



NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY

Oversight Activities of NIST's Recovery Act Construction Contracts Need Improvement

FINAL REPORT NO. OIG-12-028-A

JUNE 1, 2012

U.S. Department of Commerce
Office of Inspector General
Office of Audit and Evaluation

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UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, D.C. 20230

June 1, 2012

MEMORANDUM FOR: Dr. Patrick Gallagher
Under Secretary of Commerce for Standards and Technology
National Institute of Standards and Technology

FROM: Ann C. Eilers 
Principal Assistant Inspector General for Audit and Evaluation

SUBJECT: Oversight Activities of NIST's Recovery Act Construction
Contracts Need Improvements
Final Report No. OIG-12-028-A

We are providing for your review our final audit report on the effectiveness of NIST's oversight and activities to manage American Recovery and Reinvestment Act of 2009 (Recovery Act) awards given through the NIST construction contract program. Our audit objectives were to determine whether NIST's (1) policies and procedures were sufficient for evaluation of cost, specifications, and performance results, (2) contract award and administrative practices complied with applicable laws and regulations, including specific Recovery Act requirements, and (3) acquisition staff communicated problems with the projects to NIST management.

We found deficiencies both in NIST operating procedures and its oversight practices. Specifically, inadequate controls over contract extensions jeopardized timely completion of projects, inadequate oversight allowed noncompliance with Buy American requirements and inaccurate and incomplete Recovery Act postings on government websites, and inadequate controls led to deficiencies in award administration. With tens of millions of dollars of Recovery Act funds remaining, NIST needs to strengthen its oversight of these construction projects.

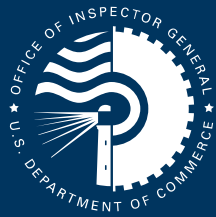
We have received your response to our draft report. Where appropriate, we have modified this final report based on this response. The formal NIST response is included in appendix C. (We summarized your response, and OIG comments, on page 18.) The final report will be posted on OIG's website pursuant to section 8L of the Inspector General Act of 1978, as amended.

In accordance with Department Administrative Order 213-5, within 60 days of the date of this memorandum, please provide us with an action plan that responds to all of the report recommendations.

Please direct any inquiries regarding this report to Johnny Dawsey, Audit Manager, at (404) 730-2056, or Rebecca Leng, Senior Advisor, at (202) 482-8294, and refer to the report title in all correspondence. To meet the deadline, you may transmit your response via e-mail to jdawsey@oig.doc.gov, but please submit a hardcopy version of your comments immediately thereafter.

Attachment

cc: Ellen Herbst, Senior Advisor to the Deputy Secretary
David Robinson, Associate Director for Management Resources, NIST
Michael Herman, Executive Officer for Administration, NIST
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Report In Brief

JUNE 1, 2012

Background

The American Recovery and Reinvestment Act of 2009 (the Recovery Act) appropriated \$360 million to NIST to construct research facilities, including \$180 million in contracts for the construction and renovation of research facilities on NIST's headquarters in Gaithersburg, Maryland, and NIST's campus in Boulder, Colorado.

The construction projects, as initially proposed, included a precision measurement laboratory; maintenance and repair projects to enhance NIST's aging facilities; Center for Neutron Research expansion for a high-efficiency cooling system and supporting infrastructure; and a National Structural Fire Resistance Laboratory, to study how fires start.

Why We Did This Review

The purpose of our review of the Recovery Act construction contracts was to determine how effectively NIST was monitoring the contracts and using the results of its monitoring to improve the acquisition program. Our audit objectives were to determine whether NIST's (1) policies and procedures were sufficient for evaluation of cost, specifications, and performance results, (2) contract award and administrative practices complied with applicable laws and regulations, including specific Recovery Act requirements, and (3) acquisition staff communicated problems with the projects to NIST management.

NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY

Oversight Activities of NIST's Recovery Act Construction Contracts Need Improvement

OIG-12-028-A

WHAT WE FOUND

We found deficiencies in NIST's operating procedures and oversight practices. With tens of millions of dollars of Recovery Act funds remaining, NIST needs to strengthen its oversight of these construction projects.

Inadequate controls over contract extensions jeopardized timely completion of projects. Contracts and task orders were extended after they had passed the end of the performance period specified in the contracts—116 days after expiration in one case. Without accountability, contracts are not on track for completion.

Lack of adequate oversight allowed noncompliance with the Buy American provision of the Recovery Act. NIST Boulder management allowed contractors to install products made in Germany and China without waivers. The process of reviewing and approving Buy American exceptions was untimely and inconsistent.

Lack of adequate oversight resulted in inaccurate/incomplete data posted on government websites. Five contractors reported zero jobs created/retained after spending \$12.7 million in Recovery Act funds. Also, incorrect contract end dates were posted on government websites.

Inadequate controls led to deficiencies in award administration. NIST did not consistently obtain legal reviews before contract issuance or issue timely contracting officer's technical representative (COTR) representation letters. Contractors did not conduct timely fraud training.

WHAT WE RECOMMEND

We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST to:

- Establish standard operating procedures (SOPs) for reviewing, monitoring, and approving contracts for extensions. Extend the performance period for six contracts that missed or are at risk of missing their performance end dates and create a management tool for monitoring the progress of construction contracts.
- Update the SOPs for Buy American exception determinations and waiver approvals. Conduct Buy American procedures training for staff.
- Provide training to staff and contractors on Recovery jobs calculation formula and ensure that data are correctly posted on government websites.
- Review the contract award process to correct inconsistencies in obtaining legal reviews, issuing COTR letters, and conducting fraud prevention training.

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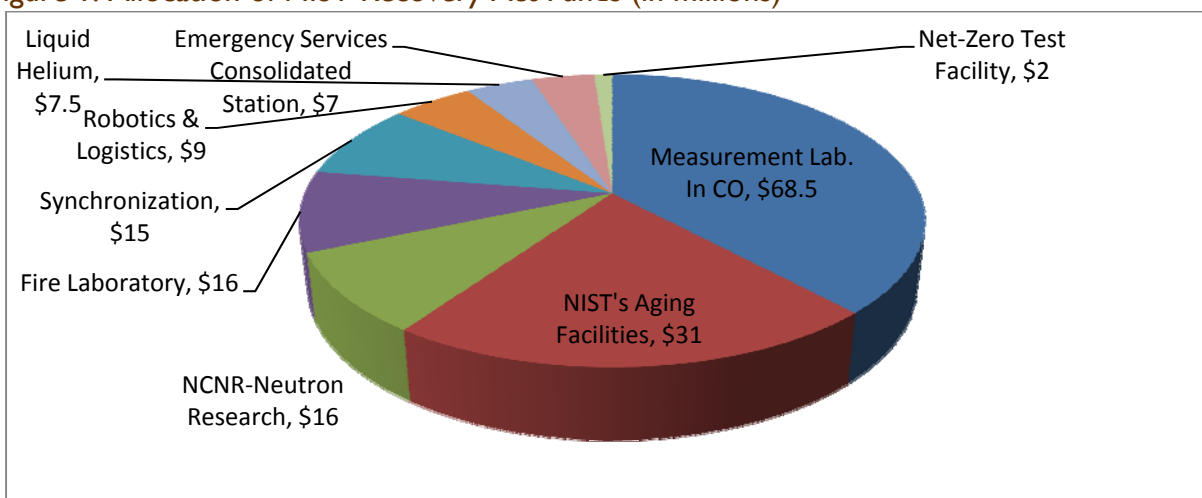
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Introduction

On February 17, 2009, the President signed the American Recovery and Reinvestment Act of 2009¹ (the Recovery Act) into law. The Recovery Act appropriated \$360 million² to NIST for construction of research facilities, including \$180 million available to NIST for the construction and renovation of research facilities on NIST's headquarters in Gaithersburg, Maryland, and NIST's campus in Boulder, Colorado. According to NIST, \$172 million would fund construction projects, and \$8 million would fund in-house oversight and construction management support to these projects.

The \$172 million in construction projects, as initially proposed, included the following: (1) \$68.5 million for a precision measurement laboratory at NIST's site in Boulder; (2) \$31 million for maintenance and major repair projects to enhance the performance of NIST's aging facilities in Gaithersburg; (3) \$16 million for the Center for Neutron Research (NCNR) expansion for a high-efficiency cooling system and supporting infrastructure in Gaithersburg; (4) \$16 million for a National Structural Fire Resistance Laboratory, to study how fires start and could be prevented and suppressed, in Gaithersburg; (5) \$15 million for design and construction of new time-code radio broadcast stations in separate locations around the country;³ (6) \$9 million for relocation and consolidation of advanced robotics and logistics operations in Gaithersburg; (7) \$7.5 million for the construction of a liquid helium recovery system both in Gaithersburg and Boulder; (8) \$7 million for design and construction of an emergency services consolidated station in Gaithersburg; and (9) \$2 million for a Net-Zero Energy Residential Test Facility in Gaithersburg (see figure 1 below).

Figure 1. Allocation of NIST Recovery Act Funds (in millions)



Source: Data from Recovery.gov

¹ Pub. L. No. 111-5.

² \$180 million was allocated for construction contracts, discussed in this report, and \$180 million was allocated for construction grants, discussed in the following report: U.S. Department of Commerce Office of Inspector General, February 14, 2012. *Oversight Activities of NIST's Recovery Act Construction Grant Awards Are Generally Effective but Need Improvements*, OIG-12-020-A. Washington, D.C.: Department of Commerce OIG.

³ According to NIST, this project did not take place.

By September 23, 2010, NIST had awarded 18 firm-fixed-price Recovery Act construction contracts, totaling \$175.7 million⁴ (see appendix B). Fifteen of the contracts, totaling \$88.7 million, were for construction projects at NIST's Gaithersburg, Maryland, campus; two contracts, totaling \$85.6 million, were for construction projects at NIST's Boulder, Colorado, campus; and one contract, totaling \$1.4 million, was for a construction project in Kekaha, Hawaii (managed by the Boulder office).

Monitoring Challenges Facing NIST

NIST's Acquisition Management Division (AMD) provides professional acquisition support services, planning guidance, and policy services and handles the administration of contracts for both the Gaithersburg and Boulder staff. AMD created specific guidance documents to assist both staff and recipients with Recovery Act requirements (e.g., Recovery Act—Buy American Act for Construction Materials, Recovery Act—Public Posting and Reporting Requirements, and Fraud Prevention Training Requirements).

NIST's Office of Facilities and Property Management (OFPM) provides facilities design, construction, engineering, maintenance, and support services for both the Gaithersburg and Boulder staff. Both AMD and OFPM are part of NIST's Office of Management Resources and provide joint oversight for the 18 Recovery Act construction contracts. See table I for some of the joint oversight responsibilities assigned to both offices.

Table I. Recovery Act Contract Oversight Responsibilities

Oversight Responsibilities	AMD	OFPM
Maintain official contract award files	✓	
Establish divisional staff policies	✓	✓
Receive and review recipient submittals (financial reports)	✓	✓
Monitor project activities to ensure project goal achievements	✓	✓
Review performance reports for consistency with the approved project	✓	✓
Ensure recipient compliance with award conditions	✓	✓
Review and approve or disapprove modifications, including time extensions	✓	✓
Provide acquisition guidance/technical assistance to recipients	✓	✓

Source: NIST

Even with an established contract construction program, NIST still risks not having appropriate and adequate monitoring processes in place. Monitoring challenges include oversight of the Recovery Act contract extensions, proper enforcement of the Buy American provision requirements, review of Recovery Act recipient data on government websites for transparency, and control over the contract administration process.

⁴ According to NIST, 1 of the 18 contracts (L&M Construction) received \$2.8 million funded with Recovery Act Science and Technical Research and Services funds.

Audit Objectives

The purpose of our review of the Recovery Act construction contracts was to determine how effectively NIST was monitoring the contracts and using the results of its monitoring to improve the acquisition program. Our audit objectives were to determine whether NIST's (1) policies and procedures were sufficient for evaluation of cost, specifications, and performance results, (2) contract award and administrative practices complied with applicable laws and regulations, including specific Recovery Act requirements, and (3) acquisition staff communicated problems with the projects to NIST management. See appendix A for details regarding our audit objectives, scope, and methodology.

Findings and Recommendations

I. Inadequate Controls over Contract Extensions Jeopardized Timely Completion of Projects

NIST is not proactively managing and monitoring the progress and completion of the 18 Recovery Act construction contracts. For example, while NIST uses a master schedule to manage and monitor the progress and completion of Recovery Act construction projects awarded to its grant recipients,⁵ NIST does not take the same approach in monitoring the progress of its own construction projects. In response to our draft report, NIST stated that it has established biweekly Recovery Act management meetings and a comprehensive spreadsheet to monitor and track project performance.

Among the 18 Recovery Act–funded construction projects, the performance period (for completing construction work) was extended for four projects only after the performance period specified in the contract had expired—in one case as late as 116 days after expiration. Currently, contractors for six projects have either missed or are at risk of missing the current performance end dates.

Timely completion of construction work for intended use, such as improving energy efficiency, is critical to achieving expected returns for responsible spending of taxpayers' money. In a March 4, 2009, White House memorandum, the President advised: “The Federal Government has an overriding obligation to American taxpayers. It should perform its functions efficiently and effectively while ensuring that its actions result in the best value for the taxpayers.”⁶ Although contractors were awarded firm-fixed-price contracts to carry out the projects, schedule delays may increase costs, which are an issue in today's constrained budget environment.

NIST officials informed us that they have various project management tools in place, such as daily site visits by the contracting officer's technical representatives (COTRs); daily reports from the contractors; biweekly or weekly progress meetings between the contractors, COTRs, and contract specialists; schedules; and monthly invoices from the contractors. However, NIST has no established procedures for evaluating and approving requests to extend the contract performance period. Consequently, it is difficult for NIST to hold contractors accountable for timely completion of construction projects.

⁵ Commerce OIG, *Oversight Activities of NIST's Recovery Act Construction Grant Awards Are Generally Effective but Need Improvements*.

⁶ White House Memorandum for the Heads of Executive Departments and Agencies, “Government Contracting,” March 4, 2009.

A. Recovery Act Contract and Task Order Extensions Were Not Approved in a Timely Manner, Affecting Contract Performance

As of December 31, 2011, NIST had approved contract extensions for 4 of the 18 contracts (see table 2). However, NIST approved extensions after the performance end date for all 4 contracts. NIST approved three contract extensions 1–16 days after the performance period end dates. The fourth contract needed extensions on all eight of its task orders, and NIST approved five of the extensions 26–116 days after the performance period end dates.

Table 2. Late Contract Extensions

Contractor	Contract Amount	Performance End Dates	Date Contract Extension Approved	Days Difference
1. Biscayne Contractors	\$2,265,265	9/22/2011	9/23/2011	1
2. McHenry Inc.	561,982	11/22/2011	11/29/2011	7
3. Universal Business Solutions	1,058,229	8/15/2011	8/31/2011	16
4. L&M Construction				
1. Task Order No. 10428	324,585	2/27/2011	3/28/2011	29
2. Task Order No. 10429	110,140	2/27/2011	3/25/2011	26
3. Task Order No. 10430	278,075	5/28/2011	8/9/2011	73
4. Task Order No. 10453	131,280	5/28/2011	7/14/2011	47
5. Task Order No. 10454	195,126	5/28/2011	9/21/2011	116

Source: OIG, data obtained from NIST

Although NIST officials provided reasonable explanations (such as change orders and construction material negotiations) for the untimely contract extensions, they did not explain why they did not take a more proactive approach to the oversight and management of these contracts. The untimely extensions affected contract performance completion because they reduce contractor incentive to finish on time.

This happened largely because NIST does not have standard operating procedures (SOPs) for reviewing and approving contract extensions. For example, Federal Acquisition Regulation (FAR) subpart 52.217-9 requires that contracts include a clause specifying how to exercise the option to extend the contracts' terms. Only 2 of the 18 contracts included an extension clause.

B. Without Accountability, Recovery Act Contracts Are Not on Track for Completion

As of December 31, 2011, 6 of the Recovery Act contracts either had missed or were at risk for missing their performance end dates (see table 3). Five of the 6 contracts had completion rates of 53 percent or less while completion performance end dates were 1 to 4 months away. It did not seem likely that the contractors would complete these projects on time without contract extensions. NIST agreed with our assessment and agreed to reassess project performance for extension consideration.

One contract had passed its original performance end date by more than seven months and its revised end date by more than 5 months (see last row of table 3 and note b). NIST stated that they had issued a cure notice⁷ to this contractor on October 19, 2011, because of pending performance issues and that NIST was currently negotiating change orders with this contractor. NIST stated that no payments have been issued to the contractor since stoppage of the contract work. However, as of February 2, 2012 (or 4 months from the contract's last approved completion end date), this issue still had not been rectified. As a result, there is no updated target date to complete the construction work specified in this contract.

Table 3. Contracts at Risk for Missing Performance End Date (as of December 31, 2011)

	Contractor	Contract Amount	Contract Award Date	Period of Performance End Date	Period of Performance (in months)	Performance Period Percentage Lapse 12/31/2011 ^a	Percent of Project Complete as of 12/31/2011
1	SEI Group	\$ 8,330,395	9/23/2010	4/27/2012	19	80%	24%
2	Grimberg/Amatea JV	\$24,842,996	9/23/2010	5/6/2012	20	79%	33%
3	J&L Mavilia	\$12,297,793	8/9/2010	3/26/2012	20	86%	41%
4	Milestone	\$ 6,273,741	7/21/2010	3/22/2012	20	87%	47%
5	Milestone	\$ 5,912,254	7/26/2010	2/29/2012	19	90%	53%
6	Universal Business Solutions	\$1,058,229	8/9/2010	10/31/2011 ^b	15	114%	64%

Source: OIG, from NIST data

^aComputed as the number of days completed on the project as of 12/31/2011 divided by the number of total days to complete the project, per the contract.

^bThis contract had an original performance end date of 8/15/2011, but NIST granted an extension after that end date had passed (see table 2).

Recommendations

We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST AMD and OFPM officials to accomplish the following:

1. Establish standard operating procedures for reviewing, monitoring, and approving contracts for extensions in a timely manner.
2. Extend the performance period for the six contracts that either have missed or are at risk of missing their performance end dates and create a master schedule-type

⁷ A cure notice is issued by the government to inform the contractor that the government considers the contractor's failure a condition that is endangering the performance of the contract.

management tool for better oversight and monitoring of the contracts to prevent additional slippage.

3. Develop a plan to complete the construction work specified in the Universal Business Solutions contract.

II. Lack of Adequate Oversight Allowed Noncompliance with the Buy American Provision of the Recovery Act

For 4 of the 18 Recovery Act contracts, the contractors requested exceptions/waivers to the Buy American provision of the Recovery Act. NIST denied one and approved two requests. It is currently reviewing the fourth request (see table 4). We also found that NIST Boulder management allowed four foreign-made products to be installed without a waiver from the NIST Director or even an evaluation of the justifications submitted by contractors (see requests 3 and 4 in table 4).

Table 4. Status of Buy American Exception Requests

	Awarding Office	Contractor (Award Date)	Foreign-Made Items (Total cost)	Installed	Waiver Approval
1	Gaithersburg	Biscayne (7/10)	Construction fitting material	n/a	Denied
2	Gaithersburg	Therrien Waddell (9/10)	Heat recovery ventilator (\$1,600)	Scheduled for 4/12	Waiver approved (10/11)
3	Boulder	Adon Construction (5/10)	Solar inverters (\$70,000)	7/10 ^a	Waiver approved (12/11)
4	Boulder	Whiting-Turner (4/10)	1. Fluorescent tubes (\$107,000)	6/11 ^a	Pending
			2. GE T-5 lamps (\$27,000)	9/11 ^a	Pending
			3. Elec. floor box trim (\$3,000)	1/12 ^a	Pending
			4. Power supplies & cord (\$17,000)	Unscheduled	Pending
			5. UPS backup power supply (\$20,000)	Unscheduled	Pending
			6. AC ring generators (\$2,000)	Unscheduled	Pending

^aInstallation took place before waiver was approved.

Section 1605 of the Recovery Act incorporated a “Buy American” provision, stipulating that a public building would not receive funding under the Act unless all of the iron, steel, and manufactured goods used in the project were U.S.-produced. The Act provides that this Buy American requirement shall not apply, however, if the head of an agency finds that there is non-availability of American-produced items, use of American-produced items would unreasonably

increase project costs, or that application is otherwise inconsistent with public interest. Where the agency head waives application of the Buy American provision, the Act requires that the waiver determination be published in the *Federal Register*.

To implement the Buy American provision and its corresponding regulation in FAR subpart 25.6, “American Recovery and Reinvestment Act—Buy American Act—Construction Materials,” NIST issued SOP NIST-08-09 in August 2009. FAR subpart 25.603 and NIST-08-09 require that exception determinations be made based on the following grounds before foreign-made products may be installed:

1. *Non-availability*. The United States does not produce iron, steel, and other relevant manufactured goods in sufficient and reasonably available quantities or of a satisfactory quality. According to the FAR, non-availability of construction material must be determined by the head of the contracting activity.
2. *Unreasonable costs*. Inclusion of iron, steel, and manufactured goods produced in the United States will increase the overall project cost by more than 25 percent. The contracting officer shall make this determination.
3. *Inconsistent with public interests*. According to the FAR, only the head of the agency can make this determination. The Department of Commerce has re-delegated this function to the Chief Financial Officer.

Moreover, the FAR requires that a notice (waiver) be published in the *Federal Register* by the head of the agency within 3 days of the inapplicability determination.⁸ In November 2010, the Commerce Secretary delegated the authority to issue and publish waivers to the NIST Director.

We identified that NIST untimely and inconsistently reviewed and approved Buy American exceptions (waivers) and that the required “non-availability” exception determination was not made before a contract award. As a result, NIST may not have achieved the intent of the Buy American provision: helping the U.S. economy. As of December 2011, NIST had expended about 67 percent of Recovery Act funds obligated to these construction contracts. With \$58 million remaining to be spent, NIST needs to strengthen its process of reviewing and approving Buy American exceptions.

A. The Process of Reviewing and Approving Buy American Exceptions (Waivers) Was Untimely and Inconsistent

NIST Gaithersburg management properly followed the SOP by making an exception determination for each contractor’s request for Buy American exceptions, obtaining waivers from the NIST Director, and posting the waiver in the *Federal Register* before allowing a contractor to install a foreign-made product. However, NIST Boulder management allowed

⁸ The original version of the FAR and NIST SOP required publication of the waiver approval in the *Federal Register* within 2 weeks.

contractors to install foreign-made products (made in Germany and China) without obtaining waivers from the NIST Director or even before they completed an exception determination.

Table 5. Timing of Installation of Foreign-Made Products

NIST Management	Contractor	NIST Notified of the Need for Exception?	NIST Completed Exception Determination?	NIST Director Approved Waiver?	NIST Posted Waiver on Fed. Register?
Gaithersburg	Therrien Waddel	Y	Y	Y	Y
Boulder	Adon	Y	N	N	N
Boulder	Whiting-Turner				
	• Product 1	Y	N	N	N
	• Product 2	Y	N	N	N
	• Product 3	Y	N	N	N

Adon. In May 2010, NIST awarded a contract to Adon Construction Company to install a solar panel photovoltaic array at the NIST radio field site facility at Kekaha, Hawaii, to help reduce electricity consumption. In July 2010, Adon submitted a request to install foreign-made electrical inverters and enclosures because it would have to wait for 12 weeks for a U.S. company to manufacture the product with specified materials—stainless steel or polyvinyl chloride (PVC). Boulder management allowed Adon to install German-made inverters and enclosures before it completed the exception determination in August 2010. Construction work was completed and solar panels were commissioned to use in November 2010.

The NIST Director finally approved the waiver request submitted by Boulder management in December 2011—18 months after the initial installation of the foreign-made materials.⁹ Meanwhile, NIST could not close out the contract because of the “unauthorized” installation of the foreign-made materials. NIST agreed this was an exceedingly long time but stated that the Buy American process was new and this was the first waiver request. NIST also stated there was no clear guidance regarding waivers, resulting in a drawn-out period of time between installation and approval.

In the exit interview, NIST stated that its processes have improved as they have gained experience handling the Buy American requirement issues. When we asked if NIST was documenting what they had learned and their improved processes, the OFPM chief responded that there was no time to do this because of the huge staff workload but that NIST was implementing the improved procedures in practice. However, without formal documentation, NIST may not be able to institutionalize the lessons learned to be able to benefit from this experience.

Whiting-Turner. NIST awarded the largest construction contract to Whiting-Turner (\$83 million—about half of NIST’s total Recovery Act construction funds available for contracts) for an extension to NIST Boulder Campus Building I. The extension will accommodate a new

⁹ The Director signed a ratification of the bureau’s prior determination that the specified items were not produced in the United States and its decision to grant Adon’s exception request.

state-of-the-art laboratory used for measuring high-frequency electronics, advanced materials research, and other areas of study.

In July 2011, September 2011 and January 2012, Boulder management allowed Whiting-Turner to install foreign-made materials from China without waiver approvals. Whiting-Turner requested six Buy American waivers but installed the following three products before NIST had completed the required exception determination:

1. lighting ballasts and compact fluorescent lamps, installed in July 2011,
2. GE T-5 lamps installed in September 2011, and
3. electric floor box trim installed in January 2012.

Not until February 2012—6 months after installation of products 1 and 2 above—did Boulder management complete the exception determination and prepare to submit the waiver requests to the NIST Director. NIST justified the lack of timely actions because the contractor installed the materials at its own risk in order to maintain the completion date schedule. NIST stated that the contractor was also aware that if the requested waivers were not approved, the contractor would have to reinstall the materials in accordance with Buy American requirements.

Performing exception determinations and obtaining waiver approval retroactively after contractors have installed foreign-made products are not in compliance with the FAR and NIST-08-09. Further, even though NIST could order contractors to remove foreign-made products if it later determines that an exception does not apply, doing so will only result in contract delays and complications.¹⁰

B. The “Non-availability” Determination Was Not Made Before Contract Award

For the contract awarded to Whiting-Turner, our review found that NIST should have made an exception determination before the contract award. FAR subpart 25.6 and NIST-08-09 require that exception determinations be requested and completed prior to the award of a contract whenever the need for an exception is foreseeable. The requested waiver materials appear to be common electrical lighting or power components. For example, there are many U.S.-made energy-efficient fluorescent T-5 lamps and ballasts. However, the contractor claimed that to meet the project specifications, it needed T-5 lamps built for a 30,000-hour life cycle, which are not available in the United States. NIST reported that its market research confirmed that the 30,000-hour T-5 lamps are not made in the United States or any other approved treaty country.

¹⁰ FAR subpart 25.607(c)(3) states, “A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government’s right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.”

We also contacted the architect and engineering (A/E) firm.¹¹ A/E staff stated that they were aware and very diligent in their preparation and revisions of the construction documents for this contractor to meet the contract's Buy American requirements. A/E staff also stated that extensive hours of research have been expended to revise the construction documents since this project was designed. In addition, A/E staff stated that they provided recommendations to this contractor during the contract submittal process to ensure conformance with the Buy American provision. However, NIST, not the A/E firm, approved the official contract submittals.

Nonetheless, the required use of 30,000-hour life-cycle T-5 lamps was included in the final project specifications approved by NIST. Based on our research, it is common knowledge that such lamps are only made by foreign countries. However, NIST did not perform the exception determination before contract award as required by NIST-08-09 and the FAR.

Recommendations

We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST AMD and OFPM Buy American officials to:

1. Review and update NIST's internal standard operating procedures for Buy American exception determinations and waiver approvals.
2. Conduct additional Buy American and NIST internal procedures training for the staff, especially on the need to conduct exception determinations before the contract award whenever possible.

¹¹ NIST hired an architect and engineering firm to revise the contract bidding documents including project specifications.

III. Lack of Adequate Oversight Resulted in Inaccurate/Incomplete Recovery Act Data Posted on Government Websites

NIST management did not ensure transparency of Recovery Act recipient data posted to the following government websites:

- 5 of 18 Recovery Act contracts appear to have underreported jobs created and retained, posted on Recovery.gov, and
- 13 of 18 Recovery Act contracts had incorrect contract performance period end dates, posted on the Federal Procurement Data System–Next Generation (FPDS-NG).¹²

The requirements of FAR subpart 5.7 enhance transparency to the public for contract actions funded in whole or in part by Recovery Act funds. Sections 1511 and 1512 of the Recovery Act require data on recipient use of funds to be posted on government websites. This reporting requirement is part of the President's and Congress's commitment to provide an unprecedented level of transparency and accountability on the use of Recovery Act funds. In addition, ensuring the accuracy of this information has been central to the administration's efforts to implement the Federal Funding Accountability and Transparency Act of 2006.¹³ As a result of this inaccurate or missing information, many NIST construction projects did not fully meet Recovery Act transparency requirements.

A. *The Number of Jobs Created and Retained with the Recovery Act Funds Was Underreported*

As of December 31, 2011, 5 of the 18 Recovery Act contracts, which represent total funding of \$21.7 million, reported zero jobs created and retained for the past five reporting quarters on the Recovery.gov website. During this period, these contracts together disbursed \$12.7 million in Recovery Act funds, which could have funded tens of thousands, if not more, labor hours.

In response to our inquiry, NIST stated that it had already contacted the construction contractors regarding the zero job numbers they reported. The contractors informed NIST that these job numbers were correct because they consider a job not created or retained if they moved the employee back and forth from the Recovery Act project to a non-Recovery Act project. NIST officials stated that the contractors did not report the created and retained jobs because they were confused about which jobs needed to be reported. NIST officials stated the contractors did not realize that they needed to report jobs even if the jobs had existed before the Recovery Act funding and were not going to be terminated when the funding ran out.

¹² The Federal Procurement Data System-Next Generation is a database management system used for all federal contracts.

¹³ Pub. Law No. 109-282. The goal of this act was to empower every American with the ability to hold the government accountable for each spending decision.

OMB Memorandum M-10-08, part 2, section 5.3, provides guidance for Recovery Act job calculations based on full-time equivalents (FTEs). In calculating FTEs, the number of actual quarterly hours worked on Recovery Act-funded jobs is divided by the number of hours representing a full-time quarterly work schedule for the kind of job being estimated.

We have concluded that NIST officials did not provide adequate jobs calculation guidance to the contractors for correctness and transparency, as required by the Recovery Act. OMB clearly states that the jobs calculation formula is based on hours worked on Recovery Act projects. And with the amount of funds already spent on the five contracts, the contractors would have financed tens of thousands, if not more, of labor hours. NIST must train its staff and educate contractors on the jobs calculation formula, determine whether other contractors' job reporting is reasonable based on the spending level, and correct the reporting on the Recovery.gov website.

B. Incorrect Contract End Dates Were Posted in the FPDS-NG

For 13 of the 18 Recovery Act contracts, NIST posted incorrect contract performance end dates in the FPDS-NG database (see table 6). In 4 of the 13 cases, the discrepancy was more than 100 days.

Department Procurement Memorandum 2009-04, p. 9, requires bureau procurement officials to conduct monthly FPDS-NG data validation and verification of 100 percent of actions awarded with Recovery Act funds. NIST's SOP 07-09, section 6.0(B)(1), requires that all postings to FPDS-NG be reviewed by NIST for quality control and compliance.

NIST stated that the performance dates were entered into the database at time of the award. NIST stated that subsequent issuance of the contracts' notice to proceed letters and contract extensions made the dates incorrect. It appears that NIST did not perform the required monthly review of these data. Therefore, these errors were not detected.

Table 6. Incorrect Contract End Dates in FPDS-NG

Contractor	Original End Date	FPDS-NG End Date	Days Difference
Adon Construction	12/15/2010	12/30/2011	380
Legatus6	07/19/2012	12/31/2012	165
Universal Business	08/15/2011	12/30/2011	137
Whiting-Turner	02/13/2012	06/01/2012	109
SEI Group	04/27/2012	06/30/3012	64
Grimberg/Amatea JV	05/06/2012	06/30/2012	55
McHenry	11/22/2011	12/31/2011	39
Biscayne Contractors	09/22/2011	09/30/2011	8
Milestone Construction	03/22/2012	12/31/2011	82
J&L Mavilia	03/26/2012	02/28/2012	27
Therrien Waddell	05/14/2012	04/30/2012	14
L&M Construction	04/12/2012	03/31/2012	12
Milestone Construction	01/04/2012	12/31/2011	4

Source: OIG, based on NIST data

Recommendations

We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST AMD officials to:

1. Provide proper training to staff and contractors on the OMB jobs calculation formula for jobs created and retained and ensure that job postings are correctly reported on the Recovery.gov website.
2. Ensure that Recovery Act contract performance end dates are reviewed and corrected on the FPDS-NG website.

IV. Inadequate Controls Led to Deficiencies in Award Administration

Effective award administration controls decrease the risks of litigation and improper use of Recovery Act contract funds. We tested the implementation of 12 control procedures, detailed in appendix A, and found inconsistent implementation of three key controls:

- legal reviews were not performed for 4 of 18 contracts,
- COTR delegation and appointment letters were not issued or signed in a timely manner for 11 of 18 contracts, and
- Recovery Act fraud training was not conducted by contractors for 3 of 18 contracts and was not conducted in a timely manner for 1 contract.

A. NIST Did Not Consistently Perform Legal Reviews

For 4 of the 18 Recovery Act contracts totaling \$7.5 million, NIST did not perform legal reviews before award issuance. This action is specified in Department of Commerce Administrative Order 208-5.¹⁴ By failing to obtain prior legal reviews, NIST risks harming the government's interest in the event of contract protests, disputes, or appeals. In response to our draft report, NIST stated that the reviews were missed because the lack of additional resources created an overwhelming workload, stress, and many hours of overtime for staff. NIST continued that staff is now fully aware of the legal review requirement and will follow policies and procedures.

In 2005, an OIG audit of NIST's procurement practices noted this same legal review issue.¹⁵ This audit found that 37 of 82 NIST contracts were not submitted for legal reviews. In response to the 2005 audit, NIST responded it would take the following corrective actions:

1. meet with the Office of General Counsel and develop review requirements,
2. develop NIST internal policy regarding documenting responses to legal reviews,
3. develop NIST internal policy regarding legal review requirements, and
4. add policy documents to NIST internal website.

In response to our draft report, NIST stated that it did develop policy in response to the 2005 audit and submitted supporting documentation. However, this lack of control in consistently receiving legal reviews revealed a deficiency in the awarding process for these contracts.

¹⁴ U.S. Department of Commerce, October 1984. *Contracting (Procurement) Review and Approval Requirements*, 208-5. Washington, D.C.: Department of Commerce. This states that the contracting authority exercised shall be subject to legal review by the Assistant General Counsel for Administration, or designee, before execution and/or issuance of (1) all solicitations and awards involving a government-estimated amount of \$250,000 or more where price offered will be the predominant basis for award and (2) all other solicitations and awards in excess of \$100,000. U.S. Department of Commerce, January 2010, Procurement Memorandum 2010-04 updated the DAO by raising the above monetary thresholds from \$250,000 to \$1 million and from \$100,000 to \$350,000 and transferring responsibility for legal reviews to the Assistant General Counsel for Finance and Litigation.

¹⁵ U.S. Department of Commerce, September 2005. *NIST's Procurement Practices Have Improved but Additional Challenges Remain*, BSD-16656-5-001. Washington, D.C.: Department of Commerce OIG.

B. NIST Did Not Reinforce Contract Management Responsibilities by Issuing Timely COTR Delegation and Appointment Letters

For 11 of 18 Recovery Act contracts (totaling nearly \$80 million), COTR delegation and appointment letters were signed 5 to 123 days after NIST awarded the contracts (see table 7 below). However, we noted that a COTR was named in each of the contracts when awarded.

Table 7. COTR Appointment Letters Signed After Contract Award

Number of Days After Contract Was Awarded	Number of Contracts	Total Contract Amounts (in millions)
1–30	3	\$14.9
31–60	2	13.3
61–90	5	41.3
91–123	1	10.1
Total	11	\$79.6

Source: OIG, based on NIST data

The *Commerce Acquisition Manual* states that to involve the COTR in the advance acquisition planning process, the agency should issue formal delegation and appointment COTR letters early in the acquisition process.

These COTR letters acknowledge, list, and document the agreed-on COTR management responsibilities for oversight of contracts. By signing the letter, the COTR agrees to

1. monitor the technical efforts being performed under the contract,
2. maintain an arms-length relationship with the contractor (to avoid conflicts of interest) and ensure that NIST avoids conflicts of interest,
3. advise the contracting officer of any potential problems under the contract,
4. assure contract performance in accordance with terms, conditions, and specifications, and
5. document COTR actions and decisions taken and maintain adequate records.

NIST management could not explain why the letters were not signed or issued in a timely manner. We attribute this control weakness to a lack of oversight and poor planning. Consequently, the COTR responsibilities were not reinforced for up to 123 days, to ensure proper Recovery Act contract oversight, management, and deliverables. Without this reinforcement, NIST management cannot be sure that (1) the contracts were monitored for potential startup problems; (2) the contracts were carried out according to terms, conditions, and specifications; and (3) the contractor did not conduct unauthorized contract administration actions.

C. Contractors Did Not Conduct Timely Recovery Act Fraud Training

For 3 of the 18 Recovery Act contracts totaling \$24.5 million, contractors did not conduct the required fraud prevention training. NIST's procurement flash notice¹⁶ requires all contractors funded by the Recovery Act to provide fraud prevention training to all employees involved in the contracts within 2 weeks of receipt of the contract awards and submit documentation of the training to NIST (which, in turn, must submit it to OIG).

NIST could not provide evidence of any attempt to require the three contracts to conduct this training. We also found that for one contract (totaling \$24.8 million), the contractor conducted the training 7 months after the contract was awarded.

By neglecting to ensure that training is performed in a timely manner, NIST management increases the risk of fraud, waste, and abuse of Recovery Act funds. This lack of control in consistently enforcing and receiving documentation of this required training revealed a deficiency in the award process of these contracts.

Recommendations

We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST AMD officials to:

1. Provide documentation of the agreed-on corrective actions for legal reviews from the 2005 audit to OIG.
2. Review the contract award process to correct the inconsistencies in obtaining legal reviews, issuing COTR delegation letters, and conducting fraud prevention training.
3. Require the three contractors that did not complete the fraud prevention training to do so and submit documentation to NIST.

¹⁶ National Institute of Standards and Technology, Procurement Flash Notice 10-0001, February 22, 2010.

Summary of Agency Response and OIG Comments

We received, from the Under Secretary of Commerce for Standards and Technology, NIST's written comments on our draft report (see the entire memorandum from May 18, 2012, in appendix C). For our final report, we have considered this response and made technical revisions, as deemed appropriate, in the body of this report. NIST agreed with the findings and recommendations. We have summarized NIST's response below.

Finding I, recommendation 1: *Agency concurred.* NIST stated they would develop an SOP for contract extensions by September 30, 2012. NIST stated that in the meantime, staff has been properly counseled to ensure that future contract extensions are administered timely. NIST further stated that the clause in subpart 52.517-9 of the FAR would not be appropriate to include in construction contracts and most of NIST construction contracts did not include options to extend terms of the contracts. However, we found this clause (subpart 52.517-9 of the FAR) in 2 of the 18 construction contracts and found options in 14 of the 18 contracts. We suggest that during the development of the SOP, NIST clarify what clause should be used to extend contract terms, including performance periods, for construction contracts.

Finding I, recommendation 2: *Agency concurred.* NIST stated they would create a master schedule-type management tool for better oversight and monitoring of the contracts to prevent additional slippage. NIST also stated that they have extended the end dates for the six contracts in question.

Finding I, recommendation 3: *Agency concurred.* After our meeting with NIST on February 2, 2012, NIST modified this contract on February 21, 2012, and stated that the project was completed on March 28, 2012.

Finding II, recommendation 1: *Agency concurred.* NIST agreed to review and update its internal SOPs for Buy American exception determinations and waiver approvals.

Finding II, recommendation 2: *Agency concurred.* NIST agreed to conduct additional Buy American and NIST internal procedures training for the staff, especially on the need to conduct exception determinations before the contract award whenever possible.

Finding III, recommendation 1: *Agency concurred.* NIST agreed to provide proper training to staff and contractors on the OMB jobs calculation formula for jobs created and retained and ensure that job postings are correctly reported on the Recovery.gov website.

Finding III, recommendation 2: *Agency concurred.* When responding to the draft report, NIST informed us that modifications extending the contract performance end dates were not included in contract files, resulting in incorrect postings in the FPDS-NG database. NIST provided supporting documentation that it has developed procedures to ensure that the Recovery Act contract performance end dates are reviewed and corrected both in contract files and on the FPDS-NG website.

Finding IV, recommendation 1: *Agency concurred.* NIST agreed with the recommendation and provided policy and procedure documentation in response to the 2005 OIG audit recommendations. However, we had asked NIST for this documentation during the audit, and NIST did not provide it until receiving our draft report. This omission calls into question NIST's ability to provide documents in a timely manner during the course of this audit.

Finding IV, recommendation 2: *Agency concurred.* NIST agreed to review the contract award process to correct the inconsistencies in obtaining legal reviews, issuing COTR delegation letters, and conducting fraud prevention training.

Finding IV, recommendation 3: *Agency concurred.* NIST agreed to require the three contractors that did not complete the fraud prevention training to do so and submit documentation to NIST.

Appendix A: Objectives, Scope, and Methodology

This audit was initiated in December 2010 as part of our continuing oversight of NIST's Recovery Act construction contracts. The audit was to determine how effectively NIST monitors the contracts and uses monitoring results to improve its acquisition program. Our audit objectives were to determine whether NIST's (1) policies and procedures were sufficient for evaluation of cost, specifications, and performance results, (2) contract award and administrative practices complied with applicable laws and regulations, including specific Recovery Act requirements, and (3) acquisition staff communicated problems with the projects to NIST management.

To satisfy these objectives, we reviewed NIST's compliance with applicable laws, regulations, policies, and procedures, including

- the American Recovery and Reinvestment Act of 2009,
- Federal Acquisition Regulation,
- 48 C.F.R. chapter 13—Commerce Acquisition Regulation,
- DAO 208-5- Contracting (Procurement) Review and Approval Requirements ,OMB-M-10-08- Updated Guidance on the American Recovery and Reinvestment Act—Data Quality, Non-Reporting Recipients, and Reporting of Job Estimates,
- NIST SOP 08-09 Recovery Act—Buy American Act—Construction Materials,
- NIST SOP 10-09 Completion of Mandatory Monthly Recovery Act Reports for the Department of Commerce/Office of Acquisition and Management (OAM),
- NIST SOP 07-09 Recovery Act Public Posting and Reporting Requirements,
- NIST SOP 12-09 Recovery Act Reporting Quality Data Review,
- NIST SOP 07-09 Recovery Act Public Posting and Tracking,
- NIST SOP 02-09 Safety in Construction Acquisitions,
- NIST SOP 05-09 Small Business Review,
- NIST SOP 06-09 Recovery Act Compliance Review Procedures, and
- Department of Commerce Procurement Memo 2009-04.

To review NIST's contract pre-award process, we reviewed all 18 NIST Recovery Act construction contracts and performed the following: (1) met with NIST officials, staff, and stakeholders responsible for contracts and project oversight and performance, (2) evaluated NIST's contract monitoring activities such as site visits and report reviews, (3) evaluated policies and procedures established for construction contracts and Recovery Act requirements; (4) conducted file reviews; and (5) assessed how NIST uses the results of the contract monitoring activities to manage the award.

Regarding data reliability, we did not rely on computer-generated information for this audit. A NIST contracting officer informed us that its paper-based system was the official file of record.

We conducted an analysis of 12 attributes for the pre-award process: (1) contract type, (2) full-open competition process (3) small business set-side reviews conducted, (4) procurement requests obtained, (5) legal reviews for all awarded contracts, (6) source selection documentation in contract award files, (7) FBO postings as required, (8) Recovery Act clause in contracts, (9) Recovery Act funds separate and identified in contracts, (10) BAA treaty clause in the contracts, (11) COTR named in contract, and (12) fraud training clause in contracts.

We performed our work in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence that provides 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.

We conducted our review from December 2010 through February 2012 under the authority of the Inspector General Act of 1978, as amended and the Departmental Organization Order 10-13. We performed our work at NIST facilities in Gaithersburg, Maryland, and Boulder, Colorado.

Appendix B: Recipient Information

Contractor Name	Construction Contract Award Amounts	Contract Award Date	Project Description
Adon Construction	\$1,415,000	5/21/2010	Solar panels—Hawaii
Biscayne Contractors	2,265,265	7/12/2010	Robotics test facility
Grimberg/Amatea Joint Venture	10,113,025	7/30/2010	NCNR-high-efficiency pumps & infrastructure support
Grimberg/Amatea Joint Venture	24,842,996	9/23/2010	National fire research laboratory
McHenry, Inc., Clyde	561,982	9/17/2010	Windows replacement
Milestone Construction	5,912,254	7/26/2010	Consolidated logistics facility
Milestone Construction	6,273,741	7/21/2010	Emergency services consolidated station
Nika Technologies	229,914	1/8/2010	Services for Capital Improvement Group
PCL Construction	2,766,112	7/15/2009	Boulder Building 1
SEI Group, Inc.	8,330,395	9/23/2010	Liquid helium recovery
Therrien Waddell, Inc.	2,680,275	9/23/2010	Net-Zero Energy Residential Testing Facility
Whiting-Turner Contracting	82,835,066	4/8/2010	B1E interior
Legatus6, LLC	4,899,531	9/13/2010	Solar panel array—Gaithersburg
Universal Business	1,058,229	8/9/2010	Energy-efficient lighting and sensors
J&L Mavilia, Inc.	12,297,793	8/9/2010	HVAC renovations
J&L Mavilia, Inc.	0	7/15/2010	Laboratory equipment installation
L&M Construction	6,330,264	8/18/2010	Laboratory fume hood replacement
L&M Construction ^a	2,872,021	7/15/2010	Task orders for fit-up of equipment
Total	<u>\$175,683,862</u>		

Source: NIST

^aAccording to NIST, this contract was funded with Recovery Act Science and Technical Research and Services funds.

Appendix C: Agency Response



UNITED STATES DEPARTMENT OF COMMERCE
National Institute of Standards and Technology
Gaithersburg, Maryland 20899-
OFFICE OF THE DIRECTOR

MAY 18 2012

MEMORANDUM FOR Ann C. Eilers
Principal Inspector General for Audit and Evaluation

From: Patrick Gallagher 
Under Secretary of Commerce for Standards and Technology

Subject: NIST Response to the draft report, *Oversight Activities of NIST's Recovery Act Construction Contracts Need Improvement*

Thank you for the opportunity to review the Office of Inspector General (OIG) draft report, *Oversight Activities of NIST's Recovery Act Construction Contracts Need Improvement*, dated April 13, 2012. Staff from the National Institute of Standards and Technology's (NIST) Office of Facilities and Property Management (OFPM) and Acquisition Management Division have reviewed the draft report and offer the comments in the attached document. NIST concurs with the recommendations in the report.

If you have any questions, please contact Rachel Kinney at (301) 975-8707.

Attachment

NIST

**National Institute of Standards and Technology Comments to the
Office of Inspector General Draft Report *Oversight Activities of NIST's Recovery Act
Construction Contracts Need Improvement***

Page 4, Paragraph 1:

The Office of Facilities and Property Management (OFPM) assigned designated project managers for the Recovery Act construction projects in Gaithersburg and Boulder under the direction of a senior Program Manager at each site. There were three to four contracting specialists and one contracting officer assigned to all of the Gaithersburg construction projects and one contracting specialist and one contracting officer assigned to the Boulder construction projects. Due to the high turnover within NIST's Acquisition Management Division (AMD), it was difficult to maintain consistency in the oversight. While OFPM and AMD each had their own project tracking mechanisms in place and worked together to resolve individual project issues, the high workload and insufficient resources did not allow them to develop a coordinated master Oversight Plan.

Corrective Action – AMD and OFPM have established bi-weekly Recovery Act management meetings and a comprehensive spreadsheet to monitor and track project performance.

Page 5, Paragraph 2:

FAR Subpart 52.217-9 would not have been appropriate to include in construction contracts. According to FAR Subpart 17.208(g), contracting officers are to insert a clause that is substantially the same as the clause 52.217-9, Option to Extend the Term of the Contract, in solicitations and contracts when the inclusion of an option is appropriate. Options are normally included in service contracts to extend the contract at the end of the last option period of the contract. Options are included when the contract is awarded. Most of the construction contracts did not include options.

Page 6, Recommendations:

“We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST to accomplish the following:

1. Establish standard operating procedures for reviewing, monitoring, and approving contracts for extensions in a timely manner.”

NIST concurs with this recommendation and will develop a standard operating procedure (SOP) by September 30, 2012. In the meantime, the AMD construction team has been counseled by the NIST Bureau Procurement Official (BPO) to ensure that all future contracts requiring extensions are administered timely. In addition, the

reviewing, monitoring, and approving of the contracts for extensions in a timely manner are the responsibilities of the contracting specialist/officer who is assigned to administer the contract.

2. "Extend the performance period for the six contracts that either have missed or are at risk of missing their performance end dates and create a master schedule-type management tool for better oversight and monitoring of the contracts to prevent additional slippage."

NIST concurs with this recommendation and has extended all six contracts. NIST will create a master schedule-type management tool for better oversight and monitoring of the contracts to prevent additional slippage.

3. "Develop a plan to complete the construction work specified in the Universal Business Solutions contract."

The Universal Business Solutions contract was modified on February 21, 2012 to extend the contract to April 13, 2012. The project was completed on March 28, 2012 and the final acceptance letter dated April 10, 2012 was sent to the contractor effective the same day.

Page 9 (Adon Construction – Kauai Solar Array Project):

NIST provides the following additional information as to why the Solectria unit was not approved:

At the time of the review, Solectria could have provided 15kw inverters, however the enclosures did not meet the project specification for being stainless steel or polyvinyl chloride (PVC). Solectria's standard enclosures were either painted aluminum or polyester powder coated steel. Solectria had never manufactured an inverter enclosure with materials equivalent to the project specifications. Solectria indicated that they could provide a stainless steel enclosure but the enclosure would be a prototype for them without a proven record of performance. Additionally, Solectria required an additional 12 weeks for the design and manufacturing of the prototypical unit. An additional twelve weeks would have extended the project schedule and would have resulted in a projected cost increase to the project of five to ten percent due to contractor extended overhead. It was determined that a prototypical unit would not be acceptable because of the schedule delays, potential cost increases, the remote location in Kauai, and that the painted aluminum, or polyester powder coated steel, enclosures were not an acceptable alternative to the specified stainless steel or PVC as both require a good deal of maintenance and are prone to corrosion.

Page 9, Paragraph 3:

NIST recommends adding additional wording so that the sentence reads:

“When we asked if NIST was documenting what they had learned and their improved processes, the OFPM chief responded that they have not had time to do formal documentation yet because of the huge staff workload, but that they were implementing the improved procedures in practice.”

Page 10, Paragraph 3:

The report states "...even though NIST could order the contractors to remove foreign-made products if it later determines that an exception does not apply, doing so will only result in contract delays and complications..." The alternative to allowing the contractor to proceed at its own risk with installation of the \$27,000 of T-5 lamps would have put the end date of the contract in jeopardy and could have conceivably brought the construction and current ongoing research within the building to a halt, thus preventing NIST from fulfilling its mission and costing taxpayer dollars in non-productivity. Today, the building is occupied and research continues unimpeded as substantial completion of construction activities occurred as scheduled on February 13, 2012.

Page 10, Paragraph 4:

The report states "...the contractor claimed that to meet the project specifications, it needed T-5 lamps built for a 30,000-hour life cycle, which are not available in the United States...". The 30,000-hour life cycle lamp is not only a contractor claim, it is a design specification for the project that helped the project meet the energy modeling done by the architect and engineering firm (A/E) to meet the efficiency requirements of the Leadership in Energy and Environmental Design (LEED) design. The U.S.-made T-5 lamps found by NIST after extensive research were built for only a 20,000-hour life cycle and did not meet the requirements developed during the energy modeling performed during A/E design for the project.

Page 11, Recommendations:

“We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST Buy American officials to:

1. Review and update NIST’s internal standard operating procedures for Buy American exception determinations and waiver approvals based on past lessons learned implementing this requirement.

2. Conduct additional Buy American and NIST internal procedures training for staff, especially on the need to conduct exception determinations before the contract award whenever possible.”

NIST concurs with both recommendations.

Page 14, Recommendations:

“We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST to:

1. Provide proper training to staff and contractors on the OMB jobs calculation formula for jobs created and retained and ensure job postings are correctly reported on the Recover.gov website.
2. Ensure that Recovery Act contract performance end dates are reviewed and corrected on the FPDS-NG website.”

NIST concurs with both of the recommendations. For the second one, NIST has developed procedures to ensure the Recovery Act contract performance end dates are reviewed and corrected (see attached documents).

Page 14, first bullet:

“legal reviews were not performed for 4 of 18 contracts.”

NIST provides the following additional information:

The requirement to award 16 construction contracts within less than 18 months without additional resources created an overwhelming workload, stress, and many hours of overtime for the AMD construction team and some reviews were missed. The contracting specialist who did not obtain the legal reviews for three out of the four contracts has left NIST. The AMD construction team is now fully aware of the requirement for legal review of all contract award documents and will be following the Procurement Memorandum issued January of 2010.

Page 15, paragraph 1:

The 2005 audit finding recommendation was “Work with the Office of General Counsel, Contract Law Division to: (1) consider developing legal review criteria for General Services Administration’s Federal Supply Schedule orders, and orders placed on Blanket Purchase and Ordering Agreements and on Indefinite Delivery and Indefinite Quantity contracts; and develop and implement a policy for resolving legal comments on contract actions.”

The NIST contracting office did develop policy in response to the 2005 audit (see attached documents). The Department of Commerce issued policy on the legal review requirements and issued a revision in January of 2010 (see attached documents).

Page 16, Recommendations:

“We recommend that the Under Secretary of Commerce for Standards and Technology direct NIST to:

1. Provide documentation of the agreed-on corrective actions for legal reviews from the 2005 audit to OIG.
2. Review the contract award process to correct the inconsistencies in obtaining legal reviews, issuing COTR delegation letters, and conducting fraud prevention training.
3. Require the three contractors that did not complete the fraud prevention training to do so and submit documentation to NIST.”

NIST concurs with the recommendations and is providing policy and procedures documents in response to the 2005 audit (see attached documents).

From: [REDACTED]
Sent: Friday, January 06, 2012 10:04 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Contract Modification after Notice to Proceed for Construction and Service Contracts/Purchase orders - This will start immediately

Team

We are having a problem on Team A with issuing a Notice to Proceed (NTP) for a construction project and Service contracts that require a Safety Plan or bonding. The NTP is issued to the contractor after receipt and verification of bonding through the Treasury website. Most projects require the approval of a Safety Plan. The NTP will not be issued until a safety plan has been approved by the contracting officers safety representative who is delegated by the contracting officer through a letter delegation, similar to the COTR delegation letter.

The issue we have identified is, after the NTP is issued for XXX days, the actual period of performance is never incorporated into the actual contract, CAward or FPDS-NG. Performance period meaning the actual end date of the contract.

In order to correct this problem, I am requiring the contract specialist to issue the NTP and put the amount of days identified in the solicitation/scope of work and the actual end date of the contract on the NTP. This will apply to all contract awards that require a NTP to be issued.

After you issue the NTP, you will need to issue a unilateral modification within 3 days to the contract stating the following:

The Notice to Proceed was issued on xx/xx/xx for XX days resulting in the period of performance on this contract to end on month, date, year (December 12, 2013). Per the terms of the contract, the contractor is required to complete the contract by this date. Any change to the performance period is a change to the terms and conditions of the contract and must be approved by the contracting officer and reflected in a modification to the contract.

If you have any questions regarding this process, please let me know so we can discuss.

Thanks [REDACTED]

POLICY AND PROCEDURES MEMORANDUM 314

MEMORANDUM FOR:	ACQUISITION MANAGEMENT DIVISION
FROM:	MICHAEL SZWED
SUBJECT:	RESPONDING TO LEGAL REVIEW
EFFECTIVE DATE:	04/17/2006
DATE OF ISSUANCE:	04/17/2006
AUTHORITY:	FAR 1.602-2(c)

PURPOSE: To establish procedures for responding to legal review comments.

POLICY: All substantive comments made by legal counsel after his/her review of acquisition documents must be responded to in writing by the assigned AMD staff member and forwarded to the attorney and the Acquisition Policy and Analysis Team.

BACKGROUND: NIST AMD previously had no formal guidance on how contracting personnel should address comments made by the DoC Contracts Law Division attorney when a review of acquisition documents had been completed. Comments had been addressed in a memorandum to the file and signed by the Contracting Officer. However, the attorney was often not informed how the acquisition staff addressed the comments.

PROCEDURE: In response to legal reviews, the AMD staff member will discuss substantive comments with the attorney from the DoC Contracts Law Division for clarification, if necessary. A memorandum to the file addressing each comment and all action taken shall be prepared by the AMD staff member and reviewed and signed by the Contracting Officer. A copy of the memorandum shall be e-mailed to the attorney or left in the attorney's mailbox in the AMD division office before distribution of the award. The legal review, including all comments, and the AMD response will be included in the acquisition file under the appropriate File Index Tab, and a copy of these documents shall be forwarded to the Acquisition Policy and Analysis Team. The Analysis Team will keep the documents in a central file and a semi-annual review will be done to analyze any trends in the responses of both legal counsel and AMD staff that may require additional training or discussion.

POLICY AND PROCEDURES MEMORANDUM 316

MEMORANDUM FOR:	ACQUISITION MANAGEMENT DIVISION
FROM:	JOSEPH WIDDUP
SUBJECT:	LEGAL REVIEW REQUIREMENTS FOR ACQUISITIONS UNDER FSS CONTRACTS, FSS BPAs, GWAC CONTRACTS, IDIQ CONTRACTS, ACQUISITIONS INVOLVING LEASING, AND ACQUISITIONS REQUIRING INCLUSION OF CONTRACTOR PROVIDED AGREEMENTS/CLAUSES/ADDENDA
EFFECTIVE DATE:	02/16/2007
DATE OF ISSUANCE:	02/16/2007
AUTHORITY:	FAR 1.602-2(c)

PURPOSE: To establish policy for legal review of acquisitions relating to Federal Supply Schedule (FSS) contracts, FSS Blanket Purchase Agreements (BPAs), FSS BPA calls/orders, Governmentwide Acquisition Contract (GWAC) orders, locally awarded Indefinite-Delivery, Indefinite-Quantity (IDIQ) orders, acquisitions involving leasing, and acquisitions whereby a Contractor tenders agreements/clauses/addenda for inclusion in a contract/order (software licenses, conference agreements, hotel booking agreements, *etc.*).

POLICY: Contracting Officers (CO) shall obtain review of acquisition-related documentation from the DOC Office of General Counsel (OGC), Office of the Assistant General Counsel for Finance and Litigation, Contract Law Division (CLD) for the following actions:

- (a) All solicitations conducted under FAR Subpart 8.404 (FSS), including stand-alone FSS orders, acquisitions that will result in award of one or more FSS BPAs, and award of individual FSS BPA orders/calls whereby the estimated value of the individual action exceeds \$1,000,000.00.
- (b) All solicitations conducted under GWAC contracts (NIH ECS, NASA SEWP, *etc.*) whereby the estimated value of the action exceeds \$1,000,000.00.

- (c) All solicitations for IDIQ orders conducted under FAR Subpart 16.505 whereby the estimated value of the action exceeds \$1,000,000.00.
- (d) All awards resulting from solicitations described in (a), (b) or (c) above.
- (e) All solicitations and awards involving lease of any type, regardless of value.
- (f) Awards whereby the apparently successful Offeror or, if after award, the Contractor tenders agreement(s)/clause(s)/addenda of their own to NIST for NIST signature, including:
 - a. Software licenses where the value of the award exceeds \$100,000.00;
 - b. Conference agreements, regardless of value of the award; or
 - c. Lodging (motel/hotel) agreements, regardless of value of the award.

The CO shall ensure that the NIST contract/order number appears on the agreement(s)/clause(s)/addenda, and the CO shall label them as an Addendum to the specified contract/order number.

Acquisition Management Group Home Page

*webpage
in 2006 -*

- The Acquisition Guidebook
- SBA Small Business Size Standards
- Service Contract Act/Directory of Occupations
- Seven Steps to Performance Based Service Acquisition Guide
- Wage Determinations Online

 **NIST and DoC Web Sites**

- AMD Internal Web Home Page
- AMD External Web Home Page
- NIST Internal Web Home Page
- NIST External Web Home Page
- NIST Administrative Manual
- NIST Technical and Administrative Calendar
- DoC OAM Home Page
- DoC Home Page
- DoC Contract Law Division
- DoC OSDBU Office
- DoC Information Technology Management Handbook

 **Other Agency Sites**

- Bureau of Labor Statistics
- DCAA
- DoT Listing of Approved Sureties
- Federal Acquisition Jumpstation
- GPO -- Government Printing Office
- NASA Procurement Library
- OPM -- Office of Personnel Management
- SBA -- Small Business Administration
- UNICOR
- VA -- Veterans in Business

 **Other Agency Contracts**

- ARPA BAA Information
- GSA Advantage -- FSS
- GSA E-Library
- Mass Buy Homepage
- NASA SEWP
- NIH Virtual Store

 **Policy and Regulations**

- Code of Federal Regulations (U.S. House of Reps)
- Competition in Contracting Act (CICA)
- Contract Pricing Reference Guides
- DoC Acquisition Policy
- DoC OAM Policy Library
- Executive Orders and Procurement Policy Letters
- GAO's "RedBook"

 **NIST AMD Policy and Procedures Memoranda (PPMs)**

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|-------------|----------------------------------|
| ■ PPM Index | ■ PPM 309 |
| ■ PPM 100 | ■ PPM 310 |
| ■ PPM 101 | ■ PPM 311 |
| ■ PPM 103 | ■ PPM 312 |
| ■ PPM 104 | ■ PPM 313 <small>Updated</small> |
| ■ PPM 105 | ■ PPM 314 |
| ■ PPM 106 | ■ PPM 315 |
| ■ PPM 200 | ■ PPM 316 |
| ■ PPM 201 | ■ PPM 401 |
| ■ PPM 202 | ■ PPM 402 |
| ■ PPM 203 | ■ PPM 404 |
| ■ PPM 300 | ■ PPM 500 |
| ■ PPM 301 | ■ PPM 502 |

 **CSTARS Links and Guidance**

- CSTARS Autonumber Generator
- CSTARS Internal Web Page
- Consolidating/Deconsolidating PRS and Creating Multiple Awards (3/01)
- MOD Reminders (3/22/01)

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