

October 14, 2005



## Acquisition

Contracts Awarded to Assist the  
Global War on Terrorism by the  
U.S. Army Corps of Engineers  
(D-2006-007)

Department of Defense  
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### **Acronyms**

AED	Afghanistan Engineer District
ANA	Afghan National Army
CPPC	Cost-Plus-a-Percentage-of-Cost
DFARS	Defense Federal Acquisition Regulation Supplement
DoD IG	Department of Defense Inspector General
FAR	Federal Acquisition Regulation
GAO	Government Accountability Office
IDIQ	Indefinite-Delivery, Indefinite-Quantity
IGCE	Independent Government Cost Estimate
OMC-A	Office of Military Cooperation-Afghanistan
PNM	Price Negotiation Memorandum
SIGIR	Special Inspector General for Iraq Reconstruction
TAC	Transatlantic Programs Center
USACE	United States Army Corps of Engineers
USCENTCOM	United States Central Command



INSPECTOR GENERAL  
DEPARTMENT OF DEFENSE  
400 ARMY NAVY DRIVE  
ARLINGTON, VIRGINIA 22202-2884

October 14, 2005

MEMORANDUM FOR COMMANDER, U.S. ARMY CORPS OF ENGINEERS  
AUDITOR GENERAL, DEPARTMENT OF THE ARMY

SUBJECT: Report on Contracts Awarded to Assist the Global War on Terrorism by the U.S. Army Corps of Engineers (Report No. D-2006-007)

We are providing this report for review and comment. We considered comments from the U.S. Army Corps of Engineers when preparing the final report.

DoD Directive 7650.3 requires that all recommendations be resolved promptly. The U.S. Army Corps of Engineers comments were partially responsive. We request additional comments on Recommendations 1., 3., and 4. We request that the additional comments by the U.S. Army Corps of Engineers be provided by November 14, 2005.

If possible, please send management comments in electronic format (Adobe Acrobat file only) to [Audcm@dodig.osd.mil](mailto:Audcm@dodig.osd.mil). Copies of the management comments must contain the actual signature of the authorizing official. We cannot accept the / Signed / symbol in place of the actual signature. If you arrange to send classified comments electronically, they must be sent over the SECRET Internet Protocol Router Network (SIPRNET).

Questions should be directed to Mr. Terry L. McKinney at (703) 604-9288 (DSN 664-9288) or Mr. John A. Seger at (703) 604-9254 (DSN 664-9254). See Appendix G for the report distribution. The team members are listed inside the back cover.

By direction of the Deputy Inspector General for Auditing:

A handwritten signature in black ink, reading "Richard B. Jolliffe".

Richard B. Jolliffe  
Assistant Inspector General  
Contract Management

## Department of Defense Office of Inspector General

Report No. D-2006-007

October 14, 2005

(Project No. D2004-D000CF-0186)

### Contracts Awarded to Assist the Global War on Terrorism by the U.S. Army Corps of Engineers

#### Executive Summary

**Who Should Read This Report and Why?** Those involved in planning and buying construction services in Afghanistan should read this report. The report provides insight on actions taken by U.S. Army Corp of Engineers personnel regarding the planning, design, construction, and contracting procedures for creating facilities for the Afghan National Army, as well as construction projects in the U.S. Central Command area of responsibility.

**Background.** Following the terrorist attacks of September 11, 2001, the United States determined that those responsible for the attacks were receiving safe harbor in Afghanistan. On September 19, 2001, the U.S. Central Command began military operations against Al Qaeda and the Taliban government in Afghanistan. In February 2002, the Commanding General of the U.S. Central Command stated that the Taliban no longer held power in Afghanistan. On March 25, 2002, the Secretary of Defense stated that the U.S. and coalition forces would help create and train the Afghan National Army once funds were identified, but stated that the size of the Afghan National Army would be proportionate to available funds.

The U.S. Central Command was responsible for conducting military and humanitarian operations in Afghanistan and requested that the Transatlantic Programs Center, U.S. Army Corps of Engineers, Winchester, Virginia, develop contracts to design and build facilities in the U.S. Central Command area of responsibility, including Afghanistan. In December 2002 and January 2003, the U.S. Army Corps of Engineers awarded two design and build contracts for construction projects in Afghanistan, including facilities to house and support the Afghan National Army. The first was a letter contract and the second was an indefinite-delivery, indefinite-quantity contract which used undefinitized task orders. Since then, the U.S. Army Corps of Engineers awarded 13 contracts from 2 multiple awards for construction projects within the U.S. Central Command area of responsibility. Our audit focused on these 15 contracts. We reviewed the letter contract valued at \$38.2 million and 36 task orders from the 14 indefinite-delivery, indefinite-quantity contracts valued at \$743.8 million.

**Results.** DoD and the U.S. Army Corps of Engineers did not adequately design and construct facilities in Afghanistan. Furthermore, the U.S. Army Corps of Engineers did not properly execute the contracts. Specifically, we found that:

- Design and construction requirements were unclear and kept changing, which increased the cost of the work, and standards for Afghan construction were not formalized.
- The Transatlantic Center, U.S. Army Corps of Engineers inappropriately used Army operations and maintenance funds for a construction project for U.S. troops valued at \$35.2 million, a potential violation of the Antideficiency Act.
- The U.S. Army Corps of Engineers had two contracting offices awarding contracts pertaining to the same projects. Although several options were available, the U.S. Army Corps of Engineers still placed requirements (valued at \$19.7 million) with a single contractor when more competitive contracts were available.
- Transatlantic Center, U.S. Army Corps of Engineers contracting officials permitted out-of-scope items on one contract.
- The Transatlantic Center, U.S. Army Corps of Engineers improperly awarded task orders without clearly describing the work to be performed and without negotiating a fair and reasonable price prior to a contractor beginning work. Furthermore, contracting personnel maintained that these contracts were firm-fixed-price contracts, but the contracts gave the contractors an incentive to increase costs.

As a result of all these issues, no assurance existed that DoD received fair and reasonable prices or the best value for work performed.

We recommend that the Commander, U.S. Army Corps of Engineers terminate Contract DACA78-03-D-0002 and use the 10 contracts in place under a multiple award mechanism to fulfill reconstruction requirements in Afghanistan. We recommend to the Commander, U.S. Army Corps of Engineers that it develop standard sets of designs for Afghan National Army facilities that are being repetitively constructed in Afghanistan and utilize those designs for future construction of like facilities. We also recommend that the U.S. Army Corps of Engineers request that the Defense Contract Audit Agency conduct a review of costs for Contract DACA78-03-D-0002. In addition, we recommend that the Commander, U.S. Army Corps of Engineers initiate a preliminary review to determine whether the use of Army operations and maintenance funds for a construction project was improper and resulted in an Antideficiency Act violation in accordance with DoD 7000.14-R, "Financial Management Regulations." See the Finding for detailed recommendations.

**Management Comments and Audit Response.** The comments from the Deputy Commander, U.S. Army Corps of Engineers were partially responsive. The Deputy Commander nonconcurred with the recommendation to terminate Contract No. DACA78-03-D-0002 and stated that it was still more advantageous to use this contract under certain circumstances. The Deputy Commander met the intent of our recommendation to formalize and develop a design standard for all Afghan National Army facilities being repetitively constructed. The Deputy Commander stated that established standards are now in place and experience little change except for incorporating lessons learned. The Deputy Commander did not address the recommendation to request that the Defense Contract Audit Agency conduct a review of the costs associated with Contract DACA78-03-D-0002. The Deputy Commander

nonconcurrent with the recommendation to initiate a preliminary review to determine if the use of operations and maintenance funds for task order 14 from Contract DACA78-03-D-0002 resulted in an Antideficiency Act violation. The Deputy Commander stated that the Transatlantic Programs Center, Winchester, Virginia, did not engage in illegal project splitting, and did not exceed statutory thresholds for use of operations and maintenance funds.

We believe that the U.S. Army Corps of Engineers should stop using Contract No. DACA78-03-D-0002 because the awardee, Contrack International, Inc., is 1 of 10 contractors under the multiple award contract mechanism and any requirement placed on the single award contract can easily be placed on the multiple award contract where all 10 contractors should have a fair opportunity to obtain the business. We also believe that the U.S. Army Corps of Engineers should initiate a preliminary review of task order 14 because the project was improperly split to avoid using military construction funds. We request that the Deputy Commander, U.S. Army Corps of Engineers reconsider his position and provide additional comments to Recommendations 1., 3., and 4. by November 14, 2005. See the Finding section of the report for a discussion of the problems noted and the Recommendations section of the report for a discussion of the management comments as it applied to the recommendations. Also see Appendix F for a discussion of the management comments as they applied to the finding, and see the Management Comments section of the report for the complete text of the comments.

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## Background

The U.S. Central Command (USCENTCOM) is a unified command and its geographic area of responsibility stretches from the horn of Africa to Central Asia. As a result, USCENTCOM is responsible for conducting military and humanitarian operations in Afghanistan. The U.S. Army Corps of Engineers (USACE) manages and designs the construction of military facilities for the Army and Air Force in the United States and around the world. The Transatlantic Programs Center (TAC), a subordinate element of USACE, is responsible for providing these same services to the Army and Air Force in the Middle East, Africa, Russia, and the Central Asian states. To accomplish this mission, TAC awarded and administered contracts for the reconstruction of military facilities in Afghanistan.

**Afghanistan Training and Reconstruction Mission.** In February 2002 USCENTCOM reported to Congress that the Taliban government no longer held power in the country and in March 2002 the Secretary of Defense announced that U.S. and coalition forces would help to create and train the Afghan National Army (ANA).

Specifically, on March 25, 2002, the Secretary of Defense reported that plans were underway to train the ANA. The Secretary also stated that DoD was trying to obtain funds for this effort and the size of the ANA would be proportionate to the funding. In April 2002 the President issued a Presidential Determination that stated assistance to Afghanistan is in the national interest of the United States. Further, he stated that an unforeseen emergency existed that required immediate military assistance to the government of Afghanistan for purposes of training and equipping the Afghan national armed forces. On May 21, 2002, the Commander of Operation Enduring Freedom announced that the United States had begun training Afghan soldiers. In June 2002 a forward engineer support team from USACE, already supporting USCENTCOM in Afghanistan, developed an initial plan for rebuilding the ANA basic training facility.

Because the forward engineer support team realized that the task of building brigade compounds to house the Afghan National Army was a much larger project than they were organized to accomplish, the mission was assigned to TAC. As a result, in September 2002, TAC deployed an integrated team of engineers, architects, cost analysts, and contracting personnel to Afghanistan. Because the ANA was being initiated from scratch, one battalion was trained at a time. The objective of USCENTCOM and the Office of Military Cooperation-Afghanistan (OMC-A) was to have the barracks ready as battalions graduated. OMC-A is responsible for training the ANA and works with the government of Afghanistan and the international community to reconstruct the Afghan security and defense sectors. Initially, TAC developed plans to house three brigades. A brigade consists of 3,000 soldiers (600 troops per battalion and 5 battalions per brigade). The initial locations for the brigades were existing facilities that were in poor condition from age and U.S. bombardment. As a result, most work was new construction with some renovation of existing facilities. The initial mission of TAC was to assist OMC-A in:



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- providing master plans, including phasing plans and costs, for facilities to house graduating battalions of the ANA;
  - assessing the Ministry of Defense engineering and construction capabilities;
  - assessing the capabilities of local contractors; and
  - obtaining information on locally available materials, equipment, and supplies.

According to TAC personnel, when they arrived in September 2002, at least two battalions had already graduated, and since there were no facilities to house them, some of the recently graduated recruits were leaving and returning to warlords. TAC personnel also determined that the project to house the ANA was already 6 months behind schedule. It was continuing to get behind because one recruit battalion graduated nearly every month.

**Facility Specifications.** TAC initially assessed the existing facilities where the brigade compounds were to be constructed. Because no designs existed, the TAC architect developed floor plans for facilities associated with a brigade compound (headquarters buildings, barracks, health centers, training rooms, water treatment plant, power plant, etc.). TAC worked with OMC-A personnel and Afghan Ministry of Defense personnel during this time in assessing the building requirements for the ANA. TAC also performed market research in Kabul, Afghanistan, to ascertain the type, quality and quantity, and cost of building material available locally. In addition, TAC assessed the quality and size of the local labor market.

TAC personnel stated that the design criteria for the facilities had to be sustainable by Afghans after construction was completed. The Afghan-sustainable design criteria included using systems and materials that Afghans can fix, maintain, use, or have access to after the United States leaves. According to TAC, time was of the essence because the project was already behind schedule. After the initial assessment, and funds for reconstruction became available, TAC awarded two contracts for the initial efforts.

**Contracting in Afghanistan.** In a November 1, 2001, memorandum entitled “Posturing for a Wartime Environment,” the Acting Assistant Secretary of the Army for Acquisition, Logistics, and Technology discussed the imperative nature of timely contracting to provide the United States Armed Forces the capabilities needed to successfully defeat terrorists. The Assistant Secretary stated that critical contract requirements in support of the anti-terrorism war effort should be accorded the highest priority. Furthermore, the Assistant Secretary stated that DoD had to be aware that any established “need by” dates be met, and when mission requirements were of such a critical time-sensitive nature and mainstream contracting approaches were not feasible, other contracting methods could be used. Two such methods the Assistant Secretary stated were awarding contracts under limited competition, citing “unusual and compelling urgency,” or awarding undefinitized contractual actions.

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**TAC Contracts.** In December 2002, TAC awarded letter Contract DACA78-03-C-0009 to Perini Corporation for design and construction services for one brigade facility in Afghanistan. Then in January 2003, it awarded contract DACA78-03-D-0002 to Contrack International, Inc., as an indefinite-delivery, indefinite-quantity (IDIQ) contract for design and construction services covering all of Afghanistan. As specific requirements or projects were identified, task orders were awarded to Contrack International under this contract but the details of the task orders were undefinitized. Contract DACA78-03-D-0002 was awarded based on full and open competition and Contract DACA78-03-C-0009 was awarded based on limited competition.

In March 2003, TAC awarded a limited-competition multiple award contract to three contractors for design and construction services in the USCENTCOM area of responsibility. TAC cited unusual and compelling urgency for not fully competing this multiple award contract, and awarded the contracts for 1 year until a fully competed multiple award contract was put in place. According to TAC, this contract was awarded to handle mostly requirements in Iraq, but was used in other areas of the USCENTCOM area of responsibility. Then in January 2004, TAC awarded a multiple award contract to 10 contractors under full and open competition procedures. The scope of these contracts was also for design and construction services in the USCENTCOM area of responsibility.

**Afghanistan Engineer District Contracts.** TAC initially operated an area office in Kabul, Afghanistan, to assist OMC-A with projects for ANA. In addition to assisting with ANA, USACE also provided assistance to USCENTCOM and the U.S. Agency for International Development for other construction projects. In order to consolidate all USACE activities, the Afghanistan Engineer District (AED) became operational in March 2004. This organization is no longer part of TAC, and has its own contingent of personnel that is composed of USACE personnel. AED personnel, including contracting officers, are assigned to AED on temporary duty for approximately 6-month intervals. Besides taking over the management of Contract DACA78-03-D-0002 from TAC, AED has awarded at least seven contracts, including five as part of a multiple award contract, for design and construction services in Afghanistan.

## Objectives

The objectives of this audit were to examine contract requirement determination procedures, appraise the validation of contract requirements, and determine compliance with the contract award procedures of the Federal Acquisition Regulation (FAR). See Appendix A for a discussion of the scope and methodology. See Appendix B for prior coverage related to the objective.

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## **U.S. Army Corps of Engineers Contract Management for Construction in U.S. Central Command Area of Responsibility**

DoD and USACE did not adequately design and construct facilities in Afghanistan, and USACE did not effectively execute the contracts awarded for these requirements. Specifically,

- Design and construction requirements were unclear and kept changing, which increased the cost of the work, and standards for Afghan construction were not formalized.
- The Transatlantic Center, U.S. Army Corps of Engineers inappropriately used operations and maintenance funds for a construction project for U.S. troops valued at \$35.2 million, a potential violation of the Antideficiency Act.
- Communication problems existed between USACE personnel in Afghanistan and Winchester, Virginia.
- The U.S. Army Corps of Engineers had two contracting offices awarding contracts pertaining to the same projects and area of responsibilities. Furthermore, the U.S. Army Corps of Engineers still placed requirements (valued at \$19.7 million) with a single contractor when more competitive contracts were available.
- The Transatlantic Center, U.S. Army Corps of Engineers contracting officials permitted out-of-scope items on one contract.
- The Transatlantic Center, U.S. Army Corps of Engineers improperly awarded task orders without clearly describing the work to be performed and without negotiating a fair and reasonable price at the outset. Contracting personnel maintained that these contracts were firm-fixed-price contracts, but the contracts gave the contractors an incentive to increase costs.

As a result, there is no assurance that DoD paid fair and reasonable prices for work performed. Furthermore, contract changes to the scope of work unnecessarily increased the cost of construction.

### **Contracts Awarded for USCENTCOM Area Construction**

We reviewed 15 contracts valued at \$782 million for design and construction services within the USCENTCOM area of responsibility. All contracts and task

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orders were awarded by TAC, and modifications were awarded by either TAC or later by AED. The 15 contracts consisted of:

- 1 letter contract with 14 modifications that included 7 change orders (\$38.2 million) (Contract DACA78-03-C-0009);
- 1 firm-fixed-price IDIQ contract and 13 undefinitized task orders and 1 definitized task order (\$183.6 million) (Contract DACA78-03-D-002);
- 3 IDIQ contracts and 6 task orders (\$88.3 million) awarded as a limited-competition multiple award contract mechanism; and
- 10 IDIQ contracts and 16 task orders (\$471.9 million) awarded as a fully competed multiple award contract mechanism.

**Scope of Work.** All contracts were for design and construction services, and included new construction, renovation, repair, and operations and maintenance. Contract DACA78-03-C-0009 was for construction of one brigade facility at Pol-e-Charki, Afghanistan, and Contract DACA78-03-D-0002 covered the entire country of Afghanistan. The multiple award contracts geographically covered the entire USCENTCOM area of responsibility. Of the \$782 million we reviewed, \$585 million was for design and construction services in Afghanistan and \$197 million was for design and construction services in other countries within the USCENTCOM area of responsibility, not including Iraq. Of the \$585 million for work in Afghanistan, \$473.1 million was for construction of ANA facilities. See Appendix C for a summary of all contracts we reviewed.

## **Design and Construction of ANA Facilities and Contract Execution**

TAC did not adequately design and construct facilities for the ANA facilities. By the time TAC arrived in Afghanistan, construction of ANA facilities was already two months behind schedule. This urgent situation forced TAC to quickly award the initial contracts, which were poorly executed. Specifically the contract requirements were unclear and kept changing, Afghan construction standards were not formalized, the wrong type of funds were used, and there was a lack of communication between USACE personnel in Afghanistan and the United States.

In addition, USACE did not adequately plan the follow-on contracts. Two USACE contracting offices were awarding contracts for the same type work and USACE was not making optimal use of a multiple award contract mechanism.

FAR 7.104(a) states that:

acquisition planning should begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award or order placement is necessary. In developing the plan, the planner shall form a team consisting of all those who will be

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responsible for the significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel.

**Planning for Rebuilding the ANA.** On March 25, 2002, the Secretary of Defense stated that the United States and other coalition forces will help to create and train the ANA. The Secretary estimated that “the size of a national [Afghan] army would be proportionate to available funds.” As a result, DoD knew in late March 2002 that it had a role in the creation of the ANA. However, there was little or no planning for acquisition support to construct facilities to house the ANA.

USCENTCOM requested in July 2002 that TAC provide assistance to support the development of the ANA. However, TAC personnel were not deployed to Afghanistan until September 14, 2002, nearly 6 months after the Secretary of Defense March 25, 2002, statement about creating the ANA. To make matters more urgent, Headquarters, USACE stated that the training of ANA troops began in June or July 2002, and by October 2002, two battalions had already graduated and required housing. According to TAC personnel some of the ANA soldiers deserted and returned to the warlords because the newly trained Afghan soldiers did not have housing.

After assessing the situation in Afghanistan in September and October 2002, the TAC team concluded that the ANA construction program was at least 6 months behind schedule. The team concluded that the program would continue to lag behind because the ANA was in the process of being formed and it was projected that a continuous stream of one trained battalion would graduate basic training each month until November 2003 (except December 2002). Consequently, by November 2003, facilities had to be constructed to house each of these battalions (approximately 7,800 soldiers) of the ANA. As a result, TAC quickly began preparing the documentation in order to award a contract to house the soldiers.

There was very little time to plan the construction of the compounds. To begin the process and be in position to award a contract to construct facilities, the TAC team had to quickly develop a master plan of the initial three compounds (Kabul Military Training Compound; Pol-e-Charki, Afghanistan; and Darualaman, Afghanistan), specifying the facility type and locations on the site for the facilities. In effect, TAC had approximately 3 months to develop floor plans, site plans, and develop a contract for construction of a small town, including infrastructure such as power plants and sewage. The TAC architect began preparing floor plan diagrams for troop barracks, dining facilities, and administrative buildings. USCENTCOM should have notified USACE in March 2002 that it required assistance in building facilities for the ANA.

TAC originally planned to award one contract, but because of mistakes TAC personnel made in preparing the information in the solicitation to the prospective contractors, it awarded two contracts. One contract was awarded in December 2002 and a second contract was awarded in January 2003. Because the construction of the compounds was behind schedule, task orders were hurriedly awarded without fully describing the requirements.

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**Initial Contract Awards.** In October 2002, there was a sense of urgency to have work begin and TAC requested proposals for the reconstruction efforts in Afghanistan on a cost-plus-fixed-fee and IDIQ basis. The scope of work was for a design and build contract under which design and construction would be performed on individual task orders including new construction; renovations; alterations; improvement; repairs; minor construction including site work, utility, and other associated work necessary for a fully functional facility; and roadway work at various locations within Afghanistan. The contractor was also to provide limited operations and maintenance support for power plants, water and wastewater treatment plants, sewage treatment, and associated distribution systems at various military installations. The contract was for a base year and 4 option years totaling \$950 million and the request for proposals were issued under full and open competition. Eight contractors provided bids, of which six were determined to be in the competitive range.

However, while analyzing the proposals, a TAC cost analyst stated that a cost realism analysis of the contractors' proposals could not be performed because the solicitation and evaluation process was not set up that way. The analyst stated that the procedures for the evaluation process did not include cost realism, only reasonableness, and the technical requirements did not match the requirements of the sample project for which the contractors bid was based on. The contracting officer also stated that the contractors had problems developing a cost-plus-fixed-fee proposal for construction because of the circumstances in Afghanistan (i.e., scope, security, insurance, etc.).

In order to award a contract and begin work, TAC did not further pursue awarding a cost-plus-fixed-fee contract, but instead requested that the six contractors that were determined to be within the competitive range resubmit their proposals under a firm-fixed-price basis. Four contractors submitted bids and Contract DACA78-03-D-0002 was eventually awarded on January 17, 2003, to Contractrack International, Inc., as a firm-fixed-price IDIQ contract. Task orders were awarded as specific work requirements were identified.

Because TAC did not adequately plan the first contract and did not award it on a timely basis, and work had to begin at one facility, TAC performed a limited competition for the second contract and sent a second request for proposal to the same six contractors determined to be in the competitive range for the first contract. All six contractors provided bids. The scope for this contract was more specific and was for construction efforts to house ANA troops at a compound at Pol-e-charki, Afghanistan. The requirement was for construction of 33 facilities including barracks, a dining facility, a power plant, a water treatment facility, and a wastewater treatment facility with completion by June 2003. TAC awarded Perini Contract DACA78-03-C-0009 on December 31, 2002, and the selection criteria was based on best value. The contract was issued as a letter contract and the price was definitized in March 2003. However, this firm-fixed-price contract also underwent revision and grew from \$18.9 million to \$38 million. TAC's inability to promptly award the first contract caused the need for this letter contract to be awarded.

**Contract Execution.** After the contracts were awarded, the requirements were poorly executed. Requirements were unclear and kept changing, Afghan

construction standards were not formalized, and wrong funds were used on one task order valued at \$35.2 million, potentially violating the Antideficiency Act. In addition, there was a lack of communication between USACE personnel in Afghanistan and the United States.

**Unclear and Changing Requirements.** Prices were not fixed at the outset because TAC awarded most work as undefinitized actions and did not definitize the actions in accordance with FAR and Defense Federal Acquisition Regulations Supplement (DFARS). Furthermore, the requirements were not clearly understood and underwent almost constant change.

For example, in task order 2 under Contract DACA78-03-D-0002, Contrack began design and construction work on the Kabul Military Training Complex on April 4, 2003, for \$14.5 million. Initially, this requirement was for construction of facilities to house U.S. military personnel training the ANA. TAC justified using an undefinitized contract action because work had to begin immediately so that work was completed by December 2003. The TAC contracting officer acknowledged that she knew that this was not the entire requirement and that the work could not be completed by December, but that OMC-A and the USACE personnel in Afghanistan said that work had to begin. The original scope of work was for the design and renovation of 1 facility and construction of 16 structures. The table below illustrates the difference between the original requirement and how it appears after 23 modifications in September 2004.

**Table 1. Changing Requirements of Task Order 2**

	Type of Work		Task Order Value
	Renovation	Construction	
Original Requirement	1	16	\$14.5 million
Current Requirement	13	22	\$48.1 million

This Task order was modified on a continuous basis and through modification 23 issued in September 2004, the task order consisted of renovating 13 buildings, new construction of 22 structures, and demolishing 5 buildings. Moreover, the requirements for construction of 9 of the original 16 items were deleted after work began and requirements for construction of 2 items were added and deleted between the original requirement and modification 23. There was never a firm requirement, not even 17 months after work began. As of October 2004, the value of this task order was \$48.1 million and was approximately 88 percent complete.

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Confusion and indecisiveness caused delays in the performance of the task orders. For example, Contract DACA78-03-D-0002, task order 7 was a 6-month task order for operations and maintenance services with options for two additional 6-month periods. However, the Afghanistan Area Office (It later became the AED), TAC, and Contrack disagreed on what work was to be accomplished under this task order. As a result, USACE contracting personnel at the Afghanistan Area Office refused to pay Contrack because they believed that it was not performing the required work. Contrack then presented information to the contracting officer at TAC insisting it had performed operations and maintenance services. The TAC contracting officer determined that Contrack would be paid for the work it had performed. Contrack agreed in negotiations to additional items in the scope of work and 2 more months of performance for the same price as its final proposal. After sending this task order to AED, problems continued. According to an AED contracting officer, AED did not receive a copy of the scope of work when it was originally awarded:

Because of this I [the AED contracting officer] strongly suspect that we [the government] paid for some things two and three times i.e., field trailers.

The lack of clearly defined scopes of work contributed to the confusion and indecision in performance of this task order.

Contract DACA78-03-C-0009, modification 5 illustrated another example of changing the requirement. The contract was to design and construct the first brigade compound at Pol-e-charki. Modification 5 definitized a portion of the work. However, contracting officials noted that the progress of the work had been delayed because the Government could not decide where it wanted to locate a power supply building. The price negotiation memorandum (PNM) stated that the contractor provided a printed chronology of events that documented the relocation of the power supply building. The PNM stated that "the chronology demonstrates the start-stop-relocate series directed by the Government or military forces that caused the delayed start, which will in-turn, delay the completion." The following lists a chronology of site changes to the power supply building:

- January 6, 2003: The building was sited on the east side of the base.
- January 15, 2003: The building was sited to the west side of the base.
- March 8, 2003: The building was sited to the east side of the base.
- March 31, 2003: The building was moved 150 meters west to save the concrete slabs.
- April 4, 2003: The building was moved back to the location on the east side established on March 8, 2003.

Another aspect that prevented effective contract execution was that Afghan construction standards were not formalized.

**Afghanistan Construction Standards.** USACE never formalized the Afghan building standards that were used in construction of the various ANA facilities. The TAC architect began preparing floor plans of the various ANA facilities using construction criteria that were considered to be "Afghan-



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sustainable." However, the Afghan-sustainable standard was generally considered to be of lesser quality than U.S. standards and was not specifically identified.

TAC personnel could not quantify the time or costs of changes made by OMC-A personnel or USACE personnel in Afghanistan to ANA designs. The TAC architect stated that as OMC-A and USACE personnel in Afghanistan rotated in, the new personnel would try changing design layouts to buildings. Some of the military personnel did not have engineering backgrounds and wanted to change building layouts. According to the TAC architect, this caused delays to the project, but he could not quantify the delay.

Furthermore, Contrack International stated that changes occurred as they prepared the designs and did not track any changes until designs were 100 percent complete and the task order was definitized. Contrack stated that OMC-A and USACE personnel in Afghanistan initiated some changes in the field before definitization and never told the TAC contracting officers. However, Contrack stated that it did not initiate any of the work, rather the work was requested by the Government. Contrack stated that it wanted to help the client, and did not want to stop work for a small amount of money.

Some general changes made to design of ANA facilities included removing baseboard heating and replacing that with wood-burning stoves, removing air conditioning from the ANA barracks, and moving toilets so they were no longer located in the barracks. These changes affected only the first several compounds. According to the architect, the switch to wood-burning stoves and removing the air conditioning from the barracks was budget-driven, and the moving of the toilets was for cultural reasons.

Without established building standards, task order requirements were often poorly defined and frequently changed. For example, Contract DACA78-03-D-0002, task order 2 was awarded on April 4, 2003, and was for construction of the Kabul Military Training Center. The original estimated price, including options, totaled \$17.5 million. The order was modified 23 times and was eventually definitized for more than \$48 million.

Contract DACA78-03-D-0002, task order 4 was for the design and construction of brigade bed-down facilities for Afghan soldiers at Pol-e-charki, Afghanistan. It was originally awarded with a not-to-exceed value of \$29.5 million. Task order 4 was later modified 11 times raising the total cost to \$45.6 million.

USACE must standardize building criteria to the maximum extent possible for construction in support of the ANA. This would help reduce excessive changes to task order requirements. Total ANA troop strength is unknown but could total up to 70,000 troops. Each compound houses approximately 3,000 troops. We were informed that three compounds are in various stages of completion, and task orders for four more compounds have been awarded. Thus, several additional compounds may be needed. Standardized construction requirements are still needed for ANA construction requirements in Afghanistan. Another task order was awarded that used the wrong type of funds that may violate the Antideficiency Act.

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**Improper Use of Funds.** USACE improperly used operations and maintenance funds for Task order 14 of Contract DACA78-03-D-0002. This project was funded with FY 2003 Army operations and maintenance funds.

Task order 14 was awarded to Contrack International, Inc., on September 29, 2003, and was for designing and building a pre-engineered metal barracks complex for U.S. military personnel at Kandahar Airfield, Afghanistan. The requirement was for 161 and later 168 barracks with bathroom and laundry facilities. The work began as an undefinitized award for a not-to-exceed amount of \$26 million.

This project was originally planned to be a competitive procurement, but after FY 2003 operations and maintenance funds became available, the acquisition strategy of the project was changed because the competitive procurement would have taken until past the end of the fiscal year. As a result, the project was placed on a task order on the single award to Contrack International, Inc., using operations and maintenance funds. The justification to do this was that the U.S. troops were currently being housed in tents which were in bad shape and would not last through the winter. Furthermore, the tents were fire hazards and had recently become infested with mice and now posed a significant health and safety hazard for the personnel. The U.S. personnel had been housed in the tents for 2 years.

With adequate planning this procurement could easily have been competed because the condition of living in tents pre-existed and was 2 years old, and DoD knew that using tents as a housing alternative was temporary. Furthermore, we believe that Military Construction Appropriations should have been used for this procurement instead of operations and maintenance funds.

Section 2805(c)(1)(a), title 10, United States Code (10 U.S.C. 2805) allows for the use of operations and maintenance funds for projects up to \$1.5 million

“in the case of an unspecified minor military construction project intended solely to correct a deficiency that is life-threatening, health-threatening, or safety threatening,” or

“\$750,000, in the case of any other unspecified minor military construction project.”

According to the TAC contracting officer, the justification to use operations and maintenance funds was that the \$26 million project was broken down into phases of \$1.5 million each, which, in the USACE opinion, met the thresholds allowed under 10 U.S.C. 2805. However, Comptroller General Decision 1991– [December 24, 1991] B-234326.15, ruled that the Air Force could not split a requirement or project into smaller projects to meet 10 U.S.C. 2805(c)(1). In addition, Army Regulation 420-10, “Management of Installation Directorates of Public Works,” paragraph 4-4a(2) prohibits the subdivision of a construction project.

The requirement and objective of this task order was to house 4,500 U.S. military personnel, which consisted of construction of 161 barracks for \$26 million.

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Through modifications the task order was eventually increased to \$35 million. However, contracting officials stated that the task order consisted of seven separate “phases.” Contracting officials took the position that the \$1.5 million limit could be applied separately to each phase. Thus, the task order included eight separate \$1.5 million line items for “design and construction” of Phases 1 through 7. (There were eight line items instead of seven because, inexplicably, Phase 6 consisted of two “increments.”) It is our opinion that it was invalid to divide the project into “phases” and claim that the limitation could be applied separately to each phase.

The task order also included a \$19 million line item for “procurement, delivery and erection of prefabricated barracks buildings complete with all fixtures, finishes, electrical, etc.” There was no specific justification for using operations and maintenance funds for this line item, so we assume that contracting officials did not consider these costs to be for “construction.” If they had, then the \$1.5 million limitation would have applied. In our opinion, “procurement, delivery, and erection” of these buildings constitutes construction, and operations and maintenance funds should not have been used to pay this \$19 million. We believe that the USACE should initiate a preliminary review to determine whether improper funds were used on this task order.

As mentioned earlier, the task order was originally planned to be a competitive procurement, but the competition was cancelled so that the order could be awarded prior to the end of FY 2003 before the operations and maintenance funds expired. The fact that the order was originally planned to be a competitive award sometime in FY 2004 shows that it was not truly urgent to award during FY 2003 and was awarded to use expiring funds.

**Communication Issues.** A lack of communication between TAC and USACE personnel in Afghanistan and changing personnel impacted the construction in Afghanistan.

According to the TAC contracting officer, lack of communication between TAC and USACE personnel in Afghanistan led to delays in definitizing work. TAC complained that the contractor reported to them that changes were made to task orders, rather than being informed by the Government official making the changes. This is the opposite of how the process should work. USACE personnel in Afghanistan should have discussed proposed changes to the task order with the contracting personnel at TAC, and after agreeing to any scope changes, the TAC contracting officer should notify the contractor of the proposed changes and request that the contractor prepare a proposal from which a fair and reasonable price could be negotiated. For example, changes were made in the field to task order 10 of Contract DACA78-03-D-0002 at a total cost of \$130,917. TAC was not asked to approve the costs of the changes until after the contractor had completed the work, demobilized from the site, and sent TAC a proposal to definitize the task order. Basically, TAC was only made aware of the changes after-the-fact when it received the bill.

Also, USACE personnel in Afghanistan stated that TAC contracting personnel failed to send pertinent contract documentation for administration purposes. For example, Contract DACA78-03-D-0002, Task order 7 was for operations and

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maintenance services at Pol-e-charki, the USACE Compound in Kabul, the Kabul Military Training Center, and the Palace Compound in Afghanistan. According to AED personnel, TAC did not send them the task order file that included the scope of work until after the base period had ended. The work was not definitized at the time of award and the scope of work was never adequately defined, resulting in disagreements between Contrack International, AED, and TAC. For example, AED contracting personnel stated that it was difficult to determine whether maintenance work under task order 7 should have been covered by warranty (a previous task order for construction), should have been completed under the punch list (a previous task order for construction), or was really a maintenance issue (task order 7). This resulted in continued problems with payments to the contractor and extended the period of performance and the scope of work. Former AED personnel believe that the Government may have paid for some of these same services more than once because they did not have the original scope of work when the task order was awarded.

**Two Contracting Offices.** After AED became a separate office, both TAC and AED contracting personnel awarded contracts for the projects and did not make optimal use of a fully competed multiple award contract mechanism. TAC and AED awarded seven contracting mechanisms with the same or similar scopes of work and overlapping periods of performance. During this time two contractors were awarded single contracts to provide design and construction services and were also awarded design and construction services contracts as part of a multiple award contracting mechanism. Furthermore, one of the contractors was performing both contracts at the same time.

For example, Contrack International, Inc. was awarded an IDIQ contract in January 2003 to provide construction services in Afghanistan. While this contract was open and Contrack International, Inc. was being awarded work under this contract, it was also 1 of 10 contractors awarded a contract under a multiple award mechanism a year later. Furthermore, AED awarded Contrack International, Inc. two more contracts for design and construction services in Afghanistan. In total, Contrack International, Inc. was awarded at least four contracts (two by TAC and two by AED) that are still open and with the same scope of work.

TAC awarded Contract DACA78-03-D-0002 to Contrack in January 2003 for design and construction projects in Afghanistan. Task orders were awarded for this contract as requirements were identified. When AED became a separate district in March 2004, TAC transferred the entire contract including all task orders to AED. As a result, AED became responsible for managing and administering this contract and is continuing to award work under this contract. Through September 2004, AED awarded three task orders and three subsequent modifications to those task orders valued at \$3.6 million for Contract DACA78-03-D-0002. AED also awarded 24 modifications to 5 existing task orders valued at \$12.7 million for the contract.

However, in the meantime, TAC awarded a multiple award contract to 10 contractors in January 2004 for design and construction projects in the USCENTCOM area of responsibility which includes Afghanistan. The 10 contractors are provided a fair opportunity to be awarded task orders and

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competition occurs among the contractors that provide a proposal. Based on the competition, TAC then awards the task order. This contracting mechanism is the most preferable method for the Government, instead of trying to negotiate fair prices with a single contractor.

Since March 2004, two different USACE contracting offices in two different locations have been awarding contract actions for work in Afghanistan, and while projects have been awarded to Contrack without competing the requirement, other requirements have been competed. OMC-A generated the requirements and forwarded them to AED. AED then decided whether the requirement would be awarded to Contrack International, Inc., by AED or whether the requirement would be sent to TAC to be awarded using the multiple award. We believe that Contract DACA78-03-D-0002 (awarded to Contrack International, Inc.) should be terminated and future requirements be placed on the multiple award contract vehicle taking advantage of the competition it offers, which is more advantageous to the Government. Furthermore, in August 2004, AED also awarded a multiple award contract to five contractors for design and construction services in Afghanistan. Of these five contractors, two were also awarded multiple award contracts by TAC. The only difference between the two multiple award mechanisms is that the mechanism put in place by TAC covers the entire USCENTCOM area of responsibility, including Afghanistan, whereas the mechanism put in place by AED covers only Afghanistan.

Continuing to place construction requirements with a single contractor for which the Government must negotiate defeats the purpose of having 10 contractors in place to bid for those same requirements. In addition, having two multiple award contracts in place for the same work duplicates the work of Government procurement resources. Because the TAC workforce is more stable (currently AED contracting personnel rotate in and out of Afghanistan approximately every 6 months), TAC contracting personnel should continue to award task orders using their multiple award contract.

**Optimal Use of the Multiple Award Contract Mechanism.** Through September 2004, work was still being awarded to Contrack International, Inc., on Contract DACA78-03-D-0002, the single award, even though the fully competed multiple award contract was in place and available for use. Seventeen modifications were made to four existing task orders that were awarded to Contrack on the single award that could have been defined as a new requirement and awarded using competitive procedures on the multiple award format. Additionally, four new task orders were awarded to Contrack International, Inc., on the single award that could have been competed using the multiple award contract mechanism.

FAR 15.402 states that competition is the preferred method for contracting officers to determine that a contract price is fair and reasonable. When change orders were made to the single award, the Government and Contrack International, Inc., had to negotiate a fair and reasonable price for the modification. However, if the requirements were placed on the multiple award mechanism, competition among the bidders would determine a fair and reasonable price. Instead of incorporating the new requirement into an existing

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task order through modifications, USACE should have classified the work as a separate requirement.

For example, AED awarded four modifications to task order 2 regarding construction of facilities at the Kabul Military Training Center even though the multiple award contract was in place and available. The requirements of the modifications were for building a vehicle maintenance facility (\$476,500), a 400-meter jogging track (\$163,669), four guard towers (\$180,000), and service entrance power to three buildings (\$496,889). Although these modifications were for work in the Kabul Military Training Center and fit within the general scope of work for task order 2, these new requirements could have been competed utilizing the multiple award contract. The modifications were not part of the original specification of the task order. Moreover, when the task order was originally awarded, all work was supposed to be completed by January 2004. These modifications were awarded from 6 to 9 months after the project should have been completed.

In total, we identified \$19.7 million of new requirements added to eight task orders of Contract DACA78-03-D-0002. Each of these requirements was awarded after the multiple award contract was in place in January 2004. See Appendix D for a complete listing of these projects. Continually modifying the task orders using the single award to Contract for the new requirements instead of awarding task orders under the multiple award contract put the Government in a less competitive environment.

**Benefits of the Multiple Award Contracts.** On January 12, 2004, TAC put the multiple award mechanism in place for a range of construction services throughout the USCENTCOM area of responsibility. Ten contractors were awarded contracts. These contracts were for 1 base year and 4 option years. At that time, TAC had four contract mechanisms in place that could conceivably have been used for a given project in Afghanistan. At the end of FY 2004, Contract's single award contract (DACA78-03-D-0002) and the 10-contractor multiple award contract were still active. The multiple award was in its base year, while Contract DACA78-03-D-0002 was in its first option year. We concluded that it would be in the Government's best interest to terminate Contract DACA78-03-D-0002. Any project that could have been awarded on this contract could also be awarded using the multiple award. Using the multiple award will provide a competitive environment for contracting in Afghanistan, thereby providing potential for Government savings. Our analysis of the multiple award is presented below.

**Multiple Award Contract Mechanism Summary.** TAC awarded 10 IDIQ contracts under a multiple award scenario for a full range of contingency operations throughout the USCENTCOM area of responsibility on January 12, 2004. While contracting problems existed on the earlier contracts awarded to Contract and Perini, this multiple award, when used properly, proved to be an effective and efficient vehicle for obtaining services in the USCENTCOM area of responsibility.

These 10 contractors, which included Contract and Perini, were awarded contracts after a full and open competition that resulted in 13 bidders. In a

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multiple award environment, work is assigned to contractors on individual task orders awarded from the contracts. FAR 16.505 requires that all contractors be given a fair opportunity to be considered for each task order unless an exception applies. This allows the Government to award task orders competitively throughout the course of the contracts. The four exceptions that can be used to award a task order without giving the contractors a fair opportunity to be considered are:

- the agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays;
- only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized;
- the order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order; and
- it is necessary to place an order to satisfy a minimum guarantee.

The multiple award contracts enabled contracting officials to efficiently award competitive task orders. Out of the 16 multiple award task orders reviewed, valued at \$471,915,563, 13 were awarded by giving all 10 contractors a fair opportunity to be considered. These 13 task orders were all awarded competitively, with multiple proposals received on 12 of them. Since price was one of the proposal evaluation factors, price competition existed, and the Government had reasonable assurance that it had obtained fair and reasonable prices. The total value of these 13 task orders was \$455,676,927 (96.56% of the total \$471,915,563 value of all 16 task orders). These 13 task orders were also awarded in a timely manner. The average time from the issuance of the Request for Proposals to the time of task order award was 63.5 days and ranged from 29 to 101 days.

Although the multiple award mechanism was effective when task orders were competed, there were instances where poor planning caused task orders to be awarded on a sole-source basis. These task orders lost the benefit of price competition. One example was task order 7 from Contract W912ER-04-D-0003 with Contrack, valued at \$1,398,649. This task order was for a wastewater treatment facility in Uzbekistan. The requirement was identified in May 2004. Contracting officials at first made arrangements to issue the requirement as a task order under Contrack's single award contract, but in July 2004, AED realized that the single award contract was only for work in Afghanistan. By then, the requirement had become urgent, and contracting officials moved the requirement to the multiple award. They awarded the task order to Contrack noncompetitively because of the urgency. Had AED contracting officials realized at the time the requirement was identified that it could not be placed on Contrack's single award contract or if this contract was previously terminated once the multiple award

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contract was in place, USACE would have had time to make it a competitive task order on the multiple award.

Poor planning caused a noncompetitive award on task order 8 from Contract W912ER-04-D-0003 with Contrack, valued at \$12,392,987. The requirement was to construct a new ammunition storage point (ASP) at Bagram Air Field. Contracting officials stated that:

the current ASP is in violation of explosives safety regulations, and airfield safety regulations, and poses imminent danger to life and government property. The existing ASP is undersized and is located within the clear areas of the runway. The inhabited building clear zone required for the amount and level of explosives stored in the current facility encompasses the entire north side of Bagram Airfield (BAF), including numerous aircraft based there. If the current ASP is not relocated, combat operations will continue at a significant risk. In addition, continued rocket threats significantly increase the potential for a catastrophic event, which would cripple BAF by taking out the airfield and munitions store for the base. In the event of an incident, the existing ASP could blow up, impacting equipment (aircraft), facilities (runway, taxiways and buildings) and personnel (soldiers and civilians).

This project was issued as a sole-source procurement on task order 8 of Contract W912ER-04-D-0003 which was 1 of 10 contracts of the multiple award contracting mechanism. The exception to providing the 10 contractors a fair opportunity was urgency, and stated that

CONTRACT is already mobilized in the area where work must commence, and therefore can begin work immediately and prevent unacceptable delays to the Government that could result in loss of life and property. It is therefore in the Government's best interests to award the task order for the work. . .

While we do not question the need for this work, we found that the task order was awarded on September 30, 2004, the last day of FY04, using funds that were to expire at the end of the fiscal year. It is hard to believe that the urgency arose at the end of the fiscal year when the funding was about to expire. Operations at Bagram Air Field had been ongoing for over a year. On May 28, 2004, a competitive task order was awarded to Contrack for repairs of Bagram's runways and taxiways, installation of airfield lighting, and other construction to allow the airfield to accommodate needed aircraft. If the construction of the new ammunition supply point had been included on this earlier task order, the ammunition supply point would have been built sooner and at a competitive price.

Although operations and maintenance funds were used for this project, the funds were properly used in compliance with the FY 2004 National Defense Authorization Act. Section 2808 of the FY 2004 National Defense Authorization Act allowed for using \$200 million of operations and maintenance funds for urgent construction projects overseas. This act authorized the Secretary of Defense to allow operations and maintenance funds for construction projects that meet each of the following conditions:



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- the construction is necessary to meet urgent military operation requirements of a temporary nature;
  - the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence;
  - the United States has no intention of using the construction after the operational requirements have been satisfied; and
  - the level of construction is the minimum necessary to meet the temporary operational requirements.

Poor planning was also evident on Contract W912ER-04-D-0004, task order 6. This task order was for modular barracks for U.S. personnel at Manas Air Base, Kyrgyzstan, and was awarded on a competitive basis under the multiple award contract mechanism. Modification 2 was added on September 29, 2004, for \$7 million, however this was for new work (additional barracks) and was not part of the original competition. The justification for issuing this as an undefinitized action was for urgency and stated:

These additional barracks were urgently needed to meet an increase in coalition forces population. This recent coalition force population increase is the result of other coalition nations redeploying their troops to Manas, versus participation in the Global War of Terrorism at other locations, and could not have reasonably anticipated until recently. Further, the overlap of personnel during deployment rotation changes essentially doubles the base population. The current troop population is resident in tents that have been utilized for almost three years, the extreme weather conditions in Kyrgyzstan require that these tents be heated. This climate exacerbates degradation of quality of life; and the necessity of heating these tents creates a significant life safety problem. It is essential that these additional barracks be constructed as soon as possible.

However, a day later, a budgetary Rough Order of Magnitude submitted by the contractor showed that the start of construction was postponed from the fall of 2004 to the spring of 2005. The Air Force base commander determined that the construction would be too disruptive to the base in the fall of 2004.

As a result, on September 15, 2004, DoD knew that the requirement was no longer urgent, and USACE personnel should have cancelled the modification. If it was urgent, and posed a significant life safety problem, as the justification stated, construction would not have been delayed until the spring of 2005. In our opinion, the only actual urgency that existed was that the operations and maintenance funding was going to expire at the end of the fiscal year.

The inability of TAC to adequately plan the contracts and determine design specifications for the ANA resulted in poorly executed contract actions, even on some task orders awarded under the multiple award mechanism. Besides a lack of planning and execution, USACE contracting personnel made improper contract awards.

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## Contract Awards

Contract DACA78-03-D-0002 and Contract DACA78-03-C-0009 operated as if both were cost-reimbursable contracts although USACE classified both as firm-fixed-price contracts. In addition, the method in which TAC contracting officers awarded four contract actions valued at \$6.1 million on the 2 contracts gave the contractors an incentive to increase costs. This would not have occurred had TAC contracting officials negotiated a fixed price before work commenced. Furthermore, TAC contracting officers allowed out-of-scope items on Contract DACA78-03-D-0002.

**Type of Contract.** Although USACE classified Contract DACA78-03-D-0002 and Contract DACA78-03-C-0009 as firm-fixed-price contracts, the two contracts did not operate as the FAR describes a firm-fixed-price contract. Instead both contracts operated as if awarded on a cost-reimbursable basis. Without a firm requirement or specification, there can be no firm price established. A firm-fixed-price contract places the risk of performance on the contractor. However, for these two contracts, there was little risk for the contractors in performing the work, because there was no incentive to control the costs.

FAR Subpart 16.202, "Firm-fixed-price contracts," states that this type of contract is suitable for acquiring

supplies or services on the basis of reasonably definite functional or detailed specifications (see Part 11) when the contracting officer can establish fair and reasonable prices at the outset, such as when –

- (a) There is adequate price competition;
- (b) There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data;
- (c) Available cost or pricing information permits realistic estimates of the probable costs of performance; or
- (d) Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved.

A firm-fixed-price contract provides for a price that is not subjected to any adjustment resulting from the contractor's cost experience during performance, and it places the maximum risk on the contractor for all costs and resulting profit or loss. Firm-fixed-price contracts are usually used in situations in which the contract requirements are clearly understood and described. The FAR states that firm-fixed-price contracts should be used in those situations in which fair and reasonable prices are established at the outset. Moreover, the method in which USACE awarded four of these contract actions gave contractors an incentive to increase costs.

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**Incentive to Increase Costs.** The creation of a Cost-Plus-a-Percentage-of-Cost (CPPC) system of contracting is prohibited by 10 U.S.C. 2306. Comptroller General Decision B-183705, Marketing Consultants International Limited, identified a four-point test for determining CPPC contracts. Contracts meeting all four criteria violate the prohibition against CPPC contracts. The four-points are:

- payment for profit is based on a predetermined percentage rate,
- the predetermined percentage rate is applied to actual performance costs,
- contractor entitlement is uncertain at the time of contracting, and
- contractor entitlement increases commensurately with increased costs.

Three task orders from Contract DACA78-03-D-0002 and one change order from Contract DACA78-02-C-0009 met three of the four criteria for a CPPC system of contracting. Although the four actions cannot be considered CPPC contracts, all four operated very similarly to a CPPC system. For each of the four above contracting actions, USACE authorized the contractors to begin work without definitizing a price, and did not definitize the actions until after the contractors had performed most or all of the work. As a result, the definitized price was based on incurred costs. The profit was charged as a percentage rate that was applied to these incurred costs. Therefore, the contractor had an incentive to increase costs, because higher costs resulted in higher profit. These contract actions did not meet the legal definition of CPPC because the profit rate was not predetermined when the initial awards were made, although in all four cases TAC accepted the contractor's proposed rate.

For example, task order 8 of Contract DACA78-03-D-0002 was for upgrading facilities for the ANA located at the Palace Compound Kabul, Afghanistan. The contractor began working without definitizing the price of the work. The task order was awarded in July 2003, and the period of performance was 120 days. The contractor submitted its final proposal on November 4, 2003, for \$617,295 including a profit of 10 percent. However, the negotiated price was \$629,433 because that was the amount the government had already paid the contractor. As a result, besides a profit of 10 percent, the contractor was paid an additional \$12,137.

This task order gave the contractor incentive to increase costs because the contractor's entitlement was uncertain at the time of contracting, and the contractor's entitlement increased commensurately with increased costs. Although the profit rate was not predetermined, it was applied to actual performance costs. Furthermore, the contractor and USACE knew that a profit percentage would be eventually applied to the costs because USACE accounted for a profit percentage in its Government estimate and the contractor proposed a profit percentage. In our opinion, the method in which this task order operated is not a sound way to conduct business. Giving the contractor an incentive to increase costs is the opposite of how a firm-fixed-price contract should be structured.

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## **Out-of-Scope Items.**

TAC contracting personnel allowed out-of-scope items on Contract DACA78-03-D-0002. The scope of the contract was for design and construction services but did not include construction equipment. Task order 3 was awarded for \$2.8 million and was for 11 pieces of equipment that included a bulldozer, wheel loader, grader, excavator, crane, four dump trucks, a roller, and an 8000-gallon mobile refueler.

The contractor that was awarded the task order purchased this equipment from an intermediary company that it used to purchase equipment. The intermediary company purchased the equipment from the dealer. As a result, USACE paid the contractor and the intermediary company profit and overhead for this equipment. USACE paid the contractor 11 percent for overhead and general and administrative expenses and 7 percent profit or, approximately \$454,000. Two invoices in the contract file show that the intermediary company was paid 7 percent profit on two pieces of equipment or, approximately \$62,000. In addition, on another task order, an AED contracting official allowed the contractor to lease 13 vehicles for \$354,217.

The lack of planning, ineffective contract execution, and improper contract awards led to an inability to determine whether USACE paid fair and reasonable prices for the construction services.

## **Fair and Reasonable Price**

Price negotiation techniques and timely definitization of work were inadequate to ensure that task orders on Contract DACA78-03-D-0002 with Contract International, Inc., and Contract DACA78-03-C-0009 with Perini Corporation were fair and reasonable. Specifically, for 12 of 24 price negotiations, the technique used to determine price reasonableness was based on comparing the contractor proposal to the Government estimates. In addition, USACE contracting officers allowed excess cost on these contracts.

Both contracts were awarded on a competitive basis, but only limited funding was obligated at the time of award. The Contract International, Inc., contract was an IDIQ contract that assigned work and obligated funds on individual task orders. The Perini letter contract was awarded as an undefinitized contract and prices were definitized on the contract modifications. Therefore, price reasonableness for these two contracts was not established by price competition, and negotiations between the Government and the contractors occurred to determine pricing. Specifically,

- the independent Government cost estimates (IGCE) were not accurate,
- the contract negotiators did not reconcile differences between the IGCEs and contractor proposals,

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- TAC contracting personnel allowed unauthorized costs to be paid to the contractor, and
  - TAC contracting personnel did not definitize contract actions on a timely basis.

**Government Estimates.** Since competition was not a basis to establish price reasonableness, contracting officials used other negotiation techniques to determine that these contract actions were reasonable. One technique was developing an IGCE that provided TAC contracting personnel a basis from which to begin negotiations with the contractor. For task orders awarded under the Contract International contract, contracting officials determined that task order prices were reasonable by comparing the proposed price to IGCE for 11 out of 20 task orders. Cost estimators at TAC prepared the IGCEs. However, the IGCEs were not reliable enough to provide assurance that prices were reasonable. IGCEs were prepared quickly and with little information. Below are comments TAC personnel made regarding the IGCE.

- A cost estimator informed us that the cost data used to compute the estimates was approximately 1 year old and that when computing estimates, estimators just "load quantities" into the estimating system.
- A TAC architect informed us that the early IGCE for Afghanistan projects were poor because they were based on information from more developed countries.
- A cost estimator noted that estimates were prepared based on the scope of work that the estimator receives. Since the statement of work was very generalized (without designs or material specifications) for most of the contract actions, the estimates are not very detailed.
- A contract negotiator noted that the estimates, at times, did not consider certain elements included in the contractor's proposal.
- A contracting officer told us that the estimators are often told what the total available funding would be and, subsequently, tailored the estimates to the funding.
- A project manager stated that some IGCEs were prepared in fewer than 10 minutes.

Also, cost estimates were prepared in Winchester, Virginia, thousands of miles away from where the work was actually performed. As a result, it was difficult for the estimators to accurately calculate a reasonable cost estimate.

- Contract DACA78-03-D-0002, task order 4 was inaccurately estimated. A major difference existed between the IGCE price and the proposed price for one of the line items. The contractor proposed a price of \$1.6 million to clear the site, but the IGCE for this line item was \$95,962. The estimator admitted that his estimated price was not

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based on facts or assumptions, but was merely a guess. Therefore, the contractor's price was accepted.

- The contractor's cost proposal for Contract DACA78-03-D-0002, task order 10 included a line item for a barbershop at a total cost of \$21,909. The IGCE for the barbershop was \$90,750. The estimated cost of the barbershop was over four times greater than the contractor's proposal. The estimator assumed that the barbershop would be a new construction, but the contractor built the barbershop utilizing an existing building. The estimators would have known this fact if the estimate was conducted in country.
- In Contract DACA78-03-C-0009, modification 10, the IGCE stated that concrete would cost \$67.14 per cubic meter; however, cost analysis revealed that the market rate was actually \$211 per cubic meter.

In another example, the costs of a Government estimate were prepared based on the costs of a contractor proposal. Task order 8 was issued as a sole-source procurement on Contract W912ER-04-D-0003 which was 1 of 10 contracts of the multiple award contracting mechanism. The project was to construct a new ammunition storage point (ASP) at Bagram Air Field valued \$12,392,987. The first TAC estimate for the project was dated September 27, 2004, and was for \$6.5 million. TAC acknowledged that this estimate was based on limited knowledge of the project scope, and assumed that this ammunition supply point was similar to other ammunition supply points constructed in war zones. The TAC estimator stated that when more information became available a couple days later, that the actual scope and size of the project was more similar to ammunition supply points located in the United States and more permanent in nature.

After the contractor proposal was submitted on September 28, 2004, TAC prepared a second estimate because the first estimate was not close to the contractor proposal.

The table below illustrates the difference between the Government estimate and the contractor proposal. For each of the line items of the work, there was a difference of 4.077 percent (except for the guard house which was 4.076 percent) between the contractor proposal and the government estimate. Because each line item has the same difference between the proposal and the Government estimate, we believe that the estimate was not independently prepared, but was prepared based on the contractor proposal. Furthermore, because there was no independent Government estimate, the Government cannot be assured that the price paid for this work was reasonable because the Government accepted the total proposed price of \$12.4 million, except for \$50,000 discount the contractor provided after the Government exercised the option at the time of award.

**Table 2. Comparison of the Contractor Proposal to the Government Estimate**

<b>Item</b>	<b>Contractor Proposal</b>	<b>Government Estimate</b>	<b>Percentage Proposal Below Estimate</b>
Demolition and Grading	\$1,251,525	\$1,304,715	4.077%
Roads and Pads	\$1,321,201	\$1,377,352	4.077%
Concrete Pads	\$585,144	\$610,012	4.077%
Protection Barriers	\$5,854,982	\$6,103,818	4.077%
Guard Tower	\$339,296	\$353,716	4.077%
Guard House	\$97,890	\$102,050	4.076%
Chain Link Fence	\$410,164	\$427,596	4.077%
Administration Building	\$878,263	\$915,589	4.077%
Vehicle Inspection Building	\$407,699	\$425,026	4.077%
Option 1: Demining	\$1,296,823	\$1,351,938	4.077%
Total without Option	\$11,146,163	\$11,619,874	4.077%
Total with Option	\$12,442,987	\$12,971,812	4.077%

Because this acquisition was quickly awarded after receiving operations and maintenance funding and had to be awarded prior to October 1, 2004, TAC did not have time to prepare an independent estimate of the cost of the project. As a result, TAC relied on the cost of the contractor proposal as the basis to award the task order.

TAC contracting officials made inadequate price reasonableness determinations by comparing the IGCE total price to the contractor's total proposed price instead of analyzing individual line items within the proposal. The negotiator overlooked major differences between the prices of individual line items on the proposal and IGCE.

For example, on Contract DACA78-03-D-0002, task order 8, the contractor proposed \$617,296. The TAC contracting official considered this price reasonable because it was less than the IGCE of \$786,223. However, the contractor proposed price did not include options 1 and 2, while the IGCE included options 1 and 2. Removing the two options from the IGCE, the estimate would have been \$350,810 (\$266,486 less than the proposed price of \$617,296). In addition, there were two line items for which the proposed price was much higher than the IGCE:

- The IGCE for renovating a dining facility was \$65,589, but the contractor proposed \$236,671.

- The IGCE for improving the Morale, Welfare, and Recreation building was \$26,871, but the contractor proposed \$121,861.

These discrepancies did not affect the proposal analysis because contracting officials compared the proposed price excluding options to the IGCE including options. Had the contracting officials taken the time to negotiate the line items, the Government may have paid a lower price.

Contract DACA78-03-D-0002, task order 4 provided another example of not comparing the individual line items of the proposal to the independent Government cost estimate. Table 3 below compares line items between the contractor proposal and the IGCE.

**Table 3. Comparison of Line Items Between the Contractor Proposal and the Government Estimate for Task Order 4**

<b>Item</b>	<b>IGCE</b>	<b>Proposal</b>	<b>Difference Between Proposal and IGCE</b>
Storage Building	\$12,353,457	\$6,255,865	\$6,097,592
Fire Station	\$1,504,518	\$161,639	\$1,342,879
Bachelor Officer Quarters	\$351,859	\$2,154,859	(\$1,803,000)
Support Facility	\$1,288,268	\$2,564,556	(\$1,276,288)
<b>Total</b>	<b>\$15,498,102</b>	<b>\$11,136,919</b>	<b>\$4,361,183</b>

The contract negotiator recalled that he did not investigate line item differences because the total estimated cost of all options was \$21.6 million, while the total proposed cost of all options was only \$17.3 million.

The contracting officials also made inadequate price reasonableness determinations on the Perini contract. For example, three change orders, totaling \$580,528, were awarded without any price reasonableness determination. Furthermore, a change order was definitized at a price of \$530,000. The price was considered reasonable because the proposal was based on actual incurred costs. This does not justify an adequate price reasonableness determination. Determining that the proposal showed actual costs does not mean that those costs were reasonable. Also, another change order was definitized at a price of \$2.8 million. Contracting officials failed to justify \$274,577 or 9.6 percent of the cost.

**Unauthorized Costs.** TAC contracting officials also accepted questionable costs that could be considered indirect costs or overhead. For some of these same costs, an AED contracting officer successfully negotiated those costs from the contractor proposal. For example, while negotiating modification 8 of task order 7, Contract DACA78-03-D-0002, the AED contracting officer stated in the PNM that the following costs should not be included in the contractor proposals:



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- mobile radio fees;
  - stationary, cleaning supplies, buffet supplies, hospitality entertainment, maintenance agreements, copying; and
  - banking, legal, and accounting fees.

As a result, the AED contracting officer successfully removed some of these items from the contractor proposal and saved \$5,350. However, TAC contracting officials allowed these items onto other task orders of the same contract. We determined that TAC contracting officials allowed these items, at a total value of \$323,980, onto other task orders of Contract DACA78-03-D-0002. These costs were accepted without negotiations. Appendix E illustrates total identified questionable costs valued at \$3.5 million accepted without negotiations under the contract. We believe that many of these items should have been incorporated as part of overhead or general and administrative percentages. Some examples are the contractor charged \$3,095 for buffet attendants; \$3,687 for janitors; and \$18,969 for rest and relaxation expenses for the contractor. The items in bold listed in Appendix E are all the items from the contractor's proposals that the AED contracting official did not believe should be allowed. We believe that USACE contracting personnel should request that the Defense Contract Audit Agency conduct a review for the task orders of Contract DACA78-03-D-0002.

The IGCEs were not reliable enough to represent reasonable pricing, and contracting officials did not take steps to rectify the differences between the estimates and proposals. TAC personnel stated that there was a sense of urgency to begin awarding task orders in order to begin reconstruction efforts. As a result, the personnel said that IGCEs were quickly prepared with little total knowledge of the entire project. While we do not doubt that TAC personnel had to react quickly, it is still the responsibility of the contracting officer to obtain a fair and reasonable price. As a result, additional steps contracting officials should have taken to ensure that the proposed prices were fair and reasonable were:

- identifying differences between individual line items of the proposal and the IGCEs, determining why those differences existed, and negotiating the proposed prices, if necessary;
- obtaining and documenting assistance from technical experts in the field to determine whether the proposed material costs and quantity of labor hours were reasonable; and
- obtaining assistance from the Defense Contract Audit Agency to determine if the proposed labor rates were reasonable.

**Negotiating Prices.** TAC improperly awarded task orders on Contract DACA78-03-D-0002. The FAR Subpart 16.505(a)(2) requires that

Individual orders shall clearly describe all services to be performed or supplies to be delivered so that full cost or price for the performance of the work can be established when the order is placed. Orders shall be

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within the scope, issued within the period of performance, and be within the maximum value of the contract.

Under Contract DACA78-03-D-0002, TAC awarded 13 of 14 task orders without clearly describing the work or establishing a fair and reasonable price when the orders were placed. Instead, TAC notified the contractor to begin work based on a rough order of magnitude, or a rough estimate of the project that the contractor submitted. TAC did not comply with the FAR because in each of the 13 task orders, TAC authorized the contractor to begin working without clearly describing the work or negotiating a fair and reasonable price.

For at least two task orders, the performance was nearing completion prior to negotiating a price. For one task order, 90 percent of the not-to-exceed price was paid to the contractor before this task order was definitized. In another order for operations and maintenance for facilities, the order was definitized only 4 days prior to the performance period expiring. As a result, the Government must have negotiated these orders based on actual incurred costs. In a firm-fixed-price contract, the Government and contractor should have agreed to a price prior to work beginning, or if work began as an undefinitized action, soon after work began without expending a majority of the not-to-exceed amount. In these two cases, neither was completed and there was little or no risk to the contractor in performing this work.

Task order 2 of Contract DACA78-03-D-0002 illustrated the difficulties in using a firm-fixed-price contract for the work in Afghanistan. In June and August 2003, additional requirements were added and the requirement to house U.S. trainers was changed to house the ANA. U.S. personnel discovered that there was not enough buffer zone between the U.S. designated facilities to comply with operational security requirements. As a result, U.S. personnel could not be located at this site. Again, no price was negotiated for the additional work and modifications were issued without negotiating a price when the modification was issued.

Modifications 1 and 2 more than doubled the original amount of the task order. Some of the original requirements were removed, and construction requirements for 2 new barracks and renovation of 11 buildings were added, and the task order still had not been definitized. In addition, the completion dates for the requirements were changed to February 2004, and more modifications were added that increased the number of facilities to this compound. As a result, TAC did not negotiate the original portion and the first two modifications to this task order until the end of March 2004, or 11 months after work began. Furthermore, completion dates were not met. Through March 2004, TAC was invoiced only \$16.2 million, or less than 50 percent of the definitized amount. This indicated that the construction was not complete, but according to the schedule, the entire portion of this task order should have been completed by February 2004.

Contract DACA78-03-D-0002, task order 14 designed and constructed a pre-engineered metal housing complex for U.S. military personnel at Kandahar Airfield. However, the price of the task order was not negotiated until six and a half months after the award date and it was negotiated for \$2.1 million more than the previously established, not-to-exceed amount.

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TAC improperly awarded 13 of 14 task orders and in doing so placed the Government in a financially risky situation while it placed no risk on the contractor. This is opposite of how a firm-fixed-price contract is intended to work.

## Conclusion

TAC did not have the time it needed to properly plan, design, and award the initial contracts for work in Afghanistan and the USCENTCOM area of responsibility. TAC engineers began with too little information in order to begin building facilities to house and support the ANA, and put together a framework to accomplish the task in a little over 3 months in a remote and sometimes hostile environment. Furthermore, TAC initially developed a logical contracting plan to accomplish building facilities for the ANA and other USCENTCOM requirements. Because there were still too many unknown factors about contracting in Afghanistan, TAC initially planned to award a cost reimbursable contract to one contractor and then, to consolidate the expected increase of construction requirements in the USCENTCOM area of responsibility, USACE planned to award multiple award contract mechanism to allow for competition of the requirements or task orders among the awardees.

However, TAC made mistakes in structuring the solicitation as a cost reimbursable contract and did not have time to correct the mistake. Because work had to begin, TAC awarded two firm-fixed-price contracts and began awarding task orders and modifications on an urgent basis without establishing firm requirements or negotiating fair and reasonable prices at the onset of work. In addition, design changes made to ANA facilities resulted in additional time and money spent on the task orders. Had there been time to adequately plan for this acquisition support, including standard designs for ANA facilities, many of the problems could have been reduced. TAC contract negotiation techniques were inadequate to ensure prices paid to the contractors were fair and reasonable. Furthermore, by waiting so long to definitize prices on several contracting actions, TAC gave contractors incentive to increase costs by reimbursing them for the actual incurred costs plus profit charged as a percentage of those costs.

Furthermore, when the multiple award contracts were in place in January 2004, TAC and AED personnel continued to use the single award contract awarded early in the process and did not take advantage of competing these requirements by using the multiple award contract mechanism. In addition, after AED became a separate engineering activity from TAC, AED began awarding contracts to some of the same contractors that TAC awarded contracts to for similar scopes of work. Overall, TAC has done an adequate job of providing contractors a fair opportunity to bid for requirements on the multiple award contract. Some problems we noted were that some task orders were awarded without providing contractors a fair opportunity for consideration because of a lack of planning by DoD.

We are not making a recommendation regarding a lack of planning for acquisition support in a wartime environment because that recommendation was made in

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DoD IG Report D-2004-057 and the Under Secretary of Defense for Acquisition, Technology, and Logistics is currently working on a study that addresses that issue.

## **Recommendations, Management Comments, and Audit Response**

We recommend that the Commander, U.S. Army Corps of Engineers:

**1. Terminate Contract No. DACA78-03-D-0002 with Contrack International, Inc., and utilize the 10 contractor multiple award mechanism for satisfying U.S. Central Command's requirements for construction.**

**Management Comments.** The Deputy Commander, U.S. Army Corps of Engineers nonconcurred to terminate this contract. The Deputy Commander stated that it was still more advantageous to use this contract under certain circumstances and it was being used generally on projects that are considered a continuation of work by the same contractor such as providing continued base operations and maintenance services.

**Audit Response.** We disagree that Contrack's single award contract, DACA78-03-D-0002, should continue to be used. USACE asserts that this contract is needed for projects that should be performed by Contrack. We believe this assertion is incorrect. Both the single award to Contrack International, Inc., and the multiple award contract were for a wide range of design and construction services, including operations and maintenance services. Therefore, the scopes of work were primarily the same for both vehicles, except that the multiple award contract covered a wider geographic area, the entire USCENCOM area of responsibility including Afghanistan. The single award contract covered only Afghanistan. As a result, any requirement placed on the single award could be placed on the multiple award vehicle. Contrack is one of the 10 contractors on the TAC multiple award mechanism. Multiple award regulations provide "exceptions to fair opportunity," which allow task orders to be awarded on a sole-source basis when it is necessary. Furthermore, the one example the USACE provided to keep this contract in existence was providing base operations and maintenance services, which was a service specifically provided for in the multiple award scope of work. This requirement could be easily competed among the 10 contractors to obtain competitive pricing. We recommend that USACE respond by November 14, 2005.

**2. Formalize and develop a design standard for all Afghan National Army facilities that are being repetitively constructed in Afghanistan and utilize those designs for future construction of like facilities.**

**Management Comments.** The Deputy Commander, U.S. Army Corps of Engineers met the intent of this recommendation to formalize a design standard for all Afghan National Army facilities being repetitively constructed. The Deputy Commander stated that established standards are now in place and experience little change except for incorporating lessons learned.

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**3. Request that the Defense Contract Audit Agency conduct a review of costs of the task orders awarded under Contract No. DACA78-03-D-0002. This review should focus on unallowable cost items.**

**Management Comments.** The Deputy Commander did not address this recommendation in his response.

**Audit Response.** We request that the U.S. Army Corps of Engineers provide a response by November 14, 2005.

**4. Initiate a preliminary review to determine whether the use of operations and maintenance funds for task order 14 from Contract DACA78-03-D-0002 resulted in an Antideficiency Act violation in accordance with DoD 7000.14-R, "Financial Management Regulations."**

**Management Comments.** The Deputy Commander nonconcurred with this recommendation stating that the U.S. Army Corps of Engineers did not engage in illegal splitting and did not exceed statutory thresholds for use of operations and maintenance funds for this task order. The U.S. Army Corps of Engineers stated that the total requirement of the task order to house 4,500 personnel could be divided into seven phases because each phase was in a different geographic area of the base, and as a result, each phase was considered a separate and complete usable camp. Each phase consisted of approximately 23 barracks buildings, 4 toilet and shower buildings, and 2 laundry buildings. According to the U.S. Army Corps of Engineers, the cost elements associated with each phase of this task order were then lawfully split into separate items, one for design and construction of the facilities, and the second for the relocatable building material. The cost of the design and construction portion was under the \$750,000 threshold which allowed the U.S. Army Corps of Engineers to use operations and maintenance funds. Further, the U.S. Army Corps of Engineers stated that the relocatable building material was under the threshold because each barracks (23 per phase and the other buildings) was considered a separate unit for a unit cost of approximately \$144,000 per barracks. The U.S. Army Corps of Engineers also stated that the draft report contained an error in how the bid items of the task order were written.

**Audit Response.** We disagree. USACE should have conducted a preliminary review. We also disagree with the USACE assertion that the cost per phase can be divided between construction and material and disagree with the USACE assertion that each barracks, toilet and shower facility, and laundry facility constitutes a separate unit when it calculated the cost. If USACE considered each phase of the project a separate and distinct usable facility, then the entire construction cost per phase should have included the design and construction portion and the total cost of the relocatable facilities. As a result, the cost per phase would have been higher than either the \$750,000 or \$1.5 million dollar threshold allowing the use of operations and maintenance funds.

In order to be under the threshold for using operations and maintenance funds, USACE instead stated that the design and construction portion for each phase of the project was for all facilities of that phase but that the cost of the buildings in each phase were considered a separate unit. For example, instead of stating that

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the cost of 23 barracks for a particular phase was approximately \$3.3 million, the USACE position is that the cost of the barracks was a unit cost of \$144,000 for 23 separate units. USACE cited a *Defense Financial Accounting Service Manual* that allowed it to expense (use operations and maintenance funds) capital equipment (the relocatable building material) if the per-item amount was less \$250,000. However, Army Regulation 420-18, "Facilities Engineering Materials, Equipment, and Relocatable Building Management," Chapter 5, paragraph 5.2.f states,

Relocatable buildings may be used instead of conventional permanent construction, particularly overseas, when the requirement duration is unknown. In such cases, the project will be programmed by using proper military construction procedures and totally funded from military construction appropriations per AR 415-15 or AR 415-35.

We maintain that in order to have a complete and usable facility, all costs associated with design, construction, materials, and utility hookup have to be considered in totaling the cost of that facility. This definition of construction is consistent with the USACE definition of construction as stated in an e-mail between TAC personnel discussing this project. The overall theme of the e-mail was how to get this project funded using operations and maintenance funds. The following is quoted from the e-mail, dated September 18, 2003.

Our [USACE] definition of construction: concrete pad, assembly of building, installation of window and doors, installation of electrical fixtures, trenching and hookup to utility systems, etc.

[Customer's] definition of construction: concrete pad, trenching and hookup to utility systems (clearing, demo, utility distribution; these are not our responsibility so they do not count). All other items he describes as being integral to the equipment purchase. Obviously given the situation we are willing to accept his definition. In doing so we have recalculated the resulting construction costs. If we assume 6 equally sized phases the total construction cost including S&A equals exactly \$750k. We are there, without a penny to spare. We'll have to hope the contractor is too. [TAC General Counsel] tells me that [Customer] is not hung up on the number of phases. He says there are 6, the scope of work we received said 7, there may be justification for using other numbers of phases (there may be logic for splitting the 3 US tent cities (A, B, C) into smaller phases, but we can not determine that). Apparently he would not have a problem if we used 7. Using 7 gives us a cushion on the \$750k limit. So that is the plan at present. Seven equally sized phases using his definition of construction.

I would feel much more comfortable if CJTF180 would state that these facilities are need for health and life safety reason therefore allowing us to increase the construction ceiling from \$750k to \$1.5m. Not only would this give us a good cushion this would also allow me to create unequal size phases which is much more logical and consistent with actual unit sizes.

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USACE should not have allowed the customer to dictate the definition of construction. After all, this is supposed to be the USACE area of expertise. By doing so, USACE indicated that it was acceptable to derive the number of phases for housing 4,500 troops to whatever level was necessary in order to use operations and maintenance funds, a violation of Public Law 97-214 and Army Regulation 420-10, paragraph 4-4a(2).

In our opinion, this project was split so that operations and maintenance funds could be used by splitting the requirement into phases. USACE stated that the entire requirement to house all 4,500 troops could be accomplished in 7 phases. By doing this, the USACE stated that each of the seven phases was a separate camp and constituted a complete and usable facility funded as a separate project. However, e-mail correspondence indicates that the number of phases could easily vary from 6 through 22. The customer stated that there were six phases, but USACE stated that seven would provide more of a cushion. (Using six phases would have resulted in the cost per phase of what the customer defined as construction being right at the \$750,000 threshold.) As a result, the requirement was divided into seven phases using the definition of construction as dictated by the customer. In our opinion, because the requirement for this project was to house 4,500 troops at one geographic location (Kandahar Airfield), a facility could not be considered "complete and usable" unless it housed all 4,500 of them. Even if seven separate camps (phases) were needed to house them all, the camps were still part of the same project.

Furthermore, we disagree with the USACE assertion that each phase was in a different geographic location at the base. USACE provided us with a diagram of the base showing the locations of the seven phases. The diagram showed that Phases 4, 5, 6, and 7 were adjacent to one another. It did not at all appear that the phases were in different geographic locations.

As a result, operations and maintenance funds should not have been used because the entire project was initially awarded for \$26 million. Even if there were seven distinct phases (which is unclear), as USACE stated, operations and maintenance funds still should not have been used because USACE improperly split the costs of the phases into separate cost elements which is inconsistent with Army regulations.

We believe that Military Construction Appropriations should have been used for the project and that USACE should still comply with this recommendation. We recommend that USACE respond by November 14, 2005.

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## Appendix A. Scope and Methodology

We began the audit by focusing on one single IDIQ contract award for work in Afghanistan; however, upon further review, discovered that similar work was being performed under a letter contract for work in Afghanistan, a limited competition multiple award contract for work within the USCENTCOM area of responsibility, and a full and open competition multiple award contract for work within the USCENTCOM area of responsibility. The multiple award contracts' scope of work is for design and construction services in Afghanistan, Kuwait, the United Arab Emirates, Qatar, Kyrgyzstan, Jordan, Pakistan, and Uzbekistan. We reviewed 36 task orders from 14 IDIQ contracts valued at \$743.8 million. Additionally, we reviewed eight modifications from the letter contract valued at \$38.2 million.

Since the Special Inspector General for Iraq Reconstruction (formerly the Coalition Provisional Authority, Inspector General) is charged with auditing and investigating issues involved with Iraqi reconstruction, we did not audit those task orders associated with Iraq. For the 15 contracts we reviewed, there were 35 task orders for work in Iraq valued at \$1.502 billion.

We examined the contracting procedures TAC officials used in awarding contracts to support the Global War on Terrorism. Specifically, we reviewed documentation that supported the requirements' determination, size and dimension specifications, types of contracts used, use of other than full-and-open competition, and determinations of price reasonableness.

During our audit, we visited TAC, Headquarters for the U.S. Army Corps of Engineers, former AED contracting officers, and one contractor. We also communicated with USCENTCOM and a USACE contracting officer stationed in Kuwait. During our visits to TAC, we interviewed contracting officers and specialists, negotiators, estimators, legal counsel, and other responsible officials involved with the procurement process.

We reviewed the contract files located and maintained at TAC and requested that TAC employees deliver additional information for task orders and modifications awarded in Afghanistan. In addition, we reviewed e-mails, PNMs, justifications for other than full-and-open competition, cost and technical evaluations, Government estimates, payments, and contract modifications.

We performed this audit from June 2004 through May 2005 in accordance with generally accepted government auditing standards. Our scope was limited in that we did not review the TAC management control program because that was not an announced objective and we only reviewed contract actions awarded regarding specific contracts from FY 2003 through FY 2004.

**Use of Computer-Processed Data.** TAC supplied us with spreadsheets detailing DD 350 number, action date, country code, type of obligation, and obligated amounts for contract actions that they awarded from FY 2002 through FY 2004. We relied on these spreadsheets to show that the contract action had been



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awarded; however, we relied on the award documents to determine the values of each contract action.

**Government Accountability Office High-Risk Area.** The Government Accountability Office (GAO) has identified several high-risk areas in the Department of Defense. This report provides coverage of the high-risk area to DoD Contract Management.

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## Appendix B. Prior Coverage

During the last 5 years, GAO, the Department of Defense Inspector General (DoD IG) and the Special Inspector General for Iraq Reconstruction (SIGIR), formerly the Coalition Provisional Authority Inspector General, have issued 11 reports discussing contracts in support of the Reconstruction resulting from the Global War on Terrorism, undefinitized contract actions, and multiple award contracts. Unrestricted GAO reports can be accessed over the Internet at <http://www.gao.gov>. Unrestricted DoD IG reports can be accessed at <http://www.dodig.mil/audit/reports>. Unrestricted SIGIR reports can be accessed at [http://www.cpa\\_ig.org/audit\\_reports.html](http://www.cpa_ig.org/audit_reports.html).

### GAO

GAO Report No. GAO-04-915, “Military Operations: Fiscal Year 2004 Costs for the Global War on Terrorism Will Exceed Supplemental, Requiring DOD to Shift Funds from Other Uses,” July 21, 2004

GAO Report No. GAO-04-854, “Military Operations: DOD's Extensive Use of Logistics Support Contracts Requires Strengthened Oversight,” July 19, 2004

GAO Report No. GAO-04-605, “Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges,” June 1, 2004

GAO Report No. GAO-04-668, “Military Operations: DOD's Fiscal Year 2003 Funding and Reported Obligations in Support of the Global War on Terrorism,” May 13, 2004

### DoD IG

DoD IG Report No. D-2004-112, “Undefinitized Contract Actions,” August 30, 2004

DoD IG Report No. D-2004-111, “Contracts Awarded by the Defense Threat Reduction Agency in Support of the Cooperative Threat Reduction Program,” August 25, 2004

DoD IG Report No. D-2004-057, “Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command–Washington,” March 18, 2004

DoD IG Report No. D-2001-189, “Multiple Award Contracts for Services,” September 30, 2001

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## **Appendix B. Prior Coverage, cont'd**

### **SIGIR**

SIGIR Report No. 05-007, "Administration of Iraq Relief and Reconstruction Fund Contract Files," April 30, 2005

SIGIR Report No. 04-005, "Award of Sector Design-Build Construction Contracts," July 23, 2004

SIGIR Report No. 04-006, "Corporate Governance for Contractors Performing Iraq Reconstruction Efforts," July 21, 2004

# Appendix C. Summary of Contracts Reviewed

Contract Number	Total (Not Including Iraq)		Afghanistan				Other Countries (Not Including Iraq)	
	Awarded (\$)	Task Orders Awarded	ANA Awards		U.S. Awards		Awarded (\$)	Task Orders Awarded
			Awarded (\$)	Task Orders Awarded	Awarded (\$)	Task Orders Awarded		
DACA78-03-C-0009	\$ 38,191,866.00	*	\$ 38,191,866.00	8	\$ -	0	\$ -	0
DACA78-03-D-0002	\$ 183,560,300.21	14	\$ 136,232,186.45	8	\$ 47,328,113.76	6	\$ -	0
DACA78-03-D-0004	\$ 69,154,551.47	5	\$ 29,413,749.00	1	\$ 6,374,879.00	1	\$ 33,365,923.47	4
DACA78-03-D-0005	\$ -	0	\$ -	0	\$ -	0	\$ -	0
DACA78-03-D-0006	\$ 19,200,521.00	1	\$ 19,200,521.00	1	\$ -	0	\$ -	0
W912ER-04-D-0001	\$ 55,620,668.50	3	\$ -	0	\$ -	0	\$ 55,620,668.50	3
W912ER-04-D-0002	\$ 41,897,722.81	2	\$ -	0	\$ -	0	\$ 41,897,722.81	2
W912ER-04-D-0003	\$ 225,607,907.30	7	\$ 123,556,011.30	2	\$ 57,543,948.00	3	\$ 44,507,948.00	2
W912ER-04-D-0004	\$ 19,767,873.00	1	\$ -	0	\$ -	0	\$ 19,767,873.00	1
W912ER-04-D-0005	\$ -	0	\$ -	0	\$ -	0	\$ -	0
W912ER-04-D-0006	\$ -	0	\$ -	0	\$ -	0	\$ -	0
W912ER-04-D-0007	\$ -	0	\$ -	0	\$ -	0	\$ -	0
W912ER-04-D-0008	\$ 126,574,391.00	2	\$ 126,574,391.00	2	\$ -	0	\$ -	0
W912ER-04-D-0009	\$ -	0	\$ -	0	\$ -	0	\$ -	0
W912ER-04-D-0010	\$ 2,447,000.00	1	\$ -	0	\$ -	0	\$ 2,447,000.00	1
<b>TOTALS</b>	<b>\$ 782,022,801.29</b>	<b>36</b>	<b>\$ 473,168,724.75</b>	<b>22</b>	<b>\$ 111,246,940.76</b>	<b>10</b>	<b>\$ 197,607,135.78</b>	<b>13</b>

\* This was not an IDIQ contract, some work was awarded at the time the contract was awarded, while other work occurred under seven change orders.

# Appendix D. Summary of New Requirements

Contract Number DACA78-03-D-0002

Contract Action	Description	Award Date	Amount
<b>Task Order 2</b>			
Modification 5	Design and construct a new clinic, two barracks, and a stone wall	February 27, 2004	\$ 5,000,000.00
Modification 10	Construct a new vehicle maintenance facility, toilet, and vehicle wash rack	July 29, 2004	\$ 476,500.00
Modification 15	Utility analysis with design options	August 18, 2004	\$ 40,000.00
Modification 17	Design and construct an asphalt running track	September 9, 2004	\$ 163,669.00
Modification 18	Design and construct four guard towers at Kabul Military Training Compound	September 14, 2004	\$ 180,000.00
Modification 19	Design and install a potable water system	September 14, 2004	\$ 46,619.53
Modification 20	Lease 13 new vehicles	September 14, 2004	\$ 354,217.00
Modification 21	Design and construct extension to building 109	September 25, 2004	\$ 498,435.44
Modification 22	Design and install service entrance power to three buildings	September 27, 2004	\$ 496,720.31
Modification 23	Design and install a concrete slab at the front entrance facility	September 27, 2004	\$ 32,990.01
<b>Subtotal for Task Order 2</b>			<b>\$ 7,289,151.29</b>

<b>Task Order 4</b>			
Modification 10	Road right of way utility installation	May 21, 2004	\$ 129,785.00
Modification 13*	Vehicle compensation	October 6, 2004	\$ 36,817.00
<b>Subtotal for Task Order 4</b>			<b>\$ 166,602.00</b>

<b>Task Order 7</b>			
Modification 4	Add more sites at "Darulaman and Command General Staff College (A subunit to Kabul Military Training Center) and a power plant at Pol-e-Charkhi and new wastewater treatment plants and water treatment plants."	May 8, 2004	\$ 150,000.00
Modification 7	Continuation of Modification 4	June 16, 2004	\$ 150,000.00
Modification 8	Definitizes Modifications 4 and 7; Modifies scope of work	July 17, 2004	\$ 382,729.45
Modification 9	Item 0007: To correct the sewer connection to building 351 at Pol-E-Charkhi	August 11, 2004	\$ 3,000.00
<b>Subtotal for Task Order 7</b>			<b>\$ 685,729.45</b>

<b>Task Order 14</b>			
Modification 3	Adds 2 options for 32 barracks	April 8, 2004	\$ -
Modification 4	Exercises the 2 options for 32 barracks	April 21, 2004	\$ 7,073,174.07
<b>Subtotal for Task Order 14</b>			<b>\$ 7,073,174.07</b>

## Appendix D. Summary of New Requirements, cont'd

Contract Action	Description	Award Date	Amount
<b>Task Order 16</b>			
Task Order 16	Design and build 400 precast concrete barriers at Kandahar Airfield	January 30, 2004	\$ 345,000.00
Modification 2	Definitizes the task order and adds more work	April 27, 2004	\$ 229,139.22
Modification 3	Modifies scope of work and number of barriers	September 30, 2004	\$ 112,823.78
Modification 1A	Air Freight	April 27, 2004	\$ 50,000.00
<b>Subtotal for Task Order 16</b>			<b>\$ 736,963.00</b>
<b>Task Order 17</b>			
Task Order 17	Site preparation for Kabul Compound "Swamp" Annex	February 4, 2004	\$ 172,232.00
Modification 1	Definitizes the task order	February 6, 2004	\$ 487,768.00
<b>Subtotal for Task Order 17</b>			<b>\$ 660,000.00</b>
<b>Task Order 19</b>			
Task Order 19	Design and construct sewer system and water system at Kandahar Airfield; design and construct concrete barriers and bunker roof sections	April 12, 2004	\$ 1,589,443.88
Modification 2	Increase the diameter of the water and sewer pipe and add a lift station	July 9, 2004	\$ 241,068.00
Modification 4	Design and build water and sewer protection barriers and roof bunker sections at Kandahar Airfield	September 30, 2004	\$ 909,767.00
<b>Subtotal for Task Order 19</b>			<b>\$ 2,740,278.88</b>
<b>Task Order 20</b>			
Task Order 20*	Install tents, provide transportation to sites, install concrete pads, electrical hook-ups, generators, and heaters	October 6, 2004	\$ 247,800.00
<b>Subtotal for Task Order 20</b>			<b>\$ 247,800.00</b>
<b>Task Order 23</b>			
Task Order 23	Site preparation for Kabul Compound "The Plain" area	February 26, 2004	\$ 169,444.44
<b>Subtotal for Task Order 23</b>			<b>\$ 169,444.44</b>
<b>Grand Total</b>			<b>\$ 19,769,143.13</b>

\* FY 2005

## Appendix E. Questionable Items from Contract DACA78-03-D-0002

Item*	Proposal Totals
<b>Accounting</b>	\$ 40,379
Airline tickets	80,667
All risk insurance	98,354
<b>Banking</b>	<b>190,374</b>
Buffet attendant	4,299
<b>Buffet supplies</b>	<b>3,095</b>
<b>Cleaning supplies</b>	<b>2,357</b>
Communications	312,960
Computers	7,218
<b>Copying</b>	<b>15,380</b>
Field office, expenses, furniture, structure, renovation	1,427,181
Food allowance	114,657
Furniture for Kabul and Karachi offices	4,366
<b>Hospitality entertainment</b>	<b>7,606</b>
Hotel	33,685
Housing for expatriates, and U.S. staff	174,216
Inland transportation from Turkey to Afghanistan	71,148
Janitors	3,687
<b>Legal</b>	<b>54,942</b>
<b>Maintenance agreements</b>	<b>3,967</b>
Parking sunshade	4,339
Rest and Relaxation lodging and tickets	18,969
Staff accommodation	803,640
<b>Stationary</b>	<b>5,880</b>
Lodging and trips	3,719
Visas	28,239
<b>TOTAL</b>	<b>\$ 3,515,323</b>

\*The items listed in bold are the questionable items from the proposal of the contractor that the AED contracting official determined should not have been allowed, as stated on page 25 of this report.

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## Appendix F. Management Comments to the Finding and Audit Response

The U.S. Army Corps of Engineers provided comments to the draft report signed by the Deputy Commander, U.S. Army Corps of Engineers. To his comments, the Deputy Commander also provided three enclosures setting forth details about conditions in Afghanistan and the TAC legal counsel views. The third enclosure was a copy of the draft report. The following are the comments that related to the finding.

**Deputy Commander Signed Memorandum Comments.** The Deputy Commander stated that he was disappointed that the DoD OIG did not outbrief TAC about the results of the audit, nor was it provided an opportunity to submit comments. In addition, he disagreed with our conclusion regarding a lack of planning for the Ammunition Supply Point on task order 8.

**Audit Response.** We disagree with the Deputy Commander regarding not having an outbrief. The DoD OIG audit team held an exit conference with 11 of the senior management personnel of TAC on September 17, 2004. Furthermore, TAC was provided an opportunity and did submit comments to the draft report, which are provided in their entirety in this final report.

We have reviewed the Deputy Commander comments regarding task order 8 and still believe that this task order should have been included as part of the competition for a previous task order. We believe that with proper planning that the need to relocate the Ammunition Supply Point (the purpose of the task order) should have been identified in the planning of a previous task order for construction and repairs to the runway and parking aprons at Bagram Air Base (task order 3). Contract documentation indicated that the need for task order 8 was because the ammunition supply point was only 500 feet from the center of the runway and posed a hazard to operations. This condition should have been known at the time of the planning to repair the runway. We believe that this requirement should have been incorporated into the planning of task order 3 and been competed among the 10 contractors of the multiple award vehicle.

**U.S. Army Corps of Engineers' General Comments on Project No. D2004-D000CF-0186.** This enclosure addressed conditions in Afghanistan and other topics related to the finding. The following comments and audit response are discussed by the corresponding paragraph numbers of the enclosure.

**Paragraph II Comments.** The comments stated that the draft report failed to capture the austere environment in which TAC personnel accomplished its mission and that the report appeared to criticize TAC for taking 6 weeks to deploy personnel after receiving the mission.

**Audit Response.** We credited the USACE in the conclusion of the draft report that TAC put together a framework to accomplish this task in 3 months in a remote and hostile environment and did not have the time needed to properly plan, design, and award contracts. We did not state that 6 weeks was an



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unreasonable amount of time for TAC to deploy to Afghanistan after receiving its mission from OMC-A. We were making the point that TAC did not arrive in Afghanistan until 6 months after Secretary Rumsfeld announced that the ANA would be formed.

**Paragraph III Comments.** USACE stated that the draft report faulted OMC-A and USACE for changing design and construction standards and that it lacked a formal construction standard for Afghan construction. USACE stated that requirements changed, especially in the early stages, because they were necessary to meet revisions in the ANA force structure, to accommodate differing site conditions, to use newly available construction materials, and to adjust facilities for cultural differences.

**Audit Response.** We do not dispute that some of the causes of changing requirements were out of the control of TAC and were necessary. However, we maintain that other causes were avoidable. The TAC architect complained that design changes resulted from USACE and OMC-A personnel rotating in and out of Afghanistan. He said that some people wanted to change the building layouts, though they did not have engineering backgrounds. The architect said that he had to “hit a moving target” as a result of the design changes which delayed the completion of projects.

**Paragraph IV Comments.** USACE stated that the draft report was not clear as to what would meet the definition of a “formalized” Afghan construction standard.

**Audit Response.** See the audit response to Recommendation 2. USACE stated that established standards are now in place and change as a result of lessons learned. USACE met the intent of the recommendation.

**Paragraph V Comments.** USACE stated that the draft report was under the mistaken impression that every USACE construction requirement could be met using the 10 contractor multiple award vehicle that TAC awarded for the entire USCENTCOM area of responsibility. Furthermore, it stated that the 5 contractor multiple award vehicle that AED awarded for construction in Afghanistan was necessary because this vehicle can be more cost effective for performance of requirements in remote areas of Afghanistan. It further stated that this vehicle was awarded with the intent to execute projects that are generally smaller or more risky while providing an opportunity to develop construction capacity in Afghanistan. The contracts on this vehicle have a limit of \$15 million per year and USACE indicated that the firms on this contract vehicle consisted of personnel with closer local ties. USACE also stated that the single award still provided a useful purpose such as continuation of existing work and providing continued base operations and maintenance services.

**Audit Response.** The 10 contractor multiple award vehicle can handle all construction requirements in the USCENTCOM area of responsibility, including Afghanistan. We maintain that the TAC 10 contractor multiple award should be the primary contract mechanism, because it provides for greater competition, and because the TAC contracting office is more stable. The scope of work for the 10 contractor multiple award vehicle is more broad than the 5 contractor multiple

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award. The major differences between the vehicles are that the 5 contractor multiple award vehicle is limited to Afghanistan and the ceiling for each contract is \$15 million per year, whereas the 10 contractor multiple award vehicle covers the entire USCENCOM area of responsibility, including Afghanistan, and the ceiling for each contract is \$500 million per year. Moreover, 2 of the 5 contractors on the AED multiple award are also on the 10 contractor multiple award vehicle awarded by TAC. If USACE continues using both vehicles, a review process should be initiated to determine the most appropriate vehicle to use. USACE also indicated in its comments that the smaller multiple award vehicle was put in place to handle smaller and more riskier requirements in the more remote areas of Afghanistan, and cited two examples in which none of the 10 contractors submitted a bid on those requirements. In those cases, the USACE philosophy of having a smaller multiple award vehicle in place for local companies is a smart and insightful decision.

We disagree that Contrack's single award contract, DACA78-03-D-0002, should continue to be used. USACE asserts that this contract is needed for projects that can only be performed by Contrack. We do not agree. Both the single award and the multiple award vehicle have the same scope of work (Design and Construction Services) except that the multiple award vehicle has a wider geographic scope than the single award. The multiple award vehicle covers the entire USCENCOM area of responsibility whereas the single award covers only Afghanistan. As a result, any requirement being placed on the single award to Contrack International, Inc., can be placed on the multiple award contract vehicle for competition. Furthermore, Contrack International, Inc., is one of the 10 contractors on the TAC multiple award vehicle. Multiple award regulations provide "exceptions to fair opportunity," which allow task orders to be awarded on a sole-source basis when it is necessary, such as when:

- providing a fair opportunity to all contractors would result in unacceptable delays;
- only one contractor is capable of performing the work; and
- the task order is a logical follow-on to a prior contract with the same contractor.

Any work in Afghanistan that can only be performed by Contrack could be awarded as a task order on the TAC multiple award mechanism by citing one of the exceptions to fair opportunity. We reiterate our recommendation that USACE terminate Contract DACA78-03-D-0002.

**Paragraph VII Comments.** USACE stated that the equipment purchased under task order 3 was not out-of-scope of the contract because the contract contained the phrase "This contract includes, but is not limited to, design and construction services for new construction, renovation, alterations. . .and other associated work necessary for a fully functional facility." In addition, USACE indicated that 13 vehicles valued at \$354,217 were not leased "under this task order."

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**Audit Response.** USACE contends that the purchase of construction equipment is justified because the scope of work states “This contract includes, *but is not limited to*, design and construction services for new construction, renovation, alterations ...and *other associated work for a fully functional facility.*” (emphasis added.) We disagree. All of the requirements discussed in the scope of work were services, not equipment. Some of the equipment purchased included a bulldozer, a crane, four dump trucks, and an 8,000 gallon refueler. We do not believe that the vague, non-specific italicized phrases justify the purchase of equipment on a services contract. By this logic, USACE could argue that anything falls within the scope, since the scope of work states that the contract is “not limited to” design and construction services.

Regarding the 13 leased vehicles, we did not state that they were leased on task order 3. As stated in Appendix D, they were leased on modification 20 to task order 2. We adjusted page 21 of this report to make it more clear that they were not leased on task order 3.

**Paragraph VIII Comments.** While the USACE acknowledged that improvements in its estimating process for Afghanistan needed to improve, it stated that some statements in the draft report were inaccurate and misleading. Specifically, it stated that the statement on page 23 of the draft report saying, “the estimators just ‘load quantities’ into the estimating system” and that an estimate was completed in 10 minutes was inaccurate and misleading. USACE also commented that it was difficult to compare contractor proposals to estimates because the contractor had more time and detailed knowledge in which to prepare the proposal, while the USACE estimates were based on lump sum and square meter pricing. The comments also stated that had USACE had more time, that the estimates would have been more accurate.

**Audit Response.** The above statements were provided to us by a TAC estimator and program manager. There was no inaccuracy in what they stated, nor was it misleading. Furthermore, USACE stated in its comments on page 64 that “the estimator enters or loads the quantities of materials into the estimating system and the computer program calculates and summarizes the remaining data.” This explanation reinforces the statement in our report. The estimator loads quantities into the system, and the system produces the estimate. We maintain our opinion that the estimates were not an adequate tool to be the sole basis for a price reasonableness determination.

The fact that the Government estimates are less detailed than the proposals and cannot reasonably be directly compared to the proposals also reinforces our conclusion about the reliability of the estimates. If the estimate and proposal cannot reasonably be compared, it is not logical to conclude that the proposed price is reasonable just because it is less than the estimated price.

**Paragraph IX Comments.** USACE agreed that improvements in the negotiating process for Afghanistan need to be made. However, it stated that the draft report omitted several difficulties USACE encountered with negotiating a fair and reasonable price, such as the changing Afghan economy and the contractor having different information than the estimator. The comments also stated that negotiations conducted from Winchester can be difficult and

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definitization of these task orders would have provided the needed knowledge base for more efficient negotiations. USACE also stated that had the DoD OIG reviewed the Pre-Negotiation Objective Memorandums along with the Price Negotiation Memorandum that the report likely would have been less critical.

**Audit Response.** The FAR requires that the Government obtain a fair and reasonable prices on all contracts. We do not believe that the difficulties associated with contracting in Afghanistan can be used to justify the price reasonableness problems we found. USACE has admitted in its comments that the Government estimates had numerous inherent limitations. As a result, USACE should have known that the estimates were not reliable enough to be the sole basis to determine that a price was reasonable.

The report identified numerous instances where the Government estimate was woefully inadequate to prove that the price was reasonable. For example, the Government estimate for a line item to clear a site was \$95,962, while the contractor's proposed price was \$1.6 million. The estimator admitted that his estimate was just a guess, not based on facts or assumptions. The independent Government cost estimates can be used as a tool to assist in price analysis. However, we maintain that the limitations and other problems with the estimates prevent them from being reliable enough to be the sole basis for a price reasonableness determination. We agree with USACE that the task orders should have been definitized in a more timely manner and pointed that out in the draft report.

We did analyze the Pre-Negotiation Objective Memorandums, PNMs, and other relevant documentation to reach our conclusions regarding price reasonableness. We agree with USACE that the PNMs often lacked the relevant detail. The FAR requires that all relevant information pertaining to the negotiation be documented in the PNM, which USACE acknowledges was not done in some situations. Furthermore, we attempted to review the Pre-Negotiation Objective Memorandums with the PNMs but could not reconcile the differences. For example, on task order 2 of Contract DACA78-03-D-0002, the Pre-Negotiation Objective Memorandum stated that the price of the barracks could not be determined because all this work was performed by a subcontractor and that no evaluation could be performed at that time but additional information will be requested and discussed during negotiations. However, the PNM did not indicate that any further information was requested or analyzed and the Government accepted the cost of the barracks as proposed.

**TAC Legal Counsel Comments.** The TAC legal counsel provided comments dated July 22, 2005 relating to the potential Antideficiency Act violation, the bona fide need, not definitizing task orders, and poor planning of task orders. Her comments relating to the potential Antideficiency Act violation are addressed in the "Recommendations, Management Comments, and Audit Response" section of this report.

**Bona Fide Need.** The TAC legal counsel stated that TAC met the requirements of the bona fide need rule. The legal counsel argued that the bona fide need rule only requires that the need for which the funds were obligated existed during the year of obligation. Therefore, since the need for the modular

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housing existed during FY 2003, it was appropriate to award the task order at the end of FY 2003 using expiring funds. The legal counsel also noted that whether or not a requirement is urgent is not relevant to the bona fide need rule.

TAC legal counsel also contended that the task order's option items did not violate the bona fide need rule, because the options had not been exercised and therefore had not been funded. The legal counsel also addressed the statement in the draft report that "one of the option items, valued at \$2.2 million, was not scheduled to be completed until 13 months had elapsed, which extended beyond the 12-month criteria." The legal counsel stated that there was no option item to task order 14 which met that description. It was also noted that the applicable criteria for severable services was 10 U.S.C. 2410(a) rather than 41 U.S.C. 253(l), and again noted that funds are not obligated for an unexercised option.

**Audit Response.** We considered the USACE position on this issue and removed the discussion of the bona fide need rule from the report.

**Improper Use of Undefined Contract Actions and Cost-Plus-A-Percentage-of-Cost Contracting.** The TAC legal counsel took exception to the DoD OIG basing its report on defining task orders and the corresponding modifications as "Undefined Contract Actions," instead of as "Unpriced Change Orders." TAC stated that it interpreted an unpriced task order to be more like an unpriced change order as discussed in the Engineering FAR Supplement.

In addition, the TAC legal counsel stated that the four contract actions we identified as CPPC did not function as CPPC because the profit rate for the actions was not predetermined, and therefore there was no predetermined rate applied to actual costs. As a result, two of the four criteria that a contract be considered CPPC were not met. The counsel also stated that "after-the-fact pricing" does not violate the CPPC statute when there is no agreement between the contracting parties that any fixed percentage will be applied to incurred costs in negotiating the price. This section of the report is now titled "Incentive to Increase Costs."

**Audit Response.** We considered the USACE position regarding the term "undefined contract action" did not apply to the task orders awarded under Contract DACA78-03-D-002. We revised this section of the report and changed the title of this section to Negotiating Prices. The previous enclosure to the management comments provided by the USACE acknowledged that improvements to the negotiation process of unpriced task orders were needed.

We considered the USACE position that the four contract actions the report identified as CPPC did not meet the legal definition of CPPC. We revised this section of the report to explain that the four contract actions gave the contractors an incentive to increase costs, even though the actions could not legally be classified as CPPC.

**Poor Planning of Task Orders Comments.** The TAC legal counsel stated that any possible poor planning that existed on the task orders discussed in the report did not lead to any known violation of law or regulation. Specifically,

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regarding contract W912ER-04-D-0003, task order 7, she stated that the draft report acknowledged that the requirement had become urgent by July 2004, when it was discovered that no other appropriate contract vehicle was available. She also stated that FAR 16.505(b)(2) authorizes exceptions to fair opportunity when providing a fair opportunity would result in unacceptable delays.

The TAC legal counsel stated that USACE could not have placed contract W912ER-04-D-0003, task order 8 on the May 2004 task order because the project was not authorized at that time. She stated that the urgent need to construct the ammunition supply point arose as a result of a July 2004 decision by the customer to construct a new runway in the path of the existing ASP. Furthermore, approval from the Under Secretary of Defense (Comptroller)/Chief Financial Officer to execute the ASP project was not received until September 28, 2004.

The TAC legal counsel stated that poor planning did not exist for contract W912ER-04-D-0004, task order 6, modification 2, and that TAC properly responded to customer-directed changes. She stated that the draft report demonstrated confusion regarding the chronology of events relating to this task order; specifically she noted that the report referred to a document labeled “change order” as a change order, when this document was actually just a budgetary rough order of magnitude estimate submitted by the contractor. She summarized the chronology of events: On July 19, task order 6 was awarded; on August 27, TAC issued a request for proposal for six additional buildings and supporting utilities and improvement; on September 15, the budgetary ROM estimate was submitted; on September 29, modification 2 was issued for the additional buildings. She also argued that the justification cited for awarding the modification for the six new buildings noncompetitively (FAR 16.505(b)(2)(i)-urgent agency need) was actually not applicable because it was a modification and not a task order. Further, she stated that all of the buildings to be constructed on this task order (including the buildings on modification 2) were needed for the project to be a “complete and usable facility.” Finally, the counsel stated that all of these buildings represented a need in FY 2004 and therefore met the requirements of the bona fide needs rule.

**Audit Response.** The TAC legal counsel stated that our draft report acknowledges that Contract W912ER-04-D-0003, task order 7 became urgent in July 2004 when it was discovered that no other contract vehicle was available. That statement is not correct. We stated that the requirement became urgent in July 2004 because of mistakes made by USACE personnel in May 2004. Because the contracting officer did not know the geographic scope of work of the single award and began procedures to use this contract, and only then later determined that this contract could not be used outside of Afghanistan, the requirement became urgent unnecessarily.

This lack of knowledge and lack of prudent business sense on the part of USACE caused the task order to become urgent in July 2004, not because it was the only contract vehicle available. Moreover, if USACE ceased to use the single contract award, as we recommended, the confusion over geographic scopes of work would be eliminated.

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TAC disagreed with our statement on the non-competitive award for task order 8 of Contract W912ER-04-D-0003. We still believe that this task order should have been incorporated in the planning for task order 3 of the same contract. That task order was competitively awarded for the design and build of a runway and taxiways, repairs, and construction of parking aprons at the Bagram Air Base, Afghanistan. We believe that the planning for that task order should have determined that the ammunition supply point would have to be relocated. In fact, the contractor was required to demine the area of the existing ammunition supply point as part of the work on the previous task order. Had this project been part of the previous task order, the relocation of the ammunition supply point could have been part of the competitively awarded task order instead of a sole-source acquisition.

Furthermore, the TAC argument that the requirement did not arise until July of 2003 would not justify an urgent sole source award at the end of the fiscal year anyway. If the need for the task order arose in July, there was still enough time to award a competitive task order before the end of September. The fact that approval to award the project was not received from Under Secretary of Defense (Comptroller)/Chief Financial Officer until September 28 also does not justify the sole source award. TAC knew it would have this authority prior to September 28, evidenced by the fact that TAC sent the request for proposal to the contractor on September 17. With proper planning the award could have been made competitively.

TAC disagreed with our statement regarding poor planning for modification 2, task order 6 of Contract W912ER-04-D-0004. TAC stated that we misinterpreted contract-related documentation and the phasing of the work to be accomplished under the task order. We disagree. We accurately reported on the documentation that was provided in the contract file including the justification not to compete the modification; we clarified the report to show that the document labeled "change order" was a budgetary ROM. Furthermore, the legal counsel stated that task order 6 including the modifications should be considered a single project producing a complete usable facility. If this were the case, then that modification should have been incorporated with the original requirement and should have then been part of the competitive process for the award of the task order. It was not, it was placed on the task order as a modification for additional buildings. We still believe that this requirement, especially after it was postponed until the spring, should have been canceled and competed using the multiple award contract vehicle.

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## **Appendix G. Report Distribution**

### **Office of the Secretary of Defense**

Under Secretary of Defense for Acquisition, Technology, and Logistics  
Director, Defense Procurement and Acquisition Policy  
Director, Acquisition Resources and Analysis  
Under Secretary of Defense (Comptroller)/Chief Financial Officer  
Deputy Chief Financial Officer  
Deputy Comptroller (Program/Budget)  
Director, Program Analysis and Evaluation

### **Department of the Army**

Commander, U.S. Army Corps of Engineers  
Auditor General, Department of the Army

### **Department of the Navy**

Auditor General, Department of the Navy

### **Department of the Air Force**

Auditor General, Department of the Air Force

### **Combatant Command**

Commander, U.S. Central Command

### **Other Defense Organizations**

Director, Defense Contract Audit Agency

### **Non-Defense Federal Organization**

Office of Management and Budget



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## **Congressional Committees and Subcommittees, Chairman and Ranking Minority Member**

Senate Committee on Appropriations  
Senate Subcommittee on Defense, Committee on Appropriations  
Senate Subcommittee on Military Construction, Committee on Appropriations  
Senate Committee on Armed Services  
Senate Committee on Homeland Security and Governmental Affairs  
House Committee on Appropriations  
House Subcommittee on Defense, Committee on Appropriations  
House Subcommittee on Military Construction, Committee on Appropriations  
House Committee on Armed Services  
House Committee on Government Reform  
House Subcommittee on Government Efficiency and Financial Management, Committee on Government Reform  
House Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform  
House Subcommittee on Technology, Information Policy, Intergovernmental Relations, and the Census, Committee on Government Reform

# U.S. Army Corps of Engineers Comments



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

AUG 01 2005

CEIR

MEMORANDUM FOR THE INSPECTOR GENERAL, DEPARTMENT OF  
DEFENSE, 400 Army Navy Drive, Arlington, VA 22202-4704

SUBJECT: Draft Audit Report--Audit of Contracts Awarded to Assist the Global War  
on Terrorism by the U.S. Army Corps of Engineers (Project. No. D2004-D000CF-  
0186)—COMMAND RESPONSE

1. This memorandum responds to the findings, conclusions, and recommendations contained in the above-referenced draft DODIG-Audit Report. Our detailed responses are contained in the three enclosures. We trust that your staff will consider our comments in the final report.
2. We are disappointed with the audit process used by your auditors to present the results of this draft report. It is my understanding that our Transatlantic Program Center (TAC) was not outbriefed on the results of the draft audit, nor was it given the opportunity to submit comments. If TAC had been given such an opportunity, I believe that many of the inaccuracies and conclusions in the report would have been corrected.
3. TAC's review comments indicate that it did not engage in illegal project splitting, did not exceed statutory thresholds for use of O&M funds, and did not violate the bona fide needs rule in obligating funds under Contract DACA78-03-D-0002. My Headquarters program management and legal staffs agree in all respects with the TAC comments. For example, the draft report concludes that poor planning caused the noncompetitive award of Task Order 8 for the construction of the Ammunition Supply Point (ASP) at Bagram Air Field. This task order was awarded on 30 September 2004. In this regard, the draft report goes on to say on page 18 that "It is hard to believe that the urgency arose at the end of the fiscal year when the funding was about to expire." In our view, this conclusion is totally unwarranted. The facts indicate that the approval to execute the ASP project from the Undersecretary of Defense (Comptroller) was not received until 28 September 2004.
4. With regard to the audit of contracts that supported Afghanistan construction programs, USACE believes that your final audit report must consider the significant accomplishments that USACE made at the behest of the Defense Department in constructing barracks and base facilities during a tumultuous time. These considerations

CEIR

SUBJECT: Draft Audit Report--Audit of Contracts Awarded to Assist the Global War on Terrorism by the U.S. Army Corps of Engineers (Project. No. D2004-D000CF-0186)—COMMAND RESPONSE

would provide the context for our mission in Afghanistan and directly relate to our ability to design and construct facilities in this war-torn country that witnessed the remarkable establishment of the Afghanistan government and the formation of its army in a very short time period. The constantly changing environment necessarily resulted in revised requirements by both the Office of Military Cooperation-Afghanistan (OMC-A) and the Afghanistan Ministry of Defense, and USACE responded accordingly. Consider the following:

- Afghanistan had been racked by 30 years of conflict – the Russian war, the Taliban years, and Operation Enduring Freedom – leaving virtually no government, no economic or civil institutions, and no stable environment. Decades of conflict set the stage for the engineering challenges. The United States initiated the Afghan National Army (ANA) program to provide stability to help prevent the reemergence of terrorism and to create an environment where institutions could develop so that Afghanistan could become self-sufficient. OMC-A's efforts were critical in meeting the U.S. goals, and the engineer effort was vital to creating a fully capable national army that could protect the country and its people.
- In Fall 2002 when TAC sent a master-planning team at OMC-A's request, TAC found that Afghanistan had little engineering capability and no usable pieces of construction equipment. The country had virtually no locally available construction materials with the exception of some crude wood products, poor quality masonry products, and concrete, and it had an abundance of unskilled local labor. To meet an aggressive construction schedule, USACE deliberately determined that local products and local labor would be used to the maximum extent possible in simplified standard designs that would be sustainable by the Afghanistan Ministry of Defense. Construction equipment and materials such as steel products and electrical and mechanical items had to be convoyed into the country through dangerous mountainous passes from neighboring Pakistan and Uzbekistan.
- The aggressive ANA construction program – in a dangerous and volatile environment - had its challenges for USACE, with course corrections necessary and lessons learned captured immediately. The program initially required

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renovation of existing, dilapidated and war-damaged buildings to accommodate battalions – with 600 soldiers – graduating every 35 days. TAC was required to use extraordinary means to accomplish the construction; mission failure would result in soldiers going back to their tribes with little likelihood that they would return to their army units. As the program evolved, design changes were required based on customer needs and identified efficiencies through the lessons learned process.

5. Now in under three years since this aggressive program was initiated, nearly 23,000 of the ANA's expected 70,000-man army are living in completed barracks. From constructing facilities at sites around Kabul, the program expanded to include brigade facilities around the country to ensure security at Mazer-e-Sharif, Herat, Kandahar, Gardez, Qalat, and Khost. Sixty-four contracts or task orders have been awarded, totaling some \$900 million. USACE is building barracks, training sites, logistics facilities, signal facilities, and hospitals for ANA soldiers who operate daily with U.S. and coalition forces against terrorists and those who oppose freedom and democracy in Afghanistan. In addition, USACE has provided billeting facilities to more than 6,000 U.S. forces. In the course of accomplishing this work, Afghan personnel are being trained in various construction trades, contributing to the country's economy and increasing their capabilities.

6. USACE efforts have been praised by the ANA, the Combined Forces Command-Afghanistan (CFC-A), OMC-A, and other federal agencies. The ANA Garrison Commander at Darulaman said, "Our Army is here for serving the nation and the people of Afghanistan ... The infrastructure that serves the ANA serves the people of Afghanistan ... We are very pleased to have similar facilities used by other military all around the world." The AED team was praised by the Commander, CFC-A, during a change of command ceremony in July 2005 for their contributions to nation building in Afghanistan. The recently departed Afghanistan District Commander has been honored as the Engineer of the Year for the New Jersey American Council of Engineering Companies. Individually, district team members have been recognized by both their U.S. and Afghanistan customers. I believe that USACE mission execution was outstanding.

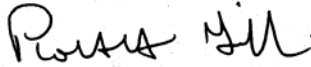
7. Working with Defense and State Department agencies, USACE is assisting with programs that are vital to Afghanistan's long-term security. While USACE appreciates the Inspector General's comments concerning the problems in estimating and

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negotiations – which provide valuable lessons learned input – other areas of the report should be revised to reflect the situation and USACE's proactive response, and some areas should be eliminated completely. Attached are the three enclosures that support the official USACE response to subject draft DODIG audit report. If you have any questions, please contact Mr. Donald Ripp, Chief Audit Executive, at 202-761-1985.

FOR THE COMMANDER:



ROBERT H. GRIFFIN  
Major General, USA  
Deputy Commander

Encls

22 July 2005

**U.S. Army Corps of Engineers' General Comments on  
Project No. D2004-D000CF-0186  
Prepared by the  
Department of Defense Office of Inspector General**

**I. Introduction**

On June 20, 2005, the Department of Defense Office of the Inspector General (DoD IG) issued a draft report titled "Contracts Awarded to Assist the Global War on Terrorism by the U.S. Army Corps of Engineers." As requested by the DOD IG, the Commander, U.S. Army Corps of Engineers (USACE) respectfully provides the following comments regarding the findings and recommendations of the DoD IG report.

**II. The Background Provided by the DoD IG Failed to Describe the Conditions in Afghanistan during the Period under Review.**

a. Though the DoD IG draft report included a general Background section, it failed to capture the austere environment in which Transatlantic Program Center (TAC) personnel accomplished this mission for U.S. Central Command (CENTCOM). See pgs. 1-3.

b. In the fall of 2002, TAC sent a master-planning team at the Office of Military Cooperation-Afghanistan (OMC-A)'s request. Although the DoD IG report appears to criticize TAC for taking 6 weeks to deploy these personnel after receiving the mission from OMC-A, USACE respectfully submits that 6 weeks was an incredibly short amount of time to locate, equip and train volunteers, receive the appropriate country clearances, arrange for military aircraft transportation and travel to Afghanistan in the fall of 2002.

c. TAC found that Afghanistan had little engineering capability and no usable pieces of construction equipment. Decades of conflict set the stage for the engineering challenges. When the United States initiated the Afghanistan National Army barracks construction program, Afghanistan had virtually no locally available construction materials with the exception of some crude wood products, poor quality masonry products, and concrete, and it had an abundance of unskilled local labor. Afghanistan also presented a dangerous and volatile environment in which to meet an aggressive ANA construction program. The constantly changing environment necessarily resulted in revised requirements by both the Office of Military Cooperation-Afghanistan (OMC-A) and the Afghanistan Ministry of Defense, and USACE responded accordingly.

**III. The DoD IG Report Omits Reasons why Design and Construction Requirements were Unclear and Kept Changing**

a. The DoD IG report faults OMC-A and USACE for design and construction standards that kept changing and the lack of formal construction standards for Afghan construction. See pgs. 7-10. The DoD IG report omits a number of factors that contributing to the need

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for flexibility in design and construction requirements. This omission leaves the reader to the false conclusion that the need for changes was the result of ineptitude on the part of the DoD.

b. Standards and requirements did frequently change – more so in the early stages of the ANA program – but many factors not mentioned in the DoD IG’s report contributed to those changes. These changes were necessary to meet revisions in the ANA force structure and corresponding revisions in requirements, to accommodate differing site conditions, to incorporate newly available construction materials and to adjust facilities because of cultural differences.

c. USACE awarded ANA task orders based on a firm understanding of the scope of the work and available funding. However, OMC-A provided USACE funding on an incremental basis. Cost estimates were prepared and a program put in place that best matched the known funding stream with the critical facility needs. Although it was known that work at some locations was not the entire requirement, the identified scope of work was that which could be funded at that point in time and which would provide the ANA with usable facilities. Because funding was allocated by OMC-A to meet the critical needs of the ANA, USACE did not direct the funding stream at each project location. Thus, as the needs of the ANA changed and with them the funding stream, changes to the design and construction requirements inevitably changed.

#### **IV. Afghan Construction Standards Exist as a Result of USACE’s Activity.**

a. While it is not clear what would meet the DoD IG’s definition of “formalized” Afghan construction standard, currently well established standards are in place for Afghan construction and little change is required from project to project.

b. The DoD IG report faults USACE for not formalizing Afghan construction standards and makes the recommendation to “[f]ormalize and develop a design standard for all Afghan National Army Facilities . . .” See pg. 30. For example, the report finds that “[w]ithout established building standards, task order requirements were often poorly defined and frequently changed.” See pg. 10. The report further states: “USACE must standardize building criteria to the maximum extent possible for construction support of the ANA. This would help reduce excessive changes to task order requirements” See pg. 10. Respectfully, the DoD IG report fails to appreciate how construction standards developed organically in Afghanistan during the ANA infrastructure project. Had USACE imposed rigid construction standards at the beginning of the ANA program could easily have resulted in further delays and changes.

c. When construction begins in a developing country, national construction standards (ex: ASTMs, DINs, BSs, etc.) typically do not exist. This was the case in Afghanistan. However, as the country builds capacity, gains knowledge of construction practices used throughout the rest of the world, and begins to obtain companies in the industry, standards develop. This is a slow and evolutionary process.

d. USACE could not borrow or improve upon existing national standards because none existed. When the program began, there was no construction industry in Afghanistan, little local materials and equipment, and a local work force that was unskilled and unorganized in accomplishing major construction projects. As the construction infrastructure of Afghanistan improved, USACE began incorporating more advantageous materials and construction techniques into the projects. USACE took the information available at the time, fully documented the known requirements, and formulated detailed design criteria. Periodically the criteria had to be changed to keep pace with the changing customer requirements and environment. The evolutionary process was fast paced during the start of the program, for the first two years.

e. The evolution of the designs was a continual process. Lessons learned were incorporated as they were identified so that the follow-on generation of facility was better than the current. This process continues to this day, although at a much lesser degree. New personnel to OMC-A seeking to improve on the established standards provided constructive suggestions. TAC and AED evaluated each suggestion and helped by providing the historical basis for the design standards that existed. Through consensus, many ideas were incorporated and others were rejected.

f. While it was conceivably possible for USACE to impose "formalized" construction standards at the outset of the ANA program, such standards would have inevitably required modifications due to customer needs, security concerns, supply constraints, funding constraints and mission requirements. When USACE was assigned the ANA infrastructure mission, planning for the ANA was in its infancy. DoD and CENTCOM were just defining the target force structure of the ANA. Training, sustainment and infrastructure requirements were being drafted, adjusted and redefined on nearly a daily basis, making it impossible to lock into a firm set of standards that would be guaranteed not to change for the foreseeable future.

g. USACE, as a DoD construction agent, is reluctant to impose its own construction standards in contravention of the customer's needs and the contractor's expertise. If the customer has changing needs, USACE attempts to accommodate them to help them meet their mission requirements. To continue with a design that is not satisfying the customer's needs for the sole purpose of standardization would not serve the customer or the Nation's needs.

h. When USACE provides a contractor with a template for bases, buildings, structures, etc., it is only providing a guide with mandatory requirements. The contractor is required to develop innovative ideas and designs that will improve the concept. The new designs may become the new standard. It would be short-sighted for the government to award design/build contracts without giving the contractor the authority to use new materials, recommend better or less expensive products that fulfill the same function, or develop innovative designs that meet the customer's needs to a greater degree than the standard designs.



i. The environmental, climatologic and geographic conditions in Afghanistan must also be considered. It would be irresponsible to use the same design for areas of the country where temperatures are 118 degrees Fahrenheit in the shade in June, as for areas of the country that stay in the 80's throughout the summer. Also to be considered are the varying elevations of the project sites, wadis, soil conditions, materials availability, and the logistics of getting materials to the site. Building materials that are available in Kabul are not necessarily available in Herat. Standard building layouts are in existence but must continue to be refined for specific regions, sites, and unique customer requirements.

j. Well established standards are now in place that experience little change from project to project except for incorporation of small lessons learned. USACE prudently defined contract requirements with the customer and made changes to those requirements that were in the best interests of the government. Under the circumstances that occurred in 2002, initiation of USACE involvement was reasonably timely, although USACE was somewhat behind in gearing up to meet the construction requirements as the program was initiated. In a fast-track program such as this, certain assumptions must be made before all facts are known. DoD, USCENTCOM, OMC-A, and TAC made reasonable assumptions, most of which proved accurate; inaccurate assumptions required changes in program direction.

**V. Use of Various Contract Vehicles was a Legitimate and Practical Method to Accomplish the Afghan Construction Mission**

a. The DoD IG report criticizes USACE for utilizing multiple contract vehicles to fulfill its mission in Afghanistan. See pg. 14-19. The DoD IG apparently is under the impression that every USACE construction requirement could be met by using the 10 multiple award contract vehicle TAC awarded for the entire CENTCOM AOR – which includes Iraq. Based on this impression, the DoD IG report recommends using “the 10 contractor multiple award mechanism for satisfying U.S. Central Command’s requirement for construction.” See pg. 30.

b. The contract mechanisms that TAC and AED have available have specific uses and applications despite their similar scopes of work. There is sound rationale for having these multiple contracts, and government procurement resources are reduced by targeting a specific project to the most advantageous contract. In all cases, an acquisition strategy is developed for each project taking into account all influencing factors, and the most appropriate contract mechanism is chosen that is in the overall best interest of the government. Use of TAC’s 10 IDIQ contracts is an excellent mechanism for accomplishing much of the construction requirements in the U.S. Central Command’s area of operations. No less than 10 of AED’s major projects are anticipated to be awarded under this contract mechanism in FY05. However, this contract mechanism does not meet all AED’s needs, nor does it completely support U.S. Central Command’s objective to support Afghan businesses and to build capacity in a country that has suffered through 30 years of war. Although the scopes may appear similar, AED’s five IDIQ contracts have significantly smaller limits (\$15 million per year) and can more cost effectively perform in remote areas of Afghanistan given the current security

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environment. The AED IDIQ contracts were awarded with the intent to execute projects that are generally small or risky while providing an opportunity to develop construction capacity in Afghanistan. To date, AED has awarded task orders totaling over \$50 million under this contract, supporting USCENTCOM's capacity building objective.

c. Though the scopes of the IDIQ contracts are similar, the usage of the contracts is quite different. In general, USACE relies more heavily on the 10 IDIQ contracts. However, overriding circumstances do exist to justify the use of other contract mechanisms as being more appropriate. The general guidelines for usage of the available contract types are as follows:

- Single award IDIQ contract, DACA78-03-D-0002: Limited to work in Afghanistan; used extensively prior to the 10 IDIQ contracts because no other timely contract vehicle was available. Following award of the 10 IDIQs, this contract was sometimes still the more advantageous contract when considering all circumstances such as physical site conditions (size, congestion, potential interferences, etc.), continuation of existing work, mobilization costs of new contractor, and size and complexity of work. Now, it is used in limited application, generally on projects that are considered a continuation of work by this same contractor (for example, providing continued base operations and maintenance services).
- Multiple award IDIQ, awarded to 3 contractors for work throughout the USCENTCOM AOR: Originally used in Afghanistan to extend competition, these contracts were awarded to handle contingency requirements in the USCENTCOM AOR. Shortly after award, it became clear that the requirements in Iraq would use up most of the contract capacity. Since an alternative IDIQ contract was available for use in Afghanistan (DACA78-03-D-0002), these contracts were primarily reserved for use in Iraq.
- Multiple award IDIQ, awarded to 10 contractors, work throughout the USCENTCOM AOR: The contract of choice when there is no other overriding circumstance that would justify use of another contract format. Because these are large U.S. firms, this contract mechanism is typically advantageous on projects of larger scope, in more secure areas of Afghanistan and the surrounding Central Asian nations.
- Multiple award IDIQ, awarded to 5 contractors, limited to work in Afghanistan: These contracts were awarded by AED to provide them their own contract mechanism for execution of Afghan projects. AED, as a separate contracting organization, does not have the ability to order work directly from TAC's 10 IDIQ contracts. AED needed an IDIQ mechanism of their own to best respond to customer requirements. The dollar limits on these contracts is considerably lower than that of the 10 IDIQs. Because these firms have closer local ties, this contract is typically used for smaller, simpler projects, in remote locations. The need for this contract was confirmed in two instances where TAC bid work to the 10 IDIQ

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contractors and received no proposals. Due to the close contractor affiliations with local Afghans, they can operate more easily in some of the remote sites where AED has projects, such as those that support the border police station program. With constant threats against foreigners, it is good business sense to use locally affiliated contractors to perform the work. These contracts also promote developing skilled labor, developing Afghan subcontractors with increased capacity and ability to function as prime contractors, and creating a vendor pool of more than 50 qualified contractors for construction contracting. Because of these initiatives, USACE can issue solicitations to the local contractors for projects up to \$5 million dollars, with confidence that they will be able to fully complete the work in accordance with the contract requirements.

- Maximum competition has been obtained in several fully competed contracts, announced through FedBizOps. Under certain situations, when time has allowed, TAC and AED have announced projects in the FedBizOps or other publications to expand competition.

TAC/AED develops an acquisition strategy for each project before proceeding with any acquisition. Based on that strategy, TAC/AED selects the most appropriate contracting vehicle. For example, in the case of task order 2, the conditions on the ground influenced using Contract (DACA78-03-D-0002) to fully build-out KMTC. Given the acquisition methods available, there were certain situations where competing among the three IDIQ contractors (later the 10 IDIQ contractors) was not in the best interest of the government. In this specific case, the KMTC project site is not well suited to having multiple large contractors working the site simultaneously. It is a relatively small congested site not suitable for cordoning off certain areas for different contractors as Darualaman and Pol-E-Charkhi were. Work under the original task order involved multiple locations throughout the site. It is not sound construction practice to place different contractors in such close proximity to each other because of tremendous possibilities for delay and interferences that could result in poor quality, which would involve claims, increased costs and increased requirements in contract administration. Combined with the schedule urgency and the increased cost of mobilizing a second contractor, using Contract International was the proper course of action in this case and represented the best value to the government.

g. Because the 10 contractor multiple award contract mechanism for the CENTCOM AOR is not suitable to fulfill every construction need in Afghanistan, USACE respectfully requests DoD IG reconsider its findings and recommendations.

#### **VI. Communication problems existed between USACE personnel in Afghanistan and Winchester, Virginia.**

The DoD IG report highlights communication problems between AED and TAC that may have affected construction in Afghanistan. A nine-and-a-half hour time difference between cooperating offices creates communication challenges in any organization. Improving communication among organizations, between leaders, and with individuals is

a high priority within USACE. The experiences in Afghanistan and Iraq have provided USACE with lessons learned that will help our organization meet these inherent communications problems for future missions.

**VII. Transatlantic Center, U.S. Army Corps of Engineers Contracting Officials Did Not Permit Out-Of-Scope Items on a Contract.**

a. The Executive Summary of the DoD IG report makes a finding that USACE contracting officials permitted out-of-scope items on one contract. See pg. ii.<sup>1</sup> Specifically, the DoD IG claims that TAC contracting personnel allowed out-of-scope items on Contract DACA 78-03-D-002 task order 3 by permitting the contractor to purchase construction equipment when "[t]he scope of the contract was for design and construction services but did not include construction equipment." See pg. 22.

b. TAC does not consider this an out of scope task order since the contract Scope of Work states, "This contract includes, but is not limited to, design and construction services for new construction, renovation, alterations ...and other associated work necessary for a fully functional facility ...." The acquisition of construction equipment under was for use by the ANA. The ANA intended to perform some of the initial site clearing and demining work at the various ANA project sites to support the infrastructure program by using their own forces. This construction equipment supports the ANA's infrastructure program, and this contract was used because of the urgent nature of the procurement action.

c. The DoD IG report further states that an "AED contracting official allowed the contractor to lease 13 vehicles for \$354,217" under this task order. AED had no contracting authority under this task order. No leasing of vehicles occurred under this task order by either AED or TAC.

d. Respectfully, USACE disagrees with the finding that the procurement of construction equipment constituted an out of scope procurement and asks the DoD IG to reexamine this finding in light of the above.

**VIII. The DoD IG Report Makes Inaccurate and Misleading Statements when Discussing the Accuracy of Government Estimates**

a. The DoD IG report discusses problems with the accuracy of government estimates prepared by USACE employees. See pg. 22-26. While USACE agrees that improvements in its estimating process for Afghanistan need to be made, some statements in the DoD IG report are inaccurate and misleading. USACE respectfully submits the following discussion so that the DoD IG might reconsider its criticism of USACE government estimates.

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<sup>1</sup> This finding does not appear, however, among the list of official findings in the body of the report. See pg. 4. Notwithstanding that apparent omission, the body of the report discusses this issue. See pg. 22. USACE provides the comments above assuming that the DoD IG has made such a finding.

b. The USACE cost estimating system is well established within the Corps and has been in use for over 20 years. Computer programs were developed for the purpose of preparing Independent Government Estimates (IGE). The estimating process includes collecting current market data in the general geographical area to create a country-specific Unit Price Book (UPB). Although it is not possible to perform local market surveys every year in this broad area of operations, TAC attempts to update the UPBs as frequently as possible. Procedures are established to create or update UPBs, which include performing country-specific cost surveys, analyzing contractor proposals and negotiations, conducting market surveys, and coordinating with field staff. If the cost data is dated, cost estimators use escalation factors to bring the data to present local market prices. The report's statement that, "the estimators just load quantities into the estimating system" is inaccurate and misleading. See pg. 23. Using year-old data is not unreasonable when it is the best available information to the estimator as long as it is adjusted to the present day values. The estimator enters or loads the quantities of materials into the estimating system, and the computer program calculates and summarizes the remaining data. For years TAC has successfully used this system, from its headquarters in Winchester, Virginia, to prepare estimates for its overseas construction projects.

c. Initially, the cost estimators had limited cost data and information (availability of contractors, labor, material and equipment) for Afghanistan despite doing an initial in-country cost survey. There was a sheer lack of labor, equipment and materials in Afghanistan. Therefore, in early stages of cost estimating, the cost estimators had no choice but to use some information for labor and equipment from other Middle East countries within the area of operations. Many of the materials were imported from neighboring countries and Europe; hence, the material costs are based on costs in those developed countries.

d. All task orders were structured as design/build packages for which the government contract specifications provided specific project requirements, standards, and criteria including basic floor plans - approximately a 10% design stage. Under this type of contracting, the contractor is responsible for the completion of the 100% design. He has some level of flexibility in developing design solutions. However, his designs must meet the minimum requirements. The contractors generally were given sufficient time to submit/develop most of their design before providing their detailed proposal. Therefore, although their proposal was based on the same requirements as the government estimate, the contractor had the advantage of having a nearly complete design from which to make more detailed quantity takeoffs. The government, on the other hand, had to base its estimate solely on the requirements stated in the RFP and had to develop its estimate largely on the basis of lump sum and square meter pricing. This was why IGEs were considerably less detailed. A direct comparison between the contractor's proposal and the government estimate is difficult.

e. Government estimates were at times prepared expeditiously and were often only based on the specific project requirements, standards, and criteria found in the original task order RFP. This is the very nature of contingency construction. The estimator does not have the benefit of completed design drawings, site survey information and current cost

data from an ever-changing war time economy. If all the above information were available along with adequate time to perform estimates, then more accurate estimates could have been prepared. To meet schedules for these contingency projects set by customers, the estimate preparation time is often very short. It's not unusual to complete a rough order of magnitude estimate in one to two days. However, the statement attributed to TAC personnel that an estimate was completed in "10 minutes" is an exaggeration.

f. The estimators further compare the cost of facilities from different contracts to assist in verifying reasonableness of their estimate. Comparing the cost of barracks or power plants or other similar structures in different contracts will show that the completed cost for each category is very competitive. As an example, a one megawatt generator with all related equipment and materials should be worth \$950,000 to \$1,050,000. In other words, the cost of 8 one megawatt generators in one power plant should fall between \$7,600,000 and \$8,400,000. A difference in price might relate to the method a particular contractor might use, such as working with or without a sub-contractor and/or method of shipping and place of purchase, or perhaps the urgency of a completed power plant requires airfreight.

#### **IX. Negotiations did not Result in Fair and Reasonable Prices for the Government.**

a. The DoD IG report criticizes USACE for failing to negotiate fair and reasonable prices. See pgs. 22-26. As with estimating, USACE agrees that improvements in its negotiations process for Afghanistan need to be made. However, the DoD IG report omits several difficulties USACE personnel encountered with respect to negotiating fair and reasonable prices. Omission of these difficulties leaves the impression that the problems associated with negotiations are entirely due to poor performance by USACE employees – an impression USACE challenges – rather than the volatile nature of the Afghan economy.

b. In the quickly changing environment of Afghanistan, USACE experienced considerable cost escalation with each new task order. Labor, in particular, escalated quickly, in part because laborers initially switched allegiances with different contractors in exchange for better wages. The cost estimators and negotiators were having difficulty keeping up with the changing Afghan economy. Some of the difficulties included:

- Logistics (trade routes not well established, landlocked)
- Transportation (poor road system)
- Labor (unskilled Afghan only; semi-skilled, skilled foreign national; US/Expat)
- Housing and life support (none available for imported labor)
- Security (of personnel, goods, and shipments)
- Schedule (airfreight, overtime)
- Construction equipment (all needed importing)
- Design and requirements changes
- Insurances

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c. The cost estimates were based on the project related information and scopes of work. At times, the estimators located in Winchester did not have access to the same information that the contractors had. For example, if information from bidders' site visits, site conditions, changes in scope from meetings in the field, etc., are not furnished to the cost estimators, certain elements in estimates may differ from those in contractors' proposals. However, it is the contract negotiator's responsibility to adjust the government's position, as necessary, to incorporate specific site conditions, status of construction, and any contractor unique construction practices which may be different than what was considered in the government estimate. In design/build projects, the government estimator does not see any detailed design until after contract award, and therefore, it is understandable that all estimating elements will not be the same. As difficulties surfaced with respect to negotiations and accuracy of the government estimate, TAC also forwarded estimates and negotiation objectives to AED for review and validation and obtained TDY assistance from AED to assist in negotiations of various task orders. This provided necessary information about in-country costs and conditions, thus contributing to more effective negotiations. In these circumstances, considerable reliance is placed on the negotiator to consider the possible government estimate shortcomings and factor in adjustments necessary to reflect all field and design conditions. Negotiations of this nature conducted remotely from Winchester can be difficult, even more so than the difficulties in estimating. Definitization of these task orders from Afghanistan would have provided the needed knowledge base for more efficient negotiations.

d. There is no reference in the report that Pre-Negotiation Objective Memorandums (POMs) were ever reviewed, but many of the comments throughout the report would likely have been tempered if the documentation in the POMs were considered with the Price Negotiation Memorandum (PNM). The inconsistencies between the contractor's proposal and the government estimate are generally identified in the POM. Due to the work volume at that time, formal revisions to the government estimate were generally not prepared. The negotiator - after reviewing additional data available from the contractor, AED field representatives, and independent analyses - made the determination on whether the contractor's proposal was fair and reasonable. The PNM should have detailed the negotiator's acceptability determination. In some cases, the PNM lacks this needed detail. In many instances the government negotiator had to relay on the contractor's data as allowed by the FAR requirement for current certified Cost and Pricing Data.

## **VI. Conclusion**



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
TRANSATLANTIC PROGRAMS CENTER  
U.S. ARMY CORPS OF ENGINEERS  
P.O. Box 2250  
Winchester, Virginia 22604-1450

CETAC-OC

22 July 2005

MEMORANDUM FOR \_\_\_\_\_

**SUBJECT:** Response to ODIG-AUD Draft Report on Contracts Awarded to Assist the Global War on Terrorism by the U.S. Army Corps of Engineers, Project No. D20004-D000CF-0186, June 20, 2005

1. References:

- a. ODIG-AUD Draft Report on Contracts Awarded to Assist the Global War on Terrorism by the U.S. Army Corps of Engineers, Project No. D20004-D000CF-0186, June 20, 2005 (ODIG-AUD Report).
- b. U.S. Army Corps of Engineers' General Comments on Project No. D2004-D000CF-0186 Prepared by the Department of Defense Office of Inspector General, July 22, 2005

2. This memorandum is in response to the findings, conclusions, and recommendations contained in the above-referenced ODIG-AUD Report. CETAC-CT is providing a separate response to the entire report. This memorandum responds specifically to legal issues raised by the report. For ease of reference, statements from the ODIG-AUD Report are restated below, followed by responses and analysis from CETAC-OC.

3. **Possible ADA Violation, ODIG-AUD, pp. ii, 4:** "The Transatlantic [Programs] Center, U.S. Army Corps of Engineers inappropriately used Army Operations and Maintenance funds for a construction project for U.S. troops valued at \$35.2 million, a potential violation of the Antideficiency Act."

a. **Summary of allegation:** This alleged violation refers to Task Order 14 of Contract DACA78-03-D-0002 (U.S. Military Barracks, Kandahar Airfield; task order issued September 29, 2003), discussed at pages 10-13 of the ODIG-AUD Report. Specifically, the ODIG-AUD Report identifies three perceived violations: (1) illegal project splitting in order to avoid exceeding statutory thresholds limiting use of operation and maintenance (O&M) funds (p. 11-12); (2) obligation of O&M funds in excess of statutory thresholds for use of O&M funds for unspecified minor military construction (pp. 11-12); and (3) obligation of appropriated funds in violation of the bona fide needs rule as codified in 31 U.S.C. § 1502(a) (pp. 12-13).



CETAC-OC

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b. **Response:** In the actions described in the ODIG-AUD Report, USACE did not engage in illegal project splitting, did not exceed statutory thresholds for use of O&M funds, and did not violate the bona fide needs rule in obligating funds for this task order.

c. **Project splitting:** Project splitting, or subdividing a construction project in order to meet statutory funding thresholds, is prohibited. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.I, 170102.L; AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1(b). Therefore, construction of interdependent facilities, all of which are required for a complete and usable facility, must typically be funded as a single project. However, "interrelated facilities," defined as "facilities which have a common support purpose but are not mutually dependent...are therefore funded as separate projects." AR 415-32, Glossary, sec. II.

d. The ODIG-AUD Report concludes that "it was invalid to divide the project into 'phases' and claim that the [funding] limitation could be applied separately to each phase" (p. 12). The ODIG-AUD Report provides no analysis to justify this conclusion.

e. The term "phase" was used in the contract to refer to separate camps, each constituting a complete and usable facility funded as a separate project. Accordingly, each "phase" described in CLINs 0007-0014 of Task Order 14 corresponded to one of seven camps to be built under the contract. In accordance with the customer's (CFLCC) work classification, each "phase" provided for the construction of a separate, individual, complete and usable camp for U.S. military personnel, consisting of approximately 23 barracks buildings, 4 toilet/shower buildings, and 2 laundry buildings, in a different geographical location from the other camp projects constructed under this task order. See COL Soltero, CJTF-180 Director of Engineers, Memorandum for the File, 26 September 2003; MAJ Johnson, JA, Memorandum for Deputy Chief of Staff, CFLCC, 12 August 2003.

f. **Statutory UMMC thresholds—CLINs 0007-0014:** 10 U.S.C. § 2805(c)(1)(a) authorizes the use of O&M funds for unspecified minor military construction (UMMC) projects up to \$750,000, or \$1,500,000 for UMMC projects intended solely to correct deficiencies threatening life, health, or safety.

g. The ODIG auditors appear to have misread the bid schedule for this task order, resulting in an incorrect perception that the task order as structured exceeded the thresholds. In fact, the bid schedule was carefully and properly constructed to ensure that obligations of funds for this project would not exceed the applicable threshold

h. The ODIG-AUD Report states that "each \$1.5 million line item was followed by an *additional* \$694,444 line item for design and construction" [emphasis added], resulting in a total amount per camp exceeding the statutory limit of \$1.5 million (p. 12). This statement reflects a critical error by the ODIG auditors in reading the bid schedule. However, the "\$1.5 million line item" listed for phases 1-7 (CLINs 0007-0014) was not an amount obligated by this task order; rather, it merely restated the "statutory cost limitation for this CLIN" and was provided for information only. The actual amounts obligated under Task Order 14 to complete phases 1-7

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were listed in sub-CLINs 0007AA through 0014AA and did not exceed the \$750,000 threshold for any individual phase.

i. The amount obligated for Phases 1-5 and 7 included \$694,444 for design and construction, plus \$55,556 in S&A costs, for a total of \$750,000. Phase 6 consisted of CLIN 0012AA and 0012BB (\$550,766 plus \$44,061) and optional CLINs 0013AA and 0013BB (\$143,678 plus \$11,495), not exercised at the time of award of this task order, for a total of \$594,827, or \$750,000 including the option.

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j. Statutory UMMC thresholds—CLIN 0001: Task Order 14 contained a line item for “[p]rocurement, delivery and erection of prefabricated barracks building complete with all fixtures, finishes, electrical, etc., in accordance with Sections 01010 and 01015.” CLIN 0001 incorporates 132 items of \$144,444.94 each, totaling \$19,066,732.08. The ODIG-AUD Report states that “[i]n our opinion, ‘procurement, delivery, and erection’ of these buildings constitutes construction, and operations and maintenance funds should not have been used” (p. 12), presumably because \$19 million exceeds the statutory thresholds for O&M construction.

k. CLIN 0001 consists of 132 items of capital equipment, valued at \$144,444.94 each. This per-item amount is below the \$250,000 unit cost expense/investment threshold below which it is appropriate to use O&M funds for purchases of capital equipment. See DFAS Manual 37-100-05, par. AO-2035 and Appendix A (\$250,000 threshold effective 20 February 2003). Therefore, it was not improper to use O&M funds for CLIN 0001. In contrast to the equipment to be procured, delivered, and erected under CLIN 0001, CLINs 0007 through 0014 included “design and construction,” construction work which must be funded either by MILCON funds or, within statutory limitations for UMMC as discussed above, O&M funds.

l. Bona fide needs rule: The ODIG-AUD Report states, “[i]n our opinion, there was not a bona fide need during FY 2003 for the modular housing purchased under Task Order 14 [awarded September 29, 2003]...Since the task order was awarded at the end of FY 2003, work on the task order occurred in FY 2004 or outside of the funds’ period of availability. The period of performance for all of the base period work was at least four months, and began in FY 2004.”

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m. The preceding statement from the ODIG-AUD Report indicates a failure to understand both the bona fide needs rule and the circumstances of this task order. The bona fide needs rule requires that appropriated funds be obligated only to meet a legitimate need of the fiscal year for which the appropriation was made. 1 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW [GAO REDBOOK VOL. 1] 5-11 (3d ed. 2004). 31 U.S.C. § 1502 codifies this rule as follows: “The 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 properly made within that period of availability...*” (emphasis added).

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n. A bona fide needs inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government. DFAS-IN Reg. 37-1, para. 070501. While an obligation on the last day of the fiscal year may raise questions as to the fiscal year to

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which the need relates, “[a]n appropriation is just as much available to supply the needs of the [last day] of a particular year as any other day or time in the year’...the timing of the obligation does not, in and of itself, establish anything improper.” GAO REDBOOK VOL. 1 at 5-17 (quoting 8 Comp. Dec. 346, 348 (1901)).

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o. Clearly there was a bona fide, current need for the camps in FY 2003. As acknowledged in the ODIG-AUD Report, the customer’s stated requirement for the project was that troops were housed, in September 2003, in tents “which were in bad shape and would not last through the winter,” and which “were fire hazards and had recently become infested with mice and now posed a significant health and safety hazard for the personnel.” ODIG-AUD Report pg. 11; see also 26 SEP 2003 MFR from CJTF-180 Director of Engineers, COL Soltero.

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p. Despite this overwhelmingly compelling statement of the need for improved housing, the ODIG-AUD Report reaches the remarkable conclusion that there was no bona fide need for the project in September 2003 (p. 13). The basis for this conclusion appears to be “that the order was originally planned to be a competitive award in FY 2004, [which] shows that it was not truly urgent to award during FY 2003 and was awarded to use expiring funds” (p. 13). “Urgency” is not a requirement of the bona fide needs rule; rather, as stated above, what is required is that funds are obligated to meet a *legitimate* or *bona fide* need of the fiscal year in which the funds are available for obligation.

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q. Option Items. The ODIG-AUD Report states (p. 13) that “FY 2003 funds were obligated for option items that were not to be awarded until several months into 2004. There clearly was not a bona fide need for these items during FY 2003, and as a result FY 2003 funds should not have been obligated.”

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r. Again, the preceding statement from the ODIG-AUD Report misstates basic principles of fiscal law. No funds were obligated in FY 2003 for options that were not exercised until FY 2004, because by definition, obligation occurs when an options is exercised. An obligation is “a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received.” 2 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW [GAO REDBOOK VOL. 2] 7-3 (2d ed. 1996). An option is not legally binding until exercised: “the reservation of the option ripens into an obligation only if and when the government exercises the option.” *Id.* at 7-18.

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s. Obligation of severable services. The ODIG-AUD Report contains (p. 13) a reference to 41 U.S.C. § 253(a), which applies to severable services provided by contracts crossing fiscal years. The report also states, apparently with regard to Task Order 14, that “[o]ne of the option items, valued at \$2.2 million, was not scheduled to be completed until 13 months had elapsed which extended beyond the 12-month criteria [*sic*]” (p. 13).

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t. It is not clear which “option item” is referred to. No option meeting the above description was included in Task Order 14. However, it should be noted that the relevant statute for DOD agencies with regard to severable services is 10 U.S.C. § 2410a, rather than 41 U.S.C. §

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253/, and that in contrast to severable services, “construction contracts may constitute a bona fide need of the fiscal year in which the contract is awarded even though performance is not completed until the following fiscal year.” Deskbook for 71st & 72nd Fiscal Law Course, The U.S. Army Judge Advocate General’s School 3-11 (2005). Furthermore, as discussed above, funds are not obligated for an unexercised option.

4. **Improper Use of Unfinalized Contract Actions, ODIG-AUD, pp. ii, 4:** “[CETAC] awarded unfinalized contract actions, which it did not finalize in a timely manner. Contracting personnel maintained that these contracts were firm-fixed price contracts, but the contracts were finalized as if they were cost-plus-a-percentage-of-costs contracts.”

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a. **Response:** As discussed in the reference b, CETAC was not able to finalize all unfinalized contract actions or unpriced change orders as quickly as would have been ideally possible. However, CETAC made every effort to finalize on schedule, and delays in finalization were unavoidable results of such external factors as unforeseen changes in contract requirements, changes in design, delays in receipt of contractor proposals, and unavailability of government negotiators due to the sheer workload. In addition, the ODIG-AUD Report consistently confuses task orders, which are akin to unpriced change orders (UCOs), with unfinalized contract actions (UCAs), and alleges that CETAC violated the requirements of UCAs when those requirements did not in fact apply. Finally, CETAC did not, directly or indirectly, award contracts on a cost-plus-a-percentage-of-cost basis.

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b. **Improper Use of UCAs:** The ODIG-AUD Report frequently refers to “unfinalized task orders” or “unfinalized actions,” alleging that these were awarded or administered in violation of regulations governing “unfinalized contract actions” (UCA). E.g., the ODIG-AUD Report states on pp. 7-8 that “[p]rices were not fixed at the outset because TAC awarded most work as unfinalized actions and did not finalize the actions in accordance with FAR and...DFARS.” In fact, the modifications described here and elsewhere in the ODIG-AUD Report were actually “unpriced change orders” (UCO) not subject to the requirements governing UCAs.

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c. An “unfinalized contract action” (UCA) is defined as “new procurement action...for which the contractual terms, specifications, or price are not agreed upon before performance is begun under the action.” 10 U.S.C. § 2326(g)(1); DFARS 217.7401(d). A contract modification that is within the scope and under the terms of a contract is not a “contract action,” DFARS 217.7401((a)(2), and therefore, an in-scope modification is not a UCA. See Appeal of Contel Advanced Systems, Inc., ASBCA No. 49072, 02-1 BCA ¶ 31,808, 2002 WL 414329 (holding that an in-scope contract modification is not a contract action, and therefore not a UCA subject to 10 U.S.C. § 2326 or to DFARS restrictions on UCAs).

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d. The term “unpriced change order” (UCO) is not expressly defined, but DFARS Part 43 refers to “unpriced change orders” as “contract modifications within the scope of the contract that are not ‘unfinalized contract actions’ as defined by DFARS 217.7401(d).”

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e. A task order is defined as “an order for services placed against an established contract,” FAR 2.101, and an IDIQ task order must be within the scope, period of performance, and the maximum value of the contract, FAR 16.505(a)(2). Therefore, an unpriced IDIQ task order does not appear meet the definition of a UCA—a new procurement for which terms, specifications, or price are not agreed upon in advance—and there is no case law or regulation that defines unpriced task orders as UCAs. As a result, CETAC has interpreted an unpriced task order to be more akin to an unpriced change order as discussed in EFARS 43.102(b).

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f. UCAs are subject to strict requirements. UCAs may only be used when a definitive contract action cannot be negotiated in sufficient time to meet the Government’s requirements, and the Government’s interest demands giving the contractor a binding commitment so that performance can begin immediately, DFARS 217.7403(a). UCAs must be “as complete and definite as practicable under the circumstances,” must contain schedules providing for definitization within 180 days after issuance or 180 days after the contractor submits a qualifying proposal, DFARS 217.7403(b), DFARS 217.7404-3. Obligations may not exceed 50% of the not-to-exceed price before definitization, or 75% if the contractor submits a qualifying proposal before 50% has been obligated, DFARS 217.7404-4.

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g. The DFARS does contemplate that definitization may take place after substantial work has been completed. DFARS 217.7404-6 requires that when final price negotiation takes place after a substantial portion of performance has been completed, the profit must reflect any reduced cost risk to the contractor for costs incurred during contract performance prior to negotiation, and the contractor’s reduced cost risk for costs incurred during performance of the remainder of the contract.

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h. Requirements of UCOs are less strict. EFARS 43.102(b) states only that the policy and procedures for at DFARS 217.74 (UCAs) “shall be used to the maximum extent practicable for contract modifications within the scope of the contract that are not ‘undefinitized contract actions’ ... (e.g. unpriced change orders)” When issuing a UCO, the Contracting Officer must sign a statement for the contract file containing, at a minimum, the reason normal contract modification procedures and lead times are not practicable; the date the requirement was first identified; the consequences of missing the required delivery date; the definitization schedule; an explanation for any deviation from the definitization schedule; the percentage of contract modification work completed by the contractor prior to definitization; and if a not-to-exceed price was not established (as should be done whenever practicable), an explanation why it was considered impracticable. EFARS 42.102(b).

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i. In accordance with EFARS 43.102, TAC has in place a CETAC Policy and Procedures on Processing Unpriced Change Orders (UCO) (Revised 17 June 1997). As noted in the reference b, CETAC personnel have in some cases been unaware of the existing policy, but steps are being taken to ensure that CETAC personnel are aware of the policy and that it shall be followed when UCOs are issued.

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j. Cost-Plus-a-Percentage-of-Cost Contracting: The ODIG-AUD Report alleges (p. 21) that “[t]here task orders from Contract DACA78-03-D-0002 and one change order from Contract DACA78-02-C-0009 met at least three of the four criteria for a CPPC system of contracting.” 10 U.S.C. § 2306 prohibits, without defining, use of a “cost-plus-a-percentage-of-cost system of contracting.” The four criteria used by the Comptroller General to determine whether this prohibition has been violated are when (1) payment is made at a predetermined percentage rate; (2) this rate is applied to actual performance costs; (3) the entitlement is uncertain at the time of contracting; and (4) it increases commensurately with increased performance costs. Marketing Consultants International Limited, B-183705, 75-2 CPD ¶ 384 (Dec. 10, 1975); ODIG-AUD Report at 21.

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k. In each task orders and change order alleged by the DODIG Report to have constituted a CPPC contract, the profit rate was not predetermined. See ODIG-AUD Report at 21: “Although the profit rate was not predetermined, it was applied to actual performance costs.” Therefore, at least two of the four criteria for identifying CPPC contracts were clearly not met. Furthermore, “[a]fter-the-fact pricing...does not violate the [CPPC] statute...when there is no agreement between the contracting parties that any fixed percentage will be applied to incurred costs in negotiating the price.” CIBINIC & NASH, COST-REIMBURSEMENT CONTRACTING at 52 (3d ed. 2004). See, for example, Digicon Corp. v. Dep’t of Commerce, 98-2 BCA ¶ 29,988, GSBICA No. 14257-COM (August 25, 1998), in which the Board found that application of the same fixed fee percentage rate to the base contract, all task orders, and an equitable adjustment did not violate the CPPC prohibition: “Like the inclusion of a standard profit markup on an equitable adjustment to a fixed-price contract, the application of a usual percentage fee on an equitable adjustment to a cost-plus-a fixed-fee contract does not violate [the CPPC proscription]...as long as the connection is demonstrated between the additional costs and the extra work required by the Government.... When a fee must be set after the completion of work, rather than properly negotiated in advance, applying the same percentage of costs as was used during contract performance is common.”

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l. DACA78-03-D-0002, Task Order 8: The ODIG-AUD Report provides no analysis to justify its conclusions regarding three of the four task or change orders that allegedly violated the CPPC prohibition. With regard to DACA78-03-D-0002, Task Order 8, the ODIG-AUD Report asserts that “the contractor and USACE knew that a profit percentage would be eventually applied to the costs because USACE accounted for a profit percentage in its Government estimate and the contractor proposed a profit percentage.” This statement is factually untrue, because both Government and the contractor knew at the time the task order was issued that the final price, including profit, was not predetermined, and would have to be negotiated. There was no agreement prior to definitization to apply a predetermined profit percentage. Because the contractor knew that both final price and profit would be subject to the contracting officer’s determination of fair and reasonable price, and because there was never a guarantee that the contractor would be compensated for actual costs, there was no incentive to increase costs.

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5. **Poor Planning Led to Sole-Source Awards/Created False Urgency, ODIG-AUD, pp. 17-19**: The ODIG-AUD Report alleges that “poor planning” caused noncompetitive award of Task

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Orders 7 and 8 of Contract W912ER-04-D-0003 (p. 17), and that “[p]oor planning was also evident on Contract W912ER-04-D-0004, task order 6” (p. 19), resulting in an unspecified impropriety.

a. **Response:** Each of the referenced task orders was awarded in compliance with applicable law and regulations. “Poor planning” on the referenced task orders, if it existed, did lead to any known violation of law or regulation.

b. Contract W912ER-04-D-0003, Task Order 7: The ODIG-AUD Report acknowledges that “the requirement had become urgent” by July 2004, when it was discovered that no other appropriate contract vehicle was available. FAR 16.505(b)(2) authorizes exceptions to the fair opportunity otherwise afforded to all IDIQ contractors if the need is “so urgent that providing a fair opportunity would result in unacceptable delays.”

c. Contract W912ER-04-D-0003, Task Order 8: This task order, for an Ammunition Supply Point (ASP) at Bagram Air Field, Afghanistan, was awarded on September 30, 2004 for \$12,392,987, using expiring funds. The ODIG-AUD Report states that “poor planning caused [the] noncompetitive award,” creating urgency at the end of FY 2004 to award the task order using expiring funds. While acknowledging the bona fide need for this project, the ODIG auditors questioned whether the project could have been included on a task order issued in May 2004, and found it “hard to believe that the urgency arose at the end of the fiscal year when the funding was about to expire” (p. 18).

d. As discussed in the reference b, the urgent need to construct the ASP arose as a result of a July 2004 decision by the customer (ACC) to construct a new runway in the path of the existing ASP. Furthermore, approval from the Undersecretary of Defense (Comptroller) to execute the ASP project was not received until September 28, 2004 (see Memorandum, Undersecretary of Defense (Comptroller), Subject: Approval to Use Operation and Maintenance (O&M) Appropriations to Fund Two Construction Projects, 28 September 2004). Awarding the ASP project as part of an earlier task order would have been improper absent the authorization received on September 28, 2004. The need existed in FY 2004, and as of September 28, 2004, authority existed to use O&M funds pursuant to § 2808; therefore, obligating FY 2004 funds to the project on September 30, 2004, prior to expiration of those funds was proper.

e. The sole-source award of Task Order 8 was authorized by FAR 16.505(b)(2), which provides an exception to the fair opportunity otherwise afforded to all IDIQ contractors if the need is “so urgent that providing a fair opportunity would result in unacceptable delays.” The limitations of FAR 6.301(b), which prohibits justifying the use of other than full and open competition based on “concerns related to the amount of funds available,” do not apply to the award of IDIQ task orders under Part 16, FAR 16.505(b)(1)(ii).

f. Contract W912ER-04-D-0004, Task order 6, Modification 2: The ODIG-AUD Report alleges (pp. 19ff) “poor planning” and poor execution of Task Order 6, Temporary Cantonment Area, Manas Air Base, Kyrgyzstan, specifically relating to the issuance of Modification 2 on

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September 29, 2004, for additional barracks, utilities, and site improvements valued at \$6,995,438. What the ODIG-AUD Report characterizes as “poor planning” in fact reflects TAC’s proper response to customer-directed changes.

g. The ODIG-AUD Report demonstrates confusion regarding the chronology of events related to this task order. The correct chronology is briefly summarized as follows: On July 19, 2004, Task Order 6 was awarded; on August 27, 2004, TAC issued an RFP for an additional requirement to design and construct six buildings and provide additional supporting utilities and improvement; the contractor provided a budgetary ROM estimate dated September 15, 2005 (on a form entitled “Change Order,” which the ODIG-AUD Report apparently misinterpreted as an actual change order issued on that date); on September 29, 2004, the contracting officer issued an unpriced change order (Modification 2/Change Order 1), including a notice to proceed and a definitization schedule.

h. The ODIG-AUD Report states that “[t]he justification for issuing this [modification] as an undefinitized action was...urgency,” yet “on September 15, 2004, DoD knew that the requirement was no longer urgent, and USACE personnel should have canceled the modification...the only actual urgency that existed was that the operations and maintenance funding was going to expire at the end of the fiscal year.”

i. First, the modification was not an “undefinitized action” in the sense of a UCA, but rather, an “unpriced change order” to which UCA requirements did not apply. The document to which the ODIG-AUD Report refers (p. 19), containing a “justification for issuing this as an undefinitized action...for urgency”—CETAC-EC-MB, Memorandum for Record dated 14 September 2004—merely documented the reasoning for the award for the contract file. The exception to competing IDIQ task orders among IDIQ contractors cited in the memorandum—FAR 16.505(b)(2)(i) (urgent agency need)—was not applicable to this modification, because the modification was not a task order subject to the fair opportunity requirement of FAR 16.505(b)(1).

j. Second, the ODIG-AUD Report appears to confuse the technical term “urgency” (as would apply in a justification for limited competition, not applicable to this modification) with the legitimate need that is required under the bona fide needs rule (discussed above). Whether or not a requirement is “urgent” is not relevant to the bona fide needs rule, which requires that appropriated funds be obligated to meet a legitimate need of the fiscal year for which the appropriation is available.

k. Finally, the ODIG-AUD Report appears to confuse the phasing of work required under Task Order 6, including Modification 2, with the need for all of the completed buildings. All of the buildings together, and all phases of construction, constituted a single project, producing a complete and usable facility. See AR 415015, Glossary, Sec. II (“Phasing of Construction”: “One ‘phase’ without companion ‘phases’ will not produce a complete and usable project. This is not to be confused with incremental construction.”) The construction schedule alluded to in the contractor’s Budgetary ROM Estimate of September 15, 2004, according to which



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construction of the buildings (including the six additional buildings added by Modification 2) on the east end of the base would follow construction of the six buildings on the west end of the base, did not mean that the buildings to be constructed last were not required until FY 2005. All of the buildings represented a need of FY 2004 for which a task order was properly awarded and funds properly obligated, but due to the construction schedule, not all of the work under the task order could be completed during FY 2004. (See above discussion regarding the bona fide needs rule).

6. POC in CETAC-OC is the undersigned, (540) 665-4042, Nancy.J.Williams@usace.army.mil.

NANCY J. WILLIAMS  
Counsel

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## **Team Members**

The Department of Defense Office of the Deputy Inspector General for Auditing, Contract Management prepared this report. Personnel of the Department of Defense Office of Inspector General who contributed to the report are listed below.

Richard B. Jolliffe  
Terry L. McKinney  
Nick E. Como  
John A. Seger  
David P. Goodykoontz  
Stacie A. Rimmer  
Julie A. Yerkes  
Jonathan P. Hale  
Courtney V. Biggs  
Meredith H. Johnson