



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-4704

MAY 3 2005

MEMORANDUM FOR AUDIT FOLLOWUP FOCAL POINT, OUSD (AT&L)

SUBJECT: Followup on GAO Report No. GAO-04-065, "REBUILDING IRAQ: Fiscal Year 2003 Contract Award Procedures and Management Challenges," June 1, 2004 (GAO Review Code 120248)

Pursuant to the requirements of DoD Directive 7650.3, the subject case is being evaluated to ensure that adequate management action is taken on the report's agreed-upon findings and recommendations. Followup status will be reflected in the Defense Audit Management Information System (DAMIS) and, as appropriate, in reports to the Secretary of Defense, the GAO, and the Congress.

At this time, we request a current status report on actions in process to implement recommendations 3, 4 and 5 of the subject report. Provide the following information:

- **Recommendation 3:** Discuss whether the Assistant Secretary of the Army signed the justification and approvals for the contracts and related task orders used by the Army Corps of Engineers to restore Iraq's electricity.
- **Recommendation 4:** Discuss (a) whether the Commanding General of the Army Field Support Command completed definitization of outstanding task orders under the LOGCAP contract; (b) the progress of DCAA audits of task orders and definitization of contracts and task orders, and (c) whether the 18 task orders were definitized.
- **Recommendation 5:** Identify whether the study of DoD's strategy for post-war operations has been completed and discuss the provisions for acquisition support that were to be incorporated into the strategy.

If actions are not complete, please explain and provide estimated completion dates and time phased milestones. **If the actions have been completed, provide supporting documentation, if available.**

We recognize that recommendations 3 and 4 were directed to the Secretary of the Army. However, the Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) prepared the DOD comments to the report. Therefore, we are directing this followup inquiry to your office. If your office determines that the followup inquiry should be directed to the Secretary of the Army, please advise us of your decision.

Please forward this information to us by **June 3, 2005**. Address mail to the Technical Director, Audit Followup & GAO Affairs, Office of the Inspector General, Department of

Defense, 400 Army Navy Drive, Arlington, VA, 22202. The action officer for this case is Tom Wright. You may reach him at 604-9652, fax 604-9608; or by e-mail at twright@dodig.osd.mil.

for Michael A. DiRump
Carlos J. Chapa
Technical Director
Audit Followup & GAO Affairs

Attachment: DoD Response Letter to GAO Final Report



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

SEP 17 2004

Mr. William T. Woods
Director, Acquisition and Sourcing Management
U.S. General Accounting Office
441 G Street, N.W.
Washington, DC 20548

Dear Mr. Woods:

This is the Department of Defense (DoD) response to the GAO report.

"REBUILDING IRAQ: Fiscal Year 2003 Contract Award Procedures and Management Challenges," dated June 1, 2004 (GAO Code 120248/GAO-04-605). Enclosed are updates to the recommendations which are listed starting on page 42 of your report and responses to your comments which are listed starting on page 46 of your report. My point of contact for this effort is Mr. Craig Curtis, (703) 614-6719 or craig.curtis@osd.mil.

Sincerely,

Deidre A. Lee
Director, Defense Procurement
and Acquisition Policy

Enclosures:
As stated



GAO REPORT - DATED JUNE 1, 2004
GAO CODE 120248/GAO-04-605

**"REBUILDING IRAQ: FISCAL YEAR 2003 CONTRACT AWARD
PROCEDURES AND MANAGEMENT CHALLENGES"**

**DEPARTMENT OF DEFENSE UPDATES TO THE RECOMMENDATIONS AND
RESPONSES TO THE COMMENTS**

RECOMMENDATION 1: The GAO recommended that the Secretary of the Army review the out-of-scope task orders for Iraqi media and subject matter experts, issued by the Defense Contracting Command-Washington, and take the necessary remedial actions. (p. 33/GAO Draft Report)

GAO COMMENT: *There is no specific GAO comment to the DoD response.*

UPDATE: Defense Contracting Command-Washington agrees with the GAO findings concerning out of scope work for the orders awarded to SAIC for the Iraq Media Network and the subject matter experts. Contracting officers ordering the out of scope work have been made aware that their actions were improper. DCC-W has instituted agency wide training in a number of topics including the need to carefully review the scope of work of a contract to determine what may be legitimately ordered from that contract. In the case of ordering against a GSA Federal Supply Schedule (FSS) contract, for example, this would require the contracting officer to compare the scope of work in the FSS contract with the scope of work under the current requirement to determine if there is an adequate fit for scope. This training will be periodically repeated. In addition, our post award reviews will include an assessment of whether work being required is within scope of the basic contract.
DoD considers this action closed.

RECOMMENDATION 2: The GAO recommended that the Secretary of the Army ensure that any future task orders under the Logistics Civil Augmentation Program (LOGCAP) contract for Iraq reconstruction activities are within the scope of that contract. (p. 33/GAO Draft Report)

GAO COMMENT 1: The Department of Defense (DoD) incorrectly noted that the recommendation was based on only one instance. In addition to the example cited by DoD, we also expressed concern about whether the task orders to provide logistical support for the Coalition Provisional Authority (CPA) and to the New Iraqi Army training program were within the scope of the underlying Logistics Civil Augmentation program (LOGCAP) contract.

UPDATE: Per the initial response, the Procuring Contracting Officer for the LOGCAP contract reviews each proposed Scope of Work which will result in a task order and makes a determination whether the action is within the scope of the contract. Appropriate legal advice is obtained as necessary.
DoD considers this action closed.

RECOMMENDATION 3: The GAO recommended that the Secretary of the Army address and resolve all outstanding issues in connection with the pending justifications and approvals for the contracts and related task orders used by the Army Corps of Engineers to restore Iraq's electricity infrastructure. (p. 33/GAO Draft Report)

GAO COMMENT: There is no specific GAO comment to the DoD response.

UPDATE: All Task Orders for this work have been definitized, as of 05 May 2004. Following are the Task Order numbers, contract numbers, dates of definitization, and definitized amounts: 1. DACA78-03-D-0004 (WGI) Task Order 0002 for Restore Iraqi Electricity was definitized on 5 May 04 in the amount of \$312,523,384; 2. DACA78-03-D-0005 (Fluor) Task Order 0006 for Restore Iraqi Electricity was definitized on 3 Mar 04 in the amount of \$335,257,226; and, 3. DACA78-03-D-0006 (Perini) Task Order 0002 for Restore Iraqi Electricity was definitized on 26 Mar 04 in the amount of \$371,797,194. DoD considers this action closed.

RECOMMENDATION 4: The GAO recommended that the Secretary of Army direct the Commanding General, Army Field Support Command and the Commanding General and Chief of Engineers, U.S. Army Corps of Engineers, to definitize outstanding contracts and task orders as soon as possible. (P. 33/GAO Draft Report)

GAO COMMENT 2: The actions being taken by the Army Field Support Command are positive steps to monitor progress in reaching agreement on the contracts' key terms and conditions. DoD did not indicate, however, what steps the Army Corps of Engineers was taking to definitize the actions for which the Corps is responsible. As noted in table 7, the Army Corps of Engineers had two undefinitized contracts on which had been obligated more than \$1.5 billion as of March 2004.

UPDATE: As of September 2004, the Not-to-Exceed amount is \$2,511,887,044 for contract DACA63-03-D-0005. Of this amount, \$55,021,000 has been definitized. The balance to be negotiated/definitized is \$2,453,431,044 or 98 percent. USACE is in receipt of audits for task orders 0008, 0009 and 0010 (fuel imports) and is currently analyzing them. DCAA is to deliver audits for task orders 0003, 0005, 0006 & 0007.

RECOMMENDATION 5: The GAO recommended that the Secretary of Defense, in consultation with the Administrator, U.S. Agency for International Development, evaluate the lessons learned in Iraq and develop a strategy for assuring that adequate acquisition staff and other resources can be made available in a timely manner. (p. 33/GAO Draft Report)

GAO COMMENT: There is no specific GAO comment to the DoD response.

UPDATE: DPAP is canvassing DoD components to determine the availability of existing and planned studies to enable insertion of acquisition planning and support for future contingency operations.

GAO COMMENT 3: DoD asserts that the determination and finding was not made on a class basis because it included a common justification for 26 specifically identified "particular procurements." The Federal Acquisition Regulation (FAR) provides for determination and findings for individual contract actions (FAR 1.702) and a class of contract actions (FAR 1.703). Because the determination and finding encompasses 26 contract actions, we concluded that it is a class determination and finding. Specifically enumerating members of the class does not alter the fundamental fact that it is for more than one action. Class determination and findings are specifically prohibited by FAR 6.302-7(c)(4). As to the questions of authority to execute the determination and finding, we do not dispute that the Deputy Secretary has broad authority to act on behalf of the Secretary. We note, however, that the plain language of the law provides that authority to approve public interest exceptions may not be delegated¹ and conclude that the Deputy Secretary did not have authority in this instance.

Footnote: With regard to the public interest exception (10 U.S.C. 2304(c)(7)), the law specifically states that, "the authority of the head of an agency under subsection (c)(7) may not be delegated." 10 U.S.C. 2304(d)(2).

DoD RESPONSE: In footnote 28 on page 28 of the report, the GAO made the following comment "Further, the Secretary's determination and finding to use the exception cannot be made on a class basis." We commented on this statement (see page 44 of the report) by pointing out that the determination was not made on a class basis, it was a common justification for 26 specifically identified "particular procurements." 10 U.S.C. 2304(c)(7)(A) provides that a determination must relate to the "particular procurement concerned." GAO asserts that the statute can only be satisfied by 26 nearly identical, but physically separate, documents. We believe that one document with a common determination that lists 26 "particular procurements" satisfies the statute. GAO did not include a response to the Department's position on this issue on page 31 where other comments were discussed.

Also in footnote 28 on page 28 of the report. GAO stated that 10 U.S.C. 2304(d)(2) provides that a determination under section 2304(c)(7), which, in this case, was signed by the Deputy Secretary, may not be delegated. We commented (see page 44) that "The Deputy Secretary has broad authority from the Secretary to act on his behalf and to act in his absence. Absent some indication otherwise, the report should not imply that the Secretary did not agree with the determination." By long-standing practice and custom, as well as by express provision in DoD directives, the Deputy Secretary acts as the alter ego of the Secretary and therefore had authority to make this finding. Notwithstanding the existence of authority, the report does not provide any evidence or indication that the Secretary did not agree with, or even that he was unaware of, the determination. On the contrary, not only was he aware of it, but he discussed it publicly. Consequently, the lack of the Secretary's signature was, at most, a technicality that could easily have been corrected if there was a substantive reason to justify bringing this technicality to the attention of the Secretary.

GAO COMMENT 4: Legal analysis by its nature reflects opinion. In the opinion of GAO, the Army, and DoD, the actual restoration of Iraqi oil infrastructure was not within the scope of the LOGCAP contract. We also noted that the LOGCAP contract anticipates contingency planning or work that can be executed under the contract. In other words, contingency planning is within the scope of the contract. In this instance, all parties agree that actual restoration of the oil infrastructure was not within the scope of the contract. Consequently, we concluded that planning the oil infrastructure restoration was also not within the scope of the contract.

We would encourage the contracting officer to continue to obtain legal assistance given the complexity of the LOGCAP contract, but we also believe that DoD needs to ensure analytical rigor in its review of task orders.

DoD RESPONSE: Second, on page 16 of the report, in discussing whether a planning task was within the scope of the LOGCAP contract, GAO included the following sentence:

"In our opinion, planning for such efforts was, correspondingly, also outside the scope. DoD nevertheless determined the planning was within scope." The word "nevertheless" implies either that DoD was aware of GAO's opinion and disregarded it, or that GAO's opinion was so obviously correct that any other opinion would be irresponsible. This implication was reinforced on page 31 where GAO stated "we remain convinced of our conclusion and emphasize the need for more analytical rigor in the review of LOGCAP task orders." We assert that DoD did an in depth review of this issue (see our comment on page 44 for the details) and that, in good faith, our opinion was that the task was in scope. We understand that GAO may have a different opinion, but there should not be an implication that DoD's opinion lacked "analytical rigor" or that such a conclusion was irresponsible.
