



JAN 10 2008

TO: Elias A. Zerhouni, M.D.
Director
National Institutes of Health

FROM: Daniel R. Levinson *Daniel R. Levinson*
Inspector General

SUBJECT: Procurements Made by the National Institutes of Health for the Department of Defense (A-03-07-03000)

The attached final report provides the results of our review of procurements made by the National Institutes of Health (NIH) Information Technology Acquisition and Assessment Center (the Center) for the Department of Defense (Defense). The Center acquires certain information technology equipment and services for Defense through task orders awarded using a Governmentwide contract (the Contract). Section 817 of the Department of Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) requires the Offices of Inspector General (OIG) of the Department of Health and Human Services and Defense to jointly review the policies and procedures for these Defense purchases and to determine compliance with applicable acquisition requirements.

The objectives of our review were to determine, for awards made on behalf of Defense, whether the Center (1) complied with appropriation statutes and financial management regulations and (2) complied with acquisition regulations and Contract provisions with respect to acquisition planning, competition, award decisions, and contractor monitoring.

The Center complied with appropriation statutes and financial management regulations for 13 of the 28 task orders that we reviewed but may not have complied for the remaining 15 task orders.

- For four task orders, the Center charged a total of \$11.8 million to operations and maintenance (O&M) appropriations for services that, it appeared, should have been charged to research, development, testing, and evaluation (RDT&E) appropriations.
- For 13 task orders, the Center paid a total of \$25.4 million for equipment and services that were provided after the period of performance for which the funds were obligated. (The 13 task orders included 2 task orders for which the Center may have inappropriately charged O&M funds instead of RDT&E funds.)

The Center did not have sufficient controls to ensure compliance with appropriation statutes and financial management regulations when using Defense funds. Defense OIG acknowledged these potential violations, and Defense is working to resolve them.

The Center generally complied with acquisition regulations and Contract provisions. However, the Center did not always maintain adequate documentation with respect to acquisition planning, competition, award decisions, and contractor monitoring. The files for all 28 task orders reviewed contained multiple errors. The Center has begun to strengthen its controls to address many of these documentation errors.

We recommend that the Center:

- work with Defense to resolve the obligation of \$11.8 million in O&M funds instead of RDT&E funds for 4 task orders,
- work with Defense to resolve the use of \$25.4 million for equipment and services that were not provided during the period of performance for 13 task orders,
- comply with Federal appropriation statutes and financial management regulations on obligating and expending funds, and
- improve controls for documenting the task order award and oversight processes.

In comments on our draft report, NIH concurred with our recommendations. Although NIH had some reservations about the first finding, NIH stated that, for those areas under its control, it had taken or was planning corrective measures in conjunction with Defense.

Pursuant to the principles of the Freedom of Information Act, 5 U.S.C. § 552, as amended by Public Law 104-231, Office of Inspector General reports generally are made available to the public to the extent the information is not subject to exemptions in the Act (45 CFR part 5). Accordingly, within 10 business days after this report is issued, it will be posted on the Internet at <http://oig.hhs.gov>.

Please send us your final management decision, including any action plan, as appropriate, within 60 days. If you have any questions or comments about this report, please do not hesitate to call me, or your staff may contact Lori S. Pilcher, Assistant Inspector General for Grants, Internal Activities, and Information Technology Audits, at (202) 619-1175 or through e-mail at Lori.Pilcher@oig.hhs.gov. Please refer to report number A-03-07-03000 in all correspondence.

Attachment

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**PROCUREMENTS MADE BY THE
NATIONAL INSTITUTES OF
HEALTH FOR THE
DEPARTMENT OF DEFENSE**



Daniel R. Levinson
Inspector General

January 2008
A-03-07-03000

Office of Inspector General

<http://oig.hhs.gov>

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OAS FINDINGS AND OPINIONS

The designation of financial or management practices as questionable or a recommendation for the disallowance of costs incurred or claimed, as well as other conclusions and recommendations in this report, represent the findings and opinions of the HHS/OIG/OAS. Authorized officials of the HHS divisions will make final determination on these matters.



EXECUTIVE SUMMARY

BACKGROUND

The National Institutes of Health (NIH) Information Technology Acquisition and Assessment Center (the Center) acquires certain information technology equipment and services for the Department of Defense (Defense) through task orders awarded using a Governmentwide contract (the Contract). To ensure adequate competition, the Center selected 45 prime contractors that it considered qualified to receive awards for “assisted” acquisitions. In assisted acquisitions, Defense transfers funds to the Center to acquire equipment and services. The Contract requires, among other things, that the Center solicit bids from all prime contractors eligible to perform the tasks required for each award. The Center also must follow all appropriation statutes; financial management regulations; and acquisition laws and regulations, including those specific to Defense awards.

Section 817 of the Department of Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) requires the Offices of Inspector General (OIG) of the Department of Health and Human Services and Defense to jointly review the policies and procedures for Defense purchases made by the Center and to determine compliance with applicable acquisition requirements. Each OIG reviewed those issues that affect its Department’s operations. We limited our review to 28 assisted acquisitions, for which the Center disbursed approximately \$183 million in Defense funds between fiscal years 2002 and 2006.

OBJECTIVES

Our objectives were to determine, for awards made on behalf of Defense, whether the Center:

- complied with appropriation statutes and financial management regulations and
- complied with acquisition regulations and Contract provisions with respect to acquisition planning, competition, award decisions, and contractor monitoring.

SUMMARY OF FINDINGS

The Center complied with appropriation statutes and financial management regulations for 13 of the 28 task orders reviewed but may not have complied for the remaining 15 task orders.

- For four task orders, the Center charged a total of \$11.8 million to operations and maintenance (O&M) appropriations for services that, it appeared, should have been charged to research, development, testing, and evaluation (RDT&E) appropriations.
- For 13 task orders, the Center paid a total of \$25.4 million for equipment and services that were provided after the period of performance for which the funds were obligated. (The 13 task orders included 2 task orders for which the Center may have inappropriately charged O&M funds instead of RDT&E funds.)

The Center did not have sufficient controls to ensure compliance with appropriation statutes and financial management regulations when using Defense funds. Defense OIG acknowledged these potential violations, and Defense is working to resolve them.

The Center generally complied with acquisition regulations and Contract provisions. However, the Center did not always maintain adequate documentation with respect to acquisition planning, competition, award decisions, and contractor monitoring. The files for all 28 task orders reviewed contained multiple errors. The Center has begun to strengthen its controls to address many of these documentation errors.

RECOMMENDATIONS

We recommend that the Center:

- work with Defense to resolve the obligation of \$11.8 million in O&M funds instead of RDT&E funds for 4 task orders,
- work with Defense to resolve the use of \$25.4 million for equipment and services that were not provided during the period of performance for 13 task orders,
- comply with Federal appropriation statutes and financial management regulations on obligating and expending funds, and
- improve controls for documenting the task order award and oversight processes.

NATIONAL INSTITUTES OF HEALTH COMMENTS

In comments on our draft report, NIH concurred with our recommendations. Although NIH had some reservations about the first finding, NIH stated that, for those areas under its control, it had taken or was planning corrective measures in conjunction with Defense. NIH's comments are included as Appendix C.

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INTRODUCTION

BACKGROUND

Defense Authorization Act Oversight

Section 817 of the Department of Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) requires the Offices of Inspector General (OIG) of the Department of Health and Human Services (HHS) and the Department of Defense (Defense) to jointly review the policies and procedures for Defense purchases made by the National Institutes of Health (NIH) and to determine compliance with applicable acquisition requirements. To meet this requirement, HHS OIG and Defense OIG signed a memorandum of understanding that specified the roles and responsibilities of each. The memorandum stated that each OIG would review and report on those issues that affect its Department's operations.

We limited our review to 28 "assisted" acquisitions, in which Defense transferred funds to the NIH Information Technology Acquisition and Assessment Center (the Center) to acquire information technology equipment and services.¹ On March 15, 2007, we provided an interim status report on the results of our review to the House and Senate Committees on Armed Services.

Governmentwide Acquisition Contracts

Governmentwide acquisition contracts are indefinite-delivery/indefinite-quantity contracts available for use by all Federal agencies. Pursuant to the Clinger-Cohen Act,² the Office of Management and Budget authorized the Center to administer Governmentwide acquisition contracts.

The Center acquires information technology equipment and services in nine task areas through a Governmentwide contract, "Chief Information Officer – Solutions and Partners 2 *Innovations*" (the Contract).³ To ensure adequate competition, the Center selected 45 prime contractors that it considered qualified to receive awards for assisted acquisitions. The Contract requires, among other things, that the Center solicit bids for task orders from all prime contractors eligible to perform in the task area applicable to each award. The Center also must follow all appropriation statutes; financial management regulations; acquisition laws; and acquisition regulations,

¹Defense OIG jointly reviewed assisted acquisitions at the Center and independently visited 16 Defense facilities with a total of 22 task orders for information technology services. In addition, Defense OIG reviewed "directed" acquisitions made by Defense facilities through the Center. In directed acquisitions, Defense does not transfer funds to NIH.

²The Federal Acquisition Reform Act of 1996 and the Information Technology Management Reform Act of 1996, Divisions D and E of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106, amended by Public Law 104-208), were combined to become the Clinger-Cohen Act (40 U.S.C. § 1401 et seq.).

³The nine task areas are Chief Information Officer support; outsourcing; information technology operations and maintenance; integration services; critical infrastructure protection and information assurance; digital Government; enterprise resource planning; clinical support, research, and studies; and software development.

including the Federal Acquisition Regulation (FAR), the HHS Acquisition Regulation, and, for Defense awards, the Defense Federal Acquisition Regulation Supplement (DFARS).

Although the Center may award task orders for periods of 1 year or less, it generally awards task orders that include one base period and up to four option periods. Each task order base and option period modification is a separate contractual “period of performance” and may be awarded only after determining that funds are available.

Availability of Federal Appropriations

An agency may obligate funds authorized by a Federal appropriation only during the period of availability of the funds. Specifically, 31 U.S.C. § 1501(a) provides that funds may be obligated under contract only when there is documentation of “a binding agreement between an agency and another person (including an agency) that is . . . executed before the end of the period of availability for obligation of the appropriation or fund” Unless otherwise specified in the appropriation, the period of availability for most funds is the fiscal year in which the appropriation was made. Operations and maintenance (O&M) funds have a period of availability of 1 fiscal year. Research, development, testing, and evaluation (RDT&E) funds have a 2-year period of availability. No-year funds are not limited by a period of availability.

The Anti-Deficiency Act prohibits the Government from obligating or expending funds in advance of an appropriation for that purpose, or in excess of such appropriation, unless authorized by law (31 U.S.C. § 1341(a)(1)). In addition, appropriations may be used only for the purpose appropriated (31 U.S.C. § 1301(a)) and only for bona fide needs arising in the year of the appropriation (31 U.S.C. § 1502).

Notwithstanding the above requirements, Congress has enacted legislation that permits an agency to contract for goods or services across fiscal years. For example, 10 U.S.C. § 2410a permits Defense agencies to enter into a contract for nonseverable services during 1 fiscal year for services that extend into the next fiscal year and to obligate the entire contract to the appropriation for the first fiscal year. However, section 2410a requires that the performance period must “begin in one fiscal year and end in the next.” If the entire period of performance falls in the second fiscal year, section 2410a does not apply and there has been a violation of the bona fide needs rule.

In addition, an agency may enter into a multiyear contract if “funds are available and obligated for such contract, for the full period of the contract or for the first fiscal year in which the contract is in effect” (41 U.S.C. § 254c(a)(1)). Similar authority is given to Defense agencies under 10 U.S.C. §§ 2306b and 2306c. This multiyear contracting authority provides an exception to the Anti-Deficiency Act and the bona fide needs rule because it permits agencies to bind the Government in advance of availability of funds and authorizes agencies to pay incrementally over the period of performance. It should be noted that the multiyear contract provision does not apply to the Center’s task orders with options that must be exercised before the Government becomes obligated (FAR 17.103). Thus, the provision would not apply to the task orders under review. Even if section 254c did apply, funds under a multiyear contract (at least sufficient for the first fiscal year) must be obligated and performance begun in the first year of the contract (41 U.S.C. § 254c(a)(1)).

OBJECTIVES, SCOPE, AND METHODOLOGY

Objectives

Our objectives were to determine, for awards made on behalf of Defense, whether the Center:

- complied with appropriation statutes and financial management regulations and
- complied with acquisition regulations and Contract provisions with respect to acquisition planning, competition, award decisions, and contractor monitoring.

Scope

We reviewed 28 assisted acquisitions for which the Center disbursed approximately \$183 million in Defense appropriated funds between fiscal years 2002 and 2006. The Center received from Defense O&M funds for 22 of the 28 task orders, RDT&E funds for 4 task orders, and no-year funds for 2 task orders.⁴ We reviewed all payments made between fiscal years 2002 and 2006 for compliance with appropriation statutes and financial management regulations.

During fiscal year 2006, the Center awarded base or option periods for the 28 task orders with an estimated value totaling \$90.9 million. These awards consisted of 17 time-and-materials task orders and 11 other task orders, including cost-plus-fixed-fee, cost-plus-award-fee, and firm-fixed-price task orders. We reviewed the fiscal year 2006 task orders for compliance with acquisition regulations and Contract provisions.

We limited our review to assessing and testing critical Center internal controls established for the acquisition of information technology equipment and services for Defense. We did not independently assess or test acquisition procedures at Defense.

We performed our fieldwork at the Center in Rockville, Maryland, from January to April 2007.

Methodology

To accomplish our objectives, we:

- reviewed appropriation and acquisition laws and regulations and Contract requirements;
- reviewed interagency agreements to determine whether they clearly defined responsibilities between Center and Defense contracting personnel;
- analyzed funding documents, including the “Military Interdepartmental Purchase Request,” and payment invoices to determine whether funds provided by Defense were the correct type of funds, were properly obligated and expended during their period of availability, and were used in accordance with appropriation statutes;

⁴Defense funded two task orders with O&M and other appropriations.

- reviewed task order files to determine whether the Center documented Defense purchases in accordance with acquisition regulations and Contract provisions;
- reviewed task order files to determine whether the Center received documentation stating that Defense had performed market research before submitting task orders to the Center and whether the results were documented in a written acquisition plan and statement of work;
- reviewed task order files to determine whether all eligible prime contractors were solicited and whether competition was obtained in accordance with acquisition regulations and Contract provisions;
- reviewed task order files to determine whether legal reviews of task order awards, performed by legal counsel or contracting officers, were documented, including sole-source justifications, cost proposals, task order award documents, task order modifications, quality assurance surveillance plans, funding documentation, and invoice payments;
- reviewed pricing analyses to determine whether fair and reasonable prices were obtained, the selection of the contractor was properly documented, and a written “determination and findings” was prepared for all time-and-materials awards;
- reviewed task order files to determine whether task orders were within the scope of the Contract; and
- reviewed task order files to determine whether the Center monitored contractor performance by designating qualified technical representatives in writing and ensuring that monitoring was conducted.

We performed our review in accordance with generally accepted government auditing standards.

FINDINGS AND RECOMMENDATIONS

The Center complied with appropriation statutes and financial management regulations for 13 of the 28 task orders reviewed but may not have complied for the remaining 15 task orders.

- For four task orders, the Center charged a total of \$11.8 million to O&M appropriations for services that, it appeared, should have been charged to RDT&E appropriations.
- For 13 task orders, the Center paid a total of \$25.4 million for equipment and services that were provided after the period of performance for which the funds were obligated. (The 13 task orders included 2 task orders for which the Center may have inappropriately charged O&M funds instead of RDT&E funds.)

The Center did not have sufficient controls to ensure compliance with appropriation statutes and financial management regulations when using Defense funds. Defense OIG acknowledged these potential violations, and Defense is working to resolve them.

The Center generally complied with acquisition regulations and Contract provisions. However, the Center did not always maintain adequate documentation with respect to acquisition planning, competition, award decisions, and contractor monitoring. The task order files for all 28 task orders reviewed contained multiple errors. The Center has begun to strengthen its controls to address many of these documentation errors.

COMPLIANCE WITH APPROPRIATION STATUTES AND FINANCIAL MANAGEMENT REGULATIONS

Potential Purpose Statute Violations

Federal Requirements

The “purpose statute” (31 U.S.C. § 1301(a)) requires that Federal “appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” Use of the wrong appropriation can lead to overobligation of the appropriation that should have been charged and can result in violations of the Anti-Deficiency Act (31 U.S.C. § 1341).

The Defense Financial Management Regulation (Defense FMR) contains details on determining which costs are appropriate for the various Defense appropriations.⁵ Generally, the Defense FMR states that information technology and automated information systems should be funded by RDT&E funds when the services provided relate to designing prototypes and processes, major upgrades to existing systems, and developmental testing and evaluation prior to acceptance of a new or significantly revised system. The Defense FMR further states that if “there is doubt as to the proper assignment of costs between appropriations,” Defense should budget RDT&E funds.

Incorrect Appropriation Charged

Appropriations relating to four task orders and totaling \$11.8 million may not have been “applied only to the objects for which the appropriations were made.” These O&M-funded awards involved work that appeared, in whole or in large part, to be research, development, and testing of computer software programs, which should have been charged to RDT&E appropriations. One of the four task orders involved both O&M and RDT&E costs. (See Appendix A for details.)

Center officials stated that Defense did not identify the purposes of funds—O&M, RDT&E, no-year, or procurement funds—transferred to the Center. Because the officials did not know the purposes for which the funds were appropriated, they could not determine the appropriateness of the funds charged. Defense funding documentation did provide appropriation numbers, which

⁵DoD [Department of Defense] 7000.14-R, Volume 2A, Chapter 1, para. 010201C.1.

correctly identified the purpose of funds; however, Center officials did not understand how to interpret the appropriation numbers and did not properly identify the type of funds provided.

The Center did not have controls in place to determine the purpose of the funds transferred from Defense. As a result, the Center may have improperly obligated \$11.8 million and expended \$9.6 million in O&M appropriations rather than RDT&E appropriations. Defense OIG Counsel stated that Defense might be able to resolve these violations by using unexpended RDT&E appropriations from appropriate periods of availability in place of the O&M funds or by making a determination that the use of O&M funds was appropriate in the cases identified. Defense has a number of unique missions and authorizations that might permit the use of O&M funds instead of RDT&E funds for these awards. However, the task order files did not contain documentation identifying the funding for these awards as exceptions to the Defense FMR. Further research on this issue is beyond the scope of our review.

Potential Bona Fide Needs Statute Violations

Federal Requirements

The “bona fide needs statute” (31 U.S.C. § 1502) requires that “[t]he balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts [task orders] properly made within that period.”

Congress has given Defense some flexibility in applying the bona fide needs rule to severable services contracts.⁶ Under 10 U.S.C. § 2410a, Defense may, during a particular fiscal year, enter into a 1-year service contract that extends into the next fiscal year and may obligate the entire contract to the appropriation for the first fiscal year. However, section 2410a requires that the performance period begin in one fiscal year and end in the next. If the entire period of performance falls in the second fiscal year, section 2410a does not apply and a violation of the bona fide needs rule has occurred.

O&M funds are 1-year funds that must be obligated for contracts for services that meet a bona fide need of the fiscal year for which they are appropriated. As discussed above, under section 2410a, Defense may obligate the full amount of a service contract in 1 year, and performance may extend into the next. However, O&M appropriations for the year are not available to fund services that do not commence until the following year. An agency may not use unobligated funds remaining from one fiscal year to fund contracts for a period of performance that begins in the subsequent fiscal year.

Funds Used Outside the Period of Performance

For 22 of the 28 task orders reviewed, Defense provided the Center with incremental funding throughout the period of performance. The Center expended the funds in the order received

⁶A severable contract is one for services that are continuing and recurring in nature (as opposed to a contract for a single deliverable that cannot be subdivided) and that are generally charged to the appropriation for the year in which the services were rendered.

without regard to their period of availability or the period of performance for which the funds were obligated. As a result, for 13 of the 22 incrementally funded task orders, the Center expended funds totaling \$25.4 million, which had been authorized for one period of performance, to pay for equipment and services contracted for and provided after the periods of performance for which the funds were obligated. For the remaining nine incrementally funded task orders, funds were expended during the period of performance for which they were obligated. (See Appendix A for details.)

The use of funds appropriated and obligated for one period of performance and expended in their entirety for a subsequent period of performance violates the bona fide needs rule. Defense may resolve these violations by adjusting its accounts (assuming sufficient funds are available) to record the expenditures against the correct fiscal year appropriations. This will require Defense to research the proper use of funds totaling \$25.4 million for the 13 task orders and to determine the correct period of performance for these funds. Further research on this issue is beyond the scope of our review.

Actions Taken by the Center

During our review, the Center requested that Defense specifically identify the types of funds provided for each award when it submits a funding document. Also, on April 7, 2007, the Center returned \$2.9 million to Defense for 1 of the 28 awards reviewed. Center contracting personnel stated that they were reviewing each of the task orders to determine whether additional unexpended funds should be returned to Defense because the periods of performance had expired. We did not evaluate the accuracy of the amount returned or the Center's analysis of the remaining task orders because such evaluations were beyond the scope of our review.

Actions Taken by Defense

Defense OIG is responsible for reviewing Defense activities to determine whether Defense complied with appropriations laws (31 U.S.C. §§ 1301(a) and 1502) and whether Anti-Deficiency Act violations occurred for the cases identified in this report. Accordingly, we discussed the findings in this report with, and provided the details to, Defense OIG.

Defense OIG, including its Counsel, acknowledged the potential violations of the purpose statute and the bona fide needs statute identified in this report and identified additional violations outside the scope of our review. Defense OIG Counsel referred these violations to the Office of the Under Secretary of Defense (Comptroller), which refers them to the appropriate Defense component for review and resolution.⁷ The investigating officer from each Defense component will coordinate the results of the review with the Defense Comptroller. At the conclusion of our fieldwork, the Defense Comptroller had not fully resolved these violations but indicated that most would be easily resolved.

⁷DoD 7000.14-R, Volume 14, Chapter 3, para. 0303.

In its final report, Defense OIG stated that it would issue another report that addresses all of the appropriation statute issues, including the proper use of funds, identified in the HHS and Defense OIG reports.⁸

COMPLIANCE WITH ACQUISITION REGULATIONS AND CONTRACT PROVISIONS

The Center generally complied with acquisition regulations and Contract provisions. Our review of available documentation showed that:

- The Center received evidence that Defense had prepared adequate statements of work and performed market research before submitting task orders to the Center.
- Competition was obtained in accordance with acquisition regulations.
- Legal reviews of task order awards were documented, including sole-source justifications, cost proposals, task order award documents, task order modifications, funding documentation, and invoice payments.
- Pricing analyses were fair and reasonable, selection of the contractor was properly documented, task orders were within the scope of the Contract, and technical representatives were designated in writing.

However, the Center did not always maintain adequate documentation to support acquisitions. As detailed in Appendix B, the Center did not:

- document in its task order files acquisition planning for 15 of the 28 task orders reviewed or a “determination and findings” for 10 task orders,
- document the receipt of no-bid responses for any of the 28 task orders or solicit an eligible contractor for 3 task orders,
- document award decisions for any of the 28 task orders, or
- document that it properly monitored contractor performance for any of the 28 task orders.

Acquisition Planning

The FAR requires that agencies perform adequate acquisition planning and that task order files fully document all aspects of the acquisition process. As part of its acquisition planning for task orders awarded by the Center, Defense is required to conduct market research (FAR 7.102) and develop written acquisition plans that address technical, business, management, and other significant considerations (FAR 7.105). For time-and-materials task orders, the contracting

⁸“FY 2006 DoD Purchases Made Through the National Institutes of Health” (Defense OIG Report D2008-022, issued November 15, 2007).

officer must also prepare and sign a determination and findings that no other task order type is suitable (FAR 16.601(c)).⁹

The Center's task order files did not always include the required acquisition-planning documents.

- For 15 of the 28 task orders reviewed, the task order files did not contain a written acquisition plan. Generally, these 15 task orders were the oldest reviewed, initially awarded during calendar years 2002 through 2004. Task orders awarded later included a written acquisition plan.
- For 10 of the 17 time-and-materials task orders included in the 28 task orders reviewed, the task order files did not include a written determination and findings to document the decision that no other task order type was suitable. A determination and findings is required because a time-and-materials task order is the riskiest and potentially the most costly award method.

The Center did not have sufficient controls to ensure that documentation of acquisition planning was placed in the task order files. However, in December 2006, after our review period, the Center began using a "task order request package" checklist. The checklist requires the contracting officer to document that the Center received, reviewed, and filed all appropriate acquisition-planning documents, including a determination and findings when necessary. If used properly, the checklist should ensure that the contracting officer reviews written acquisition plans and documents the review in the task order files.

Competition

When using Governmentwide acquisition contracts, the contracting officer must provide qualified contractors with "a fair opportunity to be considered for each order" (FAR 16.505(b)(1)).¹⁰ Section G.5 of the Contract requires that the contracting officer solicit bids from all eligible prime contractors. Each solicited contractor must respond with a bid for the award or with a no-bid response stating why it did not bid.

In most cases, the Center solicited all eligible contractors. However, we noted the following issues during our review.

- For all 28 task orders reviewed, the "solution recommendation documentation package" prepared by Defense documented the receipt of all bids but did not document no-bid responses. Center officials stated that they did not enforce the Contract requirement that all contractors submit a response to each bid solicitation. No-bid responses help ensure

⁹Effective February 12, 2007, the "determination and findings" section of the FAR was expanded and renumbered as FAR 16.601(d)(1).

¹⁰FAR 16.505(b)(2) provides specific statutory exceptions to this rule. Only one of the task orders in this review met the requirements for an exception.

that all eligible contractors received the solicitation and inform the Center why contractors decided not to bid.

- For 3 of the 28 task orders reviewed, the Center did not solicit one eligible contractor. The Center used a manual list that identified all prime contractors by task area to determine which contractors to solicit for each award. The Center's proper use of this list would meet the requirement that prime contractors be given a fair opportunity to be considered for awards. Center personnel did not solicit all eligible prime contractors for these three awards because of human error.

Award Decisions

FAR 16.505(b)(4) requires the contracting officer to document the rationale for award decisions in the task order file. Specifically, the contracting officer should document the rationale for the selection of the contractor and the price of each award, the basis for the award, and any consideration of cost and noncost factors in making the award decision.

Pursuant to the Contract, Defense provided a written solution recommendation documentation package documenting its basis for each award determination, and the Center reviewed the package for completeness and agreement with the Defense decision. However, the Center did not sign the package or document its review, modification, or agreement for any of the 28 task orders reviewed.

The Center stated that its award to the successful bidder evidenced its agreement. Nevertheless, in October 2006, the Center developed and implemented a solution recommendation documentation package checklist. The checklist requires the Center to document its review and agreement with the award decision made by Defense.

Contractor Monitoring

FAR 1.602-2 requires the contracting officer to request and consider the advice of specialists as appropriate. As supplemented by DFARS 201.602-2, the contracting officer may delegate onsite contractor monitoring responsibilities to a technical representative qualified by training and experience commensurate with the position. The technical representative's duties and responsibilities must be outlined in writing.

The Center did not always comply with the requirements of the FAR and DFARS regarding the documentation of contractor monitoring by the technical representative.

- For 25 of the 28 task orders reviewed, the task order files did not document that the designated technical representative had the necessary training and experience to monitor the contractor's performance.
- For 13 of the 28 task orders reviewed, the task order files did not document the technical representative's duties.

Additionally, the technical representative should prepare a quality assurance surveillance plan specifying work performed and the method of surveillance (FAR 46.401). The technical representative should provide the surveillance plan to the contracting officer (FAR 46.103). For all 28 task orders, however, the task order files did not contain a copy of the plan. Center officials stated that they were developing a surveillance plan template for use by technical representatives. At the time of our review, the Center had not finalized the template.

RECOMMENDATIONS

We recommend that the Center:

- work with Defense to resolve the obligation of \$11.8 million in O&M funds instead of RDT&E funds for 4 task orders,
- work with Defense to resolve the use of \$25.4 million for equipment and services that were not provided during the period of performance for 13 task orders,
- comply with Federal appropriation statutes and financial management regulations on obligating and expending funds, and
- improve controls for documenting the task order award and oversight processes.

NATIONAL INSTITUTES OF HEALTH COMMENTS

In comments on our draft report, NIH concurred with our recommendations. Although NIH had some reservations about the first finding, NIH stated that, for those areas under its control, it had taken or was planning corrective measures in conjunction with Defense. NIH's comments are included as Appendix C.

OTHER MATTER: BID-SOLICITATION PERIOD

Section G.5 of the Contract states that “prime contractors will generally be allowed five (5) business days to prepare and submit written proposals (when written proposals are required) however, more time may be necessary based on the particular task order requirements. The proposal due date shall be set forth in each announcement.” The FAR and other acquisition regulations do not define a minimum bid-solicitation period.

For 19 of the 28 task orders reviewed, the Center used the suggested bid-solicitation period of only 5 days, which usually resulted in the receipt of a single bid from a current Defense contractor. When the Center used a longer bid-solicitation period, it provided qualified contractors with a fair opportunity to be considered for each order and usually received more bids that were competitive.

APPENDIXES

**POTENTIAL NONCOMPLIANCE WITH APPROPRIATION STATUTES
AND FINANCIAL MANAGEMENT REGULATIONS**

Task Order Number	Funding Provided Incrementally	Purpose Statute		Bona Fide Needs Statute
		Use of Operations and Maintenance Funds Instead of Research, Development, Testing, and Evaluation Funds		Funds Used Outside the Period of Performance
		Obligation Amount	Expended Amount	
2054	Yes	\$0	\$0	\$11,318,218
2204	Yes	10,564,323	9,240,439	986,258
2213	No	0	0	0
2215	Yes	0	0	975,019
2228	Yes	0	0	5,849,927
2232	Yes	0	0	343,550
2311	Yes	0	0	0
2315	Yes	0	0	581,073
2323	Yes	0	0	0
2331	Yes	0	0	1,014,910
2631	Yes	0	0	1,124,876
2369	No	0	0	0
2376	Yes	0	0	0
2377	Yes	0	0	62,636
2380 ¹	Yes	0	0	2,631,569
2406	Yes	0	0	0
2407	Yes	0	0	0
2409	Yes	0	0	0
2412	Yes	0	0	265,046
2425	Yes	0	0	0
2429	Yes	432,388	365,329	3,203
2435	Yes	0	0	196,586
2480	Yes	0	0	0
2503	Yes	0	0	0
2512	No	0	0	0
2513	No	376,433	0	0
2517	No	391,634	0	0
2519	No	0	0	0
Total		\$11,764,778	\$9,605,768	\$25,352,871

¹The Center returned \$2.9 million to Defense after we identified this task order with potential unliquidated obligations.

**NONCOMPLIANCE WITH ACQUISITION REGULATIONS
AND CONTRACT PROVISIONS**

Category Code and Description

- A** The task order file did not contain a written acquisition plan.
B The task order file did not contain a determination and findings for time-and-materials awards.
C The task order file did not contain a record of the contractors solicited or no-bid responses.
D The Center did not solicit an eligible prime contractor.
E The Center contracting officer did not sign the solution recommendation documentation package.
F The task order file did not document the technical representative's training and experience.
G The task order file did not define the technical representative's duties.
H The task order file did not contain the technical representative's surveillance plan.

Task Order Number	Category Code								Total Errors
	A	B	C	D	E	F	G	H	
2054	A		C		E	F	G	H	6
2204	A		C		E	F	G	H	6
2213	A		C		E	F	G	H	6
2215	A	B	C		E	F	G	H	7
2228	A		C		E	F	G	H	6
2232	A	B	C		E	F	G	H	7
2311		B	C		E	F	G	H	6
2315	A	B	C		E	F	G	H	7
2323	A	B	C	D	E	F	G	H	8
2331	A	B	C		E	F		H	6
2361	A	B	C		E			H	5
2369	A		C		E	F		H	5
2376	A	B	C		E	F	G	H	7
2377	A	B	C		E	F		H	6
2380	A	B	C		E	F		H	6
2406			C		E	F	G	H	5
2407			C		E	F		H	4
2409			C		E	F	G	H	5
2412			C		E	F	G	H	5
2425			C	D	E	F		H	5
2429			C		E	F		H	4
2435			C		E	F		H	4
2480	A		C		E	F		H	5
2503			C	D	E	F		H	5
2512			C		E	F		H	4
2513			C		E			H	3
2517			C		E	F		H	4
2519			C		E			H	3
Total	15	10	28	3	28	25	13	28	150



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

NOV 20 2007

TO: Daniel R. Levinson
Inspector General, HHS

FROM: Director, NIH

SUBJECT: Comments on the Draft Report, *Procurements Made by the National Institutes of Health for the Department of Defense* (A-03-07-03000)

The National Institutes of Health (NIH) appreciates the opportunity to review and comment on the Office of Inspector General (OIG) draft report, entitled *Procurements Made by the National Institutes of Health for the Department of Defense*. The NIH Information Technology Acquisition and Assessment Center (NITAAC) has been working with the Defense Procurement and Acquisition office in the Department of Defense (DoD) to coordinate efforts to address the report's findings and recommendations.

The report recommends that NITAAC

1. work with Defense to resolve the obligation of \$11.8 million in O&M funds instead of RDT&E funds for 4 task orders,
2. work with Defense to resolve the use of \$25.4 million for equipment and services that were not provided during the period of performance for 13 task orders,
3. comply with Federal appropriation statutes and financial management regulations on obligating and expending funds, and
4. improve controls for documenting the task order award and oversight processes.

We concur with the above recommendations, albeit with reservations about some findings. For those areas under NIH control, we have taken or are planning corrective measures, in conjunction with DOD. Specific comments on the report are attached.

We look forward to continuing our support of DoD information technology acquisition requirements in full compliance with appropriation statutes and financial management regulations.

For any questions concerning the comments, please contact Thomas Keith, within the NIH Office of Management, at 301-435-3902 or at KeithTh@od.nih.gov

Elias A. Zerhouni, M.D.

Attachment

Comments From the National Institutes of Health (NIH) on the Office of Inspector General (OIG) Draft Report, *Procurements Made by the National Institutes of Health for the Department of Defense (A-03-07-03000)*

Recommendation 1. NITAAC should work with Defense to resolve the obligation of \$11.8 million in O&M funds instead of RDT&E funds for 4 task orders.

NIH concurs with the recommendation but does not fully concur with the finding that “the Center did not have controls in place to determine the purpose of the funds transferred from Defense” and that “the Center may have improperly obligated \$11.8 million and expended \$9.6 million in O&M appropriations rather than RDT&E appropriations.”

The NIH Information Technology Acquisition and Assessment Center (NITAAC) does have procedures in place to compare the funding type (i.e., O&M or RDT&E) with the type of services identified in the statement of work. Further, as the requesting and procuring agency, the Department of Defense (DOD) is responsible for all funding and for meeting all DOD-specific policies and regulations. It is the responsibility of the obligating authority to ensure that funds are obligated to the correct account. In this case, DOD is responsible for identifying the correct funding type of anticipated procurements, and, specifically, it is the certifying official who signs off on the funding document certifying that funds are correct for the particular task order. On the four task orders identified in the report, DOD Project Officers did not view the services as RDT&E-type services.

If the DOD OIG determines that the funds were misapplied, we will work with DOD to resolve the issue, and we will jointly prepare a DOD/NIH Action Plan to ensure that adequate controls are in place.

Recommendation 2. NITAAC should work with Defense to resolve the use of \$25.4 million for equipment and services that were not provided during the period of performance for 13 task orders.

NIH concurs with the recommendation, and NITAAC has already stopped the practice of expending funds appropriated and obligated for one performance period in a subsequent performance period. It should be noted, however, that NITAAC had been operating with the understanding that funds were provided for the life of the task order, not on the basis of the performance period, and therefore maintained and expended funds in their entirety for a specific task order.

This practice has already ceased, and NITAAC now monitors obligations according to the period of performance in which funds are received; funds are expended only for services received during that period. Any excess funding is returned to the customer when it is confirmed that the final invoice for that period has been received and accepted. NITAAC has corrected the transactions in the system by matching the expenditures with the funding obligated for that period of performance. As a result of this reallocation of the expenditures and disbursements, NITAAC has returned \$13.6 million to DOD.

Recommendation 3. NITAAC should comply with Federal appropriation statutes and financial management regulations on obligating and expending funds.

NIH concurs with the recommendation and has already implemented actions to ensure that it fully complies with all Federal appropriation statutes and financial management regulations, as noted in comments under recommendations 1 and 2 above.

Recommendation 4. NITAAC should improve controls for documenting the task order award and oversight processes.

NIH concurs with the recommendation and has already taken actions to implement it. These actions also ensure compliance with laws and regulations, as noted under the three recommendations above, and more specifically with the Federal Acquisition Regulation and its Fair Opportunity to be Considered requirements.

Action 1. In the Task Order Requirements Package (TORP) transmittal letter (amended December 2006), NITAAC now requires a written acquisition plan for all assisted task orders. As the draft report notes, Contracting Officers review a checklist that was also revised in December 2006 and that specifically identifies this item for control to ensure that all required documents are included in the procurement files. NITAAC also helps customers prepare acquisition plans by providing them with samples and templates.

Action 2. An Acquisition Plan preparation guide and template have been drafted and will be posted on the NITAAC Web site, pending final review. Acquisitions will not move forward without formal written plan, when required.

Action 3. Internal control risk assessments are being periodically conducted, and processes have also been established to measure and improve performance in these areas.

Action 4. In April 2007, NITAAC began using automated software to notify contractors of an opportunity to compete. An e-mail notice is generated and directed to all qualified contractors, thus removing the possibility of human error.

Action 5. NITAAC will review its guidelines, processes, and procedures for enforcing the “no response” contractual requirement and revise them, as needed, to ensure that regulations are being followed and to determine whether the value added from no-bid responses justifies the additional administrative burden of the streamlined acquisition process. A letter will also be sent out periodically to all contractors reminding them of this contractual requirement.

Action 6. NITAAC will review its policy and guidelines regarding the amount of time it gives potential bidders to respond to solicitations to ensure that it provides all qualified contractors with a fair opportunity to be considered for each order. NITAAC will also notify customers if a proposal’s “respond by” deadline does not give contractors sufficient time.

Action 7. NITAAC has taken steps to ensure that all eligible contractors receive a solicitation and respond if they choose not to bid. It has added the following language in the posting e-mail:

If you do not intend to bid on this task order, please submit an electronic “no response” to the customer and to NIHCIOS2@od.nih.gov by doing the following:

- Do a “reply to” the posting e-mail, add the customer to the “to” list, and append the word NORESPONSE to the subject. For example: SUBJECT: re: Task Order Tracking No. C-9999 NORESPONSE
- In the body of the message, insert a short statement explaining the “no response” rationale.

Action 8. As noted in the draft report, NITAAC developed and implemented a Solution Recommendation Document Package review checklist in October 2006 for use by contracting personnel to assess the overall solicitation process and related documentation. Additionally, NITAAC is currently reviewing the Package instructions, transmittal letter template, and review checklist and will update them as necessary to ensure that adequate documentation is created and submitted on award decision recommendations.

Action 9. NITAAC acknowledged that not all task order files documented the necessary duties, training, and experience of technical representatives, but it does not believe that it is responsible for managing and administering training and certification requirements. The new checklist implemented in December 2006 requires self certification of training. Furthermore, NITAAC is currently reviewing a transmittal letter that would require documentation of training certification and is drafting a template appointment letter that would outline specific duties of technical representatives.

Action 10. To ensure that quality assurance surveillance plans provided by DOD are properly documented at NIH, NITAAC is preparing to post on its Web site a guide and template addressing various levels of surveillance of internal review. The guide and template are currently undergoing internal review.

11/19/07