

Office of Inspector General



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Audit Report No. 01-002

**Audit of Billings for Professional
Services Provided by ACS
Government Solutions Group**



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DATE: January 11, 2001

TO: Arleas Upton Kea, Director
Division of Administration

Donald C. Demitros, Director
Division of Information Resources Management

Fred Selby, Director
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FROM: Sharon M. Smith
Assistant Inspector General

SUBJECT: *Audit of Billings for Professional Services Provided by ACS Government Solutions Group* (Audit Report No. 01-002)

This report presents the results of an audit of ACS Government Solutions Group's (ACS) billings to the Federal Deposit Insurance Corporation (FDIC) for various information technology services. The audit addressed whether ACS's billings were allowable and adequately supported under the terms and conditions of its General Services Administration (GSA) Federal Supply Schedule contract and the FDIC's delivery orders awarded under that contract.

BACKGROUND

Contracts awarded by the GSA known as Federal Supply Schedules are used to facilitate the timely acquisition of goods or services by any federal agency or other qualifying agency. The GSA's Federal Supply Schedule contracts provide federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. The GSA establishes indefinite delivery contracts with commercial firms to provide supplies and services at stated prices. Ordering offices issue delivery orders directly to registered firms for supplies and services. GSA considers the program streamlined because it reduces the time needed by agencies to acquire goods and services.

In 1997, the FDIC's Division of Administration (DOA), which is responsible for soliciting and awarding contracts, began to streamline its procurement process by issuing delivery orders to firms with GSA

Federal Supply Schedule contracts. During 1998 and 1999, the FDIC paid \$17,795,785 that ACS billed under 10 delivery orders that the FDIC awarded under the GSA's Federal Supply Schedule contract GS-35F-4415G with ACS and its predecessor, Computer Data Systems. The GSA's contract with ACS provides for the purchase of various information technology services such as systems analysis and design, installation, programming, conversion and implementation support, network services, project management, data and records management, resources and facilities management, and database planning and design. Table 1 shows the services that ACS provided; performance period; not-to-exceed amount as of December 31, 1999; and amount that the FDIC paid during 1998 and 1999 for each of the 10 delivery orders.

Table 1: FDIC 1998 and 1999 Payments to ACS

Delivery Order	System Development Services Provided	Period of Performance	Not-to-Exceed Amounts	1998-1999 Payments
9701315NLH	Financial data warehouse and corporate budgeting system	10/15/97 to 12/31/97	\$ 598,405	\$ 546,931
9701438CVB	Financial data warehouse and data access methodology	12/19/97 to 12/18/98	1,807,200	1,782,322
9701486CJT	Planning, budgeting, and other financial reporting systems	12/19/97 to 12/18/99	1,455,500	1,228,711
9800455CAF*	Business process redesign services	05/20/98 to 12/31/99	9,500,000	4,435,256
9800542CJT	Personal computer technical services	06/26/98 to 06/25/00	11,105,310	6,246,889
9800779OEU	Executive office software management section support	08/24/98 to 12/31/99	1,992,828	1,916,269
9801260CS2	Financial data warehouse and data access methodology	12/14/98 to 12/13/00	1,980,662	795,529
9801264CTL	National client application server support	02/08/99 to 02/07/01	1,998,040	662,336
9900257CEU	Application technology section support	07/12/99 to 07/11/00	632,890	124,164
9900443ORM	Executive office software management section support	10/16/99 to 10/31/00	865,500	57,378
Totals			\$31,936,335	\$17,795,785

*Division of Finance delivery order; all other delivery orders are for the Division of Information Resources Management.

Source: OIG research and review of FDIC contract files and paid invoices.

OBJECTIVE, SCOPE, AND METHODOLOGY

The audit objective was to determine whether ACS's billings were allowable and adequately supported under the terms and conditions of its GSA Federal Supply Schedule contract and the FDIC delivery orders. We reviewed 392 invoices totaling \$17,795,785 that ACS billed under 10 delivery orders that the FDIC paid between January 1, 1998 and December 31, 1999.

To accomplish our objective, we:

- Reviewed FDIC and GSA policies pertaining to Federal Supply Schedules.
- Identified all FDIC payments made during the period January 1, 1998 through December 31, 1999 to ACS and its predecessor, Computer Data Systems.
- Interviewed and corresponded with the FDIC's contracting officer, oversight managers, and security personnel; ACS's contract directors; and the GSA's primary contracting officer and an information technology project manager.
- Reviewed the FDIC contracting officer's contract monitoring files and oversight managers' contract oversight files.
- Reviewed the terms and conditions of ACS's Federal Supply Schedule contract GS-35F-4415G with the GSA and the FDIC's 10 delivery orders awarded under that contract.
- Reviewed ACS's 392 invoices that the FDIC paid between January 1, 1998 and December 31, 1999.
- Prepared an electronic database from ACS's 392 invoices consisting of 2,755 individual billing lines for all fees and expenses.
- Analyzed the invoices and billing lines to determine whether the FDIC made any duplicate payments.
- Compared the hours that ACS proposed for each labor category under each FDIC delivery order to the hours billed to determine whether the total hours and actual labor mix differed significantly from the proposals.
- Reviewed employee personnel files, job application forms, and resumes for 212 ACS and subcontractor employees who charged time to the FDIC's delivery orders.
- Analyzed experience and education qualifications for the 212 ACS and subcontractor employees to determine whether they met the GSA's Federal Supply Schedule minimum experience and education requirements and the FDIC's delivery order descriptions.
- Calculated questioned costs based upon the minimum experience and education requirements of ACS's Federal Supply Schedule contract GS-35F-4415G with the GSA and the FDIC's

delivery order labor category descriptions. For each billing line, we analyzed, calculated, and categorized the labor charges. (A complete description of our methodology for calculating questioned costs is included in appendix I.)

- Reviewed the FDIC's policies on contractor employee security.
- Determined whether ACS's employees and subcontractor personnel had access to FDIC facilities or information systems, thus requiring background investigations.
- Reviewed security files to determine whether the FDIC performed required background investigations for the 212 ACS and subcontractor personnel.
- Provided FDIC and ACS officials with our preliminary audit results to verify the accuracy and validity of our findings, seek agreement on causes, and develop recommendations.

We did not review ACS's billings for travel and other direct charges because they were not material to the overall contract charges.

To order services from ACS's Federal Supply Schedule contract, the FDIC issued delivery orders that incorporated by reference the FDIC's performance-based statements of work. These statements of work outlined the tasks to be performed, location of work, period of performance, applicable standards, acceptance criteria, and desired labor categories with descriptions of personnel including standards for experience and education. However, the ACS's Federal Supply Schedule contract also contained minimum experience and education requirements for each labor category and the experience/education requirements between the two sets of documents did not always agree.

Because of the conflicting experience and education requirements, the OIG established its own criteria against which to compare actual qualifications. We first looked to the Federal Supply Schedule contract, which contains a clause specifically stating that when a conflict exists between the GSA's Federal Supply Schedule contract and an agency's delivery order the Federal Supply Schedule contract shall control. However, the FDIC's delivery orders also contained specific language regarding employee qualifications. Accordingly, the FDIC delivery orders may have changed the GSA contract terms. Because it is not clear which terms would have legal standing, the OIG elected to question costs based on the terms that were the most favorable to the contractor. Accordingly, for this audit we consistently questioned costs based on ACS's Federal Supply Schedule contract labor categories and qualifications. Such an approach resulted in a more conservative calculation of questioned costs.

We did not evaluate internal controls because we concluded that we could meet the audit objective more efficiently by conducting substantive tests rather than placing reliance on the system of internal controls. The OIG conducted the audit from December 1999 through August 2000 in accordance with generally accepted government auditing standards.

RESULTS OF AUDIT

The FDIC paid ACS \$17,795,785 between January 1, 1998 and December 31, 1999 under 10 delivery orders for professional services, travel expenses, computer equipment, and computer supplies. Generally, ACS billed the FDIC for allowable services under the terms and conditions of its GSA contract and the FDIC's delivery orders awarded under that contract. ACS also provided the FDIC with adequate support for its billings. However, ACS billed 65 of its 212 employees and subcontractor personnel at higher labor rates than warranted by their individual qualifications. We questioned \$1,064,364 of the \$17.8 million that the FDIC paid ACS. Of that amount, we questioned \$986,191 for ACS employees who did not meet the education and/or experience requirements in its Federal Supply Schedule contract with the GSA. In addition, we questioned \$2,586 because ACS billed employees at higher rates than allowed under its delivery orders with the FDIC and \$75,587 for one employee who disclosed to ACS on his employment application that he was a convicted felon. Furthermore, the FDIC did not perform required security checks in a timely manner. Table 2 shows the FDIC's total payments to ACS during 1998 and 1999 and the amounts that we questioned (6 percent overall) for each delivery order.

Table 2: FDIC Payments to ACS and OIG Questioned Costs by Delivery Order

Delivery Order	Amount Paid	Questioned Costs	Percent Questioned
9701315NLH	\$ 546,931	\$ 42,658	7.8
9701438CVB	1,782,322	180,703	10.1
9701486CJT	1,228,711	83,704	6.8
9800455CAF	4,435,256	383,730	8.7
9800542CJT	6,246,889	236,661	3.8
9800779OEU	1,916,269	94,755	4.9
9801260CS2	795,529	30,738	3.9
9801264CTL	662,336	0	0.0
9900257OEU	124,164	7,818	6.3
9900443ORM	57,378	3,597	6.3
Total	\$17,795,785	\$1,064,364	6.0

Source: OIG analysis of FDIC contract files and ACS employees' experience and education requirements.

UNALLOWABLE LABOR CHARGES

ACS generally billed allowable labor charges and provided adequate support for its billings. However, ACS billed the FDIC for some employees that did not meet its Federal Supply Schedule education and/or experience requirements. ACS also billed some employees at rates not specified in the FDIC's delivery orders. Specifically, of the 212 contract employees that it provided, ACS billed 65 that did not meet contract specifications. As table 3 shows, ACS billed

the FDIC for 39 employees that did not meet experience and/or education requirements, 25 employees at incorrect rates, and 1 employee that was a known felon at the time he was hired.

Because some employees that ACS billed are included in more than one category, we accumulated costs by individual monthly charges for each contract employee (billing lines) to eliminate any duplicate questioned costs. Table 3 shows the number of employees, billing lines, amount billed, and questioned costs by billing category.

Table 3: Summary of ACS Billings by Category

Category	Number of Employees	Billing Lines	Total Billed	Questioned Costs
Did not meet experience requirement	27	311	\$2,578,237	\$715,741
Did not meet education requirement	6	60	397,776	135,476
Did not meet both requirements	6	60	443,857	137,572
Billed at incorrect rates/billing errors	25	36	260,350	2,586
Convicted of felony	1	13	75,587	75,587
Total employees billed incorrectly	65	480	\$3,755,807	\$1,066,962
Employees meeting all requirements	185	2,084	13,977,733	0
ACS's labor-related corrections	12	22	(20,167)	(2,598)
Included in more than one category*	(50)	0	0	0
Total labor-related charges	212	2,586	\$17,713,373	\$1,064,364
ACS's nonlabor-related adjustments	0	3	0	0
ACS's nonlabor-related corrections	0	4	(300)	0
Prompt payment discounts	0	112	(34,097)	0
Other direct charges	0	29	72,479	0
Travel	0	21	44,330	0
Total contract billings	212	2,755	\$17,795,785	\$1,064,364

*Some employees were included in more than one category. Therefore, the number of employees accounted for exceeds the 212 employees that ACS billed under the 10 delivery orders.

Source: OIG analysis of FDIC contract files and ACS employees' experience and education requirements.

ACS Personnel Did Not Always Meet Minimum Qualifications

ACS's Federal Supply Schedule contract GS-35F-4415G with the GSA established minimum experience and education requirements for various labor categories. However, the employees that ACS billed under its 10 delivery orders with the FDIC did not always meet those experience and education requirements. Of the 2,586 individual labor charges, ACS billed 431 charges to the FDIC for employees who did not meet the education and/or experience requirements specified in its Federal Supply Schedule contract with GSA. For each of those 431 charges, we

determined the labor category for which the employee would qualify. We then reduced the maximum allowable rate for that category by the average discount offered on the delivery order and questioned the difference between the discounted maximum allowable rate and the actual rate billed. In total, we questioned \$986,191—\$988,789 less \$2,598 for adjustments that ACS had already made—that the FDIC paid ACS.

Specifically, 27 of the 212 employees that ACS billed to the FDIC did not meet the minimum experience requirements. ACS billed 311 individual labor charges to the FDIC for those 27 employees totaling \$2,578,237, and we questioned \$715,741 of that amount.

Six of the employees that ACS billed to the FDIC did not meet the minimum education requirements. Generally, those employees did not have bachelors degrees or enough years of experience to substitute for a degree as required by ACS's Federal Supply Schedule. ACS billed 60 labor charges for those six employees totaling \$397,776, and we questioned \$135,476 of that amount.

Finally, six additional employees that ACS billed to the FDIC did not meet the minimum requirements for both experience and education. ACS billed 60 labor charges for those six employees totaling \$443,857, and we questioned \$137,572 of that amount.

FDIC oversight managers stated that they evaluated contractor employee qualifications based primarily on personnel descriptions contained in the FDIC's delivery orders. As we previously stated, those descriptions were part of the statements of work included in the FDIC's requests for quotation. However, only two of the eight oversight managers compared employee qualifications to requirements in ACS's Federal Supply Schedule contract with the GSA under which the FDIC awarded the 10 delivery orders to ACS. The oversight managers stated that they generally did not consider the labor category requirements in ACS's Federal Supply Schedule contract with GSA.

According to the FDIC oversight managers and ACS officials, the FDIC accepted some contract employees who did not meet minimum requirements because they had specific skills needed to complete critical tasks. Although we acknowledge the need for those critical skills, the FDIC should have issued modifications to its delivery orders adding labor categories for which the employees would have qualified.

Further, according to ACS management, ACS believed that its responsibility to provide qualified staff was restricted to the FDIC's requirements specified in the delivery orders. ACS maintained that the FDIC waived its Federal Supply Schedule contract experience requirements and accepted ACS's discounted rates as consideration for providing personnel with the qualifications specified in its delivery orders. ACS also maintained that the FDIC further waived any differences in experience requirements when the oversight managers approved resumes that ACS submitted. ACS believes that the questioned billings comply with the requirements reflected in the delivery orders and related proposals.

The OIG disagrees with ACS's position on this matter. Although we make no conclusion in this report regarding the legal standing of the GSA qualification requirements versus those of the

FDIC’s delivery orders, we compared ACS employee qualifications to the descriptions in the FDIC’s delivery orders. In many cases, ACS’s employees did not meet those qualifications either. In fact, using the FDIC’s delivery order descriptions as ACS claims to have done—rather than the GSA’s Federal Supply Schedule contract requirements—would actually increase total questioned costs by \$587,636 to \$1,652,000.

ACS Billed Personnel at Incorrect Rates

The 10 delivery orders that the FDIC awarded to ACS under its Federal Supply Schedule contract with the GSA contained set hourly rates for the specified labor categories. However, in some instances, ACS billed higher rates than those set out in the delivery orders. In other instances, ACS provided and billed for personnel in labor categories that the FDIC did not request. Of 2,586 individual labor charges for professional services, ACS billed 36 labor charges to the FDIC at rates other than those specified in the delivery orders or for labor categories that were not included in the delivery orders. Accordingly, we questioned \$2,586—the net difference in hourly rates for each labor hour charged less any reimbursements already requested by the FDIC. Table 4 shows the individual items questioned.

Table 4: Summary of ACS Incorrect Billing Rates

Category	Amount Billed	Recovered by the FDIC	Questioned by the OIG
Billed in excess of approved rates	\$32,502	(\$23,429)	\$ 9,073
Billed for labor categories not in delivery orders	14,066		14,066
Billed math errors	(20,553)		(20,553)
Total	\$27,459	(\$23,429)	\$ 2,586

Source: OIG analysis of FDIC contract files and ACS employees’ experience and education requirements.

ACS billed 32 of the 36 billing errors on delivery order 9701315NLH when it increased billing rates and added labor categories without any delivery order modifications. We questioned \$32,502 for 16 of the 32 errors when ACS billed contract employees working as systems analysts/data modelers at \$76.08 per hour rather than the \$67 per hour rate agreed to under the FDIC’s delivery order. The FDIC identified the overage after reviewing ACS’s invoice, and ACS repaid \$23,429 for the billing rate errors. However, 2 of the 16 employees billed erroneously also did not meet the GSA’s Federal Supply Schedule contract minimum experience requirements resulting in the remaining questioned cost of \$9,073.

ACS billed 16 other labor charges for employees whose labor categories the FDIC did not request under delivery order 9701315NLH. ACS also billed those 16 charges at the maximum rates allowed under its Federal Supply Schedule contract with the GSA. However, ACS discounted other labor categories in delivery order 9701315NLH by an average of 11.9 percent. Furthermore, one of the contract employees billed under those labor categories did not meet the GSA’s Federal Supply Schedule contract minimum qualifications for the labor category billed.

Specifically, ACS billed 13 charges for subject matter specialists to the FDIC at \$51 per hour and 3 charges for a technical writer at \$38 per hour.

For employees who met the GSA's Federal Supply Schedule contract minimum requirements, we questioned the difference between the actual rate billed and that same rate reduced by the average discount (11.9 percent) that ACS gave under delivery order 9701315NLH. The allowable rates for subject matter specialist and technical writer would have been \$44.95 and \$33.49, respectively. For the one ACS employee who did not meet minimum Federal Supply Schedule qualifications for his labor category, we matched his qualifications to a labor category in ACS's Federal Supply Schedule with the GSA for which that employee qualified. We then reduced the maximum allowable rate for that category by the average discount (11.9 percent) given under the delivery order and questioned the difference between the new discounted rate and the actual rate billed. Accordingly, we questioned a total of \$14,066 for those 16 billing errors.

The remaining 4 of the 36 total billing errors appeared to be mathematical errors. In two instances, ACS included correct charges on the invoices but did not include those charges in the invoice total. For the other two errors, ACS included an incorrect amount in an invoice total for one and used the wrong hourly rate for the other. ACS underbilled the FDIC a total of \$20,553 for those four billing errors.

In its response to our preliminary findings, ACS did not specifically address those billing errors. ACS's response stated in general that its billings under the referenced delivery orders were proper and in accordance with the terms and conditions of its Federal Supply Schedule contract with the GSA and the associated FDIC delivery orders.

ACS BILLED THE FDIC FOR LABOR CHARGES FOR A KNOWN FELON

Most employees that ACS provided to work on the FDIC's delivery orders received background investigations although the FDIC did not always perform those checks when required. However, some ACS employees—including three convicted felons—improperly gained access to the FDIC's facilities and data. Moreover, one of the felons stated on his ACS employment application that he was a convicted felon. Accordingly, ACS should not have used that individual to perform work under the FDIC's delivery orders. We questioned \$75,587 that ACS billed the FDIC for that individual. Table 5 shows the total number of ACS employees provided and the number of those employees required to have background investigations because either ACS designated them as key employees or they worked in the FDIC's facilities.

Table 5: ACS Employees Requiring Background Investigations

Employee		Number of Employees Provided	Background Investigation Required	Background Investigation Performed	Required Investigation Not Performed
Type	Location				
Key		43	43	38	5
Nonkey	On-site	167	167	128	39
Nonkey	Off-site	2	0	1	0
Total		212	210	167	44

Source: OIG analysis of FDIC contract files and security records.

Section 5.B.9 of its *Acquisition Policy Manual* requires that the FDIC conduct background investigations for its contractors' management officials and key personnel when the contract award is greater than \$100,000. The manual also requires background investigations for all contractor personnel working in the FDIC's facilities (on-site). However, not all ACS personnel received background investigations as required.

The FDIC Chief, Employee/Contractor Security Unit, verified that his office conducted background investigations for 38 of ACS's 43 key personnel. For the remaining five key personnel there was no record of a background investigation being conducted by the FDIC and the contracting officer had no record of a background investigation being requested. In addition, 39 of the 167 nonkey personnel working on-site did not receive background investigations as required. The FDIC performed background investigations for 128 of ACS's 167 nonkey personnel working on-site. It also performed a background investigation for one of the two nonkey employees working off-site, which was not required.

Because the FDIC did not perform all required background investigations, some contract employees improperly gained access to FDIC facilities and data, including three that had felony convictions. One of the three, employee A, was convicted of several felonies—two drug charges, one firearms charge, and one assault—and was on probation the entire time that he worked at the FDIC.

The FDIC's *Acquisition Policy Manual* (section 8.F.) and the *Code of Federal Regulations* (12 C.F.R. 366.4) both prohibit a convicted felon from performing services under an FDIC contract. ACS hired employee A to work on its FDIC delivery orders as a senior microcomputer specialist although the employee disclosed on his ACS employment application that he was a convicted felon. ACS may have overlooked the employee's disclosure because he was already working for another contractor at the FDIC as a lead microcomputer specialist when ACS took over those services. Employee A began working at the FDIC in August 1997 for another contractor and continued working at the FDIC under ACS's contract from October 1998 through October 1999. It was not until November 1999—28 months after he began working there—that the FDIC initiated a background investigation. Employee A again indicated on the FDIC background investigation forms that he was a convicted felon. The FDIC sent his fingerprints to the Federal Bureau of Investigation (FBI) for processing, and in late December 1999 the FBI's

report to the FDIC showed that employee A had an extensive criminal record. In January 2000, the FDIC required ACS to remove employee A. Nonetheless, ACS should not have used employee A on this contract based on that individual's employment application disclosure. Accordingly, we questioned the entire \$75,585 that ACS billed for employee A.

In addition, employee B, a microcomputer support specialist did not disclose his felony conviction on his employment application dated January 30, 1997. The FDIC sent employee B's fingerprints to the FBI for processing in August 1998. The FDIC received the FBI's report on August 31, 1998, which showed that employee B had felony convictions. However, employee B continued working on-site at the FDIC until April 1999 because the Employee/Contractor Security Unit was awaiting confirmation on the disposition of employee B's conviction before notifying the Acquisition Services Branch that employee B should be removed. In total, ACS billed the FDIC \$33,953 for employee B during the 9 months that employee B worked for an ACS subcontractor. However, we did not question the amounts billed because employee B did not disclose his felony conviction on his employment application.

Likewise, employee C, a senior systems analyst, did not disclose his felony conviction on his ACS employment application dated November 2, 1998. Employee C disclosed that he had worked previously at the FDIC for another contractor during the period January 1996 through March 1997. The FDIC sent employee C's fingerprints to the FBI in February 1997—when that employee worked for the former contractor—and again in November 1998 when he worked for ACS. The FBI's reports to the FDIC in June 1997 and December 1998 both showed that employee C had a felony conviction. However, the FDIC did not act on the FBI's June 1997 report because the former contractor had terminated employee C in March 1997. In response to the FBI's December 1998 report, the FDIC immediately notified ACS to remove employee C from working on the FDIC's delivery orders. In total, ACS billed the FDIC \$10,934 for employee C during the 2 months that he worked at the FDIC. Like employee B, we did not question the amounts billed because employee C did not disclose his felony conviction to ACS on his employment application.

In March 2000, the FDIC updated its *Acquisition Policy Manual* and reviewed its current contract files to ensure that it completed or requested background investigations for all on-site employees. Those changes did not require the FDIC to complete background investigations before granting contract personnel access to the FDIC's facilities and data. The manual generally states that the FDIC should not award a contract until the contracting officer receives the results of the background investigation review in which no disqualifying conditions or personnel are identified. However, in light of the fact that three convicted felons that ACS employed worked on-site at the FDIC, the FDIC did not comply with its *Acquisition Policy Manual* or 12 C.F.R. 366.4 prohibitions. Employee A had access to the FDIC's critical systems and sensitive data for more than 2 years, and employees B and C had access for 9 months and 2 months, respectively, before being terminated.

The condition we point out in this finding raises concern regarding the FDIC's background investigation policies. However, the OIG is currently addressing the issue of background

investigations in another audit entitled *Audit of the Background Investigation Process*. Two recommendations in that report are that DOA should:

- (1) Implement a program to verify that contractors are taking steps to ensure that management officials, employees, and subcontractors working under a contract with the FDIC meet minimum standards as stated in 12 CFR 366.
- (2) Base the need for conducting database background investigations on the anticipated work of contract employee rather than on their designation as “key personnel.”

Accordingly, because of those recommendations and management’s positive response to them, we make no specific recommendations in this report. However, we believe that FDIC management should obtain the results of fingerprint analyses from the FBI before granting contractor personnel access to the FDIC’s facilities and automated information systems.

CONCLUSION AND RECOMMENDATIONS

ACS generally provided qualified employees, accurately billed for their services, and adequately supported its billings. However, ACS billed some employees who did not meet minimum qualifications and billed other employees at incorrect rates. In addition, the FDIC did not perform all required background investigations before allowing ACS employees access to its facilities and data. Accordingly, we question \$1,064,364 of the \$17,795,785 that the FDIC paid to ACS and recommend that the Director, DOA, take the following actions:

- (1) Disallow \$986,191 (questioned cost)—\$988,789 less \$2,598 for previous ACS adjustments—that ACS billed for employees who did not meet the minimum education or experience requirements prescribed in ACS’s Federal Supply Schedule contract with the GSA.
- (2) Disallow \$2,586 (questioned cost) that ACS billed for employees at rates other than those approved in the FDIC’s delivery orders and for labor categories not included in the FDIC’s delivery orders.
- (3) Disallow \$75,587 (questioned cost) that ACS billed for an employee who disclosed on his ACS employment application that he was a convicted felon.
- (4) Ensure that the FDIC’s contracting officers negotiate and oversight managers administer delivery orders that are consistent with the terms of the GSA’s Federal Supply Schedule contract provisions and any related guidance for all future delivery orders awarded under ACS’s GSA contract.

CORPORATION COMMENTS AND OIG EVALUATION

In a December 5, 2000 e-mail, the Chief, Information Technology Evaluation Section, Division of Information Resources Management (DIRM) stated that DIRM had reviewed the draft and had no comments to offer since the report did not address any recommendations to DIRM.

On December 7, 2000, the Director, Division of Finance (DOF), provided a written response to a draft of this report addressing delivery order 9800455CAF, which was for services that ACS provided to DOF. The Director's response agreed with the \$383,730 of questioned costs related to delivery order 9800455CAF and stated that DOF supports all efforts by DOA to recover those questioned costs. Appendix II to this report presents the DOF Director's response.

On December 21, 2000, the Director, DOA provided a written response to a draft of this report. The Director's response agreed with the recommendations and provided the requisites for a management decision on each of the four recommendations. We did not summarize the Director's response because the actions planned or completed are the same as those recommended. Appendix III to this report presents the DOA Director's response.

The Chief, Information Technology Evaluation Section, DIRM, stated that DIRM would not provide a written response to a draft of this report because the recommendations were addressed to DOA.

Appendix IV presents management's proposed actions on our recommendations and shows that there is a management decision for each recommendation in this report. Based on the audit work, the OIG will report questioned costs of \$1,064,364 in its *Semiannual Report to the Congress*.

METHODOLOGY FOR CALCULATING QUESTIONED LABOR COSTS

For each billing line, we analyzed, calculated, and categorized ACS's labor charges as follows:

- If the employee met the minimum education and experience requirements **and** the actual billing rate agreed with the signed quotation attached to the FDIC's delivery order, we categorized the billing line as *meets*. Accordingly, we accepted the billing rate, which resulted in no questioned costs.
- If the employee met the minimum education and experience requirements **but** the actual billing rate did not agree with the signed quotation attached to the FDIC's delivery order, we categorized the billing line as a *billing error*. Accordingly, we adjusted the billing rate, which resulted in questioning the difference between the actual rate billed and the agreed upon rate.
- If the employee did not meet the minimum education and/or experience requirements, we determined the appropriate billing rate for which the employee qualified. We compared the employee's actual education and experience to the required minimum education and experience in other labor categories associated with the applicable FDIC delivery order.
 - a. If we found another labor category for which the required education and experience matched the employee's actual education and experience, we applied the billing rate for that category and questioned the difference between that rate and the actual rate billed.
 - b. If we did not find a labor category for which the required education and experience matched the employee's actual education and experience, we searched other delivery orders that the FDIC awarded under ACS's Federal Supply Schedule contract. When we found a labor category under another delivery order for which the employee qualified, we applied the billing rate for that category. Accordingly, we questioned the difference between the rate actually billed and the maximum rate on ACS's Federal Supply Schedule for that category, less the average discount for the applicable delivery order. To determine the average discount rate for each delivery order, we multiplied the total estimated hours by the GSA's maximum rate for each labor category and divided the results by the delivery order's not-to-exceed amount for each year.



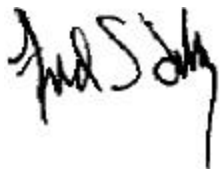
Federal Deposit Insurance Corporation

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Office of the Director
Division of Finance

December 7, 2000

MEMORANDUM TO: Sharon M. Smith
Assistant Inspector General



FROM: Fred Selby, Director
Division of Finance

SUBJECT: Response to OIG Draft Report Entitled Audit of Billings for Professional Services Provided by ACS Government Solutions Group

The Division of Finance has reviewed the subject audit report dated November 15, 2000. Based on our review, we offer the following comments:

This report shows questioned costs of \$383,730 of the \$4,435,256 paid under Delivery Order 9800455CAF. These questioned costs are a result of ACS providing contractors that did not either have the education or experience requirements for the labor category for which the contractors were hired. The Division of Finance concurs with this finding, and supports all efforts by the Division of Administration (DOA) to recover these questioned costs.

DOF has also initiated corrective action regarding the screening of future contractors. As recommended by the auditors, the Oversight Manager will compare perspective contractor educational and experience qualifications to the requirements in the General Services Administration (GSA) Schedule for personnel qualifications to assure that any perspective contractor meets these minimum requirements for the position sought to be filled.

Thank you for the opportunity to comment on your draft report. If you have any questions with our response or would like to discuss it further, please don't hesitate to contact Stan Pawlowski or myself.

Cc: R. Elosser
S. Anderson
S. Pawlowski

**FDIC****Federal Deposit Insurance**

550 17th Street, NW, Washington, DC 20429

Division of Administration

December 21, 2000

MEMORANDUM TO: Sharon M. Smith
Assistant Inspector General

FROM: *for* Arleas Upton Kea 
Director, Division of Administration

SUBJECT: Management Response to OIG Draft Report Entitled: *Audit of Billings for Professional Services Provided by ACS Government Solutions Group*

The Acquisition and Corporate Services Branch (ACSB) has completed its review of the subject Office of Inspector General (OIG) draft report. The OIG reported two findings and made four recommendations to the Director, Division of Administration (DOA), including \$1,064,364 in questioned costs.

Recommendations 1, 2, and 3 will require corrective actions by ACSB. Our plan to address the recommendations is summarized in Exhibit A, which includes expected completion dates and the documentation that will confirm the corrective actions taken. **Based on this Management Response, this also serves as a statement of certification that ACSB has completed necessary corrective action for recommendation number 4.**

MANAGEMENT DECISION:

OIG FINDING #1: The Contractor Billed (a) at Labor Category Rates That Employees Were Not Qualified For; (b) at Rates That Exceeded Those Agreed to by FDIC; and (c) for Time Charges Submitted by an Employee Prohibited From Working Under the Contract.

OIG Recommendation #1: Disallow \$986,191 that ACS billed for employees who did not meet the minimum education or experience requirements prescribed in ACS's Federal Supply Schedule contract with the GSA.

OIG Recommendation #2: Disallow \$2,586 that ACS billed for employees at rates other than those approved in the FDIC's delivery orders and for labor categories not included in the FDIC's delivery orders.

OIG Recommendation #3: Disallow \$75,587 that ACS billed for an employee who disclosed on his ACS employment application that he was a convicted felon.

Management Response #s 1, 2, 3: We agree with the finding and recommendations. DOA will disallow and pursue recovery of any amounts that cannot be adequately supported by the contractor. A decision memorandum and a demand letter, if necessary, will confirm our completion of corrective action.

OIG FINDING #2: FDIC Delivery Orders Contained Contractor Employee Qualifications and Hourly Rates That Did Not Always Agree With the Terms of the Contractor's GSA Federal Supply Schedule Contract Provisions.

OIG Recommendation #4: Ensure that the FDIC's contracting officers negotiate and oversight managers administer delivery orders that are consistent with the terms of the GSA's Federal Supply Schedule contract provisions and any related guidance for all future delivery orders awarded under ACS's GSA contract.

Management Response #4: We agree with the finding and recommendation.

The OIG found that job descriptions and minimum education and experience requirements in FDIC's Statement of Work were often not consistent with labor categories and requirements outlined in the contractor's proposal and price list. ACSB has taken steps to eliminate these discrepancies in the future.

- When ACSB completes its review of the winning bidder's proposal that includes a list of labor categories and hourly rates, the contractor's proposal becomes a part of the contract. In the future, before a contract is executed, ACSB will remove from the Statement of Work, any reference to FDIC job descriptions or related education and experience requirements, thereby eliminating potential contradictions.
- ACSB will ensure that the oversight manager (OM) receives a copy of the contractor's proposal. That will enable the OM to verify that all contractor employees are billed at the correct GSA job category and rate.
- ACSB conducted a training course in September 2000 for all OMs in the Division of Information Resources Management covering a wide range of contract related weaknesses identified in several recent OIG reports. The OMs were cautioned against granting waivers, either real or implied, of minimum education and experience requirements for labor categories under a GSA contract, without written approval from the contracting officer.
- In October 2000, the Assistant Director, Acquisition Section, issued an Oversight Manager Job Aid, providing all OMs a quick reference summarizing their responsibilities under Section 7.B. of the FDIC Acquisition Policy Manual.

This response serves as a statement of certification that ACSB has completed the necessary corrective action for recommendation #4.

In addition to the recommendations above, the OIG expressed concern about delays in completing background investigations for owners, employees, and subcontractors working under FDIC contracts. While ACSB is taking steps to reduce security risks related to contractor access to our facilities and computer systems, management is currently preparing an official response to another OIG audit of FDIC's background investigation process. Therefore, we will defer comment on this issue until our official response is released later this month.

If you have any questions regarding this management response, you may contact Richard Johnson at (202) 942-3191.

Attachment

cc: Mike Rubino
Deborah Reilly
Richard Johnson
Andrew Nickle
Kenneth Jones

EXHIBIT A

<p>DIVISION OF ADMINISTRATION SUMMARY OF MANAGEMENT DECISION</p>

NO.	FINDING DESCRIPTION	QUESTIONED COST	AMOUNT DISALLOWED	DESCRIPTION OF CORRECTIVE ACTION	EXPECTED COMPLETION DATE	DOCUMENT VERIFYING COMPLETION
1	<p>Contractor billed charges that were not allowable under the contract.</p> <p>a. Employee qualifications were not commensurate with billing rates.</p> <p>b. ACS billed at rates not agreed to by FDIC.</p> <p>c. ACS billed for time worked by a convicted felon--prohibited under the contract.</p>	<p>\$986,191</p> <p>2,586</p> <p>75,587</p>	<p>\$986,191</p> <p>2,586</p> <p>75,587</p>	<p>Management agreed with the finding and recommendations.</p> <p>DOA will take recovery actions for all amounts that the contractor is unable to adequately support.</p>	<p>04/30/01</p>	<p>Decision Memorandum or Demand Letter</p>
2	<p>FDIC sometimes accepted employee qualifications and hourly rates that did not conform with the terms in the Contractor's GSA Federal Supply Schedule contract provisions.</p>	<p>-0-</p>	<p>-0-</p>	<p>Management agreed with the finding and recommendation.</p> <p>--Conflicting information has been removed from the Statement of Work.</p> <p>--OMs will receive a copy of the contract proposal, and use that to verify correct GSA labor categories and rates.</p> <p>--A training course reiterated OM responsibilities to enforce minimum education and experience requirements under a contractor's GSA agreement.</p> <p>--ACSB issued an Oversight Manager Job Aid, providing a quick reference guide summarizing OM responsibilities.</p>	<p>Completed</p>	<p>Decision Memorandum / Other Related Documents</p>
	<p>Totals</p>	<p>\$1,064,364</p>	<p>\$1,064,364</p>			

MANAGEMENT RESPONSES TO RECOMMENDATIONS

The Inspector General Act of 1978, as amended, requires the OIG to report on the status of management decisions on its recommendations in its semiannual reports to the Congress. To consider the FDIC's responses as management decisions in accordance with the act and related guidance, several conditions are necessary. First, the response must describe for each recommendation

- the specific corrective actions already taken, if applicable;
- corrective actions to be taken together with the expected completion dates for their implementation; and
- documentation that will confirm completion of corrective actions.

If any recommendation identifies specific monetary benefits, FDIC management must state the amount agreed or disagreed with and the reasons for any disagreement. In the case of questioned costs, the amount that the FDIC plans to disallow must be included in management's response.

If management does not agree that it should implement a recommendation, it must describe why it does not consider the recommendation valid.

Second, the OIG must determine that management's descriptions of (1) the course of action already taken or proposed and (2) the documentation confirming completion of corrective actions are responsive to its recommendations.

This table presents management's responses on recommendations in our report and the status of management decisions. The OIG based the information for management decisions on management's written response to our report.

Rec. Number	Corrective Action: Taken or Planned / Status	Expected Completion Date	Documentation That Will Confirm Final Action	Monetary Benefits	Management Decision: Yes or No
1	The Director, DOA, agreed with the recommendation and stated that DOA will disallow and pursue recovery of any amounts that the contractor cannot adequately support. The Director, DOF, agreed with the \$383,730 of questioned costs related to delivery order 9800455CAF for services that ACS provided to DOF and stated that DOF supports DOA's efforts to recover those questioned costs.	04/30/01	Decision memorandum or demand letter.	\$986,191 disallowed costs	Yes
2	The Director, DOA, agreed with the recommendation and stated that DOA will disallow and pursue recovery of any amounts that the contractor cannot adequately support.	04/30/01	Decision memorandum or demand letter.	\$2,586 disallowed costs	Yes

Rec. Number	Corrective Action: Taken or Planned / Status	Expected Completion Date	Documentation That Will Confirm Final Action	Monetary Benefits	Management Decision: Yes or No
3	The Director, DOA, agreed with the recommendation and stated that DOA will disallow and pursue recovery of any amounts that the contractor cannot adequately support.	04/30/01	Decision memorandum or demand letter.	\$75,587 disallowed costs	Yes
4	The Director, DOA, agreed with the recommendation. The Director stated that for delivery orders placed under the GSA's Federal Supply Schedule DOA has taken steps to eliminate inconsistencies in minimum education and experience requirements for contractor employees between the FDIC's statement of work and the GSA's contract.	Completed	Decision memorandum and other related documents.	Unknown	Yes

Office of Inspector General



June 4, 2001
Audit Report No. 01-002-1

Audit of Billings for Professional
Services Provided by ACS
Government Solutions Group

Material has been redacted from this document to protect personal privacy, confidential or privileged information.



ACS

Harvey V. Braswell
Group President
Government Services

March 23, 2001

Honorable Gaston L. Gianni, Jr.
Inspector General Federal Deposit Insurance Corporation
Office of the Inspector General
801 17th Street NW Washington DC 20434

Subject: FDIC IG Audit Report No. 01-002
January 11, 2001
Audit of Billings for Professional Services
Provided by ACS Government Solutions Group,
Inc.

Dear Mr. Gianni:

ACS Government Solutions Group, Inc. (ACS GSG) is in receipt of the above-referenced audit report. Attached is our formal response which, we simultaneously are providing to the FDIC Department of Administration.

ACS GSG disagrees with the audit findings and conclusions, and also is concerned about the procedures adopted by the auditors in drafting and finalizing the report. Although the auditors provided ACS GSG an exit conference along with a copy of a briefing paper (**Note 1**), FDIC never provided the company with an opportunity to respond and/or comment on a draft audit report prior to publication. (**Note 2.**) This was contrary to the understanding discussed at the exit conference, when ACS GSG was advised that it would be afforded the ability to respond and comment to the audit report. FDIC never advised that it would release a final audit report prior to that opportunity. (**Note 3.**)

Moreover, this practice is inconsistent with accepted federal standards in this area. First, the release of a final report without the opportunity for prior contractor comment seems contrary to the generally accepted Government auditing standards as contained in the *Government Auditing Standards*. (**Note 4.**) Second, it is contrary to custom and practice utilized by most other federal agencies. For example the General Services Administration, which routinely audits contractors for compliance with GSA Schedule contract issues, provides contractors with a draft report for review and comment, and incorporates the

Office of Inspector General (OIG) Comments

Note 1 – The briefing paper was a reformatted version of the draft report, which incorporated ACS' response to our findings (see Note 2).

Note 2 – We provided a database of our questioned costs to ACS on June 27, 2000. ACS responded in a letter dated July 31, 2000, parts of which we incorporated into the draft report. On August 8, 2000, ACS also provided nine files of clarifying and additional data, which was used to verify and amend our questioned costs in the draft report. We reformatted the draft report as a briefing document and presented it to ACS on September 12, 2000.

Note 3 – According to the audit team's notes from the exit briefing with ACS, Mr. [name redacted]—FDIC, Division of Administration (DOA)—told ACS that he would wait for the final report before providing ACS a copy and beginning negotiations (see Note 18).

Note 4 – The OIG gave the auditee—the FDIC—an opportunity to respond to the draft report in compliance with GAGAS. The audit team also gave ACS an opportunity during the audit to respond to the audit findings, and ACS provided a response to the OIG. The OIG summarized ACS' comments and incorporated them throughout the report (see Note 2).

contractors responses in the final versions of the audit reports.

In any event, ACS GSG has prepared and submitted our comments to the DOA for review and consideration. We believe that ACS GSGs comments and response should have been incorporated into any final report prior to final publication and dissemination, and as a result object to the public disclosure of the audit report. **(Note 5.)**

Therefore, we formally request that the final audit report be withdrawn in full, and the report removed from any current display or publication (such as the FDIC and IGnet sites) and that the FDIC refrain from publishing the report in any fashion in the future since we were not afforded the ability to respond prior to completing the report. As an alternative, we propose that our attached comments be included in full in any in any current publication (including the report on the IGnet site) prior to any other further publication or dissemination. This practice of including the contractor's response in a final audit report is consistent with practices at other agencies such as GSA. If FDIC determines that it nonetheless will display or publish the report in any manner without the response, ACS GSG asks that FDIC remove ACS GSG' name from the report, since ACS GSG had not been given a fair opportunity to comment on the allegations. **(Note 6.)**

If you would like to discuss this issue further please feel free to contact me directly at 301-921 -7003.

Sincerely,

Harvey V. Braswell
ACS Group President

Enclosure

TOTAL P.02

Note 5 – ACS' response to the final report (included in this document) is essentially the same as its response to the exit conference. We incorporated ACS' response to our findings throughout the report.

Note 6 – The OIG has not changed the published report. We incorporated ACS' position on our findings in the draft report and adjusted finding amounts based on additional information that ACS provided, as appropriate. We are publishing this document, consisting of ACS' position and our reply, with our final report.

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March 23, 2001

Robert J. Sherry
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Rsherry@kl.com

Mr. [name redacted]
Division of Administration
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

**RE: *Audit of Billings for Professional Services Provided
by ACS Government Solutions Group (Audit Report
No. 01-002)***

Dear [name redacted]:

We are writing on behalf of ACS Government Solutions Group, Inc. ("ACS") in response to the above-referenced audit report. This report resulted from a review of records related to ten delivery orders issued by FDIC for various information technology ("IT") services. The stated purpose of the review was to determine whether ACS' billings were allowable and adequately supported under the terms and conditions of its GSA Multiple Award Schedule ("GSA MAS") contract and the FDIC delivery Orders.

We appreciate the opportunity to review and respond to the audit report. Our review of the report, the underlying contract and delivery orders, the facts involved, and the applicable law and regulations leads us to disagree with the conclusions expressed in the reports.

Specifically, as detailed further below, the audit conclusions are invalid for the following reasons:

- FDIC accepted the now-challenged personnel in compliance with the terms of the pertinent delivery orders, which specified FDIC qualifications;
- FDIC misinterpreted the qualifications of many challenged personnel, and their qualifications met or exceeded the requirements established by FDIC in the pertinent delivery orders;

OIG comments are shown in the detail section of this letter.

- In some cases, FDIC modified the delivery orders or waived the qualifications of the challenged personnel by accepting them after performance for a probationary period, because they possessed certain critical skills, or because they were incumbents, and is now estopped from denying these facts;
- In some cases, FDIC modified or constructively changed the delivery orders to include additional personnel not previously performing delivery order efforts; and
- Although certain services under one of the delivery orders at issue were performed by a felon already employed at an FDIC facility by an incumbent contractor, neither the GSA MAS contract nor the delivery order at issue prohibited ACS from employing the individual, and the contract and delivery order do not contain provisions permitting recovery of related costs.

Moreover, even if the delivery orders somehow were issued improperly, ACS billings were proper, as they reflected the reasonable value of the services conferred upon FDIC.

ACS considers FDIC a valued customer. The company looks forward to meeting with FDIC to review this response and resolve FDIC's concerns.

This response has four parts. Part One reviews the relevant facts. Part Two summarizes the audit report contentions. Part Three presents ACS' view why, as a legal matter, FDIC's audit claims are unfounded. Part Four contains a brief conclusion.

I. FACTS

A. Introduction

During the 1997-2000 timeframe, ACS provided a variety of critical information technology ("IT") services for FDIC under a series of ten delivery orders issued by the Division of Finance or the Division of Information Resources Management. These services included efforts such as systems analysis and design; business process redesign services; personal computer technical services; executive office management section support; national client application server support; application technology section support; and other activities.

FDIC issued these delivery orders to ACS under the authority of the General Services Administration's multiple award schedule contract ("GSA MAS") program and

the ACS GSA MAS contract (Contract No. GS-35F-4415G, sometimes referred to herein as "Contract 4415").¹ The GSA MAS program enables federal agencies and similar entities to issue orders for a wide variety of products and services, including IT services, on a streamlined basis without conducting normal competitive procedures at the time of the orders. The program authorizes GSA to negotiate contracts that contain a variety of prices, terms and conditions with IT services providers such as ACS. These terms and conditions, in the IT services context, include defined labor categories that contain descriptions of the efforts that personnel in that category may perform, as well as educational and experience qualifications corresponding to those categories. Federal agencies and activities such as FDIC then are entitled to place orders for services by issuing delivery orders against the contract.

The prices, terms and conditions contained in GSA MAS contracts and price lists are "baselines" for the negotiation and award of delivery orders. GSA MAS policies and procedures suggest that these matters can be subject to negotiation and modification in a number of circumstances. For example, the GSA MAS program authorizes the parties to a delivery order to negotiate reduced prices in a variety of circumstances, such as when an agency places large orders over the contract "maximum order threshold" stated in the contract, or when the parties intend to enter into a series of repetitive orders for GSA MAS-covered products and services under a so-called blanket purchase agreement. See, e.g., FAR 8.404(b)(3), (5) (government should seek price reductions when the order will exceed the maximum order threshold or when blanket purchase agreements are negotiated); FAR 8.404(b)(4), 9.6, 13.3 (use of teaming arrangements and blanket purchase agreements); GSAR 552.238-75 (price reductions clause); www.fss.gsa.gov/schedules (general guidance for price reductions, teaming arrangements and blanket purchase agreements),

In a similar vein, the GSA MAS contract terms and conditions frequently contemplate that the parties may negotiate different or additional terms and conditions in a particular delivery order. (**Note 7.**) See, e.g., GSA MAS IT RFP No. FCIS-JB-9800001B, sections C.9, C.11 (blanket purchase agreements and maximum order threshold provisions); 1998 Modification to GSA IT RFP Terms and Conditions for Special Item No. 132-51 (IT Services), para. 4.c. (**Note 8.**) ("The Contractor guarantees ... that all contract personnel utilized in the performance of IT/EC services under the task order shall have the education, experience, and expertise as stated in the task order"). (Emphasis

¹ The contract was awarded originally in 1996 to ACS' predecessor in interest, Computer Data Systems, Inc. ("CDSI"), CDSI changed its legal name to ACS Government Solutions Group, Inc. in September 1998. GSA recognized this name change by modification to Contract 4415 dated December 4, 1998.

Note 7 – According to a presentation made by GSA's Senior Assistant General Counsel and a GSA White Paper—*Acquisition Sources and Alternatives*—this applies to work to be performed and not the contract's basic terms and conditions such as labor qualifications.

Note 8 – The FDIC issued all delivery orders that the OIG audited under ACS' 1996 GSA Federal Supply Schedule (FSS) contract. Accordingly, the new clause was not in force during the audit period or now.

added.) This is consistent with the general regulatory principle that a contracting agency may modify a contract or delivery order so long as it is not expressly prohibited by law or regulation. See FAR 1. 102-4; see generally FAR 43 (contract modifications). The GSA MAS standard contract format and governing regulations do not in any way prohibit such modifications.

B. The FDIC RFQ Process

Consistent with these principles and this background, FDIC issued ACS a request for quotation ("RFQ") prior to issuing each of the delivery orders at issue. These RFQs each contained specific provisions governing the types of IT services desired by FDIC, as well as the qualifications that FDIC sought for the personnel that were to perform the work. In particular, the RFQs neither asked nor required ACS or any other offeror to propose personnel conforming to the labor categories and corresponding qualifications for each of the categories that appeared in the GSA MAS contract. Instead, each RFQ requested that ACS propose personnel that met FDIC specific labor categories and corresponding qualifications. FDIC generated a separate set of qualifications for each category. In virtually every instance, these qualifications and categories differed from those contained in the ACS GSA MAS contract. (Note 9.)

For example, in RFQ No. 99-00257-Q-EU, FDIC's cover letter indicated that its requirements [were) described more fully in the enclosed Request for Quotation (RFQ)." Section 2.2.5 of the RFQ stated that "personnel assigned to perform the work must demonstrate sufficient experience and qualification" and identified very specific labor category descriptions. Section 3.1.1(5) provided that the personnel resumes submitted had to "satisfy the minimum qualifications listed for the appropriate labor category." Similarly, section 7.3 of the statement of work, which was incorporated into the subsequent delivery order, directed the contractor "to furnish personnel that meet the minimum requirements listed below." Finally, the remainder of section 7.3 contained detailed and specific experience requirements for each labor category.

ACS generally responded to these RFQs by proposing to furnish personnel that met the FDIC-requested categories, requirements and qualifications at rates considered fair and reasonable in relation to those categories, services and qualifications. As a result of the RFQ process, FDIC awarded ACS the ten delivery orders at issue in the FDIC audit report. As suggested by the discussion above, the delivery orders invariably directed ACS to provide personnel that met the FDIC labor categories and qualifications. (Note 10.)

Certain other provisions of the delivery orders also are relevant to the concerns expressed by the FDIC auditors in their report. These provisions govern resumes,

Note 9 – The GSA's FSS Ordering Procedures for Services require agencies to include their own labor descriptions in RFQs so that all contractors receiving an RFQ can map the desired categories to existing labor categories on their respective FSS contracts. If the FDIC were to only include labor categories from ACS' FSS contract, FDIC might give the appearance of making a sole-source procurement.

Note 10 – On contract 98-01260-C-S2, the FDIC did not specify labor qualifications but deferred to the qualifications found in ACS' FSS contract.

personnel, and personnel qualifications. Generally, the delivery orders obligated ACS to provide the resumes of personnel to FDIC that the company proposed to use in the course of performing the delivery orders. These resumes and corresponding personnel were, under the terms of the delivery orders, subject to the advance approval of FDIC. See, e.g., Delivery Order No. 98-00779-C-EU, ¶¶13.3, 13.4; Delivery Order No. 9800542-C-JT, ¶7.0. In at least one case, the delivery order explicitly stated that FDIC had approved the personnel qualifications prior to performance on the basis of the proposal. See Delivery Order No. 97-01438-C-VB, ¶3.0.

C. The Role of the OM and the Qualification/Approval Process

Under the FDIC delivery orders, the review and approval of personnel qualifications was delegated to an oversight manager ("OM"). The delivery orders generally gave the OMs explicit authority over most matters of this nature. By way of example, OMs generally were required to: (1) provide task assignments to ACS; (2) monitor task performance; (3) review all deliverables provided by ACS; and (4) as appropriate, review resumes and make final determinations as to personnel acceptability. (**Note 11.**)

In practice, responsible ACS proposal and program management personnel generally took affirmative steps to ensure that OMs approved personnel. When requested by FDIC or required by the terms of an RFQ, ACS provided copies of resumes for each of the personnel proposed for each FDIC labor category in its proposal to facilitate OM review and approval prior to award of a delivery order.

ACS also had an internal procedure in place designed to promote compliance with the FDIC personnel qualification requirements. ACS used its Personnel Qualification Review Form ("PQRF") to assess whether candidates met the stated FDIC qualifications. (**Note 12.**) In many cases, the FDIC OMs would initial the PQRF upon presentation, signifying the OM's acquiescence that the personnel were qualified for the position. In some cases, the OM did not initial the PQRF, but provided verbal acceptance to ACS program personnel. (**Note 11.**)

In limited circumstances, FDIC and ACS agreed that certain personnel would be used to meet FDIC requirements even though they did not strictly meet the FDIC qualifications. (**Note 13.**) These situations included instances in which: (1) the parties agreed that an employee could begin delivery order performance on a probationary basis, with the understanding that the OM could remove the employee if he or she did not perform adequately; (2) an OM accepted an employee because he or she possessed critical skills in a particular tool or application for the delivery order effort; or (3) an incumbent employee was retained from the prior FDIC delivery order effort at the recommendation

Note 11 – Oversight managers do not have the delegated authority to modify the contract or any of its terms and conditions. According to the FDIC's contracting officer, the FDIC notified ACS of this fact at the contract kick-off meetings when it awarded the delivery orders. Furthermore, as ACS notes in its June 12, 1998 e-mail (included in this document), the contracting officer needs to approve added labor categories, qualifications, and the acceptability of the work. We found no evidence that the FDIC's oversight manager gave such approvals.

Note 12 – The audit team compared the information on ACS' PQRFs to the candidates' resumes in ACS' personnel files. For some, the PQRFs did not accurately reflect the candidates' qualifications shown on their resumes.

Note 13 – As stated on page 7 of the report, the FDIC and ACS should have modified the delivery order to add a labor category for which those personnel qualified along with a new—lower—labor rate. Further, according to the GSA's contracting officer for ACS' FSS contract, ACS is obligated to provide personnel with qualifications that meet the requirements of its FSS contract with the GSA.

of the FDIC. In many cases, FDIC provided an initialed PQRF, signifying OM approval; other approvals were verbal.

D. Addition of Other Personnel

In some isolated circumstances involving Delivery Order No. 97-01315-N-LH, FDIC and ACS agreed that additional personnel were required to fulfill FDIC's delivery order requirements, even though the additional personnel did not meet the qualifications for the three categories in the original delivery order. (**Note 14.**) For example, in a June 15, 1998 email, the FDIC OM confirmed that he had directed ACS (then CDSI) to add six employees in two additional categories to perform efforts not contemplated by the labor categories or personnel originally appearing in the delivery order. The OM advised in a prior email dated May 20, 1998 that "[t]hese additional labor categories were found to be necessary and the tasks they supported and the products they produced were found to be acceptable." See Attachment 1. (**Note 15.**)

E. Employment of "John Doe" ²

"John Doe" performed services as an ACS employee under Delivery Order No. 98-00542-C-JT from August 1, 1998 through October 31, 1999. AGS inherited this employee, a senior microcomputer specialist, from an incumbent contractor. The employee disclosed a felony conviction on an ACS application form, but ACS apparently overlooked this fact because the employee already was at work in an FDIC facility.

Despite the fact that FDIC policy requires that FDIC conduct background investigations for all contractor personnel working in FDIC facilities, FDIC neglected to conduct such an investigation until November 1999. Moreover, the GSA MAS contract and the delivery order at issue apparently contained no prohibitions against the employment of a felon. (**Note 16.**) Paragraph 22.0 of the delivery order provided only that if a contractor employee was suspected of a criminal act, FDIC could revoke that employee's access to FDIC systems and premises and refrain from any payments relating to that employee's efforts after revocation.

F. Additional Information Concerning Delivery and Performance

It is noteworthy that during performance of these delivery orders, neither the cognizant contracting officers nor the OMs apparently questioned the acceptability of any ACS personnel or requested replacement of any personnel that commenced

² We refer to this employee by a pseudonym given the subject matter.

Note 14 – Based on CDSI letters in the FDIC's contract files, ACS (then CDSI) requested to substitute labor categories and performed unauthorized work on its own initiative.

Note 15 – In an attempt to obtain reimbursement for the unauthorized work, ACS requested an oversight manager to write the e-mails (included in this document).

Note 16 – ACS (and CDSI) has been doing business with the government since 1968 and should have known of the prohibition against employing felons. Specifically, 12 CFR 366.4, *Disqualification of Contractors*, prohibits felons from performing services under an FDIC contract. Similar provisions are in CFR sections for other federal agencies.

performance on a probationary basis. In other words, FDIC apparently never altered or abandoned its above-described contractual practices with respect to approval and acceptance of FDIC personnel until the audit. Moreover, although ACS' invoices for the ten delivery orders at issue generally reflected FDIC labor categories and corresponding ACS-developed labor rates for those categories, FDIC never objected to these billings or indicated that they were inconsistent in any way with the parties' contractual undertakings.³ The first time that FDIC apparently raised any concerns relating to the questioned personnel or invoices was during the FDIC audit. (Note 17.)

II. SUMMARY OF AUDIT REPORT

FDIC conducted audit efforts on the ten delivery orders during 2000, and provided ACS with an "Exit Conference Briefing Paper" in a September 12, 2000 meeting. Although the briefing paper was similar in style, tone and format to a draft audit report, FDIC never afforded ACS an opportunity to comment formally on the draft, although FDIC representatives previously had indicated that a formal response would be invited.⁴ (Note 18.)

Instead, FDIC issued a final report on January 11, 2001 and released a copy to ACS thereafter. Again, despite prior representations to the contrary, ACS was not given an opportunity to provide a formal response that could be incorporated into the final audit report. This is inconsistent with standard practice at other agencies, such as GSA, which permits contractors in most instances to submit formal responses to a draft audit report, and then incorporates the responses into its final audit report.

³ For limited periods of time, ACS billed some of the services provided under two delivery orders (97-01315-N-LH and 98-00455-C-AF) under the GSA labor categories. In the case of the first delivery order, this occurred for the additional personnel that provided efforts requested by FDIC that were not contemplated by the labor categories identified in the original delivery order (see discussion above in Part I.D). (Note 14.)

⁴ This omission appears contrary to generally accepted federal accounting standards as contained in the *Government Auditing Standards*, commonly known as the "GAO Yellow Book." The "Yellow Book" suggests in section 5.32 (Note 19) that written audit reports are to be submitted to the auditee. That did not occur here, and is contrary to standard practice in other similar government audit organizations - for example, at the GSA Office of Inspector General, which audits GSA MAS contracts for compliance purposes.

Note 17 – Although the FDIC oversight managers used delivery order position descriptions to evaluate personnel, we noted several instances where oversight managers directed ACS to replace personnel because of various shortcomings. In addition, on contract 97-01315-N-LH, the FDIC directed ACS to reimburse over \$23,000 in overcharges, as explained on page 8 of the report. The FDIC also found other billing errors and discrepancies in the course of its regular invoice reviews.

Note 18 – According to the audit team's notes from the exit briefing with ACS, Mr. [name redacted], FDIC/DOA, told ACS that he would wait for the final report before providing ACS a copy and beginning negotiations.

Note 19 – The Yellow Book, Section 5.32, is the reporting standard for financial statement audits requiring submission of the report to appropriate auditee officials. Both the FDIC and ACS were provided copies of the report. However, because this was a performance audit, ACS should have cited Section 7.38 that requires auditors to report the views of responsible officials of the audited program. We incorporated the FDIC's response into the report and attached it as an appendix. We also incorporated ACS' views into the report. Accordingly, the OIG met both Yellow Book sections.

FDIC's final report (**Note 20**) concluded that while ACS generally had properly billed FDIC for services under the delivery orders and supported those billings in the audit process, ACS had not completely met its obligations. In summary, FDIC challenged \$1,064,364 of ACS' \$17,795,785 in billings to FDIC during CY 1998 and CY 1999. Those challenges can be summarized as follows:

- \$986,191 questioned because certain ACS employees allegedly did not meet the qualifications in the GSA MAS contract;
- \$2,586 questioned because ACS either overbilled for personnel in delivery orders or charged FDIC for personnel and/or labor categories that did not appear in the delivery orders; and
- \$75,587 questioned because ACS had received payments for the services of a felon.

For the first set of questioned costs, FDIC assumed that GSA labor categories -and, apparently, corresponding labor rates – applied (**Note 21**) to govern the parties' relationship, regardless of their agreement to the contrary.⁵ FDIC also suggested, without elaboration or further explanation, that if the FDIC categories and rates applied instead of the GSA ones, that the total questioned costs would increase to \$1.652 million. (**Note 22.**)

The report also acknowledged that FDIC "accepted some contract employees who did not meet minimum requirements because they had specific skills needed to complete critical tasks." Audit Report at 7 (emphasis added). The report also acknowledge[d] the need for these critical skills," but implicitly concluded that such arrangements somehow do not contractually bind FDIC.⁶ (**Note 23.**)

On the second point, FDIC noted that ACS had corrected a number of billing errors on affected delivery orders, but nonetheless questioned certain other costs

⁵ In fact, the report acknowledges that FDIC OMs principally evaluated qualifications based on FDIC labor categories and not on the GSA MAS labor categories. Audit Report at 7.

⁶ In a very similar context, FDIC auditors have conceded that "FDIC changed the GSA's education and experience requirements...." Audit Report No. 00-048, at 5. The ACS audit report does not identify any reasons why this concession was not made in this instance. (**Note 24.**)

Note 20 – The OIG performed the audit and issued the audit report. The OIG is an independent and objective unit of the FDIC that performs audits and investigations of FDIC programs and operations.

Note 21 – In calculating questioned costs, the OIG used the delivery order labor rates that the FDIC negotiated with ACS.

Note 22 – In addition to the information the OIG provided to ACS regarding questioned costs prior to the draft report being issued on November 15, 2000 (see Note 2), 2 days after issuing the draft report the OIG provided a complete database—including reports detailing questioned costs using both the FDIC and GSA qualifications—to ACS and the FDIC.

Note 23 – The report recommends that the billing rates be reduced to match a labor category for which those personnel qualified.

Note 24 – This report states on page 4 that “. . . the FDIC delivery orders may have changed the GSA contract terms.”

largely because ACS "increased billing rates and added labor categories without any delivery order modifications." Audit Report at 8. The report did not address whether the parties had agreed to modify the delivery orders to meet FDIC's requirements.

On the third issue, FDIC conceded that "[b]ecause the FDIC did not perform all required background investigations, some contract employees improperly gained access to FDIC facilities and data...." Audit Report at 10. Nonetheless, FDIC apparently questioned the costs because: (1) the felon had disclosed the conviction on his ACS application; (2) FDIC policy mandated that FDIC perform background checks on all contractor personnel working in FDIC facilities; and (3) FDIC regulation and policy prohibited a felon from performing services under an FDIC contract. The report identified no provision in the contract or delivery order that imposed these conditions, as a contractual matter, on ACS and further identified no provision permitting the FDIC to demand a refund for work performed by a felon. (**Note 25.**)

III. DISCUSSION

A. The Audit Report Incorrectly Questions Costs on the Basis of Qualifications

1. ACS Personnel Met the Qualifications Established by the Contract As Modified by the FDIC's Delivery Orders.

The FDIC effectively modified the contract with ACS when the agency created its own schedule of labor categories and corresponding qualifications (**Note 9.**) To the extent that these categories and qualifications did not fall squarely within the categories established in the GSA contract, FDIC modified that portion of ACS' contract. ACS performed in accordance with the FDIC's modification, and the FDIC similarly is obligated to perform in accordance with its modification.

It is worth recounting that nothing in the GSA MAS contract -- or even in the GSA MAS governing regulations -- prohibits procuring activities from modifying the terms and conditions of the contract or including such terms and conditions in delivery orders to meet unique requirements. Indeed, as discussed above in Part I.A, activities frequently are encouraged to consider such changes where they clearly benefit the government or will result in business efficiencies. In any event, when regulations do not prohibit particular contract actions, procuring activities clearly possess the ability to modify contracts and issue delivery orders utilizing terms and conditions that reflect reasoned business judgment. See FAR 1.102-4(e). (**Note 8.**)

Note 25 – 12 CFR 366.4, *Disqualification of Contractors*, prohibits felons from performing services under an FDIC contract. Similar provisions are in CFR sections for other federal agencies. ACS had very few private sector clients. In 1997, 98 percent of ACS' revenues were from government contracts. Its primary purpose is to service government agencies. ACS should have known that it could not provide felons to work on an FDIC contract.

Note 9 is a description of how the FSS contracting process works.

Note 8 points out that modifications apply to work to be performed, not the contract's basic terms and conditions such as labor qualifications.

Thus, when a procuring activity reaches outside the four corners of the established GSA MAS scheme and the contractor commits to those modified requirements, the parties are obligated to perform in accordance with the modified requirements. For example, in *C-MOR Co.*, ASBCA Nos. 30479, 31789, 87-2 BCA 119,682, the agency's oral modifications to an established requirements contract were held to bind both parties. In *C-MOR*, the agency and the contractor were required to perform in accordance with the agency's oral solicitation, even though the BCA held that the terms of that solicitation did not fall within the scope of the original requirements contract. Here, the work performed by ACS clearly falls within the scope of the GSA MAS contract. ACS and the FDIC both intended to be bound by the modifications to that contract, which were effected through the award of the delivery orders by the FDIC.

This obligation extends not only to FDIC's decision to impose different labor categories, qualifications and prices on ACS, but to the decision to request or accept personnel that did not strictly meet the FDIC qualifications. As mentioned above in Part I.C, FDIC and ACS agreed that certain personnel would be used to meet FDIC requirements even though they did not strictly meet the FDIC qualifications. These situations included: (1) probationary employment; (2) "critical skills"; and (3) incumbency. As the government representative identified in the delivery orders to review and approve personnel qualifications, the OM fully was empowered to agree to use of these personnel. See *Centre Mfg. Co. v. United States*, 392 F.2d 229 (1968); *Fox Valley Engineering Inc. v. United States*, 151 Ct. Cl. 228 (1960); *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662 (1994).

In short, the FDIC qualifications governed ACS' performance, and the audit erred by assuming that GSA qualifications governed. The parties agreed as a contractual matter that the FDIC standards would govern, and FDIC was empowered to modify the GSA MAS contract and/or issue delivery orders to reflect this agreement. Moreover, FDIC was free to - and did - modify the delivery orders further to request and accept personnel that did not meet the FDIC standards.

Given this conclusion, the audit report provides no basis for challenging costs incurred by ACS and paid by FDIC. The audit report suggests that if FDIC qualifications and not GSA qualifications are used, the total amount of challenged costs increases to roughly \$1,652 million. Because the FDIC qualifications generally are less rigorous than the GSA qualifications - and the corresponding labor rates, similarly, are lower - this statement appears unsupported. In fact, it is. (Note 26.) The audit report apparently drew this conclusion by simply assigning a value of \$0 to any situation in which the auditors believed that an ACS employee did not meet the requisite FDIC standards. (Note 27.) This conclusion represents flawed methodology. The report did not do an appropriate comparison of ACS personnel to FDIC standards.

Note 26 – To the contrary, some FDIC delivery order qualifications were more rigorous than the GSA qualifications.

Note 27 – The OIG only assigned a zero value in instances when no qualifying FDIC labor category existed. We were able to associate all hours billed to a GSA labor category and this approach resulted in lower amounts being questioned. Therefore, the OIG based its questioned costs on the GSA qualifications.

2. FDIC Waived Any Failure to Meet Stated Qualifications

Even if the GSA qualifications somehow bound ACS -- or the parties had not modified their agreements to permit the substitution of personnel that were probationers, possessed critical skills, or were incumbents -- the audit report fails to recognize that FDIC waived any right it possessed to insist that only GSA-qualified personnel be provided under the delivery orders. The parties' course of dealing makes it quite clear, in contrast, that FDIC waived any contractual rights it had on this score.

"There can be no doubt that a contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead." See *Gresham & Co. v. United States*, 470 F.2d 542 (Ct. Cl. 1972). Put differently, when a contract requirement is repeatedly ignored or work that is out of scope of the contract is repeatedly authorized by a Government representative, the requirements are constructively waived. *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662 (1994).

In two pertinent circumstances, FDIC waived contract terms even if it could not modify them. First, FDIC waived any requirement that GSA qualifications be met. It did this by repeatedly issuing RFQs that identified specific FDIC labor categories and qualifications and requiring that proposals and subsequent performance comport with those standards. (**Note 9.**) See *Gresham*, 470 F.2d at 556 (government's failure to enforce a specification over a series of contracts extinguished requirement to perform in accordance with it).

Second, FDIC expressly waived the requirements of the delivery orders in numerous circumstances in which it requested or accepted the use of personnel that were probationers, incumbents, or possessed critical skills. This was done, as discussed above in Part I.C, either by initialing the PQRF or by granting an oral waiver. (**Note 11.**)

This pattern of acceptance of personnel that did not squarely meet the GSA or FDIC category qualifications established that the FDIC waived these requirements under the delivery orders with ACS. Here, even if the GSA categories are applicable, the FDIC repeatedly waived those requirements and replaced them with their own. Further, even where the FDIC audit report asserts that ACS employees did not meet the FDIC requirements, authorized personnel of FDIC also repeatedly waived those requirements. *Gresham*, 470 F.2d at 555-56 (authorized representatives waived contract specification language); *Miller Elevator*, 30 Fed. Cl. at 688-90 (authorized

Note 9 is a description of how the FSS contracting process works.

Note 11 explains that oversight managers do not have the delegated authority to modify the contract or any of its terms and conditions and that the FDIC notified ACS of that fact at each of the delivery order kick-off meetings.

representatives waived contract provisions requiring written approvals from contracting officer before performing additional work).⁷

3. FDIC Is estopped from Changing Contract Terms After Contract Performance

FDIC requested ACS to provide a proposal to perform IT services in accordance with FDIC's own labor categories and qualifications, at corresponding rates. (Note 28.) FDIC awarded ACS a series of delivery orders in response to ACS' conforming proposals. During performance, FDIC directed ACS to furnish personnel that either did not fully meet qualifications or were not listed in the delivery order. (Note 29.) Finally, FDIC accepted performance and paid ACS for that performance.

Now, well after the fact, the audit report seeks to undo the FDIC's contractual obligations. In light of this history, the FDIC cannot now repudiate its actions. ACS has relied on the actions and directions of the FDIC in performing IT services under the delivery orders. FDIC now is estopped from denying its obligation to pay ACS in accordance with the prior understanding of the parties.

Estoppel prevents undue hardship to a contractor who has detrimentally relied upon an earlier inconsistent position of the Government. *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662 (1994). Clearly, the FDIC's shift in position during the audit from its position during the issuance of delivery orders and approval of labor categories results in an undue hardship on ACS if that shift causes the repayment of monies received for services already performed and accepted.

The government has been estopped from changing a course of dealing in similar circumstances. For example, the government was prohibited from reneging on its prior course of dealing with a contractor, even where that course of dealing arose only by implication through the acceptance of accounting manuals. *Peninsular ChemResearch Inc., ASBCA No. 14384*, 71-2 BCA 19066 (government required to continue accepting results of accounting method previously approved). Even when a government representative embodies a mistake of law into an order, that order will be upheld and the Government is estopped from repudiating the order - such as a contract modification - merely because of its own mistaken interpretation. *Broad Avenue*

⁷ In this regard, it must be noted that the audit report conceded that FDIC "accepted some contract employees who did not meet minimum requirements.... Audit Report at 7 (emphasis added). Even the audit conclusions recognize that FDIC modified or waived its earlier qualifications, as FDIC was entitled to do. (Note 30.)

Note 28 – According to the FDIC's contracting officer, the FDIC never intended to deviate from the GSA schedule labor category qualifications. The FDIC included labor categories to facilitate contractors' matching of the FDIC's needs to similar categories included in contractors' GSA schedules. (See Note 9.)

Note 29 – The audit team saw no evidence of the FDIC requesting unqualified personnel or labor categories that were not included in delivery orders. ACS suggested that categories not included in delivery orders be supplied as a cost-saving measure. ACS then billed for those individuals at the maximum labor rate that its GSA contract allowed although ACS discounted other categories billed under the contract 11.9 percent.

Note 30 – The report also explains that the FDIC should have issued modifications to its delivery orders that added labor categories—at lower rates—for which the employees would have qualified. The audit report draws no legal conclusions, nor does this document respond to ASC's attorney's legal arguments.

Laundry and Tailoring v. United States, 681 F.2d 746, 749-50 (Ct. Cl. 1982) (government estopped from denying existence of contract modification and liability for payment so long as the official acted within scope of authority and that action was not palpably illegal). Here, as in *Broad Avenue*, the government directed and agreed to ACS' actions, and ACS relied on that direction or agreement in its performance of the FDIC delivery orders. The FDIC cannot now simply abandon its prior requests and commitments after the contract has been performed in accordance with the FDIC's direction and the parties' agreement.⁸

B. Costs Associated With Additional Personnel Furnished by ACS That Were Not Identified in FDIC Delivery Orders Are Allowable

As discussed in Parts I.D. and 11 above, the audit report challenged \$2,586 in costs paid by FDIC to ACS principally because those charges reflected efforts by employees in labor categories that were not contained in a delivery order.⁹ (**Note 14 & Note 15.**) FDIC's oral modification of the delivery order to add personnel not identified, and ACS' acceptance of that modification, creates a contractual obligation on both parties. *C-MOR Co.*,

⁸ It is clear that during performance, the parties interpreted the delivery orders to require substitution of FDIC categories and qualifications for the corresponding GSA ones (**Note 31**), as the course of dealing - including invoicing and payment - demonstrates. Great weight must be given to the practical interpretation of a contract by the parties before the auditors questioned that interpretation. *Centre Mfg. Co. v. United States*, 392 F.2d 229, 234 (Ct. Cl. 1968). Even if there was some ambiguity in the parties' prior agreements relating to the use of FDIC categories and qualifications, those must be construed against the government as the drafter of the agreements. *Big Chief Drilling Co. v. United States*, 26 Cl. Ct. 1276, 1299 (1992). In this regard, FDIC amended its RFQs after ACS had performed most of its efforts at issue here to make clear that in the future, "offerors should utilize the labor categories from their GSA Schedule that best meet the ideal candidate descriptions and the "GSA labor description will be incorporated into the Delivery Order." FDIC FSS RFQ, version 3.2 (July 2000). (**Note 32.**)

⁹ The relevant section of the audit report actually questions \$9,073 of the costs charged by ACS on the grounds that the employees did not meet minimum GSA qualifications, and \$14,066 because ACS billed FDIC for services performed by employees whose labor categories did not appear in Delivery Order No. 97-01315-N-LH. This total amount of \$23,139 was offset by certain billing errors that ACS made in FDIC's favor (**Note 33**), for a total questioned amount of \$2,586. ACS' views on the allowability of the \$9,073 are presented in the discussion in Part III.A above.

Note 14 shows that ACS requested to substitute labor categories and performed unauthorized work on its own.

Note 15 shows that the e-mails ACS included in this document were written by an oversight manager at the request of ACS in an attempt to be reimbursed for the unauthorized work.

Note 31 – According to the contracting officer, the FDIC never intended to alter the GSA's FSS contract provisions.

Note 32 – This change does not affect delivery orders that the FDIC previously issued to ACS.

Note 33 – The FDIC directed ACS to repay \$23,429 in overcharges as discussed on page 8 of the report. These overcharges are in addition to the \$2,586 in net errors that we identified for personnel billed at incorrect rates.

ASBCA Nos. 30479, 31789, 87-2 BCA ¶19,682. The parties clearly agreed that ACS would furnish six additional personnel in two labor categories at specified rates, and government representatives acknowledged this fact - as well as the acceptability of the services - in two emails. See Attachment 1. (Note 34.)

In addition, the oral modification of the delivery order constitutes a constructive change to the delivery order. A constructive change to a contractual instrument occurs when the contractor is directed to perform work beyond the contract requirements. *Miller Elevator*, 30 Fed. Cl. at 677-80. Here, as the emails suggest, the OM directed that the services at issue be provided and indicated that they were acceptable. The emails also suggest that the contracting officer did not object to the OM's request or payment for these services. (Note 35.) Thus, the contracting officer clearly seems to have considered the request for additional services to be within the scope of the OM's authority, and in any event the contracting officer ratified the OM's actions and the payment for the services. (Note 36.) See *id.* at 685; *Williams v. United States*, 127 F. Supp. 617, *cert. denied*, 349 U.S. 938 (1955); *Reliable Disposal Co.*, ASBCA No. 40100, 91-2 BCA ¶23,895.

Alternatively, as suggested by the discussion in Part III.A.3 above, FDIC is estopped from denying its obligation to compensate ACS for the additional personnel, since the request was within the authority of the contracting officer, and the government's request was not palpably illegal. *Broad Avenue*, 681 F.2d at 749-50.

For each of these reasons, ACS is entitled to retain, and FDIC cannot validly challenge, the payment of \$14,066 for these services.¹⁰

C. Costs Associated With John Doe's Employment on the FDIC Delivery Order Are Allowable

As discussed in Parts I.E and II. above, the audit report challenged \$75,587 in costs paid by FDIC to ACS for services performed by Mr. Doe, a felon. The report concedes, as it must, that FDIC bore the responsibility imposed by its own internal procedures to ensure that background checks are performed before a contractor employee obtains access to FDIC facilities and equipment. Certainly, no provision in the GSA MAS contract or the pertinent delivery order imposed this obligation on ACS. (Note 37.) Moreover, the audit report did not -- and cannot -- identify any contract or delivery order provision that prohibited payments to ACS for services rendered by Mr. Doe prior to the

¹⁰ See *supra* note 9.

Note 34 – ACS proposed using subject matter specialists and technical writers who were not included in the delivery order. The e-mails attached to this response are ACS' attempt to justify using different labor categories to the FDIC contracting officer in order to be paid.

Note 35 – The e-mails do not include the FDIC contracting officer's approval, which was never granted.

Note 36 – The audit team found no evidence of ratification by the FDIC's contracting officer.

Note 37 – In general, no one convicted of a felony can work for the federal government either directly or under contract. Specifically, 12 CFR 366.4, *Disqualification of Contractors*, prohibits felons from working on an FDIC contract. Similar provisions are in CFR sections for other federal agencies. ACS should have been aware of this prohibition since most of its revenue comes from government contracts.

time that FDIC directed that he be removed from the project. Cf. Delivery Order No. No. 98-00542-C-JT, ¶22.0.¹¹

Had FDIC followed its own internal policy and regulation in this instance, the issue would not have arisen. But it cannot shift this transgression to ACS. (Note 38.) Absent inclusion of a specific clause in the contract or delivery order either directly or by incorporation, those requirements did not apply to ACS. *General Electric Co.*, ASBCA No. 36005, 91-3 BCA 124,353 (where parties did not incorporate specifications into specific contracts there was no obligation for contractor to conform to those specifications). In addition, neither the contract nor the delivery order contain a contract provision permitting recovery of payments for the services provided by Mr. Doe. *American Contractors*, GSBCA No. 10363, 92-2 BCA ¶24,899 (government action against contractor such as termination for default not available when contract does not specify that clause as a remedy for contractor conduct). In fact, the delivery order specified only that ACS could not receive compensation for services rendered after FDIC determined that an employee may have committed a criminal act. Consequently, ACS properly charged and received payment for those services.¹²

ACS regrets that this error occurred, and recognizes that Mr. Doe did disclose his conviction on an employment application. But as the audit report admits, Mr. Doe already was employed by another FDIC contractor and was performing similar functions at the time that FDIC awarded ACS the delivery order at issue. It was thus not wholly unreasonable for ACS to assume that he was acceptable to FDIC and that all required background checks had been performed concerning him. ACS is committed to ensuring that this incident does not recur, and will not, in the future, provide FDIC with the services of a felon when that individual discloses the conviction in his employment application or a FDIC background check reveals the fact. However, ACS is fully entitled to retain the \$75,587 under the terms of the contract and delivery order.

¹¹ "In the case where a Contractor's employee ... is suspected of committing a criminal act, FDIC can immediately revoke the employee's access to all FDIC systems and premises without requesting authorization of the Contractor. Payment to the Contractor relative to any employee whose access has been revoked shall not extend beyond the date and time of such revocation."

¹² Moreover, the prior course of dealing between the parties (as well as the fact that John Doe was an incumbent) suggested that the parties had agreed that John Doe was an appropriate employee and that ACS would be remunerated for his services. See, e.g., *Miller Elevator Co. V. United States*, 30 Fed. Cl. 662, 688-89 (1994).

Note 38 – ACS required the employee to complete an employment application as a new hire to ACS. The employee disclosed a felony conviction on an ACS form. However, as ACS stated on page 6 of this response, it overlooked that fact. According to the GSA's primary contracting officer for ACS' FSS contract, it is the contractor's responsibility to provide only qualified employees.

D. Assuming That FDIC Could Not Modify the Contract or Issue the Delivery Orders to Reflect FDIC Requirements, ACS Still Was Entitled to Payment at FDIC Rates

Even if FDIC improperly modified the GSA MAS contract and/or issued the delivery orders to reflect FDIC labor categories, qualifications and rates, ACS' billings still are allowable. The conduct of the parties demonstrated that they had entered into an implied-in-fact contract (or contracts) for the IT services, and ACS' rates reflect the reasonable value of the services in the marketplace. (**Note 39.**)

Over the course of ten delivery orders, the course of dealing between FDIC and ACS demonstrated the following agreement:

- FDIC required a proposal that reflected responsiveness to the specific labor categories and qualifications provided by FDIC in its RFQs and Statements of Work;
- FDIC required specific rates corresponding to these categories and qualifications;
- ACS provided proposals responsive to the RFQs;
- FDIC and ACS agreed to employ personnel in certain circumstances that did not fully meet FDIC qualifications; and
- ACS billed FDIC for these services and FDIC paid the billings in accordance with the parties' agreement.

Thus, even if the delivery orders were improper, the parties still had one - or a series - of implied-in-fact contracts to provide IT services under the FDIC categories, qualifications and corresponding rates. The elements of an implied-in-fact contract include (1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance, and (4) binding conduct by the government by an actor with authority. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 501 U.S. 1230 (1991).

These elements are met here. FDIC and ACS clearly intended to contract -FDIC desired IT services and ACS desired payment. The parties course of dealing clearly demonstrated an intent that ACS meet the FDIC qualifications and receive payment at corresponding rates specified in the proposals and delivery orders, and that

Note 39 – The personnel that the OIG questioned did not meet the required qualifications specified in ACS' FSS contract with the GSA. Therefore, as explained in appendix I to the report, their billing rates were reduced to labor categories for which they qualified. Accordingly, the OIG's questioned costs are based on fair and reasonable labor rates for those individuals as established in ACS's FSS contract with the GSA.

this basic agreement could be modified to reflect an agreement to substitute particular personnel with different qualifications. Accord *Miller Elevator*, 30 Fed. Cl. at 688-89 (parties' course of dealing established over several contracts and several years of performance). Finally, as discussed above in Part III.A, the contracting officers executed the delivery orders reflecting the parties' agreement to the basic terms and conditions of the implied-in-fact contracts, and the OMs clearly possessed the requisite authority to bind the government as to certain additional matters such as probationary periods and hiring of personnel with critical skills. (**Note 40.**)

Similar cases have resulted in recovery for the contractor. For example, in *Integral Biomedical Engineering Inc.*, IBCA No. 2069, 88-2 BCA 120,570, the agency procured IT software and services without the requisite GSA delegations of procurement authority. The government attempted to refrain from paying the contractor because the underlying agreement may have been illegal. The board held that an implied-in-fact contract existed for the reasonable value of the goods and services. The board further held that the contract price constituted the reasonable value for the IT services because the government could not show that lower prices were available for the services and because the contractor's proposal was accepted as offered.

Here, similarly, FDIC cannot show that lower prices were available for personnel meeting the FDIC qualifications (**Note 41**), and the ACS pricing for these services was solicited and accepted without qualification. In fact, that pricing must be acceptable because it was predicated on the higher GSA MAS pricing, which the GSA contracting officer had determined was fair and reasonable, and which was effectively "most favored customer" pricing as a matter of GSA policy. In sum, ACS is entitled to retain the monies it received for all of the questioned services because FDIC received the benefit of those services, and the FDIC pricing reflects the reasonable value of those services in the marketplace.

IV. CONCLUSION

As detailed above, the audit report makes certain erroneous assumptions about the ACS GSA contract and the delivery orders in effect between the FDIC and ACS. In addition, the report ignores numerous instances in which FDIC modified or waived the terms of the governing delivery orders. Finally, in a number of cases, FDIC did not properly assess qualifications of personnel provided by ACS under the delivery orders, and improperly assumes that the contract and delivery order require ACS to return funds paid by FDIC for services provided by a felon. Accordingly, we do not believe that the audit report provides basis for concluding that FDIC is entitled to recover \$1,064,364 under the GSA contract or related delivery orders.

Note 40 – Oversight managers do not have the authority to bind the government. ACS was apprised of that fact in the kick-off meetings for each of the 10 delivery orders. Furthermore, as ACS notes in its June 6, 1998 e-mail attached to this letter, the contracting officer needs to approve added labor categories, qualification changes, and the acceptability of the work.

Note 41 – The personnel that the OIG questioned did not meet required qualifications. (See **Note 42.**)

Accordingly, ACS requests that FDIC withdraw its audit report in full, remove the report from any current display or publication (such as the FDIC and IGnet sites) and that FDIC refrain from publishing the report in any fashion in the future. Alternatively, ACS requests that FDIC display or publish the report only in a format that includes this response. If FDIC determines that it nonetheless will display or publish the report in any manner without the response, ACS asks that FDIC remove ACS' name from the report, since ACS had not been given a fair opportunity to comment on the allegations. Finally, ACS further asks that FDIC make a finding and determination that no money is due to FDIC as a result of the audit allegations.

We look forward to discussing this response with FDIC and working with FDIC to resolve these issues. Should you wish to discuss this response or any other aspects of the matter, please contact [name redacted] at ACS at (301) [redacted] or the undersigned.

Sincerely,

Robert J. Sherry

RJS/mlb

Kirkpatrick & Lockhart LLP

Mr. [name redacted]
March 23, 2001

ATTACHMENT 1

APR-05-2001 09:14 FDIC OIG 202

Author: [redacted] at CLSI
Date: 6/15/1998 9:22 AM
Priority: Normal
TO: [redacted] at CLS, [redacted] at CLS
CC: [redacted]
Subject: FW: Information Regarding Contract No. GS-35F-4415G / Purcha

-----Original Message-----
From: [redacted]
Sent: Monday, June 15, 1998 8:53 AM
To: Harris, Thomas D.; [redacted]
Cc: [redacted]
Subject: RE: Information Regarding Contract No. GS-35F-4415G / Purchase Order No. 97-01315-N-LH
Importance: High
Tom- [redacted];

As the Project Manager on the Financial Data Warehouse and as the Oversight Manager for P.O. # 97-01315-N-LH it was at my request that CDSI initiate a modification to their resource allocations to add two additional labor categories (Subject Matter Specialist and Technical Writer). These categories were required by the FDIC to support the following activities / tasks on the Financial Data Warehouse project:

- . Data Analysis
- . System Qualification Testing
- . User Documentation
- . Technical Manuals and Documentation

The resources provided [redacted] User Documentation, [redacted] / Data Analysis, [redacted] / User Documentation, [redacted] / Data Analysis, [redacted] / System Qualification Testing and [redacted] / Technical Documentation) by CDSI to support these tasks were found to be experienced, capable and well qualified to perform these activities.

The work performed by these employees during the contract period 10-22-1997 to 12-31-1997 was completed on time, met all criteria specified and was found to be completely acceptable to the FDIC.

If you have any questions or need additional information please call me on ext. 61316. In addition, I have also attached and earlier E-Mail that was sent requesting that these additional labor categories be approved that may provide additional information and justification.

Thank you:
[redacted]
X61316

-----Original Message-----
From: [redacted]
Sent: Wednesday, May 20, 1998 1:02 PM
To: [redacted]
Cc: [redacted]
Subject: FW: CDSI Invoices
Importance: High
[redacted]

Please approve those CDSI invoices(s) which are pertinent to (PO #97-01315-N-LH) and reflect and/or reference the following labor categories - Subject Matter Specialist, Technical Writer and Senior System Development Specialist. These additional labor categories were

In our original Statement of Work we defined only three labor categories: Program Manager, Principle Systems Architect and Systems Analyst / Data Modeler. In their proposal CDSI attempted to match these labor categories via specific skill sets to predefined labor categories that currently existed on the GSA schedule. Of the three labor categories referenced in the SOW CDSI was able to map two of these labor categories (Program Manager and Principal Systems Architect) to labor categories that they had on the GSA schedule. The third labor category (Systems Analyst / Data Modeler) however, contained skill sets for which they were unable to find an explicit match so they grouped it under a generic category. It was from this generic category that System Development Specialist, Subject Matter Specialist and Technical Writer evolved.

If you would like me to FAX you the MODs to the labor categories that CDSI drafted please let me know.

[Redacted]

-----Original Message-----

From: [Redacted] at_cdsi@mail.cdsi.com
(SMTP: [Redacted] at_cdsi@mail.cdsi.com)
Sent: Friday, June 12, 1998 6:07 PM
To: [Redacted]
Cc: [Redacted] at_cls@mail.cdsi.com;
[Redacted] at_cdsi@mail.cdsi.com
Subject: Information for Tom Harris - Contracts

Per our conversation about the Bridge Contract (from 10/22/97 to 12/31/97), Tom Harris needs the following questions answered:

- 1) The FDIC needed the additional labor categories.
- 2) The employees who staffed the categories were qualified to do so,
- 3) The work performed by these employees was acceptable to the FDIC.

The Labor Categories and people affected are:

Subject Matter Specialist

[Redacted]

Technical Writer

[Redacted]

FDIC BRIDGE CONTRACT INFO:

Contract No. GS-35F-4415G
Purchase Order No. 97-01315-N-LH

Your help in this matter is appreciated

Thanks,

[Redacted]

← **Note 42** – This e-mail indicates that ACS knew that the FDIC’s contracting officer (Tom Harris) had to approve adding labor categories. As cited in **Notes 36** and **37**, the contracting officer did not approve the additional categories. Instead, the FDIC requested and received reimbursement for the work that was not authorized.