

GAO

Report to the Chairwoman,
Subcommittee on Immigration,
Citizenship, Refugees, Border Security,
and International Law, Committee on
the Judiciary, House of Representatives

October 2007

**ENERGY
EMPLOYEES
COMPENSATION**

**Actions to Promote
Contract Oversight,
Transparency of
Labor's Involvement,
and Independence of
Advisory Board Could
Strengthen Program**





Highlights of [GAO-08-4](#), a report to the Chairwoman, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

Congress enacted a program to compensate Department of Energy employees and contractors in the atomic weapons industry who developed work-related illnesses. Labor administers the program using estimates of workers' likely radiation exposure to decide claims. The estimates are produced by Health and Human Services' (HHS) National Institute for Occupational Safety and Health (NIOSH) and reviewed by the Advisory Board on Radiation and Worker Health. NIOSH awarded a contract to Oak Ridge Associated Universities (ORAU) to help carry out its work. GAO examined: (1) costs and oversight of NIOSH's contracts, (2) implementation of the conflict of interest policy for NIOSH and its contractors, (3) the extent of Labor's involvement in NIOSH's activities and actions to deny benefits, and (4) challenges to advisory board independence and options to enhance it. GAO reviewed contract files, examined Labor's comments on NIOSH documents, and analyzed data on cases sent to NIOSH for rework.

What GAO Recommends

GAO recommends improving HHS contractor oversight and transparency of Labor's involvement in NIOSH activities, to which HHS and Labor agreed, and suggests that Congress consider options to enhance board independence.

To view the full product, including the scope and methodology, click on [GAO-08-4](#). For more information, contact Daniel Bertoni at (202) 512-7215 or bertonid@gao.gov.

ENERGY EMPLOYEES COMPENSATION

Actions to Promote Contract Oversight, Transparency of Labor's Involvement, and Independence of Advisory Board Could Strengthen Program

What GAO Found

ORAU's contract costs almost tripled from \$70.1 million to \$198.7 million because the original cost estimate significantly underestimated program complexity and resources needed. The contractor ran into complexities such as unavailable or incomplete radiation monitoring records, forcing the use of more staff resources to estimate workers' radiation exposure. Labor costs were particularly expensive because of the need for technical expertise. NIOSH established procedures to monitor overall contractor performance and focused on expediting claims processing, achieving considerable progress. However, its oversight of contractor costs was insufficient and NIOSH relied primarily on external audits to validate labor charges. These audits are not a substitute for preventive controls needed to ensure that the agency reimburses only allowable costs charged by the contractor.

NIOSH has issued a comprehensive conflict of interest policy. Because there are a limited number of experts with knowledge of Energy sites, the contractor often hires individuals who previously worked at these sites, and this policy attempts to incorporate their input while avoiding conflicts of interest that could have a detrimental effect on claimants. Most policy provisions have been implemented, but with some delays. As a result, NIOSH has not yet audited disclosure forms or imposed any applicable penalties.

Labor's extensive involvement in commenting on draft NIOSH technical documents used to estimate radiation doses and returning cases to NIOSH for rework did not indicate a systematic effort to deny benefits paid to claimants, but Labor's rationale for its comments was not always transparent. A detailed explanation was needed for GAO to understand how certain comments made the NIOSH documents more clear and consistent and how this would facilitate Labor's adjudication of cases. For example, one comment suggested that NIOSH was being overly favorable to claimants and upwardly biasing their dose estimates by using data from a group of monitored workers at a particular site to estimate radiation doses for unmonitored workers at other sites. However, Labor explained it was seeking clarification to adjudicate cases where claimants might object to their estimate being based on a site where they had never worked. GAO's analysis of the 2,811 cases that Labor returned to NIOSH for rework as of March 2007 did not indicate an effort to deny benefits because 87 percent of the cases had less than a 50 percent probability of causation, based on NIOSH's initial dose reconstruction, and thus likely would have been denied.

While GAO did not find evidence that the advisory board was impeded in performing its statutory duties, issues pertaining to the board's funding structure, member appointment process, and support staff present challenges to its independence. Various options are available to enhance independence such as appropriating funds in a separate line item for the board, establishing bipartisan Congressional involvement in appointing board members, and developing procedures to ensure support staff is independent of the program.

Contents

Letter		1
	Results in Brief	3
	Background	6
	Unanticipated Program Complexity Led to Increased Contract Costs, and while NIOSH Established Procedures to Monitor Contractor Performance, Its Oversight of Contractor Costs Was Insufficient	11
	NIOSH Has Issued a Conflict of Interest Policy and Implemented Most Provisions after Some Delay, but Is Not Yet Monitoring or Enforcing the Policy	22
	Labor’s Reviews of NIOSH Documents and Returns of Cases for Rework Do Not Indicate Systematic Efforts to Contain Benefits, but Raise Issues about the Transparency of Labor’s Involvement	26
	Several Issues Present Challenges to Advisory Board’s Independence, and Various Options Could Be Considered to Address Them	32
	Conclusions	38
	Recommendations for Executive Action	39
	Matter for Congressional Consideration	40
	Agency Comments and Our Evaluation	40
Appendix I	Scope and Methodology	43
Appendix II	Status of Labor’s Comments on Draft Special Exposure Cohort Petition Evaluations	47
Appendix III	Comments from the Department of Energy	49
Appendix IV	Comments from the Department of Labor	50
Appendix V	Comments from the Department of Health and Human Services	52

Appendix VI	GAO Contact and Staff Acknowledgments	58
--------------------	--	----

Related GAO Products		59
-----------------------------	--	----

Tables

Table 1: Summary of Cost Increases in ORAU Contract, as of Fiscal Year 2007	14
Table 2: ORAU Expenditures, by Task, as of June 2007	15
Table 3: Award Fee Performance Evaluations for ORAU	18
Table 4: Implementation Status of Key Conflict of Interest Policy Provisions	25
Table 5: Types of NIOSH Documents Reviewed by Labor	28
Table 6: Estimated Percent of NIOSH's Draft Technical Documents, by Nature of Labor's Comments	29
Table 7: Options to Enhance Advisory Board's Independence	37

Figures

Figure 1: Responsibilities of Entities Involved in Administering Subtitle B of EEOICPA	7
Figure 2: Subtitle B Administrative Costs and Benefits Paid Out for Dose Reconstruction Cases, Aggregated for Fiscal Years 2001-2006	9
Figure 3: Trends in ORAU's Average Monthly Dose Reconstruction Production, March 2003 through June 2007	17
Figure 4: Summary of Cases Returned to NIOSH for Rework, as of March 31, 2007	31

Abbreviations

CDC	Centers for Disease Control and Prevention
DCAA	Defense Contract Audit Agency
EEOICPA	Energy Employees Occupational Illness Compensation Program Act
Energy	Department of Energy
EPA	Environmental Protection Agency
FACA	Federal Advisory Committee Act
FAR	Federal Acquisition Regulation
HHS	Department of Health and Human Services
Labor	Department of Labor
NIOSH	National Institute for Occupational Safety and Health
OCAS	Office of Compensation Analysis and Support
OMB	Office of Management and Budget
ORAU	Oak Ridge Associated Universities
SEC	special exposure cohort

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.



United States Government Accountability Office
Washington, DC 20548

October 26, 2007

The Honorable Zoe Lofgren
Chairwoman
Subcommittee on Immigration, Citizenship,
Refugees, Border Security, and International Law
Committee on the Judiciary
House of Representatives

The Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA)¹ was enacted to compensate employees and contractors of the Department of Energy (Energy) and its predecessors who developed serious illnesses such as cancer because of exposure to radiation, beryllium, or silica while working in the atomic weapons industry. The Department of Labor (Labor) administers Subtitle B of the act, which provides eligible workers with a onetime payment of \$150,000 and coverage of medical expenses related to their illness. From the program's inception through August 14, 2007, Labor received over 58,000 cases and has made benefit payments in over 17,000 of them totaling \$2.1 billion. To make compensation decisions for certain claims, Labor uses estimates of individual workers' likely radiation exposure, performed by scientists at the National Institute for Occupational Safety and Health (NIOSH)² and its contractors, Oak Ridge Associated Universities (ORAU) and Battelle. If the estimate, known as a dose reconstruction, shows at least a 50 percent probability that a worker's cancer was caused by occupational exposure, the worker qualifies for compensation. The act specified that the President establish an Advisory Board on Radiation and Worker Health that is tasked with advising the Secretary of the Department of Health and Human Services (HHS) on the scientific validity and quality of NIOSH's radiation dose reconstructions and recommending whether to create special classes of workers eligible for compensation without individual dose reconstructions, known as the special exposure cohort (SEC). Members of the board are scientists, physicians, and employee representatives who serve part-time on this citizens' advisory board.

¹Pub. L. No. 106-398, Title XXXVI, as codified at 42 U.S.C. §§7384-7385o.

²NIOSH is an agency within the Centers for Disease Control and Prevention in the Department of Health and Human Services.

There has been a significant growth in costs related to NIOSH's contracted work to estimate radiation exposure, which was originally negotiated to cost about \$70 million when the contract was awarded in 2002, but ultimately grew to nearly \$200 million by 2007. In addition, it is important that individuals tasked with performing dose reconstructions remain objective and neutral. However, some former employees of the Department of Energy and its predecessors, who now work for NIOSH and its contractors, could potentially have conflicts of interest in their work that may result in a bias against claimants. Further, a memorandum from the Office of Management and Budget to Labor that came to light in 2006 has generated considerable congressional concern about whether decisions to approve or deny claims were being unduly influenced by budgetary considerations, rather than established scientific procedures, given that all applicants whose claims have been approved are entitled to receive benefits.³ The memorandum and subsequent hearings raised questions about Labor's involvement in scientific activities assigned to NIOSH and the advisory board, and about the balance and independence of the board, which is funded through Labor and HHS, and receives staff support from NIOSH.

To address these issues, we focused on the following questions: (1) What are the reasons for any increases in costs for NIOSH's contractors and what procedures did NIOSH have in place to manage the contracts? (2) What is the conflict of interest policy for NIOSH and its contractors and to what extent have its provisions been implemented? (3) To what extent is Labor involved in Subtitle B activities tasked to NIOSH and has Labor taken actions to deny benefits to eligible claimants? (4) What challenges does the advisory board face in maintaining its independence and what options could further strengthen its independence?

To perform our work, we reviewed relevant laws and regulations and contract files, and observed agency and contractor operations at selected sites. We used internal control standards⁴ and guidance and Federal Acquisition Regulation requirements as a basis to assess NIOSH's contract oversight. In addition, we reviewed documents that Labor and NIOSH

³The Secretary of the Treasury shall transfer the necessary funds directly from the General Fund of the Treasury to the compensation fund, upon exhaustion of amounts in the compensation fund, without further appropriation. (42 U.S.C. §7384e(c)).

⁴*Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: Nov. 1999).

provided to Congress—including agency e-mails, internal memorandums, and other documents—in its request for information on various aspects of their program activities. To examine whether Labor was involved in Subtitle B activities tasked to NIOSH, we reviewed a random sample of 79 documents from the 187 draft NIOSH technical documents used in the dose reconstruction process for which Labor provided comments. Our sample allowed us to estimate characteristics for all 187 technical documents. To determine the nature of these comments, we categorized and analyzed the comments according to whether they focused on improving clarity and consistency, raised questions about scientific assumptions, or fell into other categories. In addition, we examined Labor’s written comments on all relevant SEC petition evaluations to determine whether the comments, if implemented, would have had the effect of reducing the magnitude of the proposed cohort of eligible claimants. To determine whether Labor took any actions to deny benefits to claimants, we also analyzed data on cases that Labor returned to NIOSH for rework according to their initial compensability decision, reasons for rework, and final outcomes following rework. Finally, we interviewed key agency officials, members of the advisory board, and a claimant advocate. Our scope and methodology are discussed in greater detail in appendix I. We conducted our work from August 2006 to October 2007 in accordance with generally accepted government auditing standards.

Results in Brief

NIOSH significantly underestimated contract costs because it did not anticipate the level of complexity of the project or the resources or staff time needed. ORAU ran into complexities such as unavailable or incomplete radiation monitoring records, which forced the contractor to use more staff resources to review the records, develop site profiles, and perform dose reconstructions—all of which were required to be performed by people with technical expertise whose cost of labor is high. NIOSH had various procedures in place to monitor overall contractor performance by, for example, reviewing the contractors’ progress reports and holding weekly meetings with contractor staff. NIOSH also oversaw ORAU’s performance by conducting semiannual performance evaluations and by periodically modifying performance criteria to target key areas for improvement, such as completing the backlog of the oldest claims. To further accelerate claims processing, NIOSH hired a second contractor, Battelle, and while that contract remained within its \$2.9 million budget, it fell 6 months behind schedule because of Battelle’s initial slow progress. While NIOSH had procedures in place to monitor contract performance, it did not adequately review contractor costs. NIOSH’s oversight of ORAU’s costs was insufficient to ensure that labor and other costs billed to the

government were allowable. NIOSH also performed limited reviews of monthly contractor invoices and did not have sufficient procedures in place to oversee ORAU's review of subcontractor costs. Additionally, NIOSH relied on external audits for assurance that contractor and subcontractor charges were proper.

NIOSH issued a conflict of interest policy for the dose reconstruction program in October 2006, and while most provisions have been implemented, NIOSH is not yet fully monitoring or enforcing the policy. Because there are a limited number of individuals with extensive knowledge of Energy sites, the contractor often hires employees who previously worked at these sites. To ensure such employees carry out their work in an objective, unbiased fashion, the policy prohibits them from performing dose reconstructions and authoring key program documents involving that site. Experts with an actual or perceived conflict may still offer advisory input to the documents, as long as their contributions are clearly attributed. The policy is comprehensive in that it addresses all aspects of the program; covers federal, contractor, and subcontractor employees; and applies to different types of conflicts of interest including individual, corporate, financial, employment-related, familial, and supervisor-subordinate relationships. Most provisions have been implemented, although there were some delays. In addition, while NIOSH has appointed a conflict of interest officer, it is not yet fully monitoring or enforcing the policy by implementing such provisions as auditing disclosure forms and imposing penalties for missing, erroneous, or incomplete forms.

Labor has been extensively involved in reviewing NIOSH's scientific work related to Subtitle B claims, and while Labor did not pursue a strategy to deny benefits to eligible claimants, the agency was not always transparent in demonstrating how its comments were intended to facilitate Labor's adjudication of claims. The program statute and regulations do not provide guidance on Labor's review of draft NIOSH documents. Labor officials told us that such reviews are done to promote clarity and consistency and help Labor adjudicate claims; moreover, NIOSH acknowledged the value of Labor's comments in this process. However, we found that in an estimated 11 percent of technical documents and several SEC petition evaluations, Labor's comments appeared to go further, and it was sometimes difficult to determine Labor's rationale for the comments from the written documents alone. This was especially true for comments that questioned NIOSH's scientific assumptions or suggested that the scope of proposed SEC class definitions should be narrowed. A detailed oral explanation from Labor officials was subsequently needed for us to understand how

the comments made the NIOSH documents more clear and consistent and how the resulting improvements would facilitate adjudication. For example, in a technical document on construction workers, a comment from Labor suggested that NIOSH was being overly favorable to claimants and upwardly biasing their dose estimates by using data from a group of monitored workers at a particular site to estimate radiation doses for certain unmonitored workers at other sites. However, Labor explained to us that it was seeking clarification of NIOSH's scientific assumptions to help adjudicate cases where claimants might object to their dose reconstructions being based on data from a site at which they did not work. In addition to commenting on NIOSH's documents, Labor also regularly returned individual radiation dose estimates to NIOSH for rework, as contemplated by the regulations. Our analysis of statistics on these cases did not indicate any systematic effort to deny benefits. We found that 87 percent of the 2,811 returned cases as of March 2007 had a less than 50 percent probability of causation, based on NIOSH's initial dose reconstruction, and thus would likely have been denied compensation. In addition, a greater percentage of cases were reversed in the claimant's favor following rework, with 16 percent of denied cases switching to approvals, compared to 11 percent of approved cases switching to denials.

While we did not find evidence that the advisory board was impeded in performing its statutory responsibilities, issues pertaining to its funding structure, membership appointment process, and support staff present potential challenges to the board's independence. However, various options are available to address these challenges. Although advisory board members state that the board has received necessary funding to date, because funding flows through Labor and HHS, the agencies may be in a position to restrict the board's budget if, for example, they dislike the board's findings regarding the addition of new classes to the special exposure cohort. In addition, there is a potential for HHS or Labor to unduly influence the presidential appointment of board members in an effort to shape the outcome of the board's decisions. For example, internal Labor correspondence in 2005 characterized the advisory board as essentially a worker advocacy organization, noting that this would increase pressure for approving more SEC classes and that a membership change was critical to counteract this pressure. The advisory board also relies on HHS for support staff, but there are no procedures in place to ensure that these individuals are and remain independent of the program that the board was tasked to review. We identified various options for enhancing advisory board independence, each with its advantages and disadvantages. Such options include appropriating funds in a separate line

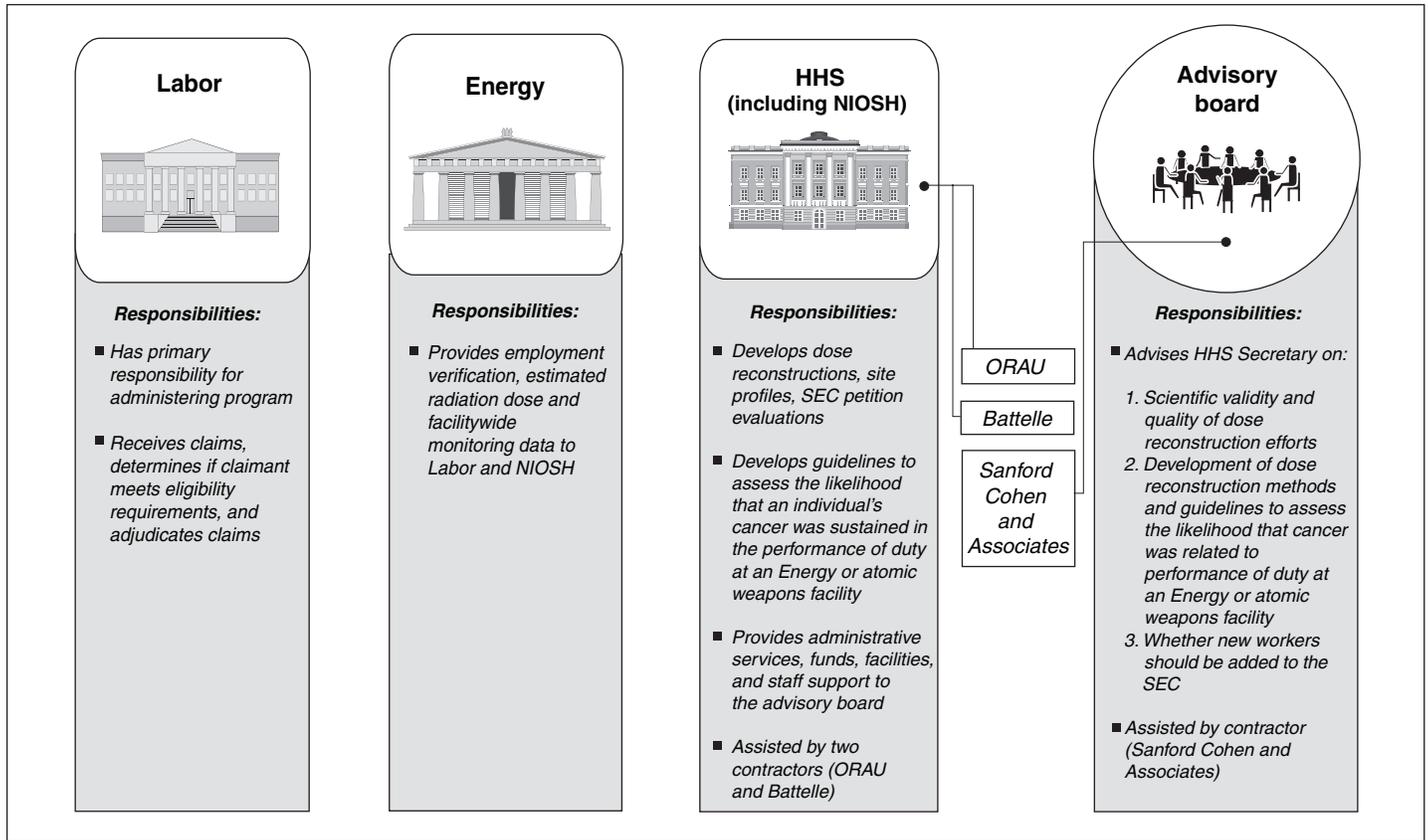
item for the advisory board, establishing bipartisan Congressional involvement in appointing board members, developing procedures to ensure no undue influence on the advisory board, and requiring the advisory board to report periodically to Congress and the Secretary of HHS on any obstacles to independence it faces.

We are making a recommendation to Labor to be more transparent in its written comments on NIOSH documents by presenting the agency's rationale and basis for the comments. We are also making recommendations to HHS to (1) strengthen oversight of costs incurred in the dose reconstruction program and improve the review and approval process for contractor billings, and (2) enhance advisory board independence by developing procedures to ensure no undue influence on the board, as required under the Federal Advisory Committee Act (FACA). To further enhance board independence, we are asking Congress to consider options related to funding, appointment of members, and advisory board reporting. In their written comments on a draft of the report, Labor and HHS concurred with our recommendations. However, HHS disagreed that it had significantly underestimated the total cost of the ORAU contract. HHS pointed out that it purposely selected a cost reimbursement award fee contract to allow for flexibility and management control. While we recognize that costs increased due to unanticipated complexity, NIOSH's independent government cost estimate of \$91.3 million for the ORAU contract was considerably lower than the \$198.7 million in total actual costs incurred by the contractor. Energy stated that it did not have any comments on the report. Comments from Energy, Labor, and HHS are provided in appendices III through V.

Background

Several different federal agencies are involved in implementing the Subtitle B program (see fig. 1). As the agency with primary responsibility for administering claims under Subtitle B, Labor receives the claims and determines whether claimants meet eligibility requirements. When considering the compensability of certain claims, Labor relies on estimations of the levels of radiation particular workers were likely exposed to when working for Energy. These estimations are known as dose reconstructions and are developed by NIOSH, within the Department of Health and Human Services. To avoid gathering redundant information for each claim associated with a particular facility, NIOSH compiles facility-specific information in technical documents called site profiles, which assist NIOSH in completing the dose reconstructions. To help it carry out its work, NIOSH awarded a 5-year contract to ORAU in September 2002 as well as a 1-year contract to Battelle in October 2005.

Figure 1: Responsibilities of Entities Involved in Administering Subtitle B of EEOICPA



Source: GAO analysis.

However, Labor does not refer all claims to NIOSH for dose reconstruction because reconstructions are not needed for certain workers who constitute an SEC.⁵ Workers from four specific sites have been designated by the act as members of this special class, and classes of workers from another 16 sites have been added to the SEC as of August 2007 because exposure records were insufficient and there is reasonable likelihood that

⁵Besides special exposure cohort claims, other claims that are not referred to NIOSH for dose reconstruction include Radiation Exposure Compensation Act Section 5 supplement, beryllium, and silicosis claims.

the workers' cancer was caused by radiation exposure.⁶ Thus, for workers' claims at an SEC-designated facility, Labor simply verifies the employment period and illness and develops a recommended decision that is issued to the claimant—fast-tracking the process.

The costs of administering the Subtitle B dose reconstruction program have been substantial over the past 5 years. Of the 53,850 cases Labor reported receiving, Labor referred 21,266 (39 percent) to NIOSH for dose reconstruction in fiscal year 2006. From fiscal years 2001 through 2006, Labor, NIOSH, and Energy spent an aggregate of \$325 million to administer the dose reconstruction program, and Labor paid out nearly \$512 million in compensation benefits to claimants for whom NIOSH performed dose reconstructions over the same period (see fig. 2). Of the three agencies, NIOSH incurred the greatest administrative costs—\$180.6 million—to carry out such activities as dose reconstructions and preparing site profiles.⁷ Labor spent an estimated \$125.9 million to adjudicate dose reconstruction claims.⁸ Finally, Energy spent about \$18.5 million to respond to NIOSH's requests for monitoring records

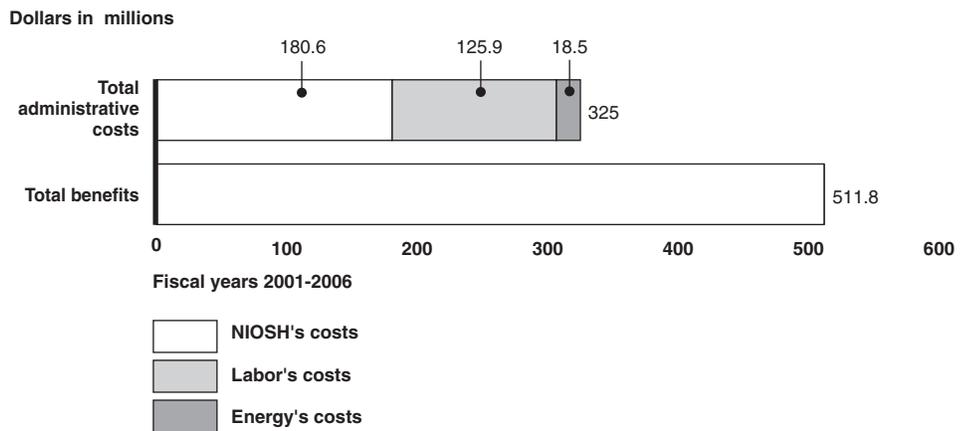
⁶The four locations designated by statute include three gaseous diffusion plants in Oak Ridge, Tennessee; Paducah, Kentucky; Portsmouth, Ohio; and an underground nuclear test site on Amchitka Island, Alaska. In addition, the Secretary of HHS used the authority granted by Executive Order 13179 to subsequently add 16 more sites to the special exposure cohort: (1) Allied Chemical, (2) Ames Laboratory, (3) Dow Chemical, (4) General Atomics, (5) Harshaw Chemical, (6) Iowa Ordnance Plant, (7) Los Alamos National Laboratory, (8) Linde Ceramics Plant, (9) Mallinckrodt Chemical Works-Destrehan Street Facility, (10) Monsanto Chemical, (11) Nevada Test Site, (12) Oak Ridge Institute for Nuclear Studies, (13) Pacific Proving Grounds, (14) S-50 Oak Ridge Thermal Diffusion Plant, (15) W.R. Grace, and (16) Y-12 Plant.

⁷Figure 2 provides administrative cost data just for dose reconstruction cases through fiscal year 2006. NIOSH also provided data on total administrative costs for all of its activities under EEOICPA—updated through the end of fiscal year 2007—including those dealing with dose reconstructions, SEC petition evaluations, worker outreach, and the advisory board. NIOSH's total EEOICPA administrative costs from fiscal year 2001 through 2007 were \$280 million, of which \$220 million was for all contractors, \$46 million for direct and indirect costs, and \$14 million for the advisory board.

⁸Labor does not break out costs to administer Subtitle B dose reconstruction cases from costs associated with other types of Subtitle B cases that do not require dose reconstruction. However, Labor officials told us that the agency incurs approximately the same costs to administer all the different types of Subtitle B cases. On the basis of this assumption, GAO estimated Labor's administrative costs. See appendix I for additional information on our scope and methodology.

needed to complete dose reconstructions and Labor's requests for employment verifications necessary to adjudicate claims.⁹

Figure 2: Subtitle B Administrative Costs and Benefits Paid Out for Dose Reconstruction Cases, Aggregated for Fiscal Years 2001-2006



Source: GAO analysis of information from Labor, NIOSH, and Energy.

Note: Administrative costs include such items as personnel, travel, rental payments, utilities, printing, facility operations and maintenance, supplies and materials, and equipment. NIOSH did not begin incurring dose reconstruction costs until fiscal year 2002.

The advisory board also plays an important role in the Subtitle B program. Created in 2000, the advisory board has 12 members and is set to terminate in 2009 unless renewed.¹⁰ EEOICPA requires that the membership of the advisory board reflect a balance of scientific, medical, and worker perspectives. The advisory board is also subject to FACA,¹¹ and is responsible for advising the Secretary of HHS on the scientific validity and quality of NIOSH's dose reconstruction efforts and whether workers at other locations should be added to the SEC. For its part, HHS provides

⁹Energy's administrative costs for fiscal years 2002 and 2003 included costs of processing records requests for the Subtitle D program, which accounted for about 3 percent of total requests while the remaining 97 percent of requests were for Subtitle B. In addition, we had to estimate costs for the period October 2003 to April 2004 because Energy did not maintain data on the Subtitle B program prior to May 2004.

¹⁰Under the executive order, the advisory board shall consist of no more than 20 members to be appointed by the President.

¹¹Under FACA, the advisory board is also required to conduct most of its meetings in public and make meeting minutes available to the public.

administrative services, funds, facilities, staff, and other necessary support to the advisory board. To assist the advisory board in its efforts, HHS awarded a 5-year \$3 million contract to Sanford Cohen and Associates in October 2003 to review such things as the scientific validity and quality of individual dose reconstructions and site profiles. GAO recently examined how well the advisory board and the contractor assisting the advisory board have carried out these reviews.¹²

In 2006, an internal memorandum from the Office of Management and Budget (OMB) to Labor generated considerable congressional concern about the potential for inappropriate efforts to contain the cost of benefits paid to claimants. The memorandum notes Labor's concern about the potential for a large expansion of benefits through the designation of the SEC and further states that the Administration planned to convene a White House-led interagency workgroup to develop options to contain growth in the costs of program benefits. The memorandum specifically identifies five options, including requiring additional administrative clearance of the SEC and addressing any "imbalance" in advisory board membership.¹³ While it is reasonable for OMB to have a role in overseeing the costs of federal programs, some have raised concerns that certain options set forth in the memorandum, if implemented, could result in decisions unduly based on budgetary considerations rather than established scientific procedures for compensating workers under this program. Congress held several oversight hearings on these issues in 2006, at which OMB and Labor officials testified that they had taken no actions, nor had any plans, to implement any of the options cited in the OMB memorandum.

¹²GAO, *Energy Employees Compensation: Adjustments Made to Contracted Review Process, but Additional Oversight and Planning Would Aid the Advisory Board in Meeting Its Statutory Responsibilities*, [GAO-06-177](#) (Washington, D.C.: Feb. 10, 2006).

¹³The memorandum to Labor specifies the following five cost-containment options: (1) require administration clearance of SEC determination, (2) address any imbalance in membership of the President's Advisory Board on Radiation and Worker Health, (3) require an expedited review by outside experts of SEC recommendations by NIOSH, (4) require NIOSH to apply conflict of interest rules and constraints to the contractor assisting the advisory board, and (5) require that NIOSH demonstrate that its site profiles and other dose reconstruction guidance are balanced.

Unanticipated Program Complexity Led to Increased Contract Costs, and while NIOSH Established Procedures to Monitor Contractor Performance, Its Oversight of Contractor Costs Was Insufficient

NIOSH significantly underestimated the costs of its 5-year contract with ORAU primarily because it did not accurately predict the level of complexity and resources—particularly labor costs—the contractor would need to commit to the project to get the job done. The contractor ran into complexities such as unavailable or incomplete radiation monitoring records, forcing it to use more staff resources to review the records, develop site profiles, and perform dose reconstructions. Because the people performing these tasks require technical expertise, the cost of their labor is high, and increases in staff time are very expensive. NIOSH established procedures to oversee contractor performance such as reviewing the contractors' progress reports and justification for cost increases. NIOSH's oversight of ORAU also consisted of semiannual evaluations that focused on increasing claims processing, and ORAU's productivity and performance ratings improved in these areas over time. To further accelerate claims processing, NIOSH hired a second contractor, Battelle, which remained within budget but fell 6 months behind schedule because of initial slow progress. However, NIOSH's oversight of ORAU's costs was insufficient to provide reasonable assurance of the appropriateness of labor and other costs billed to the government. NIOSH also did not have sufficient procedures in place to oversee the prime contractor's review of subcontractor costs. In addition, the agency relied primarily on external audits for assurance that contractor and subcontractor charges were proper. NIOSH will award another dose reconstruction contract following expiration of the ORAU contract in the fall of 2007. While officials believe that the cost estimate of the new contract is more realistic, the extent of any future cost growth remains to be seen.

NIOSH Significantly Underestimated Cost of ORAU's 5-Year Contract because of Unanticipated Program Complexity

NIOSH awarded a 5-year contract to ORAU for \$70.1 million for the period September 2002 to September 2007.¹⁴ ORAU was awarded a cost reimbursement contract that also provided an award fee for meeting performance goals. Neither NIOSH nor the contractor had performed dose reconstructions on a scale as large as the one required to carry out the program. Given this limited prior experience, the agency significantly underestimated the complexity of the work and the labor costs required to complete the project. The government's independent cost estimate

¹⁴The cost reimbursement portion was valued at \$68.7 million, and the award fee portion was \$1.4 million (2 percent of the contract amount), for a total of \$70.1 million. The actual amount of the fee earned by the contractor was determined by semi-annual performance evaluations against award fee criteria.

developed by NIOSH was \$91.3 million, a figure that was substantially lower than the amount subsequently spent on the contract over the project's life. In its comments, HHS told us that NIOSH and the contracting office selected a cost reimbursement award fee contract as a mechanism to allow for flexibility and management control, in light of the considerable uncertainty associated with the project.

Once the dose reconstruction program got under way, the complexity of the work forced the contractor to commit more staff resources at additional cost to the government. ORAU officials told us, for example, that they committed more staff hours than the contract originally estimated to reviewing records from Energy facilities because the records could not always be located, were not easily accessible, or were incomplete. ORAU also hired additional staff, and staffing levels rose from 24 in September 2002 when the contract was awarded, to a high 4 years later of 476, and leveled off at 232 as of June 2007. In addition, NIOSH had to adjust its approach to performing the work. NIOSH initially expected to perform dose reconstructions while simultaneously developing technical documents,¹⁵ such as site profiles, but subsequently found that it needed to first complete the site profiles to avoid having to collect site-related information on a case-by-case basis. While this approach facilitated the dose reconstruction process, it required a much greater upfront investment of staff time and resources.¹⁶ Labor charges were particularly high for this project, because there is a limited pool of specialists with the requisite technical expertise to estimate radiation doses and perform other tasks. For example, at \$55.9 million, direct labor charges accounted for about 92 percent of the \$61 million cost increase approved in July 2006.

As table 1 shows, the cost of the ORAU contract almost tripled from \$70.1 million to \$198.7 million. While program complexity was a factor in the cost increase, NIOSH officials told us that the volume of claims

¹⁵These technical documents refer to site profiles, technical basis documents, and technical information bulletins. Site profiles are documents that describe a specific work site, including physical appearance and layout, work processes, potential sources of radiation, and other details important to that site. Each site profile is composed of six technical basis documents. Technical information bulletins contain information on specific technical issues or procedures for estimating radiation exposure for specific or multiple work sites. They are used to augment or supplement site profiles and technical basis documents.

¹⁶See GAO, *Energy Employees Compensation: Many Claims Have Been Processed, but Action Is Needed to Expedite Processing of Claims Requiring Radiation Exposure Estimates*, [GAO-04-958](#) (Washington, D.C.: Sept. 10, 2004).

received from Labor did not play a role in increasing costs. The request for proposal required the contractor to process anywhere from 15,000 to 41,000 claims over the 5-year period, and the actual number of claims processed was within that broad range. Other than the number of claims to be processed, however, the request for proposal did not define quantifiable requirements for any of the other tasks for which the contractor was responsible, such as conducting dose reconstruction research and interviewing claimants. This lack of well-defined requirements at the outset meant that NIOSH and the contractor had to determine the specific tasks and level of resources needed to accomplish them as the project went along, making it difficult to plan for the long term and increasing the likelihood that costs would grow as the contractor's workload grew.

Table 1: Summary of Cost Increases in ORAU Contract, as of Fiscal Year 2007

Dollars in millions

Date	Funding amount	Description
September 2002	\$70.1	Original contract award amount
May 2003	2.9	Relocation of claimant interviewers to off-site location
March 2004	1.9	Increase in indirect billing rates for a subcontractor
January 2005	69.3	NIOSH direction to significantly increase level of effort in developing site profiles and technical basis documents, producing dose reconstructions, and conducting worker outreach
June 2006	4.5	Continuation of high level of production through July 2006 while negotiations were being completed on the amount needed to complete the final 13.5 months of the contract
July 2006	61.0 ^a	NIOSH direction to significantly increase level of effort in developing site profiles and technical basis documents, producing dose reconstructions, conducting worker outreach, and reviewing and responding to technical findings from the advisory board
June 2007	(15.7)	Reduction in available funding for the contract due, in part, to the continuing resolution in fiscal year 2007
July 2007	2.4	Continuation of priority tasks, such as dose reconstruction and SEC petition evaluations, through the end of the contract period
September 2007	2.3	Continuation of priority tasks, such as dose reconstruction and SEC petition evaluations, through the end of the contract period
Total	\$198.7	Total amount awarded over life of contract

Source: GAO analysis of information from the Centers for Disease Control and Prevention's Procurement and Grants Office.

^aWhile this was the funding amount proposed by the contractor, NIOSH did not fund the full amount because it was operating under a continuing resolution in fiscal year 2007.

An expansion of the contractor's tasks also accounted for 15 percent of the cost increase. ORAU was originally assigned six tasks related to performing dose reconstructions and developing site profiles. NIOSH and the contractor later added five more tasks. Some tasks, such as preparing SEC petition evaluations and responding to advisory board reviews, were added as NIOSH gained a better understanding of the level of support it needed from ORAU, while another was added in response to NIOSH's concern that different tasks within ORAU were not well coordinated and that the contractor lacked a sense of urgency toward accomplishing the

work. Of all the tasks assigned to ORAU, dose reconstruction was by far the costliest, accounting for over a third of total expenditures, followed by dose reconstruction research (which included developing site profiles), as shown in table 2.

Table 2: ORAU Expenditures, by Task, as of June 2007

Dollars in millions

Task	Cumulative expenditures	Percentage of total
Dose reconstruction	\$68.21	37
Dose reconstruction research	44.59	24
Database management	15.88	9
Identify and obtain relevant data	13.66	7
Claimant interviews	12.77	7
Technical and program management support	9.30	5
SEC petition evaluations	6.68	4
Records management	7.77	4
Quality assurance	2.23	1
Integration of scientific issues	2.78	1
Responding to advisory board and contractor assisting the board	1.48	1
Total	\$185.35	100

Source: GAO analysis of ORAU expenditure data.

Note: Expenditures include direct labor, equipment, materials and supplies, travel, other direct costs, subcontracted resources, project associates, and indirect costs.

NIOSH Established Contract Oversight Procedures That Focused on Expediting Processing of Claims but Performed Insufficient Oversight of Contractor Costs

NIOSH established procedures to monitor overall contract performance but did not have sufficient procedures in place to monitor ORAU's costs. To oversee contract performance, NIOSH tooks steps such as reviewing the contractors' monthly progress reports, conducting quarterly assessments through its Contract Oversight Team, and holding weekly meetings with contractor staff. NIOSH also reviewed ORAU's requests for additional funding to ensure they were adequately justified and documented. In some cases, NIOSH questioned the contractor's basis for additional funding and requested additional documentation to sufficiently quantify labor requirements for some of the individual tasks under the contract. For example, NIOSH was concerned that ORAU's staffing levels and the ratio of managers to staff were higher for some tasks than what was needed to complete essential activities. It subsequently approved the

additional funding requested after obtaining further justification from ORAU. In other cases, NIOSH approved a slightly lower amount than what was requested because it believed, for example, that the membership cost in a professional organization was not directly billable to the contract.

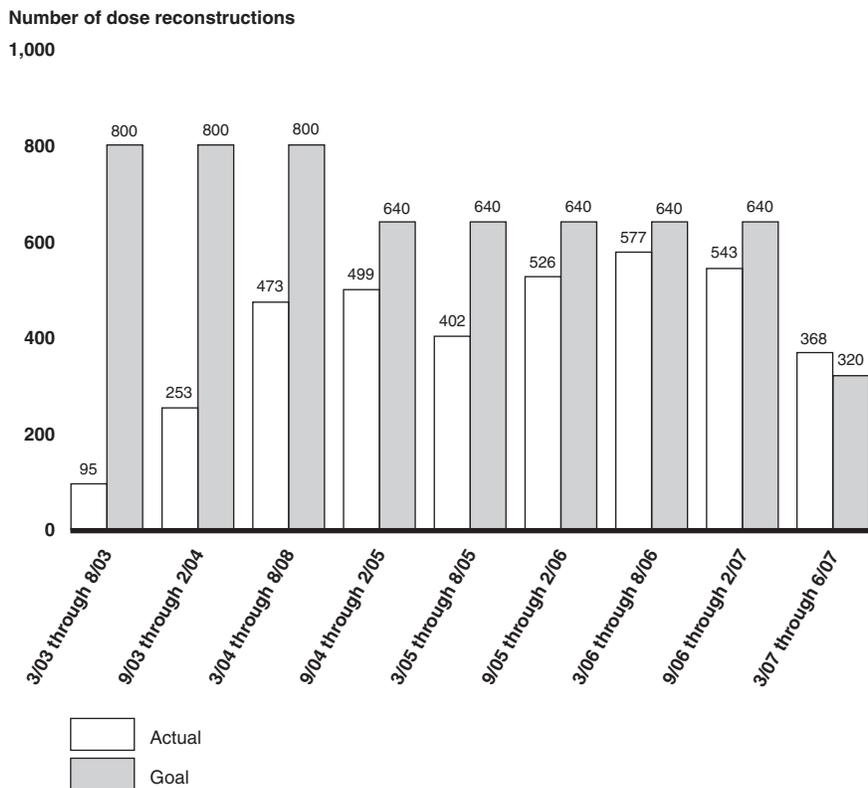
The type of contract used for ORAU was an award fee contract. NIOSH exercised oversight of contractor performance, in part, through semiannual award fee evaluations in which ORAU's performance was measured against certain evaluation criteria. Through contract modification, these criteria were periodically modified to target key areas for improvement. For example, criteria for the first evaluation period included start-up activities in contrast to later award periods that focused on other priorities, such as efficient processing of the backlog of oldest claims. While periodic adjustments to the award fee criteria were made, overall NIOSH held the contractor accountable for technical performance and management, which primarily encompassed dose reconstruction claims processing. These criteria were worth 85 out of 100 points.¹⁷ NIOSH's program director told us that the agency put a premium on productivity in light of intense pressure from the claimant and congressional community to process claims quickly. The remaining 15 points were allocated to business and cost management.

NIOSH and ORAU made various mid-course adjustments to expedite claims processing through such steps as systematically developing site profiles and "workbooks" that automated dose reconstruction calculations and hiring a new ORAU project director whose priority was to accelerate claims processing. As a result of these efforts, the volume of dose reconstructions increased considerably after the first few years and generally leveled off as ORAU began processing the backlog of the oldest, most difficult claims. However, the average 6-month performance remained short of NIOSH's goal for the number of dose reconstructions produced per month for all but the most recent evaluation period. (See fig. 3.) NIOSH's initial goal was 800 dose reconstructions per month, but was adjusted down to 640 per month and then later in the contract period to 320 per month as the number of dose reconstructions remaining to be completed declined. NIOSH officials told us that the initial target was

¹⁷For the evaluation period from September 2006 to March 2007, technical performance included completion of dose reconstructions, and providing technical assistance in responding to review comments from the advisory board and its contractor. Technical management included completion of the backlog of claims, project quality assurance and control, and SEC support functions.

established somewhat arbitrarily because, at the time, the project had essentially no experience with producing dose reconstructions and that the goal was adjusted as NIOSH and the contractor gained a better understanding of the program.

Figure 3: Trends in ORAU’s Average Monthly Dose Reconstruction Production, March 2003 through June 2007



Source: GAO analysis of NIOSH data.

Note: The last period reflects a 4-month average through June 2007, which was the most recent data available.

Despite the emphasis on expediting dose reconstructions, ORAU’s performance evaluations showed a mixed track record for delivering accurate products on time, and typically resulted in “average” ratings for the contractor, as shown in table 3. ORAU got off to a difficult start, and its very first evaluation from September 2002 to March 2003 noted that the contractor did not produce any dose reconstructions of sufficient quality and that management failed to add staff in order to meet agreed upon dose reconstruction targets. Subsequent evaluations noted that while ORAU had made substantial progress in reducing the backlog of cases, it still

needed to improve efficiency in producing dose reconstructions, which should have resulted in a steady increase in number of claims processed despite the fact that the backlog consisted of older, more complex cases. ORAU's performance gradually improved and the contractor subsequently received ratings of excellent in the two most recent periods due, in part, to sustaining a high level of dose reconstruction production and responding to advisory board reviews.

Table 3: Award Fee Performance Evaluations for ORAU

Six-month period	Rating (on a scale of excellent, very good, average, marginal, unacceptable)
Sept. 2002–Mar. 2003	Average
Mar. 2003–Sept. 2003	Average
Sept. 2003–Mar. 2004	Average
Mar. 2004–Sept. 2004	Very good
Sept. 2004–Mar. 2005	Average
Mar. 2005–Sept. 2005	Average
Sept. 2005–Mar. 2006	Very good
Mar. 2006–Sept. 2006	Excellent
Sept. 2006–Mar. 2007	Excellent
Mar. 2007–Sept. 2007	To be determined upon contract completion

Source: GAO analysis of NIOSH information.

To further accelerate claims processing, NIOSH redirected a portion of ORAU's work to a second contractor, Battelle. While ORAU focused on Energy sites, Battelle was assigned to handle dose reconstructions for 1,447 of the oldest claims from 256 Atomic Weapons Employer sites.¹⁸ The

¹⁸An Atomic Weapons Employer is an entity other than the U.S. government that processed or produced radioactive material, for use by the government, to produce an atomic weapon and has been designated by the Secretary of Energy as an Atomic Weapons Employer for purposes of the compensation program.

Battelle task order was for 1 year at a total cost of \$2.9 million.¹⁹ As with the ORAU contract, Battelle's initial progress was slow as it established the necessary infrastructure such as creating dose reconstruction methods and quality assurance procedures. In addition, dealing with large volumes of often illegible monitoring records was more complex and took longer than expected. As a result, Battelle fell 6 months behind schedule and the task order was extended through May 2007 but at no additional cost to the government.²⁰ To evaluate Battelle's ongoing performance, NIOSH conducted informal oversight through weekly meetings and reviewing monthly progress reports. In a formal evaluation after the task order expired, Battelle received 16 out of 20 available points for quality, value, timeliness, and business relations, and NIOSH noted that Battelle had completed all required work.

While NIOSH had procedures in place to monitor overall contract performance, the program and contracting offices' procedures to monitor ORAU's costs were insufficient. Primary responsibility for contract management rests with the contracting officer in the Procurement and Grants Office within the Centers for Disease Control and Prevention (CDC). The contracting officer is responsible for overall contract administration and ensuring compliance with all terms of the contract. The contracting officer is assisted by personnel in the program office who perform such duties as monitoring contractor performance, reviewing invoices and vouchers, and recommending approval or disapproval actions to be taken by the contracting officer. However, officials from the program and contracting offices told us that they performed limited reviews of ORAU invoices. For example, ORAU's monthly invoices were

¹⁹The Battelle contract was in the form of a cost plus fixed fee task order lasting 1 year because the work required was much more limited than the ORAU contract. The task order was awarded in October 2005 and scheduled to expire the following October; its cost reimbursement portion was \$2.7 million and the fixed fee portion was \$188,000, for a total award amount of \$2.9 million. This was nearly twice as much as the government's independent cost estimate of \$1.5 million because the personnel proposed by Battelle were more highly qualified, and thus charged higher labor rates, than those used in the government estimate. However, the Centers for Disease Control and Prevention determined that Battelle's proposed rates were fair and reasonable based on Defense Contract Audit Agency audits of Battelle's proposed bidding and billing rates.

²⁰Battelle's initial scope of work was reduced when six facilities were deleted from the scope. These six facilities represented 166 out of 1,447 claims that Battelle was responsible for processing, according to NIOSH officials. However, NIOSH officials stated that there was no commensurate decrease in costs because the number of additional claims received for the remaining Battelle sites more than offset the reduction in claims from the six deleted facilities.

compared with its monthly progress reports to identify potential anomalies. However, the program and contracting offices did not have sufficient policies and procedures for reviewing and approving the invoices to determine whether costs billed to the government were allowable, reasonable, and allocable. Because cost reimbursement contracts place the maximum risk with the government and provide the contractor with little financial incentive to control costs, the Federal Acquisition Regulation (FAR) requires that appropriate contractor surveillance be implemented by the agency when such contracts are used in order to provide reasonable assurance that efficient methods and effective cost controls are used. Furthermore, ORAU's invoices did not contain the appropriate level of detail nor supporting documentation needed to determine the allowability of costs, according to the project officer for the ORAU contract and the contracting specialist. For example, ORAU's invoices did not provide hours worked and labor rates by employee or provide support for travel costs. As such, the lack of detail on the invoices could hinder NIOSH's ability to identify potentially improper charges based on the invoices alone. The contracting specialist told us that new CDC guidelines dated March 2006 require contractors to submit a detailed breakout of labor rates and charges by employee, and that the requirement would take effect with the next dose reconstruction contract to be awarded following expiration of the ORAU contract in September 2007.

NIOSH also did not have sufficient policies and procedures in place with regard to ORAU's oversight of subcontractor costs, which constituted 66 percent of ORAU's initial cost proposal. While we recognize that under the FAR, the government's direct contracting relationship is with the prime contractor, the need for a process in place to ensure the prime contractor is providing adequate oversight and effective cost control of its subcontractors' expenditures is even more pronounced when both entities' contracts are cost reimbursement. Instead, NIOSH relied primarily on ORAU to review and validate subcontractor charges without having an adequate process in place to assess whether ORAU was properly carrying out this responsibility.

NIOSH also relied on the Defense Contract Audit Agency's (DCAA) reviews of corporate wide accounting systems for ORAU and its subcontractors for assurance that charges billed were proper. While external reviews such as DCAA's can supplement an overall system of internal control, they are not a substitute for them and do not provide NIOSH with assurance that the amounts billed were allowable. Additionally, NIOSH relied on DCAA audits of ORAU's incurred costs to

determine whether direct and indirect costs were allowable. While such audits—which can occur years after the government reimbursed the contractor—do determine the allowability of invoice amounts, they do not take the place of preventive controls, such as invoice review procedures, that the agency needs to ensure that only allowable costs are reimbursed. For example, the last DCAA incurred cost audit was performed in March 2007 for costs billed to the government in 2003. While the audit showed that direct and indirect costs were acceptable, costs billed since then have not yet been audited.

NIOSH's Cost Estimate for Next Dose Reconstruction Contract Is Based on Historical Data

ORAU's 5-year contract was set to expire in September 2007, and NIOSH has already issued a request for proposal for a new dose reconstruction contract, expected to be awarded shortly thereafter.²¹ The new contract will remain a cost plus award fee contract because NIOSH officials told us it is very difficult to predict the amount of effort that will be required to accomplish the contract objectives, given outside influences such as advisory board reviews. However, the new contract will be an option year contract—the first year is a base year followed by 4 option years. Thus, the contract could be terminated at any time after the first year or be extended for up to 4 additional years.

NIOSH officials believe that the government's cost estimate for the new contract is more realistic compared to the first contract because it is based on historical data. For example, NIOSH expects that site research would be mostly completed during the first contract, so it estimated little cost for those activities. By contrast, NIOSH anticipated that SEC activities would continue at the same pace during the new contract, and estimated costs for that activity accordingly. In addition, we found that the new request for proposal contains a more clearly defined scope of work than the first proposal. However, the extent of any future cost growth remains to be seen.

²¹NIOSH was still in the process of negotiating the next dose reconstruction contract, as of October 2007. In the interim, ORAU's contract period has been extended to allow the priority activities of dose reconstruction cases and SEC petition evaluations to continue without disruption.

NIOSH Has Issued a Conflict of Interest Policy and Implemented Most Provisions after Some Delay, but Is Not Yet Monitoring or Enforcing the Policy

NIOSH issued a comprehensive conflict of interest policy addressing all aspects of the dose reconstruction program, covering different types of conflicts of interest—individual, corporate, financial, and other relationships—and pertaining to a wide range of entities, including federal and contractor employees. The policy is important because there is a limited pool of experts—many of them former Energy employees—who can produce dose reconstruction reports, site profiles, and SEC petition evaluations. Therefore, the input of such experts must be carefully managed to ensure these key documents are accurate. While most policy provisions have been carried out, implementation was delayed for certain provisions such as filing disclosure forms because the forms were too cumbersome to be filed as specified by the policy. In addition, NIOSH is not yet fully monitoring or enforcing the policy, although it has appointed a conflict of interest officer. For example, NIOSH has not yet audited conflict of interest disclosure forms or imposed penalties for any missing, erroneous, or incomplete forms.

Policy Addresses All Aspects of Dose Reconstruction Program and Covers a Wide Range of Entities

Having a conflict of interest policy is important to protecting program integrity, particularly since the government is charged with administering the dose reconstruction program and adjudicating claims. There is a limited pool of experts with the knowledge needed to perform the work, and not surprisingly, many of these experts worked for the Department of Energy in the past. Some of the experts working in this program have had previous involvement at Energy facilities where workers were exposed to radiation and were, in fact, hired for their extensive knowledge of these facilities. NIOSH therefore must carefully balance the need to obtain all relevant information about Energy's sites by involving experts who are familiar with the sites while ensuring that scientific judgments that affect claimants' eligibility for benefits are made in an unbiased manner.

NIOSH issued its first conflict of interest policy for this program on October 17, 2006, and vetted the policy with the advisory board before finalizing it.²² NIOSH officials stated that the new policy was precipitated in part by a claimant advocate's allegation that a subject expert who authored a site profile used information they had previously developed while working at that site, and that the author's bias toward their own

²²While ORAU previously developed a conflict of interest policy for its staff that was incorporated into its contract on October 8, 2002, as a contract deliverable, NIOSH developed a policy for staff and its contractors in 2006.

previous work resulted in incorrect data, leading to an underestimate of the radiation dose. ORAU's policy at the time was ambiguous about how much input such experts could provide to a document and, further, did not have specific rules requiring experts to disclose any conflicts of interest. NIOSH officials told us that they developed a policy in 2006 that would allow knowledgeable individuals to contribute their expertise—particularly since their numbers are limited—but avoid conflicts of interest. The policy prohibits employees with any sort of potential, actual, or perceived conflict from taking a lead role on technical documents, SEC petition evaluations, or individual dose reconstructions. The NIOSH policy addresses different types of conflict of interest—individual, corporate, financial, employment-related, familial, and supervisor-subordinate relationships. However, in the interest of making sure that all available factual information about radiation doses is gathered from all relevant sources and considered, experts who have a perceived or actual conflict of interest with a site are still permitted to contribute to site profiles and SEC petition evaluations for that site, as needed, to ensure their completeness and accuracy. However, the policy requires that their specific contributions be fully noted.

The NIOSH policy is comprehensive in that it addresses all aspects of the dose reconstruction program, as well as corporate entities and all federal, contractor, and subcontractor employees associated with the dose reconstruction program.²³ As such, the policy applies not only to those who directly perform key program functions, but also to those who serve in ancillary roles such as administrators, support staff, and attorneys.²⁴

While Most Provisions Are Now Implemented, NIOSH Is Not Yet Fully Monitoring or Enforcing Its Policy

NIOSH and its two principal contractors for the dose reconstruction program—ORAU and Battelle—have implemented most applicable policy provisions, including prohibiting individuals with an actual or perceived conflict from performing dose reconstructions or authoring site profiles and disclosing narrative and quantitative input by site and subject experts to technical documents (see table 4). For example, ORAU uses a database

²³The NIOSH policy does not apply to the advisory board, which may choose to create and administer its own conflict of interest policy to supplement existing applicable ethics requirements. The NIOSH policy also does not apply to the contractor assisting the board since the contractor is expected to conform to conflict of interest provisions set forth by the board.

²⁴The policy covers those attorneys on HHS' Office of General Counsel Radiation Compensation Legal Team who perform program-related duties.

tracking system to automatically prevent the assignment of dose reconstruction claims to staff that have a conflict with the particular site under review. In addition, site and subject experts who contributed to technical documents are clearly identified and their input has been attributed to them in order to fully disclose the source of the information. Moreover, ORAU went beyond what the policy requires by retroactively annotating and attributing technical documents to their source to provide the basis of each finding, conclusion, and other information in the document.

Table 4: Implementation Status of Key Conflict of Interest Policy Provisions

Provision	NIOSH	ORAU	Battelle
Dose reconstructions, technical documents, and SEC petition evaluations			
Individuals with a conflict cannot perform dose reconstructions or author technical documents and SEC petition evaluations for sites at which they have a conflict	●	●	●
Site and subject experts			
All input to documents is attributed to each source	●	●	●
Experts are identified on the approval page of technical documents	●	●	●
Public disclosure forms			
Individual and corporate entities complete a disclosure form when first assigned to a program function ^a	● ^d	● ^d	● ^d
Electronic copies of disclosure forms are publicly available on the Web within 1 day of completion	● ^d	● ^d	● ^d
Procedures demonstrating compliance			
Procedures demonstrating compliance are posted on the Web within 60 days of final publication of the policy	● ^d	● ^d	n/a ^b
Entity's employees are informed of the policy and implementing procedures	●	●	n/a ^b
Monitoring and enforcement			
NIOSH conflict of interest officer reviews disclosure forms, ensures key program documents conform to policy, and investigates and resolves complaints	◐	n/a	n/a
NIOSH will audit disclosure forms periodically	○	n/a	n/a
Any errors in disclosure forms as a result of NIOSH's audit will be corrected immediately and penalties imposed for failure to comply	○	n/a	n/a ^b
Anyone may submit complaint to NIOSH regarding missing or erroneous disclosure forms by contacting NIOSH conflict of interest officer ^c	●	n/a	n/a
Policy incorporated as a contract provision and tracked as a deliverable	●	n/a	n/a

Source: GAO analysis of NIOSH conflict of interest policy and actions taken to implement its provisions.

Note: ● = fully implemented; ◐ = partially implemented; ○ = not yet implemented

^aA modified version of this provision may be implemented, allowing a new disclosure form to be filed each time an individual's association with a site changes.

^bNot applicable given pending expiration of Battelle task order when policy was issued.

^cNo complaints had been filed as of May 2007, according to the conflict of interest officer.

^dDelayed implementation.

However, implementation of some provisions was delayed. For example, NIOSH and its contractors were required to file disclosure forms whenever an individual was assigned to a new or different task. However, the implementation of this provision was delayed because NIOSH and contractor officials found it cumbersome to file the forms that often, and NIOSH decided to allow individuals to file disclosure forms only when

there were changes in the particular sites with which they had a conflict. Ensuing delays in filing disclosure forms led to delays in posting procedures demonstrating compliance with the policy on the organizations' Web sites.

These delays have, in part, hindered NIOSH from fully monitoring and enforcing its policy, meaning that the NIOSH-appointed conflict of interest officer has only just begun a review of all disclosure forms and key program documents to ensure they conform to the policy.²⁵ NIOSH officials told us that the review will be completed once NIOSH has developed a Web-based tool that will match the document author with its disclosure form, but officials did not indicate when the tool would be ready. While NIOSH is also required to periodically audit completed disclosure forms, it has not yet developed audit procedures or a timetable for fulfilling this requirement, nor has NIOSH imposed penalties for any missing, erroneous, or incomplete forms.

Labor's Reviews of NIOSH Documents and Returns of Cases for Rework Do Not Indicate Systematic Efforts to Contain Benefits, but Raise Issues about the Transparency of Labor's Involvement

While Labor did not pursue a strategy to deny benefits to eligible claimants, the agency was extensively involved in commenting on NIOSH's scientific work and did not transparently provide its rationale for certain comments on NIOSH technical documents or SEC petition evaluations. Labor officials told us that, as the lead agency, Labor reviews NIOSH documents to promote their clarity and consistency so that Labor can better adjudicate claims. We estimated that 65 percent of the technical documents contained comments pertaining to clarity and consistency or contained no comments at all, but in some instances, Labor's comments appeared to go further and questioned NIOSH's scientific assumptions. It was difficult to determine, from the written documents alone, how these particular comments pertained to Labor's adjudication role because the agency did not explicitly document its rationale. Labor officials subsequently met with us and explained how these comments did in fact relate to the adjudication of claims. However, we remain concerned that this lack of transparency in Labor's written comments could give the appearance of an effort to deny benefits to eligible claimants. Apart from commenting on NIOSH documents, Labor also returned nearly 3,000 cases to NIOSH for rework. Of returned cases, 87 percent of them had a less than 50 percent probability of causation, based on NIOSH's initial dose

²⁵The position is temporarily filled by the NIOSH chief of staff until a permanent individual is appointed.

reconstruction, and thus would likely have been denied compensation. Of these cases, 16 percent were subsequently awarded benefits. The remaining cases that Labor returned had a 50 percent or greater probability of causation and thus would likely have been awarded benefits based on the initial dose reconstruction. However, 11 percent of these cases were denied following rework.

Labor's Comments on NIOSH's Documents Focused on Clarity and Consistency, but Rationale for Comments That Questioned NIOSH's Science Lacked Transparency

Labor's extensive comments on NIOSH's documents were intended to promote the clarity and consistency of these documents, but the rationale for questioning some scientific assumptions and SEC definitions was not always explicit. While the law and regulations do not provide guidance on Labor's authority to comment on NIOSH draft technical documents and SEC petition evaluations, both NIOSH and Labor acknowledged the value of Labor's comments in helping facilitate the adjudication of claims. Labor makes compensation decisions based on NIOSH's radiation estimates for individual claimants but has no explicit authority to comment on the underlying technical documents on which the estimates are based. Labor officials told us, however, that they reviewed these technical documents—as well as SEC petition evaluations—because the executive order implementing EEOICPA gives Labor, as lead agency, broad authority to administer the program.²⁶ At Labor's request, NIOSH agreed, in January 2006, to systematically submit certain draft documents to Labor for review and comment. These included the three types of technical documents used in dose reconstruction—site profiles, technical information bulletins, and technical basis documents—and SEC petition evaluations, as shown in table 5. Labor officials told us that they offer comments intended to facilitate adjudication of claims by highlighting needed improvements to the clarity and consistency of NIOSH's documents, and acknowledged that all comments are to be taken at NIOSH's discretion.

²⁶Executive Order No. 13179, 65 Fed. Reg. 77487 (Dec. 7, 2000).

Table 5: Types of NIOSH Documents Reviewed by Labor

	NIOSH document	Description
Technical document used in dose reconstruction	Site profile	Describes a specific work site. Details factors such as the physical appearance and layout of the work site, the work processes used there, the types of materials used and potential sources of radiation
	Technical basis document	Individual documents that form a site profile. An individual document contains information on a specific aspect of the work site, such as the physical layout of the work site or the work processes used
	Technical information bulletin	Documents containing information on specific technical issues or procedures for estimating radiation exposure, used to add to or supplement technical basis documents and site profiles and may be used for specific or multiple work sites
SEC petition evaluation		Evaluation of requests filed by claimants seeking the addition of new classes of employees to the special exposure cohort

Source: NIOSH.

Note: NIOSH considers SEC petition evaluations to be a type of technical document. However, unlike site profiles, technical basis documents, and technical information bulletins, SEC petition evaluations are not used in the dose reconstruction process.

Labor commented extensively on the three types of technical documents used in dose reconstruction and on SEC petition evaluations, and the majority of their comments were clearly related to facilitating the adjudication of claims. We reviewed Labor’s comments for a random sample of 79 technical documents from the 187 documents upon which Labor provided comments as of March 31, 2007. On the basis of this sample, we estimate that 65 percent of the technical documents contained only comments that dealt with making the documents clear and consistent, or contained no comments at all from Labor. Eleven percent of technical documents contained comments pertaining to NIOSH’s scientific processes, assumptions, or conclusions.²⁷ These results are summarized in table 6. We also reviewed Labor’s comments on the 6 draft SEC petition evaluations on which Labor provided substantive written comments. Likewise, Labor’s comments on some SEC petition evaluations sought to clarify the definition of workers and facilities that were being proposed for inclusion in the SEC, and Labor officials told us that they did not make any

²⁷ Estimated percentages are based on a random sample and are subject to sampling error. All percentage estimates in this report have 95 percent confidence intervals plus or minus 9 percentage points of the estimate itself. Appendix I provides additional information on the technical document sample and estimates.

recommendations to approve or deny the petition.²⁸ (See app. II for a listing of SEC petition evaluations and indication of whether Labor provided comments.)

Table 6: Estimated Percent of NIOSH’s Draft Technical Documents, by Nature of Labor’s Comments

Type of comment	Estimated percentage of Technical documents
Clarity, consistency, or no comment	65
Accuracy	19
Minor editorial change	13
Scientific processes, assumptions, or conclusions	11
Tone	11
Comment agrees with NIOSH language	1

Source: GAO analysis of Labor’s comments on a sample of NIOSH draft technical documents.

Note: Percentages do not sum to 100 because Labor may have provided more than one type of comment for a technical document.

We found, however, that other comments appeared to go beyond clarity and consistency. Moreover, it was not always clear without considerable verbal explanation from Labor as to how the comments related to clarity and consistency and would facilitate the adjudication of claims. An estimated 11 percent of the technical documents contained comments that questioned NIOSH’s scientific assumptions. In addition, comments on several SEC petition evaluations suggested that the SEC definition was too broad and that the size of the cohort should therefore be reduced. It was difficult to determine, from the written documents alone, how these particular comments were related to Labor’s adjudication role—as opposed to NIOSH’s scientific role—because Labor did not explicitly document its rationale. Instead, it was necessary for Labor officials to walk us through each document and provide the additional context needed to understand how the comments were linked to adjudication. For example, in a technical information bulletin on construction workers, Labor’s written comment suggested that NIOSH was being overly

²⁸Of the 30 draft NIOSH SEC petition evaluations as of March 5, 2007, Labor officials told us that they provided written comments on 6 and oral comments on 5 evaluations. Officials told us that these oral comments were not substantive and were never documented. With regard to the remaining 19 petition evaluations, Labor sent letters to NIOSH noting “we have no comment” for 7 evaluations, reviewed but provided no oral or written comments on 2 evaluations, and did not review the remaining 10 evaluations.

favorable toward claimants by taking information derived from a group of monitored workers at a particular Energy site and using it to estimate radiation doses for certain unmonitored workers at other sites. Specifically, Labor asked, “Could this not upwardly bias the assumed average annual dose to unmonitored subcontractor construction workers?” On its surface, this comment might be interpreted as an attempt to reduce the likelihood of certain claimants receiving compensation. However, Labor explained to us that the agency sought clarification of NIOSH’s scientific assumptions and that this clarification was needed to adjudicate cases where claimants might have objected to their dose reconstruction being based on data from a site at which they had never worked. While Labor was eventually able to demonstrate how its comments on technical documents and SEC petition evaluations were tied to adjudication, we remain concerned that Labor’s lack of transparency in giving its rationale when it made the comments to NIOSH could give the appearance of an effort to deny benefits to eligible claimants.

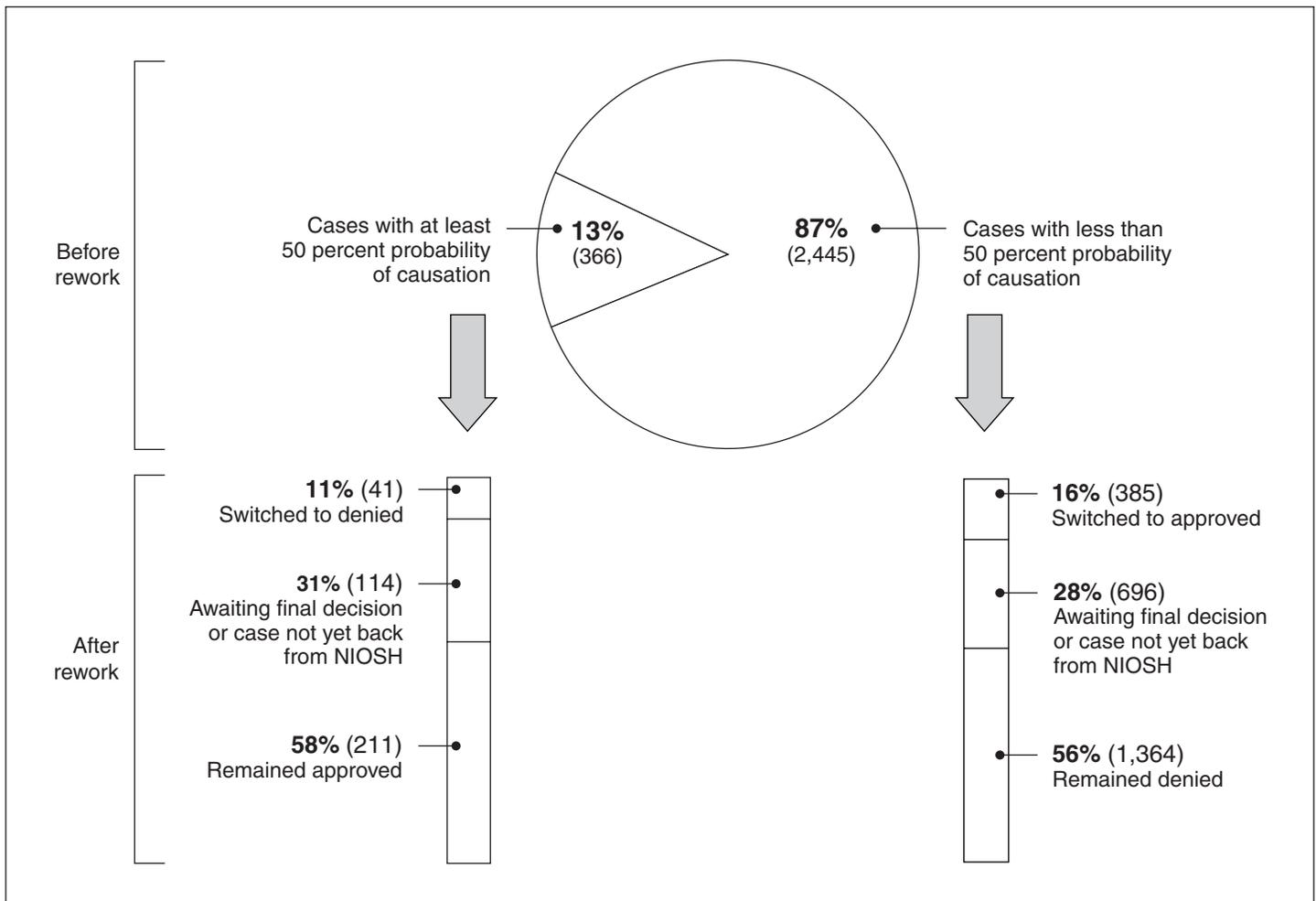
Data on Cases That Labor Returned to NIOSH for Rework Did Not Reflect Systematic Attempt to Deny Benefits

As contemplated by EEOICPA regulations, Labor may return cases to NIOSH for rework for any reason, as part of the adjudication process. As of March 2007, Labor had returned nearly 3,000 cases for rework, and the data we reviewed did not indicate a systematic strategy by Labor to deny benefits to claimants.²⁹ Were Labor pursuing such a strategy, the agency could have requested that NIOSH rework primarily those cases that would have been approved so that the likelihood of employment-caused cancer could be reduced and the case ultimately denied. However, our analysis of Labor statistics on these cases showed that the vast majority (87 percent) of cases returned to NIOSH for rework had a less than 50 percent probability of causation, based on NIOSH’s initial dose reconstruction, and thus would likely have been denied compensation, as shown in fig. 4. The most common reason for returning a case was that information originally

²⁹These 2,811 cases also included 10 compensable “glove box” cases involving claimants who developed prostate and other cancers while handling potentially harmful materials by using a sealed container with gloves built into the side, allowing manipulation of objects inside the container without actually touching them. As with some technical documents and SEC petition evaluations, some of Labor’s comments on these cases appeared to question NIOSH’s scientific assumptions, and we found it difficult to ascertain how the comments were linked to adjudication. Labor subsequently explained that it asked NIOSH to rework the dose estimate using workers’ actual employment period and glove box design so that Labor could adjudicate glove box cases in a manner consistent with other prostate cancer cases. Eight cases remained compensable after rework, while two were still awaiting a final decision.

sent to NIOSH had subsequently changed, such as the presence of an additional type of cancer or a longer term of employment at a nuclear facility. Also, a greater percentage of cases were reversed in the claimant's favor following rework, with 16 percent of denied cases switching to approvals, compared to 11 percent of approved cases switching to denials.

Figure 4: Summary of Cases Returned to NIOSH for Rework, as of March 31, 2007



Source: GAO analysis of Department of Labor data.

Several Issues Present Challenges to Advisory Board's Independence, and Various Options Could Be Considered to Address Them

While we did not find evidence that the advisory board was impeded in performing its statutory responsibilities, issues pertaining to the board's funding structure, member appointment process, and support staff present challenges to independence, leaving the board vulnerable to potential outside influence. Various options are available to address these challenges, such as appropriating funds directly to HHS in a separate line item specifically for the advisory board, including Congress on a bipartisan basis in the appointment of advisory board members, and requiring HHS to develop procedures to ensure that the advisory board will not be inappropriately influenced. These options have various advantages and disadvantages.

Issues Related to Advisory Board Funding, Membership, and Support Staff May Challenge Board Independence

The advisory board does not receive direct appropriations, and instead, its funds pass through Labor and HHS. While Labor was authorized to transfer necessary funds to NIOSH in fiscal years 2001 to 2005, no specific line item funding was authorized for the board's operations.³⁰ In contrast, Labor's 2006 appropriations act directed the Secretary of Labor to transfer \$4.5 million to NIOSH for use by or in support of the advisory board. No change was made to that provision in the 2007 continuing resolution. While advisory board members report having received necessary funding to date, the absence of a specified amount reserved exclusively for the board's operations could pose a future challenge to the advisory board's independence and credibility because the agencies have a potential opportunity to limit the board's budget if they disapprove of the board's actions on such issues as the quality and validity of NIOSH's dose reconstructions and recommendations on adding classes of workers to the SEC.

The process by which board members are appointed is also not clearly established or uniform, presenting a challenge to the advisory board's independence. EEOICPA requires the President to appoint board members, in consultation with organizations having expertise on worker health issues, to ensure that members reflect a balance of scientific, medical, and worker perspectives. However, neither the act nor the executive order implementing the act specifies criteria for nominating and selecting board members. While the advisory board is also subject to the

³⁰In fiscal years 2001 to 2005, Labor's appropriation acts authorized the Secretary of Labor to transfer such funds as necessary to any executive agency authorized under EEOICPA to carry out those authorities. In turn, NIOSH provided funding for the advisory board's operations.

FACA requirement that board membership be balanced, Members of Congress and the claimant community have raised concerns about potential influence by Labor and NIOSH to reduce the number of worker representatives in order to shape the outcome of the board's decisions on SEC petitions. These concerns were precipitated by internal Labor correspondence in 2005 that characterized the advisory board as being essentially a worker advocacy organization and noted that a change in membership would be critical to counteracting the pressure to add more classes to the SEC. Five of the 12 board members have been replaced since the board was established. As of October 2006, only two members were worker representatives, according to the designated federal officer, but that number has since grown to four worker representatives.

The executive order that implements EEOICPA also tasks HHS—of which NIOSH is a part—with providing support staff and resources to the advisory board.³¹ However, there is a potential for key federal agency officials supporting the board to have conflicts of interest, presenting another challenge to ensuring advisory board independence. GAO's prior work showed that certain federal officials supporting the advisory board in the past may not have been sufficiently independent.³² For example, the designated federal officer for the advisory board was also the director of the NIOSH program being reviewed by the board. In response to concerns about the appearance of dual roles, the NIOSH Director replaced the designated federal official with a senior NIOSH official not involved in the program. However, there is currently nothing in place to ensure that HHS will avoid similar conflicts of interest in the future as new candidates are considered for advisory board support roles over the life of the board. In addition, several advisory board members expressed concerns to us that HHS general counsel staff may not be sufficiently independent because they are tasked with providing legal advice to the advisory board and NIOSH simultaneously. Wearing these dual hats has, at least on one occasion, prevented HHS general counsel staff from advising the advisory board on certain legal matters in a public forum since the matter dealt with ongoing litigation that involved NIOSH.

³¹Executive Order 13179 requires HHS to provide the advisory board with administrative services, funds, facilities, staff, and other necessary support services, and to perform the administrative functions of the President under the Federal Advisory Committee Act with respect to the advisory board.

³²[GAO-06-177](#).

Options to Enhance Advisory Board Independence Could Involve Congressional, Agency, and Advisory Board Action

We identified various options to enhance advisory board independence by addressing challenges arising from the advisory board’s funding structure, membership process, and staff support. Table 7 provides an overview of possible options, how they compare to the current program, their advantages and disadvantages, and possible models in other programs. The options presented are independent of each other and could be implemented in any combination, if at all.

One option is to require that funds be appropriated directly to HHS in a separate line item specifically for the advisory board.³³ Such a change could more directly route funds to the advisory board and avoid any potential agency efforts to inappropriately reduce the advisory board’s funding and, in doing so, limit its scope of activities. Congress funded the advisory board via a separate line item in fiscal years 2006 and 2007 but did not do so in previous fiscal years. The Antitrust Modernization Commission is an example of another FACA committee that was funded via a separate line item.

A second and a third option for increasing the independence of the advisory board pertain to the appointment of advisory board members. Option two is to include Congress, on a bipartisan basis, in the appointment of members to the advisory board.³⁴ This could reduce the potential for any efforts by any administration to “stack” the board. However, the option could also have the disadvantage of lengthening the appointment process. The Veterans’ Disability Benefits Commission is a possible model for this option.³⁵ A third option is to require that the Administration’s nomination and selection process be publicized and that the public be allowed to have input in the nomination process. In GAO’s

³³This option has been proposed in the Energy Employees Occupational Illness Compensation Program Improvement Act of 2007 (H.R. 268). As of September 2007, H.R. 268 had been referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary and to the Subcommittee on Workforce Protections of the House Committee on Education and Labor.

³⁴Proposed legislation (H.R. 268) would require that all 12 members of the advisory board be appointed by Congress. Specifically, the Speaker of the House of Representatives, President of the Senate, Minority Leader of the House of Representatives, and Minority Leader of the Senate would each appoint three board members. In addition, the appointing entities would be required to select a board member from each of the following three communities: scientific, medical, and worker, to ensure all three perspectives were equally represented on the board.

³⁵The 13 members of the Veterans’ Disability Benefits Commission are appointed by the President and leaders of Congress.

prior work on federal advisory committees, we identified as a best practice the strategy of seeking nominations from the public by using widely available resources, such as the *Federal Register* and agency Web sites, to broaden the pool of candidates from which committee members may be drawn, as well as creating a systematic and transparent method of obtaining nominations that help create a balanced advisory committee.³⁶ Other research has also noted the salience of making information about the committee formation and nomination process public in order to “draw from a wide and diverse base for committee appointments and to ensure balance in the resulting committee makeup.”³⁷ However, disadvantages of this option may include increased administrative and publishing costs and a longer nomination process. The Environmental Protection Agency’s (EPA) Science Advisory Board, which advises EPA on scientific matters, may be a possible model for this option.³⁸

A fourth option for increasing independence could be for Congress to require the advisory board to report periodically to the Secretary of HHS and congressional committees of jurisdiction on whether the advisory board is encountering any obstacles that may impair its ability to perform its statutory responsibilities in an independent and credible manner. For example, the advisory board could be asked to highlight any obstacles in areas including the adequacy of funding, access to data, independence of agency support staff, and the balance of perspectives among board members. The advantage of this option is that it could provide a mechanism for periodically surfacing any such issues from the people who would likely have firsthand knowledge of them. Disadvantages of this option are that it could increase the advisory board’s already substantial workload and it may prove difficult to reach consensus among board members as to whether they are actually encountering any obstacles to independence. According to officials from General Services Administration’s Committee Management Secretariat, whose task it is to

³⁶GAO, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*, [GAO-04-328](#) (Washington, D.C.: Apr. 16, 2004).

³⁷National Academy of Sciences, National Academy of Engineering, and Institute of Medicine; *Science and Technology in the National Interest: Ensuring the Best Presidential and Federal Advisory Committee Science and Technology Appointments*, The National Academies Press (Washington, D.C.: 2005).

³⁸EPA’s Science Advisory Board uses the *Federal Register* to publish notices seeking nominations to the board, uses its Web site as a vehicle for soliciting nominations to its peer review committees, and requests public comment on proposed committee membership.

monitor and report executive branch compliance with FACA, there are currently no advisory committees required to report to Congress on obstructions to their independence. However, General Services Administration officials were supportive of the option and noted its potential benefits.

A fifth option would be for HHS to develop procedures to ensure that federal officials providing staff support to the advisory board remain independent of NIOSH's dose reconstruction program. While FACA regulations require that agency heads develop procedures to assure that advice or recommendations of advisory committees will not be inappropriately influenced by the appointing authority or any special interests, HHS has not developed such procedures for the advisory board. For example, the agency could develop written guidelines to ensure that officials providing staff support to the advisory board, such as the designated federal officer or general counsel, are sufficiently independent of the program under review. Having such procedures could provide greater transparency about factors that need to be considered when designating new candidates for these roles over the life of the advisory board. The Department of Defense developed such procedures for its many advisory committees, one of which is the Veterans' Advisory Board for Dose Reconstruction, and could be used as a possible model for this option.

Table 7: Options to Enhance Advisory Board's Independence

	Funding	Appointment of members		Advisory board report	Federal officials
	Option 1	Option 2	Option 3	Option 4	Option 5
Description of option	Congress appropriates funds directly to HHS in a separate line item for the advisory board. ^a	Include Congress, on bipartisan basis, in the appointment of members evenly divided among worker, scientific and medical communities. ^a	Appointing authority clarifies and publicizes board member nomination and selection process and allows public to play a role in nominations.	Advisory board reports periodically to Congress and Secretary of HHS on any obstacles to its independence.	HHS develops procedures to ensure that federal officials providing staff support to the board are independent.
Current program	Funding passes through Labor and HHS; funding was a separate line item for first time in fiscal years 2006 and 2007.	Members are appointed by President; no requirement to appoint a specific number of representatives from each community.	Unclear how members are nominated and selected; no opportunity for public to nominate candidates.	No such required mechanism for reporting concerns.	No such procedures.
Advantages of option	Protects board's scope of work and actions from potential influence by Labor and HHS. Overall administrative costs reduced.	Increases board's credibility by promoting greater balance in perspectives; balance ensured by stipulating number of members from each community.	Provides greater transparency and understanding of membership process; conflicts of interest identified prior to member selection; broader pool of qualified candidates.	Provides a regular mechanism for advisory board to report on its ability to carry out its work in an independent and credible fashion.	Protects board's independence by helping ensuring federal officials providing staff support to the board are free of conflicts.
Disadvantages of option	Appropriated sum might not guarantee sufficient funding for advisory board.	May extend the time required to nominate and select new members.	Additional administrative and publishing costs; longer nomination process; potential negative public reaction if publicly-nominated candidates are not selected.	May increase board's already significant workload; members may have difficulty reaching consensus on whether board independence is being impeded.	May be difficult to obtain staff knowledgeable yet independent of the program.
Possible models for option	Antitrust Modernization Commission.	Veterans' Disability Benefits Commission.	EPA's Science Advisory Board.	None identified by federal officials responsible for FACA oversight.	Veterans' Advisory Board for Dose Reconstruction.

Source: GAO analysis.

^aA similar option is proposed in pending legislation (H.R. 268).

Conclusions

Much progress has been made since EEOICPA's enactment in developing and implementing the Subtitle B dose reconstruction program. NIOSH has expedited dose reconstructions with a focus on eliminating the backlog of the oldest claims. In addition, the advisory board has recommended the addition of 16 new classes to the special exposure cohort. For its part, Labor has approved compensation for over 17,000 cases totaling more than \$2.1 billion in benefit payments.

However, the program could be further strengthened in several ways. NIOSH's oversight of contractor billings in the dose reconstruction program did not have the level of internal controls to be expected of a project of this magnitude and complexity. Further, NIOSH's oversight of ORAU's review of subcontractor costs was not commensurate with the significant proportion of work they performed. Given that the next dose reconstruction contract will also be a cost reimbursement contract, it is therefore critical that NIOSH establish policies and procedures that will provide reasonable assurance of the appropriateness of contractor costs. While ORAU's monthly invoices did not contain sufficient detail to permit NIOSH to validate billings, the next contract will require the contractor to submit a detailed breakdown of labor rates and charges. This is a positive first step toward improving oversight of contractor payments, and NIOSH management's continued attention to this area will be critical to establishing a lasting and more effective administration of future dose reconstruction contracts.

Both Labor and NIOSH officials have acknowledged that Labor's provision of comments on various NIOSH draft documents is useful in facilitating the adjudication of claims, but without greater transparency, the agency will not be able to counter the perception that it is attempting to deny benefits to claimants. Our review of Labor's comments and analysis of data on cases it returned for rework indicated that Labor is not pursuing a strategy to deny benefits, and further, that its comments and involvement are helpful in adjudicating claims fairly. However, it required a detailed explanation on the part of Labor, to demonstrate that its comments were all related to facilitating adjudication, and that it had not attempted to infringe upon NIOSH's role in the scientific aspects of the process. In the wake of the OMB memorandum, claimants and Members of Congress are understandably concerned about whether certain federal agencies are taking actions behind the scenes to inappropriately deny benefits. Given that this program is under considerable scrutiny and that the claimants involved have serious illnesses and are looking for fair and equitable consideration of their claims, the transparency and credibility of the Subtitle B dose reconstruction program are paramount. Continued

monitoring of this issue, as well as transparency on the part of Labor, is important to ensuring program credibility and allowing for congressional oversight.

The advisory board performs critical functions in the Subtitle B program and operates in a technically complex and high-pressure environment with input from multiple stakeholders, including claimants, Members of Congress, federal agency officials, and others. Board independence is essential to ensuring that the work of the board will have credibility. The board faces continuing vulnerabilities with regard to its needs for funding and staff support and the appointment of new members to ensure a balance of perspectives. To some extent these vulnerabilities are inherent to advisory committees in general, but in this case the vulnerabilities have been exacerbated by Administration concerns, surfaced in the OMB memorandum, about the need to develop cost containment strategies for the Subtitle B program. Hence, continuing diligence is needed in assessing the situation in which the board performs its work and considering the need for any adjustments to further promote the board's independence.

Recommendations for Executive Action

To strengthen NIOSH's oversight of costs incurred in the dose reconstruction program and improve NIOSH's review and approval process for contractor billings, we recommend that the Secretary of Health and Human Services direct the Director of CDC's Procurement and Grants Office to:

- Establish appropriate policies and procedures for effective review and approval of the prime contractor's invoices. Such policies and procedures should specify the steps to be performed for review and approval, the individuals responsible for carrying out these steps, the level of invoice detail needed to perform an appropriate review, and the appropriate documentation to be maintained of that review process.
- Establish a policy and procedures to periodically assess the prime contractor's oversight of subcontractor costs to determine if there are any deficiencies and corrective actions needed and assess whether the controls can be sufficiently relied on to ensure that subcontractor payments are allowable, reasonable, and in compliance with all FAR and contract requirements.

To increase transparency and facilitate congressional oversight of Labor's involvement in NIOSH activities, we recommend that the Secretary of Labor take steps to ensure that Labor's comments on draft NIOSH

technical documents and SEC petition evaluations more explicitly indicate how the comments are intended to promote clarity and consistency, and thereby facilitate Labor's adjudication of claims. This could include a brief explanation accompanying Labor's comments on each NIOSH document, that would adequately describe Labor's specific rationale for its comments.

To further enhance the independence of the President's Advisory Board on Radiation and Worker Health, we recommend that the Secretary of HHS implement the agency's regulatory responsibility under FACA to develop procedures to ensure that the advisory board's work is not unduly influenced by the appointing authority or any special interests. These procedures could include a provision specifying that federal officials who fill key board support roles must be independent of the dose reconstruction program.

Matter for Congressional Consideration

In light of the potential vulnerabilities of the Advisory Board on Radiation and Worker Health, Congress may wish to consider the options related to funding, appointment of members, and advisory board reporting that we have identified to further enhance the independence of the advisory board.

Agency Comments and Our Evaluation

We provided a draft of this report to Energy, Labor, and HHS for review. Comments from the three agencies are reproduced in full in appendixes III through V. Energy stated that it did not have any comments on the report. Labor agreed with our findings about its comments on NIOSH's documents and return of cases for rework. With regard to our recommendation, Labor stated that it did not anticipate that there would be a need to explain the reason for its comments on NIOSH documents given Labor's frequent coordination with NIOSH. Nevertheless, Labor agreed with our recommendation and noted that it is now including the rationale and basis for its written comments on NIOSH documents.

HHS agreed with our two recommendations regarding strengthening oversight of contract costs. HHS generally agreed with our recommendation to develop procedures to ensure the advisory board's work is not unduly influenced by the appointing authority or special interests. The agency noted that its Federal Advisory Committee Management Handbook outlines policies and procedures to help ensure that HHS advisory committees are fairly balanced in their membership. HHS also stated that in soliciting potential nominees for various HHS advisory committees, it uses a number of avenues to help ensure a balance

of perspectives, such as notices in professional publications and the Federal Register. Nonetheless, HHS agreed there is merit to establishing a more formalized process for identifying and selecting advisory committee designated federal officers.

With regard to the ORAU contract, HHS disagreed with our characterization that it “significantly underestimated” the cost of the contract. HHS noted that, in light of limited prior experience and understanding of the project’s complexity, it purposely selected a cost reimbursement award fee contract to allow flexibility and management controls over ORAU’s performance. We revised our report to acknowledge this point. Nonetheless, NIOSH’s independent government cost estimate of \$91.3 million for the ORAU contract and the original award amount of \$70.1 million were both considerably lower than the \$198.7 million in total actual costs eventually incurred by the contractor. Therefore, we did not revise our characterization that total contract costs were significantly underestimated and, as we recognized in our report, this was due in large part to unanticipated program complexity.

HHS questioned the accuracy of the figures cited in our report on total NIOSH administrative costs for dose reconstruction cases, and total ORAU costs. With regard to the former, NIOSH officials told us in a subsequent discussion that the figure was overstated because it included some NIOSH costs for activities outside of performing dose reconstructions, such as evaluating special exposure cohort petitions and responding to the advisory board. Accordingly, we revised the report to adjust the figure on NIOSH administrative costs. HHS also provided information updated through the end of fiscal year 2007 on NIOSH’s total EEOICPA administrative costs and we incorporated this information in the report. In addition, HHS pointed out that the figure in our report on the estimated total cost of the ORAU contract at completion did not reflect the most current information through the end of fiscal year 2007. We updated the total ORAU contract cost figure according to additional documentation obtained from the contracting office.

Finally, with regard to conflict of interest issues, HHS said that we incorrectly stated that NIOSH issued its first conflict of interest policy for this program on October 17, 2006, and noted that an earlier policy was established by ORAU and incorporated into its contract on October 8, 2002, as a deliverable under the contract. We revised the report to make it clear that while ORAU’s conflict of interest policy took effect in 2002 for its staff, NIOSH developed a comprehensive conflict of interest policy for its own staff and contractors in 2006. HHS also said that its general

counsel staff who advise the program are organizationally separate from NIOSH and are therefore not subject to NIOSH's conflict of interest policy for the program. We clarified our report by citing language contained in NIOSH's conflict of interest policy for the dose reconstruction program regarding which specific general counsel staff are covered by the policy.

HHS also provided several technical comments, which we have incorporated as appropriate.

We will send copies of this report to the Secretaries of Energy, HHS, and Labor; relevant congressional committees; and other interested parties and will make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

A list of related GAO products is included at the end of this report. If you or your staff have any questions about this report, please contact me at (202) 512-7215 or at bertonid@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Other contacts and staff acknowledgments are listed in appendix VI.



Daniel Bertoni
Director, Education, Workforce,
and Income Security Issues

Appendix I: Scope and Methodology

To determine the reasons for any increases in costs of the two dose reconstruction contracts awarded by the National Institute for Occupational Safety and Health (NIOSH) and determine how effectively the contracts were managed, we met with contracting officials from the Centers for Disease Control and Prevention's Procurement and Grants Office in Pittsburgh, Pennsylvania, and reviewed the contract files for ORAU and Battelle. As criteria to review internal controls over payments made to contractors, we used our *Standards for Internal Control in the Federal Government*¹ and the Federal Acquisition Regulation. We also analyzed pertinent contract-related materials, including the contracts, the request for proposal for the next dose reconstruction contract, external audits of the contractors' and subcontractors' accounting systems and labor rates, NIOSH's semiannual award fee performance evaluations, correspondence between the contracting office and the contractor, and documents submitted by ORAU: monthly progress reports, requests for cost increases, and internal audits. Finally, we interviewed officials from NIOSH's Office of Compensation Analysis and Support (OCAS) and toured its headquarters in Cincinnati, Ohio, to get a better understanding of procedures and practices. Similarly, we interviewed contractor officials from ORAU and toured its offices in Cincinnati, Ohio, and Richland, Washington, to observe operations. While in Richland, we also met with contractor officials from Battelle.

To determine the conflict of interest policy for NIOSH and its contractors, we interviewed the NIOSH Conflict of Interest Officer, the OCAS Director, and contractor officials. To ascertain the implementation status of key provisions contained in the policy, we also reviewed selected documents such as disclosure forms, technical documents, and agency and contractor procedures. In addition, we periodically visited the Web sites for OCAS and its contractors to verify that disclosure forms, implementation procedures, and contact information for the NIOSH Conflict of Interest Officer had been posted, as required. While our work was not designed to investigate the merits of specific allegations of conflicts of interest, we also reviewed pertinent transcripts of advisory board meetings and interviewed a claimant advocate who worked for a non-profit organization that monitors implementation of EEOICPA and was familiar with the evolution of NIOSH's conflict of interest policy.

¹[GAO/AIMD-00-21.3.1](#).

To determine the extent of Labor involvement in Subtitle B activities tasked to NIOSH, we analyzed Labor's comments on draft NIOSH technical documents used in the dose reconstruction process as well as special exposure cohort (SEC) petition evaluations. Our population consisted of draft NIOSH technical documents (site profiles, technical basis documents, and technical information bulletins) upon which Labor provided comments as of March 31, 2007. We obtained from Labor a listing of the 236 of these documents, and after eliminating those documents where Labor did not raise further questions and was merely responding to NIOSH's resolution of Labor's original set of comments, we were left with 187 documents. Due to resource constraints, we were not able to review all 187 documents. Instead, we reviewed a probability sample of the documents that would allow us to estimate characteristics for the entire population of technical documents. Thus, we selected a random sample of 79 technical documents for review: 5 site profiles, 59 technical basis documents, and 15 technical information bulletins. On the basis of this random sample, we produced percentage estimates for the population of 187 technical documents. Because we followed a probability procedure based on random selections, our sample is only one of a large number of samples that we might have drawn. Since each sample could have provided different estimates, we express our confidence in the precision of our particular sample's results as a 95 percent confidence interval (e.g., plus or minus 9 percentage points). This is the interval that would contain the actual population value for 95 percent of the samples we could have drawn. As a result, we are 95 percent confident that each of the percentage estimates in this report will be within plus or minus 9 percentage points of the true values in the study population.

To evaluate the nature of Labor's comments, we categorized and analyzed the comments according to whether they pertained to issues of clarity, consistency, accuracy, tone, or minor edits. We also analyzed Labor's comments to see if they raised questions about the scientific assumptions contained in the document. SEC petition evaluations were not included in our sample of technical documents. For these, we similarly examined the nature of Labor's comments on the 6 petition evaluations for which Labor indicated it had provided substantive written comments, as of March 5, 2007. We analyzed the comments to determine whether the comments, if implemented, would have had the effect of reducing the magnitude of the proposed cohort of eligible claimants.

To determine whether Labor was potentially trying to deny benefits paid to claimants, we analyzed data on the 2,811 cases that Labor returned to NIOSH for rework according to whether the cases were compensable

before rework, why they were returned for rework, and what was their final outcome following rework. Our scope included cases that: were “pre-decisional,” meaning a recommended decision had not yet been issued; had a recommended decision but were still awaiting a final decision; had a final decision; or were subject to Director’s orders to re-open the case. Results of our analyses of technical documents, SEC petition evaluations, and cases returned for rework were verified internally by another auditor.

We performed our review by also analyzing pertinent law and regulations. In addition, we reviewed documents that Labor and NIOSH provided in response to several committee and subcommittee requests for all documents and communication—including agency e-mails, letters, and other documents—pertaining to the role of these two agencies in implementing EEOICPA. The requests covered a broad range of topics including Labor’s correspondence with NIOSH, the two NIOSH dose reconstruction contracts, SEC regulations, the advisory board, and the contractor assisting the board. Finally, we interviewed key Labor and NIOSH agency officials to discuss Labor’s role in commenting on NIOSH documents and how those comments were linked to the adjudication process. We also met with officials in Labor’s Seattle District Office to gain a better understanding of the claims adjudication process.

To determine challenges to advisory board independence and identify possible options to enhance board independence, we interviewed all 12 current board members, the designated federal officer for the board, the project manager for the contractor assisting the board, and a claimant advocate. We also analyzed transcripts from recent hearing records that included statements from the Director of Labor’s Office of Workers Compensation Programs as well as internal agency communication provided to this subcommittee. In addition, we reviewed the literature on federal advisory committees, existing procedures concerning the board, and pertinent law and regulation. We also identified advantages and disadvantages that would be relevant for policymakers to consider in implementing these options. Finally, we attended two meetings of the advisory board held in Washington, D.C., and Naperville, Illinois.

To determine the costs of administering the Subtitle B program, we analyzed data from Energy, NIOSH, and Labor. Energy’s administrative costs for fiscal years 2002 and 2003 included costs of processing requests for records pertaining to the Subtitle D program, which accounted for about 3 percent of total requests, and the remaining 97 percent of requests were for the Subtitle B program. Because Energy did not maintain data on

the Subtitle B dose reconstruction program prior to May 2004, we estimated costs by multiplying the number of requests from Labor and NIOSH for Energy records by the average cost of processing such requests for the period October 2003 through April 2004. In addition, Labor did not break out administrative costs for the dose reconstruction program from other Subtitle B costs. However, Labor officials told us that the agency incurs roughly the same costs to administer the different types of Subtitle B cases, be they dose reconstruction cases or others such as beryllium, silicosis, and SEC cases. On the basis of this assumption, we took total obligations, subtracted funds that Labor obligated to NIOSH, and divided the result by the total number of Subtitle B cases filed to arrive at the average cost per Subtitle B case. We then multiplied average cost per case by the total number of cases that Labor referred to NIOSH for dose reconstruction to arrive at total administrative costs. We performed this calculation for fiscal years 2001 through 2006. In addition, we analyzed Labor's total expenditures on benefits paid out in the dose reconstruction program. To assess the reliability of data on administrative costs and benefits paid, we interviewed agency officials about data quality control procedures and reviewed relevant documentation. We determined that the data were sufficiently reliable for purposes of this report.

We conducted our work from August 2006 to October 2007 in accordance with generally accepted government auditing standards.

Appendix II: Status of Labor's Comments on Draft Special Exposure Cohort Petition Evaluations

Department of Energy site (as of March 5, 2007)	Labor provided written comments	Labor reviewed but had no written comments	Labor provided oral comments	Labor reviewed but had no oral comments	Labor did not review
Classes of employees added to the SEC					
Allied Chemical Corporation Plant	✓ ^a				
Ames Laboratory			✓		
Harshaw Chemical Company	✓				
Iowa Ordnance Plant, 1949–1974, Line 1					✓
Iowa Ordnance Plant, radiographers, 1948-1949		✓		✓	
Linde Ceramics Plant	✓				
Los Alamos National Laboratory– RaLa, 1944-1963					✓
Mallinckrodt Chemical Works, Destrehan Street Facility, 1942- 1948			✓		
Mallinckrodt Chemical Works, Destrehan Street Facility, 1949- 1957			✓		
Nevada Test Site			✓		
Oak Ridge Institute for Nuclear Studies					✓
Pacific Proving Grounds	✓				
S-50 Oak Ridge Thermal Diffusion Plant					✓
Y-12 Plant, 1943-1947		✓		✓	
Y-12 Plant, 1948-1957			✓		
Petitions that have qualified for evaluation and are still under review					
Bethlehem Steel Company	✓ ^a				
Blockson Chemical Company	✓				
Chapman Valve					✓
Dow Chemical Company	✓ ^a				
Feed Materials Production Center					✓
General Atomics	✓ ^a				
Hanford	✓ ^a				
Monsanto Chemical Company	✓				
Nuclear Materials and Equipment Corporation					✓

**Appendix II: Status of Labor's Comments on
Draft Special Exposure Cohort Petition
Evaluations**

Department of Energy site (as of March 5, 2007)	Labor provided written comments	Labor reviewed but had no written comments	Labor provided oral comments	Labor reviewed but had no oral comments	Labor did not review
Rocky Flats Plant					✓
Sandia National Laboratory-Livermore	✓ ^a				
W.R. Grace and Company	✓ ^a				
Y-12 Plant, 1951-1959					✓
Petitions not added to the SEC					
Iowa Ordnance Plant, 1946-1948					✓
National Bureau of Standards, Van Ness Street	✓				

Source: NIOSH and Labor.

^aLabor sent NIOSH a letter noting that it had no comment on the petition evaluation.

Appendix III: Comments from the Department of Energy



Department of Energy
Washington, DC 20585

October 9, 2007

Mr. Daniel Bertoni
Director
Education, Workforce, and
Income Security Issues
United States Government Accountability Office
Washington, DC 20548

Dear Mr. Bertoni:

The Office of Health, Safety and Security (HSS) has completed its review of the draft Government Accountability Office (GAO) Report; GAO-08-4, *ENERGY EMPLOYEES COMPENSATION: Actions to Promote Contract Oversight, Transparency of Labor's Involvement, and Independence of Advisory Board Could Strengthen Program*. HSS has no comments on the draft report.

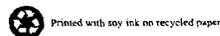
Thank you for allowing us the opportunity to review the draft report.

If there are questions, you may contact Patricia Worthington, Director, Office of Health and Safety, at (301) 903-5926.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn S. Podonsky".

Glenn S. Podonsky
Chief Health, Safety and Security Officer
Office of Health, Safety and Security



Appendix IV: Comments from the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210



OCT 12 2007

Mr. Daniel Bertoni
Director, Education, Workforce, and
Income Security Issues
United States Government Accountability Office
Washington, D.C. 20548

Dear Mr. Bertoni:

Thank you for the opportunity to comment on the draft report entitled, "Energy Employees Compensation: Actions to Promote Contract Oversight, Transparency of Labor's Involvement, and Independence of Advisory Board Could Strengthen Program," with respect to the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). We concur with your findings that the Department of Labor's (DOL) comments on the National Institute for Occupational Safety and Health (NIOSH) documents and DOL's return of EEOICPA claims for rework of NIOSH's dose reconstructions, were intended to maintain consistent and fair claims adjudication. GAO found no evidence of a systematic effort by DOL to deny benefits to claimants because there was none.

As the study found, DOL's returning of NIOSH dose reconstructions has far more frequently resulted in a tentative denial (a case with an initial dose reconstruction leading to a probability of causation of less than 50%) changing to an approval, rather than tentative approvals changing to denials. As you state, DOL returned 2,445 tentative denials to NIOSH, and so far 385 have been converted to approvals. Only 13% (366 cases) of all returns were tentative approvals, and only 41 of those were ultimately reversed and denied.

The tentative approvals that were reversed had been sent back largely because DOL had discovered some fundamental error, such as a subsequent determination that the employee did not work in a qualifying facility or that the wrong cancer(s) had been used to determine the probability of causation. To our knowledge, none of the handful of cases that DOL returned for rework based on a technical question about NIOSH's application of its methodology has been reversed and denied. In summary, DOL's review of individual dose reconstructions, as intended, has overwhelmingly been favorable to the claimant.

When making comments on various NIOSH dose reconstruction guidance documents and Special Exposure Cohort petition recommendations, DOL was seeking to assist NIOSH in ensuring that its processes and decisions would be fair, consistent, and administrable in the claims adjudication process. DOL has strong interest in this area because we are ultimately responsible to the claimants for the outcomes of this process. As an example of the need for clarity, an SEC class definition that does not clearly identify which employee groups are covered, or does not align with existing employment records, can significantly slow and

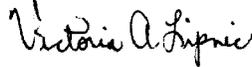
complicate the determination as to which persons are or are not included in the class. DOL's input has been particularly important given that NIOSH's EEOICPA management and staff had little or no previous experience with this type of benefit program. As your report notes, NIOSH has acknowledged the value of DOL's input.

With respect to the transparency of our comments, our staff did not anticipate that an explanation as to why the comments were being made would be required. This is because the Department has had to engage in extensive and ongoing coordination with NIOSH to design and properly implement the complex interactions between the two Departments required by EEOICPA. In-depth discussions have been particularly necessary because the NIOSH staff had no expertise in compensation programs. Given that frequent coordination with NIOSH, we presumed that the reasons for our comments, which were provided as internal communications, would be readily understood by the NIOSH recipients. Nevertheless, DOL concurs with the GAO findings and recommendations, and has already implemented the recommendation that DOL's written comments on NIOSH documents include the rationale and basis for the comments.

Finally, the Department has been keenly aware from the beginning of the program that many claimants are elderly and have serious illnesses, and we have endeavored to get payments out to eligible claimants as quickly as possible within the confines of the law. We agree with the GAO conclusion that the transparency and credibility of the Part B dose reconstruction program – and indeed of the entire EEOICPA program – are paramount. Again, we appreciate the GAO finding that there was no evidence of a systemic effort by DOL to deny benefits to claimants and will continue our work to ensure that claimants receive fair and equitable consideration of their claims.

Thank you for the opportunity to comment on this report.

Sincerely,



Victoria A. Lipnic

Appendix V: Comments from the Department of Health and Human Services



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Assistant Secretary
for Legislation

Washington, D.C. 20201

OCT 15 2007

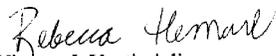
Mr. Daniel Bertoni
Director, Education, Workforce, and
Income Security Issues
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Bertoni:

Enclosed are the Department's comments on the U.S. Government Accountability Office's (GAO) draft report entitled, "Energy Employees Compensation: Actions To Promote Contract Oversight, Transparency of Labor's Involvement, and Independence of Advisory Board Could Strengthen Program" (GAO-08-4).

The Department appreciates the opportunity to review and comment on this report before its publication.

Sincerely,

for 
Vincent J. Ventimiglia
Assistant Secretary for Legislation

COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE U.S. GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT *ENERGY EMPLOYEES COMPENSATION: ACTIONS TO PROMOTE CONTRACT OVERSIGHT, TRANSPARENCY OF LABOR'S INVOLVEMENT, AND INDEPENDENCE OF ADVISORY BOARD COULD STRENGTHEN PROGRAM* (GAO-08-4)

General Comments

HHS appreciates the opportunity to review and comment on GAO's draft report regarding this important program, and welcomes independent assessments as a way to improve performance and provide the best public service.

In various passages of the draft (including *Highlights Page* "What GAO Found," and on pages 3, 8, 11, 12, and 13), GAO indicates that the HHS Centers for Disease Control and Prevention's (CDC) National Institute for Occupational Safety and Health (NIOSH) "significantly underestimated contract costs" for the Oak Ridge Associated Universities (ORAU) contract and that, "while NIOSH had procedures in place to monitor contract performance, it did not adequately review contractor costs." CDC/NIOSH and CDC/Procurement and Grants Office (PGO) carefully and purposely selected a cost reimbursement contract with a performance award fee as the best contractual mechanism to provide the agency with technical support to the dose reconstruction program. This contract mechanism was a 5-year award with \$70.1 million as the initial funding base.

As GAO notes in the draft, there was no prior experience or basis of understanding regarding the complexities or obstacles which would be faced in order to perform dose reconstructions on the scale required by law in this program. Thus, NIOSH and PGO determined that the cost reimbursable contract with an associated performance driven award fee allowed the best flexibility and management control. NIOSH and PGO envisioned from the start that total costs of the contract would exceed the initial base award. This expectation was clearly indicated and justified in budget requests as additional work (e.g., development of unique tools for dose reconstruction, Special Exposure Cohort Petition evaluations, worker outreach, increasing support to the Advisory Board on Radiation and Worker Health [ABRWH] deliberations) was required and directed within the scope of the contract. NIOSH disagrees that it "significantly underestimated" the contract costs associated with the ORAU contract as presented by GAO. Rather, NIOSH chose and administered a contract mechanism that has proven to be responsive to the requirements of law and program needs and that has afforded effective management controls over the performance of work as well.

It appears that GAO inaccurately reports, based on estimation (*Highlights Page, "What GAO Found," pages 8, 9, 12*) that for fiscal years (FY) 2001 – 2006 the ORAU contract costs were \$200 million, ORAU costs tripled to \$209.7 million, and NIOSH incurred the greatest administrative costs (\$225.3 million) of the involved agencies. From an HHS perspective, these estimated dollar amounts do not accurately represent costs incurred from 2001 to the time in FY 2007 when GAO conducted the review. They should not have been estimated or limited to FY 2006 which makes the amount look inflated since NIOSH and CDC provided GAO with costs incurred to the time of the GAO review.

COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE U.S. GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT ENERGY EMPLOYEES COMPENSATION: ACTIONS TO PROMOTE CONTRACT OVERSIGHT, TRANSPARENCY OF LABOR'S INVOLVEMENT, AND INDEPENDENCE OF ADVISORY BOARD COULD STRENGTHEN PROGRAM (GAO-08-4)

At the conclusion of FY 2007, NIOSH's program administrative costs for FY 2001 through FY 2007 have been \$280 million, of which \$220 million went to all contractors associated with the program (\$198 million to ORAU), \$46 million in CDC/NIOSH direct and indirect costs, and \$14 million in Advisory Board costs.

The draft also raises concerns regarding the appointment of a balanced mix of members to the ABRWH. The draft states that the process by which members are appointed "is not clearly established or uniform, presenting a challenge to the advisory board's independence." The draft further states that, while the Energy Employees Occupational Illness Compensation Program Act and a presidential executive order stipulate members should represent the scientific, medical, and worker communities, neither the legislation nor the executive order specifies criteria for nominating and appointing board members. HHS would like to emphasize that ABRWH, as a Federal advisory committee, is subject to the Federal Advisory Committee Act (FACA) requirement that "An advisory committee must be fairly balanced in terms of the points of view represented and the functions to be performed" (General Services Administration Federal Advisory Committee Management Final Rule, 41 CFR 102-3.30(c)). The Department has developed a Federal Advisory Committee Management Handbook (the Handbook) which clearly outlines policies and procedures in order to ensure adherence to this requirement by all FACA committees assigned to HHS, including ABRWH. Specifically, Part III of the Handbook states: "...Departmental policy provides that committee membership will be fairly balanced in terms of points of view represented and the committee's function. Consideration will be given to a broad representation of geographic areas, gender, race, ethnicity, and disability."

HHS/CDC utilizes a number of avenues to solicit names of qualified individuals to consider as nominees for member appointment to its FACA committees. These avenues may include notices in professional publications; newspapers; the *Federal Register*; professional recommendations from persons in academia, industry, and government; and referrals from interest groups and affected populations. This process helps to ensure that committee membership is formed in accordance with the requirements of FACA, the HHS Handbook, and the individual committee charters which specify the required expertise.

However, ABRWH is a Presidential advisory committee, and its members are appointed by the White House – not by HHS. HHS provides the names of potential nominees to the HHS Office of the White House Liaison. Although HHS ensures that the nominations provided meet all FACA and HHS requirements, the White House has final appointment authority and may accept or reject nominees provided by HHS, or appoint individuals other than those recommended by HHS.

COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE U.S. GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT ENERGY EMPLOYEES COMPENSATION: ACTIONS TO PROMOTE CONTRACT OVERSIGHT, TRANSPARENCY OF LABOR'S INVOLVEMENT, AND INDEPENDENCE OF ADVISORY BOARD COULD STRENGTHEN PROGRAM (GAO-08-4)

Another inaccuracy appears on page 21 of the draft which states "NIOSH issued its first conflict of interest policy for this program on October 17, 2006..." It is important to note that conflict of interest concerns have been addressed since the beginning of the program. A conflict of interest policy was the first deliverable under the contract and, after appropriate review, was incorporated into the contract on October 8, 2002.

Additional General Comments

1. On page 22, GAO states that the HHS attorneys who advise the program are covered by the OCAS Conflict or Bias policy (NIOSH/OCAS COB). Because the attorneys, who are employees of the HHS Office of the General Counsel (OGC), are organizationally separate from CDC, NIOSH, the OCAS Program and the Advisory Board on Radiation and Worker Health (Advisory Board), they are covered by the HHS ethics and conflict requirements, instead of the NIOSH/OCAS COB requirements. This helps ensure that attorneys are held to the highest ethical standards while remaining separate from, and able to provide unbiased legal advice to, both program officials and the advisory board.
2. GAO's report does not distinguish between employees of CDC and employees of the Office of the General Counsel. OGC's structure within HHS ensures that attorneys providing program advice are organizationally separate from entities such as program officials and members of the advisory board and can provide unbiased legal advice when called upon to do so. It is not clear how the Department of Defense standards mentioned as an example on page 35 would provide any additional benefits in this regard.

Following are HHS responses to the recommendations contained in the draft.

GAO Recommendation: "To strengthen NIOSH's oversight of costs incurred in the dose reconstruction program and improve NIOSH's review and approval process for contractor billings, we recommend that the Secretary of Health and Human Services direct the Director of CDC's Procurement and Grants Office to:

- Establish appropriate policies and procedures for effective review and approval of the prime contractor's invoices. Such policies and procedures should specify the steps to be performed for review and approval, the individuals responsible for carrying out these steps, the level of invoice detail needed to perform an appropriate review, and the appropriate documentation to be maintained of that review process.
- Establish a policy and procedures to periodically assess the prime contractor's oversight of subcontractor costs to determine if there are any deficiencies and

corrective actions needed and assess whether the controls can be sufficiently relied on to ensure that subcontractor payments are allowable, reasonable, and in compliance with all [Federal Acquisition Regulation] FAR and contract requirements.”

HHS Response: HHS agrees with these recommendations and has directed CDC/PGO to develop procedures for the effective review and approval of prime contractor’s invoices. In addition, CDC/PGO will work with NIOSH and the prime contractor to establish procedures for the prime contractor’s oversight of the subcontractors to ensure deficiencies are addressed and corrective actions implemented to enhance the allowability of payments to contractors.

CDC’s Financial Management Office is in the process of procuring a scanning system that will allow all invoices to be electronically submitted and processed. This system will permit CDC’s finance, procurement, and program offices to review and approve the invoice and payment at the same time. Also, CDC/PGO will be implementing a new contract payment system in fiscal year 2008 which will require a restructuring of the procedures when implementation of the new system is complete.

COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE U.S. GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT ENERGY EMPLOYEES COMPENSATION: ACTIONS TO PROMOTE CONTRACT OVERSIGHT, TRANSPARENCY OF LABOR'S INVOLVEMENT, AND INDEPENDENCE OF ADVISORY BOARD COULD STRENGTHEN PROGRAM (GAO-08-4)

CDC/NIOSH will insert the billing instructions that were issued in March 2006 which require contractors who were awarded contracts after this date to provide a monthly breakout of labor rates and charges associated with each contractor or subcontractor employee. Additionally, detailed periodic assessments of contractor and subcontractor invoices will be performed by NIOSH and PGO for future contracts.

GAO Recommendation: “To further enhance the independence of the President’s Advisory Board on Radiation and Worker Health, we recommend that the Secretary of HHS implement the agency’s regulatory responsibility under FACA to develop procedures to ensure that the advisory board’s work is not unduly influenced by the appointing authority or any special interests. These procedures could include a provision specifying that federal officials who fill key board support roles must be independent of the dose reconstruction program.”

HHS Response: HHS/CDC GENERALLY concurs with this recommendation. As noted previously, HHS has developed guidance on the nomination of Presidential advisory committee members in accordance with FACA. HHS/CDC agrees that there is merit to establishing a more formalized process for the identification and selection of committee Designated Federal Officers.

Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

Dan Bertoni, Director, Education, Workforce, and Income Security
(202) 512-7215, bertonid@gao.gov.

Staff Acknowledgments

Andrew Sherrill, Assistant Director, and Meeta Engle, Analyst-in-Charge, managed this assignment. Other staff who made key contributions to this assignment were Claudia Becker, Angela Miles, Robert Sampson, and Ellen Soltow. In addition, Jessica Botsford, Doreen Feldman, and Kenneth Patton provided legal assistance; Luann Moy and Mark Ramage assisted with the methodology; Ruth Walk provided subject matter expertise; and Charles Willson provided writing assistance.

Related GAO Products

Hanford Waste Treatment Plant: Department of Energy Needs to Strengthen Controls over Contractor Payments and Project Assets. [GAO-07-888](#). Washington, D.C.: July 20, 2007.

Energy Employees Compensation: GAO's Prior Work Has Identified Needed Improvements in Various Aspects of the Program. [GAO-07-233T](#). Washington, D.C.: December 5, 2006.

Department of Energy, Office of Worker Advocacy: Deficient Controls Led to Millions of Dollars in Improper and Questionable Payments to Contractors. [GAO-06-547](#). Washington, D.C.: May 31, 2006.

Energy Employees Compensation: Adjustments Made to Contracted Review Process, but Additional Oversight and Planning Would Aid the Advisory Board in Meeting Its Statutory Responsibilities. [GAO-06-177](#). Washington, D.C.: Feb. 10, 2006.

Energy Employees Compensation: Many Claims Have Been Processed, but Action Is Needed to Expedite Processing of Claims Requiring Radiation Exposure Estimates. [GAO-04-958](#). Washington, D.C.: Sept. 10, 2004.

Energy Employees Compensation: Even with Needed Improvements in Case Processing, Program Structure May Result in Inconsistent Benefit Outcomes. [GAO-04-516](#). Washington, D.C.: May 28, 2004.

GAO's Mission

The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's Web site (www.gao.gov). Each weekday, GAO posts newly released reports, testimony, and correspondence on its Web site. To have GAO e-mail you a list of newly posted products every afternoon, go to www.gao.gov and select "E-mail Updates."

Order by Mail or Phone

The first copy of each printed report is free. Additional copies are \$2 each. A check or money order should be made out to the Superintendent of Documents. GAO also accepts VISA and Mastercard. Orders for 100 or more copies mailed to a single address are discounted 25 percent. Orders should be sent to:

U.S. Government Accountability Office
441 G Street NW, Room LM
Washington, DC 20548

To order by Phone: Voice: (202) 512-6000
TDD: (202) 512-2537
Fax: (202) 512-6061

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Web site: www.gao.gov/fraudnet/fraudnet.htm

E-mail: fraudnet@gao.gov

Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Gloria Jarmon, Managing Director, JarmonG@gao.gov, (202) 512-4400
U.S. Government Accountability Office, 441 G Street NW, Room 7125
Washington, DC 20548

Public Affairs

Susan Becker, Acting Manager, BeckerS@gao.gov, (202) 512-4800
U.S. Government Accountability Office, 441 G Street NW, Room 7149
Washington, DC 20548