

GAO

Report to the Chairman, Committee on
Energy and Commerce, House of
Representatives

September 2006

FEDERAL REAL PROPERTY

NIH Has Improved Its
Leasing Process, but
Needs to Provide
Congress with
Information on Some
Leases





Highlights of [GAO-06-918](#), a report to the Chairman, Committee on Energy and Commerce, House of Representatives

Why GAO Did This Study

The National Institutes of Health (NIH) is the nation's primary medical and behavioral research agency. NIH's need for leased space has more than doubled since 1996 to about 3.9 million square feet in 2005. In 1996, General Services Administration delegated leasing authority to NIH that includes performing budget scoring and prospectus analysis. In light of NIH's increased use of leased space, GAO was asked to address two issues: (1) Is NIH complying with budget scorekeeping guidelines and Office of Management and Budget's (OMB) requirements for implementing the guidelines to determine if a lease should be classified as operating or capital and ensure that no violations of the Antideficiency Act occur because of improper budget scorekeeping? and (2) Is NIH complying with the congressional prospectus process for both leases and alterations to leased buildings? To address these issues we interviewed leasing and financial officials, reviewed laws and reviewed budget scoring and prospectus analysis of 59 leases.

What GAO Recommends

GAO recommends that the Director of NIH, using GSA as the proper channel, report to the appropriate congressional committees five previous NIH prospectus-level leases that did not follow the congressional prospectus process. In commenting on our report NIH concurred with our recommendation.

www.gao.gov/cgi-bin/getrpt?GAO-06-918.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Mark Goldstein at (202) 512-2834.

FEDERAL REAL PROPERTY

NIH Has Improved Its Leasing Process, but Needs to Provide Congress with Information on Some Leases

What GAO Found

NIH has implemented a formal leasing process that, if carried out effectively, should comply with budget scorekeeping guidelines and OMB's requirements for classifying operating and capital leases. This process should ensure that no Antideficiency Act violations occur due to leasing. The agency's new leasing process addresses previous problems with inconsistent and informal implementation of the guidelines and requirements by properly identifying operating and capital leases and properly recording lease obligations for budget scoring purposes. In October 2005, the U. S. Department of Health and Human Services expressed the belief that the potential \$565 million in unrecorded obligations from 50 active multiyear NIH leases were not Antideficiency Act violations. We agree that no Antideficiency Act violations exist because the GSA delegation of leasing authority included specific authority that directed NIH to obligate funds for multiyear leases, one year at a time, and that such actions were exempt from the Antideficiency Act. GSA is also modifying its guidance for delegated leasing authority, which would make it clear that agencies with delegated leasing authority can score operating leases in the same manner as GSA. The scoring process for capital leases would remain unchanged.

As part of its leasing process, NIH has also established decision points for identifying any leases for which a prospectus should be submitted through GSA for congressional approval, under the Public Buildings Act of 1959, as amended. This process involves submitting leases and alterations to leased buildings for approval whose costs exceed a legislatively established threshold. In addition, NIH has designated the Office of Acquisitions, Office of Resource Facilities to review prospectus-level alterations to leased buildings to ensure that the contracting for alterations to leased buildings does not exceed the prospectus threshold for alterations to leased buildings. However, NIH has taken no action to address five prospectus-level leases that were not submitted to the appropriate congressional committees in past years. While there is no penalty provided in law for not submitting a prospectus, failure to do so hinders the ability of the appropriate congressional committees to fulfill their oversight responsibilities for all prospectus-level leases.

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Abbreviations

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| GSA | General Services Administration |
| HHS | U.S. Department of Health and Human Services |
| LeMOP | Leasing Management and Oversight Program |
| NIH | National Institutes of Health |
| OBSF | Office of Business Systems and Finance |
| OMB | Office of Management and Budget |
| ORF | Office of Resource Facilities |
| ORFDO | Office of Research Facilities Development and Operations |
| Property Act | Federal Property and Administrative Services Act of 1949, as amended |

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United States Government Accountability Office
Washington, DC 20548

September 8, 2006

The Honorable Joe Barton
Chairman
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

The National Institutes of Health (NIH), a part of the U.S. Department of Health and Human Services (HHS), is the nation's primary medical and behavioral research agency. Composed of 27 institutes and centers, NIH provides leadership and financial support to programs designed to protect and improve the nation's health by conducting research in such areas as the causes, diagnosis, prevention, and cure of human diseases; the biological effects of environmental contaminants; and the understanding of mental, addictive, and physical disorders. At the end of September 2005, the agency owned or leased more than 17 million square feet of space for research, administration, and other needs. Since 1996, NIH's leased space has more than doubled—from about 1.4 million square feet in 1996 to about 3.9 million square feet in 2005.

In September 1996, the General Services Administration (GSA) delegated authority to HHS to issue leases for a term of up to 20 years and to perform all functions related to leasing, such as obtaining space in accordance with all applicable laws and regulations, budget scorekeeping¹ guidelines, and the Office of Management and Budget's (OMB) requirements for implementing the guidelines for leases. Simply put,

¹Budget scorekeeping, of which lease scoring is a part, is the process of estimating the budgetary effects of pending and enacted legislation and comparing these effects with limits set in the budget resolution or legislation. Scorekeeping tracks such data as budget authority, receipts, outlays, the surplus or deficit, and the public debt limit. Scorekeeping guidelines for leases require that an agency first determine if a lease is an operating or capital lease; OMB requirements describe how to calculate the budget authority that is required to cover the government's legal obligations and how outlays are to be recorded in agency budgets. In addition, OMB interprets the scorekeeping guidelines to determine the cost that should be recognized and recorded as an obligation at the time an agency signs a contract or enters into a lease. The scorekeepers are the House and Senate Budget Committees, the Congressional Budget Office, and OMB. The budget scorekeepers determine the rules, and OMB issues guidance to the agencies on implementing them.

budget scorekeeping ensures that agencies comply with budgetary laws. There are obligational requirements² that are meant to ensure compliance with fiscal statutes such as the Antideficiency Act.³ The budget scorekeeping rules for leases are consistent with the obligational requirements. Thus, failure to comply with budget scorekeeping guidelines could cause an Antideficiency Act violation. In addition to transferring this scorekeeping responsibility to HHS, GSA's delegation provided that, for each lease whose cost exceeds a legislatively established threshold, the agency would work through GSA to secure an approved prospectus⁴ from the appropriate congressional committees, under the Public Buildings Act of 1959, as amended.⁵ In December 1996, HHS re delegated its authority to its four lease-holding agencies, which included NIH. Currently, NIH has 59 active leases issued under its delegated leasing authority with a total value of about \$1.3 billion.

Because of NIH's increased use of leased space, you asked us to review certain parts of the agency's leasing process. In response, we addressed the following issues:

- Is NIH complying with budget scorekeeping guidelines and OMB's requirements for implementing the guidelines to determine if a lease should be classified as operating or capital⁶ and ensure that no violations of the Antideficiency Act occur because of improper budget scorekeeping of leases?

²31 U.S.C. § 1501.

³The Antideficiency Act prohibits an officer or employee of the United States from making expenditures or incurring obligations before appropriations become available, unless otherwise authorized by law. 31 U.S.C. § 1341.

⁴A prospectus is a justification for a proposed construction, lease, or alteration project (which includes an alteration to a leased building). A prospectus for a proposed lease is submitted when the cost exceeds a legislatively established threshold, which is \$2.41 million for fiscal year 2006, and includes information on the project's size, cost, location, and other features. For alterations to leased buildings, the prospectus threshold is one half the prospectus threshold for a lease. An agency with delegated leasing authority analyzes each lease to determine whether it needs a prospectus. GSA then prepares a prospectus in consultation with the agency and submits the prospectus to the appropriate House and Senate authorizing committees.

⁵40 U.S.C. § 3307.

⁶An operating lease is a lease that meets the six criteria listed in the scorekeeping guidelines in OMB Circular A-11 appendix A. A capital lease is any lease other than a lease purchase that does not meet all six criteria.

-
- Is NIH complying with the congressional prospectus process for both leases and alterations to leased buildings?

To address NIH's compliance with budget scorekeeping guidelines and OMB's requirements, we reviewed (1) the laws and regulations relating to leases; (2) budget scorekeeping guidelines and OMB's implementing requirements; (3) the Antideficiency Act; (4) NIH's inventory of leased properties, its revised budget scoring of the 58 leases⁷ under its delegated authority in 2003, and its leasing guidance; and (5) HHS's views on the Antideficiency Act. In addition, we interviewed HHS's Deputy Assistant Secretary from the Office for Facilities Management and Policy; NIH's Director of the Office of Acquisitions; NIH's Acting Chief of the Budget Branch from the Office of Business and Systems Finance, who performed the revised budget scoring; other relevant NIH leasing and financial officials; and GSA officials. We also wrote to OMB concerning agencies that are considered self-insuring under budget scoring guidelines.

To address NIH's compliance with the congressional prospectus process, we (1) reviewed the laws and regulations relating to leases; (2) GSA's prospectus guidance and delegation of authority to lease; (3) NIH's inventory of leased properties, its revised prospectus analysis of the 58 leases under its delegated authority in 2003, and its leasing guidance. In addition, we interviewed HHS's Deputy Assistant Secretary from the Office for Facilities Management and Policy; NIH's Director of the Office of Acquisitions; NIH's Acting Chief of the Budget Branch from the Office of Business and Systems Finance, who performed the revised prospectus analysis; other relevant NIH leasing and financial officials; and GSA officials. GSA informed us that no alterations to leased buildings were submitted for prospectus approval between fiscal years 1996 and 2005. For the purposes of our review, the information we gathered was sufficiently reliable. We conducted our work between July 2005 and August 2006 in accordance with generally accepted government auditing standards.

Results in Brief

NIH has developed a formal leasing process that, if implemented effectively, should comply with budget scorekeeping guidelines and OMB's requirements for classifying operating and capital leases. NIH's process

⁷One of the 59 leases was issued in January 2006, this report discusses the remaining 58 leases that were in NIH's 2003 review of all its leases; therefore, we refer to only 58 leases in this report. In addition, NIH has 16 active leases that were contracted for through GSA.

should also ensure that no Antideficiency Act violations occur due to leasing. NIH was prompted to formalize its leasing process after it reviewed all its leases in 2003 and discovered problems with its budget scoring and prospectus analysis. The agency's new multistep leasing process, which was developed in 2003 and updated in 2005, now addresses previous problems with inconsistent and informal implementation of the guidelines and requirements by properly identifying operating and capital leases, so the lease obligations may be properly recorded for budget scoring purposes. Furthermore, to address the improper classification of eight operating leases identified in its 2003 review, NIH reclassified or renegotiated leases to make them comply with the budget scoring rules. In October 2005, HHS expressed its belief that the potential \$565 million in unrecorded obligations from 50 active multiyear NIH leases identified in the 2003 review were not considered to be Antideficiency Act violations. We agree that no Antideficiency Act violations exist. According to a GSA official, GSA is modifying its guidance for delegated leasing authority, which would make it clear that agencies with delegated leasing authority can score operating leases in the same manner as GSA. The scoring process for capital leases would remain unchanged.

As part of its leasing process, NIH has also established decision points for identifying any leases for which a prospectus should be submitted for congressional approval under the Public Buildings Act of 1959, as amended. In addition, NIH's Office of Acquisitions, Office of Resource Facilities (ORF) is now responsible for ensuring that the contracting for alterations to leased buildings does not exceed the prospectus threshold for alterations to leased buildings. To enforce this threshold, a warranted real estate contracting officer from the Office of Acquisitions begins reviewing an alteration to a leased building project as early as the concept stage. However, there is an unresolved issue involving some prior NIH prospectus-level leases. Five leases from past years were not submitted to the appropriate congressional committees for review and approval, as provided for in the Public Buildings Act of 1959, as amended. While there is no penalty provided in law for not submitting a prospectus, failure to do so hinders the ability of the appropriate congressional committees to fulfill their oversight responsibilities for all prospectus-level leases. We are recommending that the Director of NIH, using GSA as the proper channel, report to the appropriate congressional committees the five previous NIH prospectus-level leases that did not follow the congressional prospectus process. We provided a draft of this report to NIH, HHS and GSA. HHS, responding for NIH and itself, concurred with our findings and recommendation and provided some technical comments, which we have incorporated where appropriate. HHS stated that, as a matter of policy, it

does not object to voluntarily complying with the GSA prospectus requirements for the five leases dealt with in our draft report. GSA informed us orally that it had no comments.

Background

In 1996, GSA began a program called “Can’t Beat GSA Leasing” that offered federal agencies the choice of (1) using GSA as their leasing agent, (2) assuming responsibility for their own leasing, or (3) using a combination of both options. The program was an outgrowth of GSA’s commitment to streamline its leasing operations, respond to the government’s changing needs, and address recommendations from client agencies. GSA delegated leasing authority to HHS in September 1996, and HHS re delegated this authority to NIH, one of its four lease-holding agencies, in December 1996. GSA’s original delegation consisted of six conditions, which included the requirements that federal agencies acquire and utilize leased space in accordance with all applicable laws and regulations⁸ and —prior to finalizing lease contracts and alterations to leased buildings that exceed a legislatively established threshold—work through GSA to secure an approved prospectus from the appropriate congressional committees. Since 1997, NIH has elected to rely on GSA for some of its leasing needs, but it has issued a majority of its leases on its own.

⁸The conditions included, but were not limited to, the Competition in Contracting Act, Executive Order 12072, Executive Order 13006, Davis Bacon Act, the GSA Acquisition Regulations, and GSA Federal Property Management Regulations (FPMR). When the delegation was issued to NIH in 1996, the FPMR stated that delegated leasing authority shall be exercised in accordance with the Budget Enforcement Act of 1990 and OMB Bulletin 91-02, Part B (41 C.F.R. § 101.18.104-1). In 2003, GSA revised its regulations to provide that all agencies are required to follow the budget scorekeeping guidelines and OMB’s requirements for leases, capital leases, and lease purchases identified in appendixes A and B of OMB Circular A-11. (41 C.F.R. § 102-73.130).

NIH Has Improved Its Lease Scoring Process and Believes that Its Unrecorded Obligations for Operating Leases Do Not Violate the Antideficiency Act

In response to past problems identified in a 2003 internal review of its leases, NIH developed a formal leasing process in 2003 that includes decision points for budget scoring. The process was updated in 2005, and if implemented effectively, it should ensure that NIH leasing complies with OMB's scorekeeping guidelines for classifying leases. This new process should also ensure that no violations of the Antideficiency Act occur due to improper scorekeeping.

The executive and legislative branches formulated the budget scorekeeping rules in connection with the Budget Enforcement Act of 1990. The purpose of these rules is to ensure that scorekeepers adhere to scorekeeping conventions and specific legal requirements when they measure the effects of legislation. They are also used by OMB for determining amounts to be recognized in the budget when an agency signs a contract or enters into a lease. The rules are reviewed annually by the scorekeepers and revised, as necessary, to achieve their purpose.⁹ According to scorekeeping guidelines, a lease is classified as either operating or capital, based on six criteria.¹⁰ If a lease meets all six criteria, then it qualifies as an operating lease; otherwise, it must be treated as a capital lease for purposes of budget scoring. For operating leases for agencies other than GSA, budget authority is required for the estimated total payment that is expected to arise under the full term of the contract or, if the contract includes a cancellation clause, for an amount sufficient to cover the lease payments for the first fiscal year plus an amount sufficient to cover the costs associated with cancellation. For GSA

⁹We previously reported that the budget scorekeeping rules favor leasing and that one option for scorekeeping would be to recognize that many operating leases are used for long-term needs and should be treated on the same basis as purchases. This would entail scoring up front the present value of lease payments covering the same time period used to analyze ownership options. Applying the principle of up-front full recognition of long-term costs to all options for satisfying long-term space needs—purchases, lease purchases, or operating leases—is more likely to result in selecting a more cost-effective alternative than using the current scoring rules. GAO, *Budget Scoring: Budget Scoring Affects Some Lease Terms but Full Extent Is Uncertain*, [GAO-01-929](#) (Washington D.C.: Aug. 31, 2001).

¹⁰The six criteria are (1) ownership of the asset remains with the lessor during the term of the lease and is not transferred to the government at or shortly after the end of the lease term; (2) the lease does not contain a bargain-price purchase option; (3) the lease term does not exceed 75 percent of the estimated economic life of the asset; (4) the asset is a general purpose asset, it is not for a special purpose of the government, and it is not built to unique specifications of the government lessee; (5) there is a private sector market for the asset; and (6) the present value of the minimum lease payments over the life of the lease does not exceed 90 percent of the fair market value of the asset at the beginning of the lease term.

operating leases, only the budget authority needed to cover the annual lease payment is required.¹¹ For a capital lease, budget authority is required for the net present value of the total cost of the lease and property taxes (but not for imputed interest costs and identifiable annual operating expenses).

In 2003, NIH's Assistant Director for the Chief Financial Officer and Central Services asked the Acting Director of the Office of Research Facilities Development and Operations (ORFDO) to certify that all leases were operating leases for the purposes of the annual NIH financial statements, according to an NIH official. To address this request, the ORFDO Acting Director conducted an internal risk assessment. This resulted in a review of all NIH's leases, which identified problems with implementing budget scorekeeping guidelines and OMB requirements, as well as identifying prospectus leases. More specifically, this review identified eight leases that had been improperly classified as operating leases instead of capital leases and potential unrecorded obligations from 50 active multiyear operating leases that totaled \$565 million, as of September 30, 2005. According to the Director of the Office of Acquisitions, NIH's lease scoring process had been inconsistent and informal from 1996 to 2003, which may explain the improper lease classifications and unrecorded obligations identified in the 2003 review. Due to staff changes at the agency in past years, we were not able to determine why the budget scoring process was inconsistent and informal from 1996 to 2003.

In 2003, NIH attempted to address its problems in complying with scorekeeping guidelines by developing the Leasing Management and Oversight Program (LeMOP), a new multistep leasing process that includes budget scoring. LeMOP is a means for NIH to exercise stronger oversight in the leasing process than it had done previously. The process consists of a business case¹² that goes through the following five critical decision points:

¹¹According to scorekeeping guidelines, for funds that are self-insuring under existing authority, only the amount of budget authority needed to cover the annual lease payment is required to be scored. In November 2005, OMB clarified its requirements by stating that the only funds that are considered self-insuring are certain revolving funds in GSA.

¹²The business case consists of the need for the lease action, the reason it cannot be met within current space, the Space Justification Document, and a general estimate of the range of life-cycle costs.

-
1. Initial approval that there is a justifiable need,
 2. Approval of a general strategy on how the need will be met,
 3. Approval of a detailed strategy for meeting the need,
 4. Signing of the lease and obligation of the funds, and
 5. Documentation that the agency has reviewed the action and the space requirement is being met.

As part of the third decision point, the Office of Business Systems and Finance (OBSF) uses the budget scoring process for leases that it developed during NIH's 2003 review to conduct an independent test of the planned lease contract against OMB's budget scorekeeping requirements. The test is based on estimates of the lease rate, the lease term, and other factors. As part of the fourth decision point, OBSF tests the final lease price against OMB scoring requirements to determine if the proposal conforms to applicable rules for budget scoring. In effect, the process establishes a specific requirement that ensures that NIH leases undergo budget scoring.

In addition to implementing LeMOP, NIH corrected its improper classification of the eight operating leases identified in the 2003 review. Two of these leases were reclassified as capital leases, and the remaining six were renegotiated by eliminating the option-to-renew clauses from the lease so that they could properly qualify as operating leases. By deleting the option-to-renew clauses, NIH reduced the terms of the leases, which impacted budget scoring. This allowed the leases to meet the scoring criteria for an operating lease—that the present value of the minimum lease payments over the life of the lease not exceed 90 percent of the fair market value of the asset at the beginning of the lease term. Leases exceeding this 90 percent level are to be identified as capital leases.

As a final measure in response to the 2003 review, NIH sought HHS's advice on whether it had \$565 million in unrecorded obligations that violated the Antideficiency Act. The unrecorded obligations occurred because NIH scored its operating leases without cancellation clauses similar to GSA—that is, it scored only the budget authority that was

needed to cover the annual lease payment.¹³ This was done instead of following scorekeeping guidance for an operating lease for agencies other than GSA—that is, budget authority is required for the estimated total payment expected to arise under the full term of the contract or, if the contract includes a cancellation clause, for an amount sufficient to cover the lease payments for the first year plus an amount sufficient to cover the costs associated with the cancellation clause.

NIH asked HHS whether it thought that the \$565 million in unrecorded obligations was an Antideficiency Act violation. This act states that an officer or employee of the United States is prohibited from making expenditures or incurring obligations in advance of available appropriations unless otherwise authorized by law. HHS stated that it did not believe the potential \$565 million in unrecorded obligations from scoring operating leases to be Antideficiency Act violations.

We concluded that no Antideficiency Act violation exists. Under the Federal Property and Administrative Services Act of 1949, as amended (Property Act), GSA is authorized to enter into a lease agreement for a term of up to 20 years to accommodate the federal government.¹⁴ In addition, GSA is authorized under the Property Act to delegate to the head of another federal agency most of its authorities, which includes leasing authority.¹⁵ When GSA delegated its leasing authority to the Secretary of HHS, who then redelegate this authority to NIH, the GSA leasing delegation signed by the Administrator specifically stated, “I hereby delegate authority to the heads of all federal agencies to perform all functions related to the leasing of general purpose space for a term of up to 20 years regardless of geographic location.”

GSA has specific statutory authority to obligate funds in advance of available appropriations. This authority provides that, when entering into

¹³As previously noted, GSA is considered by OMB to be self-insuring and, as such, is required to score only the amount of budget authority needed to cover annual lease payments for an operating lease.

¹⁴40 U.S.C. § 585.

¹⁵40 U.S.C. § 121 provides that the GSA Administrator may delegate authority under the act except for the (1) authority to prescribe regulations on matters of policy applying to executive agencies, (2) the authority to transfer functions and reallocated amounts from one component of GSA to another under certain situations; and (3) other authority for which delegation is prohibited under the act. The Property Act does not prohibit the delegation of leasing authority.

multiyear leases, “the obligation of the amount for a lease is limited to the current fiscal year for which payments are due without regard to the Antideficiency Act.”¹⁶ Accordingly, GSA is directed by law to obligate funds for multiyear leases one year at a time, and it is exempt from the general prohibition in the Antideficiency Act against obligating the government in advance of appropriations for GSA leases. Since GSA delegated all of its leasing authorities through HHS to NIH, the provision in the Property Act relating to the obligation of multiyear leases also applies to NIH. This delegation authorizes NIH to enter into multiyear leases without recording the entire amount of the lease in the first year. Therefore, the fact that NIH entered into multiyear leases without having an appropriation for the entire amount of each lease did not constitute a violation of the Antideficiency Act.

GSA is drafting a modification to its guidance for delegated leasing authority which, according to a GSA official, will clarify that agencies with delegated leasing authority can score operating leases in the same manner as GSA does. GSA and agencies with delegated leasing authority are expected to continue to score capital leases according to OMB’s requirements.

NIH Corrected Weaknesses in Implementation of Prospectus Guidance, but Some Past Prospectus-level Leases Remain Unreported

As part of its leasing process, NIH has established decision points for identifying leases whose costs exceed a legislatively established threshold and for which a prospectus should be submitted for congressional review and approval prior to finalizing contracts. In addition, all alterations to leased buildings are reviewed by an NIH leasing official. These changes should ensure that NIH identifies leases that need to be submitted for review. However, five prior leases that should have been submitted for review still remain unreported.

The Public Buildings Act of 1959, as amended, provides for GSA to submit a prospectus for review by the appropriate Senate and House authorizing committees when the cost of a proposed construction, lease, or alteration project exceeds the legislatively established dollar threshold for leases or alterations to leased buildings, which is indexed and revised each year. For an agency with delegated leasing authority, GSA, working in consultation with the agency, prepares a prospectus for any lease involving a net annual rental—excluding services and utilities—in excess

¹⁶ 40 U.S.C. § 585.

of the prospectus threshold. For alterations to leased buildings, the prospectus threshold is one-half of the lease prospectus threshold. After the prospectus is prepared, GSA submits it for approval to the appropriate congressional committees.

To address previous problems with inconsistent and informal implementation of prospectus guidance, NIH has incorporated into its leasing process several decision points for identifying any leases for which a congressionally approved prospectus should be submitted. As part of the third decision point of LeMOP—*approval of a detailed strategy for meeting the need*—OBSF will use the prospectus analysis formula, which it developed during NIH's 2003 review of all leases, to conduct an independent test of the planned lease contract against the annual prospectus threshold. NIH plans to have GSA issue any lease that exceeds the prospectus limit, with NIH providing the appropriate information and support. As part of the fourth decision point—*signing of the lease and obligation of the funds*, OBSF will test the final lease price against prospectus thresholds to determine if the proposal conforms to applicable rules for the prospectus process. This prevents the agency from issuing a prospectus-level lease without a congressionally approved prospectus, even though the lease was initially identified as nonprospectus as part of the third decision point.

Furthermore, according to NIH's Office of Acquisitions, ORF, it is now responsible for ensuring that the contracting for alterations to leased buildings does not exceed that prospectus threshold. To prevent any delay in the process, reviews of an alteration project in a leased building begin as early as the concept stage to determine whether a prospectus is required. The Office of Acquisitions also takes into account all other approved alterations to the leased building for the given year to ensure that the total cost of all alterations to that leased building does not exceed the prospectus threshold.

As part of the 2003 review of all its leases, NIH identified five leases that had not been sent to the appropriate congressional committees for approval, under the Public Buildings Act of 1959, as amended.¹⁷ GSA is to provide a lease prospectus to the appropriate congressional committees

¹⁷GSA informed us that several prospectus level leases were submitted to the appropriate committees and were approved and issued by GSA for NIH space between 1996 and 2005. NIH's 2003 review of all leases did not include reviewing alterations to leased buildings.

for approval prior to signing a lease. This process involves agencies with delegated leasing authority, which must identify prospectus level leases to GSA for submission. According to the Director of the Office of Acquisitions, NIH had not established a formal prospectus analysis for leases or alterations to leased buildings from 1996 to 2003. As a result, NIH did not notify GSA of the five prior prospectus-level leases that should have been submitted to the committees. While there is no legal penalty for not following the congressional prospectus process, failure to do so hinders the ability of the appropriate congressional committees to fulfill their oversight responsibilities for all prospectus-level leases. Although these five leases have been in effect for several years, GSA officials told us that it would still be appropriate for NIH to work with GSA to notify the committees of their existence. The officials noted, for example, a past instance where GSA reported, after the fact, a prospectus level lease that was issued without approval of the appropriate committees. NIH officials stated that they want to clear up any unresolved issues concerning their prospectus and budget scoring problems.

Conclusions

NIH has taken actions to formalize its processes of lease scoring and prospectus analysis by developing and implementing LeMOP, its new leasing process. The specific decision points in this process should address the problems NIH had with consistently complying with OMB's scorekeeping guidelines and the congressional prospectus process. Because only one lease has been issued under the new process, it is too early to assess the effectiveness of NIH's implementation of LeMOP.

An issue remains with five prior leases that were not submitted to the appropriate congressional committees for review under the Public Buildings Act of 1959, as amended. Although these leases have been in effect for several years, it is nonetheless important that information on them be submitted to the appropriate committees in order to maintain NIH's accountability to Congress in this area and allow the committees to exercise their oversight responsibilities. NIH has expressed its desire to resolve any remaining issues concerning its prospectus and budget scoring processes.

Recommendation for Executive Action

We are recommending that the Director of NIH, using GSA as the proper channel, report to the appropriate congressional committees the five previous NIH prospectus-level leases that did not follow the congressional prospectus process.

Agency Comments

We provided a draft of this report to NIH, HHS and GSA for comment. In response, HHS provided written comments for itself and NIH. HHS concurred with our findings and recommendation and offered some technical comments that we have incorporated in this report. HHS stated that, as a matter of policy, it does not object to voluntarily complying with the GSA prospectus requirements for the five leases dealt with in the draft report. A letter from HHS commenting on our report is included as appendix I. GSA informed us orally that they had no comments.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies of this report to the appropriate congressional committees, the Director of the National Institutes of Health, the Secretary of Health and Human Services, the Administrator of the General Services Administration and the Director of the Office of Management and Budget. We will make copies available to others upon request. In addition, this report will be available at no cost on the GAO Web site at <http://www.gao.gov>.

If you have any questions about this report, please contact me at (202) 512-2834 or goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix II.

Sincerely yours,



Mark L. Goldstein
Director, Physical Infrastructure Issues

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



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

AUG 14 2006

Mr. Mark Goldstein
Director, Physical Infrastructure Issues
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Goldstein:

Enclosed are the Department's comments on the U.S. Government Accountability Office's (GAO) draft report entitled, "FEDERAL REAL PROPERTY: NIH Has Improved Its Leasing Process, but Needs to Provide Congress with Information on Some Leases" (GAO-06-918), before its publication. These comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

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

Sincerely,

A handwritten signature in cursive script that reads "Daniel R. Levinson".

Daniel R. Levinson
Inspector General

Enclosure

The Office of Inspector General (OIG) is transmitting the Department's response to this draft report in our capacity as the Department's designated focal point and coordinator for U.S. Government Accountability Office reports. OIG has not conducted an independent assessment of these comments and therefore expresses no opinion on them.

COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
ON THE U.S. GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT
REPORT "FEDERAL REAL PROPERTY: NIH HAS IMPROVED IT'S
PROCESS, BUT NEEDS TO PROVIDE CONGRESS WITH INFORMATION ON
SOME LEASES" GAO 06-918

A significant issue addressed in the draft GAO report is whether NIH must provide Congress with certain information regarding five existing but not specifically identified leases, pursuant to the General Services Administration (GSA) prospectus submittal requirements applicable to leases and alterations of leased buildings established by 40 U.S.C. 3307. GAO frames that issue as follows, "Is NIH complying with the congressional prospectus process for both leases and alterations to leased buildings?" With regard to that issue, the draft GAO report states on page 2 that, "GSA's delegation (of its long-term leasing authority) provided that, for each lease whose cost exceeds a legislatively established threshold, the agency would work through GSA to secure an approved prospectus from the appropriate congressional committees, so as to be in compliance with the Public Buildings Act of 1959, as amended." (The GSA prospectus requirements now found at 40 U.S.C. 3307 originated in section 7 of the Public Buildings Act of 1959). The draft GAO report found that, "NIH has taken no action to address five prospectus-level leases that were not submitted to the appropriate congressional committees in past years." Based on that finding, the draft GAO report recommends "that the Director of NIH, using GSA as the proper channel, report to the appropriate congressional committees five previous NIH prospectus-level leases that did not comply with the congressional prospectus process."

While, as a matter of policy HHS does not object to voluntarily complying with the GSA prospectus requirements for the five leases dealt with in the draft GAO report, HHS maintains that as a matter of law the GSA prospectus requirements that are generally applicable to alterations of leased space would not be applicable to instances in which HHS intends to finance such alterations with funds previously appropriated to HHS.

Appendix II: GAO Contact and Staff Acknowledgments

GAO Contact

Mark L. Goldstein (202) 512-2834 or goldsteinm@gao.gov

Staff Acknowledgments

In addition to those named above, John Finedore, Tom Keightley, Susan Michal-Smith, Chris Bonham and Tamera Dorland made key contributions to this report.

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