



GSA Federal Acquisition Service

August 17, 2006

MEMORANDUM FOR INSPECTOR GENERAL
DEPARTMENT OF DEFENSEFROM: JAMES A. WILLIAMS
COMMISSIONER

A handwritten signature in cursive script that reads "James A. Williams".

SUBJECT: Report on FY 2005 DoD Purchases Made Through
the General Services Administration (Project No. D2005-
D00CF-0222.000)

Thank you for the opportunity to comment on the draft report, "FY 2005 DOD Purchases Made through the General Services Administration." GSA shares the interests of Department of Defense (DoD) in ensuring that contracts for goods and services on behalf of the government comply with law, regulation and administrative guidance. In addition, we share your concern that our customer agencies, and ultimately the American taxpayer, receive the best value for the dollar spent.

GSA is a key supplier of best value goods and services to DoD in support of its mission every day. GSA's Schedules Program provides over \$10.5 billion of goods and services to DoD. A large portion of these goods and services are provided by small businesses (over 33% program-wide), a significant aid to DoD in meeting its small business goals. GSA's Governmentwide Acquisition Contracts (GWACs) used by DoD programs provide for DoD's needs, cutting acquisition lead time while providing compliant, fully competed solutions to meet warfighters' needs. In addition, GSA's GWAC program provides DoD with the opportunity to meet its HUBZone and 8(a) Small Business goals through two GWACs focused on these two categories of small business. Two additional GWACs will be added, focused on Service-Disabled Veteran Owned Small Businesses and Small Businesses, in the next 12 months. According to DoD, our telecommunications contracts will save DoD in excess of \$200 million over the prices they were previously paying for similar services. We also provide DoD with non-tactical vehicles at substantially lower prices than DoD could historically provide itself.

While providing DoD with these best value goods and services, GSA allows DoD to leverage its acquisition workforce through GSA's various programs, thus reducing the need to increase the size of its acquisition workforce in areas

outside of its core missions. GSA is also able to use the combined buying power of the government to pass along savings to other agencies within the government as well and in certain markets to state and local governments.

It is our understanding that the sampling for this report was drawn from the universe of work performed by GSA's Client Support Centers (CSCs) and provided to you by GSA's IG, as well as actions found while visiting the specific DoD activities identified in Appendix A. We note that from the universe available for selection, that the contracting actions that were considered, occurred outside the time period specified (May 14, 2005 and October 31, 2005). This is important to understand since these actions preceded current DoD and GSA guidance and the steps GSA undertook to bring our performance into compliance in those areas where we had found that we were out of compliance. Given the total universe of actions available for sampling we think that this report, in light of our clarifying comments below, demonstrates that GSA and DoD made significant improvements since the first problems were uncovered over three years ago.

We observe that you refer to the best interests of the government and the best interests of DoD interchangeably throughout the report. We agree that what is in the best interests of the government and what is in the best interests of the DoD should always be synonymous, however it is not clear to us, from your draft report, that this is always the case. For example, use of Governmentwide Acquisition Contracts (GWACs) and Multiple Award Schedules which leverage the government's buying power, reduce the administrative costs per transaction and present a single face to industry, are clearly in the best interests of the government as a whole.

We also note that the goods or services purchased by GSA on behalf of DoD, were for necessary, current and vital needs of the warfighter; the government paid a fair and reasonable price; and the goods or services were delivered to the intended DoD recipients.

As you know, GSA, in order to improve its acquisition planning both for itself and its agency customers, developed and implemented an on-line acquisition planning tool across the agency. The tool is fully compliant with FAR Part 7 and is used for contract actions of a value in excess of \$100,000.

Further, GSA instituted a Procurement Management Review (PMR) program wherein GSA visits all of the CSCs annually, randomly selects contracts and reviews those contracts for consistency with applicable rules and regulations. The PMRs are showing continuous improvement across-the-board by GSA's contracting activities.

GSA is committed to providing all of its customers with sufficient data concerning the work they have asked us to perform on their behalf and to this end we will meet with the Office of Under Secretary Comptroller/Chief Financial Officer and



the Office of the Under Secretary of Defense For Acquisition, Technology & Logistics to determine exactly what information is needed and when that information is needed.

Attached are more detailed comments concerning the Draft Report. Again thank you for the opportunity to comment on your Draft Report. We look forward to working with your office, and DoD, on continuing to improve the service we provide our customers in the Department of Defense.

cc: Administrator
GSA IG
CAO



Page 1 of the Executive Summary, Paragraph entitled "Results." We recommend that you delete the words and figures:

"Although GSA and DoD contracting and program management officials improved the assisted contracting process, they continued to purchase goods and services without fully complying with appropriation law, the Federal Acquisition Regulation, and DoD procurement regulations. Of the 56 purchases reviewed, 55 were either hastily planned or improperly executed or funded."

And substitute therefore the words and figures:

"We found significant improvement by both GSA and DoD contracting and program management officials in the use of GSA's assisted acquisition process. We also found that DoD program officials still made some errors in the application of appropriation law and DoD guidance on the use of DoD's funds. In addition, we found instances of noncompliance by DoD officials with DoD procurement regulations. We also found instances where we questioned the compliance by GSA with fiscal law and Federal Acquisition Regulation requirements."

Comment: We agree that because of different interpretations of the applicability of DoD guidance on the use of DoD's funds, GSA used funds in a manner consistent with the FAR but inconsistent with the DoD guidance as it now appears to be evolving. We also agree that GSA should comply with DoD's guidance regarding DoD purchases, even though we believe the law allows greater flexibilities in conducting interagency transactions than your report seems to indicate. As you know, the authority for interagency agreements began in 1932 with the enactment of the Economy Act, 31 U.S.C. § 1535, which was the first governmentwide statutory authorization for Federal agencies to provide work, services or materials to other Federal agencies on a reimbursable basis. Subsequently, Congress enacted more authorities for interagency transactions including the Federal Property and Administrative Services Act of 1949 (the Property Act), which established GSA; the Government Management Reform Act of 1994, Pub. L. 103-356 (1994); and the Information Technology Management Reform Act of 1996, Pub. L. 104-106 (1996).

The purpose of these authorities was to leverage the buying power of the Government by creating economies of scale and to promote an economical and efficient system of Government procurement. In order to advance these goals, Congress did not include the fiscal year restrictions found in the Economy Act in these statutes, thus permitting greater flexibility to award contracts on behalf of customer agencies. This fact has been explicitly recognized by the Government Accountability Office, see Volume II, Principles of Federal Appropriation Law, 7-28 to 7-31, (3rd Ed. 2006).



Nonetheless, GSA fully intends to ensure that all DoD funds are used in accordance with DoD guidance, and we are working with DoD to clarify what exactly that guidance means so that we can give appropriate implementing instructions to our personnel. Further as we noted in our cover letter, GSA now uses an automated tool for preparing acquisition plans and nowhere in your report do you provide specifics where GSA actually failed to properly execute the contracts in accordance with the FAR or applicable supplements. The proposed language is more accurate in its depiction of DoD and GSA's actions supported by the evidence in the report.

Page 1 of the Executive Summary, Paragraph entitled "Results." Third bullet, we recommend that you delete the words and figures:

"on 6 of 14 sole-source purchases reviewed, GSA Client Support Centers did not provide adequate justification for sole-source procurements;"

Comment: We have carefully reviewed the 6 acquisitions you identified as not having adequate sole source justifications. We found:

- In the first case GSA did a sole source bridge contract for 6 months with the incumbent in order to run a competition. The J&A file didn't include this explanation, although it was clear from the whole file that this was the reason. The customer's requirement would not allow a termination of performance while GSA recompeted the contract.
- In the second case we used an IDIQ contract that had been properly awarded as a sole source contract to place an order. A proper J&A to support the sole source justification was in the basic contract file. There is no requirement in the FAR, GSAM or DFARS to complete a J&A for orders placed against a contract under these circumstances.
- In the third and fourth cases you reviewed modifications which were outside the scope of the audit, from prior years.
- In the fifth case the contracting complied with fair opportunity inviting all holders of the GWAC to bid, but only one submitted a proposal. In explicably, the CO put a J&A in the file to explain why only one GWAC holder responded. There was no requirement for a J&A in either the FAR, GSAM or DFARS. The J&A would have been inadequate if one had been required, but there was no requirement for a J&A.
- In the sixth case, we have reviewed the contract file in question. The sole source modification that occurred in April 2005 was fully compliant with the FAR and GSAM and was signed by the contracting officer on 28 April 2005. We also discovered in our review of the file that the original award was a sole source award and that while the copy of the J&A in the file



does not appear to be signed, it does have a time and date stamp on it contemporaneous with the original award. The contract action within the scope of your audit was fully compliant with all applicable guidance.

Page 2 of the Executive Summary. Paragraph entitled "Results." Fourth bullet, we recommend that you delete the words and figures:

"on 12 of 54 purchases, both GSA and the requesting DoD activity improperly used Government funds that resulted in potential violations of the Anti-Deficiency Act: and"

And substitute therefore the following words and figures:

"on 1 of 54 purchases GSA reviewed, and the requesting DoD activity improperly used prior year funds when exercising an option, violating the Anti-Deficiency Act."

Comment: We evaluated all 12 of the cases referred to in the bullet referenced above. In one of the cases (Come and Get it Product Services Purchase No. 19) the draft report stated that the Fleet Numeric and Meteorology and Oceanography Center should have used Other Procurement funds instead of O&M funds. We are unable, and it would be inappropriate for us, to comment on whether the correct DoD appropriation was used. We note that there was no finding of any impropriety on GSA's part.

Three of the cases involved equipment purchases (Kiosks Purchase No. 31, Personal Video Systems Purchase No. 41, Joint Multi-Disciplinary Vulnerability Assessment Purchase No. 42). We disagree with your conclusion that,

The receipt of goods after the DoD appropriation expired could not be justified because of delivery time, production lead-time, or unforeseen delays. Use of FY 2005 O&M funds to satisfy FY 2006 requirements does not meet the intent of the bona fide needs rule.

The Government Accountability Office has long recognized that an appropriation is just as much available to supply the needs of the last day of a fiscal year as any other day or time in the year, and that the timing of an obligation does not, in and of itself, establish anything improper. See, 8 Comp. Dec. 346 (1901); 38 Comp. Gen. 628 (1959). In these cases, DoD components came to GSA with well documented requirements reflecting bona fide needs of FY 2005 and properly recorded obligations during FY 2005. GSA promptly initiated procurement action and awarded contracts as expeditiously as possible based on the complexity of the acquisitions, ensuring that all procurement rules were followed and that adequate competitions were conducted.



Four of the cases (Interactive Multimedia Purchase No. 15, NetCentric FastTrack Services Purchase No. 16, Trusted Service Engine Purchase No. 17, Information Assurance Purchase No. 20) involved procurements for non-severable services. It is well established that when a proper IA for non-severable services has been accepted by the servicing agency, the customer agency may record a valid obligation, 31 U.S.C. § 1501(a)(1). See *Transfer of Fiscal Year 2003 Funds from the Library of Congress to the Office of the Architect of the Capitol*, B-302760 (May 17, 2004); *Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929 (Apr. 25, 2001). Moreover, "where an interagency agreement is based on specific statutory authority other than the Economy Act, an agency is not required to deobligate funds at the end of the period of availability." *Independent Statutory Authority of Consumer Product Safety Commission to Enter Into Interagency Agreements*, B-289380 (July 31, 2002). See also, B-282601, Sept. 27, 1999; B-167790 (Sept. 22, 1977). Upon acceptance of these interagency agreements, GSA was required to work promptly and diligently to award a contract. However, there was no requirement for GSA to award a contract within the fiscal year, as there would be under the Economy Act. Although our review revealed that these procurements were for non-severable services, we are concerned that the contracts awarded were structured as if they were for severable services. While this does not amount to a violation of the Anti-Deficiency Act, we believe our acquisition workforce should do a better job of matching the contract structure to the customers' requirements. We will include this issue as part of our ongoing training initiatives.

The remaining four cases involved procurements for severable services. Two of these (IT and Operations Support (J2) Purchase No. 39 and National Industrial Security Program Certification and Accreditation Tools Purchase No. 48) were new requirements. It is GSA's position that, just as with non-severable services, once a proper interagency agreement for severable services is accepted by a servicing agency, the requesting agency may record a valid obligation. The servicing agency must then promptly and diligently work on the agreement; however, if the authority for the agreement is other than the Economy Act, the servicing agency may retain and obligate funds in the following fiscal year. (Of course, in compliance with 41 U.S.C. § 253f and 10 U.S.C. § 2410a, the ensuing contract may be for no more than 12 months). In these cases GSA promptly initiated procurement action and awarded contracts as expeditiously as possible based on the complexity of the acquisitions, ensuring that all procurement rules were followed and that adequate competitions were conducted. We do not believe this constituted a violation of the bona fide needs rule or the Anti-Deficiency Act.¹

¹ We are aware that the GAO has issued opinions treating severable services differently from non-severable services for purposes of the bona fide needs rule. We note that the GAO interpretation regarding severable services has not been embodied in any statute, nor adopted by any court. The bona fide needs statute, 31 U.S.C. 1502, does not distinguish between severable



In the Network Operation Security Center task order (4TFL57052211), GSA issued a bridge task order in order to allow adequate time to complete due diligence and prepare for recompetition and award of a new effort to replace two separate existing task orders set to expire on 31 JUL 2005. There was a bridge task order (4TFL57B57011, number 7011) put in place with a period of performance of 1 AUG 2005 through 30 SEP 2005. The new task order that followed the bridge (number 2211) was awarded on 8 SEP 2005 with a start date of 1 OCT 2005. GSA policy allows for the receipt of funds for a bona fide need of one fiscal year though award of the task order might not occur until the following fiscal year. The intent in awarding the bridge (7011) and the new order (2211) was consistent with that policy. The requirement for the new effort was presented to GSA on or about June 2005 as a need of the customer at that time. We acknowledge that it is the DOD IG's position and interpretation of fiscal law that task order 2211 represented a bona fide need of FY06 since the period of performance on 2211 started on 1 OCT 2005, and therefore required FY06 type funds. We promptly responded to that concern by coordinating with the customer and obtaining FY06 Air Force funds to cure this when it was brought to the attention of Region 4 in February 2006. According to our understanding of the DOD IG's interpretation, no violation of the bona fide needs rule would have occurred had the bridge (7011) ended prior to 30 SEP 2005 and the new order (2211) been awarded with performance beginning on or before 30 SEP 2005.

In the final case, Network System Support and Administration, we agree with you that it was improper to exercise an option with a period of performance entirely in the following fiscal year using current year funds. This constituted a violation of the bona fide needs rule, and unless the Joint Information Operations Center applies corrective funding, this is a violation of the Anti-Deficiency Act. It was also improper to award a base period in excess of one year since this was a contract for severable services.

GSA believes that this final action is aberrant and not reflective of the changed working environment we created when we initiated our "Get it Right" program. To increase awareness of the requirements with fiscal guidance, GSA frequently reminds our personnel of the applicable rules and we are looking at changes to our systems with the objective of preventing any violations in the future. GSA is also preparing end of year "Tips" to send to all of our contracting offices to remind them of the existing guidance and to help them focus on the total action.

and non-severable services. We believe the same acquisition lead time allowed for contracts for non-severable services should be allowed when the contract is for severable services. In the information technology age, severable services include services that are essential for an agency to operate, such as help desk support and network administration for agency computer systems. Contracts for severable services can also involve millions of dollars. Thus, it is just as important to conduct proper, fully competed procurements.



Page 2 of the Executive Summary. Results Paragraph, the first full paragraph at the top of the page, we recommend that you delete the words and figures:

“The DoD Office of the Inspector General identified 4 of 11 Client Support Centers that did not fully comply with DoD procurement and funding regulations. The four Client Support Centers were not fully compliant due to problems such as potential Anti-Deficiency Act violations, and the lack of adequate interagency agreements.”

Comment: We have studied your report thoroughly and cannot find therein any justification for singling out the 4 CSCs you identify. Your report does not include evidence that during the period the audit was supposed to cover, FY 05, that the CSCs failed to comply with the guidance that was in existence at the time the MIPRs and Inter-Agency Agreements were sent to GSA. Further, while there was a difference of opinion in what financial guidance should be followed, the CSCs in question followed the guidance that GSA had issued, which is discussed above. In the future, GSA will assist DoD in ensuring that the DoD requiring activity has complied with DoD's guidance before accepting the agreement, although this was not a requirement during the time period in question.

