IPE-10418, No. 10775, and No.10417.

1. Beginning on p. 7 of your report, you discuss interagency agreements pursuant to the Economy Act, 31 U.S.C. 1535. As your office is aware, Economy Act agreements must be reviewed by the Office of the Assistant General Counsel for Administration. This requirement is set forth in a Memorandum from the General Counsel dated April 8, 1994, which is mentioned several times in your report.

However, on p. 19 of the report, you concluded that only those Economy Act agreements valued at \$500,000 or greater must be reviewed by OGC. This is incorrect, and your report should be revised to make clear that there is no Department-wide \$500,000 exception to the requirement that Economy Act agreements receive legal review. It also should be made clear that such legal review must be obtained from the Office of the Assistant General Counsel for Administration.

Furthermore, your discussion concerning DAO 208-5 is incorrect and should be deleted. This DAO specifically states that it does not apply to "interagency transfer of funds." This includes Economy Act transactions. Accordingly, the entire discussion concerning DAO 208-5 should be deleted from p. 19 of your report.

2. On p.21, the report gives the impression that an analysis under OMB Circular A-76 does not need to be conducted with regard to any Economy Act transaction. This is incorrect. You are correct to the extent you contend that some Economy Act transactions will not require an analysis under the Circular. However, in many instances, it is applicable, and this should be clear in your report. For example, if another agency is offering to provide services, as opposed to goods manufactured by the private sector, an analysis under OMB Circular A-76 must be conducted. We believe that your report should be revised to reflect that, depending on the circumstances, the Circular may apply to Economy Act transactions.⁵
3. On p. 31, you state that there should be a database that would identify agreement types "precisely," such as "memoranda of understanding, reimbursable agreement, or obligation agreement." As we have explained in the past, our office has learned that there is a lot of confusion as to what a "Memorandum of

⁵ The same impression is given on p. 30 of the report and should be corrected.

3

Understanding/Agreement" is. The current draft of your report also reflects confusion regarding this term.

The term "Memorandum of Understanding/Agreement" is a generic term that means nothing more than "agreement." A memorandum of understanding or agreement may be used for reimbursable work and to acquire work from others. It is not a precise type of agreement. Unless changed, we fear your report will continue the confusion which already exists at the Department regarding what an MOU/A is. This confusion has consequences in that employees often treat a document based solely on what it is called. In order to keep better track of agreements *and* to make subsequent IG inspections more meaningful, this confusion needs to be corrected. Your report can serve to help clear up this problem. Therefore, we would ask that you revise the report with this problem in mind.

ATTACHMENT IV

Department's Office of the Chief Financial Officer and Assistant Secretary for Administration Response to the Draft Report



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

AUG 20 1999

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

FROM: Sonya G. Stewart *Sonya Stewart*
Acting Deputy Assistant Secretary for Administration

SUBJECT: Draft Report: Patent and Trademark Office - Improvements
are Needed in PTO's Management of Interagency
Agreements (IPE-10728)

In response to your June 30, 1999 memorandum to Linda Bilmes, we have reviewed the subject inspection report and agree that the Department needs policies and procedures for multi-agency agreements. The attached summary of recommendations offered in the report includes our response and, where appropriate, the action we plan to take to respond to those recommendations.

Please do not hesitate to contact me at 202-482-4951 if you would like to discuss this matter in additional detail.

Attachment

SUMMARY OF RECOMMENDATIONS TO THE
CHIEF FINANCIAL OFFICER AND
ASSISTANT SECRETARY FOR ADMINISTRATION

"DRAFT REPORT: PATENT AND TRADEMARK OFFICE –
IMPROVEMENTS ARE NEEDED IN PTO'S MANAGEMENT
OF INTERAGENCY AGREEMENTS (IPE-10728)"

Recommendation 13.

Policies and procedures should be established that ensure multi-agency contracts and MAS actions are adequately planned, with articulated requirements, and coordinated through the Department's or bureau's procurement organization.

Action Plan

The Office of Executive Assistance Management (OEAM) is leading an effort in conjunction with the Office of Acquisition Management to prepare and issue formal Departmental policies and procedures in the form of a handbook which will include appropriate preparation procedures, review, and clearance of interagency and other special agreements. Multi-agency contracts which are implemented through interagency agreements will be covered in the handbook. See the response to Recommendation 14 below with respect to MAS actions.

Action Taken to Date

OEAM provided to interested stakeholders within the Department a preliminary draft handbook soliciting comments and has convened meetings to discuss the handbook and comments received. OEAM is currently revising the draft handbook to incorporate comments as appropriate.

Recommendation 14.

Policies and procedures should be established that ensure a procurement process is used to take advantage of competition among the schedule contract offerors while at the same time maintaining the streamlining characteristics intended by the Federal Acquisition Streamlining Act and the Information Technology Management Reform Act.

Response

The Federal Acquisition Regulation (FAR), which provides uniform policies and procedures for acquisition by all executive agencies, has recently been amended to reflect new procedures for placing orders under multiple award contracts at FAR Part 16.505(b). The amendment emphasizes that agencies shall use only fair methods when placing orders. For example, the contracting officer shall not employ allocation or designation of any preferred awardee(s) that would result in less than fair consideration being given to all awardees prior to placing each order. The policy in the FAR is now clear and complete; therefore, further supplement to Departmental policy is not required.

Recommendation 15.

Policies and procedures should be established to ensure that multi-agency contract actions are supported by a determination in accordance with the Economy Act and FAR Part 17.5, to the effect that the transaction is in the best interest of the government.

Action Plan

The handbook will require that each interagency agreement entered into under the authority of the Economy Act be supported by a Determination and Finding (D&F) in accordance with the Economy Act and FAR Part 17.5. In addition, the D&F must be approved by a contracting officer.

Recommendation 16.

Policies and procedures should be established to ensure that multi-agency contracts, MAS transactions, and Economy Act interagency agreement transactions are reviewed by the Office of General Counsel for legal sufficiency.

Action Plan

The Handbook will require Office of General Counsel review of all interagency agreements. Legal review and clearance will verify that the correct legal instrument has been selected and that each agreement meets the following criteria:

1. Is in compliance with legislative and regulatory requirements.
2. There is appropriate legislative authority.
3. Does not include terms unacceptable to or unnecessary for the Department.