Department of Veterans Affairs
Office of Inspector General

Patient Financial Services System Contract Planning, Award, and Administration Review VA Central Office

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To Report Suspected Wrongdoing in VA Programs and Operations

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Executive Summary

Introduction

At the request of the Deputy Secretary of Veterans Affairs and the Chairman, House Veterans Affairs Committee, the VA Office of Inspector General conducted a review of the contracting process involving the contract with Unisys for the Veterans Health Administration's Patient Financial Services System (PFSS). The review addressed procurement planning, contract award, costs, administration, and termination.

Results

On July 15, 2003, VA issued a firm fixed price task order to Unisys to implement commercial off-the-shelf software to upgrade PFSS with payments based on acceptance of specific deliverables. The contract award was for $140 million over a period of 10 years.

We concluded VA's interests were not protected because of deficiencies in the administration of the contract. Lack of critical documentation and poorly maintained contract files hampered our review. For example, we were unable to reach any conclusion about the solicitation and award because there were no documents relating to the technical evaluation of each bidder's proposal and little documentation about the solicitation and award process. There was a lack of continuity in the administration of the task order, and little evidence of any meaningful interactions between the contracting officer and the contracting officer technical representative. Our review found mandatory procedures for performance based procurements were not followed and contract modifications were not properly processed.

There were performance problems from the inception of the contract. Unisys' failure to timely deliver finished usable components hampered the progress of the PFSS project. VA issued Modification 9 in August 2005 to restructure the contract and establish new deadlines for deliverables but performance problems by Unisys continued. After months of delays, VA began to terminate the contract for default. Although those actions were coordinated with and approved by the Office of General Counsel (OGC), we found VA failed to use proper procedures for terminating a commercial item contract.

The former VA General Counsel halted the termination process based on advice of his staff over concerns VA would not prevail if Unisys filed a claim. There was no evidence the OGC reviewed appropriate documents, spoke with contracting and program officials, or prepared a legal analysis of the options available to VA prior to rendering that advice.

As a result of our recommendation to the Deputy Secretary, the contract was terminated for convenience with a mutual settlement of all claims. In addition to a monetary

payment, representing the percentage of work completed and accepted, VA will only reimburse Unisys for those travel claims that are properly documented.

We recommend the Deputy Assistant Secretary for Acquisitions & Materiel Management (OA&MM):

- take appropriate action to have VA establish policy requiring contracting officials, program officials, and OGC to meet on a regular basis to discuss contractor performance and develop a plan to address non-performance; and

- take appropriate administrative action against the Contracting Officer for failing to ensure the actions taken to terminate the contract for cause complied with the terms of the contract and that the termination was in the best interest of VA.

We recommend the Acting Under Secretary for Health convene a team of contract, program officials, and OGC attorneys to develop a plan to complete the PFSS project.

We recommend the Acting General Counsel:

- take appropriate administrative action against OGC attorneys who approved the cure notice and show cause letters, and offered advice and guidance without conducting a review to determine whether the termination was supportable or complied with the terms of the contract; and

- ensure that when termination of a contract or task order is being considered, the OGC is required to conduct a review and advise the contracting officer and program officials, in writing, whether the action is legally supportable.

Comments

The Acting Under Secretary for Health agreed with our recommendation, but noted that he was unable at this time to convene a team to develop a plan to complete the project because of budget restraints related to the ongoing continuing resolution. The Acting Under Secretary stated that VHA had already met the intent of the recommendation by establishing an Integrated Product Team chaired by the VHA Chief Business Office, VA Office of Acquisition and Materiel Management, and VA Office of Information and Technology executives. He noted that he would re-initiate the necessary measures to meet the intent of the recommendation if VA decides to proceed with PFSS or a similar project in the future. If a decision is made to fund the completion of the PFSS project, we will ask VHA to submit a plan implementing the recommendation.

The Deputy Assistant Secretary (DAS) for OA&MM concurred with our findings and recommendations, with comment, and estimated that the actions would be completed within 120 days of the response and proposed a detailed implementation plan. He also

noted the PFSS contract was indicative of systemic problems within VA. The OIG will follow-up until the plan is implemented.

The Acting General Counsel did not concur with the findings and recommendations. The following is our response to the non-concurrence.

OIG Response to OGC Non-concurrence

On July 15, 2003, VA competitively awarded a Task Order to Unisys for the development and maintenance of the PFSS. The awarded Task Order was valued at $140 million over 10 years. This PFSS project was congressionally mandated. After a long history by Unisys of failing to meet established contract deadlines, VA terminated the contract.

Our report concluded that the OGC initially concurred with actions proposed by VA to terminate the Task Order with Unisys for cause, but after the Notice of Termination was issued to Unisys, reversed its position and rendered a decision that termination for cause was not legally supportable. We found that OGC's initial support and subsequent reversal were rendered without conducting a review and analysis of the facts necessary to make those decisions. By failing to conduct a review and analysis, OGC abdicated its responsibility to provide legal support to VA program and contracting officials. As a result, VA terminated the contract for convenience and paid Unisys for the percentage of the work that had been performed, plus travel costs.

Our review and analysis found that there were sufficient grounds to terminate the task order for cause. However, because of OGC's failure to conduct the review and analysis needed to determine if a termination for cause was justified and supportable, VA lost the opportunity to proceed with the termination for cause. This greatly reduced VA's ability to leverage a more favorable financial settlement to purchase the work completed.

We also found that OGC provided incorrect advice to VA that the contract would expire on October 1, 2006, without any further liability to VA. This advice, which was once again provided without reviewing the contract file, was incorrect because there was no contractual relationship between the outstanding deliverables and the option years.

After VA program and contracting officials requested legal support concerning actions that were likely to lead to litigation, OGC had a responsibility to provide sound and competent advice that is based on a review and analysis of the facts and applicable law. Based on our findings, we recommended appropriate administrative action against the OGC attorneys who did not act in the best interest of the Government by failing to meet this responsibility. To prevent similar problems in the future, we recommended that when termination of a contract or task order is being considered, that OGC be required to conduct a thorough review and analysis of the facts and provide a written opinion on whether the action is legally supportable to program and contracting officials.

On January 16, 2007, the Acting General Counsel responded with a non-concurrence to the findings and recommendations. On January 19, 2007, OGC provided a supplemental response. Our reviews of these responses determined that no information was provided that refutes the findings and conclusions in our report relating to OGC, or cause us to change our recommendations. Our findings, conclusions, and recommendations are based on evidence which consists of documents and other records provided by OGC and others, as well as sworn testimony from individuals involved with the contract and the termination process. OGC did not request or review any of our evidence, including the testimony of OGC staff and others, prior to submitting the non-concurrence. We believe OGC's response to the report demonstrates their unwillingness to accept responsibility and be held accountable for the consequences of decisions made by program and contracting officials based on OGC's advice.

Overall, when the settlement was executed on September 30, 2006, VA terminated the contract for convenience and settled any claims that Unisys may have had against VA. Although VA paid Unisys approximately $30 million over the life of the contract, PFSS was never fully developed or implemented. In response to the draft report, the Acting Under Secretary for Health stated that completion of the PFSS project will not be pursued due to lack of IT funding.

For a chronology of events supporting the findings and recommendations presented in the report concerning OGC, and our response to specific OGC comments, see Appendix E.

*(original signed by Jon A. Wooditch,
Deputy Inspector General for:)*
GEORGE J. OPFER
Inspector General

Introduction

Purpose

At the request of the Deputy Secretary of Veterans Affairs and the Chairman, House Veterans Affairs Committee, the Department of Veterans Affairs Office of Inspector General (OIG) reviewed issues relating to a contract with Unisys for the Patient Financial Services System (PFSS). The review looked at issues concerning contract costs, contract administration, and contract termination.

Background

In furtherance of a congressionally mandated program to improve and update the Veterans Health Administration (VHA) financial system, VA solicited proposals for the integration of commercial off-the-shelf-software (COTS) to upgrade PFSS. The goal of PFSS was for VHA to improve on its ability to collect first and third party payments from eligible veterans and private health care insurers for care provided at VA facilities. The program was to be a comprehensive, integrated billing and accounts receivable system with standardized business practices. The goal was to realize greater efficiencies and revenue collection than was possible through VA's existing legacy system, VistA.

On July 15, 2003, VA issued Task Order CBOPFSS10001 against Unisys' Federal Supply Service (FSS) contract for Information Technology (GS-35-0343J). Under the task order, Unisys was to implement COTS to manage PFSS. The task order was firm-fixed-price with payments based on the acceptance of specific deliverables; subsequently, the order was modified 12 times. Travel expenses were reimbursable based on actual expenses in addition to the firm-fixed-price for the deliverables. The initial estimate of the project was $135.6 million over a 10 year period. VA spent $16,691,657 on the PFSS project through September 2006.

Contract performance delays were experienced during the infant stage, which was attributed to both parties. Unisys' continued failure to deliver products as required by the contract continued to delay PFSS project completion. In the spring of 2005, VA considered terminating the task order for cause but, after studying the options and the potential impact on the product, VA issued Modification 9 on August 5, 2005, at Unisys' request. The modification restructured the contract and established new deliverable dates, broken down into iterations. Shortly after Modification 9, Unisys missed the first deliverable deadline and the same problems continued. By early 2006, the relationship between VA and Unisys deteriorated to the point where it was agreed that the only alternative was to terminate the contractual relationship. Because Unisys defaulted on the contact by not providing the deliverables specified by the contract, a termination for cause (default) was considered appropriate. VA put Unisys on notice through a cure letter, dated May 18, 2006, and a show cause letter dated June 30, 2006, and Unisys

responded to both. The Office of General Counsel (OGC) was involved in the discussions surrounding the termination and reviewed and approved all documents pertaining to that action. However, on July 13, 2006, the former General Counsel became involved in the process. Based on advice from the Assistant General Counsel for Professional Staff Group V, he ordered the contracting officer to cease all actions to terminate for cause. On the same day, the contracting officer sent a letter to Unisys telling them to stop work. The following week meetings were held with Unisys to negotiate a settlement through Modification 13 to the task order. However, disagreement ensued within VA as to whether this was the appropriate action and, if so, whether the settlement amount was fair and reasonable.

To resolve these matters, the Deputy Secretary asked the Office of Inspector General to review the matter and advise him on the alternatives available to VA. All work to complete Modification 13 was suspended pending the review. The results of this review were provided to the Deputy Secretary on September 18, 2006. On or about September 30, 2006, VA and Unisys agreed to mutually terminate the contract and reached a settlement. The settlement agreement of $12,000,000 included $9.5 million for the percentage of work completed and the potential payment of up to $2.5 million for travel costs. These costs will be paid if Unisys provides the proper documentation to support claimed expenses.

Scope and Methodology

In addition to the request from the Deputy Secretary, the Chairman, House Veterans Affairs Committee, requested a review of the entire contracting process relating to the PFSS project including VA leadership involved in negotiating the contract, VA's project management, contractor performance, termination for cause, financial settlement of the contract, initial contract cost, modifications cost, and total cost.

To assess the issues we reviewed the PFSS contract files, program management files, OGC documents, and electronic mail messages from and among VA officials involved in all aspects of the project. We interviewed program managers, contracting personnel, senior acquisition officials, and OGC attorneys, including the former General Counsel. We also spoke with knowledgeable VA officials about funding and other issues relating to the development and integration of the program.

Results and Conclusions

Issue 1: Whether acquisition planning was adequate

Findings

The documentation provided showed that, prior to soliciting proposals, VHA complied with Federal Acquisition Regulation (FAR) 7.104, which provides general procedures for acquisition planning. The regulation states, in part, "Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award or order placement is necessary. In developing the plan, the planner shall form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel."

The FAR requires written acquisition plans and notes. The plans should include a statement of need; milestones at which decisions should be made; and they must address all the technical, business, management, and other significant considerations that will control the acquisition. We found evidence of compliance with these requirements in the following three key documents in the files that were provided to us: (i) a report by KPMG Consulting dated October 22, 2002, on PFSS Requirements and Business Rules; (ii) PFSS Vendor Market Research and Analysis Guidelines, (PFSS Guidelines) dated January 20, 2003; and, (iii) a presentation dated May 8, 2003 that describes the PFSS system and includes a schedule for completion.

The KPMG report defines the functional and technical requirements of the PFSS and provides business rules documentation. The report defines the project as a comprehensive review, redesign, and implementation of business process improvements and information technology for VHA's revenue cycle, and establishes the goal of PFSS as improving the results of VHA revenue cycle operations to a level equal to top performing commercial healthcare providers by replacing VistA Integrated Billing and Accounts Receivable applications with a COTS software product. This study appears comprehensive and served as the springboard for the software vendor market research plan. The KPMG report did not address utilizing an integrator to meet the requirements; the solution focused on software only.

The PFSS Guidelines focused on the selection of a software solution to fulfill the PFSS goal. The Guidelines were important because they established the criteria for evaluating software solutions, established a market research team, and defined the team's roles and responsibilities. The document restricted participation by the Office of Acquisition and Materiel Management (OA&MM) to due diligence, regulatory compliance, management, and eventual potential acquisition process activities. The document concluded by stating that the market research team would present their report to the PFSS Board of Directors, who, in turn, would work with OA&MM to utilize the research findings to select a

vendor or product for PFSS. We were unable to find anything in the contract file regarding the execution of the market research plan or the conclusions that may have been communicated to the PFSS Board of Directors.

The third key document was a presentation dated May 8, 2003, VHA Revenue Cycle Current vs. Future and subtitled "Milestone 1/Milestone 2 Decision Briefing Prototype Development Approval." The briefing was conducted by VHA's Chief Business Office Program Manager and the PFSS Project Manager. The presentation included an organization chart of the Project Team, and stated the purchase of COTS software would be accomplished through the acquisition of a Systems Integrator Contractor. It further stated the acquisition of integration services would include:

- Systems integration services to install interface and maintain the COTS product.
- Patient Management, Billing, and Accounts Receivable software license(s) to support prototype.
- Supporting hardware and install services for the prototype.

One slide in the presentation, "PFSS Schedule," included a milestone chart of the planning process which shows the definition of the conceptual solution began on June 3, 2002, and the selection of the system integrator would be completed by May 30, 2003. The milestone chart showed the selection of an integrator as a separate task from acquiring and accepting COTS software to be used in the integration. The chart showed contract negotiations for the software were also expected to be competed by May 30, 2003. The presentation clearly shows that two separate contracting actions were contemplated–one for integration services and one for software. We did not find any documents that explained why only one contract was ultimately awarded. However, there were several documents stating that while performance problems existed with Unisys, there were no problems with the subcontractor IDX, the software developer. Separate contracts, as recommended in the initial plan, would have allowed VA to terminate the contract with Unisys for cause without affecting VA's ability to continue working with IDX. In the end, one of the issues VA faced with terminating Unisys for cause was VA's desire to keep IDX to complete the PFSS project.

This presentation also included a 10-year spending projection for PFSS, which reflected a budget of $135.6 million and was to be staffed by 105 full time equivalent employees, including 15 contractor employees. Integration was to be concluded by 2005, and maintenance was budgeted in the option years.

Conclusion

We concluded that VHA generally complied with the requirements of the FAR concerning acquisition planning.

Issue 2: Whether the solicitation and award were conducted properly

Findings

There was little documentation in the contract file relating to the solicitation and award processes that occurred after the requirement was defined and the acquisition plan completed. These required processes include synopsizing, issuing a solicitation, evaluation of proposals, negotiations, contract preparation, and contract award [FAR part 7 and VA Acquisition Regulation (VAAR) 807].

Although documents in the contract file referenced a statement of objectives (SOO), it was not in the file. After making inquiries, we were able to obtain the SOO from the contract administrator. The use of a SOO indicates the use of performance based contracting, FAR part 37, which is encouraged by GSA when ordering from their IT schedule. We found no evidence that options other than GSA's IT schedule were considered, such as full and open competition.

VA's request for quotation (RFQ) was not in the files and there was no timeline to show when the RFQ was issued, or how prospective bidders were selected. Correspondence showed at least five vendors responded to the RFQ and VA's first choice, Booz Allen Hamilton, withdrew their offer on or about June 4, 2003. After Booz Allen withdrew, VA contacted the other bidders to address concerns with their proposals. Documents in the file show VA contacted Unisys, IBM, and Micron to schedule meetings to clarify their proposals and to communicate some changes to the SOO. It was not clear who the fifth vendor was or what happened with that vendor's proposal.

There was no documentation relating to the technical evaluation of each proposal or showing how the selection was made other than to say the basis of award to Unisys was best value and they were second choice to Booz Allen Hamilton, who withdrew their offer. Although there appeared to be concerns about the remaining offers, including Unisys, there was no indication as to the nature of the concerns, and whether or how they were resolved. Absent information relating to the technical evaluations, we cannot express an opinion about the source selection process.

With respect to the task order awarded to Unisys, we have several concerns with the format of the contract. These concerns include attaching the SOO to the task order, the use of option years, and the lack of a comprehensive award document.

We found the mandatory procedures for performance based procurements were not followed [FAR Part 37]. Under FAR Part 37, offerors are required to develop and submit technical proposals that address the SOO and show how they will fulfill the stated program objectives. Once the contract is awarded, the awarded offeror's technical proposal becomes the statement of work and is the basis for measuring contract

performance and the SOO is no longer relevant. Here, the contracting officer included the SOO and Unisys' technical proposal as attachments to the VA Form 0737, Task/Delivery Order for Supplies or Services. This violated FAR 37.602(c), which states the SOO is not to be included in the resulting contract. The SOO and Unisys' technical proposal in the task order resulted in disputes between VA and Unisys, which made it more difficult to hold Unisys accountable.

The SOO included a provision for option years, something which is not appropriate for the procurement of a system, or any other deliverable, that may take more than one year to complete. This resulted in unnecessary confusion when VA decided to terminate the relationship with Unisys on this contract.

We also found the initial award used a phased methodology of acquiring the system desired and assigned the phases to optional periods of performance. However, the deliverables associated with the described phases did not coincide with any specific option year. For example:

- The base period was from date of award through September 30, 2003. Phase 1(a) deliverables were not due until October 30, 2003, which fell into option period 1.
- Modification 2 included a deliverable schedule with deliverables due every month through January 2005.
- Modification 6 spread the deliverables out through December 2005.
- Modification 9 included deliverables through October 2006.

Because none of the deliverables was aligned with a fiscal year, the implementation of option years was not related or relevant to performance. Although OGC advised VA officials that a decision not to exercise the option year beginning on October 1, 2006, would end the relationship with Unisys, we concluded that this was not accurate. While not exercising the option year may have precluded Unisys from starting work on deliverables or iterations, VA would still be liable to pay for any work Unisys had performed as of September 30, 2006.

It appears the use of option years may have been related to funding. However, there were no provisions in the task order or the modifications that required VA approval before Unisys commenced work on any specific deliverable or iteration. If funding was an issue, VA should have incorporated the FAR clauses that addressed incrementally funding a contract, and the availability of funding.

FAR 37.602 (c) states that a period of performance should be included in the SOO; however, VA included a base period and option years. A more appropriate method would have been a multi-year contract with deliverables occurring over the period of

project performance. If funding was an issue, the task order should have included a provision prohibiting the contractor from beginning work on any phase of the project without written authorization from the contracting officer, and continuation of the project's phases would be dependent on the availability of funding. This methodology would not have hindered the Government's right to cancel at any time either due to non-performance or because of lack of funding.

We also found the task order was not a comprehensive document and relied on attachments to make the document complete. The task order, which awarded a $140 million dollar contract, was a three page document, with attachments. The task order relied on attachments identified in blocks 8, 15, and those incorporated by reference in the text on page 3. Additionally, the second page of the order stated: "FAR clauses 52.227-16 and 52-227-19 are hereby incorporated and included into the terms and conditions *if not already present within the UNISYS GSA Schedule* contract." (Emphasis added) This shows the Contracting Office did not review the GSA contract prior to awarding the task order.

The governing GSA contract, containing terms and conditions applicable to award made against GSA schedule contracts, was not in the contract file. These terms and conditions were essential to both the award and administration of the task order and should have been in the contract file. VA failed to follow GSA ordering procedures requiring travel to be awarded based on a not-to-exceed (NTE) amount. Instead, the VA task order included a rough order of magnitude (ROM) which represents an estimate rather than a NTE amount. As a result, the burden of managing travel expenses fell on VA rather than on Unisys and put VA at risk of overpaying travel expenses.

Conclusion

There appears to have been adequate competition; however, the absence of critical documentation in the contract file regarding the solicitation and award processes prevented us from being able to fully assess whether VA properly evaluated the proposals and made an appropriate award. We did conclude that VA failed to follow the mandatory FAR procedures for performance based contracts.

Issue 3: Whether the contract was administered properly

Findings

We concluded VA's interests were not protected because of deficiencies in the administration of the contract. VA Acquisition Regulation (VAAR) 842.070 defines contract administration as the coordination of actions required for the performance of a contract, including the guidance and supervision necessary to assure that all contractual obligations are fulfilled. Contract administration includes a number of actions:

monitoring performance; verifying and certifying invoices; ensuring appropriate funding is available; ensuring compliance with the contract terms and conditions and contract modifications; and communicating with the contractor, the contracting officer's technical representative (COTR), and program staff. The following paragraphs discuss the key deficiencies we identified in the administration of the task order:

The contract file was not maintained properly and hampered our review. The contract file should contain all information relevant to the procurement. The file was disorganized, incomplete, and included numerous duplicate documents while important documents were missing. Contract file maintenance is a key factor in administering a contract and should contain documentation to support all contracting actions. VAAR 804.872-874 provides the standard for maintaining a contract file. The contract file did not meet basic requirements to support procurement actions.

<u>Lack of continuity in the administration of the task order</u>: Records show a high turnover of key personnel involved in the task order administration, which resulted in a lack of continuity and may have delayed VA's decision to terminate the contract. In less than 3 years, there were five COTRs and at least three contract administrators assigned to the contract since award. Contract administration is defined as the coordination of actions required for the performance of a contract including the guidance and supervision necessary to assure that all contractual obligations are fulfilled. The Unisys contract was awarded and administered by personnel within the OA&MM. A contracting officer and contract administrator were assigned to the day to day administration of the contract. Evidence in the file suggests most of the administrative duties were conducted by the contract administrator, who made recommendations and prepared documents to be executed by the contracting officer. From our review of the contract file, we concluded the contracting officer did not provide adequate supervision to the contract administrator because of the significant number of mistakes found in both the contract documents and the correspondence in the contract file. Many examples of these mistakes are addressed in this report.

The problems caused by the high turnover were compounded by the poor condition of the contract file. New personnel did not have sufficient information in the file to understand the contract's terms and conditions, or the status of various contracting actions. As such, they did not have sufficient information to properly administer the task order. The last contract administrator assigned to the PFSS contract was a contract employee, not a VA employee. The following are two examples that demonstrate the deficiencies:

- An e-mail from the contract administrator to the contracting officer, dated December 15, 2005, summarized the Modification 10 action that initially increased the contract value $1.5 million related to change requests while negotiation of a final price for the items was underway. The e-mail states that contract value increased by $1,500,000 from $139,632,769 to $141,132,769. This statement significantly understated the contract price which was $148,942,901

because the contract administrator did not take into consideration the $9,310,132 increase in Modification 9. This type of error results in problems with both funding and payment. The error demonstrates a lack of knowledge regarding modifications and/or the poor condition of the contract file.

- In an e-mail dated June 8, 2006, the contract administrator, who was assigned to the project in late 2005, asked the program administrator whether the work was fully funded, whether Phase 1(b) had started, whether ROM for travel needed to be developed for all work on Modification 9, and what amount had been invoiced to date. A contract administrator should either know the answers to these questions or be able to readily find the answers in the contract file. These questions are indicative of a lack of knowledge of the contract and contract performance and can be directly related to the poor condition of the contract file and the lack of continuity in contract administration.

We determined the lack of consistent staffing contributed to a reactive, rather than a proactive, way of administering the task order, which ultimately led to a delay in terminating the task order. In addition, there were never more than two contracting personnel working on the task order at the same time, both of whom were also responsible for administering other government contracts. We believe the magnitude of the PFSS project warranted additional personnel, especially after problems with the contractor's performance became apparent shortly after award.

Lack of communication: There was little evidence in the files of any meaningful interactions between the contracting officer and COTR. This is significant because the COTR is a technical advisor to the contracting officer on matters relating to contract performance. We found the COTR's involvement or impact on the administration of the task order was minimal. The first COTR was assigned to the contract on October 31, 2003, almost 3 months after the task order was awarded and Unisys had commenced work. Less than 4 months later, February 25, 2004, a new COTR was appointed. In less than 6 months, August 9, 2004, a third COTR was appointed, and was followed by the fourth COTR, December 12, 2005, and the appointment of the fifth COTR on June 19, 2006.

Two different versions of the letter delegating responsibilities to the COTRs were used. The letters generally covered the same duties and responsibilities, and we determined they were comprehensive and applicable to the task order. The duties included:

- Monitor the contractor's performance to assure compliance with technical requirements of the task order (with immediate notification to the contracting officer if performance is unsatisfactory). The COTR shall be responsible for the documentation of any performance problems. All written communication regarding the contractor's performance shall be submitted to the contracting officer for action.

- Review and approve progress reports, technical reports, deliverables, contractor's technical proposals, and other items required for approval.
- Review contractor's proposals; make recommendations to the contracting officer regarding the proposal. As COTR, you will participate in any resulting negotiations.
- Review and approve weekly time sheets. Time sheets will be signed by the COTR, and will be used as the basis for payment of invoices.[1]
- Participate and/or conduct scheduled meetings.
- Ensure that changes in work under the task order are not implemented before written authorization or a task order modification is issued by the contracting officer.
- Recommend in writing to the contracting officer changes desired in the task order with justification for the proposed change.

The delegation prohibited the COTR from making changes to the provisions of the task order, including increases or decreases in price, requiring additional copies of deliverables, extending completion time established in the task order, and terminating the task order and/or contract in whole or in part. A COTR's compliance with the duties and responsibilities delineated in either letter should have resulted in sound contract management. However, there was little evidence in the contract file to show that any of the five COTRs performed the duties and responsibilities specified in the letters.

<u>Contract modifications were not properly processed</u>: VAAR 843.170 requires a Standard Form (SF) 30, which includes specific instructions for modifying a contract or task order. With the exception of Modification 2, the SF 30 instructions were not followed. Modification 2 was the only modification that was adequately documented. Correctly processed, the SF 30 would have been a road map of the task order modification process, showing how the original task order valued at $137,632,769.68 was modified, which tasks were active, and the funding associated with each task.

Our contract modifications review identified actions that: (i) established expected tasks to be accomplished with and without associated funding; (ii) failed to completely described what tasks were being modified; (iii) failed to assign the proper contract value to tasks assigned; and (iv) applied funding from several sources to the tasks to be completed. Because of these inadequate contracting actions, we found it difficult to determine the ultimate value of the contract. We also found that from a financial aspect, determining amounts charged against different funding sources was confusing.

[1] The requirement for time sheets did not apply to this procurement.

In response to a review of the contract file conducted by OA&MM, in which OA&MM commented that modifications were inconsistently processed using either VA Form 0737, or an SF 30, the contracting officer asserted that either a VA Form 737 or the SF 30 can be used to process modifications. We were unable to find support for the contracting officer's position. The use of SF 30, and following the instructions therein, results in the sound processing of modifications and provides VA with a better understanding of the impact of the modification on the contract.

Modification 3 added FAR clauses inconsistent with a commercial item contract: Attached to Modification 3 was purchase order 741-V34059 executed in the VA's Integrated Funds Distribution, Control Point Activity, Accounting, and Procurement (IFCAP) system that added funding to the contract. The modification included two un-numbered sheets that added FAR clauses[2] inconsistent with the clauses contained in the GSA contract. For example, the GSA FSS contract contained FAR clause 52.212-4, which is required in commercial item contracts. This clause includes the criteria and requirements for terminating a commercial item contract. Two of the clauses referenced in the attachment to the modification, 52.249-1 and 52.249-8, provide the criteria and requirements for non-commercial item procurements and conflict with the provisions of 52.212-4. As discussed in greater detail below, this may have contributed to errors made when VA attempted to terminate the task order for default.

The contracting officer told us he added the clauses to the task order and that the IFCAP system produces a document that includes the clauses by default. He was unconcerned about the problem and inferred the IFCAP system was to blame if incorrect or inconsistent FAR clauses were added to the contract via modification. Even assuming there is a glitch in the IFCAP system, the contracting officer has the responsibility to review all documentation to ensure the integrity of the contract is maintained. If the contracting officer was aware this could happen, he had the responsibility to routinely review documents obtained from IFCAP to ensure clauses, particularly those inconsistent with clauses in the GSA contract, the task order, or another modification, were not inadvertently added to the contract. If this is a recurring problem, VA needs to take action to ensure it is resolved.

VA did not hold Unisys accountable after Modification 9 was issued on August 8, 2005: Modification 9 is an example of the impact of not following SF 30 instructions when executing a modification. In addition to being both confusing and poorly documented, we could not identify the specific documents that were intended to be included as part of the modification. There were several documents included with modification 9 in the contract file. However, since these documents were not indexed or labeled we could not clearly recognize and understand their connection to the modification. It was not clear whether several of the documents related to the modification were missing or misfiled.

[2] The clauses added include 52.233-1 (Disputes), 52.243-1 (Changes – Fixed Price), 52.249-1 (Termination for Convenience of the Government – Fixed Price), and 52.249-8 (Default – Fixed Price Supply and Service).

For example, the following text is from VA Form 0737 that was used to execute the modification:

> "Modification 0009 to Task Order CBOPFSS001 against Unisys Schedule GS35F0343J is hereby implemented accepting the Data Conversion Proposal of July 14, 2004, modified after negotiations to include Dayton, VAMC and the Patient Management Proposal of November 11, 2004, that also includes the December 1, 2004, addendum."

Included separately in the modification were iterations 1, 2, and 3 attachments explaining in detail the new iteration process. Of the documents cited, the only document clearly labeled was Unisys' November 11, 2004 proposal, PFSS Patient Management Proposal. Form 0737 further states: "Attached herein are exceptions VA has to the July 14, 2004, Data Conversion proposal and are hereby removed."

There was no attachment to the Form 0737 that addressed exceptions and we were unable to determine what was meant by "hereby removed." The absence of the attachment made the statement, which appears to be internally inconsistent, more confusing. We also found other attachments were not properly identified or cross referenced to the Form 0737. We found documents in the contract file in close proximity to Modification 9 that could have been attachments 1, 2, or 3 but, because they were not labeled appropriately, we could not verify whether they were the cited attachments.

One of the records that may or may not be part of Modification 9 is an undated, unsigned document titled VHA Patient Financial Services System Data Conversion Proposal. The only connection between the document and the modification is that it contains at least one of the line items[3] included in the funding amount.[4] The modification did not provide sufficient information to show how the contract value changed as a result of the proposal. In addition, the proposal should have been incorporated by reference and should have been clearly labeled as an attachment to the modification.

Another document in the file with Modification 9 was an undated Power Point presentation, titled "PFSS Contract Mod 9 Roadmap." This presentation is the only record we could find that referenced additional travel expenses of $2,661,416 to support February 2006 "Go-Live." Although there was no contract document to support this amount, the contract administrator included this amount when he provided the program manager with the budgeted travel amount. There should have been a contract document that specifically added this amount to the contract price.

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[3] This proposal included $5,778,205 in labor and $888,094 in travel which could be reconciled to the spreadsheet dated October 19, 2005, converting the program to the "iterative" methodology. These two amounts are classified in the spreadsheet as "Patient Management" under the column heading "PM."

[4] An email from the contract administrator to the program manager on July 5, 2006, breaks down the funding as $7,760,761 (services) and $1,064,003 (travel).

The execution of Modification 10 demonstrates poor planning: The contracting officer executed Modification 10 on November 28, 2005, and had an effective date of October 1, 2005. This modification served three purposes: (i) added funding to the contract; (ii) retroactively executed an option year; and, (iii) added tasks to the contract that were to be definitized at a later date. The modification cites Unisys' proposals dated June 9, 2005, and September 19, 2005. Considering the close proximity in time to the execution of Modification 9, this demonstrated poor coordination and planning. These tasks should have been identified and included in Modification 9. Adding the tasks via Modification 10 resulted in confusion in determining how much VA would owe Unisys if the contract was terminated for convenience, instead of for cause.

Conclusion

We concluded that VA's interests were not protected because of deficiencies in the administration of the contract. We found the high turnover rate of VA personnel working on the contract, poor communications, and a poorly maintained, disorganized and incomplete contract file contributed to poor contract administration.

Issue 4: Whether VA took appropriate and timely action to address contractor performance before and after Modification 9

Findings

The documentation and interviews showed that there were many problems with the contractor's failure to deliver acceptable products by the dates specified in the task order. The problems surfaced almost immediately after contract award and continued throughout. As the progress of the project continued to lag, both sides attempted to blame each other for the delays and the failure to meet appropriate schedules. Because of the myriad of problems in 2005, VA officials considered terminating the contract with Unisys. On March 9, 2005, the contracting officer issued what appears to be a cure notice which identified all the deficiencies and requested that Unisys submit a correction strategy. Unisys' response listed a host of complaints about VA, including a complaint that delays by VA in testing and accepting deliverables contributed to the delays. After researching the matter and exploring alternative courses of action, senior management agreed to extend the contract another year, Fiscal Year (FY) 2006.

The OIG's Chief Information Officer reviewed project management documentation to gauge the quality of the Unisys program and deliverables. He reviewed program management plans, requirements management documents, work breakdown schedules, functional analysis documents, configuration management plans, and system requirements and specifications. He concluded that Unisys appropriately followed program management guidelines resulting in a well run project with high quality

deliverables. Documentation prior to Modification 9 showed that some of the missed deadlines for deliverables were directly attributable to issues encountered with VHA's legacy computer systems while others were not attributable to VA.

In an attempt to reach an accord, both parties agreed to resolve all outstanding issues with Modification 9, issued August 8, 2005. Modification 9 was a critical contracting action because it significantly redefined the agreement between VA and Unisys. The intent was to reconcile all issues with contract performance and monitoring for both parties. The changes in Modification 9 were based on a proposal submitted by Unisys. They were significant because they re-formatted the deliverables into iterations in lieu of phases, changed the dates the iterations would be completed, and added $9,310,132 to the contract value. Witnesses told us that Modification 9 was supposed to be a new beginning. The hope was that the project would get back on track and real progress could be made toward achieving completion.

However, Unisys continued to miss deadlines delaying the project even longer. Within 5 weeks after Modification 9, Unisys defaulted by not meeting the October 7, 2005, deadline for Iteration 3. Iteration 3, the key component of IDX Flow Cast, was not delivered and accepted until April 2006, 6 months after it was due. By January 26, 2006, Unisys was late on 13 deliverables prompting a letter from the contracting officer requesting Unisys to rectify the situation. The program manager told us that all the iterations were delivered at least 4 months late. The January 26 letter did not bring resolution to the situation and no further action was taken until the spring of 2006. By this time, the relationship between VA and Unisys deteriorated to the point where it was determined the relationship should be terminated. In May 2006, the contracting officer decided to terminate the contract for cause.[5] Although the program manager agreed the relationship needed to be terminated, she relied on the contracting officials to take the appropriate action.

The contracting officer sent Unisys a cure letter on May 18, 2006, advising them of the problems with the contract and inviting their response. On June 30, 2006, a Show Cause letter was sent to Unisys advising them of VA's position and gave Unisys an opportunity to respond with reasons why termination for cause should not occur. Neither letter was required under the applicable FAR provisions. On July 13, 2006, VA sent a letter to Unisys that was identified as a termination for cause letter, but in reality was a stop work order.

The contracting officer did not use the proper procedures for terminating a commercial item contract for cause. He followed the requirements in FAR Part 49. Terminations of commercial item task orders or contracts are governed by FAR Part 12, not Part 49. FAR Part 12, specifically states that the concepts in the applicable FAR clause, 52.212-4,[6]

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[5] The terms "cause" and "default" are often used interchangeably.
[6] FAR clause 52.212-4 is contained in the governing contract between GSA and Unisys.

differ from those contained in the termination clauses prescribed in Part 49 and, consequently, the requirements of FAR Part 49 do not apply [FAR 12.403]. Contracting officers are required to follow the procedures in this section. FAR 12.403 references the "excusable delay" provisions in FAR clause 52.212-4 that requires contractors to notify the contracting officer as soon as possible when there is any excusable delay. The purpose of placing the burden on the contractor is to eliminate the need for a Show Cause notice prior to terminating a contract. In addition, a Cure Notice is required prior to termination of a contract when the basis for the termination is any reason other than delay [FAR 12.403].

Unisys did not meet the Modification 9 deadlines and never notified the contracting officer of any excusable delays. Therefore, under FAR 12.403, VA had the right to terminate the contract for cause when the default occurred, if such an action was determined to be in the best interest of VA.

The contracting officers' actions, with consent by OGC, demonstrated they either did not know or understand the differences between a FAR Part 12 and FAR Part 49 termination for cause or that the procedures established in FAR Part 49 were inapplicable to the termination of a commercial item contract.

Although the contracting officer initiated the termination for cause on his own initiative, all of the documents and steps taken relating to the termination process were coordinated with and reviewed by OGC, Group V staff. OGC reviewed the cure letter, the show cause letter, and other correspondence and deemed them legally sufficient. For example, records show OGC reviewed the cure letter, offered suggested changes in language, and agreed the letter could be sent out. There was no evidence of any meetings or discussions between the program manager, the contracting officer, and OGC to discuss whether a termination for cause was in the best interest of VA or if there was a better alternative.

On July 13, 2006, the Deputy Secretary was briefed on the status of the PFSS project. He was surprised to learn the contract with Unisys was about to be terminated since he had not been previously notified of the decision. The Deputy Secretary directed the General Counsel to provide him with a status of the situation. Late that afternoon, the General Counsel held a meeting with senior officials and others involved in the PFSS project. At that meeting the General Counsel halted the termination action and decided the best course of action for VA would be to let the contract expire on September 30, 2006. He based that decision in part on advice given by the Assistant General Counsel for Professional Staff Group V, that a termination for cause could not be sustained if Unisys filed a claim. We were unable to determine the basis for the Assistant General Counsel's opinion because we found no evidence that she, or anyone else in Group V, reviewed the contract files, spoke with the contracting officer or the program manager, or prepared a legal analysis before rendering this advice.

Shortly after the July 13, 2006, meeting, Modification 13 was proposed with the intent the parties would negotiate a final settlement and agree to mutually dissolve the contract. Prior to that proposed settlement, the Deputy Secretary asked the OIG to review the matter and provide him with sufficient information and recommendations for a course of action.

Conclusion

We found that, from the beginning, Unisys repeatedly failed to deliver acceptable products by dates specified in the task order. Although Modification 9 was intended to resolve all disputes between the parties with respect to performance, the contractor continued to miss deadlines without notifying the contracting officer of any excusable delays. VA failed to develop and implement a plan to monitor performance and take action as soon as Unisys failed to meet the deadline for the first deliverable which affected VA's ability to terminate for cause. When action was taken to terminate for cause, the decision was not coordinated to ensure it was in the best interest of VA. In addition, the contracting officer and Office of General Counsel applied the wrong standards, which developed the action unnecessarily.

Issue 5: What was the appropriate action to terminate the Task Order with Unisys

Findings

At the request of the Deputy Secretary, we reviewed the planned actions, researched the law, and looked at the advantages and disadvantages of the termination options. In mid-September, we provided him with our preliminary findings, a discussion of the available options, and recommendations. Discussion of those options is below.

After the decision on July 13, 2006, to halt the termination for cause, the following options were discussed by OGC, OA&MM, VHA, and others relating to this task order: termination for cause, termination for convenience of the Government, and allowing the contract to expire on September 30, 2006, by not exercising the option year.

The procedures for terminating task orders issued against GSA contracts are found in FAR 12.403 and FAR clause 52.212-4, Contract Terms and Conditions-Commercial Items. Paragraph (m) authorizes the government to terminate the contract, or any part thereof, for cause in the event of any default by the contractor or if the contractor fails to comply with any contract terms and conditions or fails to provide the government with adequate assurances of future performance. If a task order is terminated for cause, the government is not liable to the contractor. Based our review of the records and interviews with key personnel, we concluded there was sufficient and supportable justification to terminate the task order for cause. The terms of the task order required

Unisys to satisfactorily complete specific tasks on or before dates specified in the task order, which Unisys clearly failed to do.

In addition to providing for a termination for cause, FAR clause 52.212-4 (l) provides for termination for the sole convenience of the government. In contrast to a termination for cause where the government is not liable to the contractor for any cost incurred for unacceptable deliverables, subject to the terms of the contract, the contractor is entitled to be paid a percentage of the contract price reflecting the percentage of the work performed prior to receiving the notice of termination. If the task order was terminated for convenience, VA would be liable for a percentage of the work performed.

Meetings and e-mails between OGC and other parties suggested that by not exercising the next option year, the task order would expire on September 30, 2006, with no financial impact on VA. We found no legal review or analysis was completed to verify whether this option was legally supportable, would achieve the anticipated results, or was in the best interest of VA. We reviewed the task order, modifications, other documentation, relevant case law, and concluded this was not a viable option. As discussed above, the task order and modifications, in particular Modifications 9 through 12, were firm-fixed-price for specific deliverables with specific delivery dates that were not funded or otherwise related to an option year. Although the task order included option years, the services provided in those option years did not relate to the deliverables in the task order or Modifications 9 through 12.

Although termination for cause was a viable option, we did not find any evidence of discussions or analysis regarding whether it was the best option for VA, prior to the decision by the former General Counsel to halt the termination for cause. We did not find a comprehensive review or analysis of the issues to determine the consequences of a termination for cause versus a termination for convenience. There was no cost analysis performed to determine the financial impact of a termination for cause versus a termination for convenience. There was no analysis of potential risks in the event of litigation. We also found no analysis showing the cost to VA if the contract was terminated for cause versus the cost VA would incur by paying Unisys to acquire ownership of the work completed and the outstanding deliverables, if the contract was terminated for convenience.

Based on our review of all the information and interviews with key personnel, we advised the Deputy Secretary it would be in VA's best interest to terminate the task order with Unisys for convenience with a settlement along the lines of what had been proposed in draft Modification 13.

Under the provisions of FAR 52.212-4, when a contract or task order is terminated for the convenience of the Government, the Government is required to pay a percentage of the contract price that relates to the percentage of the work completed. To determine whether the amount proposed in draft Modification 13 was fair and reasonable, we

reviewed records related to the development and integration of the program. We found no evidence VA estimates of percentage of completed work were inaccurate. We were told VA used a software configuration management system to test the program's developmental state in order to determine the percentage of work completed. Although we did not conduct a study to verify those results, we reviewed the documentation and interviewed the program manager and are satisfied VA's approach was a valid determination method. Therefore, with respect to the settlement agreement set forth in draft Modification 13, we did not take exception to the amount related to the percentage of work completed on the task order.

Conclusion

Based on our review in September 2006, we advised the Deputy Secretary that it would be in VA's interest to terminate the task order for convenience and attempt settlement along the lines of what had been proposed in Modification 13. We found that VA did not conduct a comprehensive analysis or comparison of the options available to terminate the relationship nor was there any analysis of the consequences of the actions.

Issue 6: Whether VA properly assessed payment for travel expenses

Findings

Approximately $3.5 million of the $12 million proposed settlement in draft Modification 13 related to Unisys' claim for unpaid travel expenses. In our recommendation to the Deputy Secretary, we took exception to paying any travel expenses because Unisys had not submitted invoices and/or the required supporting documentation as required by GSA regulation. We recommended no payment be made for travel until Unisys submitted appropriate documentation to support the claimed costs. In fact, Unisys had not submitted invoices for approximately $2.8 million of the claimed $3.5 million. Our recommendation was incorporated into the final agreement and Unisys will be required to submit the proper documentation before VA pays any claimed travel expenses.

After providing the Deputy Secretary with our preliminary findings, we continued to review documentation relating to the award and administration of the task order. Buried in the records, we identified an issue that could have an impact on the amount of travel costs that VA may be asked to pay as part of the negotiated settlement terminating the contract.

We found the task order prices used to calculate the amount owed under the settlement agreement for the percentage of work completed for Iterations 3 and 4 included a portion of estimated travel costs in the amount of $548,175. Costs related to travel should not have been included. This occurred because when the contracting officer approved

Modification 12, which increased the prices for Iterations 3 and 4, the costs for travel were improperly embedded in the price and not listed as a separate line item. We realized this when we reviewed documentation showing how Unisys calculated the price for the additional work. Because VA already paid approximately $548,175 for travel costs for these iterations in the $9.5 million portion of the settlement, we advised VA that any travel claim relating to Iterations 3 and 4 should be rejected unless Unisys can show the costs were not included in the total price for the iteration used to calculate the $9.5 million payment and provides adequate documentation to support the travel.

We also found a lack of communication with the program staff regarding the amounts budgeted for travel. An email dated June 6, 2006, from the program manager to several VA employees (including both the contracting officer and the contract administrator) asked about the total travel budget for the PFSS project. We compared the responses and all the cost figures cited in the response and concluded that neither the contracting office nor the program office was aware of the amount budgeted for travel.

Conclusion

We concluded VA should not pay any travel expenses until Unisys submits an invoice with appropriate documentation supporting the claimed costs. We also found VA erroneously paid $548,175 for travel costs for work in Iterations 3 and 4.

Issue 7: Whether funding issues were properly evaluated in determining appropriate action

Findings

Draft Modification 13 prompted a review of contract funding and expenditures of the funds that had been appropriated. Correspondence within VA shows concern that a termination for cause would result in the loss of funds obligated against the task order because the funds were obligated from appropriations that have since expired. Because there was no funding in FY 2007 appropriations, there was concern the loss of existing funding would affect the completion of the project. Information provided by VHA showed if the task order was terminated for cause, approximately $15 million in funds would be at risk because they were from prior year appropriations that have expired and were not previously deposited in the 1VA Fund.[7][8]

[7] There is $22 million in unspent funds that have been obligated under this Task Order. Of this amount, only $5,768,323 will not be returned to expired appropriations because it was obligated to the Task Order from the 1VA Fund and can be returned to the 1VA Fund.

[8] Of the $17 million that has been obligated using appropriated funds, $3.7 million is from FY 2004, $11.8 million from FY 2005 funds, and $1.8 million from IT Funds for FY 2006. The $1.8 million for FY 2006 is from a 2-year appropriation and can be re-obligated when a new contract is issued.

Although continued funding was an issue VA needed to address, we concluded the impact on funding would be the same with the implementation of any option that ended the contractual relationship with Unisys. If the task order was terminated, for cause or convenience, or if it expired at the end of the option year, the unspent funds obligated against the task order would be de-obligated and returned to the expired appropriations.

It was suggested that the impact on funding by termination or expiration could be avoided if the task order was terminated and a new contract or task order was awarded to a new vendor by September 30, 2006. Based on our review of the documentation relating to funding, we concluded the impact would be the same whether the action to end the relationship was taken before or after September 30, 2006.

We discussed with the Chief Finance Officer, OA&MM, whether some or all of the funds can be placed in a 1VA Fund to be used when a new contract is awarded to complete the project. Based on this discussion and our review of the 2004 and 2005 agreements between VHA and the 1VA Fund, we concluded there was a possibility that funds from FY 2004 and 2005 obligated against the task order, but not spent, may be deposited in the 1VA Fund. In our recommendations to the Deputy Secretary, we recommended that VA further review this possibility.

Conclusion

We found that VA's concern that termination of the task order had to be completed before September 30 or VA risked losing funds obligated against the task order was without merit. Because all of the funds obligated were from appropriations that had since expired, the impact on funding would be the same with the implementation of any option that ended the contractual relationship with Unisys.

Summary of Conclusions

We concluded that the contracting process for the PFSS project was marginal at best. Mandatory procedures for performance-based procurements were not followed and VA's interests were not protected because of deficiencies in the administration of the contract. Contracting and program officials properly defined and planned for VA's requirements. The contract administration was poor which can be attributed in part to frequent turnover of VA personnel assigned to administer the contract, a poorly maintained contract file, and lack of communication between responsible VA entities, program officials, and the OGC. We also concluded VA failed to take prompt action to terminate the relationship with Unisys when it was apparent the contractor was having serious performance problems and failing to meet delivery schedules. We are unable to comment on the solicitation and award process because the relevant records were not maintained in the contract file.

Recommendations

Based on our review, we made recommendations to the Deputy Assistant Secretary for Acquisition and Materiel Management, the Under Secretary for Health, and the Acting General Counsel.

Recommended Action(s) 1. We recommend that the Deputy Assistant Secretary for Acquisition and Materiel Management take appropriate action to have VA establish policy requiring contracting officials, program officials, and OGC to meet on a regular basis to discuss contractor performance and develop a plan to address non-performance.

Recommended Action(s) 2. We recommend that the Deputy Assistant Secretary for Acquisition and Materiel Management take appropriate administrative action against the Contracting Officer for failing to ensure the actions taken to terminate the contract for cause complied with the terms of the contract and that the termination was in the best interest of VA.

Recommended Action(s) 3. We recommend that the Acting Under Secretary for Health convene a team of contract, program officials, and OGC attorneys to develop a plan to complete the PFSS project.

Recommended Action(s) 4. We recommend that the Acting General Counsel take appropriate administrative action against Office of General Counsel attorneys who approved the cure notice and show cause letters, and offered advice and guidance without conducting a review to determine whether the termination was supportable or complied with the terms of the contract.

Recommended Action(s) 5. We recommend that the Acting General Counsel ensure that when termination of a contract or task order is being considered, the Office of General Counsel is required to conduct a review and advise the contracting officer and program officials, in writing, whether the action is legally supportable.

Appendix A

Deputy Assistant Secretary for Acquisition and Materiel Management Comments

Department of Veterans Affairs **Memorandum**

Date: January 11, 2007

From: Deputy Assistant Secretary for Acquisition and Materiel Management

Subject: **Patient Financial Services System Contract Planning, Award, and Administration Review, VA Central Office**

To: Office of Inspector General

We have reviewed the subject report, and our responses to the two recommendations for the Office of Acquisition and Materiel Management are attached. We concur with both recommendations, with comments, and estimate completion of actions on both recommendations within 120 days of this response.

(original signed by:)

Jan R. Frye

Attachment

Appendix A

Deputy Assistant Secretary for Acquisition and Materiel Management Comments to Office of Inspector General's Report

Deputy Assistant Secretary for Acquisition and Materiel Management Comments to Office of Inspector General's Report

The following comments are submitted in response to the recommendations of the Office of Inspector General's Report:

OIG Recommendations:

Recommendation 1. We recommend the Deputy Assistant Secretary for Acquisition and Materiel Management take appropriate action to have VA establish policy requiring contracting officials, program officials, and OGC to meet on a regular basis to discuss contractor performance and develop a plan to address non-performance.

OA&MM Comments:

Concur, with comments. The underlying fact in this recommendation is that the PFSS program was severely mismanaged. Program costs, schedule, and performance were not properly monitored and controlled, and, therefore, necessary corrective actions were not taken when required. The result was the recent cancellation of the entire program with nothing gained for the approximately $30M spent in contract costs. The cause for this failure was poor program management and inadequate contract administration. VA has a weak culture of program management and contract administration, and PFSS is no exception. The acquisition team, lead by the program manager, did not properly manage this effort. I emphasize that the failure of the PFSS program was due to the combined failure of the entire acquisition team, made up of representatives from technical, contracting, and legal communities. While contracting officers must be properly supervised and held accountable for their actions, the same must be required of VA program managers in the execution of their programs. Proper execution begins with development of an appropriate acquisition strategy by the acquisition team, selection of the proper contract type, and effective program management and contract administration by the joint acquisition team. Periodic program reviews are often lacking, as they were in this program, and program oversight above the program manager is often only accomplished after a significant problem arises in the areas of cost, schedule, or contractor performance. This culture must be reversed. PFSS is a great example of what will go wrong without proper program oversight and contract management. Below are my recommendations for fixing the problems, with some already implemented. The OIG's recommendation that the undersigned establish a policy requiring contracting officials, program officials, and OGC to meet on a regular basis to discuss contractor performance will not solve the underlying problems in VA's acquisition culture. This is a much larger issue, and a systemic approach must be used to change our culture.

1. Use integrated product teams (IPTs) to develop acquisition plans, performance work statements (or statements of objectives), source selection plans, quality assurance plans, etc. In short, the development of all products required for the acquisition will be done collaboratively by all of the stakeholders. This approach is now encouraged by this office for all requirements over $5M. For instance, an IPT is presently developing all of the above products for Project Hero, a VHA demonstration program to maximize veterans' health care. It is the desire of the DAS for OA&MM that the use of IPTs become mandatory for appropriate acquisitions across VA. In that vein, an information letter (IL) is currently being drafted. The purpose of this IL, if approved, will be to mandate the use of IPTs for all eligible programs in the future. This effort currently has the support of VA's Chief Acquisition Officer and the VA Deputy Secretary. A copy of this IL will be provided to the OIG as part of the closeout process for this report.

2. Use contract review boards (CRBs). In the past, contracting officers have not been properly supervised in Acquisition Operation Services. Contracting officers must be supervised in their actions by their superiors in order to ensure effective and efficient contracting operations. In order to rectify this shortfall, effective December 15, 2006, contract review boards are now mandatory for all procurements estimated to exceed $5M. This requirement is codified by a written policy statement. CRBs are designed to: 1) minimize vulnerabilities leading to potential protests, disputes, claims, and litigation against the Department; 2) ensure compliance with established Federal and Department acquisition policies and procedures; 3) provide senior-level advice on contracting actions and support to the respective contracting officer; 4) provide consistency of procurements across the Department; and 5) improve the knowledge of Department acquisition personnel as they embrace and implement good business practices. Rather than just an exchange of documents, a CRB fosters an interactive exchange of ideas and solutions to complex, high visibility, and high-dollar requirements. The CRB process infuses a team atmosphere into the review program by encouraging discussion, give-and-take, and consensus building. CRBs will convene at three critical junctures during the contracting process: before the solicitation is issued, before negotiations commence (if required), and before contract award. Contracting actions will not proceed beyond any of these milestones without the express approval of the CRB Chairperson. Technical and legal personnel are also CRB members.

3. Improve program management. While OA&MM can't dictate how a program is managed by the requiring activity, we must elevate program issues to the highest levels if it appears that problems exist. Senior leaders in OA&MM must be involved in program reviews conducted by program offices. This is now taking place. For instance, this office is a major player in Project Hero, as indicated in paragraph 1 above. It is the intention of the undersigned that OA&MM senior executives will take an active role in all major acquisition programs in the future.

4. Improve contract administration. The acquisition team must work in concert to ensure successful acquisitions. As indicated above, there is a weak culture throughout VA in the area of contract administration. Often, contracts are awarded and put on the shelf, with little attention given to their proper administration. Management is often accomplished only by exception, and PFSS certainly followed this pattern. This serious flaw has been identified in previous IG and GAO reports. I have directed my staff to develop a plan to improve overall contract

Appendix A

administration in OA&MM. This plan, when completed, will be provided to the OIG as part of the closeout process for this report.

Recommendation 2. We recommend the Deputy Assistant Secretary for Acquisition and Materiel Management take appropriate administrative action against the Contracting Officer for failing to ensure actions taken to terminate the contract for cause complied with the terms of the contract and that the termination was in the best interest of VA.

OA&MM Comments:

Concur. Administrative action will be taken against the contracting officer for failing to properly perform his functions as required.

Appendix B

Acting General Counsel Comments

Department of Veterans Affairs **Memorandum**

Date: January 8, 2007

From: Acting Under Secretary for Health (10)

Subj: OIG Draft Report, Patient Financial Service System Contract Planning, Award, and Administration Review at VA Central Office (WebCIMS 369727)

To: Assistant Inspector General for Audit (54A)

1. I have reviewed the draft report, and while I agree with your recommendation for me to convene a team of contract, program officials, and Office of General Counsel (OGC) attorneys to develop a plan to complete the Patient Financial Service System (PFSS) project, I am unable to concur at present due to Fiscal Year 2007 (FY07) Budget restraints related to the ongoing continuing resolution. With implementation of the information technology (IT) appropriation and the projected length of the continuing resolution, VHA reviewed all IT projects to determine which were critical to direct patient care and for which funding was essential. The PFSS project is not included in the list of projects that will receive funding in FY07 and FY08. As a result, VHA has de-funded the PFSS project effective immediately.

2. It is important to note, however, that VHA had already met the intent of this recommendation by establishing an Integrated Product Team (IPT), chaired by the VHA Chief Business Office (CBO), VA Office of Acquisition and Materiel Management (OAMM), and the VA Office of Information executives, with membership that includes OGC, CBO, OAMM, Veterans Integrated Service Network 10, Office of Small and Disadvantaged Business Utilization, and the Acquisition Review Service in Austin, Texas. The PFSS IPT was responsible for jointly developing the acquisition strategy, determining appropriate methods for procurement, and validating that VA receives the best product during the procurement for the PFSS project. If VA decides to proceed with PFSS or a similar project in the future, I fully plan to re-initiate the necessary measures to meet the intent of this recommendation.

3. Thank you for the opportunity to review the draft report. If you have any questions, please contact Margaret M. Seleski, Director, Management Review Service (10B5) at (202) 565-7638.

(original signed by:)

Michael Kussman, MD, MS, MACP

Appendix C

Acting General Counsel Comments

Department of Veterans Affairs **Memorandum**

Date: January 16, 2007

From: Acting General Counsel (025)

Subj: Patient Financial Services System Contract Planning, Award, and Administrative Review

To: Office of Inspector General (50)

1. We have reviewed the proposed Office of Inspector General (OIG) draft report (Report) of the contracting process involving the contract with Unisys for VHA's Patient Financial Services System (PF SS). The report addresses procurement planning, contract award, costs, administration, and termination. The report is critical of the advice provided by attorneys in the Office of the General Counsel *(QGC)* and recommends that administrative action be taken against several attorneys. In addition, it recommends that *OGC* provide written reviews whenever termination of a contract or task order is being considered. **For the following reasons, we strongly disagree with the findings and recommendations of the Report as they pertain to the Office of the General Counsel.**

2. As outlined in the Report, the PFSS contract was a task order awarded to Unisys against a GSA FSS contract. Due to performance issues, in spring 2006, VA contracting personnel, with OGC concurrence, took steps to either get Unisys back on schedule or to terminate the relationship if that was unsuccessful. These actions included issuance of a cure notice an May 18, 2006, and a show cause letter on June 30, 2006. Your office contends that, since this was a commercial item procurement governed by the Federal Acquisition Regulation (FAR) Part 12, neither a cure notice nor a show cause letter was appropriate and that the contracting officer could have immediately terminated the task order for cause upon a finding that the action was in the best interest of VA. Specifically, you claim that the applicable termination for cause clause included in the contract, 52.214-4, required a contractor to notify the contracting officer as soon as possible when there is an "excusable delay." An "excusable delay occurs when the contractor's performance problems are caused by the Government.

You contend that, since such a notice was allegedly not provided, then VA had the right to terminate the contract when the default occurred. Instead, you assert that VA contracting personnel, with OGC concurrence, improperly used FAR Part 49 procedures, which generally *do* require a cure notice and a show cause letter prior to a termination for default.

3. **Your legal analysis is not correct.** FAR 12.403 provides that contracting officers may use FAR Part 49 as guidance to the extent that it does not conflict with FAR 12.403 and the language of the termination paragraphs in FAR 52.214.4. Issuance of a cure notice and *a* show cause letter

do not conflict with that section. The Office of the General Counsel has taken the position generally, and specifically with regard to the subject matter, that because the Boards and Courts have consistently opined that the contracting officer should be circumspect when rendering a decision to terminate for cause, a conservative approach is necessary. Mere lack of notification of deadlines is not sufficient to sustain a termination for cause. If the facts ultimately reveal, for example, that there was an excusable delay, the contractor relied to its detriment that the contract completion date was waived, or there was a constructive change in the scope or duration of the contract, a termination for cause would not be defensible. In the matter at hand, the advice to issue show cause and cure notices, as well as the request for additional information were attempts to determine whether a termination for cause was the appropriate and legally sustainable course of action. Indeed, in its July 11, 2006, response to the show cause letter, Unisys contended that:

> to the extent there are contractual delays, they are excusable under he terms of the contract because they were caused by acts of the government in its contractual capacity. Unisys further asserts that the government has, by its actions, waived previously established deadlines. Unisys *reiterates that it notified the government of the delays and their cause.* (Emphasis added.)

The consequence of an unsustainable termination for cause is severe in that the termination for cause is converted to a termination for convenience, resulting in paying the contractor for cost incurred. Ms. Phillipa Anderson and her staff provided this explanation to acquisition and program principals throughout the course ~f the spring and summer of 2006.

4. In the Report at page 15, paragraphs 4 and 5, it is asserted that OGC, Professional Staff Group V and specifically the Assistant General Counsel advised that a termination for cause could not be sustained without benefit of having reviewed the contract files, speaking with the contracting officer or program manager, or preparing a legal analysis. **These assertions are wholly erroneous**. The staff attorney, [redacted], his supervisor, [redacted], the Deputy Assistant General Counsel, and [redacted] the Assistant General Counsel, had been working with the Acquisition staff, as well as the program office since February 2005 on matters relating to the subject contract, the contractor's performance and options before VA on how to proceed. [redacted] regularly attended meetings and otherwise discussed with the Acquisition staff and the program office's staff matters arising under the contract, specifically contract performance issues. As the performance issues became more critical, his supervisors also attended many meetings and were routinely briefed by [redacted]. Consequently, they became well-versed in performance issues surrounding this contract. Specifically, with regard to whether the contractor's performance placed it in jeopardy of being terminated for default, Professional Staff Group V consistently advised acquisition and program principals that a termination for default is difficult to support generally, and specifically with regard to the PFFS contract. In fact, throughout the course of deliberations in the spring of 2006 regarding the decision as to whether a show cause letter was appropriate. [redacted] informed acquisition and program principals that before he could advise that a termination for default was defensible, he needed to review additional documentation. In June of 2005, a briefing paper prepared by [redacted] for the Deputy Secretary sets forth Professional Staff Group V's

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reservations. (See Attachment 1.) In July of 2006, an email message from [redacted] to [redacted], the contracting officer reiterated his need for the review of documents not contained in files previously reviewed. (See Attachment 2.) Throughout the spring and early summer of 2006, Professional Staff Group V consistently advised that given what information they had before them they were not prepared to concur in a termination for cause. The Assistant General Counsel has defended terminations for default before the Board of Contracts Appeals. She routinely participates in deliberations by contract administrators on the propriety of terminating a contract for default. She has lectured on contract performance issues, including termination for default. Given her expertise concerning the legal bases for terminating for default, there was no operational need to prepare a written "legal analysis" (however much that may have facilitated OIG's post *hoc* review of this matter).

5. In the Report at page 17, paragraph 2, the assertion is made that the OGC recommendation that not exercising the next option year would not have a financial impact was made without benefit of a cost analysis. **This assertion is in error.** Pursuant to the terms of the contract specifically and case law generally, the timely election not to exercise an option does not expose the Government to liability, i.e. the contractor is not entitled damages.

6. In the Report at page 17, paragraph 4, it is asserted that that there was no analysis of potential risks in the event of litigation. **That is wholly erroneous (see discussion above).**

7. In the Report at page 17 paragraph 5, it is stated the OIG advised the Deputy Secretary "it would be in VA's best interest to terminate the task order with Unisys for convenience with a settlement along the lines of what had been proposed in draft Modification 13." Your draft report inexplicably fails to acknowledge that [redacted] was the lead counsel who designed this strategy and outlined the framework of the settlement; he then was part of the negotiation team that successfully negotiated the settlement.

Paul J. Hutter

Attachments

[OIG Note: Attachments to response were omitted but may be available under the
Freedom of Information Act]

Appendix D

Acting General Counsel Supplemental Comments

Department of Veterans Affairs **Memorandum**

Date: January 19, 2007

From: Acting General Counsel (02)

Subj: Draft OIG Report on PFSS Contract Issues

To: Office of Inspector General (50)

1. This supplements my memorandum of January 16, 2007, commenting on the subject draft report.

2. Given the strong exception we have taken to the findings in the draft report that are critical of OGC employees' advice and assistance in connection with this contract, I obviously disagree with the report's recommendation that I "take appropriate administrative action against" them.

3. The draft report also recommends that I:

> ensure that when termination of a contract or task order is being considered, the Office of General Counsel is required to conduct a review and advise the contracting officer and program officials, in writing, whether the action is legally supportable.

While our clients understand that OGC attorneys are available to render advice in connection with contract matters, including terminations, we obviously cannot ensure we will always be consulted whenever anyone, anywhere in the Department, "considers" terminating a contract or task order. However, you should be aware that the Associate Deputy Assistant Secretary for Acquisitions, with OGC concurrence, has issued a policy requiring the convening of Contract Review Boards whose duties would include the review "of all proposed terminations for convenience, for cause, or for default, regardless of the dollar value of the actions or contracts involved, and all proposed contract modifications valued at $1 million or more." Attachment 1 As you will note, the policy calls for OGC attorneys to be members of these review boards, and the boards are to provide written memoranda of their findings to the contracting officers. This policy is currently in effect with regard to VACO procurements, and OA&MM is making plans to roll it out to cover VA field facilities. Office of Regional Counsel attorneys would participate on field-level Contract Review Boards.

4. Concerns have been raised about whether OGC attorneys changed position on whether a termination for cause was legally defensible and the draft report states that our office made the

determination without reviewing the contract files or performing any legal analysis. We disagree. It was our consistent position, as we indicate in our January 16, 2007 memorandum, that before we could have advised that a termination for default was legally defensible, we would have needed to review additional documents. This office did concur, on July 13, in letter to Unisys styled as a "Notice of Termination." The substance of the letter, which was significantly rewritten by [redacted], states that "VA now intends to proceed with a Termination for Cause. VA would like to meet on Friday, July 14, 2006 to discuss the specifics of the termination." It further provides, "We note that in your July 11, 2006 response, you stated that Unisys is willing to enter into discussions that will lead to an amicable and equitable resolution of all issues between the parties. In the spirit of cooperation, VA is willing to entertain those discussions; however, the onus is upon Unisys to present any further evidence or proposals which Unisys deems appropriate." The letter also instructs Unisys to stop work. Attachment 2

5. The email message, dated July 13, 2006, 9:23 a.m., transmitting our concurrence, states: "Please note that while this letter addresses the issue of termination, it does not comply with all of the requirements of FAR Part 12.4. If VA follows through on its Termination for Cause, it must send Unisys a follow-up letter which complies with each of those requirements. We have reviewed the letter and find the letter itself to be legally sufficient. It is important to note that the letter could be construed as a "de facto" termination for cause. In that event, VA needs to make sure that there are sufficient grounds for such a termination. It is our understanding that the contracting office and the program office have reviewed these grounds and the evidence and feel that it is worthy of a termination for cause. Based upon this information and certification, we find this action to be legally sufficient." Attachment 3

6. In that same email string [redacted] questions whether legal concurrence is necessary. His message of July 12, 2006 to [redacted] states: "Can not wait on Counsel since they are not available and waited long enough. Nor is necessary at this point seeing that we are going to attempt a negotiation." It was our understanding as well that this letter was not intended to convey a final decision to terminate for cause but, to serve as a prelude to negotiations with Unisys in which they were advised that such a termination was being actively considered by the contracting officer. As such, the letter was legally sufficient based on the representations of the contracting officer and program office that they had reviewed the evidence and determined that the grounds existed for a termination. However, before we would have concurred in any actual termination, we would have needed to review the relevant contract files ourselves and performed a legal analysis. Indeed, on July 14, [redacted] advised the contracting officer as follows:

> When you submit the "termination for cause" package -- besides the traditional determination and findings and other supporting documentation that you deem relevant -- please include the following additional information:

1. All relevant PESR meeting notes, reports, presentations;
2. Any change requests submitted by Unisys;
3. Iteration Exit Reviews;

4. Any other relevant briefings from Unisys to VA or VA to Unisys;

5. Any documentation that we have that supports our rejection of Unisys deliverables;

6. Any e-mails, letters, or other correspondence from Unisys to the contracting office and/or the program office that state or provide support for their position;

7. Any e-mails, letters, or other correspondence from the contracting office and/or the program office that support or state our position;

8. Any other documentation which the contracting office or the program office believes would support a termination for cause.

Thus, it was clear even after the meeting of July 13, that the possibility of a termination for cause was still being considered.

7. Statements contained in the transcripts of [redacted], the contracting officer and [redacted] Acting Project Manager, PFSS Project, further evidence that the attorneys were consistent in voicing concerns as to whether a termination for cause could be supported. At page 13, beginning at line 14, [redacted] states: "General Counsel - - not to speak for them, but the advice I was given from General Counsel was that they did not believe a termination for default would be upheld, and that we should consider other options such as letting this contract option year expire, which was one of the options on the table, as well as termination for convenience." When asked whether this was before the July 13th meeting with [redacted], she replied: "Oh, yes." Throughout [redacted] interview he made statements that the attorneys wanted more information before concluding that a termination for cause could be supported. For example, at page 7, beginning at line 14, he states: "It was just a matter of, you know, they wanted more documentation to - - prove the case, which may be correct, but it was just an issue of that's one thing, and then I have an immediate problem on my hand that I had to start addressing." See also, pages 6, 18 – 22, 25, and 31 – 33.

8. Thank you for the opportunity to review the transcripts, and offer this additional explanation. As you know, OGC is engaged in ongoing discussions with OIG and OA&MM on how each can best serve the other.

Jack H. Thompson, Deputy General Counsel
Signed for

Paul J. Hutter

Attachments

[OIG Note: Attachments to response were omitted but may be available under the Freedom of Information Act]

Appendix E

OIG Response to Office of General Counsel Comments

OIG Response to Office of General Counsel Comments

On January 16, 2007, the Acting General Counsel responded with a non-concurrence to the findings and recommendations. On January 19, 2007, OGC provided a supplemental response. Our reviews of these responses determined that no information was provided that refutes the findings and conclusions in our report relating to OGC, or cause us to change our recommendations. Our findings, conclusions, and recommendations are based on evidence which consists of documents and other records provided by OGC and others, as well as sworn testimony from individuals involved with the contract and the termination process. Following is chronology of events supporting the findings and recommendations presented in this report, and our response to both the January 16, 2007, response and the January 19, 2007, supplemental response.

Chronology

July 15, 2003: VA competitively awarded a Task Order to Unisys for the development and maintenance of the PFSS. Unisys was the integrator for the system software developed by IDX, a subcontractor to Unisys.

August 8, 2005: To resolve problems over Unisys' failure to meet established deadlines for PFSS, Unisys requested a modification to the Task Order that revised the deliverables and the delivery schedule. In response, VA issued Modification 009 to the Task Order, which was considered by all parties as a new beginning for the contractual relationship.

January 26, 2006: VA sent a letter to Unisys notifying them of the failure to meet delivery dates established under Modification 009 and requested Unisys to provide an explanation for the slippage and a plan for corrective action by February 3, 2006.

February 6, 2006: Unisys responded and blamed VA for the failure to meet deadlines.

February 13, 2006: VA asked Unisys to provide specific information to support the allegation that the delays were caused by VA.

March 3, 2006: Unisys responded and continued to blame VA for the delays but did not provide the supporting information that VA requested.

March 20, 2006: The contracting office held a meeting with program and contracting officials to discuss the task order. The OGC was invited to the meeting.

April 19, 2006: The Contracting Officer (CO) drafted a cure notice to be sent to Unisys noting that it was being reviewed by the program office and OGC.

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May 16, 2006: In an e-mail, OGC advised the CO that with certain changes, they had no legal objections to the release of the letter [cure notice], but specifically stated that their review "did not address the issue of whether or not VA has the documentation or a sufficient case to prove that Unisys has in fact slipped in the performance of the contract or the actual delivery date of its deliverables."

May 19, 2006: VA issued the cure notice to Unisys with a 10-day time period to cure the deficiencies identified in the notice. The notice advised Unisys that the Government may terminate for default under the terms and conditions of the FAR 52.212-4, Contract Terms and Conditions-Commercial Items clause of the contract.

June 30, 2006: VA issued a show cause letter to advise Unisys that they failed to cure the deficiencies and gave them until July 7, 2006, to present facts to support a claim of an excusable delay, and that VA was considering termination under the default provisions of the contract. OGC concurred with the show cause letter as legally sufficient.

July 11, 2006: In their response, Unisys denied that they had defaulted and stated that any delays were excusable delays in that they were caused by the acts of VA. Once again, Unisys did not provide any specific information to support their assertion.

July 12, 2006: At 2:52 p.m., the CO sent a draft letter addressed to Unisys to the VA program office and OGC for concurrence. The letter notified Unisys of VA's intention to proceed with a termination for cause and ordered Unisys to stop work immediately.

July 13, 2006: At 9:23 a.m., OGC advised the CO that they "have reviewed the letter and find the letter itself to be legally sufficient." OGC noted that the letter could be construed as a *de facto* termination for cause. OGC further stated "In that event, VA needs to make sure that there are sufficient grounds for such a termination. It is our understanding that the contracting office and the program office have reviewed these grounds and the evidence and feel that it is worthy of a termination for cause. Based upon this information and certification, we find this action to be legally sufficient."

July 13, 2006: At 10:31 a.m., the CO e-mailed the termination/stop work letter to Unisys.

July 13, 2006: At 2:36 p.m., the former General Counsel sent an e-mail to his staff and to the Deputy Assistant Secretary for the Office of Acquisition and Materiel Management (OA&MM) requesting a meeting on the history of the contract, the cure notice, all responses, and who approved the letter that was sent to Unisys earlier that day.

July 13, 2006: At 5:00 p.m., the former General Counsel held a meeting. At that meeting, the Assistant General Counsel made a statement that a termination for cause was not legally supportable. Based on this statement, the former General Counsel decided that the Task Order would not be terminated for cause. Also on the advice of the Assistant General Counsel, the former General Counsel determined that there would not be a settlement with Unisys and the contract would be allowed to expire at midnight on September 30, 2006, by not exercising the option year. Contracting officials testified that this was a complete reversal, that OGC had been

on board with the decision to terminate for cause, and that the Assistant General Counsel had nothing to support the statement.

July 13, 2006: At 6:49 p.m., OA&MM sent an e-mail summarizing the outcome of the meeting: (1) revise the letter to clarify the subject line and VA's intent to hold discussions rather than proceeding to termination, (2) meeting [with Unisys] to be held Monday instead of Tuesday, (3) consider strategy of not exercising option year and letting contract die, and (4) develop a negotiation strategy.

July 14, 2006: The former General Counsel's response to the e-mail stated that there was nothing to negotiate, and just tell Unisys that VA was not exercising the option year.

July 18, 2006: VA met with Unisys and the parties began negotiating a settlement that would terminate the contract for convenience, which was the only option available once OGC determined that the contract would not be terminated for cause.

September 30, 2006: VA entered into an agreement to terminate the contract and pay Unisys $9.5 million to purchase the unfinished product and an additional $2.5 million for travel claims submitted with supporting documentation.

OIG Response to OGC Non-concurrence

Issue 1: In Paragraph 3, OGC made a general assertion that our legal analysis is not correct. OGC states that it is permissible to use FAR Part 49 as guidance in FAR Part 12 terminations and implies that there was a conscious decision to follow FAR Part 49 procedures. OGC asserts this course of action was taken based on OGC's advice and was necessary to determine whether a termination for cause was the appropriate and legally sustainable course of action. OGC also implies that Unisys' response to the show cause letter supports the decision to implement FAR 49 procedures.

OIG Response: OGC did not reference any specific statement in our report or provide an analysis, with supporting law or other documentation, to support their general assertion that the legal analysis is not correct. The evidence does not support OGC's claim that there was a conscious decision to follow FAR Part 49 procedures instead of the less restrictive FAR Part 12 procedures, that the decision to use FAR Part 49 was based on advice from OGC, or that these procedures were necessary to determine whether a termination for cause was the appropriate and sustainable course of action.

Although we agree that FAR Part 12 specifically provides that FAR Part 49 procedures can be used as guidance, these procedures were not necessary in this case and significantly delayed the resolution of the issues relating to Unisys' failure to meet the contractual deadlines, which resulted in increased costs and project delays. We found more than ample evidence in the file to refute the claim that the cure notice and show cause letter were necessary to determine whether a termination for cause was sustainable.

FAR Part 12 puts the burden on the contractor to notify the agency in writing as soon as possible, when an excusable delay occurs. Unisys did not meet its burden, which gave VA the right under FAR Part 12 to terminate the Task Order for cause when Unisys did not meet established deadlines and was unable to provide VA with adequate assurances of future performance. Correspondence between January 26 and March 3, 2006, shows that the CO notified Unisys of the delays and provided Unisys with the opportunity to provide an explanation and evidence to support an excusable delay claim. Although Unisys blamed VA generally for the delays, Unisys did not provide any evidence to support its position.

Our review found no evidence that would support an excusable delay claim, which should have obviated the need for a cure notice and a show cause letter. OGC was unaware of this information because they did not conduct a review and analysis of the contract files or discuss the evidence with the CO and program officials.

As support that the show cause letter was necessary, OGC cites a paragraph from Unisys' July 11, 2006, response to the show cause letter in which Unisys asserts that delays were "excusable under the terms of the contract because they were caused by the acts of the government in its contractual capacity." Unisys further alleged that VA "has, by its actions, waived previously established deadlines." OGC emphasized Unisys' assertion that "it notified the government of the delays and their cause." These statements are not unlike those made by Unisys in response to the letters VA sent between January and March or the response to the cure notice. Other than general statements, Unisys provided no evidence to support these allegations of excusable delays. We found no evidence to support the claims that VA waived deadlines or that Unisys had notified VA of any delays and their cause.

The evidence shows that the CO made the decision and started the process of terminating the contract for cause based on a request from program officials, who were frustrated with Unisys' continued failure to meet deadlines. The CO, not OGC, made the decision what process to follow and obtained concurrence from OGC during each step of the process. There was no evidence, either in the records or testimony, that FAR Part 12 procedures were discussed or that the CO or OGC was even aware that the less restrictive FAR Part 12 procedures should have been considered first given that this was commercial item procurement.

Issue 2: In paragraph 4, OGC states "In the Report, at page 15, paragraphs 4 and 5, it is asserted that OGC Professional Staff Group V and specifically the Assistant General Counsel advised that a termination for cause could not be sustained without benefit of having reviewed the contract files, speaking with the CO or program manager, or preparing a legal analysis." OGC states that these assertions are "wholly erroneous" and represents that the staff attorney, the Deputy Assistant General Counsel, and the Assistant General Counsel, had been working with the acquisition staff, as well as the program office since February 2005 on matters relating to the subject contract, how to proceed, and options. OGC does not dispute our finding that they did not prepare a legal analysis; they merely assert that there was no operational need to prepare one.

OIG Response: In addition to misrepresenting the statements in the referenced paragraphs of the report, OGC provided no evidence to support the general assertion that our finding is "wholly erroneous." Although the records reflect that OGC was involved at various times with issues

relating to the contract, neither the records nor the testimony support the level of involvement OGC claims in their response. The problems we identified and attributed to OGC were not based on whether OGC attended meetings and commented on or concurred with the cure notice and show cause letter. We based our finding on the fact that OGC did not conduct the review and analysis necessary to make a determination whether sufficient grounds for a termination for cause existed before the decision on July 13, 2006.

The staff attorney testified that he was involved prior to Modification 009 in August 2005, but that he was not aware of the performance/non-performance issues that arose after Modification 009 was issued until he was consulted in the spring of 2006 because there "was continuous slippage on the part of Unisys to meet the deliverable schedule." His testimony showed that he was vaguely aware of Modification 009 and told us, "I've heard of it. I have probably seen it. I'm not sure what's in it." Knowledge of Modification 009 and the events that transpired afterwards were critical to any determination whether there were sufficient grounds to terminate the Task Order for cause. It was evident from the staff attorney's testimony that he was not intimately familiar with the terms and conditions of the contract.

The evidence also refutes the claim that the Assistant General Counsel, who ultimately made the decision that a termination for cause was not legally supportable, was intimately aware of the facts of the case. In her testimony, she stated she had not reviewed the contract file and that she relied on briefings that the staff attorney provided. The Assistant General Counsel was unable to identify what documents she had reviewed and did not provide us with any specific documentation on which she based her advice. Although at one point in her testimony she referenced a briefing book, neither she nor anyone else in OGC provided a briefing book in response to our request for all documents relating to this contract. Based on the testimony of the staff attorney, we concluded that a briefing book addressing these issues was not prepared.

To support their position, OGC provided a briefing memorandum prepared by the staff attorney on or about June 21, 2005. This memorandum was prepared more than a year before the termination process began in 2006 and is not relevant to the issue relating to the termination. The staff attorney testified that he was asked to identify options for the Deputy Secretary and the briefing memorandum reflected those options. The result of the briefing memorandum was Modification 009, which was issued in an effort to resolve all outstanding performance issues between VA and Unisys.

Modification 009 redefined the deliverables and established new delivery dates and was essentially a *de novo* contract to complete the work under the Task Order. The June 21, 2005, briefing memorandum had no legal significance with respect to the decision in 2006 to terminate the contract. The relevant issues in 2006 were whether Unisys met the deadlines established in Modification 009, and whether the delays were caused by acts of VA after Modification 009 was issued. The fact that OGC provided the June 21, 2005, analysis to support their position shows that they are still unaware of the significance of Modification 009 on the termination action and further demonstrates their lack of knowledge regarding the relevant facts on which the decision to terminate the Task Order for cause was based.

OGC's assertion that "throughout the spring and early summer of 2006, Professional Staff Group V consistently advised that given what information they had before them, they were not prepared to concur in the termination for cause" is misleading. The records show that OGC approved the cure notice and show cause letter and determined that they were "legally sufficient." In an e-mail dated July 13, 2006, OGC not only concurred with the termination letter, but stated, "It is our understanding that the contracting office and the program office have reviewed these grounds [for termination] and the evidence and feel that it is worthy of a termination for cause. Based upon this information and certification, we find this action to be legally sufficient." There is no evidence in the records or in the testimony to show that OGC advised program and contracting officials that there was insufficient evidence to support a termination for cause. OGC was not in a position to make this determination because they had not conducted a review and analysis of the relevant facts.

OGC did state reluctance to proceed with a termination for cause. However, the evidence shows that this was based on unknown risks associated with litigation in general and not based on a review and analysis of the facts of this case. The CO told us that the staff attorney was "afraid there was something out there that would weaken our case." OGC's position is that there was no operational need to prepare an analysis. If OGC had prepared an analysis, they would have known that the delays were not caused by VA.

Issue 3: In paragraph 5, OGC asserts that the finding on page 17, paragraph 2, that the OGC recommendation to not exercise the next option year would not have a financial impact was made without the benefit of a cost analysis, is "in error." OGC states that the timely election not to exercise an option does not expose the Government to liability (i.e., the contractor is not entitled to damages).

OIG Response: It is not clear from the comments whether OGC has misinterpreted the statement on page 17, paragraph 2, or is referencing the statement in paragraph 1 on that page. Nonetheless, OGC does not dispute that a cost analysis was not performed. Rather they appear to argue that a cost analysis was not necessary because the contract would have expired and the contractor would not be entitled to damages. This issue arose for the first time at the meeting held by the former General Counsel at 5:00 p.m. on July 13, 2006. There is no evidence that OGC raised this to the program and contracting officials as an alternative to termination for cause prior to that meeting.

OGC's comments regarding the affect of not exercising the option year, further demonstrate that they did not review the contract file and do not fully understand the terms and conditions of the Task Order. Although the Task Order did have option year provisions, this allowed VA to order additional work when funding became available and bore no relationship to the work that had been ordered and for which funds had been obligated. The CO testified that there was no relationship between the tasks contained in Modifications 009-012 and the option year. His testimony was consistent with our review of the Task Order and the testimony of other VA contracting officials. Unless VA took action to terminate the Task Order, VA was required to pay for the work performed to complete those tasks.

OGC asserts in the last section of paragraph 3 that the "consequence of an unsustainable termination for cause is converted to a termination for convenience, resulting in paying the contractor for cost incurred." Although OGC is correct in stating that an unsuccessful termination for cause will be converted to a termination for convenience under FAR clause 52.212-4 (m), the statement that VA would be responsible for paying the contractor for costs incurred is not consistent with the plain language of FAR clause 52.212-4 (l), Termination for Convenience of the Government. This provision states:

> Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

As noted in the report, no one performed an analysis to determine what VA would have been required to pay if they were unsuccessful in pursuing a termination for default versus the terms of the settlement as contained in Modification 013. OGC's comments further support our position that no one considered the implications of FAR Part 12.

Issue 4: In paragraph 7, OGC criticizes the OIG for not giving the staff attorney credit for the terms of the termination for convenience settlement.

OIG Response: We did not assign credit to anyone for the settlement because the records and testimony show that it was a joint effort. We also did not blame anyone for the deficiencies we identified with the proposed settlement. The advice we provided the Deputy Secretary in September 2006 was not entirely supportive of the agreement initially proposed by VA. As OGC is aware, we found that the proposed settlement amount was flawed because it included approximately $3.5 million for travel which Unisys had not claimed and had not submitted documentation to support as required by law. OGC should have recognized that payment for travel under these circumstances was prohibited. With respect to the final negotiation of the settlement, we recommended a lump sum payment of $8.5 million, and that there was justification to increase the amount of $9.5 million, if necessary. However, at settlement VA offered $9.5 million without any effort to settle at the amount recommended.

Although our review concluded that VA had a good case to support a termination for cause, we recommended a termination for convenience along the lines of the settlement proposed in draft Modification 013. One reason for our recommendation was the fact that once OGC reversed its initial support, VA's ability to pursue a termination for cause was greatly diminished.

Issue 5: On January 19, 2007, OGC submitted a supplemental response signed by the Deputy General Counsel on behalf of the Acting General Counsel. OGC restates that it non-concurs with the recommendation for administrative action.

Appendix E

OIG Response: Paragraph 3 references our second recommendation that the Acting General Counsel "ensure that when termination of a contract or task order is being considered, the Office of General Counsel is required to conduct a review and advise the CO and program officials, in writing, whether the action is legally supportable." OGC references a recently issued OA&MM policy requiring the development and implementation of Contract Review Boards and indicates that OGC will be complying with the policy. Although not specifically stated, OGC implies that this may meet the intent of our recommendation.

The information and discussion in the remaining paragraphs of the supplemental response are essentially a regurgitation of the issues raised in the January 16, 2007, non-concurrence and is addressed in our response. All of the information provided with the supplemental response was considered during our review. The information and discussion only provide further support for our conclusion that OGC did not conduct the review and analysis required to make a determination whether a termination for cause was legally supportable.

Appendix F

OIG Contact and Staff Acknowledgments

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Appendix G

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