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Washington, D.C. 20201

TO: Raynard S. Kington, M.D., Ph.D.
Acting Director
National Institutes of Health

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

SUBJECT: Follow-Up Review of Procurements Made by the National Institutes of Health for the Department of Defense (A-03-08-03000)

The attached final report provides the results of our follow-up review of procurements made by the National Institutes of Health, 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 acquisition contract (the Contract). Section 817 of the Department of Defense Authorization Act for Fiscal Year 2007 (the Act) required 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 procurement requirements. In their prior reports, both OIGs reported instances of noncompliance. Accordingly, the Act required the OIGs to conduct follow-up reviews.

Our objectives were to determine whether the Center implemented the recommendations made in our previous report and complied with (1) appropriations statutes and financial management regulations and (2) acquisition regulations and Contract provisions for awards made on behalf of Defense.

The Center initiated significant corrective actions but did not fully implement the recommendations in our previous report related to the use of operations and maintenance (O&M) funds instead of research, development, test, and evaluation (RDT&E) funds and the use of funds for equipment and services that were provided after the period of performance for which the funds were obligated.

During our current review period, the Center complied with appropriations statutes and financial management regulations for 27 of the 33 task orders reviewed but may not have complied for the remaining 6 task orders. Specifically, the Center paid \$3.7 million for equipment and services that were provided after the period of performance for which the funds were obligated. The

Center generally complied with acquisition regulations and Contract provisions for the five new task orders reviewed. However, the Center did not always maintain adequate documentation with respect to competition, award decisions, and contractor monitoring, and the Center exercised a task order option that may not have filled an existing need of the Government. After these errors occurred, the Center implemented improved controls or took other corrective actions.

We recommend that the Center:

- request the Defense Comptroller to provide a final decision on the use of \$1.2 million of O&M funds instead of RDT&E funds for three task orders identified in our previous review that remain unresolved,
- work with Defense to resolve funds (\$1.4 million identified in our previous review and \$3.7 million identified in our current review) that were used for equipment and services provided after the period of performance for which the funds were obligated,
- work with Defense to determine whether the contractor provided the full level of services in the base year for one task order, and
- determine whether options to task orders fill an existing need of the Government before awarding the options.

In comments on our draft report, NIH concurred with our recommendations. NIH stated that for those areas under its control, it had taken action or was planning corrective measures in conjunction with Defense.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, Office of Inspector General reports generally are made available to the public to the extent that information in the report is not subject to exemptions in the Act. Accordingly, this report will be posted on the Internet at <http://oig.hhs.gov>.

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-03-08-03000 in all correspondence.

Attachment

cc:
Dennise March
Director of Acquisition Program Support

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**FOLLOW-UP REVIEW OF
PROCUREMENTS MADE BY THE
NATIONAL INSTITUTES OF HEALTH
FOR THE
DEPARTMENT OF DEFENSE**



Daniel R. Levinson
Inspector General

May 2009
A-03-08-03000

Office of Inspector General

<http://oig.hhs.gov>

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OFFICE OF AUDIT SERVICES FINDINGS AND OPINIONS

The designation of financial or management practices as questionable, a recommendation for the disallowance of costs incurred or claimed, and any other conclusions and recommendations in this report represent the findings and opinions of OAS. Authorized officials of the HHS operating 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 acquisition 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 appropriations 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 (the Act), as amended, P.L. No. 109-364 (Oct. 17, 2006), required 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 appropriations statutes and procurement requirements. In their prior reports, both OIGs reported instances of noncompliance. Accordingly, the Act required the OIGs to conduct follow-up reviews.

We limited our follow-up review of compliance with appropriations statutes and financial management regulations to 33 assisted acquisitions (28 task orders covered in our previous review and 5 additional task orders awarded or funded during fiscal year 2007) for which the Center disbursed approximately \$284 million in Defense funds between fiscal years 2002 and 2007. We limited our follow-up review of compliance with acquisition regulations and Contract provisions to the five additional task orders.

OBJECTIVES

Our objectives were to determine whether the Center:

- implemented the recommendations made in our previous report and
- complied with (1) appropriations statutes and financial management regulations and (2) acquisition regulations and Contract provisions for awards made on behalf of Defense.

SUMMARY OF FINDINGS

The Center initiated significant corrective actions but did not fully implement the recommendations in our previous report related to the use of operations and maintenance (O&M) funds instead of research, development, test, and evaluation (RDT&E) funds and the use of funds

for equipment and services that were provided after the period of performance for which the funds were obligated.

During our current review period, the Center complied with appropriations statutes and financial management regulations for 27 of the 33 task orders reviewed but may not have complied for the remaining 6 task orders. Specifically, the Center paid \$3.7 million for equipment and services that were provided after the period of performance for which the funds were obligated. The Center generally complied with acquisition regulations and Contract provisions for the five new task orders reviewed. However, the Center did not always maintain adequate documentation with respect to competition, award decisions, and contractor monitoring, and the Center exercised a task order option that may not have filled an existing need of the Government. After these errors occurred, the Center implemented improved internal controls or took other corrective actions.

RECOMMENDATIONS

We recommend that the Center:

- request the Defense Comptroller to provide a final decision on the use of \$1.2 million of O&M funds instead of RDT&E funds for three task orders identified in our previous review that remain unresolved,
- work with Defense to resolve funds (\$1.4 million identified in our previous review and \$3.7 million identified in our current review) that were used for equipment and services provided after the period of performance for which the funds were obligated,
- work with Defense to determine whether the contractor provided the full level of services in the base year for one task order, and
- determine whether options to task orders fill an existing need of the Government before awarding the options.

NATIONAL INSTITUTES OF HEALTH COMMENTS

In comments on our draft report, NIH concurred with our recommendations. NIH stated that for those areas under its control, it had taken action or was planning corrective measures in conjunction with Defense. NIH's comments are included as Appendix D.

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INTRODUCTION

BACKGROUND

Defense Authorization Act Oversight

Section 817 of the Department of Defense Authorization Act for Fiscal Year 2007 (the Act), as amended, P.L. No. 109-364 (Oct. 17, 2006), required 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 each reviewed and reported on those issues that affected its Department's operations.

In our January 2008 report on purchases made by NIH for Defense, we determined that NIH did not always comply with appropriations statutes and procurement requirements.¹ A Defense OIG report likewise determined that NIH did not always comply with applicable requirements.² Pursuant to section 817(a)(2) of the Act, if the OIGs' reviews showed that NIH had not complied, the OIGs were required to conduct a follow-up review that focused on NIH's fiscal year 2007 procurements for Defense.

We limited our follow-up review to "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.³ On June 13, 2008, we provided an interim status report on the results of our follow-up 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,⁴ the Office of Management and Budget authorized the Center to administer Governmentwide acquisition contracts.

¹"Procurements Made by the National Institutes of Health for the Department of Defense" (A-03-07-03000), issued January 10, 2008.

²"FY [fiscal year] 2006 DoD Purchases Made Through the National Institutes of Health" (D2008-022), issued November 15, 2007.

³Defense OIG jointly reviewed assisted acquisitions at the Center and independently visited eight Defense facilities with a total of nine 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 but instead places task orders itself through NIH contracts (Federal Acquisition Regulation (FAR) 4.601).

⁴The 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 (P.L. No. 104-106, amended by P.L. No. 104-208), were combined to become the Clinger-Cohen Act (40 U.S.C. § 1401 et seq.).

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).⁵ 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 appropriations statutes; financial management regulations; acquisition laws; and acquisition regulations, including the 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 multiple 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, test, 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, an appropriation 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 severable services during one 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 statute.

⁵The 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.

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 statute because it permits agencies to bind the Government in advance of the 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 whether the Center:

- implemented the recommendations made in our previous report and
- complied with (1) appropriations statutes and financial management regulations and (2) acquisition regulations and Contract provisions for awards made on behalf of Defense.

Scope

We reviewed 33 assisted acquisitions for which the Center disbursed approximately \$284 million in Defense appropriated funds between fiscal years 2002 and 2007. The 33 acquisitions included the 28 task orders covered in our previous review and 5 additional task orders awarded or funded during fiscal year 2007.⁶ Defense provided the Center with O&M funds for 27 of the 33 task orders, RDT&E funds for 4 task orders, no-year funds for 3 task orders, and procurement funds for 2 task orders.⁷ For all 33 acquisitions, we reviewed all payments and adjustments made since our previous review for compliance with appropriations statutes and financial management regulations. We limited our review of compliance with acquisition regulations and Contract provisions to the five additional task orders.

We reviewed the Center’s controls for obligating and expending funds, documenting the task order award and oversight processes, and acquiring 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 February through June 2008.

⁶One of the five additional task orders was awarded during fiscal year 2006; however, it was not included in the previous review because no payments were made during fiscal year 2006.

⁷Defense funded three task orders with O&M and other appropriations.

Methodology

To accomplish our objectives, we:

- reviewed appropriations 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 the statement of work, 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 appropriations statutes;
- 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 every time-and-materials award;
- reviewed task order files to determine whether task orders were within the scope of the Contract and fulfilled an existing need of the Government; and
- reviewed task order files to determine whether the Center monitored contractor performance by designating qualified contracting officer technical representatives in writing and ensuring that monitoring was conducted.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain

sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

FINDINGS AND RECOMMENDATIONS

The Center initiated significant corrective actions but did not fully implement the recommendations in our previous report related to the use of O&M funds instead of RDT&E funds and the use of funds for equipment and services that were provided after the period of performance for which the funds were obligated.

During our current review period, the Center complied with appropriations statutes and financial management regulations for 27 of the 33 task orders reviewed but may not have complied for the remaining 6 task orders.⁸ Specifically, the Center paid \$3.7 million for equipment and services that were provided after the period of performance for which the funds were obligated. The Center generally complied with acquisition regulations and Contract provisions for the five new task orders reviewed. However, the Center did not always maintain adequate documentation with respect to competition, award decisions, and contractor monitoring, and the Center exercised a task order option that may not have filled an existing need of the Government. After these errors occurred, the Center implemented improved internal controls or took other corrective actions.

IMPLEMENTATION OF PREVIOUS RECOMMENDATIONS

In our previous report, we recommended 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 appropriations statutes and financial management regulations on obligating and expending funds, and
- improve controls for documenting the task order award and oversight processes.

Although the Center did not fully implement all of these recommendations, it took significant corrective actions.

- The Center contacted Defense contracting officer technical representatives to resolve the use of \$11.8 million in O&M funds instead of RDT&E funds for four task orders. For one of the four task orders, the Defense Comptroller decided that O&M funds totaling \$10.6 million were appropriate to use, but the Center had not requested or received a

⁸The six task orders were included in our previous review.

Defense Comptroller decision resolving the remaining three task orders totaling \$1.2 million.

- The Center, with the assistance of the HHS and Defense OIGs, resolved \$24 million of the \$25.4 million for equipment and services that were provided after the period of performance for which the funds were obligated. The remaining \$1.4 million was still unresolved. As shown in Appendix A:
 - The Center resolved \$24 million by using existing funds provided during fiscal years 2002 through 2007 to redistribute \$15.5 million in obligations and expenditures and to return \$11.7 million in Defense funds that were no longer needed. The Center also received \$3.2 million in Defense funds to resolve funding shortfalls.
 - The remaining \$1.4 million included three unresolved categories.⁹ The Center decided, but had not yet taken action, to return \$638,556 in Defense funds that were no longer needed and to request \$705,623 in Defense funds to resolve funding shortfalls. The Center had not decided how to resolve an additional \$1,442,758.
- The Center implemented controls established by Defense for funding awards and options. Defense discontinued the advance funding of task orders, and the Center began forwarding vendor invoices to Defense for review and approval. Defense now determines the correct appropriation to use and transfers sufficient funds to pay the vendor invoices and the Center's service charge.
- The Center improved controls for documenting the task order award and oversight processes by developing and implementing four standard documents: the task order requirements package checklist, the statement of work package checklist, the solution recommendation document package checklist, and the quality assurance surveillance plan template for the contracting officer's technical representative.

COMPLIANCE WITH APPROPRIATIONS STATUTES AND FINANCIAL MANAGEMENT REGULATIONS

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"

⁹The unresolved amount equaled \$1,375,691: (\$638,556) + \$705,623 + (\$1,442,758).

Congress has given Defense some flexibility in applying the bona fide needs statute to severable services contracts.¹⁰ 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 statute 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 year. 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 1 fiscal year to fund contracts for a period of performance that begins in the subsequent fiscal year.

Funds Used Outside the Period of Performance

During fiscal year 2007, the Center complied with appropriations statutes and financial management regulations for 27 of the 33 task orders reviewed but may not have complied for the remaining 6 task orders. For the six task orders, which were incrementally funded throughout the period of performance, the Center expended funds totaling \$3.7 million that 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. (See Appendix B for details.)

The use of funds appropriated and obligated for one period of performance and used in a subsequent period of performance violates the bona fide needs statute. 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 the Center and Defense to research the proper use of funds totaling \$3.7 million for the six 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 and Defense

During our current review period, the Center advised us that it had implemented internal controls over the obligation of funds and payments for the appropriate periods of performance. These controls, developed by Defense, improved oversight and helped ensure compliance with appropriations statutes and financial management regulations. We verified that the Center received funds only after it had submitted invoices to Defense. The errors identified above occurred before the Center and Defense had implemented the improved controls.

¹⁰A 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.

COMPLIANCE WITH ACQUISITION REGULATIONS AND CONTRACT PROVISIONS

During our current review period, the Center continued to generally comply with acquisition regulations and Contract provisions. Our review of available documentation showed that the Center had corrected our previous finding that acquisition planning was not adequately documented; the Center's files for the five task orders reviewed contained all required acquisition-planning documents. However, as detailed in Appendix C, the Center did not:

- document the receipt of no-bid responses for four of the five task orders,
- document the basis for award of four of the five task orders, or
- document contractor monitoring or prepare a quality assurance surveillance plan for any of the five task orders.

Also, for one task order, we were unable to determine whether the contractor provided services in accordance with the original task order or with certain proposed changes. In addition, the contracting officer exercised an option under the task order that may not have filled an existing need of the Government.

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)).¹¹ 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. No-bid responses help ensure that all eligible contractors received the solicitation and inform the Center why contractors decided not to bid.

For the five task orders reviewed, the Center solicited all eligible contractors. However, for four of the five task orders, the Center did not document receipt of no-bid responses and the task order files were not always complete. We also identified this condition in our previous review.

In September 2007, the Center addressed our finding by establishing a policy to obtain no-bid responses from solicited contractors and began enforcing the Contract requirement that a contractor choosing not to bid must submit a no-bid response to each solicitation. To verify that the Center obtained no-bid responses from solicited contractors, we reviewed three additional task orders that the Center awarded for Defense after our review period. We found that the Center obtained the no-bid responses and filed them in the task order files.

¹¹FAR 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.

Award Decisions

FAR 16.505(b)(5) 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. To comply with the FAR, section G.5(6) of the Contract requires that customers, including Defense, prepare a solution recommendation documentation package for each award.

Pursuant to the Contract, Defense provided the Center with a written solution recommendation documentation package that documented the basis for each award determination. The Center reviewed each 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 four of the five task orders reviewed. We also identified this condition in our previous review.

The Center developed several checklists to document award decisions and satisfy the requirement of FAR 16.505(b)(5). These checklists, finalized since our prior review, require the Center to document its review and agreement with the award decisions made by Defense. However, the Center did not fully implement these checklists until after it had awarded the four task orders. For the remaining task order, the file included signed copies of the task order requirement package checklist and the solution recommendation documentation package checklist.

To verify that the Center used these checklists for Defense task orders, we reviewed three additional task orders that the Center awarded after our review period. We found that the Center had documented the rationale for award decisions by completing the checklists.

Contractor Monitoring

FAR 1.602-2 requires that the contracting officer 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 contracting officer technical representative qualified by training and experience commensurate with the position. The technical representative's duties and responsibilities must be outlined in a written delegation letter from the contracting officer.

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 two of the five task orders reviewed, the files did not document that the designated technical representative had the necessary training and experience to monitor the contractor's performance.
- For one of the five task orders reviewed, the files did not describe 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). However, the task order files did not contain a copy of the plan for any of the five task orders reviewed. We also identified this condition in our previous review.

During our current review period, but after the five task orders were awarded, the Center included a quality assurance surveillance plan template in its statement of work package template for use by the technical representative. Because the Center implemented the template after we completed our fieldwork, we did not verify use of the template.

Contract Changes

On October 27, 2006, the Center awarded a firm-fixed-price task order for \$11.6 million: \$3.7 million for the base year and a total of \$7.9 million for two 1-year options. We were unable to determine whether the contractor provided base-year services in accordance with the original task order or in accordance with certain proposed changes. Therefore, we could not determine whether \$3.7 million was a reasonable amount for the work actually performed in the base year. In addition, the contracting officer exercised the first option without determining that the option filled an existing need of the Government and was the most advantageous method of fulfilling a need, considering price and other factors.

Proposed Changes to the Statement of Work

The task order provided that “[o]nly the Contracting Officer has authority to (1) direct or negotiate any changes in the Statement of Work” Accordingly, any changes in the statement of work must be authorized by the contracting officer and documented in the task order file.

Three months after the base period began, Defense and its contractor agreed to propose a change in the statement of work, and on January 19, 2007, the contractor provided a copy of the proposal to the Center and Defense for consideration. The proposal would have (1) reduced help-desk support for the base period from 12 months to 60 days, after which the contractor would discontinue help-desk support, and (2) increased system administration by adding an optional task for which Defense would determine the actual performance. A subsequent proposal submitted by the contractor on April 6, 2007, removed the help-desk function and related costs and eliminated the proposed additional task.

The task order file did not contain a copy of the April 6, 2007, proposal¹² or documentation that the contracting officer had reviewed either proposal or considered making any modification to the base-year task order. In accordance with the task order, the contractor’s monthly bill did not itemize each task performed. Consequently, we were unable to determine whether the contractor performed in accordance with the original task order or in accordance with the proposed

¹²Although the task order file did not include a copy of the April 6, 2007, proposal, the copy that we obtained from Defense OIG showed that the Center was included in the distribution.

changes. According to Defense OIG, the help-desk function was not available after the first 60 days of the base year. The contractor was paid the full \$3.7 million for the base year.

Exercise of the First Option

FAR 17.207 requires that, before exercising an option, the contracting officer must determine whether the option fills an existing need of the Government and is the most advantageous method of fulfilling a need, considering price and other factors. The regulation also requires the contracting officer to determine and document that the option was exercised in accordance with the original terms and conditions evaluated as part of the base award, including any price and work requirements.

On October 27, 2007, the contracting officer exercised the first option at the original, evaluated price of \$3.9 million and certified that the option filled an existing need of the Government and was the most advantageous method of fulfilling a need, considering price and other factors. However, the changes proposed by Defense and the contractor indicated that the option did not fill an existing need of the Government. The contracting officer did not consider those proposed changes in exercising the option.

Actions Taken by the Center

On September 22, 2008, 7 months after we presented these issues to the Center, the contracting officer issued a modification to the first option that reduced staffing for help-desk support, increased planning support provided by subject matter experts, and renegotiated pricing. This modification resulted in a \$1,072,206 reduction in the cost of the first option for services that did not fill a need and were not provided. The contracting officer also decided not to exercise the second option.

RECOMMENDATIONS

We recommend that the Center:

- request the Defense Comptroller to provide a final decision on the use of \$1.2 million of O&M funds instead of RDT&E funds for three task orders identified in our previous review that remain unresolved,
- work with Defense to resolve funds (\$1.4 million identified in our previous review and \$3.7 million identified in our current review) that were used for equipment and services provided after the period of performance for which the funds were obligated,
- work with Defense to determine whether the contractor provided the full level of services in the base year for one task order, and
- determine whether options to task orders fill an existing need of the Government before awarding the options.

NATIONAL INSTITUTES OF HEALTH COMMENTS

In comments on our draft report, NIH concurred with our recommendations. NIH stated that for those areas under its control, it had taken action or was planning corrective measures in conjunction with Defense. NIH's comments are included as Appendix D.

APPENDIXES

RESOLUTION OF PREVIOUS FINDING ON COMPLIANCE WITH BONA FIDE NEEDS STATUTE
As of June 12, 2008

Task Order Number	Payment for Services Outside Period of Performance	Final Determination by the Center*				Final Determination Pending by the Center
		Resolved Internally by Reallocation of Funds	Actions Completed	Actions Determined but Not Taken	Funds To Be Obtained From Defense	
		Funds Returned to Defense	Funds Obtained From Defense	Funds To Be Returned to Defense	Funds To Be Obtained From Defense	
2054	\$11,318,218	(\$10,457,603)	\$2,183,000	\$0	\$562,286	\$0
2204	986,258	(522,258)	0	0	0	(464,000)
2215	975,019	(570,186)	0	(476,035)	71,202	0
2228	5,849,927	(4,484,945)	1,043,576	0	0	0
2232	343,550	255,068	0	0	54,636	(53,581)
2315	581,073	(581,073)	0	(10,366)	10,366	0
2331	1,014,910	(1,013,468)	0	(1,442)	0	0
2361	1,124,876	1,047,306	0	0	0	0
2377	62,636	21,018	0	(83,654)	0	0
2380	2,631,569	1,168,431	0	0	0	(925,204)
2412	265,046	(272,179)	0	0	7,133	0
2429	3,203	63,856	0	(67,059)	0	0
2435	196,586	(193,691)	0	0	0	0
	\$25,352,871	(\$15,539,724)	\$3,226,576	(\$638,556)	\$705,623	(\$1,442,785)

*The Center = National Institutes of Health, Information Technology Acquisition and Assessment Center.

**NONCOMPLIANCE WITH BONA FIDE NEEDS STATUTE
IDENTIFIED IN CURRENT REVIEW
As of June 12, 2008**

Task Order Number	Fiscal Year 2006	Fiscal Year 2007	Total
C2204	\$237,693	\$0	\$237,693
C2215	0	361,064	361,064
C2228	710,857	812,467	1,523,324
C2232	748,987	664,557	1,413,544
C2377	81,100	0	81,100
C2380	116,271	0	116,271
Total	\$1,894,908	\$1,838,088	\$3,732,996

**NONCOMPLIANCE WITH ACQUISITION REGULATIONS
AND CONTRACT PROVISIONS IDENTIFIED IN CURRENT REVIEW**

Category Code and Description

- A** The task order file did not contain a record of the solicited contractors’ no-bid responses.
- B** The Center contracting officer did not document the award decision by signing the solution recommendation documentation package.
- C** The task order file did not document the contracting officer technical representative’s training and experience.
- D** The task order file did not define the contracting officer technical representative’s duties.
- E** The task order file did not contain the contracting officer technical representative’s quality assurance surveillance plan.
- F** The task order file did not document whether the contracting officer considered proposed changes to the statement of work.

Task Order Number	Category Code						Total Errors
	A	B	C	D	E	F	
2430	A	B	C		E		4
2494	A	B	C	D	E		5
2520	A	B			E	F	4
2524	A	B			E		3
2537					E		1
Total	4	4	2	1	5	1	17



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

MAR 30 2009

TO: Daniel R. Levinson
Inspector General, HHS

FROM: Acting Director, NIH

SUBJECT: Comments on the Draft Report, *Follow-up Review of Procurements Made by the National Institutes of Health for the Department of Defense (A-03-08-03000)*

The National Institutes of Health (NIH) appreciates the opportunity to review and comment on the Office of Inspector General (OIG) draft report, entitled *Follow-up Review of 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.

We concur with the four recommendations in the report. 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 Wanda F. Russell, NIH Office of Management, at 301-435-3902 or at RussellW@od.nih.gov.

A handwritten signature in black ink, appearing to read "Raynard S. Kington".

Raynard S. Kington, M.D., Ph.D.

Attachment

Comments From the National Institutes of Health on the Office of Inspector General Draft Report, *Follow-up Review of Procurements Made by the National Institutes of Health for the Department of Defense* (A-03-08-03000)

Recommendation 1. NITAAC should request the Defense Comptroller to provide a final decision on the use of \$1.2 million of O&M funds instead of RDT&E funds for three task orders identified in the OIG's previous audit and that remain unresolved.

NITAAC concurs with the recommendation but has been unsuccessful in resolving this matter by working with the Department of Defense (DOD) Contracting Officer Representatives (COR). NITAAC is escalating these concerns to the Defense Comptroller. Specifically, NITAAC is contacting the Defense Comptroller to ask for a final decision on the use of \$1.2 million of O&M funds instead of RDT&E funds for the three task orders identified in the OIG's previous audit and that remain unresolved. NITAAC plans to complete this task by April 29, 2009. However, resolution by NITAAC will not be possible until the Defense Comptroller responds with a final decision.

Recommendation 2. NITAAC should work with Defense to resolve funds (\$1.4 million identified in the OIG's previous review and \$3.7 million identified in the OIG's current review) that were used for equipment and services provided after the period of performance for which the funds were obligated.

NITAAC concurs with the recommendation and is working to resolve these issues. NITAAC is reviewing all task orders in question and has contacted the appropriate DOD offices to return or obtain funding as needed to correct the funding issues. NITAAC is also working with the NIH Office of Financial Management (OFM) to correct the transactions in the NIH Administrative Data Base so that expenditures are properly allocated to the task orders' period of performance. NITAAC, in coordination with OFM and DOD, plans to complete the reconciliation and corrections by May 1, 2009.

Recommendation 3. NITAAC should work with Defense to determine whether the contractor provided the full level of services in the base year for one task order.

NITAAC concurs that the surveillance of all task orders should be carried out so that the Government knows what services were delivered and whether all contractual services were received.

In this particular case, confusion arose between DOD and NITAAC on order modification and whether the services provided matched task order requirements. DOD has stated that it requested a modification to reduce the scope of services to be provided in the base year. However, NITAAC has no record of the DOD's request.

It is NITAAC's position that DOD did receive the full level of services for the base year because this task order was a firm fixed-price order and the COR approved invoices indicating that all the services contracted for were accepted.

Comments From the National Institutes of Health on the Office of Inspector General Draft Report, *Follow-up Review of Procurements Made by the National Institutes of Health for the Department of Defense (A-03-08-03000)*

To ensure complete surveillance of future task orders, NITAAC plans to implement a checklist to ensure key elements of quality assurance are included in the Quality Assurance Surveillance Plan that is submitted with the Task Order Request Package. The following are among the key items that will be checked: identification of items for surveillance; standard of performance; acceptable quality levels; method of surveillance; objective measures; key item incentives and penalties; and COR training, qualifications, availability, proximity, background, and experience. The checklist will be included in the contract file and signed by the Contracting Officer. NITAAC plans to implement the checklist and training for its use by June 1, 2009.

Recommendation 4. NITAAC should determine whether options to task orders fill an existing Government need before awarding the options.

NIH concurs with the recommendation and already determines whether contract options fill an existing Government need before award. Before an option is exercised, NITAAC provides a "Notice of Intent" to exercise an option to its customer, who verifies that the option requirements are valid. The decision to exercise an option is recorded in a determination and finding and is documented within the contract file.

3/26/09