



U.S. DEPARTMENT OF COMMERCE
Office of Inspector General



***NATIONAL INSTITUTE
OF STANDARDS
AND TECHNOLOGY***

***NIST'S Procurement Practices
Have Improved But Additional
Challenges Remain***

Audit Report No. BSD.-16656-5-0001/September 2005

PUBLIC RELEASE

Office of Audits, Business and Science Division





SEP 30 2005

MEMORANDUM FOR: William A. Jeffrey
Director
National Institute of Standards and Technology

FROM: Johnnie E. Frazier

SUBJECT: *NIST's Procurement Practices Have Improved But
Additional Challenges Remain*
Audit Report No. STD-16656-5-0001

Attached is our report on our performance audit of NIST's procurement practices. We were pleased to see that you are committed to ensuring that NIST implements good, sound procurement practices and that you agree with our observation that NIST leaders need to ensure that program managers actively support the NIST Acquisition Management Division's initiatives to improve procurement activities. To further improve NIST's procurement practices, we recommend in our report that NIST (1) increase competition and improve acquisition planning, (2) develop or improve guidelines to assist program personnel in conducting effective market research, conducting and documenting past performance reviews, preparing independent government estimates, and preparing Justifications for Other Than Full and Open Competition; (3) with the Department's Office of General Counsel, establish updated internal guidelines for legal review of contract actions; (4) establish a tracking and monitoring system for acquisition staff training; and (5) establish an aggressive campaign to eliminate unauthorized procurement actions. The executive summary begins on page i, and recommendations begin on page 21.

We appreciate the level of attention and careful consideration that you and your staff took to address our findings and recommendations. In accordance with DAO 213-5, please provide us with the audit action plan for our review and concurrence addressing all of the report recommendations within 60 days of this memorandum. Should you need to discuss the contents of this report or the audit action plan, please call me at (202) 482-4661, or Allison Lerner, Acting Assistant Inspector General for Auditing, at (202) 482-1934.

cc: Thomas P. Klausung, Acting Chief Financial Officer
Phyllis Bower, Director, Acquisition Management Division
Steven Willett, NIST Audit Liaison



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EXECUTIVE SUMMARY

NIST relies on contracts and vendors to supply many of the goods and services it needs to accomplish its mission, spending millions of dollars on procurements ranging from basic office equipment to specialized scientific instruments and services. In fiscal year 2004, NIST purchased more than \$276 million in products and services, or about 36 percent of its fiscal year 2004 total available resources of \$771 million. Within NIST, under the chief financial officer, the Acquisition Management Division (AMD) is responsible for managing, overseeing, and supporting NIST procurement operations, including contracts, simplified acquisitions and delegated procurement via the bankcard program, and for advising customers on acquisition strategies.

AMD also is responsible for ensuring that all acquisitions of goods and services are in compliance with various federal laws, regulations, and policies governing procurement operations and procedures. The Federal Acquisition Regulation establishes uniform policies and procedures that cover all aspects of procurement and is used by executive agencies. The Office of Federal Procurement Policy in the Office of Management and Budget, established by Congress in 1974, provides, among other things, government-wide procurement policies for agencies to follow in complying with the Federal Acquisition Regulation.

Congress passed the Competition in Contracting Act of 1984 to increase competition and limit noncompetitive contracting. The act, which applies to all solicitations after March 31, 1985, limits federal agencies to making noncompetitive awards under seven specified circumstances; and requires them to justify, certify, and approve in writing all noncompetitive decisions, and to plan procurements to allow maximum time for obtaining competitive offers. Additionally, in 2002 the president issued an initiative to promote access of small business to government contracts through full and open competitive procedures.

We conducted a performance audit to determine whether NIST (1) has effective procurement policies and procedures that comply with laws and regulations, (2) is effectively processing procurements in accordance with those policies and procedures, and (3) has an adequately trained acquisition workforce. To accomplish these objectives, we analyzed a random, judgmental sample of approximately one-third of NIST's contract awards (new contracts and task orders) exceeding \$100,000 from fiscal year 2002 and from January through June, fiscal year 2004.¹

Our audit found that although NIST's acquisition policies and procedures comply with laws and regulations, do not conflict with Department guidance, and generally meet the needs of the agency's acquisition team, they do require some modifications as outlined later in this report. We also noted that the agency has improved some acquisition practices over the two years we reviewed, and AMD has taken steps to educate acquisition team members about their responsibilities in the procurement process. However, AMD cannot be successful on its own in

¹ We selected samples from the two different time periods because management of the Acquisition Management Division changed at the end of fiscal year 2003. Our sample was designed to allow changes in operating practices instituted by the new management to be reflected in our audit result.

improving the procurement process and needs the active participation and cooperation of NIST program managers. Therefore, it is important that NIST's leadership ensures that program managers actively support AMD's initiatives to improve agency procurement activities.

Our specific findings and recommendations are as follows:

Greater emphasis is needed on promoting full and open competition. NIST has improved its use of full and open competition in contracting, but may be missing out on savings and other benefits that competition promotes because of inadequately justified sole-source procurements, a lack of acquisition planning, and the methods used in contracting for consulting services. From interviews with program and contracting staff and review of contract files, we determined that program staff did not always support competition, preferring instead to work with contractors they knew or had dealt with previously, necessitating the use of noncompetitive procedures. Adding to the problem, procurement staff often did not question noncompetitive solicitations or offer alternatives to encourage competition. We reviewed 92 contract actions totaling \$77.2 million from fiscal years 2002 and 2004 out of a universe of 243 contracts totaling \$183.7 million. We found that 55 percent or \$26.3 million of fiscal year 2004 contracts we reviewed were competed, and 39 percent or \$30.2 million in contracts were competed in fiscal year 2002. We also noted that there was a lack of competition when contracting for consulting services. While NIST made progress in competing more contracts in fiscal year 2004 than in 2002, the overall sample percentage of 42 for contracts awarded using full and open competitive procedures is low. NIST may be able to further increase competition through improved acquisition planning and has required agency managers to prepare annual spending plans that will project upcoming acquisition requirements. (See page 5.)

Program officials need to conduct better market research. NIST program officials—typically contracting officer's representatives—are responsible for conducting market research that is documented in the procurement packages submitted to AMD. Market research is critical for determining how the contracting officer will process the acquisition as it provides for collecting and analyzing information about capabilities within the market to satisfy agency needs. It provides the acquisition's background, the agency's needs, a list of potential suppliers, customary industry terms and conditions, and it forms the basis for justifying the use of other than full and open competition contracting such as a non-competitive sole-source contract. Of the 39 fiscal year 2002 awards processed under negotiated contract or simplified acquisition procedures, 11 awards totaling \$3,036,650 were not supported by adequate market research as defined by NIST's policies and procedures.² Insufficient market research was a contributing factor for the poor justifications for contracts processed under other than full and open competition procedures identified in our review. Market research for fiscal year 2004 awards processed under the same procedures was adequate. (See page 11.)

Contract actions are often not subjected to required legal review and, when done, legal comments are not always addressed. Department Administrative Order (DAO) 208-5 requires

² NIST's policies requires the requesting office to prepare a market research report that includes background details on the acquisition, the agency's needs, the required schedule for delivery or period of performance, a list of potential suppliers, the sources contacted and information obtained, customary industry terms and conditions, and the methodology for obtaining the information.

the Department's Office of General Counsel, Contract Law Division, to review the legality of proposed contract awards including, among other things, negotiated procurements that have a contract life-cycle expenditure expected to exceed \$250,000, and procurements using less than full and open competition expected to exceed \$100,000. Although the General Services Administration's Federal Supply Schedule orders and orders placed against indefinite delivery or indefinite quantity contracts are not specifically mentioned in DAO 208-5, they pose monetary and performance risks to the government. GSA schedule contracts are general contracts lacking specificity where the order defines the requirements such as in orders for services. Indefinite type contracts do not procure or specify a firm quantity of supplies or services but set a minimum and a maximum order amount that do not always provide an incentive to contain costs. We therefore applied the legal review criteria to these contracts and orders in our sample, and the Contract Law Division attorneys agreed with our methodology. We found 37 instances amounting to \$23.7 million, including 28 in fiscal year 2002 and 9 in fiscal year 2004, where contracts that should have been submitted for legal review were not. Of this amount there were 10 orders amounting to \$5.5 million placed against blanket purchase authorizations or indefinite delivery and indefinite quantity contracts.³ We also found that when legal comments were received, contract files often did not contain evidence of how or if the legal points were resolved. The government's interests may not be protected without adequate legal review. (See page 12.)

Methods needed for conducting and documenting past performance reviews when evaluating offers. The 1994 Federal Acquisition Streamlining Act states that contracting officials should consider a potential contractor's past performance as an indicator of its likely performance under a new arrangement. The Federal Acquisition Regulation requires consideration of past performance for negotiated procurements expected to exceed \$100,000, and for acquisition of commercial items. According to the regulation, past performance is also a key consideration in making best value selections under simplified acquisition procedures and when making purchases off the Federal Supply Schedules. Neither the Department nor NIST has specific guidelines for conducting and documenting past performance reviews when evaluating offers. We found that NIST does not always use past performance in the evaluation process when making awards. When it does, its methods for documenting and analyzing the information are inconsistent leaving the quality of the reviews dependent on the expertise of the technical review teams and contracting staff responsible for each contract awarded. (See page 15.)

Basis for government estimates needs to be established. The Federal Acquisition Regulation requires agencies to prepare their own, independent estimate of the cost of a proposed acquisition. Neither the Department nor NIST has specific guidance on how to prepare these estimates. Though the contracts in our sample contained government estimates, all but the construction-type requirements did not document the basis for the estimate. Purchase orders for commercial items did not always note how the estimate was derived--whether it was from a catalog or from market research, for example. In 14 instances, totaling \$3,245,910, government estimates accompanying purchase requests for supplies or services were exactly the same as the amount of the contractor's proposal. (See page 16.)

³ FAR Subpart 13.303 states that a blanket purchase agreement is a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply. FAR Subpart 16.501-1 states that indefinite delivery and indefinite quantity contracts do not procure or specify a firm quantity and provide for the issuance of orders for the delivery of supplies during the period of the contract.

Unauthorized procurements⁴ should be eliminated. From our discussions with team leaders in AMD and a review of the unauthorized procurement log, we identified a number of unauthorized procurements that were approved, or ratified, after the fact. In fiscal year 2002, NIST processed 46 unauthorized procurement actions based on submitted purchase orders, and in fiscal year 2004, there were 28 such actions—a total of 74 unauthorized procurement actions. Additionally, the division issued orders in fiscal year 2002 against blanket purchase agreements for services where the period of performance was three months prior to the effective date of the agreements and where the required legal review was not conducted. Although the contracting officer was aware of these situations, there was nothing in the file to document that the contracting officer had given the contractor any instructions regarding performance or payment. Unauthorized procurements leave the government vulnerable and can result in obligating more funds than available. (See page 17.)

A system for ensuring acquisition staff are trained needs to be established. The Department of Commerce Acquisition Career Management Program, outlined in Commerce Acquisition Manual Section 1301.6, implements the Office of Federal Procurement Policy's Policy Letter on Procurement System Education, Training and Experience Requirements for Acquisition Personnel. The program was designed to provide Commerce acquisition employees with the knowledge, skills, and abilities to do their work. NIST does not have a formal policy for managing, documenting, and reporting training that meets federal requirements. Although contracting personnel are taking training, there is no system in place to provide assurance that staff is completing the required training. (See page 19.)

To resolve the issues we identified in our audit, we made the following recommendations on page 20:

We recommend that the NIST Director require that the Director, Acquisition Management Division, take the following actions to improve agency procurement activities.

1. Compete acquisitions whenever possible to fully comply with the Competition in Contracting Act of 1984, and provide training to program officials and contracting staff regarding the use of competition.
2. Minimize sole-source procurements by ensuring that the required justification form, CD-492, *Justification for Other Than Full and Open Competition*, is completed and adequately documented, and provide training to program officials on how to adequately justify a procurement when using other than full and open competition.
3. Revise market research guidelines and provide training to help program personnel conduct effective market analysis.

⁴ An unauthorized commitment, as defined in Federal Acquisition Regulation, Subpart 1.602-3, is an agreement that is not binding solely because the government representative who made it lacked the authority to enter into the agreement on the government's behalf. Ratification is the act of approving an unauthorized commitment of funds by an official who has the authority to do so.

4. Work with the Office of General Counsel, Contract Law Division to (1) consider developing legal review criteria for General Services Administration's Federal Supply Schedule orders, and orders placed on Blanket Purchase and Ordering Agreements, and on Indefinite Delivery or Indefinite Quantity contracts; and (2) develop and implement a policy for resolving legal comments on contract actions.
5. Develop procedures for conducting and documenting past performance reviews, using the Office of Federal Procurement Policy's guidebook as a reference and provide training to program officials and contracting staff.
6. Develop procedures for preparing independent government estimates for the various types of acquisitions and provide training to program officials and contracting staff.
7. Establish and implement an aggressive campaign to eliminate unauthorized procurement actions through training sessions, communication efforts, and establishing responsibility.
8. Develop procedures for managing, documenting, and verifying training for acquisition staff to ensure compliance with requirements detailed in Section 1301.6 of the Commerce Acquisition Manual.

We also recommend that the NIST Director ensure that program managers actively support AMD's initiatives to improve agency procurement activities, and that NIST managers adequately prepare annual spending plans for fiscal year 2005 and quarterly updates to help the agency provide more responsive, effective, and efficient acquisition services and ensure compliance with federal regulations.

INTRODUCTION

Founded in 1901, the National Institute of Standards and Technology (NIST) is part of the Commerce Department's Technology Administration and serves as the federal focal point for researching and developing measurements, standards, and related technologies. For fiscal year 2004, NIST resources totaled approximately \$771 million—\$609 million from appropriations, \$122 million from work performed for other federal agencies, and \$40 million from user fees. NIST has approximately 3,000 employees located in Gaithersburg, Maryland, and Boulder, Colorado.

NIST relies on contracts and vendors to supply many of the goods and services it needs to fulfill its mission, spending millions of dollars annually on procurements ranging from basic office equipment to specialized scientific instruments and services. In fiscal year 2004, NIST spent more than \$276 million—36 percent of its total resources—on products and services. Within NIST, under the chief financial officer, the Acquisition Management Division (AMD) is responsible for managing, overseeing, and supporting NIST procurement operations, including contracts and simplified acquisitions or other bankcard purchases, and for providing acquisition advice to program staff involved in the procurement process.

AMD also is responsible for ensuring that all acquisitions of goods and services are in compliance with various federal laws, regulations, and policies governing procurement operations and procedures. The Federal Acquisition Regulation establishes uniform policies and procedures that cover all aspects of procurement and is used by executive agencies. The Office of Federal Procurement Policy in the Office of Management and Budget, established by Congress in 1974, provides, among other things, government-wide procurement policies for agencies to follow in complying with the Federal Acquisition Regulation.

Congress passed the Competition in Contracting Act of 1984 to increase competition and limit noncompetitive contracting. The act, which applies to all solicitations made after March 31, 1985, and the Federal Acquisition Regulation require federal agencies to:

- Make noncompetitive awards under only seven specified circumstances (detailed on page 7 of this report).
- Justify, certify, and approve in writing all noncompetitive decisions.
- Plan procurements to allow maximum time for obtaining competitive offers.
- Search the marketplace and, at a minimum, publish notices of proposed noncompetitive contract awards in the Commerce Business Daily, specifying needs and soliciting inquiries.
- Designate advocates for competition.

Other reform initiatives followed, including the Federal Acquisition Streamlining Act of 1994 and the Clinger-Cohen Act of 1996. These were intended to reduce the time and money spent purchasing needed goods and services by replacing cost reimbursement contracts with firm fixed-price performance-based contracts, promoting greater use of commercially available products, and encouraging simplified acquisition methods such as credit card purchases of supplies and services valued up to \$100,000. Additionally, in 2003, the president issued an initiative to promote access of small business to government contracts through full and open competitive procedures. The initiatives reduced the types of management reviews and oversight required for individual contracts and gave contracting officers more latitude to determine the acquisition method and the amount of documentation needed to justify their decisions.

While these streamlined acquisition processes have helped contracting offices serve their customers—program staff—more efficiently, the processes may expose agencies to mismanagement and abuse. Basic acquisition principles—careful planning, appropriate levels of competition, skillful negotiations, well-structured contracts, and effective contract management—must be followed to ensure taxpayer dollars are wisely spent and laws and regulations followed.

The Government Accountability Office and the Office of Federal Procurement Policy have recently identified problems with the government's streamlined procurement process, including questionable and even illegal purchases made with government credit cards, lack of competition in the award of government contracts, and contracts that do not focus on results. Past OIG work found problems with the Department's implementation of performance-based contracting; insufficient contract administration; and inadequately trained contracting officers and technical representatives.¹

¹ OIG Report ATL-12319-1-0001, NWS National Data Buoy Center's Evaluation of Technical Services Contract Was Inadequate, dated 3/28/2001; and OIG Inspection Report OSE-15676, Acquisition of NEXRAD Transition Power Source Marred by Management, Technical, and Contractual Problems, dated September 2003.

OBJECTIVES, SCOPE, AND METHODOLOGY

We sought to determine whether NIST (1) has effective procurement policies and procedures that comply with laws and regulations, (2) is effectively and efficiently processing procurements in accordance with those policies and procedures, and (3) has an adequately trained acquisition workforce to process procurements. To accomplish these objectives, we

- Examined NIST’s policies and procedures for processing and managing procurement actions in effect at the time of our review, as well as relevant federal laws, regulations, and guidelines, including the Federal Acquisition Regulation.
- Analyzed a random, judgmental sample of approximately one-third of NIST’s contract awards (new contracts and task orders) exceeding \$100,000 from fiscal year 2002 and from January through June, fiscal year 2004.² For fiscal year 2002, from a universe of 185 awards totaling \$63,750,103, we selected 72 awards in the amount of \$48,163,920 for review. For fiscal year 2004, from a universe of 58 awards totaling \$119,953,625, we selected 20 contracts in the amount of \$29,074,878 for review. There were a total of 92 contracts selected for review. The sample included negotiated contract awards and awards made under Section 8(a)³ of the Small Business Act, the General Services Administration’s Federal Supply Schedules, and simplified acquisition procedures.
- Examined individual contract actions equal to or less than \$100,000 where the total actions awarded per vendor during the period January through June 2004 exceeded \$100,000. There were nine such vendors with awards totaling \$2,748,273.
- Looked for evidence of “split acquisitions”—that is instances in which NIST broke a single acquisition totaling more than \$100,000 into two or more smaller purchases less than \$100,000 to circumvent spending limits.
- Reviewed fiscal year 2004 training records for contracting personnel in the Acquisition Management Division and any NIST policies and procedures to manage training, as well as the Commerce Acquisition Manual, Chapter 1301.6.
- Identified the contracting officer representatives (COR) assigned to the fiscal year 2004 sampled contract awards and reviewed COR training records.

² We selected samples from the two different time periods because management of the Acquisition Management Division changed at the end of fiscal year 2003. Our sample was designed to allow for changes in operating practices instituted by the new management to be reflected in our audit result. During the audit, we coordinated with the Director of Acquisition Management Division, as well as the Acting Director while the Director was out; however, throughout the report, we have used only the term “Director.”

³ The 8(a) program is designed to help socially and economically disadvantaged individuals obtain a share of the federal procurement dollar. The title “8(a)” derives from Section 8(a) of the Small Business Act of 1953, as amended. Through this program, the government enters into contracts with the [Small Business Administration \(SBA\)](#), and SBA subcontracts the work to an eligible 8(a) firm, a three-party contract that contains the signature an SBA official, SBA’s contractor and the agency’s contracting officer. For each requirement identified by the agency to be fulfilled via the 8(a) program, the contracting officer must prepare an offering letter to SBA.

We interviewed NIST's AMD director, managers, and contracting personnel, as well as program officials who request and manage procurements. We also interviewed attorneys in the Department's Office of General Counsel, Contract Law Division⁴ and officials in the Department of Commerce's Office of Acquisition Management. During the course of our review, procurement personnel reported that the need for approval (i.e., ratification) of unauthorized purchases is a frequent problem at NIST, and we performed limited procedures to confirm whether such a problem does exist.

We evaluated NIST's internal controls related to processing and managing procurements and found them for the most part to be adequate. Any exceptions are described in detail in the body of the report. During the review, we were provided computer-generated data for contracts awarded during fiscal year 2002 and fiscal year 2004 from which we selected our samples. We verified the data's reliability by comparing the data fields from NIST's computer-generated report on the fiscal years 2002 and 2004 contracts in our audit sample against the actual contract documents. We concluded that the computer-generated data were reliable.

We conducted our audit from February 2004 through January 2005 at the NIST campus in Gaithersburg, Maryland, performing our work in accordance with generally accepted government auditing standards, under authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13, dated May 22, 1980, as amended.

⁴ Throughout this report, references to the Office of General Counsel mean the Contract Law Division within the Department of Commerce's Office of General Counsel.

FINDINGS AND RECOMMENDATIONS

Our audit revealed that although NIST's acquisition policies and procedures comply with laws and regulations, do not conflict with Department guidance, and generally meet the needs of the agency's acquisition team, NIST does not always properly apply these policies and procedures when acquiring goods and services. Additionally, these procedures require some modifications. Specifically, we found a lack of competitive contracting, missing or inadequately documented justifications for sole-source procurements, a lack of procurement planning, inadequate market research, failure to seek legal review of contract agreements, insufficient documentation of contractors' past performance, and ill-defined procedures for developing independent government price estimates. We also found that unauthorized procurements pose a serious problem as they must be ratified after the fact. Further, although NIST does have an adequate system for tracking and managing the contracting officers' representatives' training, the agency does not have a system for ensuring that acquisition staff are meeting all training requirements. Our review did not reveal any situations where NIST was splitting requirements into multiple awards and circumventing procurement policy.⁵

NIST'S PROCUREMENT GUIDANCE

Subchapter 2.03 of NIST's Administrative Manual contains the agency's policies and procedures for conducting acquisitions. The Acquisition Management Division recently updated the subchapter to be consistent with current acquisition policies and procedures and with guidance in NIST's Table of Services (TOS) posted on its intranet site (<http://www-i.nist.gov/admin>). The TOS is a user friendly list of services with hyperlinks to a myriad of acquisition topics important to all members of the acquisition team: procurement forms, competition requirements, sole source procurements, service contracting, technical review panels, small business set asides, and other topics. (See Appendix I.) It also contains links to useful training and program information for contracting officer's representatives.

We noted that the agency has improved some acquisition practices over the two years we reviewed, and AMD has taken steps to ensure acquisition team members understand their responsibilities in the procurement process by providing guidance to new managers and program officers. However, AMD needs the active participation and cooperation of NIST program managers. Therefore, it is important that NIST's leadership ensures that program managers actively support AMD's initiatives to improve agency procurement activities. Additionally, we believe NIST needs to further enhance acquisition guidance to provide information on conducting market research, using a contractor's past performance as a part of the selection process, developing independent government estimates, updating its internal legal review criteria, and establishing policies to track and monitor procurement staff training.

I. GREATER EMPHASIS NEEDED ON PROMOTING FULL AND OPEN COMPETITION

Federal Acquisition Regulation, Part 6 requires contracting officers to promote and provide for full and open competition in awarding government contracts and to adequately justify noncompetitive awards. The Competition in Contracting Act of 1984 requires federal agencies to increase competition and limit noncompetitive solicitations. In 2002, the President reinforced the act by issuing an initiative calling for more competition in government contracting. NIST's

⁵ For example, simplified acquisition procedures (applicable for purchase up to \$100,000 and for commercial items up to \$5,000,000 including options, Federal Acquisition Regulation, Subpart 13), legal reviews, and certain clearances.

internal guidance requires competition for open market procurements greater than \$100,000. The guidance provides that orders over \$2,500 made under the General Services Administration’s Federal Supply Schedules must be competed among at least three vendors.

Our review disclosed that although NIST has improved its use of full and open competition in contracting, it may be missing out on the savings and other benefits that competition promotes because of problems with the use of sole-source procurements, a lack of acquisition planning, and the methods used to procure consulting services. From interviews with program and contracting staff and review of contract files, we determined that program staff was not always open to competition, preferring instead to work with contractors they knew or had dealt with previously. Further, procurement staff often did not question noncompetitive solicitations or offer alternatives to encourage competition. We reviewed 92 contract actions that exceeded \$100,000 from fiscal years 2002 and 2004 (table 1) and found that 55 percent of fiscal year 2004 contracts we reviewed were awarded based on full and open competition procedures, compared with 39 percent in fiscal year 2002.

Table 1: Distribution of Audit Sample

Fiscal Year	Sampled Contracts ⁶		Contracts Competed				Contracts Not Competed			
	Number	Dollars	Number	Percent	Dollars	Percent	Number	Percent	Dollars	Percent
2002	72	48.1M	28	39	30.2M	63	44	61	17.9M	37
2004	20	29.1M	11	55	26.3M	90	9	45	2.8M	10
Totals	92	77.2M	39	42	56.5M	73	53	58	20.7M	27

Though NIST’s track record has clearly improved over time, efforts should continue to increase the use of full and open competition procedures. AMD is working with program managers to encourage competitive procurements, but it must emphasize the potential benefits of full and open competition to ensure that competition occurs whenever possible, acquisitions are adequately planned, and noncompetitive acquisitions are sufficiently justified. Outreach and training provided by AMD to customers and support from NIST’s key managers are essential to expanding the use of competition.

Justifications for Other Than Full and Open Competition Need to Be Improved

The Department of Commerce is authorized by 41 USC 253(c) to contract without providing for full and open competition in certain situations; however, procurements processed under these exceptions must be supported by a detailed written justification that cites the specific authority. Federal Acquisition Regulation, Part 6 identifies seven statutory authorities for contracting without full and open competition, as follows:

- The product or service is available from only one responsible source.

⁶ Audit universe for fiscal year 2002 was 185 contract actions totaling \$63,750,103. Audit universe for fiscal year 2004, January through June, was 58 contract actions totaling \$119,953,625

- The agency's need could not have been anticipated and is of such unusual and compelling urgency that the agency will be seriously injured if the award is not made quickly.
- A particular source is needed to maintain a facility in case of national emergency, to achieve industrial mobilization, or establish or maintain essential engineering, research, or development capability.
- Competition is precluded by the terms of an international agreement or treaty with a foreign government or international organization.
- A particular source is mandated by statute (e.g. Federal Prison Industries, Committee for Purchase from People Who Are Blind or Severely Disabled).
- Disclosure of an agency's needs would compromise national security.
- The head of an agency determines that competition is not in the public's best interest and gives Congress 30 days' written notice.

To complement Federal Acquisition Regulation, Part 6, NIST guidance requires that form CD-492—*Justification for Other than Full and Open Competition*—be prepared for all competition-restricted procurements. This includes open market procurements awarded under negotiated contract or simplified acquisition procedures, as well as all sole-source orders placed under Federal Supply Schedules. Awards to SBA “8a” contractors are made under specific statutory authority and do not require a CD-492.

The CD-492 must provide the following information: (1) the authorized exception from competition; (2) descriptions of the supplies or services, the proposed contractor's unique qualifications, efforts made to ensure that offers are solicited from as many potential sources as practicable, and the market survey; (3) the actions the agency plans or has taken to overcome any barriers to competition; and (4) the contracting officer's certification that the justification is accurate and complete.

The noncompetitive contracts we reviewed were not always supported by adequately documented CD-492s or the CD-492s were missing. We sampled 92 contract actions, of which 53 were awarded using other than full and open competition procedures. All 53 of these actions were sole-source contracts. Thirty-five of these—all made in fiscal year 2002—required CD-492s, but in 24 instances the CD-492 justification forms prepared to support the sole source procurements were inadequately documented, and in two cases, the CD-492s were missing from the contract file. (See table 2.) We did not find problems with the support for the FY 2004 sole source procurements in our sample. However, Office of General Counsel advised that they encountered problems in 2004 when reviewing sole source procurements where the CD-492, *Justification for Other than Full and Open Competition*, did not contain sufficient documentation to justify the use of other than full and open competition procedures or where a CD-492 was not prepared when one was needed. They provided us with copies of these actions to support their position. Although these actions were outside of our sample, we reviewed the actions and agreed with their conclusions.

Table 2: INADEQUATE JUSTIFICATIONS (Fiscal Year 2002)					
Award Methodology	Total Number Requiring CD-492	Total Value Requiring CD-492	Number Deficient or Missing	Dollar Value of Deficient CD-492	Percent Deficient
Federal Supply Schedule	17	\$4,578,715	16	\$4,474,850	94
Simplified Acquisition/Negotiated	18	4,636,221	10	2,212,045	56
Total	35	\$9,214,936	26	\$6,686,895	74

Of the 53 contracts awarded using other than full and open competition, three were awarded based on unusual and compelling urgency; 12 were authorized or required by statute,⁷ seven did not indicate the exception under which they were awarded, one was a task order that was not subject to the justification requirements, and 30 (67 percent) were awarded under the authority that only one responsible source could satisfy agency requirements. The “one responsible source” authority is appropriate when impediments to full and open competition exist, even though there may be more than one potential source. The single, most important component of justifications citing this authority is comprehensive market research to validate the specified source’s unique capabilities. Based on this research, the justification must thoroughly describe the qualifications that render the designated source the only appropriate supplier. For the awards we reviewed, the “one responsible source” authority was generally not adequately supported on the CD-492.⁸ For example:

- The CD-492 for a \$150,000 services contract included the following three-sentence justification: “This is the only known source for this activity. The XXX has established existing relationships with all 50 states. Therefore, to our knowledge, the XXX is the only group that can assist states by offering assistance at the highest levels of state government.” There was no evidence of any market research to support the statement.
- For a \$135,000 award for services to provide workshops, the CD-492 provided information as to why the chosen contractor could do a good job, but never addressed why a market survey was not conducted to determine whether another contractor might be equally capable.

AMD managers told us that they are emphasizing the importance of competition when working with program staff and are reviewing sole-source procurement requests and accompanying justifications to determine whether competition is possible. Customers confirmed during interviews that the contracting staff questions sole-source procurements, will normally ask for additional supporting information, and will work to structure requirements to make competition possible.

⁷ This number includes 11 contracts that were awarded under the Small Business Administration 8(a) program, and 1 awarded to the Federal Prison Industries (UNICOR), which is a mandatory source per Federal Acquisition Regulation, Subpart 8.6.

⁸ See page 18 for two examples of the use of “one responsible source” as the authority to make sole source awards for copier and telephone services.

The contracting officer is responsible for promoting and providing for full and open competition, unless any of the seven authorized exceptions apply. Should a sole-source procurement be warranted, contracting officers must work with program officials to ensure compliance with existing guidance, and prepare and sign a CD-492 documenting the exception and attesting to the adequacy of the justification. Training sessions should be provided to program officials to enable them to prepare a well-supported justification. A well-supported, valid CD-492 is NIST's assurance that it is in compliance with the Competition in Contracting Act and is valuable in the government's defense against a company protesting a NIST contract award.

Improved Acquisition Planning Needed

One hindrance to competition has been a general lack of procurement planning even though the Competition in Contracting Act and the Federal Acquisition Regulation require it. Subpart 7.102 of the regulation requires that agencies perform acquisition planning for all procurements in order to promote acquisition of commercial items and to promote competition to the maximum extent practicable to ensure that the government meets its needs in the most effective, economical, and timely manner. Although the Commerce Acquisition Manual requires formal, detailed acquisition plans for procurements estimated to exceed \$5,000,000, it also requires planning for all other acquisitions with the degree determined by the size, scope and complexity of the acquisition. Additionally, DAO 208-15 states that effective planning (1) provides lead time to allow for a thorough search for all potential contractors, (2) distributes procurement activity and actions more evenly over the fiscal year, (3) consolidates similar product or service requirements for multiple customers or multiple procurements and (4) enables agencies to allocate procurement funds more precisely and effectively.

We determined from our review of contracts and discussions with AMD staff that NIST has not performed adequate procurement planning. During our discussions with the Director of AMD, she stated that she has had problems getting fairly basic planning information from the program offices. She attributed this to her customers generally not understanding what encompasses good acquisition planning as they are very involved in the science and less attentive to administrative details. It is possible that the 53 contracts from our sample of 92 processed under other than full and open competition procedures could have been significantly reduced had sufficient acquisition planning taken place at NIST. Planning would have allowed time to conduct a thorough search for all potential contractors in order to identify whether other possible sources were available to create competition. Additionally, improved planning could allow procuring offices sufficient time to announce procurements, and to gather and evaluate the competitive offers.

NIST's chief financial officer issued Administrative Bulletin No. 04-03 on February 9, 2004, defining the acquisition submission guidelines for program offices to use when scheduling their procurement actions for the fiscal year. This was done in an effort to ensure that sufficient time was allowed for processing procurements. However, the directive did not require offices to prepare an acquisition plan outlining projected procurement requirements and a spending plan for AMD.

NIST has recognized the importance of acquisition planning and has taken actions to make improvements. On December 30, 2004, NIST's CFO asked agency managers to prepare annual spending plans for fiscal year 2005, with quarterly updates to help the agency provide more responsive, effective, and efficient acquisition services and ensure compliance with federal regulations. The spending plan requires managers to:

- Identify projected procurement requirements.
- More effectively utilize staffing and resources by submitting requirements proportionately throughout the fiscal year.
- Significantly decrease the number and dollar amount of unauthorized procurements.
- Facilitate contract consolidation and more favorable contract arrangements, thereby leveraging NIST's buying power and minimizing administrative processing costs.

Projections of upcoming acquisition requirements will enable AMD staff and program managers to facilitate opportunities for competition and have adequate time to process the acquisition. NIST needs to ensure that program offices understand the need to communicate openly with AMD and that AMD coordinates with NIST managers to make sure that the plans contain useful data and accurate projections of procurement requirements. AMD should use the data contained in the plans to improve the procurement process and increase competition.

Competition Needed in Contracting for Consulting Services

During our review, we were informed by an AMD manager that NIST has historically contracted on a sole-source basis for scientific and technical expertise with leading scientific experts including former NIST employees. In an effort to appropriately address NIST's scientific consultant needs, AMD began contracting with a consulting firm under the 8(a) Small Business Administration program. AMD managers stated that the contractor was supposed to have an extensive listing of scientists available from which it would be able to identify qualified personnel when responding to NIST's task order requirements. NIST would then select a resource from the listing the contractor provided. However, this did not take place. During the review period, NIST issued 23 individual purchase orders to the firm. Additionally, NIST awarded a blanket ordering agreement (BOA)⁹ to the same consulting firm as a direct award, non-competitively, under the 8(a) program and awarded 7 task orders under the BOA. Of the total 30 orders placed with the contractor during the period, 17 purchase orders and all seven task orders specified a government-referred resource.¹⁰ In each of these instances, the contractor provided its proposal with the government-referred resource identified as the contractor's key personnel.

⁹ A basic ordering agreement may be used when the same services are needed on a recurring basis. Its purpose is to expedite future contracting actions by performing the initial steps in the contractor selection process before a particular service is needed.

¹⁰ A government-referred resource is personnel NIST specifies to the contractor as being capable to accomplish the task.

NIST stated that the consulting firm would not be directed to hire specific personnel to work under a task order, but that only a suggested source would be provided with the contractor being responsible to find the qualified candidates. However, as noted previously, in 24 of 30 orders, the contractor's key personnel were the government-referred resources identified by NIST with no additional candidates identified by the contractor.

The Office of General Counsel's attorney who reviewed the awarding of the BOA expressed concerns regarding the award of the BOA and these comments are part of the BOA contract file. The attorney raises issues regarding NIST designating resources, the possible creation of personal services relationships, and the use of the contractor as primarily a recruiting and labor placement agency. The Office of General Counsel's attorney further stated that the contractor did not have demonstrated scientific and technical expertise to supervise the day-to-day work of the personnel it placed at NIST as, from a review of the company's website, the company had experience primarily with information technology and specialized engineering services. As a result, the effective supervision of the consultants would be by NIST and not by the contractor.

In addition to the issues raised by the Office of General Counsel, we are concerned that NIST did not take the necessary steps to ensure adequate competition as only one BOA was awarded, noncompetitively, and the task orders were awarded based on the resource identified by the government. Additionally, when issuing task orders, the contractor has not provided a listing of qualified personnel from which NIST may make a selection but rather has provided NIST with the personnel that NIST has specifically identified as the government-referred source—eliminating the contractor's need to identify any additional sources that could meet the requirements.

The AMD director stated that since our examination of the consulting firm orders, NIST has prepared an acquisition plan to replace the current BOA, and the Department's acquisition review board is reviewing the plan. The Director stated that the current BOA will be replaced with one or more BOAs and that the process will be conducted using full and open competition. Until the new contract is in place, the division director stated that the existing consulting firm is being used and the firm has hired a highly qualified employee to manage the task order assignments. Although we did not perform a complete audit of the manner in which NIST contracts for consulting services, the Office of Inspector General reserves the right to address this area in a future review.

II. PROCUREMENT PROCESSING PRACTICES NEED IMPROVEMENT

Program Officials Need to Conduct Better Market Research

Federal Acquisition Regulation, Part 10 expressly requires market research as an initial step in the acquisition process for all contracts in excess of \$100,000. Agencies use market research to determine if there are sources or commercial items available that can satisfy their requirements, or can be modified to meet those requirements. Such research is critical to how the contracting officer will process an acquisition or for justifying the decision to limit or forgo competition.

For example, if research establishes that suitable commercial items or services are available, the policies and procedures at Part 12¹¹ of the regulation must be followed.

NIST program officials—normally acting as contracting officer’s representatives—are responsible for conducting market research and including their findings in the procurement package submitted to AMD.¹² However, we found that of the 39 fiscal year 2002 awards processed under negotiated contract or simplified acquisition procedures, 11 awards totaling \$3,036,650 were not supported by adequate market research. We did not find problems with the market research conducted in the 20 contract files we reviewed from FY 2004.

AMD’s Table of Services (see Appendix I) links to a market research report form, on which contracting staff are to document their research findings, including background details on the acquisition, the agency’s needs, the required schedule for delivery or period of performance, a list of potential suppliers, the sources contacted and information obtained, customary industry terms and conditions, and the methodology for obtaining the information. However, the contract files we reviewed frequently did not contain the required information. AMD customers told us that they were confused by the market research requirement, and by the report form and associated instructions. They were also unsure about how to obtain some of the information required on the report form. We discussed these problems with the division director, who stated that she is aware of the difficulties, is updating the instructions and report form, and will provide training to the program staff.

Contracts Need Required Legal Review

Department Administrative Order 208-5 establishes review and approval requirements applicable to the exercise of contracting authority, including legal review by the Office of General Counsel.¹³ Legal review of proposed contract awards is required for, among other things:

- Negotiated procurements for which the contract life-cycle expenditure is expected to exceed \$250,000. For indefinite delivery and indefinite quantity¹⁴ contracts, all solicitations and awards for which the contract life-cycle maximum amount exceeds \$250,000, and for requirements contracts with life-cycle estimates above \$250,000.
- Contracts using less than full and open competition, including SBA 8(a) contracts for which the expected award exceeds \$100,000.

¹¹ Federal Acquisition Regulation, Part 12 prescribes the policies and procedures unique to the acquisition of commercial items—policies more closely resembling those of the commercial marketplace.

¹² Generally, the detailed market research needed for negotiated contracts is not required for contracts awarded using the Federal Supply Schedules or under the Small Business Administration’s 8(a) program.

¹³ The Department’s Office of General Counsel, Contract Law Division, has posted the Department of Commerce Legal Review Thresholds on the Department’s web site at the location www.ogc.doc.gov/pdfs/LegalReviewThresholds1.pdf.

¹⁴ Federal Acquisition Regulation, Subpart 16.501 provides for three types of indefinite-delivery contracts: definite-quantity, indefinite quantity, and requirements contracts. These contracts are used when a need has been identified but the precise quantity and delivery requirements are not known at time of award. Orders known as task or delivery orders are placed under the contracts.

The Administrative Order does not expressly require legal review of GSA Federal Supply Schedule orders. Additionally, even though indefinite delivery and indefinite quantity contracts meeting specific criteria are required to be reviewed by the Administrative Order, orders issued against these contracts are not expressly subject to legal review. However, these orders can pose monetary and performance risks to the government.¹⁵ GSA supply schedule contracts are general contracts lacking specificity where the order defines the requirements such as in orders for services. Indefinite type contracts do not procure or specify a firm quantity of supplies or services but set a minimum and a maximum order amount that do not always provide an incentive to contain costs. As a result, we applied the criteria to these contracts and orders in our sample. We discussed our methodology with attorneys from the Contract Law Division of the Office of General Counsel. The attorneys agreed that these procurement actions do pose a potential risk to the government and that consideration should be given to amending NIST's internal legal review guidelines to specifically include Federal Supply Schedule and indefinite delivery and indefinite quantity orders.

We found 37 instances, including 28 in fiscal year 2002 and 9 in fiscal year 2004, where contracts that should have been submitted for legal review were not. Of this amount there were 10 orders amounting to \$5.5 million placed against blanket purchase authorizations or indefinite delivery and indefinite quantity contracts. We found that of the fiscal year 2004 competitively awarded contracts, five purchase orders were issued under the Federal Supply Schedules. The orders were for services ranging from \$210,000 (plus four unpriced option years that could increase the total price by \$840,000 based on the initial year's cost), up to \$524,313. In the sampled actions from fiscal year 2002, there were three delivery orders for services placed against indefinite delivery and indefinite quantity contracts that had been awarded competitively under simplified acquisition or negotiated contracting procedures totaling \$271,200, \$440,000 and \$768,957. The \$440,000 order was modified and grew to \$734,000 within 4 months. None of these contract actions were referred for legal review, and, as a result, the government's interests may not have been protected. Although NIST has made improvements in referring contract actions for legal review, more remains to be done.

¹⁵ See pages 17 and 18 for two examples of orders placed against Federal Supply Schedules that involved questionable performance periods and large contract amounts where legal reviews were not obtained.

Table 3: Legal Review Referrals						
Acquisition Method	Completed Requiring Review	Completed – No Review Conducted	Noncompetitive Requiring Review	NonCompetitive but No Review Conducted	Total Requiring Review	Total Contracts With No Review Conducted
Federal Supply Schedules						
FY 2002: Number	4	4	18	15	22	19
FY 2002: Amount	\$12,085,086	\$12,085,086	\$6,256,715	\$5,298,407	\$18,341,801	\$17,383,493
FY 2004: Number	6	5	3	2	9	7
FY 2004: Amount	21,774,445	1,774,445	992,681	831,416	22,767,126	2,605,791
8a						
FY 2002: Number	1	1	7	2	8	3
FY 2002: Amount	425,248	425,248	6,935,947	514,487	7,361,195	939,735
FY 2004: Number	1	0	4	1	5	1
FY 2004: Amount	3,500,000	0	1,331,091	138,000	4,831,091	138,000
Mandatory Source						
FY 2002: Number	0	0	1	0	1	0
FY 2002: Amount	0	0	102,466	0	102,466	0
FY 2004: Number	0	0	0	0	0	0
FY 2004: Amount	0	0	0	0	0	0
Simplified/Negotiated						
FY 2002: Number	16	4	18	2	34	6
FY 2002: Amount	16,466,425	1,480,157	4,636,221	609,927	21,102,646	2,090,084
FY 2004: Number	1	1	2	0	3	1
FY 2004: Amount	512,563	512,563	455,486	0	968,049	512,563
Total by year:						
FY 2002: Number	21	9	44	19	65	28
FY 2002: Amount	28,976,759	13,990,491	17,931,349	6,422,821	46,908,108	20,413,312
FY 2004: Number	8	6	9	3	17	9
FY 2004: Amount	25,787,008	2,287,008	2,779,258	969,346	28,566,266	3,256,354
Total: Number	29	15	53	22	82	37
Total: Amount	\$54,763,767	\$16,277,499	\$20,710,607	\$7,392,167	\$75,474,374	\$23,669,666

Handling Legal Comments. NIST has no formal guidance for how contracting personnel should address legal comments on contract documents subject to review. In many instances, contracting staff responded to the legal comments in a memorandum prepared for the record and reviewed by the contracting officer. However, our review found the files rarely contained evidence of contracting staff working with commenting attorneys to resolve the issues identified in the legal review. Contracting staff should work with counsel to ensure that substantive legal issues are understood, addressed, and documented in the contract file.

We discussed the legal review thresholds and resolution of legal comments with the Department’s Office of General Counsel, Contracts Law Division attorneys who agreed Federal Supply Schedule orders and task or delivery orders should be included in the Department’s legal review threshold criteria and subject to legal review but that there may be insufficient staff to do the job. The attorneys also stated that discussions between the acquisition staff and the Office of General Counsel attorneys would be very beneficial, as, in many instances, they do not know how their comments are handled until after contract award. As a result of our discussions, AMD is working with the Office of General Counsel to update NIST’s internal guidance for legal review criteria for Federal Supply Schedule orders as well as orders made under blanket purchase agreements and indefinite delivery and indefinite quantity contracts. Additionally, the

division director was agreeable to develop and implement a policy for resolving legal comments on contract actions.

Past Performance Reviews Need to be Conducted and Documented

The 1994 Federal Acquisition Streamlining Act states that contracting officials should consider a potential contractor's past performance as an indicator of its likely performance under a new contract arrangement. Additionally, the Federal Acquisition Regulation requires that past performance be used for evaluating offers exceeding \$100,000 in negotiated procurements, and for acquisition of commercial items. Past performance is also a key consideration in making best value selections under simplified acquisition procedures and when making purchases off the Federal Supply Schedules. In essence, the contracting officer should consider past performance in evaluating offers for nearly all types of acquisitions. In May 2000, the Office of Federal Procurement Policy (OFPP) issued "Best Practices for Collecting and Using Current and Past Performance Information" to help agencies use past performance when evaluating offers.

Although the Federal Acquisition Regulation requires use of past performance when evaluating offers, it does not contain specific guidance as to how a technical review team or contracting staff is to evaluate or consider the contractor's past performance. Additionally, neither the Department nor NIST has provided such guidance. Our review showed that AMD does not always use past performance in the evaluation process when making awards. When it does, its methods for documenting and analyzing the information are inconsistent. Ultimately, the quality of past performance evaluations depends on the expertise of the technical review teams and contracting staff responsible for each contract awarded.

We found a total of 30 instances totaling \$22,870,123 (23 totaling \$20,915,536, from fiscal year 2002 and 7 totaling \$1,954,587 from fiscal year 2004), out of the 92 awards included in the sample, in which past performance reviews were deficient. For example, on a fiscal year 2002, 5-year competitive indefinite delivery and indefinite quantity multiple award contract with a life-cycle cost not to exceed \$3.75 million, past performance was one of five evaluation factors. AMD established a technical review team to evaluate the proposals. However, the technical review team members conducted their evaluations inconsistently: they did not gather the same information or obtain all the details needed to adequately assess each company's performance on other projects. The information gathered related more to the company's experience than to past performance. The Office of General Counsel reviewed the evaluation results and reached the same conclusion. It appears that the review team did not fully understand their responsibilities for evaluating past performance or how to carry out those responsibilities. Additionally, on a fiscal year 2004 contract in the amount of \$125,000 awarded under the simplified acquisition procedures, past performance was not considered during the award process. The solicitation did not specify that past performance would be a consideration when making the award; therefore, the technical evaluation team did not evaluate the past performance of the proposing contractors. To meet the intent of the 1994 Federal Acquisition Streamlining Act and ensure consistency in assessing past performance when evaluating offers, AMD should develop guidelines for conducting these reviews and documenting the findings. The guidelines should consider the best practices detailed in the OFPP publication. Additionally, training should be provided to

technical review team members and contracting staff regarding how to use past performance when evaluating offers.

Basis for Government Estimates Needs to Be Identified

Federal Acquisition Regulation, Part 7, requires agencies to plan ahead for acquisitions, which includes preparing their own, independent estimate of the cost, normally determined through market research. Independent government estimates provide contracting officers with an unbiased and realistic cost against which to evaluate and negotiate contract proposals. Agencies can use the estimates to reserve funds for a pending contract, to compare prices proposed by offerors, and to determine whether price quotes are reasonable. Cost estimates can be as simple as a quote from a catalog for common commercial products to more complex calculations that include direct labor costs, overhead rates, profit, etc., for a support service or construction project. As noted earlier, good market research is key to developing a strong, credible estimate. But whether using a complex calculation or catalog pricing to develop the government estimate, the contracting officer is responsible for determining and documenting its validity.

Neither the Department nor NIST has specific guidance on how program offices are to prepare independent government estimates. Though contracts in our sample contained government estimates, only those for construction-type requirements were accompanied by supporting documentation; estimates for other supplies and services were not. Purchase requests for commercial items did not always note how the estimate was derived—whether it was from a catalog or from market research—and AMD did not clarify the source of the estimate. A government estimate should be independent so that it may be used to assess the reasonableness of the contractor's quote or offer. As such, a quote from a contractor cannot constitute a government estimate. However, we found 14 instances totaling \$3,245,910 where the program office inserted a government estimate on the purchase request that was the same as an attached vendor quote. Of this number, there were 11 instances totaling \$2,699,840 where the government estimates accompanying purchase requests for supplies or services precisely matched the amount of the contractor's proposal and the resulting contract award. For example, a sole-source purchase request dated May 15, 2002, had a government estimate of \$200,000. Accompanying the purchase request was the contractor's quote, dated May 13, 2002, in the amount of \$200,000. The contract was subsequently awarded in the same amount, \$200,000, under simplified acquisition procedures. The file documentation revealed that the program office did not conduct market research and did not prepare an independent government cost estimate.

The independent government cost estimate is key to sound acquisition processes. However, NIST program staff does not have guidelines for preparing cost estimates, and, according to the AMD director, may therefore not know how to effectively develop them. Additionally, an Office of General Counsel, Contracts Law Division attorney has provided legal comments during review of contract actions that program officials be counseled that they are not to obtain formal quotes or proposals from vendors. AMD should issue guidelines for determining independent government estimates for both simple and complex acquisitions, and train program officials and contracting staff in how to apply the guidelines.

III. UNAUTHORIZED PROCUREMENTS SHOULD BE ELIMINATED

From our discussions with team leaders in AMD and our review of the unauthorized procurement log maintained by the division, we determined that unauthorized procurements were a problem at NIST, and that unnecessary division and Office of General Counsel time was used approving (i.e., ratifying) them after the fact. Ratification, as defined by Federal Acquisition Regulation, Subpart 1.602-3 and Commerce Acquisition Letter No. 30, is the act of approving an unauthorized commitment of funds by an official who has the authority to do so. An unauthorized commitment, as defined in the same subchapter of the regulation, is an agreement that is not binding solely because the government representative who made it lacked the authority to enter into the agreement on the government's behalf. Acquisition Letter No. 30 and NIST Administrative Manual Subchapter 2.03 require the responsible program official who made an unauthorized commitment to submit a memorandum explaining the circumstances and requesting approval to the Head of the Contracting Office, who will either approve or reject the ratification request. Every unauthorized procurement, regardless of the amount, is subject to this process and each action must receive legal review by the Office of General Counsel. According to Subpart 1.602-1, only contracting officers have authority to enter into contracts and the CO must ensure that all requirements of law, executive orders, regulations, and all other applicable procedures have been met.

In fiscal year 2002, NIST processed 46 unauthorized procurement actions totaling \$412,065 based on submitted purchase orders, and from January through September 2004, NIST processed 28 such actions totaling \$1,071,143—a total of 74 actions. Although the number of actions decreased in FY 2004, the dollar value of the actions increased by \$659,078. The majority of the individual unauthorized procurement actions were below \$100,000 and for various supplies and services including lecture fees, periodicals, maintenance services, and ad placements. We did identify four actions that exceeded \$100,000. One of these actions was included in our audit sample: this action, in the amount of \$205,904, was for renewal of web access to scientific publications that should have been in place by January 1, 2004. The service had been provided for 7 years and required annual reauthorization; however, the agency failed to renew prior to the December 31, 2003 expiration date. The web provider continued to make the web service available and the program office accepted the services, without alerting the contracting officer. The request for ratification to cover the unauthorized procurement of services provided beginning January 1, 2004, was forwarded to AMD on April 12, 2004—4 1/2 months after the expired contract ended. While agency personnel followed proper procedures to process this ratification, the unauthorized procurement could have been avoided if adequate planning and good management practices were in place at the program level.

From our audit sample, we also found several fiscal year 2002 orders placed under Federal Supply Schedules that were signed after the period of performance began, creating a situation where the government was receiving services without a valid contract in place. Additionally, the required legal review was not conducted. The questionable orders are as follows:

- **Copier equipment and maintenance services.** An order was placed against a blanket purchasing agreement on December 18, 2001, in the amount of \$374,763; however, the period of performance began October 1, 2001, almost 3 months prior to the award date.

The company provided services during this period. The blanket purchasing agreement, signed December 6, 2001, with a \$1.5 million ceiling over 5 years, was sole-source citing the “one responsible source” exception.

- **Telephone services.** An order was placed against a blanket purchasing agreement on January 25, 2002, in the amount of \$1,678,000, 3 months after the period of performance began on October 1, 2001. The company provided services during this period. The blanket purchasing agreement was sole-source, citing the “one responsible source” exception. It was signed on January 23, 2002, having a \$6,390,000 ceiling over a 5-year period.

We discussed these contract actions with the AMD director, who stated that she did not consider them to be unauthorized because the division knew about the requirements but did not process the orders in a timely manner. She added that, when the copier award was made, the division was trying to consolidate the agency’s requirements for copier maintenance and was awaiting revised Federal Supply Schedule pricing for the services, which was not available until several months into the new fiscal year. These factors slowed NIST’s ability to award a contract. The director stated that the contractor knew it was working without a contract, and that NIST made no payments to the contractor until the contract was signed. As for the phone system order, the division director stated that since the program office had submitted its purchase request on time, she did not consider this order to be unauthorized, even though the division had not processed it until after performance began.

We recognize the agency’s efforts to consolidate requirements; however, a signed purchase request from the program office does not create a contractual relationship. Additionally, the government cannot accept voluntary services from a contractor, and a purchase order should not be dated to include performance periods not initially covered by a signed agreement. Passive authorization may have existed in the above-mentioned orders where the contracting officer allowed the vendor to proceed; however, the services were unauthorized because no binding contractual agreement was in place prior to the services being provided. As a result, the 3-month period of performance prior to the effective date on each order is subject to ratification. The Office of General Counsel, Contract Law Division attorney agreed with this position.

We did not conduct an in-depth review of all ratifications that occurred in the timeframe covered by our audit; however, we did address the problem with AMD managers and the Office of General Counsel. The division managers stated that they discuss unauthorized procurements at various training sessions for program officials stressing that these procurements should not take place. Division managers stated that they have seen a decline in the number of ratification requests for fiscal year 2004; however, as noted above, the dollar value of the ratification requests increased. The division managers also stated that they discuss unauthorized procurements with the offices requesting the ratifications and ensure that all ratification packages are properly supported. However, the Office of General Counsel’s attorney stated that ratifications are a continuing problem, causing the office to direct its limited resources toward the required legal review of them and taking away time that could be devoted to the day-to-day contracting activities at NIST. Additionally, the attorney stated that a binding contractual

agreement must be in place in order for the government to accept supplies or services and that absent such an agreement, an unauthorized procurement exists subject to ratification procedures.

Unauthorized purchases and subsequent ratifications are serious matters and this practice should be discontinued immediately. NIST's leadership must ensure that all NIST employees are aware that unauthorized procurements are not acceptable and that, if appropriate, action is taken against employees who make unauthorized procurements. Additionally, AMD should be required to conduct regular training sessions for program personnel designed to further the decrease in unauthorized procurements and ratifications. The division should carefully review all ratification requests and ensure that they are properly supported. Additionally, the division should explore the use of contractual tools, such as options, modifications, and, if necessary, letter contracts to ensure that supplies and services provided by contractors to NIST are provided under legal contractual agreements.

IV. A SYSTEM FOR ENSURING ACQUISITION STAFF ARE TRAINED NEEDS TO BE ESTABLISHED

The Department of Commerce Acquisition Career Management Program, outlined in Commerce Acquisition Manual (Section 1301.6), implements the Office of Federal Procurement Policy's Policy Letter No. 97-01, dated September 12, 1997, on Procurement System Education, Training and Experience Requirements for Acquisition Personnel. The Career Management Program was designed to provide Commerce acquisition employees with the knowledge, skills, and abilities to do their work. It identifies critical skills, mandatory and recommended training courses associated with the contracting series GS-1102, -1105, and -1106, and requires designated points-of-contact at the bureaus to provide timely updates of completed training to the Department's Office of Acquisition Management.

The Career Management Program established three levels within the GS-1102 series and identified mandatory training for each level. After the mandatory training is completed, 40 hours of skills currency training and continuing education is required every 2 years. The Career Management Program established one level for the GS-1105 and -1106 series with 40 hours of mandatory training in simplified acquisitions and 24 hours of skills currency training and continuing education every 2 years.

The training point-of-contact in NIST's Acquisition Policy and Analysis Branch reports periodically to the Office of Acquisition Management on training completed by NIST contracting staff. She provided us with the log she maintains to record training completed by contracting staff during fiscal year 2004, from which she compiles the Acquisition Management Division's reports to the Department's Office of Acquisition Management. However, she stated that she is not provided copies of training certifications to support the information contained in the training log.

To verify the information in the training log, we met with the AMD director, who stated that supporting documentation other than the training log is not centrally maintained, but that the individuals attending training maintained their own training certificates. The division director instructed division staff to forward any training certificates they had to us. We compared the

training log information for 22 GS-1102 (contracting officer/specialist) and 8 GS-1105 (purchasing agent) to the certificates the staff provided, but were unable to fully verify any staff member's training because of discrepancies between training hours recorded and documentation provided. Additionally, several certificates did not show the name of the training facility or have the trainer's official signature, and there was no indication that supervisors had reviewed the certificates.

During discussions with the division director, we requested to see the written procedures used for managing the training program; however, the director reported that there are no written procedures in place. She stated that she is aware that the division is not following the provisions of the Commerce Administrative Manual 1301.6, part 2.3.2.3, which requires (1) training participants to submit proof of course completion to their supervisor, (2) supervisors to record this information, and (3) participants to maintain copies of all certificates for their records. However, the director stated that she would take action to comply with Section 1301.6 of the Commerce Administrative Manual.

While AMD staff is clearly attending training, there is no system in place to document and verify completed training. By establishing procedures for documenting and verifying training, NIST will be able to ensure that staff meets the training requirements.

Contracting Officer Representatives Training

During our review of the acquisition staff training, we also reviewed the training records for the contracting officer representatives assigned to the 20 contract awards from the fiscal year 2004 sample. Commerce Acquisition Manual 1301.67 sets out the training program for the Department's contracting officer representatives. NIST maintains a system independent of training for acquisition staff that tracks the training requirements and completed course work for the contracting officer representatives. We found that the representatives had received the training required by Commerce Administrative Manual Part 1301.67, and that NIST has an adequate system in place to identify and track the training.

Recommendations

We recommend that the NIST Director require that the Director, Acquisition Management Division, take the following actions to improve agency procurement activities.

1. Compete acquisitions whenever possible to fully comply with the Competition in Contracting Act of 1984, and provide training to program officials and contracting staff regarding the use of competition.
2. Minimize sole-source procurements by ensuring that the required justification form, CD-492, *Justification for Other Than Full and Open Competition*, is completed and adequately documented, and provide training to program officials on how to adequately justify a procurement when using other than full and open competition.

3. Revise market research guidelines and provide training to help program personnel conduct effective market analysis.
4. Work with the Office of General Counsel, Contract Law Division to (1) consider developing legal review criteria for General Services Administration's Federal Supply Schedule orders, and orders placed on Blanket Purchase and Ordering Agreements, and on Indefinite Delivery or Indefinite Quantity contracts; and (2) develop and implement a policy for resolving legal comments on contract actions.
5. Develop procedures for conducting and documenting past performance reviews, using the Office of Federal Procurement Policy's guidebook as a reference and provide training to program officials and contracting staff.
6. Develop procedures for preparing independent government estimates for the various types of acquisitions and provide training to program officials and contracting staff.
7. Establish and implement an aggressive campaign to eliminate unauthorized procurement actions through training sessions, communication efforts, and establishing responsibility.
8. Develop procedures for managing, documenting, and verifying training for acquisition staff to ensure compliance with requirements detailed in Section 1301.6 of the Commerce Acquisition Manual.

We also recommend that the NIST Director ensure that program managers actively support AMD's initiatives to improve agency procurement activities, and that NIST managers adequately prepare annual spending plans for fiscal year 2005 and quarterly updates to help the agency provide more responsive, effective, and efficient acquisition services and ensure compliance with federal regulations.

APPENDIX I

Table of Services	
THE PROCESS	FORMS
Acquisition Deadlines	JOFOC (CD-492)
Acquisition Process Flowchart	Market Research Report
Acquisition Seminar - Management Update Series	
Business Cards <ul style="list-style-type: none"> • Business Card Request • Business Card Policy • Adman Purchase of Business Cards 	Online Administration Forms For <ul style="list-style-type: none"> • Certification for Services (NIST-1082)
Central Contractor Registration Notification	
Checklist of Required Forms	Past Performance Report
Competition Thresholds	Small Business Set Aside (CD-570)
CSTARS Information	Small Business Set Aside (CD-570) Instructions
Equipment Loans	COTR INFORMATION
Executive summary of NIST Acquisition Process	Classes/Sources for Training
Frequently Asked Questions	COTR Program
Guidelines for Preparing a Statement of Work	COTR Reports
Interagency Agreements	Procurement Integrity Requirements
Lecture Fees	Technical Panel Do's & Don'ts
Lecture Fee Chart	OTHER RESOURCES

Priority Sources of Supply	Contract's External Web Page
Ratification of Unauthorized Procurements	Service Contracting Considerations
Required Clearances	SEWP & Other GWACs
Sole Source Procurements	Small Purchase Small Business Set-Aside Program
Tips to Accelerate the Process	8(a) Program Guidance
OTHER SERVICES	
Bankcard/BPA Program	
COMMITTS Program	
Concept of Operations (CONOPS)	
Federal Procurement Related Sites	
GSA Advantage	
GSA Schedule E-Library	

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Source: NIST Acquisition Management Division intranet web page <http://www-i.nist.gov/admin>

