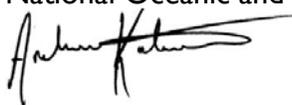




June 1, 2016

MEMORANDUM FOR: Eileen Sobeck
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration



FROM: Andrew Katsaros
Principal Assistant Inspector General for Audit and Evaluation

SUBJECT: *NOAA Fisheries' Alaska Regional Office Use of Contract Raises Issues Regarding Personal Services*
Final Report No. OIG-16-030-1

This report provides the results of our review of a complaint received in January 2015 from a confidential complainant regarding the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS, or NOAA Fisheries) Alaska Regional Office's use of grants and cooperative agreements and whether they are used to acquire personal services, thereby supplementing its full-time equivalent (FTE) workforce. We were unable to substantiate the complainant's claim; however, we did find that the regional office used a contract to acquire administrative support services, the execution and management of which contained similarities in appearance to prohibited personal services contracts, which should be avoided to ensure that NOAA Fisheries does not inappropriately supplement its FTE workforce.

We performed our fieldwork from June 25, 2015, to October 30, 2015, and we were on site at the NOAA Fisheries regional office in Juneau, Alaska, August 27–28, 2015. See appendix A for specific details on our objective, scope, and methodology.

Introduction

NOAA Fisheries is an office of NOAA within the Department of Commerce with 5 regional offices, 6 science centers, and more than 20 laboratories throughout the United States and its territories. The agency works to prevent overfishing, rebuild fish stocks, and provide economic benefits for the nation as well as fishing opportunities for commercial, recreational, and subsistence fishermen. The NOAA Fisheries Alaska Region oversees sustainable fisheries that produce about half the fish caught in U.S. waters, with responsibilities covering 842,000 square nautical miles off Alaska.

In July 2015, NOAA awarded contract number WE133F-15NC-0629 to ArcSoft Consulting for \$41,280. The contract was for 960 hours or with a period of performance ending on December 31, 2015, whichever came first. As of October 2015, due to subsequent amendments, the contract value was increased to \$49,020 and 1,140 hours. According to the award's scope of

work, the contract would provide “on-site support to the Regional Administrator’s (RA) Office including completion of data entry, filing, retrieval, copying, scanning and indexing of paper and electronic records; answering phone and directing calls to appropriate subject matter experts; drafting, publishing and distributing a variety of regulatory documents and routine correspondence; and administering the schedule for the RA Office staff.”

Finding and Recommendations

The Execution and Management of a Contract for Administrative Support Services Contained Similarities in Appearance to a *De Facto* Personal Services Contract

Under the Federal Acquisition Regulation (FAR),¹ agencies are not permitted to award personal services contracts unless authorized by statute. The hallmark of a personal services contract is the establishment of an employer–employee relationship between the government and the contractor’s personnel. The government is expected to obtain its employees by direct hire under competitive procedures, not through a personal services contract. Under Departmental guidance,² each contract’s statement of work should be carefully drafted to prevent improper continuous supervision and control over contractor personnel, and proper contract oversight is needed to ensure these practices do not occur during contract performance.

While onsite, we found a contract to ArcSoft Consulting (contract number WEI33F-15NC-0629) for a professional technical administrative support employee. This contract contained explicit language stating that the contract was for “non-personal services and that no employer–employee relationship exists between the Government and the Contractor.” However, there were several aspects of this contract that raised concerns during our review.

For example, NOAA Fisheries management participated in the selection of the contract employee and a Fisheries employee signed the contractor’s timesheet as the manager. Further, prior to awarding the contract, essentially the same services were performed by a permanent NOAA Fisheries employee who received direct oversight and supervision from a NMFS manager in the region.

Moreover, in our interviews with NOAA Fisheries employees, we also learned that the contract was awarded because the office was unable to process a direct hire due to a recent sequestration. NOAA Fisheries had 2 years’ worth of backfill positions and OPM ranked secretaries low on the list of priorities; therefore, the secretarial services were contracted. This contributed to the perception that a potential prohibited employer–employee relationship existed during the course of the contract, though there was insufficient evidence to determine that there was continuous supervision and control over contract personnel for this contract to become a *de facto* personal services contract.

¹ 48 C.F.R. § 37.104. The FAR is codified in title 48 of the Code of Federal Regulations.

² Procurement Memorandum 2015-05, “Maintaining Proper Relationships with Support Services Contractors.”

Appropriately, the NOAA contract for secretarial services does not expressly refer to personal services in describing the work to be performed. However, the previously noted features of its history, management, and execution suggest that NOAA should maintain an improved awareness with respect to its appearance as such.

While this contract has expired, to avoid this problem in the future NOAA Fisheries needs to ensure that it does not manage its support services contracts in such a way that they become—or have the appearance of—prohibited personal service contracts.

Recommendations

We recommend the Assistant Administrator for Fisheries

1. Develop a control process that restricts future awards from being managed as personal service contracts.
2. Distribute guidance to NOAA Fisheries program staff on statutory restrictions and limitations relating to personal services contracts.

Summary of Agency Response and OIG Comments

On March 21, 2016, OIG received NOAA's response to the draft report, which we include here as appendix B. Based on NOAA's review of the draft report, we have made additional clarifications and revisions. Although NOAA did not agree with the details of our findings, it has already begun implementing corrective action to address OIG's recommendations.

NOAA states in its response that "the examination of the contract language and conversations with Region staff . . . did not include contact with either the Contracting Officer or Contracting Officer Representative." Further, NOAA states that "[d]uring the course of this investigation, the Region was unaware of the OIG's concern of a prohibited contracting practice and the Region was not provided the opportunity to address this concern until now." Contrary to NOAA's statement, OIG met with the Deputy Regional Administrator on July 7, 2015, which is when the auditor learned about the contract in question and why it was awarded. The OIG informed the Deputy Regional Administrator that the OIG would be looking into this matter further. Later, the OIG met with the Contracting Officer, located in the regional office in Juneau, AK, on August 27 and August 28, 2015, and discussed the purpose of the review, nature of the complaint, and OIG's preliminary concerns related to the management of the contract with ArcSoft Consulting.

NOAA further comments that the contract states that "[t]he Government and the Contractor understand that the services to be provided under this contract by the Contractor are non-personal services and that no employer–employee relationship exists between the Government and the Contractor (WEI 33F-15NC-0629 Page 22)" and that "[t]he successful contractor will meet frequently with identified NMFS staff (Deputy Regional Administrator, Administrative Officer and other administrative staff) to discuss progress and any tasks electronically or by phone, as needed (WEI 33F-15NC-0629 Page 20)." While NOAA is correct that the language of the contract states that the contract was not a personal services contract, because of the actions of agency personnel, the distinction between personal services and non-personal

services is not as clear as it would have been if NOAA Fisheries had followed agency policy.

NOAA also states that “[t]he draft findings provided to NMFS referenced an effort on the part of the Region to use NOAA Contract Award WE133F-15NC-0629 to circumvent a NOAA hiring freeze. It is regrettable that the investigator would have left with this impression and this response seeks to reinforce the assurance that: 1) deliverables from this contract were not a like-substitutes for NOAA Federal employee supervised tasks, and 2) during the time of this contract NOAA was not under a hiring freeze.” OIG updated the draft to show the statement made by regional employees in interviews. According to a senior NOAA Fisheries employee, the office was unable to process a direct hire due to a recent sequestration. NMFS had 2 years’ worth of backfill positions and OPM ranked secretaries low on the list of priorities; therefore, the secretarial services were contracted out. Further, prior to awarding the contract, those services were performed by a NOAA Fisheries permanent employee. The prior employee’s position description contains essentially the same duties performed by the contractor employee.

The final report will be posted on OIG’s website pursuant to section 8M of the Inspector General Act of 1978, as amended (5 U.S.C. app., § 8M).

In accordance with Departmental Administrative Order 213-5, please submit to us—within 60 calendar days of the date of this report—an action plan that responds to the recommendations in this report.

Thank you for your attention to this matter. If you have any questions, or would like to arrange a meeting with our audit team, please feel free to contact me at (202) 482-7859.

Appendix A.

Objective, Scope, and Methodology

The objective of the review was to determine whether NOAA inappropriately used a cooperative agreement and grant to acquire personal services, as alleged by a confidential complainant. Our fieldwork included interviews with NOAA officials and reviews of grant files, project narratives, and supporting documents. We did not analyze NOAA Fisheries' internal control procedures, nor did we rely on the center's computer-processed data. In conducting our review, we used criteria established in applicable laws, regulations, and guidelines including the Federal Grant and Cooperative Agreement Act of 1977, Federal Acquisition Regulation, Part 37—Service Contracting, and the Department's *Interim Grants and Cooperative Agreements Manual*.

This review was conducted in accordance with Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General on Integrity and Efficiency, and was performed under the authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13, dated April 26, 2013, as amended.

Appendix B. Agency Response

MAR 21 2016



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

MEMORANDUM FOR: Andrew Katsaros
Principal Assistant Inspector General for Audit and
Evaluation

MEMORANDUM FROM: Eileen Sobock 
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration

SUBJECT: NMFS Response to Draft OIG Memo: *Alaska Regional Office Use of Contract to Acquire Personal Services*

During the period June 2015 – February 2016 the NMFS Alaska Region utilized the services of ArcSoft Consulting for a Technical Administrative Support Time and Materials Contract procured under NOAA Award WE133F-15NC-0629. The service provided to the government through this contract consisted of routine administrative tasks not requiring daily supervision. The contracts statement of work describes these core tasks as:

On-site support to the Regional Administrator's (RA) Office including completion of data entry, filing, retrieval, copying, scanning and indexing of paper and electronic records; answering phone and directing calls to appropriate subject matter experts; drafting, publishing and distributing a variety of regulatory documents and routine correspondence; and administering the schedule for the RA Office. (WE133F-15NC-0629 Page 36)

During the examination of the contract language and conversations with Region staff that did not include contact with either the Contracting Officer or Contracting Officer Representative, the Office of Inspector General concluded that the Region was inappropriately using a technical support contract to perform work fitting the definition of a personal services contract. The evidence cited for the misuse of a technical time and materials contract was the existence, or appearance of an existence, of an employee- employer relationship between the contract staff and NMFS Alaska Region staff.

At the center of this draft finding is the concept that NMFS Alaska Region staff exercised relatively continuous supervision and control over the contractor personnel performing the contract. During the course of this investigation, the Region was unaware of the OIG's concern of a prohibited contracting practice and the Region was not provided the opportunity to address this concern until now.

In acquiring these services, the Region took significant steps to ensure no inappropriate relationship occurred between the contractor staff and the



government. While the contract's deliverables had some overlap with activities occasionally conducted by the Region's administrative staff, at no time did contract staff receive supervision by Region personnel.

In addition to structuring this award so that services were limited to deliverables that did not require supervision, the Region took specific contractual precautions, evidenced in the statement:

The Government and the Contractor understand that the services to be provided under this contract by the Contractor are non-personal services and that no employer-employee relationship exists between the Government and the Contractor (WE133F-15NC-0629 Page 22)

What little technical direction required during this 8 month contract was provided consistent with the terms of the contract, which stated:

The successful contractor will meet frequently with identified NMFS staff (Deputy Regional Administrator, Administrative Officer and other administrative staff) to discuss progress and any tasks electronically or by phone, as needed. (WE133F-15NC-0629 Page 20)

In satisfying the contract's deliverables, technical direction between NMFS staff and contract personnel occurred by knowledgeable staff fully aware of the Federal Acquisition Regulation prohibition on personal services contracts. The agency took considerable steps to communicate verbally and in writing the nature of the agency/vendor relationship and the necessity of avoiding the appearance of a personal services contract.

The draft findings provided to NMFS referenced an effort on the part of the Region to use NOAA Contract Award WE133F-15NC-0629 to circumvent a NOAA hiring freeze. It is regrettable that the investigator would have been left with this impression and this response seeks to reinforce the assurance that: 1) deliverables from this contract were not a like-substitutes for NOAA Federal employee supervised tasks, and 2) during the time of this contract NOAA was not under a hiring freeze.

These draft findings serve to remind NMFS of the importance of statutory restrictions on personal services contracts. In response to these findings, NMFS will undertake a review of internal control mechanisms to prevent the occurrence of personal services contracts. Additionally, the Alaska Region Office that was the subject of this investigation will undertake additional training to ensure full compliance with all Federal Acquisition Regulations.

Thank you for the opportunity to respond to this important inquiry and for providing NMFS with a valuable external evaluation tool to assess the soundness of our fiscal integrity.

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