

U.S. DEPARTMENT OF COMMERCE
Office of Inspector General



**PUBLIC
RELEASE**

DEPARTMENT OF COMMERCE

*Improvements Are Needed in Commerce
Agencies' Implementation and Oversight of
Interagency and Other Special Agreements*

Final Inspection Report No. IPE-9460/September 2000

Office of Inspections and Program Evaluations



TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
INTRODUCTION	1
PURPOSE AND SCOPE	1
BACKGROUND	4
OBSERVATIONS AND CONCLUSIONS	7
I. Most of the Agreements That We Reviewed Appeared to Serve Important and Appropriate Functions	7
II. Some Commerce Bureaus Have Improperly Entered into Informal Arrangements Without the Benefit of a Written Agreement	11
III. Some Agreements Have Been Used When a Traditional Procurement Contract Would Have Been More Appropriate	16
IV. Some Agreements Have Been Used When Financial Assistance Awards Would Have Been More Appropriate In Accordance With Federal Guidelines	19
V. The Department Is Improving the Process for Preparing and Monitoring Agreements	23
A. Commerce agreements do not consistently comply with federal requirements .	23
B. The oversight process for reviewing departmental agreements is inadequate . . .	32
C. Departmental policies and procedures for agreements are clearly needed	37
D. Many bureaus also need policies and procedures for agreements	39
VI. Commerce Bureaus Generally Do Not Adequately Track and Control Agreements . . .	43
VII. Some Commerce Bureaus Need to Improve Their Systems and Procedures to Better Ensure Full Cost Recovery under Reimbursable Agreements	48
RECOMMENDATIONS	51
APPENDIXES:	
A: Glossary of Acronyms	52
B: Office of Administration Response to Draft Report	53
C: Office of the General Counsel Response to Draft Report	56

EXECUTIVE SUMMARY

The Department of Commerce relies heavily on interagency and other special agreements to perform its mission. Specifically, in fiscal year 1997, Commerce had more than 4,700 agreements, involving approximately \$1.1 billion in funds received for reimbursable activities or obligated to acquire goods or services from other parties. These agreements can be between Commerce entities or between one Commerce unit and another federal agency, a state or local government agency, a university or other educational institution, a not-for-profit organization, or a private party. While agreements involve a significant amount of federal resources, they are not subject to the same administrative controls as traditional procurement contracts, grants, or cooperative agreements.

This is the final report of a series that we have issued on our Department-wide review of agreements. It summarizes several cross-cutting issues we identified during our reviews of the handling of interagency agreements at 10 Commerce bureaus or line offices. We also draw upon work performed under other OIG reviews of agreements conducted during previous years. In addition to identifying common problems that the different Commerce bureaus have experienced in preparing and administering agreements, this report also highlights several “best practices” which may be helpful to other bureaus and line offices. A summary of our specific findings follows:

Most of the Agreements That We Reviewed Appeared to Serve Important and Appropriate Functions We found that most bureaus and line offices are using agreements to cover activities that should be funded by an agreement. In addition, the agreements are being used appropriately to further Commerce’s varied missions. However, it is important to maintain diligent oversight of the acceptance and implementation of agreements. For example, accepting too much reimbursable work can divert a program from its primary mission. And, continuing to operate a program in Commerce that is funded and guided mostly by another agency potentially hinders the efficiencies that can be gained by properly aligning those functions in the other agency. Agreements may often be necessary to fulfill Commerce’s many missions, but the over \$1.1 billion in federal resources committed to them demand close management attention (see page 7).

Some Commerce Bureaus Have Improperly Entered into Informal Arrangements Without the Benefit of a Written Agreement During our various reviews, we came across instances in which bureaus performed work for other parties without the benefit of a written agreement. By proceeding with these efforts without a written agreement, they are violating Departmental and agency policies and, in the process, are putting the U.S. government’s interests and credibility at risk (see page 11).

Some Agreements Have Been Used When a Traditional Procurement Contract Would Have Been More Appropriate We found that several Commerce agencies circumvented procurement laws and regulations by using agreements instead of traditional procurement contracts to acquire goods and services. In our individual agency reviews, we also found, for example, instances where a Commerce bureau improperly managed a procurement that was requested through an interagency agreement. To correct these problems, we recommend that program officials be informed, through training or other guidance, about how to best determine when a procurement contract, rather than an agreement, would be the most appropriate instrument(s) for an anticipated funds transfer to a private entity (see page 16).

Some Agreements Have Been Used When Financial Assistance Awards Would Have Been More Appropriate In Accordance With Federal Guidelines During our individual reviews of Commerce agencies, we questioned whether some agency officials and staff were improperly or unwisely using agreements in lieu of a grant or cooperative agreement to provide financial assistance. In one graphic example, we concluded that agreements for an entire program were unwisely used instead of financial assistance awards (grants or cooperative agreements). We found that (1) the purpose of the existing agreement better fit the definition of a cooperative agreement or a grant and (2) changing the legal instrument to a grant-type award improved the funding process and strengthened the agency's ability to oversee and monitor projects. We have also recommended that Commerce officials be informed about how to determine when a cooperative agreement or grant would be the most appropriate instrument(s) for an anticipated funds transfer to a private or public entity. Departmental policies and oversight should be clear and vigilant to ensure that the correct funding instruments are used (see page 19).

The Department Is Improving the Process for Preparing and Monitoring Agreements In a September 1998 report to the Chief Financial Officer and Assistant Secretary for Administration and the General Counsel,¹ we urged the Department to take a stronger role in overseeing how the bureaus draft, implement, and administer agreements. In that report, we also discussed the most common deficiencies found during our reviews, including failure to comply with federal requirements and to receive necessary programmatic, administrative, and legal review. We are pleased to note that the Department has since agreed to implement Department-wide guidance for agreements and is currently working with the bureaus to prepare that guidance. The issuance of the handbook is a priority of the Department and staff are working to have it issued as soon as possible (see page 23).

¹ *Office of the Secretary—Interagency and Other Special Agreements Require Better Management and Oversight*, IPE-10418, September 1998.

Commerce Bureaus Generally Do Not Adequately Track and Control Agreements A common problem we encountered during our reviews of Commerce bureaus and the systems and processes they have for managing agreements was that few bureaus were able to adequately track and control their agreements. The bureaus had different ways of classifying agreements, and frequently overlooked agreements made with another Commerce agency. In some cases, bureaus still track expired agreements and some track open but inactive agreements. As a result, we found inconsistent reporting of agreements among Commerce bureaus. In our previously issued inspection reports, we made recommendations to both the Department and the bureaus to develop databases to track and control their agreements. We are aware that some progress has been made to date to implement these recommendations. At the same time, we are also aware that this matter requires additional management attention and oversight (see page 42).

Some Commerce Bureaus Need to Improve Their Systems and Procedures to Better Ensure Full Cost Recovery under Reimbursable Agreements Considering the significant amount of reimbursable work performed by Commerce bureaus, full cost recovery is a serious concern. An agency's failure to recover actual costs or, in the case of a joint project, to equitably apportion full costs could also result in a circumvention of the appropriations process because it could cause the agency to undercharge or overcharge the sponsoring organization. Unfortunately, we found many examples where Commerce bureaus do not adequately account for and recover full costs for reimbursable activities. To correct this problem, we suggest that bureau chief financial officers and other senior management be held accountable for implementing reliable systems for identifying and recovering full costs on reimbursable activities (see page 48).

On page 51, we offer recommendations to the Chief Financial Officer and Assistant Secretary for Administration and the Acting General Counsel to address the cross-cutting concerns raised in this report. These recommendations are in addition to the recommendations made in the 10 inspection reports that we issued previously covering interagency agreements of individual bureau and line offices (see page 2 for a list of the bureaus and line offices covered in those inspection reports).



In responding to our draft report, the Acting Director, Office of Executive Assistance Management stated that the Department is in agreement with our findings and recommendations and that efforts are underway to take corrective action on the findings contained in the report. In addition, the Assistant General Counsel for Administration stated in her response to our draft report that the Office of the General Counsel was in complete agreement with our recommendations and would continue to work with the OIG staff and appropriate staff in the Office of Administration to adopt the recommendations.

INTRODUCTION

Pursuant to the authority of the Inspector General Act of 1978, as amended, the Office of Inspector General conducted an inspection of the Department of Commerce's management of interagency and other special agreements. Fieldwork was performed during the period from May 1997 through April 2000, in accordance with the *Quality Standards for Inspections* issued by the President's Council on Integrity and Efficiency.

Inspections are special reviews that the OIG undertakes to provide agency managers with timely information about operations, including current and foreseeable problems. Inspections are also done to detect and prevent fraud, waste, and abuse, and to encourage effective, efficient, and economical operations. By highlighting problems, the OIG intends to help managers move quickly to address those identified during the inspection and avoid their recurrence in the future. Inspections may also highlight effective programs or operations, particularly if they may be useful or adaptable for agency managers or program operations elsewhere.

PURPOSE AND SCOPE

Interagency and other special agreements are mechanisms for federal agencies to define terms for performing work for others, acquiring work from others, or coordinating complementary programs. These agreements can be between Commerce entities; or between one Commerce unit and another federal agency, a state or local government agency, a university or other educational institution, a not-for-profit organization, or a private party. They involve a significant amount of federal resources, but are not subject to the same administrative controls as traditional procurement contracts, grants, or cooperative agreements.

We defined interagency and other special agreements as those agreements that are not traditional procurement contracts, grants, or cooperative agreements.² For simplicity, we use the term "agreement" to refer to the various types of interagency or other special agreements within our

² The Federal Grant and Cooperative Agreement Act of 1978 defines these types of agreements: **Procurement contracts**—legal instruments "reflecting a relationship between the United States Government and a State, a local government, or other [non-federal] recipient when . . . the principal purpose . . . is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government" (31 U.S.C. § 6303); **Grants**—legal instruments used when "(1) the principal purpose of the relationship is to transfer a thing of value to a State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States . . . and (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement" (31 U.S.C. § 6304); **Cooperative agreements**—differ from grants only in that they are to be used when substantial involvement by the executive agency is expected (31 U.S.C. § 6305).

scope. Agreements can include memoranda of agreement, memoranda of understanding, joint project agreements, purchase orders that document both parties' acceptance, or any other document that details the terms of an agreement and the parties' acceptance. Agreements can transfer funds from one party to the other, or bind one or both parties to commit funds or resources to a project.

This is the final report of a series issued on our Department-wide review of agreements. The purpose of our inspections was to assess the effectiveness and efficiency of Commerce processes for undertaking agreements among its bureaus and with outside agencies or parties. The scope of our inspections included determining: (1) the appropriateness and advisability of Commerce agreements as funding mechanisms for specific projects, (2) the extent to which Commerce programs are supported through and rely on these agreements, (3) the relevance of agreements to departmental goals and objectives, and (4) whether Commerce agreements possibly circumvented procurement or financial assistance regulations. In addition, we evaluated the bureaus' administrative, managerial, and programmatic oversight of agreements. The scope of our inspections did not include cooperative research and development agreements (CRADAs), which are primarily used by federal laboratories to partner with nonfederal entities to facilitate the transfer of technologies for future commercial application.

Since 1997, we issued reports on the following Commerce entities: the Office of the Secretary, the Minority Business Development Agency, the International Trade Administration, the Bureau of the Census, the National Institute of Standards and Technology, the Patent and Trademark Office, the National Technical Information Service, and the National Oceanic and Atmospheric Administration's National Weather Service (NWS), National Marine Fisheries Service (NMFS), and Office of Oceanic and Atmospheric Research (OAR).³ We also interviewed cognizant officials from the other major organizational units within Commerce. This report relies on this previous inspection work in the area of agreements, as well as other reports issued by the OIG within the previous six years, which covered some aspect of agreement activity.

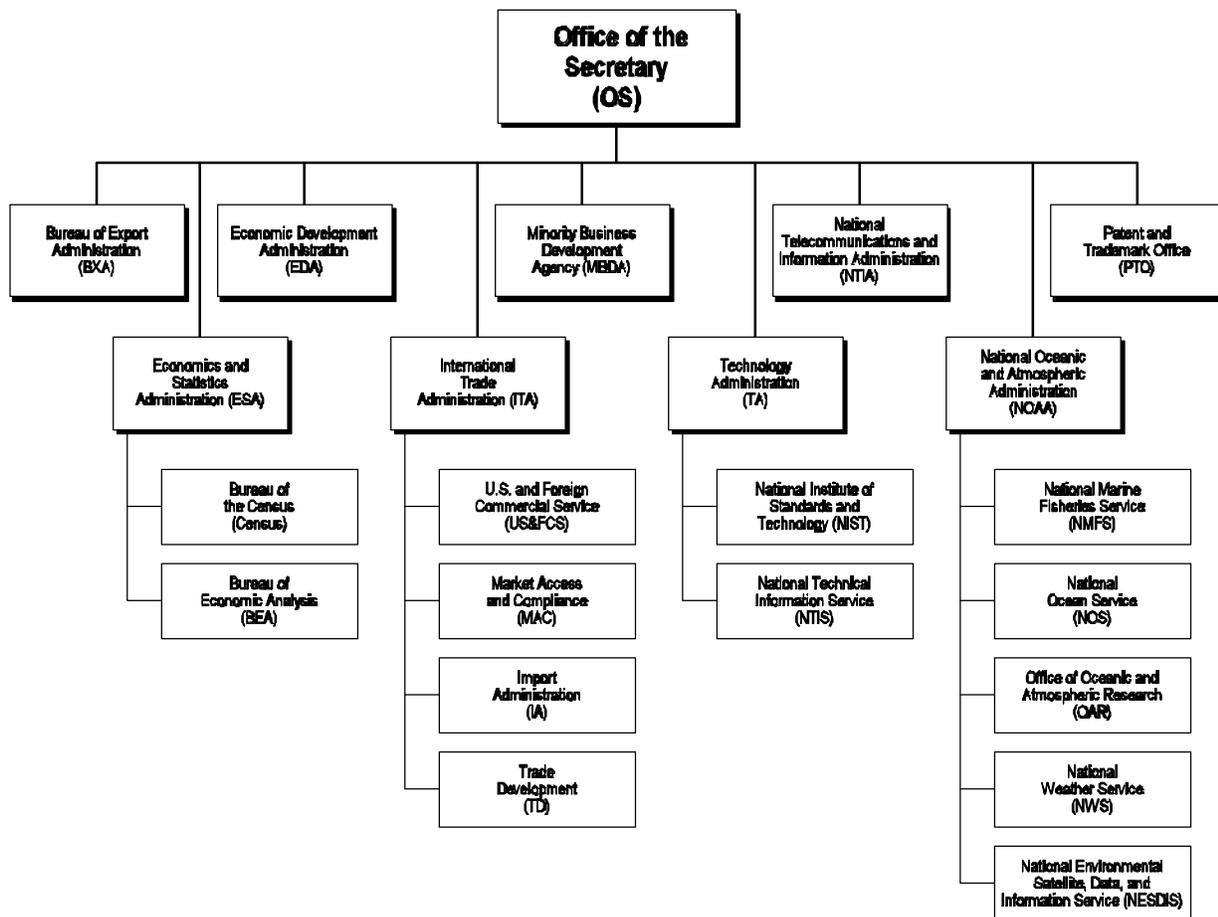
³ *Office of the Secretary—Interagency and Other Special Agreements*, IPE-10418; *Use of Cooperative Agreements Will Improve Management and Oversight of the Minority Business Opportunity Committee Program*, IPE-10309, March 1998; *Improvements are Needed in ITA's Management of Interagency and Other Special Agreements*, IPE-10752, September 1998; *Bureau of the Census—Interagency Agreements Require Improvements*, IPE-10523, March 1999; *NIST's Policy of Allowing Informal Collaborations with Non-Federal Researchers Requires Additional Controls*, IPE-10854, September 1998; *Patent and Trademark Office—PTO Has Improved its Management of Interagency Agreements*, IPE-10728, September 1999; *National Technical Information Service—Management Over Interagency Agreements Needs Improvement*, IPE-11021, June 1999; *NWS Requires Better Management and Oversight of Interagency and Other Special Agreements*, IPE-10417, March 1999; *National Marine Fisheries Service's Interagency and Other Special Agreements Require Additional Improvements*, IPE-10775, September 1998; *OAR's Interagency and Other Special Agreements Require Additional Improvements for Compliance*, IPE-10310, May 1998.

For each of the 10 inspection reports on agreements that we issued, we tried to determine the number, dollar value, and type of agreements for each bureau or line office reviewed. We then selected a representative sample of agreements to analyze. In addition, we reviewed background documentation relating to the relevant laws and departmental policies and procedures pertaining to these agreements, including the Economy Act, the Department's joint project authority, the Intergovernmental Cooperation Act, relevant Department Administrative Orders, and the *Department of Commerce Accounting Principles and Standards Handbook*. We also conducted telephone and/or personal interviews with cognizant Commerce staff to further evaluate certain agreements. In preparing this cross-cutting report, we contacted some agency officials to follow up on our earlier recommendations and to help determine the progress of corrective actions taken in response to our initial agency reports.

BACKGROUND

Commerce has an expansive mission. Its bureaus promote U.S. exports, develop innovative technologies, gather and disseminate statistical data, measure economic growth, grant patents and trademarks, promote minority entrepreneurship and economic development, predict the weather, and monitor stewardship of the nation's atmospheric and oceanic resources. Other federal agencies and nonfederal organizations either have similar missions or require information or services from Commerce bureaus to fulfill their own unique missions. Agreements are one method for Commerce and other parties to formally agree to share information, provide needed services, or coordinate their programs to optimize the benefits from each entity's efforts. If properly monitored and controlled, agreements are necessary to define the roles and responsibilities of each of the parties so that the greatest return is realized from similar or complementary programs.

Figure 1: Department of Commerce Organizational Chart



In fiscal year 1997, Commerce had more than 4,700 agreements, involving approximately \$1.1 billion in funds received for reimbursable activities or obligated to acquire goods or services from other parties (see Table 1 below).⁴ Additional Commerce resources were committed to performing activities under memoranda of understanding or agreement, which involved no transfers of funds. The distribution of agreements ranges from 15 for BXA to more than 2,000 for NOAA.

Table 1: Summary of Department of Commerce Agreements (Fiscal Year 1997)

Department of Commerce Bureau	Interagency and Other Special Agreements	
	Estimated Value	Number Identified
Bureau of Export Administration	\$2,342,000	15
Economic and Statistics Administration	213,509,000	756
Economic Development Administration	14,929,000	33
International Trade Administration	36,209,000	109
Minority Business Development Agency	3,591,000	23
National Oceanic and Atmospheric Administration	470,015,000	2,038
National Telecommunications and Information Administration	30,780,000	120
Office of the Secretary	23,970,000	206
Patent and Trademark Office	49,215,000	55
Technology Administration	267,070,000	1,400
Total	\$1,111,630,000	4,755

This report summarizes the major observations and recommendations from the reports this office recently issued on 10 separate organizational units within Commerce. We also rely on other

⁴ The number of Commerce agreements and the associated funding are estimates based on the best information available to us at the time of this review. As discussed on page 42, neither the Department nor the bureaus have a database or other record-keeping system that has complete and reliable information about all types of agreements.

recent OIG work on issues related to agreements. Common problems are identified along with recommendations that should improve the processing and administration of agreements throughout the Department. Finally, we also highlight several instances of “best practices” for other bureaus and line offices to possibly apply.

OBSERVATIONS AND CONCLUSIONS

I. Most of the Agreements That We Reviewed Appeared to Serve Important and Appropriate Functions

Commerce bureaus are mandated to perform a wide variety of activities. Other federal agencies and nonfederal parties either have similar missions or require information or services from Commerce bureaus to fulfill their own unique missions. In the past, the OIG has criticized Commerce agencies for failing to coordinate their efforts with other parties with similar or duplicative programs. Agreements are one method for agencies to formally agree to share information, provide needed services, or coordinate their programs to optimize the benefits from each agency's efforts.

Research programs provide a good example of why agreements are often necessary and beneficial. Commerce has several programs that were established or have become the centers of expertise in the federal government for their types of research. NWS, for example, was designated by the Bureau of the Budget (now the Office of Management and Budget) as the sole civilian provider of meteorological services and research. Other legislation or presidential orders also provide that other Commerce bureaus should provide special services to other federal and nonfederal entities.⁵ These authorities, combined with the statutory principle that goods or services provided to outside individuals and entities are supposed to be self-sustaining, explain and support why many Commerce programs receive a significant amount of reimbursable funding.

If control is maintained on the type of reimbursable work that is accepted and if that work does not unfairly compete with the private sector, building experience in Commerce-related research that other federal agencies can rely on can help prevent duplication of effort. By contracting with Commerce, these other agencies do not have to invest in facilities, equipment, and personnel to develop their own research capabilities. Also, the Commerce research facilities can benefit from research advances made during reimbursable projects, expanding the positive impact to other reimbursable projects and Commerce mission-related research.

Other Commerce agencies have specific mandates to provide services to or receive services from other federal and nonfederal parties. For example, Census's authorizing legislation allows it to "acquire by purchase or otherwise" information pertinent to its work from "states,

⁵ For example, NIST's authorizing legislation states that it "should serve industry, trade associations, state technology programs, labor organizations, professional societies, and educational institutions by disseminating information on new basic technologies including automated manufacturing processes" (15 U.S.C. § 271(a)(7)).

counties, cities, or other units of government, or their instrumentalities.”⁶ Federal departments and agencies may also be called upon and compelled by the Secretary of Commerce to provide information useful to Census for its work. In addition, Census has authority under 13 U.S.C. § 8 to enter into joint statistical projects with non-profit organizations or agencies.

Agreements may also be the most cost-effective method of obtaining services, thereby permitting funds saved to be redirected to other program functions. For example, NWS has an agreement with the Coast Guard that allows it to use Coast Guard vessels for the transport, installation, extraction, and maintenance of deep water data buoys. Because NWS usually has access to existing Coast Guard cruises for free, it saves the costs that would normally be paid to a private vessel specially rigged to perform these functions. Through this arrangement, NWS is able to support more buoys in more locations than would be possible by obtaining the services through traditional procurement contracts.

However, these benefits must be balanced with the problems that can arise with agreements. During past reviews, we have found instances where reimbursable funding has diverted the attention of a Commerce agency from its core mission. In a 1994 inspection report,⁷ we expressed our concerns that the NTIA’s Institute for Telecommunication Sciences (ITS) was overly-reliant on reimbursable funding. Its fiscal year 1993 budget consisted of \$3.8 million in direct funding and \$8.2 million in reimbursable funds. We determined that, because of the large amount of reimbursable work done by ITS and the questionable priority of some of this work, the size and staffing of its laboratory were larger than necessary to accomplish NTIA’s primary mission. The increased volume of such work shifted much of the laboratory’s focus to projects that had little relevance to Commerce’s priorities, and added to the size of ITS’s permanent staff, as ITS tended to hire permanent personnel to staff these temporary reimbursable projects. This practice resulted in continual employment growth, which in turn triggered the need to solicit future funding. ITS was left vulnerable to the uncertainty of receiving sufficient funding from others.

In another example, we determined that a Commerce program that received a significant amount of reimbursable funding should be transferred to its largest sponsoring agency.⁸ NOAA’s Office

⁶ 13 U.S.C. § 6.

⁷ *NTIA Interagency Agreements, Institute of Telecommunication Sciences*, IRM-5723, January 1994.

⁸ *Office of Aeronautical Charting and Cartography Should Be Transferred to FAA*, IPE-8646, September 1996.

of Aeronautical Charting and Cartography prepares aeronautical charts and maps for the federal government and the public. Its largest customer is the Department of Transportation's Federal Aviation Administration (FAA), with which the Office of Aeronautical Charting and Cartography has an agreement detailing services to be provided and how those services will be paid for. After evaluating several operational and organizational options, we concluded that the Office of Aeronautical Charting and Cartography should be transferred to FAA, with which it is closely associated through its funding, aviation safety mission, and program direction.

We found that FAA both directs what charts and other products are required for public and FAA use, and provides the necessary information to prepare and maintain those charts. We determined that by combining the programmatic direction and information source (FAA) with the functional operation (Office of Aeronautical Charting and Cartography) in the same organizational structure, increased efficiencies would be realized. Operationally, consolidation should improve communication and coordination, increasing productivity and reducing the need for liaisons to transmit FAA's requirements to NOAA. The Congress agreed and effective October 1, 2000, the Office of Aeronautical Charting and Cartography will be part of FAA.⁹

We have also found that agreements may be appropriate and consistent with Commerce's mission, but they can be abused. In two 1997 inspection reports,¹⁰ we criticized NOAA for failing to maintain adequate financial controls over its weather satellite programs. Under a 1973 memorandum of agreement, NOAA determines the general requirements for new satellites and operates them once they are in orbit, while the National Aeronautics and Space Administration (NASA) handles their acquisition and launch. NOAA and NASA work together to plan and budget for the satellite programs and then NOAA includes funding in its annual budget request based on NASA's projected need for new funding.

Based on our concerns about how large balances of unspent NOAA funds had accumulated at NASA, our reviews identified \$180.6 million in funds to be put to better use as a result of NOAA's failure to exercise adequate financial control over the transfers.¹¹ The excess funds represented funding that was not needed to meet NASA's current year or forward funding

⁹ See Public Law No.106-181, the "Wendell H. Ford Aviation Investment and Reform Act for the 21st Century."

¹⁰ *Excess Funding in the Polar Orbiting Satellite Program*, OSE-8797-7-0001, March 1997; *Excess Satellite Funding Indicates Need For Better Financial Controls*, OSE-8797-7-0002, September 1997.

¹¹ \$101.3 million was identified in OSE-8797-7-0001, March 1997, and \$79.3 million was identified in OSE-8797-7-0002, September 1997.

requirements and that could have been better used to support other NOAA critical program needs or to reduce future satellite budget requests. By sending large amounts of funds to NASA, NOAA was able to avoid having to identify the unspent funds as unobligated carryover balances, which enabled it to escape the scrutiny such funds receive from the Department, OMB, and Congress. NOAA and the Department agreed to implement procedures to prevent the accumulation of excess funds and to properly record carryover in the future.

These examples illustrate the need to maintain diligent oversight of the acceptance and implementation of agreements. Accepting too much reimbursable work can divert a program from its primary mission and place its resources at risk. And, continuing to operate a program in Commerce that is funded and guided primarily by another agency hinders the efficiencies that can be gained by properly aligning those functions in the other agency. Finally, using agreements to distort and manipulate the budget process seriously damages Commerce's credibility and can hinder the government's or department's ability to make the best use of taxpayers' dollars. Agreements may often be necessary to fulfill Commerce's many missions, but the over \$1.1 billion in resources committed to them demands close management attention.

II. Some Commerce Bureaus Have Improperly Entered into Informal Arrangements Without the Benefit of a Written Agreement

We have found several examples in which bureaus performed work for other parties without the benefit of a written agreement. By proceeding with these efforts without a written agreement, they are violating their own agency's policies and putting the U.S. government's interests and credibility at risk. In addition, as identified in several recent OIG reports, there are numerous examples of Commerce programs that would operate more efficiently and effectively if they formally coordinated their efforts with other federal and nonfederal parties. Agreements would be one way to formalize existing relationships with other parties or to initiate closer coordination.

Written agreements better define project responsibilities

In one of our recent reports,¹² we discussed agreements entered into by ITA's U.S. Export Assistance Centers (USEACs), located in nearly 100 cities throughout the United States.¹³ Some USEAC sites are operating under informal arrangements that are not documented in written agreements or not forwarded to headquarters for review and clearance. Although some officials said that they send all of their agreements through US&FCS headquarters and the Department's Office of the General Counsel (OGC) for review and clearance, other field officials were not so certain. At least one office director said that he seldom entered into formal written agreements with his local trade promotion partners because he finds this to be too constraining and time consuming given the time it would take to produce a written agreement and have it approved by the leadership of each participant.

Participation by local organizations, particularly state and local governments and nonprofit trade associations, is an essential part of the USEAC concept. We recommended that USEACs regularly pursue written agreements with their local trade promotion partners. Negotiating and formalizing existing or future relationships helps to better define each partner's responsibilities and expectations. USEACs can then have a firmer basis on which to rely for the assistance and support of their partners.

¹² *ITA's Interagency and Other Special Agreements*, IPE-10752.

¹³ USEACs were created as part of the National Export Strategy, which is developed by the Trade Promotion Coordinating Committee, an interagency body composed of representatives of federal agencies involved in trade promotion. The USEACs, with a national network of "hub" sites staffed by representatives from US&FCS, Small Business Administration, and the Export-Import Bank of the United States, linked to "spoke" sites of a few US&FCS staff, offer "one-stop" shopping for small-to-medium U.S. exporters seeking export counseling, information, financial assistance, and other trade promotion services.

Written agreements provide important protections
for Commerce's research organizations

During our recent reviews of Commerce bureaus' management of agreements, we became aware of several risks associated with allowing nonfederal researchers to work in Commerce facilities without a written agreement. As discussed below, these risks relate to the assignment of intellectual property rights, access to sensitive information, and liability for injuries. Commerce bureaus should be aware of these concerns as they draft guidance on agreements and as they make decisions about how to handle these collaborations as they arise.

First, Commerce has several research organizations that promote innovation through individual achievement and collaborative efforts. If a visiting researcher has a "flash of brilliance" that leads to an invention, the ownership of the intellectual property rights of that invention is ambiguous without a written agreement.

Written agreements are beneficial to Commerce agencies and the other parties because they assign intellectual property rights before an invention occurs. Commerce's interests are protected to some degree even when no agreement is signed. Under the common law of intellectual property rights, the parties would have rights to inventions as follows: (1) inventions by the government alone would belong to the government, (2) inventions by the nonfederal researcher alone would belong to that researcher or his/her employer, or (3) inventions created jointly by the government and the nonfederal researcher would be jointly owned. A written agreement is more beneficial to the government, however, because it reduces ambiguity by informing all parties of their respective rights before the collaboration occurs. Such an agreement could alter the common law rules by giving the government more rights.

Another disadvantage of having no written agreement is that the government is not guaranteed a license to use all inventions created out of the collaboration. A license is not equivalent to ownership, but it allows the licensee to use the intellectual property, while protecting it from a claim of patent infringement by the owner. A written agreement can ensure that the government has at least a license to use inventions created during collaborations with nonfederal parties. A written agreement, therefore, is in the government's best interest because it allows the government to continue to use and apply valuable technology.

Second, we are concerned about the risk of nonfederal researchers having improper access to sensitive information. Commerce agencies are required by law to ensure the security of both proprietary and national security material. Relevant statutes and regulations include the Economic Espionage Act, the Trade Secrets Act, and the Department's *Personnel Security Manual*. Considering recent security problems with foreign visitors at other federal

laboratories,¹⁴ we have concerns about the lack of controls over visiting researchers working in Commerce facilities without an agreement.

The last potential weakness of concern to us is that by permitting informal collaborations, visiting researchers may obtain unauthorized access to proprietary materials.¹⁵ Depending on the facilities, there may be only limited proprietary information, but the existence of any such material is of concern to us. As discussed in our 1998 report on NIST's policy of allowing informal collaborations with non-federal researchers, in some cases, laboratory work involving sensitive material may not be physically separated from other areas where nonsensitive work is being conducted.¹⁶ Written agreements provide some protection from improper disclosure of information. They can contain non-disclosure provisions that ensure that any proprietary information learned during the relationship with a Commerce agency will not be disclosed to a third party. These provisions protect Commerce and the other party by clearly describing each party's responsibilities for protecting information. The agreements have the added benefit of providing a record of the activities that involve sensitive information.

Written agreements can improve coordination between federal agencies

During our 1998 review of PTO's plans to acquire additional space to consolidate its facilities and operations, we found that the project suffered from the lack of an interagency agreement with the General Services Administration.¹⁷ Without such an agreement, there were a number of important undefined factors that could have adversely affected the project, including the fee structure for GSA's efforts, PTO's rights to turn back unneeded space, and GSA's role as construction manager. In its response to our draft report, PTO agreed with our recommendation that it should execute an agreement with GSA. Subsequently, an agreement was negotiated and put in place.

¹⁴ *Department of Energy: DOE Needs to Improve Controls Over Foreign Visitors to Weapons Laboratories*, General Accounting Office, GAO/RCED-97-229, September 25, 1997.

¹⁵ This could be a particular problem at the Department's NIST laboratories.

¹⁶ *NIST's Policy of Allowing Informal Collaborations with Non-Federal Researchers Requires Additional Controls*, IPE-10854, September 1998.

¹⁷ *PTO Needs to Refine Its Space Consolidation Planning*, IPE-9724, March 1998.

During a review of ITA's trade promotion efforts, we found several instances where ITA and other Commerce bureaus would benefit from a formal, written agreement.¹⁸ First, we reviewed several economic adjustment grants made by EDA that related to trade promotion. Our review of two of the five grants indicated that EDA made some efforts to coordinate its review of the grant proposals, but requested comments from the wrong organizational unit in ITA or the wrong US&FCS regional office. The lack of coordination complicated ITA's efforts to coordinate its trade promotion activities with other partners and could have resulted in unnecessary duplication of effort. We concluded that EDA and ITA needed a memorandum of understanding specifying each agency's roles and responsibilities in the area of international trade, and how they would better coordinate their future activities. More specifically, we recommended that EDA notify designated officials in US&FCS as soon as possible of potential awards dealing with international trade in an effort to get the appropriate ITA unit's assessment of such awards.

Similarly, we found during that same review that minority business development centers, funded by MBDA, regularly counsel exporters, but do not then refer these clients to the local US&FCS office. Although MBDA's headquarters does not currently provide its centers with any guidance on international trade-related activities, MBDA and ITA were in the process of developing a memorandum of understanding outlining each agency's responsibilities as they relate to export promotion of minority firms.

Finally, we discovered during that same review that NTIA proposed to the Secretary of Commerce to take the lead in Commerce's trade promotion for the telecommunications industry sector. This proposal was not coordinated with ITA, which in its Trade Development program unit, has its own group of trade specialists assigned to follow the telecommunications industry. We recommended that both agencies institutionalize their respective roles and responsibilities by revising the relevant Department Organizational Orders and signing an interagency agreement that details how they will work together. With better coordination at the departmental level for trade promotion, and with clearer guidelines for preparing interagency agreements, situations such as this would hopefully be minimized.

As these examples indicate, there are many circumstances when a written agreement would benefit the Department. Commerce officials should therefore be encouraged to initiate written agreements when a long-term or otherwise significant relationship is anticipated. These collaborations can range from the commitment of funds to a mutual effort to coordinating existing activities to achieve the greatest return. In addition, a written agreement should be required in every case where a transfer of funds is intended. The agencies should also be

¹⁸ *Management Improvements Needed to Better Prepare for the Export Challenges of the 21st Century*, IPE-9904, March 1999.

encouraged to regularly review existing relationships to identify opportunities to improve operations by initiating or revising a written agreement.

III. Some Agreements Have Been Used When a Traditional Procurement Contract Would Have Been More Appropriate

Periodically, we have reported that Commerce agencies have circumvented procurement laws and regulations by using agreements instead of traditional procurement contracts. For example, in 1993, we found that the Census Bureau misused its joint statistical agreement authority under 13 U.S.C. § 8.¹⁹ The primary purpose of most of the agreements we examined during that review appeared to be the acquisition of services for the bureau's direct benefit and use. Under law, executive agencies are to use traditional contracts for this purpose. In addition, we found that the Census Bureau did not require its program offices to certify that proposed joint projects with certain nonprofit organizations complied with Department policy that encourages open competition.²⁰ In fact, the types of services performed under most agreements we examined could have been performed by other qualified organizations. All joint projects with nonprofits are now entered into pursuant to the Department's joint project authority, contained in 15 U.S.C. § 1525.

We have also found instances where a Commerce bureau improperly managed procurement contracts related to agreements. In 1997, we reported numerous procurement deficiencies during NTIS's implementation of the CyberFile project, an on-line tax-filing system that NTIS was developing for the Internal Revenue Service (IRS) through an interagency agreement.²¹ Our inspection disclosed that NTIS's programmatic and procurement planning for CyberFile was grossly inadequate and that its use of delivery order contracts and interagency agreements was highly questionable. Specifically, because of poor planning, NTIS:

- Underestimated the cost and resources required to develop CyberFile, then used sole-source Small Business Administration 8(a) contracts, which were inadequate to handle the required volume of effort, and which in turn exceeded the \$3 million threshold for such contracts.

¹⁹ *Census Bureau's Administration of Joint Statistical Projects*, SED-5049, February 1993.

²⁰ In responding to our draft report, the Acting Director, Office of Executive Assistance Management stated that our report implied that Department policy encourages open competition for joint project agreements. He said that while competition is required and/or encouraged, as appropriate, for procurement contracts and financial assistance awards, there is no stated policy concerning competition for Commerce's joint project authority. We agree. However, we believe competition for agreements entered into under the joint project authority is desirable and should be carried out, to the maximum extent practical.

²¹ *Management and Procurement Deficiencies Related to the CyberFile Project*, IPE-9364, March 1997.

- Over-relied on support contractors for CyberFile development without maintaining adequate control over their activities.
- Failed to pass along critical IRS contract specifications to its contractor and subcontractors, resulting in a system that did not meet IRS security and delivery requirements.
- Issued work authorizations in advance of contract agreements defining requirements, which resulted in the initial estimated \$1.4 million software development cost rising to over \$7.8 million.
- Used the prime development and systems integration 8(a) contract to funnel much of the CyberFile development work to subcontractors that were ineligible under the 8(a) program.
- Used a complex web of interagency agreements to avoid federal competition requirements and departmental oversight, thereby increasing government costs by about \$875,000.
- Violated federal regulations on delivery order contracts and interagency agreements by failing to conduct market surveys or price analyses, and improperly entered into and poorly managed interagency agreements.

In a 1999 report, we discussed an agreement between NWS and the Mexican Comision Nacional del Agua.²² It had insufficient justification for other than full and open competition for the award of four sole-source procurement contracts to provide technical assistance and management services under the agreement. Specifically, individual sole source justifications for each of these contracts were not prepared, the proposals were not announced in the *Commerce Business Daily*, and not all of the awards were competitively bid.

The contracting officer in charge of these four NWS contracts stated that the *Federal Acquisition Regulation* (FAR) was not relevant because the funding is not appropriated; rather, it is reimbursed by the Mexican Commission. However, the FAR clearly requires the preparation of a special justification and advertising in the *Commerce Business Daily* for all sole source contracts over \$25,000. Regardless of the funding source, we believe that Commerce should adhere to the FAR requirements for contracts entered into under reimbursable agreements, including preparing sole source justifications and advertising all sole-source contracts in the *Commerce Business Daily*. To do otherwise would promote a dual procurement process that may lead to waste.

²² *NWS Requires Better Management and Oversight of Interagency and Other Special Agreements*, IPE-10417, March 1999.

The fact that reimbursable funding is involved does not change the need to follow federal and departmental procurement policies. The government has a strong interest in maintaining procurement practices that are fair to the private sector and provide quality and low cost goods and services to the government. Therefore, we recommend that the Department and its bureaus clarify when FAR requirements for procurement actions apply to reimbursable funding.

In addition, to help program officials determine when a procurement contract is the most appropriate instrument(s) for an anticipated funds transfer to a private entity, we recommend that the Department (1) encourage program officials to seek guidance from the Office of the General Counsel (OGC) and provide contact information for the various OGC divisions with expertise in these areas and (2) explain the differences and benefits of the various types of agreements during departmental training sessions on procurement contracts, financial assistance, or other agreements.



In responding to our draft report, the Assistant General Counsel for Administration stated that the General Law Division has developed training classes and written materials that can be provided to all interested offices in the Department to help with determining the most appropriate instrument(s) for an anticipated funds transfer to a private entity. These training materials also served as the basis for the initial draft of the Department's Agreement Handbook, which is discussed on page 39. Our recommendation that the Department and its bureaus clarify when FAR requirements for procurement actions apply to reimbursable funding was not specifically addressed in the Assistant General Counsel's or the Acting Director, Office of Executive Assistance Management's written responses, but both stated that they were in agreement with our findings and recommendations.

IV. Some Agreements Have Been Used When Financial Assistance Awards Would Have Been More Appropriate In Accordance With Federal Guidelines

During our reviews of Commerce bureaus, we found at least one area where agreements were unwisely used instead of financial assistance awards. Specifically, in fiscal year 1997, MBDA used joint project agreements to provide approximately \$2.29 million to 11 minority business opportunity committees (MBOCs). After our inquiry, MBDA decided to continue support for the program, but agreed to transfer the funds using cooperative agreements.²³

There are some cases when the purpose of an existing agreement better fits the definition of a cooperative agreement or a grant, or when a project is better served by conversion to a cooperative agreement or grant. In each of these cases, changing the legal instrument to a financial assistance award improves the funding process and strengthens the oversight and monitoring of the program, thereby increasing its credibility. If agreements, most notably joint project agreements, are used in place of grants and cooperative agreements, there is not a thorough and verifiable award process because they are not examined by the Department's, or any other, financial assistance office. In addition, agreements are generally not competitively awarded, as is Department policy for grants and cooperative agreements. While it is not always clear why authorizing officials would use an agreement in place of the preferred grant or cooperative agreement, we believe they may do so because either they have not been made aware of the required and/or preferred mechanism or because an agreement requires less time and/or is not scrutinized as thoroughly as a financial assistance award.

When is a cooperative agreement appropriate?

In the case of the MBOC program, an agreement may have been legal, but not the most appropriate or effective funding mechanism. Commerce's joint project authority permits its bureaus to engage in joint projects of mutual interest with a variety of organizations. Joint projects are most appropriate when the federal participant and partner organization each contribute expertise to jointly produce a product or service. But, under certain circumstances—such as with the MBOCs—cooperative agreements would have been more appropriate. Under the Federal Grant and Cooperative Agreement Act, an executive agency must use a cooperative agreement when the principal purpose of the relationship is for the federal government to provide assistance in order to carry out a public purpose of support or stimulation authorized by law. Substantial involvement is also expected between the federal agency and the

²³ *Cooperative Agreements Will Improve Management and Oversight of MBOC Program*, IPE-10309, March 1998.

recipient in carrying out the activity contemplated in the agreement. We found that the MBOC program clearly fits within these requirements.

The primary goals of an MBOC are to increase opportunities for minority entrepreneurs and to facilitate the capacity of institutions to promote continuing minority business success. MBOCs are intended to function as outreach organizations, mobilizing resources and acting as a clearinghouse for market opportunities and other valuable business information in local communities. MBOCs also serve as advocates for the full inclusion of the minority-owned businesses in the economic life of the community, including the expansion of public and private sector purchasing from minority firms. In furtherance of these goals, MBDA procedures call for strong interaction between agency officials and awardees, including: (1) holding extensive discussions with potential applicants, (2) conducting visits and quarterly reviews to evaluate awardee performance, and (3) holding decision-making authority over MBOC personnel selections. Given this close interaction, we believe, and MBDA agrees, that these programs should be funded by cooperative agreements.

When is a grant more appropriate?

Grants, on the other hand, are more appropriate when substantial involvement by the Commerce bureau is not expected. Specifically, the Federal Grant and Cooperative Agreement Act states that grants are legal instruments used when “(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States . . . and (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.”²⁴

Financial assistance processes provide additional oversight and review

We should note that there are at least two benefits to using the financial assistance process to fund Commerce programs. First, the review process for grants and cooperative agreements is more rigorous than that for agreements which can help to make programs more effective and fair. When grants or cooperative agreements are used, grants specialists examine the proposed agreements for adequacy of terms and conditions, ensure that the awardees understand vital terms and conditions, and validate the award procedures. In addition, OGC reviews the proposed notice of intent to make awards published in the *Federal Register*. The OGC review ensures that the notice is fair and proper, and contains such information as evaluation criteria (basic qualifying

²⁴ 31 U.S.C. § 6304.

factors) and selection factors (used to distinguish among qualified applicants). OGC also examines the financial assistance application information before it is sent to prospective applicants. Finally, OGC will examine award packages before they are finalized.²⁵

In addition, the OIG reviews several aspects of financial assistance awards. First, it performs name and credit checks of prospective awardees, as appropriate. In addition, the OIG team reviewing the award checks completed audit and inspection reports and investigative files for negative findings on the proposed recipient and discusses ongoing audit and/or inspection work related to proposed recipients with the OIG staff performing the work to ascertain potential problems that need consideration before an award is approved.

Second, by using the financial assistance process to fund Department programs, the award process becomes open to competition. Having competition in issuing a grant or cooperative agreement should greatly benefit the Department and the sponsoring bureaus by providing for a larger group of award candidates from which to choose. Department Administrative Order 203-26 states that “discretionary grant [and cooperative agreements] program awards shall be made on the basis of competitive review.” Such reviews include minimum requirements which must be complied with unless a special waiver is obtained. The minimum requirements for competitive review include:

- (a) An application is reviewed only when it has been submitted in response to an application notice published in the *Federal Register* or any additional publication used by the organization unit.
- (b) Applications are treated fairly under the review process.
- (c) Each application receives an independent, objective review by one or more review panels qualified to evaluate the applications submitted under the program.
- (d) Each review panel uses the selection criteria that apply to the program covered by the application notice.
- (e) After the review panel has evaluated the applications, the organization unit prepares a rank ordering of the applications based solely on the evaluations by the review panel.
- (f) The organization unit determines the order in which applications will be selected for funding based on the following factors:
 - (1) Any priorities or other program requirements that have been published in the *Federal Register* and apply to the selection of applicants for new awards; and
 - (2) The rank order of the applications established by the review panel on the basis of the selection criteria.

²⁵ As with other departmental grants, OGC will examine award packages for all awards except competitive awards of less than \$100,000.

- (g) The grants officer may choose not to fund a highly ranked application based on certain high risk factors.²⁶

Combined with the additional oversight by OGC and the OIG, these elements of competitive review should make programs, such as the MBOC program, more effective and fair. The Department should carefully consider these benefits when it or one of its bureaus is considering funding a project through an agreement. If the statutory criteria for grants or cooperative agreements apply, then one of these financial assistance instruments should be used instead of other types of agreements. As noted in the previous chapter on procurement contracts, departmental guidance that helps to identify which instrument is appropriate should be developed to assist the bureaus in making this determination. Specifically, we recommend that the Department (1) encourage program officials to seek guidance from OGC and provide contact information for the various OGC divisions with expertise in these areas and (2) explain the differences and benefits of the various types of agreements during departmental training sessions on procurement contracts, financial assistance, or other agreements



In her response to our draft report, the Assistant General Counsel for Administration expressed concern that our report implied that joint project agreements lack controls and, therefore, should be avoided. This was not our intention. However, while OGC maintains that joint project agreements receive a rigorous legal review, we found a number of cases where previous legal reviews were not adequate (see page 33 of this report.) We understand that, in an effort to adopt the recommendations made in our earlier reports, the individual bureaus and line offices have instituted improved programmatic and budgetary review procedures, thus improving the quality of joint project agreements sent to OGC for legal review. We applaud these improvements and urge the bureaus and OGC to continue their efforts to ensure that agreements are not used when a financial assistance award would have been more appropriate in accordance with federal guidelines.

With regard to the need to provide guidance to the bureaus on when financial assistance instruments should be used instead of agreements, OGC's General Law Division has developed training classes and written materials that can be provided to all interested offices in the Department. These training materials also served as the basis for the initial draft of the Department's Agreement Handbook, which is discussed on page 39.

²⁶ It is important to note that unsolicited proposals that fall outside the program goals of a competitive program may be funded on a noncompetitive basis with the proper justification.

V. The Department Is Improving the Process for Preparing and Monitoring Agreements

In our September 1998 report to the Chief Financial Officer and Assistant Secretary for Administration and the General Counsel,²⁷ we identified many reasons why the Department needs to take a stronger role in overseeing how the bureaus draft, implement, and administer agreements. Some of our concerns included the failure to comply with federal requirements and to receive necessary programmatic, administrative, and legal review of agreements. The Department has since committed to implementing Department-wide guidance for agreements. For the benefit of the Commerce bureaus and line offices for which we did not issue a report, a discussion of the most common deficiencies follows. This will hopefully serve as a useful tool for enabling them to avoid the problems of others when using agreements.

A. *Commerce agreements do not consistently comply with federal requirements*

We found that departmental policies for preparing agreements are incomplete. Specifically, the Department lacks centralized guidance on when and how bureaus should enter into agreements and what approval or review processes apply. The *Department of Commerce Accounting Principles and Standards Handbook* provides some minimal guidelines on performing reimbursable services and entering into joint projects. OS's Office of Management and Organization is responsible for maintaining departmental directives. However, officials in this office stated that departmental guidelines for agreements have never been a priority.

Because of this lack of adequate guidance, many agreements are improperly or haphazardly assembled. Often, they (1) cite the wrong legal authority or fail to cite any legal authority, (2) are not adequately justified, (3) lack the signatures of the proper officials, (4) have incomplete budget information, and/or (5) have unclear or undefined termination dates or review periods. As discussed below, these deficiencies have serious consequences.

Some agreements fail to cite applicable legal authorities

We found that several Commerce bureaus fail to consistently cite the applicable legal authority that is used as the basis for their agreements. Legal authorities typically cited in agreements include: Economy Act of 1932 (31 U.S.C. §§ 1535-1536), Commerce's joint project authority (15 U.S.C. §§ 1525-1526), and Intergovernmental Cooperation Act (31 U.S.C. § 6505). Program authority may also exist as a result of congressional action. For example, specific authority for

²⁷ IPE-10418.

another federal agency to transfer funds to a Commerce agency may be contained in programmatic statutes (*e.g.*, the Clean Water Act, 42 U.S.C. § 7403(b)(4), or the National Sea Grant College Program Act, 33 U.S.C. § 1123(d)(6)).

Citation of proper legal authority is important because the type of authority chosen for a particular agreement affects the treatment of funds transferred under the agreement, including the timing or disposition of receipts. For example, the Economy Act requires that all payments for work or services performed be deposited to the appropriation or fund against which the charges have been made. Under the joint project authority, all payments are deposited into a separate account that may be used to directly pay the costs of work or services performed, to repay advances, or to refund excess sums when necessary. All receipts for furnishing specialized or technical services authorized under the Intergovernmental Cooperation Act may be deposited in the appropriation or funds from which the cost of providing such services has been paid or is to be charged. In contrast, amounts collected as user fees must be returned to the U.S. Treasury in full unless existing statutes specifically provide otherwise. Without an accurate citation, Commerce bureaus cannot be certain that they are properly depositing and handling funds associated with agreements.

The type of legal authority used also affects the period of availability for funds transferred under an agreement. For Economy Act agreements, the period of availability of funds transferred may not exceed the period of availability of the source appropriation. Accordingly, one-year funds transferred by the requesting agency must be returned at the end of that fiscal year and deobligated by that agency, to the extent that the performing agency has not performed or incurred valid obligations under the agreement. When the agreement is based on some statutory authority other than the Economy Act, the funds will remain payable in full from the appropriation initially charged, regardless of when performance occurs. The funds are treated the same as contractual obligations, subject, of course, to the “bona fide needs rule”²⁸ and to any restrictions in the legislation authorizing the agreement. Therefore, it is necessary to determine the correct statutory authority for any agreement, in order to apply the proper obligational principles.

²⁸ The bona fide needs rule states that a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation is made.

To illustrate, in two separate reports,²⁹ we found that NOAA's Office of Oceanic and Atmospheric Research (OAR) does not consistently cite the applicable legal authority in its agreements and has not demonstrated an acceptable level of improvement in authority citation since the problem was identified in the earlier 1996 report. That report indicated that 45.4 percent of agreements sampled did not cite a legal authority. The sample used in our 1998 report indicated that 39.4 percent did not cite a legal authority, a minimal improvement. Our other recent reports on how Census and NWS manage their agreements cited similar deficiencies.³⁰

The current practice of not directly citing a legal authority in agreements is inappropriate. However, we recognize that there are instances where citing a legal authority may not be appropriate, such as in international agreements where diplomatic reasons may dictate not including a citation to a legal authority. We have recommended that any departmental guidance address what legal authorities Commerce bureaus may rely on for their agreements. In addition, the guidance should clarify when a legal authority must be cited in the agreement itself. If it is not appropriate for the legal authority to be cited in the agreement, the guidance should require that the official agreement file contain the citation of the appropriate legal authority.

Agreements are not always adequately justified

In order to construct a valid agreement, requirements defined in each applicable statutory authority must be met. On the following page, Table 2 lists some relevant legal citations and includes factors that must be considered when creating agreements.

²⁹ *OAR's Cost Recovery for Sponsored Research Needs Improvement*, STL-7658, June 1996; *OAR's Interagency and Other Special Agreements*, IPE-10310.

³⁰ *Bureau of the Census Interagency Agreements Require Improvements*, IPE-10523, March 1999; IPE-10417.

Table 2: Summary of Relevant Legal Authorities

Legal Authority	Applicable Criteria
Economy Act of 1932 (31 U.S.C. § 1535)	a. Funds are available.
	b. The head of the ordering agency decides the order is in the best interest of the government.
	c. The agency filling the order is able to provide the goods or services.
	d. The head of the ordering agency decides whether or not the ordered goods can be provided as conveniently or cheaply by a commercial enterprise.
Joint project authority (15 U.S.C. § 1525)	a. The total costs (sum of costs for all participants in the joint project) for such projects must be apportioned equitably.
	b. Joint projects may be performed only if the project (1) cannot be done at all or as effectively without the participation of all parties to the project, (2) is essential to the furtherance of a departmental program, (3) is undertaken with an eligible partner (nonprofit organizations, research organizations, or public organizations or agencies), and (4) is of mutual interest to both parties.
Intergovernmental Cooperation Act (31 U.S.C. § 6505)	a. Agencies may provide specialized or technical services for state or local governments that the agency is especially competent and authorized by law to provide.
	b. The services must be consistent with and further the government's policy of relying on the private enterprise system to provide services reasonably and quickly available through ordinary business channels.
	c. Services may be provided only when there is a written request for those services made by the state or local government. The requestor must also pay all identifiable costs incurred by the agency in rendering the service.

Written justifications addressing these factors, although logical, are not always required. The FAR prescribes the policies and procedures applicable to interagency acquisitions only under the Economy Act. When a government agency purchases a good or service from another government agency, the requesting agency must prepare a determination and finding (D&F).

D&Fs document that “(1) use of an interagency acquisition is in the best interest of the Government; and (2) the supplies and services cannot be obtained as conveniently or economically by contracting directly with a private source.”³¹ Additional matters must be addressed in the D&F if the Economy Act agreement requires contracting by the servicing agency.³² According to the FAR, a D&F “shall be approved by a contracting officer of the requesting agency with authority to contract for the supplies or services to be ordered, or by another official designated by the agency head.”³³ Specifically, a contracting officer ensures that authorities and funding are adequate.

The FAR requirement for a D&F for Economy Act transfers appears to be the only regulation that explicitly requires a written justification addressing relevant legal criteria.³⁴ Yet, for all types of agreements regardless of the legal authority cited, written justifications, which demonstrate that the legal criteria have been met, represent a good management practice. Several of the criteria listed in Table 2 are complex, such as the joint project authority requirement that the project cannot be done at all or as effectively without the participation of all parties. Without the aid of a written justification, it may be difficult to show that the criteria for some agreements have been met. In addition, managers or other officials who review agreements that they did not negotiate need sufficient written documentation to determine that all relevant criteria have been met.

We found that most often only limited supporting documentation was included with agreements to indicate that Commerce officials considered the factors required to support the agreements’ legal citations. In particular, for those agreements where Commerce pays for services from other federal agencies under the Economy Act, the bureaus do not consistently prepare D&Fs in compliance with the FAR. NOAA’s National Sea Grant College program, for example, simply agrees to fund another agency’s project, prepares a procurement request, and submits that paperwork to NOAA’s Office of Finance and Administration for processing. We also found that for intra-agency transfers Commerce agencies often do not document their determination that the government can provide the needed goods or services more cheaply or conveniently than a commercial enterprise.

³¹ FAR § 17.503(a).

³² FAR § 17.503(b).

³³ FAR § 17.503(c).

³⁴ In addition to a D&F, the FAR requires that Economy Act agreements include specific provisions, such as a description of the supplies or services required, delivery requirements, a funds citation, payment terms, and acquisition authority, as may be appropriate (FAR § 17.504(b)).

While the applicable statutory authorities do not necessarily require written justifications addressing the applicable criteria, nonsystematic review of complex issues and determinations, many of which are not documented, often results in insufficient consideration being given to many of the criteria that must be met for these authorities to be used. We have recommended that the Department review existing laws, including those listed in Table 2, and determine what requirements should be supported by written justifications. Then, the Department should provide adequate guidance and oversight to the bureaus to ensure that agreements include appropriate written documentation to prove that the relevant criteria have been met.

Many agreements are not signed by the appropriate official

During our review of agreements throughout the Department, we found that many agreements were not approved and signed by an appropriate official. Some, but not all, bureaus have express delegations of signature authority for agreements. There are varying criteria for who can approve and sign various types of agreements. Often, a dollar threshold or programmatic priorities determine who should sign an agreement, but there is no consistent policy.

For example, of the 62 NWS agreements we reviewed, 9 agreements were signed by individuals who did not have approval authority and 3 agreements had not been signed by either party to the agreement.³⁵ We also found that 12 of the 99 OAR agreements we reviewed were not approved and signed by an appropriate official.³⁶ However, both NWS and OAR were proceeding with activities as if the agreements were in force. The *NOAA Budget Handbook* provides criteria, based on funding and work-years, for who must sign or approve reimbursable agreements. In the case of OAR, NOAA's Chief Financial Officer and Chief Administrative Officer officially delegated additional signature authority to the Director of the Environmental Research Laboratories. The memorandum provided that this delegation formalized OAR's established practices and emphasized that all future delegations must be approved in writing.

The Department should ensure that each agreement receives the appropriate level of approval and is signed by an authorized official. For each type of agreement (reimbursable, obligation, or unfunded), criteria should be established for Department-level approval and delegations to the bureaus. All relevant information for each agreement should also be provided to the designated official, including justifications and budget documentation. These officials could then be held

³⁵ IPE-10417.

³⁶ IPE-10310.

accountable for ensuring that all agreements are consistent with Commerce's mission and involve an appropriate use of resources.

Agreements often have incomplete budget information

Commerce agreements do not always include total project costs combined with acceptable budget summaries. Agreements that require full cost recovery, such as those which result in user fees, should include total project costs to ensure all costs will be recovered, as required by federal laws, OMB Circular A-25, the *Department of Commerce Accounting Principles and Standards Handbook*, and bureau-level guidance.

In practice, we found that some Commerce offices, such as OAR and NMFS, often rely on research proposals to define and justify reimbursable projects. In addition to a statement of work, proposals include total project costs and budget summaries. However, these proposals often are not forwarded with the formal agreement for review by the officials responsible for signing the agreement. In addition, the proposals are not always referenced in the agreements. Incorporating the proposals by reference and attaching the proposal to the agreement or including proposal cost information in the actual agreement would greatly improve the quality of Commerce agreements.

When agreements do not identify total project costs, managers and reviewers cannot accurately determine whether full costs are being recovered. Also, if total project costs are not identified, an agreement may not receive approval at an appropriate level within the organization. Accurate, detailed budget summaries also assist managers and reviewers in assessing the commitment of staff time or other resources to particular agreements. Therefore, total project costs and budget summaries, including Commerce's contributing share, should be defined in the agreement. If that information is provided in a proposal exclusively, the proposal be expressly incorporated by reference in the agreement.

Termination dates or review periods are not always defined

Some Commerce agreements we reviewed did not define a termination date or review period. While there is no departmental guidance on termination dates and review periods, some bureaus have internal policies. For example, the *NOAA Budget Handbook* requires that reimbursable agreements include terms stating (1) when and under what circumstances the agreement is to be terminated and (2) that the agreement must be reviewed periodically, but not less than annually. In addition, NWS issued a policy in June 1994 requiring that each of its agreements be reviewed every three years.

During our recent reviews, we found that of the 62 NWS agreements we reviewed, 39 did not specify the performance term and 26 failed to cite an effective date.³⁷ Some agreements also did not state a termination date. In addition, 7 of 99 OAR agreements and 14 of 26 Census agreements did not sufficiently define a termination date or review period.³⁸

In reviewing ITA's agreements, we found an example of an agreement that no longer seems appropriate considering ITA's organizational changes over the last couple of years. The US&FCS district office in Nashville, Tennessee, established a branch office in Knoxville, Tennessee, effective March 1990, before the present network of USEACs was established. With the new USEAC structure, Knoxville is now a "spoke" office reporting to the Atlanta USEAC "hub" site, not Nashville. Also, we found many agreements that had expired, some as recently as June 1998, and others as early as March 1995, without a new agreement put in place, even though the interagency relationship continued to exist.³⁹

Defining these relevant dates or time periods is important to ensure that agreements are properly administered and kept up-to-date. When the stated performance period is undefined or indefinite, it is difficult to determine whether the agreement is still valid and whether reassessment of the agreement ever occurred. In addition, even if a need still exists, as time passes, critical features of the project, such as the level of funding or other resources, may need modification. An ill-defined performance period may ultimately result in the performance of work that is no longer mission-related, the waste of funds and personnel, or the inequitable apportioning of project costs.

In most cases, agreements should have a defined performance period with a stated effective date and, when possible, a specific termination date. However, we recognize that there may be instances where flexibility in this requirement is necessary to best meet the needs of the Department. In these instances, the lack of a termination date in the agreement must be thoroughly justified by the responsible program office and documented in the official agreement file. In addition, for agreements that continue over an extended term where it is not feasible to define a termination date, the agreement should have a provision for a periodic review and amendment by mutual consent of the parties.

Agreement negotiation process should be improved

³⁷ IPE-10417.

³⁸ IPE-10523.

³⁹ IPE-10752.

As part of any new policies and procedures for agreements, the Department should include a more formal method of ensuring that agreements prepared by other parties are complete before they are signed by Commerce officials. During our review of other Commerce bureaus, we found that agreements are often deficient due in part to the fact that other parties prepared the agreements and the Commerce bureau failed to negotiate with the other party to make necessary changes before the agreements were signed. This is most often the case when the Commerce bureau performs reimbursable work for others, rather than purchasing services.

In one case we found that OAR officials were making some effort to identify missing terms and notify the other parties of what those terms should be.⁴⁰ OAR prepared a cover letter that was sent to the other party with the signed agreement. The letter, signed by the OAR official who signed the agreement, acknowledged receipt and acceptance of the attached agreement and included several standard items, such as the amount of the agreement, legal citation, termination date, and billing terms, whether or not those terms were stated in the agreement. However, this practice did not represent a formal agreement between the parties, because the additional terms in the letter were not formally agreed to by the other party.

We suggest that the Department work with the bureaus to establish a formal procedure for ensuring that agreements prepared by other parties contain all necessary information. Standard language should be developed and sent to the sponsoring party when negotiations on a project first begin. The standard language would inform the other party of basic elements that must be included in any formal agreement, including legal citation, termination date or performance period, and total project costs. This notice could be incorporated into any initial correspondence or be presented as a brief standard form. Forms of this nature, such as those used by the Census Bureau or the Environmental Protection Agency, would be useful resources for developing a standard form.

As a second step, if a final agreement is still incomplete, Commerce bureaus should prepare a formal modification or amendment that specifies missing terms and is signed by both parties. The bureaus could use the same standard form used during negotiations. To ensure full compliance, the programs should not be permitted to begin work on a project until the agreement and any modifications or amendments needed to include missing terms are signed. Given common and persistent deficiencies found throughout the Department, a procedure that formally notifies other agencies and/or parties of necessary terms and subsequently modifies or amends

⁴⁰ IPE-10310.

incomplete agreements is essential to ensure future compliance and to protect Commerce from any risks associated with these deficiencies.

—————

The Assistant General Counsel for Administration's written response to our draft report provided comments regarding the citation of legal authority in agreements and whether termination dates need to be cited in all agreements. Where appropriate, we made changes to our report to address the comments. In addition, the Assistant General Counsel stated that her office has developed written materials and conducted training sessions on agreement preparation. We are pleased to hear of these efforts and urge OGC to continue working with the bureaus to improve the preparation and review of agreements.

B. The oversight process for reviewing departmental agreements is inadequate

There is an opportunity for the Office of the Secretary to create a process that could greatly improve the review of agreements throughout Commerce. Because the Office of the Secretary is in the unique position of overseeing many administrative details for its bureaus and offices, it naturally follows that it is in a position to ensure that agreements contain all required elements before they are finalized. There are four specific areas of review that the Department should consider: budget, procurement, legal, and programmatic.

Agreements do not always receive adequate budget review

Agreements involve a significant amount of resources—either the transfer of funds or the commitment of funds or resources to a project. Because of this fact, each Commerce agreement should receive a thorough budget review to ensure that federal resources are wisely and justifiably used. We have recommended that in any departmental guidance on agreements, the Department should state what budget documentation and detail are necessary for the bureau budget offices to approve the obligation of resources to a performing agency or entity, or to receive reimbursable or advance funding from a sponsoring agency or entity. Individual bureaus would then be responsible for reviewing their own agreements for compliance with departmental and bureau-level guidance.

Several bureaus have an informal review process for agreements. For example, ITA follows the general practice of having its Office of Administration and budget offices process all agreements involving the transfer of funds. Agreements not involving money are handled by the Assistant

Secretaries of the program units. There is no documentation of these processes, however, and therefore no assurance that all agreements receive appropriate review.⁴¹

Contracting officers do not regularly review and approve agreements

With regard to procurement review, the FAR provides that D&Fs, which support agreements that transfer funds under the Economy Act, should “be approved by a contracting officer of the requesting agency with authority to contract for the supplies or services to be ordered, or by another official designated by the agency head.”⁴² However, throughout Commerce, we found that contracting officers or designated officials are not always reviewing D&Fs. In fact, Census unjustifiably removed this requirement from its agreement review process.⁴³

Officials in the Office of the Secretary’s Office of Acquisition Management were aware of the FAR requirements, but acknowledged that they did not review most Economy Act agreements and supporting D&Fs. We believe that Office of Acquisition Management contracting officers should approve all Economy Act fund transfers and D&Fs, or delegate this responsibility, for agreements below a certain threshold, to the contracting officers in the appropriate bureau. This review is critical to meet the FAR requirements and also to ensure that the authority provided by the Economy Act is not being used to inappropriately acquire goods and services from other federal agencies.

Agreements do not always receive legal review

We found that many Commerce agreements did not receive any legal review before becoming effective. If an agreement has not been reviewed by legal counsel, it may (1) not comply with legislative and regulatory requirements, (2) not cite appropriate legislative authority, or (3) include terms unacceptable to or unnecessary for a federal agency. Currently, the Department does not have any orders or regulations that establish criteria for when legal review is required before an agreement is signed. An April 1994 OGC memorandum states that Economy Act and joint project agreements “should” be sent to OGC for review, implying some level of discretion. However, OGC officials told us that all agreements must be sent to them for review unless a specific delegation has been granted. In addition, most of the bureaus do not have clear policies on when bureau counsel and/or OGC review is required for agreements.

⁴¹ IPE-10752.

⁴² FAR § 17.503(c).

⁴³ IPE-10523.

Due in part to the lack of guidance on legal review of agreements, the bureaus follow various practices for having their agreements reviewed. Several bureaus or organizational units, particularly ITA and NOAA headquarters, have policies of sending all of their agreements to legal counsel for review. However, their agreements processes are largely informal and undocumented so there is no assurance that all agreements receive legal review.

In fact, of the agreements we reviewed during our bureau and line office inspections, a relatively small number actually received a legal review. OGC did not review NTIS's delivery orders and interagency agreements implemented as part of its CyberFile project, which involved numerous procurement deficiencies.⁴⁴ OGC reviewed only 10 OAR agreements in fiscal year 1997; while 12 of the 62 NWS agreements from fiscal year 1997 we sampled were reviewed by OGC.⁴⁵ Most NIST agreements also do not receive OGC review, while some are reviewed by NIST's Deputy Chief Counsel for Technology Administration. Many agreements themselves evidence a lack of legal review because of the failure to include basic provisions, such as a citation to legal authority.

A clear policy is needed that details when agreements should be submitted for legal review. Because it is simply not practical or necessary for all agreements to be reviewed by OGC, we recognize that there should be some programmatic criteria and dollar thresholds developed to assist bureaus and offices in determining which agreements must be reviewed by OGC and which should have bureau-level legal review. For example, the Department could require OGC review of agreements that are over a certain dollar threshold, commit significant funding or other resources, include irregular terms and conditions, involve a private or foreign party, are signed at the line office level or higher, or potentially involve significant departmental liability. OGC also recognizes the need for criteria and, over the past three years, has been working with departmental bureaus and offices to develop thresholds for legal review of agreements. Once the thresholds are set, they are to be incorporated into the forthcoming individual bureau's and office's guidance on agreements.

In addition to a clear policy, pre-approved language that is regularly reviewed and updated would facilitate the process by making agreements easier to draft and review. To meet this need, OGC recently developed several model agreements for use by Commerce bureaus. The models cover Economy Act, Joint Project, Intergovernmental Cooperation, and Special Studies agreements and

⁴⁴ CyberFile was an on-line tax-filing system that NTIS was developing for the Internal Revenue Service through an interagency agreement (see *Deficiencies Related to the CyberFile Project*, IPE-9364).

⁴⁵ IPE-10310; IPE-10417.

OGC has made them available on its web site.⁴⁶ In addition to the OGC model agreements, NIST uses several standard forms for its interactions with nonfederal researchers, including a guest researcher agreement and a facilities use agreement. Finally, the *NOAA Budget Handbook* also includes some standard language for agreements.

Programmatic review should be formalized

The Department should also incorporate a programmatic review requirement into its review process for agreements. We found that agreements receive various levels of programmatic review, but often these review processes are undocumented. As discussed on page 25, some legal authorities that authorize agreements include complex criteria that must be met. In addition to determining what written justifications should be prepared for these criteria, the Department should require the bureaus to determine the appropriate level of review. Designated offices or officials could then be held accountable for the appropriateness of agreements.

In one example we reported on at NWS,⁴⁷ a 25-year-old agreement between the Coast Guard and NWS's National Data Buoy Center specified that a minimum of 15 Coast Guard personnel were to be detailed to NWS. The agencies had not reviewed this agreement to determine whether the number of personnel were still necessary, possibly causing the Center to waste some of the \$1.2 million that it spent on this arrangement every year. This lack of oversight was due in part to NWS's inconsistent policies on reviewing agreements. In September 1997, NWS issued a directive requiring that all interagency agreements be reviewed at least once every three years. The *NOAA Budget Handbook*, however, required that agreements include terms stating that the agreement must be reviewed periodically, but not less than annually.

We found one agreement between NMFS and the Pacific Marine States Fisheries Council had specific details that were no longer relevant or accurate.⁴⁸ For example, the type of computer being used and the number of Council personnel working on-site at NMFS facilities had all changed. In addition, another six agreements were no longer active, but there is no documentation that these agreements were ever closed out or officially terminated.

In another example, NASA transferred \$6.3 million to OAR to perform one task under a 1973 memorandum of understanding between NASA and NOAA, which governs joint satellite

⁴⁶ See <http://www.ogc.doc.gov/ogc/admin/general.html>

⁴⁷ IPE-10417.

⁴⁸ *NMFS's Agreements Require Additional Improvements*, IPE-10775.

programs worth approximately \$172 million a year.⁴⁹ While the 1973 agreement stated that it remained in effect indefinitely and could be terminated or modified at any time, it had not been formally updated since it was first drafted 25 years ago. NASA and NOAA both agreed that the agreement needed updating and a new agreement was signed in June 1998, shortly after our report was issued.

We found three Sea Grant agreements that were signed in 1977, 1984, and 1987, respectively.⁵⁰ The agreements included provisions which required that they (1) be reviewed periodically, but not less than annually, and (2) remain in effect until terminated by mutual agreement or upon adequate notice of either party. However, we found that Sea Grant did not regularly review these agreements. Although the agreements still relate to valid programmatic needs, they may require amendment. In particular, the Fish and Wildlife Service initiated a review of and recommended changes to its 1977 agreement with Sea Grant, but no action had been taken by Sea Grant in response. The 1984 U.S. Department of Agriculture agreement coordinates its Extension Service activities with the local Sea Grant programs and the 1987 NWS agreement authorizes Sea Grant programs to organize weather reports from mariners. Even though there may still be some value to these programs, they should be periodically reviewed to determine if changes in circumstances require the agreements to be updated.

The Department should require the bureaus to periodically reevaluate the necessity and appropriateness of individual agreements. As discussed on page 29, many of the agreements we reviewed contained indefinite duration provisions, often stating that the agreement is valid until terminated by one or both parties. Even when provisions for annual or periodic reviews were included, we found that most agreements were never reevaluated. Without a periodic reassessment, there is no assurance that agreements continue to, among other things, (1) comply with legislative and regulatory authority, (2) meet legislative criteria, (3) be mission-related, or (4) protect the government's interests. In addition, significant departmental funds may be wasted if due diligence is not exercised. We believe that the Department needs to ensure that agreements are reviewed and revised or renewed as appropriate, at least every three years.

In responding to our draft report, the Assistant General Counsel for Administration stated that the General Law Division has prepared five model agreements that are available on the Division's web site. We changed our report on page 34 to reflect this information. In addition,

⁴⁹ IPE-10310.

⁵⁰ IPE-10310, May 1998.

other clarifications were made to our discussion on contracting officer and legal review of agreements to respond to the Assistant General Counsel's written comments.

C. *Departmental policies and procedures for agreements are clearly needed*

A thorough policy on agreements is a necessary resource for officials preparing and reviewing agreements, by providing such information as when an agreement is necessary, what level of approval is required, and what specific language is needed. Considering the problems discussed above and in our separate reports on bureau and Office of the Secretary agreements, we recommended that the Department prepare formal policies and procedures, such as a Department Administrative Order or handbook, outlining the types of agreements that can be entered into by Commerce bureaus; the minimum necessary content and steps for preparing agreements; standard language or form agreements; and the review, approval, and renewal policies and procedures that should be followed by all Commerce bureaus.

This guidance should be comprehensive, specifying how each type of agreement should be prepared and reviewed. For example, some agreements may only require programmatic and legal review, while others should be reviewed by procurement, budget, legal, and program offices. At a minimum, the new guidance should:

- Require all Commerce agreements to include at least the following items: citation of legal authorities, applicable written justifications, signatures by the appropriate bureau and departmental officials, total project costs, budget summaries, and termination dates and/or review periods.⁵¹ There should also be formal procedures that ensure agreements prepared by external parties contain all necessary information.
- Require bureaus to prepare D&Fs for transfers authorized by the Economy Act.
- Direct bureaus to establish appropriate internal review processes for each type of agreement. Explicitly state the responsibility of each bureau, the minimum path of review and approval, and thresholds for review. The bureaus will be responsible for designating

⁵¹ We recognize that there may be a few instances where some of these items may not be required in an agreement. Two known exceptions are (1) the citation of legal authority, which may not be appropriate for an international agreement and (2) termination dates. In both cases, the legal authority used and/or the reason why a termination date is not included in the agreement should be adequately documented in the official agreement file. As discussed on page 30 where a termination date is not feasible, the agreement should have a provision for a periodic review and amendment by mutual consent of the parties.

which of their operating units will perform these required functions. Such bureau guidance should also be written.

- Direct the bureau budget offices to review budget documentation for every agreement and to approve the obligation of resources to a performing agency or entity or the receipt of reimbursements/advances from a sponsoring agency or entity.
- State that Economy Act orders and supporting D&Fs, above a specific threshold, must be reviewed by Office of Acquisition Management contracting officers. Economy Act orders below that threshold should be delegated to bureau contracting officers or other designated officials for review.
- Provide generic, Department-wide standards for which agreements require OGC and/or bureau counsel review. For those bureaus that require greater oversight, OGC should negotiate more specific criteria for legal review of their agreements.
- Require the bureaus to perform initial and periodic review of programmatic justifications for every agreement. Reviews should be at least every three years.

To be effective, any new guidance should be widely distributed. To accomplish this, the Department should encourage the bureaus to provide training on how to prepare and process agreements. In addition, the Department should make all information relevant to preparing and processing agreements easily accessible by posting documents on its Intranet and presenting this information at any relevant departmental and bureau conferences. Any subsequent changes in federal, departmental, or agency regulations or procedures and applicable laws should also be widely distributed. As we recently reported, NIST has made some interesting efforts to widely distribute its guidance.⁵² Its Intranet includes sample agreements, contact names, links to relevant regulations and laws, and decision trees to help program officials decide which agreements are appropriate. Although a paper copy of its administrative manual may always be necessary, the Intranet site appears to be more user friendly, which hopefully encourages better compliance with the applicable requirements.

We are pleased to report that the Department has agreed with our observations and recommendations with regard to creating departmental policies and procedures. In responding to our September 1998 report which made these recommendations, the Chief Financial Officer and Assistant Secretary for Administration stated that “We agree with the recommendation to

⁵² IPE-10854.

establish uniform Department-wide policies and procedures for use by all bureaus, and will work in consultation with the Office of Inspector General (OIG), the Office of the General Counsel, and other interested stakeholders on their development.” Further the Chief Financial Officer stated that “We agree that, once issued, Departmental guidance should be broadly disseminated and electronically accessible.”⁵³

The Department, in conjunction with OGC, has worked very hard to develop an Interagency Agreements Handbook that promotes uniform implementation of agreements throughout the Department. The Handbook contains departmental policies and procedures pertaining to agreements, while also giving due consideration to the various program requirements and procedures present at the bureau level. Over the past year, numerous meetings between cognizant officials in all the bureaus have occurred to discuss the contents of the Handbook and draft versions of the Handbook has been widely circulated for comment several times. At present, the Office of Acquisition Management is examining an alternative approach to agreements between Commerce operating units. However, the issuance of the Handbook remains a high priority for the Department and officials anticipate that it will be issued in the very near future.



In responding to our draft report, both the Acting Director, Office of Executive Assistance Management and the Assistant General Counsel for Administration stated that they were in agreement with our recommendation and would continue to work together to ensure that the Handbook is issued.

D. Many bureaus also need policies and procedures for agreements

During our Department-wide review of agreements, we found just one bureau (NIST) that had a comprehensive set of guidelines for processing agreements. We also found that a few bureaus already have guidance covering just certain types of agreements. For example, NOAA prepared a directive for its agreements in October 1992, and Census prepared guidelines for its agreements in July 1997. NOAA’s directive outlines agreement responsibilities and policies of each NOAA office, and Census’s guidelines provide the contents and steps for preparing agreements for each Census office. In particular, Census’s guidelines require a citation of legal authority, a statement of work, financial information, termination provisions, and authorizations.

⁵³ IPE-10418.

In addition to the NOAA guidance, two of its line offices, NMFS and OAR, have developed supplemental guidance and checklists to follow while preparing agreements. OAR’s checklist includes basic information about the agreement (such as type of sponsor and period of performance), substantive justifications, applicable legal authority, strategic plan elements, budget information, billing basis and cycle, and waiver justification for not seeking advance funding from nonfederal sources. The official preparing an agreement must mark certain boxes to identify which option in each section applies. Once completed, the checklist will remain on file with the agreement and serve as an assurance that each of the required elements has been addressed. If consistently applied and regularly updated, the checklist should improve compliance with federal requirements for agreements.

However, most of the bureaus or line offices that we reviewed either had no guidance on agreements, or the guidance that was in use was incomplete in some way. Accordingly, we made recommendations in our individual reports to these bureaus and line offices to put in place internal policies and procedures that outline the steps for preparing and processing agreements. In most cases, we recommended that the bureaus and line offices ensure that their guidance was consistent with the forthcoming departmental Handbook, as discussed in the previous section. The status of each bureau or line office’s implementation of our recommendation is shown in Table 3 below.

Table 3: Status of Implementation of OIG Recommendations on Guidance for Agreements

Bureau or Line Office	Recommendation on Guidance?	Status
OS	Yes	The Department has concentrated its efforts on issuing the Interagency Agreements Handbook. Once it is issued, OS will begin work on appropriate internal policies and procedures for OS offices to use in preparing and implementing agreements.
MBDA	No	Not applicable
PTO	No	Not applicable

NTIS	Yes	<p>Since the issuance of our report, the Secretary of Commerce has recommended that NTIS be closed at the end of fiscal year 2000 and some of its functions transferred to the Library of Congress. In that same period, NTIS also lost one-third of its staff and is currently operating under a hiring freeze, which has strained its resources. Given this situation, developing guidance for agreements has understandably not been a priority for bureau management. In addition, NTIS has been waiting on the guidance from the Department before preparing a set of guidelines specific to NTIS agreements. At this time, the fate of NTIS is unknown until the Congress takes action. Therefore, bureau officials told us that if NTIS appears to have a future when the Department's Handbook is issued, they will begin work on guidance for NTIS's agreements.</p>
Census	Yes	<p>Census has developed its own internal guidance for the preparation and review of bureau agreements. This guidance is in the final review process and officials anticipate that it will be issued by September 30, 2000. Census's guidance considers the contents of the draft versions of the Department's Handbook</p>
NOAA NWS	Yes	<p>NWS completed a chapter for its guidance covering Economy Act agreements. This chapter, and subsequent chapters as they are completed, will be disseminated to NWS's field offices. NWS is waiting on the issuance of the Department's Handbook before it issues final policies and procedures to ensure that a rewrite will not be necessary.</p>

NOAA NMFS	Yes	NMFS is still operating under the guidance that was in place at the time of our inspection. Officials have started drafting new guidance that will be in-line with the Department's Handbook. However, they have decided to wait to and issue NMFS's final guidance after the Department's Handbook is issued to ensure that a rewrite will not be necessary. NMFS officials estimate that they will have their guidance issued in final form approximately one month after the issuance of the Department's Handbook
NOAA OAR	Yes	OAR began developing its guidance in 1999, but after consultation with OGC and NOAA management, decided to wait until the Department's Handbook is issued to proceed any further.
ITA	Yes	ITA issued interim guidance for preparing and processing agreements in July 1999. Since then, ITA and OGC officials having been working together on developing more detailed chapters for the guidance that cover the different legal authorities that ITA has to enter into agreements. It is anticipated that the final guidance will be issued sometime in fall 2000.
NIST	No	Not applicable

VI. Commerce Bureaus Generally Do Not Adequately Track and Control Agreements

During our reviews of Commerce bureaus and the systems and processes they have for managing agreements, we found that few bureaus were able to adequately track and control their agreements. Some bureaus keep lists of agreements for their individual operating units, but no comprehensive departmental inventory exists. As a result, we found inconsistent reporting of agreements among Commerce bureaus. The bureaus had different ways of classifying agreements, and frequently overlooked agreements between their bureau and another Commerce agency. In some cases, bureaus still record expired agreements and some record open but inactive agreements. Consequently, we experienced significant difficulty collecting an accurate inventory of agreements by agency or, in the case of NOAA, by major line office.

Generally, Commerce bureaus had no policies or procedures in place to guide their operating units and headquarters officials in the proper handling of agreements. Some agencies have implemented centralized systems, while others rely on individual programs to catalog agreements. MBDA, NIST, ESA, TA, EDA, and BXA all maintain centralized databases. NOAA's National Environmental Satellite, Data, and Information Service's (NESDIS) Office of International and Interagency Affairs was updating its database of all NESDIS agreements. OS, ITA, NOAA headquarters offices, and NWS, on the other hand, kept no centralized lists of agreements, while OAR's and NMFS's lists were incomplete.

Some bureaus can use existing financial and accounting computer systems to provide information on agreements. For example, NOAA and Census each track costs associated with individual reimbursable projects, which can be the basis for determining how many reimbursable agreements exist and how much in resources is committed to these activities. Similarly, because obligation agreements involve payments, NOAA's and Census's finance offices can obtain information on obligation agreements. However, there is no similar ability to compile a comprehensive listing of unfunded agreements.⁵⁴

As the pilot for implementation of the Commerce Administrative Management System (CAMS), Census has been able to develop and implement modules that could be useful in setting up a database of agreements. The reimbursable module can track and act as a repository of information about reimbursable agreements. In addition, the module pre-screens reimbursable agreements through the interactive input form; it would not allow someone to enter a request for a reimbursable without filling in all required fields.

⁵⁴ In an earlier report to the NOAA Comptroller, we expressed our concerns about NOAA's ability to produce a concise, credible inventory of interagency agreements. (*Preliminary Findings Regarding Inspection Work on NOAA Interagency Agreements*, IRM-6291, September 1994)

A central database of agreements would be a useful management and administrative tool. The Government Performance and Results Act requires federal agencies to describe coordination and planning with other agencies on shared or similar functions and programs. In July 1997, the House Science Committee criticized Commerce's strategic plan for failing to adequately discuss coordination of cross-cutting programs. The Department has since included more information about program "linkages" in its strategic plan for 1997-2002. For each strategic theme (economic infrastructure, science/technology/information, and resource and asset management and stewardship), the Department describes several linkages with other federal and nonfederal parties that support these strategic themes. Basic information from a departmental database could be used to further develop these linkages.

From an administrative perspective, a central database of agreements would help Commerce bureaus in administering and maintaining their agreements. The FAR requires that the Department maintain centralized files for contracts and grants in order to provide better control and oversight. We believe that there is nothing unique about agreements that would preclude them from being similarly reviewed and maintained. By having relevant dates in the system, programs could easily identify which agreements are due for renewal, termination, or review. Also, officials could quickly respond to inquiries on particular agreements by accessing the system by identifying number, project title, or contact name.

During our earlier review, OS officials agreed that a database of summary information for each agreement should be established and maintained, allowing OS and the bureaus to quickly obtain agreement information and determine what agreements exist. We believe that at least the following summary information on each agreement should be stored in an electronic database: purpose or title, parties, termination date, review period, funding information, legal authority, and contact person or office. The database could also be used to establish a document numbering system. Each entry would be assigned a unique number, which would then be placed on the actual agreement and any related documents. Commerce bureaus could then better identify and track the physical documents.

Given the large number of agreements and their importance to achieving Commerce's mission, a comprehensive database of agreements would help management and other responsible officials better control and maintain their agreements. OS officials suggested to us that the Department's Risk Management Team evaluate the composition of a Department-wide database of agreements. Because a Department-wide database would be a major effort and possibly involve significant resources to develop, we agree that the Department should carefully consider what approach to take in creating a central database of agreements.

We have identified two options for creating a central list of agreements. First, the Department could develop one standard system or database program that each bureau can access to add, modify, or delete agreements. Alternatively, each bureau could maintain its own database that is compatible with requirements specified by the Department. The Department would define which data elements are required for a centralized list and then require the bureaus to periodically provide the information electronically to be uploaded into the central list at the Department level.

In responding to our report on Office of the Secretary agreements, the former Chief Financial Officer and Assistant Secretary for Administration stated that he agreed with our recommendation for central tracking of agreements and “Although the second option identified under this recommendation (a bureau-maintained ‘feeder system’) appears to be most workable, we will consult with the appropriate parties, e.g., technical support personnel, to determine the best method for meeting this objective.”⁵⁵ To date, however, little action has been taken on our recommendation. The biggest impediment to developing the database, finding the funds to pay for it, was eliminated when funding was made available in fiscal year 2000. However, because the planning for the database is in its early stages, the Department has no estimate as to when the database will be operational.

Most of the bureaus and line offices we reviewed also had similar problems as the Department in adequately tracking and controlling their agreements. Accordingly, we made recommendations in our individual reports to these bureaus and line offices to develop a database to track and control their agreements. In most cases, we recommended that the bureaus and line offices ensure that their databases were compatible with the forthcoming Department-wide database for agreements, as discussed above. The status of each bureau or line office’s implementation of our recommendation is shown in Table 4 below.

Table 4: Status of Implementation of OIG Recommendations on Agreements Database

Bureau or Line Office	Recommendation on Database?	Status
OS	Yes	Once the Department-wide database for agreements is completed, OS will begin work on a centralized system to adequately inventory, track, and control OS’s agreements.
MBDA	No	Not applicable

⁵⁵ IPE-10418.

PTO	Yes	Prior to the issuance of our draft report, in part in response to our request for a listing of agreements, PTO developed a comprehensive agreements database to better manage its agreements. This database has been operational for approximately two years.
NTIS	Yes	NTIS had an agreements database, but it was unnecessarily complex and difficult to use. NTIS redesigned its database and it is undergoing final testing. Officials anticipate that it will be fully operational by September 30, 2000, at which point NTIS intends to train users in how to use it. Notwithstanding its proposed closure, NTIS acted to implement this recommendation in order to improve financial record keeping and to assist in the orderly termination of existing obligations should that prove necessary.
Census	Yes	Census has hired a contractor to develop a Internet-based agreement tracking system. The database became operational at the end of July 2000.
NOAA NWS	Yes	NWS has developed a database for its agreements and all agreements active in fiscal years 1999 and 2000 have been entered.
NOAA NMFS	Yes	NMFS developed a database for tracking its agreements. Data entry in the new database was started in November 1998. NMFS recognizes that it may need to make some changes to its database depending on what is required for the Department-wide database for agreements.
NOAA OAR	Yes	OAR is currently tracking its agreements using a word processing program. However, it is developing a database that will allow for additional information to be added and for users to query the system. OAR anticipates that its new database will be operational on or before October 1, 2000.

ITA	Yes	ITA officials have not taken any action to establish a centralized system to track and control ITA's agreements. They are waiting for the Department-wide database for agreements to be completed before beginning work on the bureau's database, as they want to ensure that the two databases are compatible.
NIST	No	Not applicable



In responding to our draft report, the Acting Director, Office of Executive Assistance Management stated that staff in the Office of the Secretary will work with appropriate officials in the Office of Inspector General, Office of the General Counsel, and the operating units to thoroughly review the needs of the Department and determine the information to be included in the database.

VII. Some Commerce Bureaus Need to Improve Their Systems and Procedures to Better Ensure Full Cost Recovery under Reimbursable Agreements

Considering the significant amount of reimbursable work performed by Commerce bureaus, full cost recovery is a serious concern. Commerce bureaus are required by federal law, OMB Circular A-25 on user fees, the *Department of Commerce Accounting Principles and Standards Handbook*, and internal bureau guidance to achieve full cost recovery for work performed under certain agreements. In particular, the Economy Act requires federal agencies to recover actual costs for reimbursable work performed for other federal agencies. Commerce's joint project authority requires agencies performing joint projects to apportion full costs on an equitable basis.

An agency's failure to recover actual costs or to equitably apportion full costs in a joint project could also result in a circumvention of the appropriation process because it could cause the agency to undercharge or overcharge the sponsoring organization. A performing agency's appropriated funds may be improperly (1) depleted to the extent that the labor and other costs that should be charged to sponsored project agreements are charged to appropriated funds, or (2) augmented to the extent that an agency receives amounts in excess of its actual costs. Furthermore, the ordering agency's appropriation can be improperly augmented if does not reimburse the performing agency for its full costs.

We found many examples where Commerce bureaus do not adequately account for and recover full costs for reimbursable activities. In June 1996, we reported that OAR's lack of a time management system for recording labor costs and charging inadequately supported overhead rates were the primary causes for OAR's inability to achieve full research cost recovery.⁵⁶ The report estimated that OAR did not recover \$27.9 million of labor costs and associated overhead costs for fiscal years 1993 and 1994. A 1995 OIG audit report found that NMFS did not recover \$9.3 million in labor costs and associated overhead for the same two fiscal years.⁵⁷

In a more recent report,⁵⁸ we discussed an agreement between NMFS and the Department of Interior's National Biological Service that required NMFS to conduct research in support of the national marine mammal tissue bank and the Alaska marine mammal tissue archival project for \$70,000, in fiscal year 1997. Although the Economy Act was cited as the authority to transfer funds, NMFS did not charge labor and NOAA overhead to Interior and did not obtain a waiver,

⁵⁶ *OAR's Cost Recovery for Sponsored Research Needs Improvement*, STL-7658, June 1996.

⁵⁷ *NMFS Cost Recovery for Sponsored Research Needs Improvement*, STL-6528, May 1995.

⁵⁸ IPE-10775.

as required by the *NOAA Budget Handbook*. We also found several examples of insufficient cost recovery in NWS agreements.⁵⁹ For example, NWS subscription fees for the “Weekly Weather Crop Bulletin” do not include postage, labor, or overhead, costs that are required to be recovered under OMB Circular A-25.

For various reasons, several other bureaus do not even attempt to recover full costs. Our 1994 report to ITA cited the fact that it had not provided a complete and timely accounting of its costs and expenditures to other parties to its agreements.⁶⁰ During our 1998 review,⁶¹ ITA officials stated that they did not think full cost recovery was a requirement and that the effort to identify and recover full costs exceeded whatever marginal amount of funds they could identify. They also claimed that recovering more than ITA’s additional direct costs is an augmentation of its appropriation. We disagreed with ITA’s position. In our fiscal year 1998 and 1999 financial statements audit reports, we have continued to stress that ITA needs to recover the full cost of the various trade events and seminars it sponsors to ensure that it is in compliance with OMB Circular A-25.⁶²

Similarly, BXA officials recently told us that they do not try to recover full costs for the salaries of the staff doing the work they were already paid for by BXA, such as consultations with foreign governments to establish or update foreign export controls. This policy is in stark contrast to how BXA managed a fee-based seminar program for exporters and government officials on the export licensing process. In 1994, we reported that BXA routinely charged seminar fees at rates that were intended to produce a profit.⁶³ In the majority of cases, fees were set without consideration of cost, and revenues from individual seminars substantially exceeded the seminars’ expenses. OGC determined that BXA could not set seminar budgets so as to consistently collect profits from seminars, although the agency could use surplus funds that were inadvertently collected for related export activities.

⁵⁹ IPE-10417.

⁶⁰ *Interagency Agreements Conducted by the International Trade Administration*, IRM-6290, September 1994.

⁶¹ IPE-10752.

⁶² *U.S. Department of Commerce Fiscal Year 1998 Consolidated Financial Statements*, FSD-10899-9-0001, March 1999 and *U.S. Department of Commerce Fiscal Year 1999 Consolidated Financial Statements*, FSD-11911-0-0001, March 2000.

⁶³ *BXA Is Improperly Operating Its Seminar Fund*, ADD-5127, March 1994.

We have found other agencies that also deliberately charge more than their actual costs. Our report on NTIS's management of the CyberFile project found that it inappropriately charged a cost-plus-a-percentage-of-cost fee to other federal agencies, a practice that maximized its fees but fostered inefficient procurement practices.⁶⁴

Unlike many of the other concerns we raise in this report, the problem here is not a lack of guidance, but bureau officials' failure to implement reliable systems for tracking reimbursable costs. Therefore, we are recommending that the chief financial officer of each bureau fulfill, and be held accountable for, his or her responsibilities to maintain systems and methodologies consistent with departmental policies. If a bureau believes that full cost recovery is somehow contrary to its mission or appropriations authority, then it must seek a written waiver from OMB authorizing it to charge other parties less than the full cost of its activities.



In their responses to our draft report, the Acting Director, Office of Executive Assistance Management and the Assistant General Counsel for Administration did not specifically address this recommendation, but both stated that they were in agreement with our findings and recommendations.

⁶⁴ IPE-9364.

RECOMMENDATIONS

We recommend that the Chief Financial Officer and Assistant Secretary for Administration and the Acting General Counsel complete actions, as outlined in our 1998 report on Office of Secretary agreements, and in this report, to:

1. Complete development and implementation of uniform Department-wide policies, procedures, and guidance for the use, management, and oversight of interagency and other special agreements (see page 23).
2. Establish a centralized system to adequately inventory, track, and control Commerce's agreements (see page 42).

In addition, we recommend that the Chief Financial Officer and Assistant Secretary for Administration and the Acting General Counsel direct appropriate officials to take the following actions for the Department of Commerce:

3. Clarify when FAR requirements for procurement actions apply to reimbursable funding and ensure that bureaus and line offices are adhering to the FAR requirements for contracts entered into under reimbursable agreements, including preparing sole source justifications and advertising all sole-source contracts in the *Commerce Business Daily* (see page 18).
4. Inform program officials about how to determine the most appropriate instrument(s) for an anticipated funds transfer to a private entity—procurement contract, grant, cooperative agreement, or other type of agreement—including:
 - C Encouraging program officials to seek guidance from OGC and providing contact information for the various OGC divisions with expertise in these areas.
 - C Addressing the differences and benefits of the various types of agreements during departmental training sessions on procurement contracts, financial assistance, or other agreements (see pages 18 and 22).
5. Hold the bureau chief financial officers and other bureau management accountable for implementing reliable systems for recovering full costs on reimbursable activities (see page 50).

APPENDIX A
Glossary of Acronyms

BXA	Bureau of Export Administration
CAMS	Commerce Administrative Management System
D&F	Economy Act determination and finding
EDA	Economic Development Administration
ESA	Economic Statistics Administration
FAA	Federal Aviation Administration
FAR	<i>Federal Acquisition Regulation</i>
GSA	General Services Administration
IRS	Internal Revenue Service
ITA	International Trade Administration
ITS	Institute for Telecommunications Sciences
MBDA	Minority Business Development Agency
MBOC	Minority Business Opportunity Committees
NASA	National Aeronautics and Space Administration
NESDIS	National Environmental Satellite, Data, and Information Service
NIST	National Institute of Standards and Technology
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NTIA	National Telecommunications and Information Administration
NTIS	National Technical Information Service
NWS	National Weather Service
OAR	Office of Oceanic and Atmospheric Research
OGC	Office of the General Counsel
OIG	Office of Inspector General
OMB	Office of Management and Budget
OS	Office of the Secretary
PTO	Patent and Trademark Office
TA	Technology Administration
USEAC	U.S. Export Assistance Center
US&FCS	U.S. and Foreign Commercial Service

APPENDIX B
Office of Administration Response to Draft Report



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

September 29, 2000

MEMORANDUM FOR Edward Blansitt
Deputy Inspector General

FROM: John J. Phelan, III *Carin J. O'Neil for*
Acting Director, Office of Executive
Assistance Management

SUBJECT: Draft Inspection Report: *Improvements Are Needed in
Commerce Agencies' Implementation and Oversight of
Interagency and Other Special Agreements (IPE-9460)*

Thank you for the opportunity to review and comment on the subject draft inspection report. We agree that improvements are needed in the implementation and oversight of Department of Commerce interagency and other special agreements. As noted in the report, efforts have been made in several areas throughout the Department to begin taking corrective action on the findings contained in the report.

The attached comments provide our response to the report. Please do not hesitate to contact Elizabeth Dorfman of my staff at 202-482-4115 if you would like to discuss this matter in additional detail.

Attachment

Comments
Draft Inspection Report No. IPE-9460
*Improvements Are Needed in Commerce Agencies'
Implementation and Oversight
of Interagency and Other Special Agreements*

Page ii, Last Paragraph - The last sentence states that it is anticipated that the guidance, in the form of a handbook, will be finalized by September 30, 2000. This anticipated date will be extended, as the Office of Acquisition Management is examining an alternative and streamlined approach to agreements between Department of Commerce (DoC) operating units. However, the issuance of the handbook remains a high priority and will be effected as soon as possible.

Page 16, Section III, 1st Paragraph

- The fifth sentence states that noncompetitive agreements with nonprofit organizations were not justified. This incorrectly implies that competition is required for these agreements. We understand that the discussion concerns misuse of agreements when the more appropriate transaction may have been a traditional procurement contract which would have required competition.
- The sixth sentence also incorrectly implies that DoC policy encourages open competition for agreements pursuant to the joint project authority contained in 15 USC § 1525. Competition is required and/or encouraged, as appropriate, for procurement contracts and financial assistance awards, but there is no stated policy concerning competition for DoC's joint project authority.

Page 23, Section A, 2nd Paragraph - Item 5 in the second sentence includes an unclear or undefined termination date as an example of an insufficiency in an agreement. There are instances when it is advantageous for an agreement to omit the specific termination date. The handbook will recommend, but will not require, inclusion of the period of agreement.

Page 25, 2nd Paragraph - This paragraph strongly supports use of the legal authority in all agreements. In discussions with the operating units about interagency and other special agreements, it was determined that there are legitimate instances when the legal authority should not be included in the agreement. The handbook will encourage the use of the legal authority on the agreement and will require that the official agreement file contain the citation of the appropriate legal authority when it is not listed on the agreement.

Page 37, Section C

- 1st bullet - The listed items will be required in each file, but may not be required on each agreement, depending upon circumstances of the agreement. For instance, the legal authority may not be included on an international agreement.

Comments (continued)
Draft Inspection Report No. IPE-9460
*Improvements Are Needed in Commerce Agencies'
Implementation and Oversight
of Interagency and Other Special Agreements*

- 2nd bullet - The Office of Acquisition Management is reviewing the procedures for intra-agency transfers pursuant to the Economy Act. The appropriate procedures will be included in the handbook.
- 3rd bullet - The handbook will stipulate required responsibilities and will require that the operating units assign the functions. However, we do not anticipate that the Department will prescribe to the operating units the offices that will perform those required functions.

Page 43, 3rd Paragraph - This paragraph includes suggestions for information to be included in the database of summary information. Staff in the Office of the Secretary will work with appropriate officials in the Office of Inspector General, Office of General Counsel, and the operating units to thoroughly review the needs of the Department and determine the information to be included in the database.

Page 50, Recommendations - In general, we agree with the OIG's recommendations. Many of the recommendations will be addressed upon issuance of the Department's Interagency and Other Special Agreements Handbook which will be issued for comment and final clearance as soon as possible.

APPENDIX C
Office of the General Counsel Response to Draft Report



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

SEP 20 2000

MEMORANDUM FOR: Jill A. Gross
Assistant Inspector General for Inspections
and Program Evaluations
Office of the Inspector General

FROM: Barbara S. Fredericks *BSF*
Assistant General Counsel
for Administration

SUBJECT: Draft Inspection Report Number IPE-9460 Regarding Interagency
and Other Special Agreements

At your request, we are providing our comments to Draft Inspection Report No. IPE-9460 regarding your office's review of interagency and other special agreements at the Department of Commerce (DOC).¹ The report finds that these agreements require better management and oversight. We agree. Of course, the ultimate responsibility for compliance with all requirements will rest with the official who signs an agreement. Therefore, we believe the primary goal of any plan for improvement should be to ensure that managers fully understand both the requirements in the law and their responsibilities. We are in complete agreement with your recommendations, and will continue to work with your staff and the appropriate staff in the Office of Administration to adopt those recommendations. Regarding recommendation 4, the General Law Division has developed training classes and written materials that can be provided to all interested offices in the Department. In fact, those training materials served as the basis for the initial draft of the Department's agreements handbook, the subject of recommendation 1.

We hope our comments will assist in making your final more effective in this respect. As you are aware, your report coincides with my office's continuing efforts to improve the preparation and review of agreements. We have undertaken much work in this area. The report could encourage people to use the resources we have already developed because they coincide with your recommendations directed to the Acting General Counsel. Specifically, we have: (1) worked extensively with the Office of Executive Assistance Management (OEAM) and with DOC bureaus to help them develop guidance for the preparation of agreements; (2) developed several model forms for various types of agreements; and (3) conducted training sessions regarding agreement preparation. These revisions could lead to a more frequent use of the agreement models we have developed.

¹Draft Report: *Improvements Are Needed in Commerce Agencies' Implementation and Oversight of Interagency and Other Special Agreements* (IPE-9460).

Your report on page 34 highlights the need for model agreements to be prepared. We share the view that standardized forms should be made available to DOC clients to guide their preparation of appropriate agreements. In fact, we have prepared five model agreements that have been available for quite some time to everyone at DOC via the General Law Division webpage. This site for all of these agreement modes, as well as guidance and contact information, is: <http://www.ogc.doc.gov/ogc/admin/general.html>. We routinely refer our clients to that website. Publication of that site in your report will provide further notice to the Department that forms exist.

The following are additional comments to the report. These responses are intended to supplement our comments to the previous reports regarding interagency and other special agreements at specific bureaus.

1. Confusion regarding agreement types and terminology. On page one of your report, you state: "Interagency and other special agreements are mechanisms for federal agencies to define terms for performing work for others (reimbursable agreements), acquiring work from others (obligation agreements), or coordinating complementary programs without the transfer of funds (memoranda of understanding or agreement, also referred to as unfunded agreements)." This sentence perpetuates inaccurate terminology regarding the types of agreements used at the Department.²

First, "Memoranda of Understanding (or Agreement)" is merely a generic term that refers to agreements. It applies to reimbursable agreements as well as agreements which do not involve the transfer of funds. In fact, it can apply to all three of the types of agreements you are trying to distinguish.

Second, the term "obligation agreement" inaccurately refers only to agreements through which DOC is acquiring goods or services. However, it is much broader in application. Agreements through which parties collaborate on activities, but do not acquire goods or services, also may involve the obligation of DOC funds and resources.

Third, the term "unfunded agreement" is not accurate. It is a term which we encourage bureaus to avoid using because most of the agreements where parties are coordinating complementary programs without the transfer of funds do, in fact, involve the obligation of funds; they are not "unfunded" agreements. We suggest that the report simply delete the use of the word "unfunded" so as not to perpetuate the myth that there exists a category of agreements that do not, in some way, commit the use of Department resources.

2. Inaccuracy regarding controls over interagency and other special agreements. On page "i" and 1 of your report, you state that interagency and other special agreements are not

²This problem is presented on pages 1, 28, 33, 37, 39, 35, 43.

subject to the same controls as traditional procurement contracts, grants, etc. This is not true. For example, Economy Act agreements are "controlled" by the Federal Acquisition Regulations, which are the very same regulations that govern Federal Government procurement contracts. Further, your report gives the inaccurate impression that interagency and other special agreements are virtually unregulated agreements. To the contrary, my office has taken affirmative measures to make sure that all Economy Act agreements meet the requirements of the FAR. This is accomplished not only through our review of agreements, but through the use of our models for Economy Act agreements located on the General Law Webpage. This misimpression could be solved through the simple expedient of amending the last sentence in the first paragraph on page "1" to read: "While agreements involve a significant amount of Federal resources, they are not subject to the same *administrative* controls as traditional procurement contracts, grants, or cooperative agreements." A similar change should be made to the corresponding paragraph on page 1 of the report.

3. NOAA Administrative Order 201-105 has been rescinded. Several sections of your report refer to NOAA Administrative Order (AO) 201-105. Your report needs to be revised to reflect that this order is no longer in effect. My office identified several problems with this Administration Order, and, in light of these problems, NOAA rescinded this AO some time ago. As the IG has acknowledged in at least one past report, this AO contained contradictions resulting in problems and confusion.³
4. Delete the requirement of a termination date for all agreements. On page 31 of your report you state that "[a]ll agreements should have a defined performance period with a stated effective date and when possible, a specific termination date." We disagree. In the first instance, specific termination dates are not legally required.

Moreover, in our experience, there are times when such a term may run counter to the Department's interests. There are instances where an operating unit of the Department will have negotiated very favorable terms in an agreement, and will want to have those terms to continue for as long as possible. Having a requirement that the agreement terminate at a specific date or a requirement that the parties review the agreement a specific date may effectively open up the terms of the agreement the operating unit would rather not have disturbed. Clients have expressed to us a fear that including such a term can cause an agreement to be renegotiated with worse terms being subsequently imposed on the Department.

Accordingly, while we agree it may generally be preferable to have termination dates in agreements, it should not be an absolute requirement in any guidelines issued. Your report be modified to reflect that there should be some flexibility on this issue based on the needs and interests of the Department. However, in recommending this more flexible

³Your report makes reference to this rescinded AO on pages 28, 35, and 39.

approach, you should stress that operating units should develop regular processes for internal review, and that the lack of any termination date or clause in the agreement must be thoroughly justified by the program office.

5. Delete the discussion regarding "contract" requirements. We strongly recommend that the portions of the report related to contracts⁴ be deleted because traditional procurement contracts, as well as grants and cooperative agreements, are specifically excluded from the scope of your review. Although we recognize that a "cross-cutting" report is broad by its very nature, some may interpret problems with a particular procurement or financial assistance arrangement as evidencing problems with other types of agreements. Each type of relationship follows different rules and organizational processes, and problems with one process may not be relevant to another process.
6. Correct the misconception regarding competition under the financial assistance process. Page 21 of the report fails to take into account the possibility, under current process, of making sole source or unsolicited awards on a noncompetitive basis. Similarly, the report's comment on obtaining a special waiver is not completely accurate. We recommend that the following language be substituted for the second full paragraph on page 21:

Second, by using the financial assistance process to fund Department programs, the award process becomes open to competition. Having competition in issuing a grant or cooperative agreement should greatly benefit the Department and the sponsoring bureaus by providing for a larger group of award candidates from which to choose. Department Administrative Order 203-26 states that "discretionary grant [and cooperative agreements] program awards shall be made on the basis of competitive review." Such reviews include minimum requirements which must be complied with unless a special waiver is obtained. The minimum requirements for competitive review include: [(a)--(g) (no changes)].

We recommend that you add the following sentence after paragraph (g): [Note: Unsolicited proposals which fall outside the program goals of a competitive program may be funded on a noncompetitive basis with the proper justification.]

⁴See, e.g., page 16 and recommendation three regarding traditional procurement actions. Similarly, your reference to the Federal Technology Transfer Act of 1986 is not necessary given the scope of your report.

7. Correct inaccuracies regarding the propriety of joint project agreements.⁵ In the same section that discusses your preference for financial assistance arrangements, when appropriate, your report creates the incorrect impression that joint project agreements (JPAs) suffer from a lack of controls, and, therefore, should be avoided. This inaccuracy must be corrected: the legal review of JPAs is no less rigorous than the legal review of other matters. In their effort to adopt the previous recommendations contained in your earlier reports on the practices of individual bureaus, those bureaus have instituted significant program and budget review processes before the agreements are presented to our office for legal clearance.⁶ Additionally, my office has been developing terms for JPAs that would alleviate your concerns for JPAs when funds are transferred out of the Department, and will be seeking your input on these terms before they are adopted. A more appropriate discussion on pages 20-22 should include an analysis of how bureaus have changed their understandings of, and approaches to, the use of JPAs and financial assistance.

8. Correct inaccuracies regarding OMB Circular A-25. Page 25 of your report creates the impression that OMB Circular A-25 applies to all agreements. This is not correct. This circular applies only to a specific type of agreement commonly referred to as user charge agreements. Similarly, on page 26 of your report, you refer to this circular at the user charge authority. This is technically inaccurate. OMB Cir. A-25 merely provides guidance, not authority for these agreements. There are several statutes that authorize user charge agreements for specified types of activities and services.⁷

⁵You must amend the chart on page 26 to add two missing statutory criteria to the section describing the applicable criteria of the joint project authority: that the project may only be undertaken with an eligible partner ("nonprofit organizations, research organizations, or public organizations or agencies"; and that the project be on a matter of mutual interest.

⁶The use of three-year-old findings in this report inevitably impacts on the currency of your office's description of cross-cutting problems in the bureaus, and discounts the effectiveness of your corrective recommendations. Obviously, the time delays inherent in the wide scope of your field work and the process of issuing ten inspection reports unavoidably results in a reliance on old data. However, your conclusions in this report do not accurately reflect the changes that have been made in the bureaus based on the recommendations contained in your office's earlier reports and our office's advice to them. As we mentioned at the beginning of this memorandum, we have already begun the necessary efforts suggested by your recommendations.

⁷We question the accuracy of your statement on page 24 that many DOC agreements are entered into pursuant to 31 U.S.C. § 9701 in light of our experience in reviewing agreements. This is a user charge authority which requires fees received to be placed in the Treasury; it does not allow the fees to be retained by DOC. Most of the user charge agreements that we review are authorized by other statutes that permit DOC to retain the fees, most importantly, the Department's own user fee authority, at 15 U.S.C. § 1525.

9. Delete the requirement of a legal citation for all agreements. On page 25 of your report, you state that all agreements should have legal authorities cited in them. Although we generally agree with this practice, we recommend that you qualify this recommendation. It is not legally required to have legal citations in all agreements, and our office has found that there are some instances (*e.g.*, international agreements) where diplomatic reasons may dictate not including a citation to our legal authorities in an agreement with another country. Some flexibility should be left in this area, along the same lines we suggest with termination clauses.
10. Reassess the recommendation regarding Economy Act agreement review by the Office of Acquisition Management. On Page 33 of your report, you recommend that all Economy Act agreements above a certain dollar threshold be reviewed by the Office of Acquisition Management. Our experience and practice has been to advise clients that the FAR requires that all Economy Act agreements be supported by a "Determination and Finding" (D&F), which normally must be signed by a contracting officer. See 48 CFR 17.503. Given that contracting officers already are involved in most Economy Act agreement processes, an IG recommendation of an additional requirement involving the Office of Acquisition Management is not necessary.⁸
11. Clarify the requirement of legal review by the Office of the Assistant General Counsel for Administration. On page 33, you imply that there is leeway regarding whether Joint Project and Economy Act agreements must be sent to the Office of the Assistant General Counsel for Administration for legal review. This is not true. Pursuant to the April 1994 OGC memorandum from the General Counsel, all Joint Project agreements and Economy Act agreements must be reviewed by my office. Your report should be revised to correct the misimpressions of employees you have interviewed so as to provide program managers with a clear statement that the legal review process is required. One of the problems the IG identified is that some program offices have made various attempts to circumvent the review process, and, consequently, agreements have not always been given to legal counsel for review. Although this problem may be resolved with the issuance of a Department handbook on agreements, we feel it would benefit the Department if a clear statement is issued from your office that legal review should always occur.

Please feel free to contact me for further comments or advice.

⁸On page 37, there also seems to be some additional confusion regarding the preparation of D&Fs. The FAR requires a D&F for all Economy Act agreements. The report implies that there is a distinction between preparing a D&F for inter-agency versus intra-agency Economy Act agreements. This distinction does not exist in the FAR.