



January 12, 2010

TO: Thomas R. Frieden, M.D., M.P.H.
Director
Centers for Disease Control and Prevention

FROM: /Daniel R. Levinson/
Inspector General

SUBJECT: Review of the Centers for Disease Control and Prevention's Compliance With Appropriations Laws and Acquisition Regulations—Contractor A (A-04-08-01059)

The attached final report provides the results of our review of the Centers for Disease Control and Prevention's (CDC) compliance with appropriations laws and acquisition regulations. Like other Federal agencies, CDC is required to follow appropriations laws and the Federal Acquisition Regulation (FAR) when acquiring services with appropriated funds.

This audit, initiated as a result of a congressional request, is the first in a series of audits of CDC's contracting practices. It focuses on a 2003 service contract awarded to a small business referred to as "Contractor A." Under the contract, CDC awarded to Contractor A 149 task orders totaling \$106 million from 2003 to 2008. Our review covered eight task orders for severable services, which were valued at \$18.9 million and required an estimated 110 contractor personnel.

Our objective was to determine whether CDC's service contract and selected task orders awarded to Contractor A complied with appropriations laws and acquisition regulations with respect to competition, inherently governmental functions, pricing, personal services, and contract funding.

CDC's service contract and eight sampled task orders awarded to Contractor A complied with appropriations laws and acquisition regulations with respect to competition, inherently governmental functions, and pricing. However, the task orders did not always comply with appropriations laws and acquisition regulations with respect to personal service contracts and contract funding. Specifically, CDC inappropriately administered all eight task orders as personal service contracts. Additionally, for six of the eight task orders, CDC extended the performance periods for severable services beyond 1 year without the statutory authority to do so. These deficiencies occurred because CDC's policies and procedures were not adequate to ensure compliance with the prohibition on contracting for personal services and did not address funding requirements for severable service contracts.

By using contractor personnel for personal services, CDC violated the FAR, which states that obtaining personal services by contract circumvents civil service laws that require Government employees to be hired through competitive appointment or other required procedures unless Congress has authorized an exception. CDC also violated the bona fide needs statute by extending periods of performance beyond 1 year and expending \$1,092,888 of annual appropriations outside their 1-year period of availability.

We recommend that CDC:

- identify any active contracts or task orders currently being administered as personal service contracts and take action to correct their administration,
- develop and implement policies and procedures to prevent CDC officials from administering task orders as personal service contracts,
- determine whether the \$1,092,888 expended outside the 1-year period of availability violated the Anti-Deficiency Act and take action to correct any such violations, and
- develop and implement policies and procedures to ensure compliance with appropriations statutes and acquisition regulations regarding obligating and expending funds.

In comments on our draft report, CDC disagreed that it administered task orders awarded to Contractor A as personal service contracts and did not directly address our first recommendation. Nevertheless, CDC described actions that it had taken or planned to take in response to our second recommendation. CDC agreed with our last two recommendations.

CDC did not address the key elements of personnel services identified in our audit. Most significantly, CDC did not address our finding that its employees had provided relatively continuous supervision and control of onsite contractor personnel. CDC also did not address our findings on onsite contractor performance, equipment and supplies furnished to contractor personnel, services necessary to accomplish CDC's mission, and services needed beyond 1 year. When considered together, these findings demonstrate that CDC violated the FAR. We maintain that CDC should identify any contracts or task orders currently being administered as personal service contracts and take corrective action.

Section 8L of the Inspector General Act, 5 U.S.C. App., requires that the Office of Inspector General (OIG) post its publicly available reports on the OIG Web site. Accordingly, this report will be posted at <http://oig.hhs.gov>.

Please send us your final management decision, including any action plan, as appropriate, within 60 days. If you have any questions or comments about this report, please do not hesitate to call me, or your staff may contact Lori S. Pilcher, Assistant Inspector General for Grants, Internal Activities, and Information Technology Audits, at (202) 619-1175 or through email at Lori.Pilcher@oig.hhs.gov. Please refer to report number A-04-08-01059 in all correspondence.

Attachment

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**REVIEW OF THE CENTERS FOR
DISEASE CONTROL AND
PREVENTION'S COMPLIANCE
WITH APPROPRIATIONS LAWS
AND ACQUISITION
REGULATIONS—CONTRACTOR A**



Daniel R. Levinson
Inspector General

January 2010
A-04-08-01059

Office of Inspector General

<http://oig.hhs.gov>

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Section 8L of the Inspector General Act, 5 U.S.C. App., requires that OIG post its publicly available reports on the OIG Web site.

OFFICE OF AUDIT SERVICES FINDINGS AND OPINIONS

The designation of financial or management practices as questionable, a recommendation for the disallowance of costs incurred or claimed, and any other conclusions and recommendations in this report represent the findings and opinions of OAS. Authorized officials of the HHS operating divisions will make final determination on these matters.

EXECUTIVE SUMMARY

BACKGROUND

During fiscal years 2000 through 2008, the Centers for Disease Control and Prevention (CDC) awarded more than \$1.9 billion in service contracts to help accomplish its mission. Like other Federal agencies, CDC is required to follow appropriations laws and the Federal Acquisition Regulation (FAR) when acquiring services with appropriated funds.

This audit, which we initiated as a result of a congressional request, is the first in a series of audits of CDC's contracting practices. It focuses on a 2003 service contract that CDC awarded to a small business referred to in this report as "Contractor A." Under the contract, CDC awarded Contractor A 149 task orders totaling \$106 million from 2003 to 2008. Our review covered eight of these task orders. The eight task orders called for severable services, which are services that are recurring and continuing in nature and that are not intended to provide a specific end product, such as a report. The eight task orders were valued at \$18.9 million and required an estimated 110 contractor personnel.

OBJECTIVE

Our objective was to determine whether CDC's service contract and selected task orders awarded to Contractor A complied with appropriations laws and acquisition regulations with respect to competition, inherently governmental functions, pricing, personal services, and contract funding.

SUMMARY OF FINDINGS

CDC's service contract and eight sampled task orders awarded to Contractor A complied with appropriations laws and acquisition regulations with respect to competition, inherently governmental functions, and pricing. However, the task orders did not always comply with appropriations laws and acquisition regulations with respect to personal service contracts and contract funding. Specifically, CDC inappropriately administered all eight task orders as personal service contracts. Additionally, for six of the eight task orders, CDC extended the performance periods for severable services beyond the 1-year maximum statutory period. These deficiencies occurred because CDC's policies and procedures were not adequate to ensure compliance with the prohibition on contracting for personal services and did not address funding requirements for severable service contracts.

By using contractor personnel for personal services, CDC violated the FAR, which states that obtaining personal services by contract circumvents civil service laws that require Government employees to be hired through competitive appointment or other required procedures unless Congress has authorized an exception. CDC also violated the bona fide needs statute by extending periods of performance beyond 1 year and expending \$1,092,888 of annual appropriations outside their 1-year period of availability.

RECOMMENDATIONS

We recommend that CDC:

- identify any active contracts or task orders currently being administered as personal service contracts and take action to correct their administration,
- develop and implement policies and procedures to prevent CDC officials from administering task orders as personal service contracts,
- determine whether the \$1,092,888 expended outside the 1-year period of availability violated the Anti-Deficiency Act and take action to correct any such violations, and
- develop and implement policies and procedures to ensure compliance with appropriations statutes and acquisition regulations regarding obligating and expending funds.

CENTERS FOR DISEASE CONTROL AND PREVENTION COMMENTS

In comments on our draft report, CDC disagreed that it administered task orders awarded to Contractor A as personal service contracts and did not directly address our first recommendation. Nevertheless, CDC described actions that it had taken or planned to take in response to our second recommendation. CDC agreed with our last two recommendations. CDC's comments are included as Appendix B.

OFFICE OF INSPECTOR GENERAL RESPONSE

CDC did not address the key elements of personal services identified in our audit. Most significantly, CDC did not address our finding that its employees had provided relatively continuous supervision and control of onsite contractor personnel. CDC also did not address our findings on onsite contractor performance, equipment and supplies furnished to contractor personnel, services necessary to accomplish CDC's mission, and services needed beyond 1 year. When considered together, these findings demonstrate that CDC violated the FAR. We maintain that CDC should identify any contracts or task orders currently being administered as personal service contracts and take corrective action.

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INTRODUCTION

BACKGROUND

The mission of the Centers for Disease Control and Prevention (CDC) is to promote health and quality of life by preventing and controlling disease, injury, and disability. To help accomplish its mission, CDC contracts for certain services, such as professional, administrative, and technical assistance services. During fiscal years 2000 through 2008, CDC funding for service contracts increased from \$74 million to \$370 million per year, for a total of \$1.9 billion during the 9-year period.

This audit, which we initiated as a result of a congressional request, is the first in a series of audits of CDC's contracting practices.

Contracting Responsibilities

CDC's Procurement and Grants Office (PGO) is responsible for the award, administration, and closeout of all CDC contracts. Within PGO, contracting officers are responsible for ensuring effective contracting; ensuring compliance with contract terms; ensuring that contractors receive impartial, fair, and equitable treatment; and determining the adequacy of contractor performance.

CDC's centers, institutes, and offices (program offices) are the primary initiators of service contracts. Contracting officers delegate certain administrative duties to program office employees referred to as "contracting officers' technical representatives" (project officers) and "technical monitors." As the contracting officers' authorized representatives for administering contracts and task orders, respectively, project officers and technical monitors are responsible for ensuring proper Government oversight of contractors' performance. Project officers and technical monitors are not empowered to make any contractual commitments or to authorize any contractual changes on the Government's behalf.

CDC's Financial Management Office is responsible for processing payments to contractors and for maintaining records of invoices, payments, and supporting documents.

Federal Laws and Regulations

Federal agencies are required to follow appropriations laws and the Federal Acquisition Regulation (FAR) when acquiring supplies and services with appropriated funds. Selected requirements are summarized below.

Competition

The FAR states that under the Small Business Administration's (SBA) 8(a) Business Development Program, contracting officers may limit competition to eligible 8(a) contractors. Pursuant to FAR 19.805-1(a)(1):

. . . an acquisition offered to the SBA under the 8(a) Program shall be awarded on the basis of competition limited to eligible 8(a) firms if—(1) [t]here is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and that award can be made at a fair market price; and (2) [t]he anticipated total value of the contract, including options, will exceed \$5.5 million for acquisitions assigned manufacturing North American Industry Classification System (NAICS) codes¹ and \$3.5 million for all other acquisitions.

Inherently Governmental Functions

FAR 7.503(a) states that “contracts shall not be used for the performance of inherently governmental functions.” Inherently governmental functions include determining agency policy, such as the content and application of regulations; determining budget policy, guidance, and strategy; and directing and controlling Federal employees.

Fair and Reasonable Pricing

FAR 15.402 states that “contracting officers must—(a) purchase supplies and services from responsible sources at fair and reasonable prices.”

Personal Services

FAR 37.104 prohibits agencies from awarding personal service contracts unless specifically authorized by statute. The FAR characterizes a personal service contract as one in which an employer-employee relationship is created between the Government and contractor personnel. This relationship may be created by the contract terms or by subjecting contractor personnel to relatively continuous supervision and control by agency employees during contract performance.

Contract Funding

The bona fide needs statute (31 U.S.C. § 1502) requires that “[t]he balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period.” Pursuant to the bona fide needs statute, agencies generally are required to fund severable service contracts with funds that are current and available for the year in which performance takes place.² However, pursuant to 41 U.S.C. § 2531, an agency may enter into a contract for severable services for a period that begins in 1 fiscal year and ends in the next fiscal year if the contract period does not exceed 1 year. Such contracts may be funded entirely with funds available in the earlier year.

¹Federal statistical agencies use the NAICS to classify business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS codes designate major sectors of the economies of Mexico, Canada, and the United States.

²Severable services are services that are recurring and continuing in nature. Nonseverable services, which are services to provide a specific end product (e.g., a report), cannot be subdivided into fiscal year segments.

The FAR reflects the bona fide needs statute, as well as the statutory exception. FAR 32.703-3 states that “[a] contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization . . .” or when the contract is for a nonseverable service.

Service Contract Awarded to Contractor A

In 2003, CDC awarded task order contracts to four businesses under SBA’s 8(a) program, a business development program to help small, disadvantaged businesses compete in and gain access to Federal and private procurement markets. The contracts called for management consultation and technical assistance services in support of CDC-wide operations. Under the four contracts, CDC issued 183 task orders totaling \$135 million.

One of the four contractors (Contractor A) was awarded 149 task orders totaling \$106 million. Contractor A is a minority- and woman-owned professional services corporation certified by SBA as an 8(a) small and disadvantaged business. Contractor A, which has offices in three States, employs more than 300 personnel and has active contracts with approximately 500 consultants.

OBJECTIVE, SCOPE, AND METHODOLOGY

Objective

Our objective was to determine whether CDC’s service contract and selected task orders awarded to Contractor A complied with appropriations laws and acquisition regulations with respect to competition, inherently governmental functions, pricing, personal services, and contract funding.

Scope

Our audit covered CDC’s service contract with Contractor A (contract 200-2003-01396) and eight task orders for severable services awarded under the contract between July 15, 2003, and December 31, 2008. The eight task orders were valued at \$18.9 million and required an estimated 110 contractor personnel. (See Appendix A for details on the eight task orders.)

We did not review CDC’s overall internal control structure. We limited our internal control review to obtaining an understanding of CDC’s policies and procedures for awarding and administering contracts.

We performed our fieldwork at CDC in Atlanta, Georgia, from July 8, 2008, through March 31, 2009.

Methodology

To accomplish our objective, we:

- reviewed relevant Federal laws, regulations, and guidance;
- gained an understanding of CDC's policies and procedures related to contract award and administration;
- gained an understanding of the contract administration responsibilities of PGO and program officials;
- conducted a risk assessment of the 149 task orders awarded to Contractor A and judgmentally selected³ 8 task orders (task orders 12, 25, 34, 46, 105, 111, 121, and 128) for detailed review;
- reviewed documentation maintained by PGO, program offices, and the Financial Management Office related to the contract and the 8 task orders;
- reviewed the competitive procedures used to award the contract and the 8 task orders;
- assessed the procedures used to price and fund the 8 task orders;
- interviewed, as shown in Appendix A, Contractor A personnel and CDC officials to gain an understanding of the types of services provided under the 8 task orders and the extent to which:
 - contractor personnel performed inherently governmental functions,
 - CDC employees provided direction and supervision to contractor personnel, and
 - other elements of personal services existed in contract administration;
- reviewed the terms and conditions of, and subsequent modifications to, the 8 task orders to determine whether the periods of performance exceeded 1 year; and
- reviewed CDC's financial records to quantify the payments made outside the 1-year periods of performance.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions

³Our selection factors included whether the task orders were competed, whether Contractor A was the only bidder, and whether the task orders potentially included inherently governmental activities. We also considered the dollar value of the task orders.

based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

FINDINGS AND RECOMMENDATIONS

CDC's service contract and eight sampled task orders awarded to Contractor A complied with appropriations laws and acquisition regulations with respect to competition, inherently governmental functions, and pricing. However, the task orders did not always comply with appropriations laws and acquisition regulations with respect to personal service contracts and contract funding. Specifically, CDC inappropriately administered all eight task orders as personal service contracts. Additionally, for six of the eight task orders, CDC extended the performance periods for severable services beyond the 1-year maximum statutory period. These deficiencies occurred because CDC's policies and procedures were not adequate to ensure compliance with the prohibition on contracting for personal services and did not address funding requirements for severable service contracts.

By using contractor personnel for personal services, CDC violated the FAR, which states that obtaining personal services by contract circumvents civil service laws that require Government employees to be hired through competitive appointment or other required procedures unless Congress has authorized an exception. CDC also violated the bona fide needs statute by extending periods of performance beyond 1 year and expending \$1,092,888 of annual appropriations outside their 1-year period of availability.

PERSONAL SERVICES

Federal Acquisition Regulation

FAR 37.104 prohibits agencies from awarding personal service contracts unless specifically authorized by statute. The FAR characterizes a personal service contract as one in which an employer-employee relationship is created between the Government and contractor personnel. This relationship may be created when contractor personnel are subject to relatively continuous supervision and control by a Government officer or employee during contract performance.

The FAR provides that "[t]he sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account." The FAR lists additional factors to aid in determining whether services are personal in nature:

- The contractor performs onsite.
- The Government furnishes the principal tools and equipment.
- The services directly apply to an agency's mission.
- The need for the type of service can be expected to last beyond 1 year.

The FAR states that “the Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.”

Task Orders Administered as Personal Service Contracts

CDC administered all eight sampled task orders awarded to Contractor A as personal service contracts, primarily by providing direct supervision and control of contractor personnel, reviewing their timecards, and evaluating their performance. CDC also arranged for onsite performance of work, furnished contractor personnel with equipment and supplies, used contractor services to directly advance the agency’s mission, and expected the need for the services to last more than 1 year.

Supervision of Contractor Personnel

Our interviews with 23 Contractor A personnel⁴ and with CDC program officials, as well as our review of contract files, revealed that CDC employees maintained relatively continuous supervision and control of contractor personnel who worked onsite at CDC. Such supervision and control took the form of routine assignment of tasks to individual contractor personnel, often on a daily basis. In some instances, CDC employees also reviewed and signed contractor personnel timecards and/or evaluated the performance of contractor personnel.

Routine Assignment of Tasks to and Control of Contractor Personnel

Of the 23 Contractor A personnel interviewed, 19 worked onsite. Of the 19 personnel, 9 stated that CDC employees assigned tasks to them daily. Nine others did not specify how often they received task assignments; however, four of these personnel reported that they performed routine activities for CDC employees or that CDC employees were responsible for their day-to-day supervision. The remaining individual, a contractor consultant, stated that a CDC employee assigned his tasks on a weekly basis. In addition, 18 of the 19 onsite contractor personnel reported that they had been supervised by CDC employees or that they reported to a CDC supervisor. For example:

- A former contractor consultant, who had worked under task orders 34 and 128, stated that her daily tasks came directly from CDC officials.
- An administrative assistant under task order 128 stated that she reported to three CDC employees and that these employees assigned her daily tasks.
- A management and program analyst under task order 105 stated that she received daily assignments from the Chief of CDC’s Immunology and Pathogenesis Branch. The Branch Chief confirmed that she assigned work to contractor personnel on a daily basis

⁴Contractor A personnel included consultants under contract with Contractor A.

and stated that the “contractor directly contacts me to request leave or indicate absences from work.”

- An administrative assistant under task order 46 stated that she reported directly to a CDC employee for her daily work activities.
- A contractor consultant under task order 12 reported that he performed several routine day-to-day activities for his “CDC supervisor.”
- A cost accountant under task order 111, while not specifying how often he received task assignments from CDC employees, stated that a CDC employee provided his day-to-day supervision.
- A health communications specialist under task order 128 stated that she reported to a CDC communications officer and that she was required to report to this individual when taking time off from work.

The CDC contracting officers associated with the eight sampled task orders agreed that the types of supervision and control of contractor personnel that we found would represent prohibited personal services. However, the contracting officers stated that they were not aware that such supervision and control had occurred. They added that they relied on CDC project officers, technical monitors, and other CDC officials to administer the day-to-day activities of the task orders and that they did not have the resources to regularly monitor those activities.

Approval of Contractor Personnel Timecards

From February 2004 until March 2008, CDC employees regularly signed the timecards of at least 23 Contractor A employees and 3 consultants who worked under task orders 12, 34, and 128. Contractor A employees reported their time on semimonthly timecards provided by Contractor A; consultants used their own timecards. Signing the timecards of contractor personnel contributed to creating an employer-employee relationship.

On March 20, 2008, CDC implemented policies and procedures that prohibited CDC employees from signing or reviewing contractor timecards. The contract files contained no Contractor A personnel timecards signed by CDC employees after that date.

Evaluation of the Performance of Contractor Personnel

Of the 19 onsite Contractor A personnel interviewed, 6 stated that CDC employees had evaluated their performance.⁵ For example:

- A contractor consultant under task order 12 and a contractor employee under task order 128 stated that CDC employees wrote their annual performance evaluations.

⁵The fact that CDC evaluated the performance of some contractor personnel surfaced during our interviews. We did not specifically ask all interviewees whether CDC employees had evaluated their performance.

- A contractor employee under task order 25 reported that the CDC Chief Operating Officer evaluated her performance and reported it to Contractor A.
- Two contractor personnel under task order 105 stated that CDC employees conducted their performance evaluations and orally reported the results to Contractor A. However, both contractor personnel stated that Contractor A was ultimately responsible for their evaluations.

A project manager for Contractor A stated that Contractor A was responsible for evaluating its employees' performance. He also stated that Contractor A used input provided by CDC to conduct performance evaluations.

CDC's responsibility for evaluating a contractor is limited to reviewing the contractor's overall contract performance. By evaluating the performance of individual contractor personnel, CDC took on Contractor A's responsibility and contributed to creating an employer-employee relationship.

Onsite Contractor Performance

CDC estimated that 94 (85 percent) of the 110 Contractor A personnel needed for the eight sampled task orders would be required to work onsite at CDC offices and thus provided their office space. Of the 23 Contractor A personnel interviewed, 19 (83 percent) stated that they worked onsite.

Equipment and Supplies Furnished to Contractor Personnel

CDC provided onsite Contractor A personnel with equipment and supplies, including computers, telephones, and other office equipment for the eight sampled task orders.

Of the 19 onsite Contractor A personnel interviewed, 18 reported that CDC had provided their equipment and/or supplies. The remaining employee stated that CDC had not provided his equipment and supplies. However, a CDC program official who worked with this employee stated that CDC had provided a computer and various supplies to the employee. A Contractor A program manager also stated that CDC had provided all equipment and supplies to onsite Contractor A personnel. According to a CDC contracting officer, CDC had provided contractor personnel with computers to ensure compliance with CDC information technology security policies.

In addition, the statements of work for four of the eight sampled task orders stipulated that CDC would provide contractor personnel with all necessary equipment and supplies. The statements of work for the four remaining task orders stated that the contractor would be responsible for providing necessary equipment and supplies. However, 10 onsite contractor personnel who worked on the latter four task orders stated that CDC had, in fact, provided their equipment and supplies.

Services Necessary To Directly Accomplish the Agency's Mission

The task order statements of work showed that Contractor A's services would be directly applied to CDC's integral efforts to further its mission and that CDC used the task orders to supplement its Government staff. For example:

- Task orders 12, 34, and 128, all for work at the Office of Public Health Genomics, stated: "It is increasingly impossible for existing staff to meet current workload requirements" The task orders further stated that "staff resources are not adequate to assure timely implementation of essential activities Onsite program operations and management assistance is required as a critical staffing adjunct"
- Task order 105 stated: "The objective of the task is to maintain services critical to the mission of the Influenza Division, NCIRD [the National Center for Immunization and Respiratory Diseases] and CDC." The task order added that CDC had "no qualified staff available to perform these functions."

Furthermore, CDC employees stated that the contract services were integral in furthering the agency's mission. For example, a technical monitor responsible for two sampled task orders stated that Contractor A's work was critical to CDC's mission. Similarly, a technical monitor for another task order⁶ stated that Contractor A personnel represented 80 percent of the personnel in her branch and that her branch could not operate without the assistance of the contractor personnel.

Services Needed Beyond 1 Year

The terms of the service contract and eight sampled task orders awarded to Contractor A indicated that CDC's need for the services was long term and ongoing (beyond 1 year). The original term of the contract consisted of a 1-year base period of performance and four 1-year option periods. The contract and option periods covered the 5-year period from July 2003 through December 2008. CDC later modified the contract terms to allow task order performance up to 2 years beyond the expiration date of the contract.⁷ Additionally, CDC exercised at least one 1-year option period, awarded a follow-on task order, and/or extended the period of performance beyond 1 year for each of the sampled task orders.⁸

Some task order statements of work also revealed that CDC expected a long-term need for the services. For example, in discussing the background and need for contractor services under task orders 12, 34, and 128, CDC expressly stated that it needed the contractor's services "on a long-term, ongoing basis."

⁶Task order 89 was not part of our sample. We interviewed this individual because of her role in the award of the service contract.

⁷This extension applied only to task orders issued before the December 31, 2008, expiration date.

⁸During our review, we learned that CDC had awarded four new follow-on service contracts that, together with options, will span a 7-year period of performance.

Inadequate Policies and Procedures on Personal Services

To avoid contracting for personal services, CDC had implemented certain policies and procedures, such as:

- requiring contractor personnel to wear badges that identified them as contractors,
- providing training on the “do’s and don’ts” concerning the treatment of contractor personnel, and
- prohibiting CDC employees from signing contractor timecards.

However, these policies and procedures failed to prevent CDC from administering the eight sampled task orders as personal service contracts.

CDC’s policies and procedures, issued in May 1986 and last updated in July 2000, were not consistent with the FAR. CDC’s policies defined personal services as services “performed by commercial service personnel who require direct Government supervision and who perform an inherent Government function.” The FAR, however, establishes no link between inherently governmental functions and personal services. Further, the FAR defines personal services in terms of the employer-employee relationship created between Government personnel and contractor personnel, provides various descriptive elements as an aid for determining whether services are personal services (as previously discussed in this report), and provides that the Government’s control and supervision of contractor personnel is the key element in determining whether services are personal in nature.

Circumvention of Civil Service Laws

By using contractor personnel for personal services, CDC violated the FAR, which states that obtaining personal services by contract in effect circumvents civil service laws. Civil service laws require Government employees to be hired through competitive appointment or other required procedures unless Congress has authorized an exception. Congress had not specifically authorized CDC to contract for personal services.

CONTRACT FUNDING

Federal Laws and Regulations

The bona fide needs statute (31 U.S.C. § 1502) requires that “[t]he balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts [task orders] properly made within that period.” Pursuant to the bona fide needs statute, agencies are generally required to fund severable service contracts with funds that are current and available for the year in which performance takes place. However, pursuant to 41 U.S.C. § 2531, an executive agency may enter into a contract for procurement of severable services for a period that begins in 1 fiscal year and ends in the next fiscal year if the contract period does not exceed 1 year. Such contracts may be

funded entirely with funds available in the earlier year (the year in which the contract was awarded).

The FAR reflects the bona fide needs statute, as well as the statutory exception. FAR 32.703-3 states that “[a] contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization . . .” or when the contract is for nonseverable services.

The Anti-Deficiency Act (31 U.S.C. § 1341) provides that officers or employees of the Government may not make or authorize an obligation in excess of the available funds or in advance of appropriations.

Performance Periods Exceeding 1 Year

CDC extended the periods of performance beyond 1 year for six of the eight sampled task orders. These extensions were funded using fiscal year funds outside their periods of availability. The extensions ranged from 6 days to 1 year beyond the original 1-year performance periods. For example:

- In July 2007, CDC awarded task order 121, which called for one full-time consultant for a 1-year base period (July 18, 2007, through July 17, 2008) and two 1-year option periods. CDC fully funded the base period of the task order at the full-time level of performance. In May 2008, Contractor A management informed the CDC contracting officer that the consultant was needed only on a part-time basis and that, as a result, funding was still available under the base year. Contractor A requested a 1-year, no-cost extension to the base period of performance to continue the consultant’s part-time work on the task order. The CDC contracting officer modified the terms of the task order as Contractor A requested.
- In November 2004, CDC awarded task order 25, which specified a performance period of November 2004 through October 2005. In November 2005, the CDC contracting officer extended the performance period by 2 months. According to the contracting officer, additional services were needed, but funding was not adequate to exercise a new option period or issue a new task order because of a continuing resolution.
- In February 2004, CDC awarded task order 12, which specified a performance period of March 2004 through February 2005. In March 2005, the CDC contracting officer extended the period of performance by 3 months. In May 2005, another contracting officer extended the period of performance by an additional 15 days. One CDC contracting officer stated that she thought that the services were nonseverable expert/consultative services that were not subject to the funding limitations of severable services.⁹

⁹The statement of work referred to the services generally as “consultative” services but also described them as “non-technical” and “administrative.” The statement of work also did not specify an end product. Thus, the services met the definition of severable services.

CDC contracting officers issued similar extensions beyond 1-year periods of performance for task orders 34, 46, and 111.

Inadequate Policies and Procedures on Contract Funding Limitations

CDC inappropriately extended the periods of performance for severable service contracts beyond the 1-year period of availability of the funds because it had not developed and implemented adequate policies and procedures to ensure compliance with appropriations statutes and acquisition regulations on obligating and expending funds.

Specifically, CDC's policies and procedures did not address funding requirements for severable and nonseverable service contracts, nor did they require a determination of whether contracted services are severable or nonseverable before funding a contract action. CDC's policies and procedures also did not address the funding of contract extensions that cause periods of performance to exceed 1 year and did not prohibit the use of funds associated with a prior-year appropriation for costs incurred in a subsequent year.

The PGO Director stated that CDC was in the process of improving its policies and procedures on funding contracts. However, CDC was awaiting the results of a Departmentwide review of contract funding issues before implementing new policies and procedures.

Violations of the Bona Fide Needs Statute

By extending periods of performance beyond 1 year, CDC expended \$1,092,888 of annual appropriations outside their 1-year period of availability and violated the bona fide needs statute in administering six task orders (12, 25, 34, 46, 111, and 121). Such expenditures also could violate the Anti-Deficiency Act if sufficient funds from applicable appropriations are not available to cover the expenditures.

CDC may resolve the violations of the bona fide needs statute by adjusting its accounts (assuming sufficient funds are available) and recording the expenditures against the correct fiscal year appropriations. This will require CDC to research the proper use of funds totaling \$1,092,888 and to determine the correct period of availability for those funds.

RECOMMENDATIONS

We recommend that CDC:

- identify any active contracts or task orders currently being administered as personal service contracts and take action to correct their administration,
- develop and implement policies and procedures to prevent CDC officials from administering task orders as personal service contracts,
- determine whether the \$1,092,888 expended outside the 1-year period of availability violated the Anti-Deficiency Act and take action to correct any such violations, and

- develop and implement policies and procedures to ensure compliance with appropriations statutes and acquisition regulations regarding obligating and expending funds.

CENTERS FOR DISEASE CONTROL AND PREVENTION COMMENTS

In comments on our draft report, CDC disagreed that it administered task orders awarded to Contractor A as personal service contracts. CDC did not directly address our recommendation to identify any contracts or task orders currently being administered as personal service contracts and take corrective action. Nevertheless, CDC described actions that it had taken or planned to take in response to our recommendation to develop and implement policies and procedures to prevent CDC officials from administering task orders as personal service contracts. CDC agreed with our recommendations relating to contract funding and described its ongoing and planned corrective actions. CDC's comments are included as Appendix B.

OFFICE OF INSPECTOR GENERAL RESPONSE

CDC did not address the key elements of personal services identified in our audit. Most significantly, CDC did not address our finding that its employees had created an improper employer-employee relationship by providing relatively continuous supervision and control of a significant number of contractor personnel who worked onsite at CDC. For example, 13 of 19 contractor employees interviewed reported that CDC employees had assigned them daily tasks or directed their routine activities. Further, 18 of 19 contractor personnel interviewed reported that they had been supervised by CDC employees, and 6 stated that CDC employees had evaluated their performance. CDC also did not address our findings on onsite contractor performance, equipment and supplies furnished to contractor personnel, services necessary to accomplish CDC's mission, and services needed beyond 1 year.

When considered together, our findings demonstrate that CDC violated the FAR by administering task orders as personal service contracts. We maintain that CDC should identify any contracts or task orders currently being administered as personal service contracts and take corrective action.

APPENDIXES

APPENDIX A: TASK ORDER DETAILS

Task Order	Purpose	Period of Performance	Awarded Dollars ²	Estimated Number of Contractor Personnel	Number of Contractor Personnel Interviewed ³	CDC ¹ Personnel Interviewed			
						Contracting Officer	Project Officer ⁴	Technical Monitor	Other Project/Program Personnel
12	To support operations of CDC's Office of Genomics and Disease Prevention	3/01/2004–6/15/2005	\$937,838	10	2	Yes	Yes	No ⁵	No
25	To provide professional assistance to CDC's Office of the Chief Operating Officer related to planning special events and activities	11/4/2004–12/31/2005	158,999	2	1	Yes	Yes	Yes ⁶	No
34	To support operations of CDC's Office of Genomics and Disease Prevention	6/16/2005–9/12/2007	3,680,016	13	4	Yes	Yes	Yes	No
46	To provide operational support to CDC's Division of Health Communication, Office of Director	12/22/2005–10/29/2008	813,256	5	3	Yes	Yes	No ⁷	Yes ⁸
105	To provide technical assistance and support services critical to the mission of CDC's National Center for Immunization and Respiratory Diseases	9/30/2006–9/29/2008	2,790,823	19	4	Yes	Yes	Yes	Yes
111	To assist CDC's Financial Management Office with budgeting, financial systems, program analysis, accounting standards, and accounts payable	4/6/2007–6/30/2009	3,906,238	34	4	Yes	Yes	Yes	No
121	To provide management support and consultation to CDC's Division of Laboratory Systems in managing its personnel requirements	7/18/2007–7/17/2009	138,352	3	1	Yes	Yes	Yes	Yes
128	To support operations of CDC's Office of Public Health Genomics	9/13/2007–9/12/2009	6,474,373	24	9	Yes	Yes	Yes	No
Total			\$18,899,895	110	28				

¹CDC is the Centers for Disease Control and Prevention.

²Awarded dollar values reflect obligated funding.

³Some contractor personnel were involved in multiple task orders.

⁴The project officers were responsible for administering the service contract and did not work on individual task orders.

⁵The individual no longer worked at CDC.

⁶The individual was listed as the cotechnical monitor on the award document. The technical monitor listed on the award document denied any involvement in this task order.

⁷The individual listed as the technical monitor on the award document could not confirm his involvement in this task order.

⁸The individual was a program manager in CDC's Management Analysis and Services Office.

**APPENDIX B: CENTERS FOR DISEASE CONTROL AND
PREVENTION COMMENTS**

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30333

OCT 7 2009

TO: Daniel R. Levinson
Inspector General

FROM: Director, Centers for Disease Control and Prevention
Administrator, Agency for Toxic Substances and Disease Registry

SUBJECT: CDC Response to Office of Inspector General (OIG) Draft Report on CDC's Compliance
with Appropriations Law and Acquisition Regulations, Report No. A-04-08-1059 dated
July 2009

DATE: October 7, 2009

EXECUTIVE SUMMARY

This audit was initiated as a result of a congressional request; it was the first in a series of audits of CDC's contracting practices. It focuses on a 2003 service contract that CDC awarded to a small business. Under the multiple award contracts, CDC awarded one contract to [REDACTED] for a total of 149 task orders totaling \$106 million from 2003 to 2008. The review covered eight task orders for services which were valued at \$18.9 million and required an estimated 110 contractor personnel.

OBJECTIVE

The objective was to determine whether CDC's service contract and selected task orders awarded to [REDACTED] complied with appropriations laws and acquisition regulations with respect to competition, inherently governmental functions, pricing, personal services, and contract funding.

Office of the Inspector General (OIG) Recommendations:

CDC's service contract and eight sampled task orders awarded to [REDACTED] complied with appropriations laws and acquisition regulations with respect to competition, inherently governmental functions, and pricing. However, the task orders did not always comply with appropriations law and acquisition regulations with respect to personal service contracts and contract funding. Specifically, in some instances, CDC's programmatic administration of all eight task orders was performed as if they were personal service contracts. Additionally, for six of the eight task orders, CDC extended the performance periods for severable services beyond the one-year maximum statutory period. These deficiencies occurred because CDC's program personnel were not adequately trained to ensure compliance with the prohibition on contracting for personal services. Additionally, CDC's policies and procedures did not adequately address funding requirements for contracts that contain both severable and nonseverable portions.

OIG note: We have deleted the name of the contractor from this appendix.

The HHS OIG made the following recommendations in its draft report: (1) Identify any active contracts or task orders currently being administered as personal service contracts and take action to correct their administration; (2) Develop and implement policies and procedures to prevent CDC officials from administering task orders as personal service contracts; (3) Determine whether the \$1,092,888 expended outside the one-year period of availability violated the Anti-Deficiency Act and take action to correct any such violations; and (4) Develop and implement policies and procedures to ensure compliance with appropriations.

CDC Response:

(1) Identify any active contracts or task orders currently being administered as personal service contracts and take action to correct their administration.

The contract in question was neither structured nor administered as a personal services contract by the CDC. The subject contract was one of four contracts for Management Consultation and Technical Assistance (MCTA) services under a CDC-wide multiple-award, 8(a) competitive small business set-aside. None of the contracts, or the subsequent task orders, were structured or issued as personal services contracts. None of the Statements of Work (SOW) were written as personal services.

The rules governing personal services have been conveyed to the CDC staff via CDC-wide e-mail distributions and various training sessions and presentations. The CDC did not make recommendations regarding the pay or benefits accruing to contractor employees. Contractor employees were not given technical direction by CDC Contracting Officer Technical Representatives (COTRs) that fell outside the contract's SOW, and the work performed by contractor employees was as defined in the contract's SOW. CDC has also implemented safeguards against inadvertent personal services by issuing policy advisories regarding improprieties such as timecard validation and providing performance appraisal input on contractors' employees, and CDC policies require contractor employees be clearly identified as such on e-mail signature lines and recorded telephone messages so that they are clearly distinguished from Federal employees.

The example of a CDC supervisor contributing to a contractor employee's annual appraisal or interfacing in some way that would seem to taint the relationship with elements of personal services does not mean the contracts were administered as personal services. We believe this conduct by a CDC employee is the exception and not the rule. We recognize that there may be instances where the actions of federal employees may have contributed to creating the appearance of one or more personal services indicators, but the totality of these circumstances do not rise to the level of the contract relationship being for personal services, and we do not believe the contracts were regularly administered as personal services.

Nevertheless, the CDC will continue to be vigilant and communicate the proper conduct to government representatives involved in these contracts, and the current certification program required of COTRs will supplement continued training and policy to reduce these instances.

(2) Develop and implement policies and procedures to prevent CDC officials from administering task orders as personal service contracts.

CDC has been proactive in the issuance of guidance and training on the topic of personal services. To prevent CDC officials from monitoring contractual work as if a contract were for personal services,

CDC has issued a series of policy advisories, conducted training, and in coordination with our human resources office, posted specific guidance on personal services on the CDC intranet, including policy guidance on contractor identification, and timecard processing.

Concerning this specific contract, on April 15, 2009, during an Open House event for the Management Consulting and Technical Assistance (MCTA) contracts, PGO gave a presentation to CDC staff members in which the issue of personal services was specifically addressed. It was clearly stated that personal services were prohibited under the terms and conditions of the MCTA contracts.

In addition, PGO routinely addresses personal services through training. Provided below is a sample of CDC entities that recently received training which included the topic of personal services:

- 1) Management Officer/Staff Office Directors, September 4, 2008
- 2) Deputy Chief Operating Office, September 10, 2008
- 3) Office of Workforce and Career Development (OWCD), August 20, 2008
- 4) Coordinating Center for Health Promotion (CoCHP) Senior Staff, September 11, 2008
- 5) Office of Health and Safety, October 30 2008
- 6) Labor Management Cooperative Council, November 2008
- 7) Management Information Systems Office (MISO), January 7, 2009
- 8) Coordinating Center for Environmental Health and Injury Prevention (CCEHIP),
March 23, 2009
- 9) National Institute for Occupational Safety and Health (NIOSH), May 11, 2009

Additionally, the CDC policy on personal services will be updated and re-issued in FY 2010. We plan to make the COTR responsible for ensuring that program officials that interact with the contractors directly are aware of the policy.

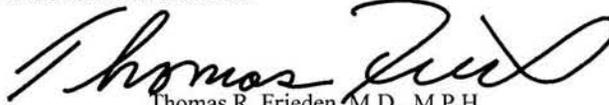
(3) Determine whether or not the \$1,092,888 expended outside the one-year period of availability violated the Anti-Deficiency Act and take action to correct any such violations

CDC is in the process of adjusting its accounts to properly record funds expended outside the 1-year period of availability. Sufficient funding is available for these adjustments; therefore, CDC did not violate the Anti-Deficiency Act.

(4) Develop and implement policies and procedures to ensure compliance with appropriations statutes and acquisition regulations regarding obligating and expending funds.

In order to ensure adherence to appropriation laws and acquisition regulations, CDC will develop and implement policies and procedures to comply with the recent changes to the HHS acquisition guidance. A Standard Operating Procedure is being drafted that will require CDC contracting officers to clearly identify and document the severability or nonseverability of proposed work at the outset of the contract or task order, as well as the appropriate level of funding. Also, although the OIG report identified the services in the task orders as severable, CDC believes the SOWs could have been more clear regarding the severable or nonseverable nature of the work. For example, the requirements could have identified specific end products with due dates as applicable. In the future, CDC will make efforts to train program officials to write better SOWs with clearly defined requirements and end products as appropriate.

In addition, Appropriations Law training will continue to be offered to contracting and financial personnel at CDC. In coordination with the Financial Management Office (FMO), PGO has had approximately 90% of its staff attend formal Appropriations Law training in the past 18 months. We also have continual acquisition training planned for our employees. PGO, in collaboration with the Program Offices and FMO, is carefully reviewing current and future acquisition plans for the proper funding methodology (incremental funding or full funding) in relation to severability determinations. Severability determinations will be documented clearly in the acquisition cycle and reminders to the procurement staff will be posted to the contracts checklist.



Thomas R. Frieden, M.D., M.P.H.