



End-of-the-Year Spending

Report No. OIG-AMR-70-12-02

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Memorandum from the Acting Acquisitions Management Branch Chief,
Response to Draft Report “End-of-the-Year Spending” (OIG-AMR-70)

*National Labor Relations Board
Office of Inspector General*

EXECUTIVE SUMMARY

We performed this audit because, over the years, the audits of the financial statements have identified violations of the *bona fide* needs rule. Those audits, however, reviewed only the procurement actions that were above \$100,000. Given that the majority of procurement actions are below \$100,000, we decided that it was prudent to test procurement actions that involve amounts below \$100,000 to determine the extent to which violations of the *bona fide* needs rule are occurring in the NLRB's procurement function.

We were also aware of comments by the procurement staff that end-of-the-year procurement actions create significant workload pressures. Our concern was that those pressures could degrade the internal control environment for the procurement function and lead to errors, as evidenced by the findings in the audits of the financial statements.

It is perhaps not surprising that a significant amount of procurement activity is occurring at the end of the fiscal year. To better understand the end-of-the-year procurement environment, we believe it is useful to compare the level of work occurring at year's end with mid-year work. That comparison for Fiscal Year 2011 showed that the work for the Agency's procurement function was four times greater in September than it was in June and that 71.5 percent of the procurement actions in September 2011 occurred in the last 2 weeks. Overall we believe that better financial planning would greatly alleviate the end-of-the-year pressure placed upon the Agency's procurement process.

We found that our concerns regarding the degradation of the internal control process were correct. In addition to identifying \$296,410.83 in questioned costs that resulted from *bona fide* needs rule violations, we also found a lack of internal control over the work to ensure that it was properly processed in compliance with the Federal Acquisition Regulation. This lack of control was evidenced by both a deliberate disregard for the Agency's procurement procedures and what appears to be mistakes due to a lack of sufficient time to properly complete the procurement actions.

In its response to the draft report, Management agreed with our recommendations and stated that corrective action would be initiated. The response also stated that they have taken steps to improve controls over the financial management of the Agency, including creating an Office of the Chief Financial Officer. The comments are provided as an appendix to the report.

BACKGROUND

The *bona fide* needs rule generally states that an appropriation for a given fiscal year is not available for the needs of a future fiscal year. The rule is derived from 31 U.S.C. 1502(a), which states:

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 and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

The *bona fide* needs rule is particularly important for end-of-the-year spending because “[a]n appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such appropriation . . . [that] would be a plain violation of the law.” 8 Comp. Dec. 346, 348 (1901).

We performed this audit because audits of the financial statements have identified violations of the *bona fide* needs rule. Those audits, however, tested only the procurement actions that were above \$100,000. Given that the majority of procurement actions are below \$100,000, we decided that it was prudent to test procurement actions that involve amounts below \$100,000 to determine the extent to which violations of the *bona fide* needs rule are occurring in the NLRB’s procurement function.

We were also aware of comments by the procurement staff that end-of-the-year procurement actions create significant workload pressures. Our concern was that those pressures could degrade the internal control environment for the procurement function and lead to errors, as evidenced by the findings in the audits of the financial statements.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this audit was to review the Agency's procurement process at the end of Fiscal Year (FY) 2011 and to determine if those procurements met the requirements of the *bona fide* needs rule. We began this review as an inspection, but as we progressed through the fieldwork we determined that the number and type of procurement issues that we discovered that were unrelated to the *bona fide* needs rule required additional work not contemplated when we initiated the inspection and that the level of our review would be more properly characterized as an audit.

We compiled procurement statistics – the number of transactions and dollar amounts – for the period from June through September 2011. These were the months after the Agency received an appropriation and adopted an operating plan. We used these statistics to determine trends in the procurement workload.

For the *bona fide* needs testing, the universe of procurement actions for the audit involved obligations for goods and services above the micro-purchase level (\$3,000) that occurred during September 2011. From that universe we excluded from our testing items over which the Agency did not have discretion and/or were recurring in nature, such as space rent, database subscriptions, court reporting, postage, and shared governmental IT services. We also excluded training obligations because we intend to conduct a separate review of the training program.

We then determined that the scope of the audit contained 78 procurement actions totaling \$4,185,193.09. These actions included 63 purchases of goods and services, 13 modifications, and 2 option exercises. For these procurement actions, we reviewed documentation obtained from the Acquisitions Management Branch (AMB) and the Finance Branch to determine whether the purchase was for a *bona fide* need of FY 2011.

In testing for *bona fide* needs, we reviewed documents from the contract files. During the review we identified instances of noncompliance with the Federal Acquisition Regulation (FAR). Our review, however, was generally limited to matters that related to funding issues and items that were readily

apparent in the contracting documents. Our findings are not the result of comprehensive testing of compliance with the FAR.

We conducted this performance audit in accordance with generally accepted government auditing standards during the period January 2012 through July 2012. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

FINDINGS

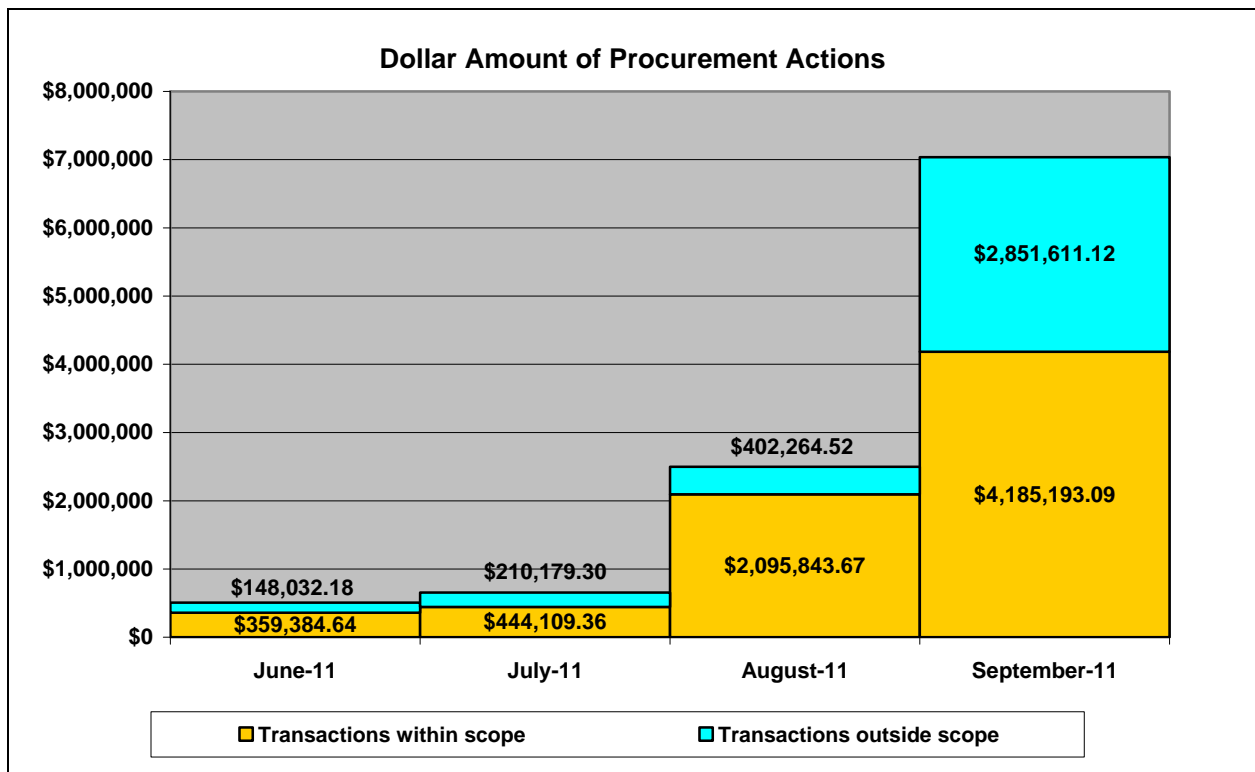
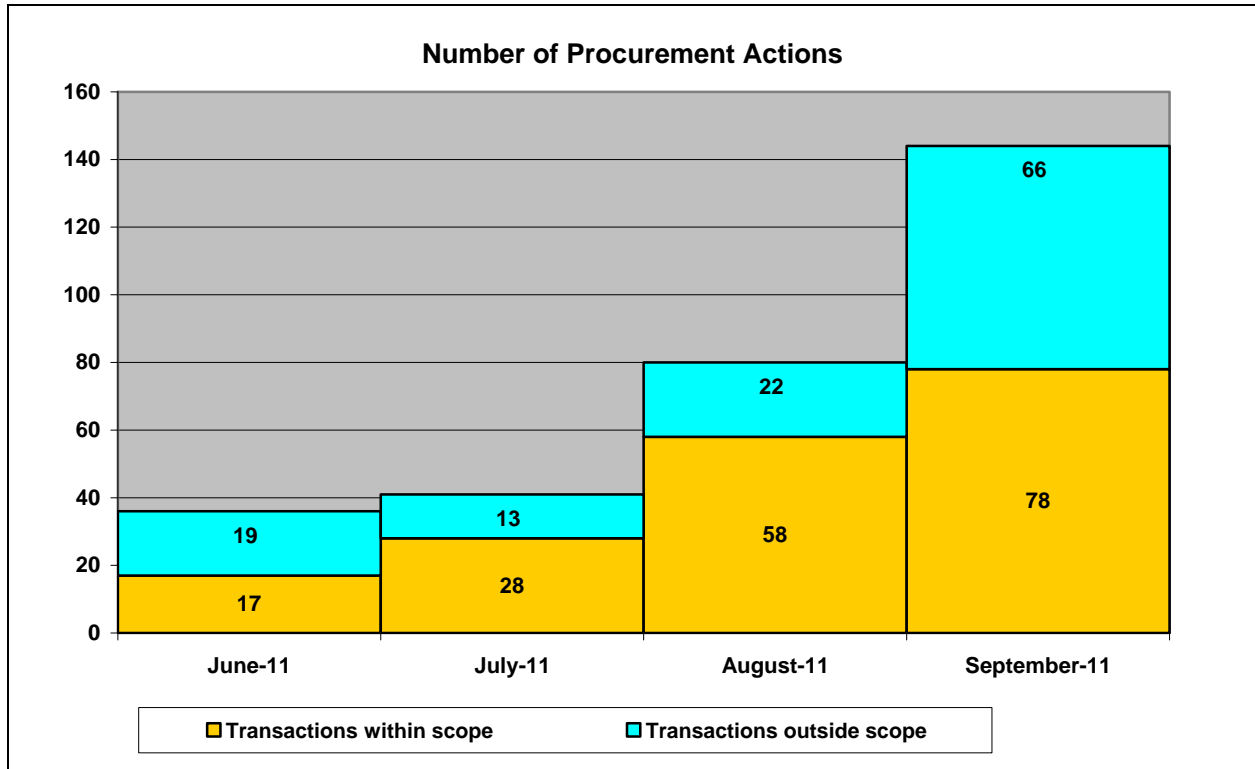
We found that a significant amount of procurement activity is occurring in the last 2 weeks of the fiscal year and that there is a lack of internal control over the work to ensure that it is properly processed in compliance with the *bona fide* needs rule and the FAR. As a result of the lack of internal control, we identified \$296,410.83 in questioned costs.

TRENDS

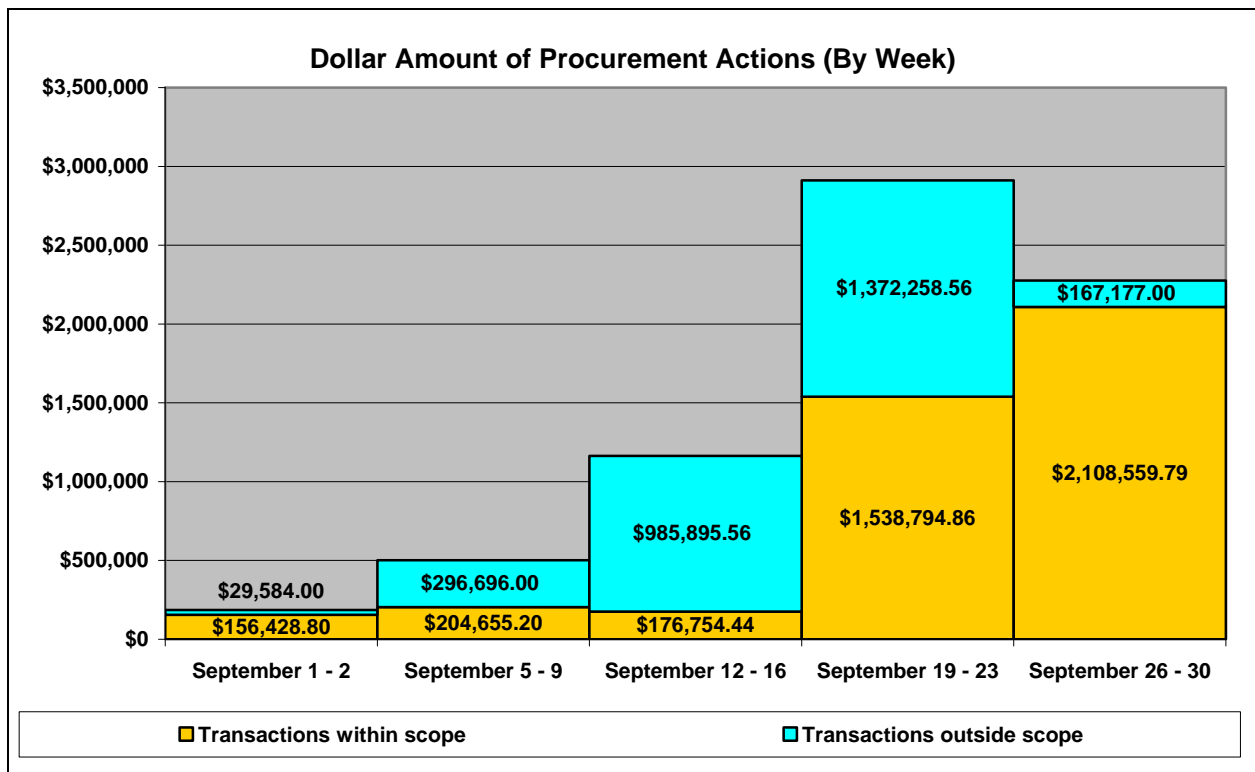
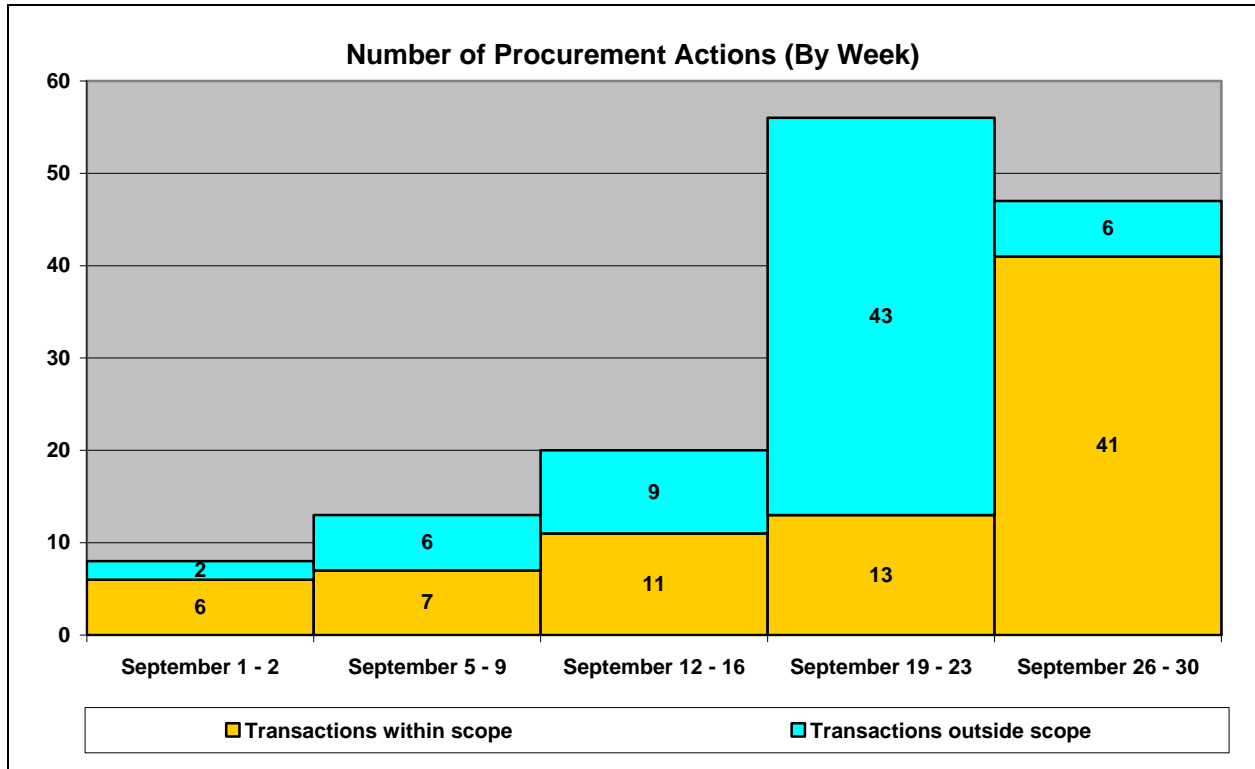
On July 6, 2011, the AMB Chief issued a memorandum to the Agency's senior managers reminding them of time frames for submitting requirements to purchase goods and services. Early submission of procurement requests was encouraged. Nevertheless, only one of the procurement actions processed during September 2011 was received in advance of the applicable cut-off date cited in the memorandum, and less than half were received before September 15, the date identified by the AMB as the date by which all procurement actions should be received for processing. We also found in two contract files that the Contracting Officer documented that the late submission of the request impacted his ability to perform the required functions.

Whether viewed in volume of procurement actions or dollar value of procurement actions, it appears that a disproportionate amount of procurement activity occurs in the final month and the final 2 weeks of the fiscal year.

June through September 2011



September 2011



RECEIPT AND USE

In addition to testing the transactions against the *bona fide* needs rule, which is a legal test, we also reviewed when the goods or services would be received as a test of whether the use of FY 2011 funds for the purchases would be reasonable. For goods, we considered them to be received in FY 2012 if the contract file documented that they were actually or would be received in FY 2012. Services were determined to be received in FY 2012 if the period of performance was predominantly in FY 2012. Of the 78 procurement actions tested, one procurement action was excluded from this analysis because it was terminated before performance began. For the remaining procurement actions, 55 (71.43 percent) involved goods or services that were received in FY 2012. As shown in the table below, the amount obligated for the 55 actions was \$3,808,510.55, or 91 percent of the universe tested.

Type of purchase	Received in FY 2012		Received in FY 2011	
	Number	Amount	Number	Amount
Severable Services	12	\$1,112,232.38	6	\$135,933.44
Non-severable Services	7	\$146,085.75	5	\$54,724.67
Equipment	12	\$1,698,105.15	1	\$12,600.00
Software	4	\$477,065.87	2	\$63,718.15
Furniture	14	\$297,218.70	0	\$0.00
Supplies	1	\$4,555.90	4	\$53,493.57
Subscriptions	2	\$21,746.80	0	\$0.00
Publications	3	\$51,500.00	3	\$30,272.00
Rental of Equipment	0	\$0.00	1	\$6,105.51
Total	55	\$3,808,510.55	22	\$356,847.34
Percent	71.43%	91.43%	28.57%	8.57%

As noted in the Objective, Scope and Methodology section, we excluded certain procurement actions from our *bona fide* need analysis. Our analysis of those transactions revealed that \$2,509,604.12 were for goods or services that were predominantly received in FY 2012. Those items include

obligations for court reporting, databases, postage, and shared information technology services.

At the NLRB, approximately 90 percent of the annual appropriation is allocated to personnel and rent costs. In FY 2011, the 10 percent of the appropriation for all other needs was approximately \$28 million. So, the \$6.3 million spent in September, the last month of FY 2011, for goods and services received predominantly in FY 2012 was approximately 22 percent of the Agency's FY 2011 discretionary spending.

This type of end-of-the-year spending creates additional management issues. When items are procured because it is the end of the year and there is a concern to spend the appropriation before it lapses, goods and services may be procured before they can be used or are needed, resulting in waste. At the other extreme, the needs of one fiscal year are not met until the following year. Three situations illustrate these issues:

- A procurement action came to our attention because of a modification that occurred during the period of time that was within the scope of the audit, but the end-of-the-year spending issue occurred as the result of an FY 2010 procurement. The Agency procured \$367,332 in software and a year of license and software maintenance support at a cost of \$80,813.04 in the last week of FY 2010 using that year's appropriation. Although the Agency's request for quotes included services to install or modify the software so it could be used, those services were not procured because of budgetary issues. At the time of the procurement, the Office of the Chief Information Officer (OCIO) staff thought they had a vendor who could install and modify the software, but there was no agreement with that vendor and the OCIO staff did not have the expertise. As it turned out, the vendor that the OCIO thought could install the software could not provide the personnel to do it. In November 2010, the OCIO contemplated canceling the procurement because of difficulty in obtaining the needed services. The OCIO noted that the procurement was completed in FY 2010 to utilize FY 2010 funds. Then in January 2011, the Agency procured the services for the modifications to the software using FY 2011 funding.

- At the end of FY 2011, a visitor badging system was procured for the Security Branch at a cost of \$6,973. The system included hardware; software; installation and 1 year of onsite support; and supplies. In March 2012, staff in the Security Branch stated that they received the system in October 2011 and installed it, but the system has not been used because they were waiting to “integrate this system with other projects.” In July 2012, we were told that a 60-day pilot of the system was initiated at the end of June.
- According to the Chief Information Officer, the Government/Industry standard is that personal computing devices should generally be replaced on a 4-year life cycle. When the CIO decided to procure 800 computers at the end of FY 2011, those laptop computers were to be used to replace laptop computers that were out of the 4-year life cycle. Although there was a need to replace laptop computers throughout the fiscal year, it was not until September 13, 2011, that he was told that funding was available for the procurement of 725 laptop computers. Then on September 30, 2011, the Chief Information Officer was told that additional funding was available to purchase 75 laptops.

While there may be circumstances that justify procuring and then delaying implementation, except for the need to spend appropriated funds before they expired, we are unaware of any compelling circumstance that required the Agency to purchase the software or badging system. In the case of the OCIO software, there was no clear plan to get from the procurement of almost half a million dollars in software and services to implementation. For the Security Branch, they simply were not yet ready to put the system into service. On the other hand, the OCIO had an actual need to replace laptop computers that went unmet because the funding was not provided until the last weeks of the fiscal year.

The lack of proper fiscal management resulted in a push to spend the appropriation at the end of the fiscal year for services that were not used and a failure to meet current needs throughout the year. While the waste of taxpayer dollars may be small in comparison to the appropriation, it represents a waste that could have been avoided.

BONA FIDE NEEDS

To understand our findings below, it is necessary to understand a few points of appropriation law.

First, an amount can be recorded against an appropriation only when there is an “obligation,” which is a definite commitment that creates a legal liability of the Agency for the payment from appropriated funds for either goods or services. For the procurement actions within the scope of this audit, an obligation was created only when there was a binding agreement that was in writing, for a purpose authorized by law, executed before the expiration of the period of availability of the appropriation, and for specific goods or services. The primary purpose of these requirements is to ensure that there was an offer and an acceptance that imposed a legal liability on both parties when an amount is recorded against an appropriation.

Second, services are generally described as either severable or non-severable. Severable services can be terminated without the Agency losing the benefit of services that it already received, while non-severable services need to be completed in their entirety for the Agency to receive the benefit. Non-severable services are funded in their entirety when the procurement action is created, regardless of length of time that the services will be provided. Severable services are funded from the appropriation that is available when they are received. However, there is statutory authority to fund severable services that have a period of performance crossing fiscal years from funds for the first fiscal year, provided that the period of performance does not exceed 12 months.

Of the 78 procurement actions tested, we found that 6, totaling \$278,079.39, were not *bona fide* needs of FY 2011. One was a *bona fide* need of FY 2010 and five were *bona fide* needs of FY 2012. A review of procurement actions related to the items in the universe identified another \$18,331.44 that were not *bona fide* needs of FY 2011. We consider the sum of these items, \$296,410.83, to be questioned costs. Questioned costs are defined by the Inspector General Act as “an alleged violation of a provision of a law, regulation, ...governing the expenditure of funds.” These procurement actions include:

- On September 21, 2011, the Agency procured 725 laptop computers using FY 2011 funds. At 10:04 p.m. on September 30, 2011, the purchase order was modified to add an additional 75 laptop computers, at a cost of \$131,731.50. On the modification document, the Contracting Officer marked that the modification was an “agreement of the parties” and that the contractor “is required to sign this document and return 1 copy to the issuing office.” The e-mail message transmitting the modification to the contractor also stated that the modification needed to be signed and returned. The contractor did not sign the modification until October 3, 2011. Because the modification was not signed by the contractor until after the end of FY 2011, there was no agreement with the contractor for the purchase of the additional 75 laptops computers during FY 2011, and FY 2011 funds were no longer available when the agreement was executed in FY 2012.
- On June 30, 2011, the Agency had 133 Kodak scanners. On that date the warranty for 56 scanners expired without being renewed. The remaining 77 scanners were covered under an extended warranty that ran until February 1, 2012.

On September 28, 2011, AMB created a procurement action purporting to acquire an extended warranty for 56 Kodak scanners that had not had a warranty since June 30, 2011. The procurement action occurred by a modification to the agreement for the extended warranty on the 77 scanners by adding the 56 scanners. The beginning date of the period of performance, however, was July 1, 2011 rather than September 28, 2011 – the date that the Contracting Officer signed the procurement action. Justification for the backdating of the period of performance was achieved by the AMB Chief executing a ratification document.

The Contracting Officer then sent the modification to the contractor on September 29, 2011, noting that the contractor was required to sign and return it. There is no evidence in the contract file that the contractor met that requirement. In fact, there was an error on the modification and a corrected modification was sent to the contractor and then returned by the contractor on

October 3, 2011. From a *bona fide* needs analysis, this procurement action was not a need of 2011 because there is no evidence that there was an agreement in writing prior to the end of the period of availability of the FY 2011 appropriation.

Even if the modification had been signed and returned by the contractor prior to the end of FY 2011, the use of FY 2011 funds was not appropriate because the procurement action was improper.

At the time the procurement action was completed, there was no unauthorized commitment that could be ratified. A ratification is the means by which a Contracting Officer authorizes the payment to a contractor for an “unauthorized commitment.” An “unauthorized commitment” is an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into the agreement on behalf of the Government. In order to approve a ratification and pay for an unauthorized commitment, the Contracting Officer must get the concurrence of legal counsel and the head of the procurement activity.

The Agency’s Special Counsel did not concur with the ratification as proposed by the Contracting Officer. According to Special Counsel, he informed the Contracting Officer that there was not an unauthorized commitment that could be ratified and that he did not know of a lawful means of completing the proposed procurement. Despite the lack of concurrence by the Special Counsel, the AMB Chief approved the procurement action as a ratification because, in his opinion, the procurement was in the best interest of the Government.

The action by the AMB Chief was improper and an abuse of his discretion. First, if the AMB Chief honestly believed that a ratification was the proper course of action, he lacked the authority to approve a ratification because the FAR, at 48 CFR 1.602-3(c)(5), limits the authority to approve a ratification to matters in which legal counsel concurs that payment is appropriate, unless the agency’s procedures do not require the concurrence. At the NLRB, the Office of General Counsel requires that Special Counsel conduct a legal review of proposed ratifications

and that disagreements between the AMB and the Special Counsel be brought to the attention of the General Counsel and Chairman. The AMB Chief did not act in accordance with these procedures. Additionally, the FAR, at 48 CFR 1.602-3(b)(2) and (3), provides that ratification approval authority resides with the head of the procurement activity unless it has been delegated to the chief of the contracting office. Although the AMB Chief claimed to have the authority to approve ratifications, the only document provided in response to our request was a delegation of authority dated February 27, 2012.

In response to our questioning about this procurement action, the AMB Chief acknowledged that he was told by legal counsel that there was not an unauthorized commitment that could be ratified and that despite the legal opinion, he executed the ratification document. The AMB Chief also stated that after FY 2011 ended, he thought about the ratification and researched how he could cancel it. He believes he may have canceled it, but he does not have documentation of such action. He stated that he believed what he did was proper and that what really occurred was that the warranty period began on September 28, 2011, when the procurement action was executed. The AMB Chief also noted that his actions saved the Agency money.

There may have been a means to procure the warranty services that were requested by the OCIO, but the manner in which AMB Chief went about fulfilling that need overrode internal controls for the procurement process and degraded the procurement environment by establishing and contributing to the negative attitude toward internal control and conscientious management. Whether the AMB Chief saved the Agency money or not, we are unaware of a reasonable justification for his approval of what he knew was an improper ratification action.

- On September 26, 2011, the Agency procured 50 speakerphones. The purchase order was modified on September 30, 2011, to add an additional eight speakerphones at a cost of \$2,112.40, which was recorded as an obligation against FY 2011 funds. On the modification document, the Contracting Officer marked

that the modification was an “agreement of the parties” and that the contractor “is required to sign this document and return 1 copy to the issuing office.” The procurement file does not contain a signed copy of the modification. Without a copy of the modification document that is signed by the contractor prior to the expiration of FY 2011, there is no obligation for the eight additional speakerphones that can be charged against the FY 2011 appropriation.

- On September 2, 2011, the Agency completed a procurement action for furniture costing \$121,980.54 for a Regional Office that was scheduled to move to a new space on April 1, 2012. The furniture was to be delivered on or before October 14, 2011 – 42 days after the order. Because the move was scheduled for 6 months after the end of FY 2011, a fact that was known at the time the furniture was ordered, and there was apparently more than sufficient time to order the furniture in FY 2012, the furniture was not a *bona fide* need of FY 2011.
- On September 30, 2011, the Agency used a purchase card to pay outstanding invoices in the amount of \$9,145.35 that was recorded against the FY 2011 appropriation. The invoices were for repairs to the NLRB Headquarters space that were authorized by NLRB or General Services Administration officials in FY 2010 and were invoiced between June 17 and August 10, 2010. Because the repairs were authorized in writing and occurred in FY 2010, they were a *bona fide* need of FY 2010 rather than FY 2011.
- On September 26, 2011, the Agency requested a 1-day media training workshop for the Agency heads. The Agency completed the procurement without competition by executing a Justification for Other than Full and Open Competition memorandum based on an “unusual and compelling urgency to obtain the service.” The procurement action, in the amount of \$4,500, occurred on September 28, 2011, and was recorded against the FY 2011 appropriation. The period of performance was October 17, 2011 through October 22, 2011. The workshop occurred on October 17, 2011.

With relatively few exceptions, training is a *bona fide* need of the year in which it occurs. Given that the training did not occur for 19 days after it was procured, we find that the exceptions do not apply. We also find that there was no urgent or compelling need to justify the lack of competition.

- On August 30, 2011, the Agency procured Blackberry services with a period of performance from September 1 through September 30, 2011, and recorded the obligation against the FY 2011 appropriation. Then on September 27, 2011, the Agency executed a modification to that procurement to continue Blackberry services through November 30, 2011 at an amount of \$16,219.04, and again recorded the obligation against the FY 2011 appropriation.

The Agency executed two modifications -- one on November 15, 2011, to extend services to the end of December 2011 and another on December 9, 2011, to extend the services to end of January 2012. The two modifications totaled \$16,219.04 and were recorded against FY 2011 funds.

The Blackberry services are severable services and are a *bona fide* need of the year in which they are received. As noted above, there is a statutory exception if the Agency has a period of performance that crosses fiscal years, provided the total period of performance does not exceed 12 months. However, this exception is not available as a means to reach back to a prior fiscal year through a modification of an existing procurement action because such an agreement has to be executed before the end of the period of availability of the appropriation. For the Blackberry services, the modifications in November and December 2011 were after the end of the period of availability for the FY 2011 appropriation, so they were a *bona fide* need of FY 2012.

- On September 15, 2011, the Agency procured a visitor access control and badging system for NLRB Headquarters, at a cost of \$6,973. The purchase included installation and a year of onsite support services that had a period of performance from October 28, 2011 to October 27, 2012, at a cost of \$1,650. No other

periods of performance are listed in the procurement documentation. The entire procurement was recorded against FY 2011 appropriation.

The support services are severable services and are a need of the year in which they are received, unless they cross fiscal years, in which case the Agency may choose to record the obligation for the 12 months of the service to the first fiscal year. So, in this matter the support services were not a *bona fide* need of FY 2011, as apparently they could not be received until the period of performance began in FY 2012.

Recommendation

We recommend that the Office of the Chief Financial Officer:

1. Correct the *bona fide* needs rule violations by initiating the appropriate accounting adjustments to the FY 2010, 2011, and 2012 appropriations.

COMPLIANCE WITH THE FAR AND INTERNAL CONTROLS

We identified the following issues unrelated to the *bona fide* needs rule during our testing.

- On September 23, 2011, an Agency manager made an unauthorized commitment when he purchased supplies for the Division of Operations-Management outreach program. The cost of the supplies was \$4,941.90 – an amount that exceeded the manager’s micro-purchase spending limit of \$3,000. When the manager received the invoice for the supplies, he could not pay it. The manager then contacted a Contracting Officer and requested that the Contracting Officer make the payment. The Contracting Officer paid the invoice amount with his purchase card.

The payment by the Contracting Officer was in effect a ratification that he was not authorized to complete. At that time, such authority had not been delegated by the head of the procurement activity to the AMB. Additionally, the Contracting Officer did not seek legal

review, which is required by the FAR and Agency procedures.

- On September 23, 2011, the Facilities and Property Branch made a request for interior door signs for the Washington Resident Office. The request included a Justification for Other than Full and Open Competition. The basis for the justification was that the vendor had a template that complies with the Agency's existing signage and is compliant with the Americans with Disabilities Act, and the signs could be shipped out "ASAP." The justification also stated that several vendors could provide the door signs, but there would be a 4-5 business day turnaround time, and that the "incredibly urgent nature of the door signage" does not allow for multiple quotes at that time. The amount of the procurement was \$4,555.90 – an amount above the micro-purchase level. The justification was not signed by the Contracting Officer and there was no evidence in the contract file that the procurement was awarded through a competitive process or awarded through the GSA schedule process.

Staff in the Facilities and Property Branch stated to us that the signs were needed because the Washington Resident Office moved from the 5th floor to the 6th floor of the Headquarters building, and that office interacts with the public. They also stated that the Resident Office's move occurred in April 2011.

The FAR, at 48 CFR 6.301(c), states that contracting without providing for full and open competition shall not be justified based upon a lack of advance planning or that the appropriation is about to expire. Because the Resident Office moved 5 months before the signs were ordered, the failure to properly plan for the signage cannot be used to justify an urgent or compelling need for the signs to warrant no competition – particularly in light of the fact that other vendors could provide the signs in 4-5 days. We note that the signs were not received by the Agency until November 21, 2011.

- On September 27, 2011, the Agency added \$53,410 in FY 2011 funds to a procurement action for retirement/benefit support services for the Human

Resources Branch. At the time of the modification, the period of performance had expired.

Our review of the contract file disclosed several issues. In April 2010 the Agency entered into a procurement action for retirement/benefit support services with a period of performance from April 19, 2010 through December 19, 2010. The original procurement action required that the vendor provide two individuals to perform the services for 1,280 hours each at a rate of \$98.00 per hour. The procurement action identified the individuals by name and obligated funds for each individual separately. One of the two individuals was not cleared to work and the other initiated and performed 651 hours of service before walking off the job. The Agency then terminated the procurement for “convenience.” The documentation of the termination states that the basis for the termination was that the vendor’s employee stopped performing the services and that the vendor could not replace the employee.

In November 2010, the Contracting Officer executed a replacement “contract.” The replacement “contract” was not for 629 hours, the balance of the hours remaining, but was for the original amount of 1,280 hours procured and obligated \$125,440 in FY 2010 funds, with a period of performance for 32 weeks.

There is no explanation in the contract file of how the hours and period of performance were determined. There is also no explanation in the contract file regarding the failure to provide two individuals or why funds obligated for the second individual were not deobligated prior to the end of FY 2010.

To use prior year’s funding, replacement “contracts” are limited to the scope of the amount of the obligation remaining as a result of the breach by the vendor and must be initiated in a timely manner. Because the Agency did not initiate a replacement “contract” for the individual who was not cleared to work in a timely manner, the funds obligated for that purpose were not available in FY 2011. Therefore, the only FY 2010 funds available due to the vendor’s breach were \$61,642, with a period of performance that would run for approximately 16 weeks.

The Contracting Officer also modified the replacement “contract” to add hours using FY 2011 funds. On February 24, 2011, 640 hours were added and obligations were incrementally recorded that amounted to \$62,720. The Contracting Officer, however, did not modify the period of performance, which would have ended on or about June 17, 2011, or 32 weeks after performance began. Without a modification to the period of performance, it was impossible for the vendor to perform those hours by June 17, 2011. Then on September 27, 2011, the Contracting Officer executed a modification to add \$53,410 to the task order to cover the remaining “545 hours.” After FY 2011 ended, \$57,937.60 in FY 2010 funds and \$4,517.80 in FY 2011 funds were deobligated.

The proposed initial replacement “contract” was reviewed by Special Counsel. That review raised questions regarding the procurement action, but did not address the *bona fide* needs issue associated with a replacement “contract.” Nevertheless, the Contracting Officer was provided with information that a replacement “contract” could only be for the remaining part of the procurement that had not been met by the vendor and that the replacement “contract” must be awarded timely. It was also noted that unwarranted delay in terminating a procurement action raises the presumption that the original procurement action was not intended to meet a then-existing *bona fide* need.

- We identified 10 noncompetitive procurement actions in which the Contracting Officer did not certify the accuracy and completeness of the justification for less than full and open competition.
- We identified four purchase card transactions that appeared to be split purchases. Each of the four transactions involved two or more purchases with the same vendor on the same day that together would exceed the micro-purchase level.
- In some circumstances, the Agency requested that the contractor sign and return a copy of a modification. In addition to those identified in our discussion of *bona fide* needs, we identified 10 procurement actions, involving 4

contractors, for which the contractor's signature was required but not documented in the Agency's procurement files. In 6 of the 10 procurement actions an obligation was recorded and the contractor performed despite the lack of a written agreement.

Recommendation

We recommend that the Office of the Chief Financial Officer:

2. Review the procurement procedures in place and create a system of internal control to ensure that the Agency's procurement process operates in compliance with the FAR.

APPENDIX

**UNITED STATES GOVERNMENT
National Labor Relations Board**



Memorandum

Date: September 7, 2012
To: David Berry, Inspector General
From: *Douglas Wolf*
Douglas Wolf, Acting Acquisitions Management Branch Chief¹
Subject: Response to Draft Report "End-of-the-Year Spending" (OIG-AMR-70)

I am pleased to have this opportunity to respond to the draft report provided to me on August 10, 2012.

The Agency takes seriously the findings and agrees that improvements to internal controls and financial management are necessary. In that regard, after receiving expertise and guidance from the National Academy of Public Administration and addressing internal resistance from the Division of Administration, the Agency established the Office of the Chief Financial Officer (OCFO), which includes the Budget Branch, Accounting Branch, and Acquisition Management Branch. This is consistent with the auditor's recommendation presented in the FY 2010 Financial Statement Audit that the Agency establish a system of internal controls to ensure laws and regulations relating to procurement are properly applied, including establishment of a Chief Financial Officer (CFO) position outside of the Division of Administration that reports to Agency heads, as it would improve effectiveness and efficiency in financial operations, reliability of financial reporting, transparency of financial data, and compliance with applicable laws and regulations. This new structure eliminates the former stove piped operations and provides a single integrated financial point of contact, the CFO. The Agency fully expects the CFO will be a highly qualified financial management professional, who will develop a strong financial management and internal control structure within the Agency and who will change the culture of the financial management practice of the Agency. The CFO will infuse more discipline, structure, and internal control in the financial management lifecycle and throughout the financial management process.

Further, the Agency is committed to migrating to a substantially improved core accounting system (Oracle Financials) in early October 2012, adopting new procedures and controls, fully developing commitment accounting, training users of the system, and holding allowance holders more accountable to reserve their individual budgetary funds on a timely basis. These changes will improve financial decision making, decrease procurement challenges, and alleviate the

¹ David Graham, the Acquisitions Management Branch Chief at all relevant times, recently retired. The Agency has not yet acquired a permanent replacement.

fiscal year-end strain on the Acquisitions Management Branch (AMB), in particular, which will lead to opportunities for fewer inadvertent errors.

The Agency offers responses to your recommendations below.

1. Correct the bona fide needs rule violations by initiating the appropriate accounting adjustments to the FY 2010, 2011, and 2012 appropriations.

The Agency agrees with your recommendation, but withholds correction of specific actions until a review is conducted on each individual action by our newly-established OCFO.

After a careful review, assessment, and determination is completed on each action by the AMB under the newly-established OCFO with assistance from Special Counsel, as appropriate, accounting adjustments will be made to those actions where required to correct the appropriate funding year. To complete this review and to accurately apply the appropriate accounting adjustments, the OCFO is requesting that the Office of the Inspector General (OIG) identify the specific procurement actions noted by award number, the amount, and any other pertinent information for each. Thereafter, the OCFO will provide updated information about adjustments made to the OIG.

2. Review the procurement procedures in place and create a system of internal control to ensure that the Agency's procurement process operates in compliance with the FAR.

The Agency agrees with this recommendation.

In an effort to ensure that the Agency's procurement process operates in compliance with the Federal Acquisition Regulations (FAR) and to improve internal controls around the procurement process, the OCFO is planning to develop procedural documents for NLRB program offices in the area of advanced procurement planning; guidance related to the acquisitions of services, supplies, and IT requirements; AMB policy and procedures in conjunction with the FAR; and related directives specific to the mission of NLRB.

The OCFO will issue policies, guidance and directives as determined necessary to ensure a system of internal control is implemented for the NLRB procurement process to properly and successfully acquire goods and services required for the mission of the NLRB and in compliance with the FAR. The guidance and directives will also take into account the process by which the requiring activities will provide for advanced procurement planning. In this regard, the AMB under the direction of the CFO will ensure the requiring activities fully understand the importance of procedures, and the required lead times to properly acquire goods and services that will alleviate the possibility of bona fide needs rule violations and non-compliance of FAR.

We appreciate both your efforts and the work you performed to bring these important issues to our attention. We remain committed to making changes as necessary or appropriate to ensure a properly controlled financial environment for the Agency.

cc: The Board and Acting General Counsel