



U.S. PATENT AND TRADEMARK OFFICE

The U.S. Patent and Trademark Office's Awarding and Administering of Time-and- Materials and Labor-Hour Contracts Needs Improvement

FINAL REPORT NO. OIG-15-012-A
DECEMBER 3, 2014

U.S. Department of Commerce
Office of Inspector General
Office of Audit and Evaluation

FOR PUBLIC RELEASE





December 3, 2014

MEMORANDUM FOR: Michelle K. Lee
Deputy Under Secretary of Commerce for Intellectual Property
and Deputy Director
U.S. Patent and Trademark Office


Andrew Katsaros
Principal Assistant Inspector General for Audit and Evaluation

FROM:

SUBJECT: *The U.S. Patent and Trademark Office's Awarding and Administering of
Time-and-Materials and Labor-Hour Contracts Needs Improvement
Final Report No. OIG-15-012-A*

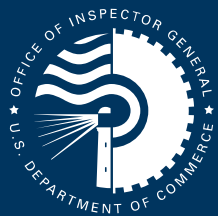
Attached is our final report on our audit of time-and-materials and labor-hour (T&M/LH) contracts awarded for fiscal year 2012. The objective of our audit was to determine whether USPTO properly awarded and administered T&M/LH contracts.

We determined that contracting and program officials did not follow best practices to award and administer T&M/LH contracts and task orders for work performed. This occurred because (1) contract and task order awards lacked justifications and established ceiling prices, (2) contractor monitoring and oversight was inadequate, and (3) contract files lack key documentation. These conditions arose because contracting and program officials did not follow Office of Federal Procurement Policy, FAR, the Commerce Acquisition Manual, and USPTO policies for awarding and administering T&M/LH contracts. Our findings include potential monetary benefits, in the form of unsupported costs, totaling more than \$24 million.

The final report will be posted on OIG's website pursuant to section 8L of the Inspector General Act of 1978, as amended.

In accordance with Department Administrative Order 213-5, please provide us with your action plan within 60 days of the date of this memorandum. We appreciate the assistance and courtesies extended to us by USPTO. If you have any questions about this report, please contact me at (202) 482-7859 or Mark Zabarsky, Audit Director, at (202) 482-3884.

Attachment



Report In Brief

DECEMBER 3, 2014

Background

For fiscal year (FY) 2012, the U.S. Patent and Trademark Office (USPTO) awarded 416 time-and-materials (T&M) and labor-hour (LH) contracts (e.g., contracts and task orders) with a total obligated value of approximately \$129 million. These contract types require contractors to provide their best efforts, up to the maximum number of hours authorized, to accomplish contract objectives. Each hour of work authorizes a contractor to charge the government an established labor rate, which includes profit. T&M/LH contracts are considered high risk because the government assumes the risk for cost overruns.

Although USPTO has authority to make purchases and enter into contracts with certain exemptions from the Federal Property and Administrative Services Act of 1949 and Competition in Contracting Act of 1984, it is still subject to several laws such as the Office of Federal Procurement Policy Act, Small Business Act, Service Contract Act, and Procurement Integrity Act.

Why We Did This Review

Since 2009, the government has increasingly regulated contracts other than firm fixed price contracts. A Presidential Memorandum on Government Contracting, issued March 4, 2009, emphasized the importance of agencies becoming more fiscally responsible in their contract actions by governing the appropriate use and oversight of all contract types and cutting contract costs. In July 2009, the Office of Management and Budget (OMB) directed agencies to reduce the use of high-risk contracts, which include cost-reimbursement and T&M/LH contract types. Out of USPTO's 416 T&M/LH contracts, we reviewed a judgmental sample of 28 contracts—22 task orders and 6 stand-alone contracts, with a total expended value of approximately \$247 million—to determine whether USPTO properly awarded and administered these contracts.

U.S. PATENT AND TRADEMARK OFFICE

The U.S. Patent and Trademark Office's Awarding and Administering of Time-and-Materials and Labor-Hour Contracts Needs Improvement

OIG-15-012-A

WHAT WE FOUND

We determined that contracting and program officials did not follow best practices to award and administer T&M/LH contracts and task orders for work performed. These conditions occurred because contracting and program officials did not follow Office of Management and Budget memorandums, Federal Acquisition Regulation (FAR), the Commerce Acquisition Manual (CAM), and relevant USPTO policies, specifically regarding:

Contract and task order award procedures. We found that contracting officers neither (a) justified the use of T&M/LH contracts nor (b) established ceiling prices in task order award documents. Contracting officers did not follow government established best practices for justifying the use of T&M/LH contract types for 27 contracts. Also, contracting officers did not establish ceiling prices for 23 contracts, thus increasing the risk of incurring additional costs.

Contract oversight procedures. We found that (a) contracting officers and program officials often did not prepare or did not provide surveillance plans such as quality assurance surveillance plans (QASPs) or service level agreements (SLAs); (b) surveillance personnel did not consistently document acceptance of deliverables or maintain documentation of contractor performance; (c) surveillance personnel did not sufficiently document support for invoice payments; and (d) contracting officials did not ensure that surveillance personnel were trained, certified, and appointed prior to providing contract technical oversight for contracts.

Contract files. We found that contract files were lacking key contract documentation such as contract award documents, modifications, and surveillance plans—which the FAR requires in contract files to constitute a complete history of the contract transactions, to support informed decisions at each step in the acquisition process and provide information for reviews and investigations.

WHAT WE RECOMMEND

We recommend the Director of Office of Procurement

1. require contracting officers to document the contract file providing the specific justification supporting the decision for choosing a T&M/LH contract type.
2. establish and document ceiling prices in the contract award document for all task orders and stand-alone contracts.
3. require contracting officers to prepare and maintain a surveillance plan in the contract file for T&M/LH contracts.
4. ensure CORs and TOMs document the acceptance of all deliverables in accordance with contract requirements and USPTO policy.
5. reemphasize that CORs and TOMs document surveillance over contractor performance, to ensure work performed on a T&M/LH basis is done in accordance with contract and task order requirements.
6. ensure future T&M/LH contracts include FAR Subsection 52.232-7, the T&M payment clause.
7. require contracting officers to appoint in writing properly trained and certified CORs and TOMs prior to awarding T&M/LH contracts, and remove those who fail to meet those requirements.
8. Improve controls to properly maintain and safeguard contract files.

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*COVER: Detail of fisheries pediment,
U.S. Department of Commerce headquarters,
by sculptor James Earle Fraser, 1934*

Introduction

For fiscal year (FY) 2012, the U.S. Patent and Trademark Office (USPTO) awarded 416 time-and-materials (T&M) and labor-hour (LH) contracts (e.g., contracts and task orders¹) with a total obligated value of approximately \$129 million.² T&M/LH contract types require contractors to provide their best efforts, up to the maximum number of hours authorized, to accomplish contract objectives. Each hour of work authorizes a contractor to charge the government an established labor rate, which includes profit.

In November 29, 1999, the President signed into law the Patent and Trademark Office Efficiency Act (effective March 29, 2000), granting USPTO authority to make purchases and enter into contracts with certain exemptions from the Federal Property and Administrative Services Act of 1949 and Competition in Contracting Act of 1984. As a result, USPTO is not subject to the Federal Acquisition Regulation (FAR) in its entirety, particularly parts 6 (Competition Requirements) and 15 (Contracting by Negotiations). Although this Act gives USPTO flexibility within the acquisition process, the agency is still subject to several laws such as the Office of Federal Procurement Policy (OFPP) Act, Small Business Act, Service Contract Act, and Procurement Integrity Act. In 2003, USPTO published its Acquisition Guidelines (PTAG), which allow for flexibility within its acquisition process.³

T&M/LH contracts are considered high risk because a contractor's profit is tied to the number of hours worked; therefore, the government assumes the risk for cost overruns. Because of this risk, OFPP⁴ requires agencies to provide appropriate government monitoring of contractor performance to give reasonable assurance that efficient methods and effective cost controls are being used. Further, because of the risk involved, FAR⁵ directs that T&M/LH contracts may only be used when it is not possible at the time of award to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. Accordingly, a T&M/LH contract may be used only after the contracting officer justifies, in writing, that no other contract type is suitable.

Since 2009, the government has increased its efforts to regulate the use and management of contracts other than firm fixed price contracts. A Presidential Memorandum on government contracting⁶ emphasized the importance of agencies becoming more fiscally responsible in their contracts by governing the appropriate use and oversight of all contract types and cutting contract costs. In July 2009, Office of Management Budget (OMB) directed agencies to reduce the use of high-risk contracts, which include T&M/LH contract types.⁷

¹ A *task order* is for services placed against an established contract or with government sources.

² This information was obtained from the Federal Procurement Data System–Next Generation. The total obligated amount represents funds obligated only in FY2012.

³ USPTO issued an updated version of the PTAG on October 3, 2013.

⁴ OFPP memorandum, October 27, 2009. "Increasing Competition and Structuring Contracts for the Best Results."

⁵ FAR subsection 16.601(c).

⁶ The memorandum, entitled "Government Contracting," was issued March 4, 2009.

⁷ OMB memorandum, July 29, 2009. "Improving Government Acquisition."

Objectives, Findings, and Recommendations

In this audit, out of the 416 T&M/LH contracts, we reviewed a judgmental sample of 28 contracts—22 task orders and 6 stand-alone contracts—with a total expended value of approximately \$247 million.⁸ In conjunction with OMB and USPTO policies, we used guidance from the FAR and the Department of Commerce’s Acquisition Manual (CAM) as a benchmark for identifying practices that we considered most beneficial to ensure effective use of T&M/LH contracts. Our objective was to determine whether USPTO properly awarded and administered these contracts.

We determined that contracting and program officials did not follow best practices to award and administer T&M/LH contracts and task orders for work performed (see tables I and 2). These conditions occurred because contracting and program officials did not follow OMB, FAR, the Commerce Acquisition Manual (CAM), and relevant USPTO policies. Specifically, regarding contract and task order award procedures (see finding I), we found that contracting officers neither (a) justified the use of T&M/LH contracts nor (b) established ceiling prices in task order award documents.

Table I. Summary of Findings for Award Procedures

Number of Contracts Reviewed	Contract Type Not Justified	Negotiated Ceiling Prices Not Established in Task Order Award Document
28	27	23

Source: OIG review of contract files

Regarding contract oversight procedures (see finding II), we found that:

- Contracting officers and program officials often did not prepare or did not provide surveillance plans such as quality assurance surveillance plans (QASPs) or service level agreements (SLAs).⁹
- Surveillance personnel¹⁰ did not consistently document acceptance of deliverables or maintain surveillance documentation of contractor performance.
- Surveillance personnel did not adequately review invoices. According to the 103 invoices we reviewed, USPTO paid contractors approximately \$35.4 million. However,

⁸ This amount represents the total dollars expended over all performance periods associated with the 28 contracts we reviewed.

⁹ A *service level agreement* is a performance matrix that USPTO uses to evaluate contractors’ performance. The matrix includes requirements, goals, and measurement methods. This document has the same elements as a QASP.

¹⁰ Surveillance personnel encompasses the titles of contracting officer representative (COR), contracting officer’s technical representatives (COTRs), technical or task order monitors (TOMs), and others who ensure proper development of requirements and assist contracting officers (COs) in administering their contracts.

the documentation associated with approximately \$24.6 million lacked adequate support to determine whether payments made to the contractors were warranted.

- Contracting officials did not ensure that surveillance personnel were trained, certified, and appointed prior to providing contract technical oversight for contracts.

Table 2. Summary of Findings for Oversight Procedures

Number of Contracts Reviewed	Lack of Surveillance Plans	Lack of Monitoring Contractor's Performance	Missing or Inadequate Supporting Documentation for Invoice Payments	Surveillance Personnel Not Trained, Certified, and Appointed
28	17	24	25	27

Source: OIG review of contract files

Further, we found that contract files were lacking key contract documentation (see finding III).

While T&M/LH contracts are appropriate when specific circumstances justify the risks, we conclude that improved management controls are needed, including justifications specific to the individual procurements explaining why T&M/LH contracts are being used. Without proper monitoring of T&M/LH contractor performance, the risk of wasted government dollars is increased.

Appendix A further details the objectives, scope, and methodology of our audit. Appendix B summarizes the findings. Appendix C charts the potential monetary benefits we found from our review.

I. Contract and Task Order Awards Lacked Justifications and Established Ceiling Prices

Contracting officers did not follow government established best practices for justifying the use of T&M/LH contract types for 27 contracts. Not documenting the contract file with the rationale for the decision to use a T&M/LH contract does not necessarily indicate that the contract was inappropriate. However, USPTO may have incurred additional costs by unnecessarily using a riskier contract type that provides no incentive to the contractor for cost control or labor efficiency. Specifically, contracting officers should document why the work to be performed is appropriate for a T&M/LH contract. This will help ensure that the government does not incur excessive cost growth on these contracts when a less risky contract type would be more appropriate. Also, contracting officers did not establish ceiling prices for 23 contracts, thus increasing the risk of incurring additional costs.

A. Justifying the Use of T&M/LH Contracts

FAR¹¹ requires contracting officers, when choosing to use a T&M/LH contract, to provide sufficient facts and circumstances in a written justification, known as a determination and findings,¹² concluding that no other contract type is suitable for the acquisition. The CAM¹³ requires that the justification must demonstrate the need for a T&M/LH contract and explain why it is not possible at the time of placing the contract or order to estimate accurately the extent or duration of work or anticipated costs with any reasonable degree of confidence.

However, contracting officials did not follow FAR and CAM criteria regarding justification for using T&M/LH contracts. First, we found that contracting officers did not document the rationale for 26 of the 28 contracts. For example, on the task order with a total expended value of approximately \$17.5 million awarded against a blanket purchase agreement (BPA) for comprehensive information technology services, the contracting officer did not provide evidence that the contract file contained a written rationale for awarding a T&M contract. In general, contracting officers told us they are not required to document the rationale in contract files.

Second, for the 2 remaining contracts, contracting officers prepared determination and finding documents to justify the use of a T&M/LH contract. However, on one task order for training and patent libraries support to the Scientific and Technical Information Center—at a total expended value of approximately \$11.5 million, the contracting officer quoted FAR criteria for when a T&M contract is appropriate. The determination and findings document outlined in general terms why a T&M type contract must be used, stating that “a T&M/LH contract is suitable since it is not possible to anticipate costs with any reasonable confidence at time of contract award.” However, the contracting officer did not specify why it was not possible to anticipate or estimate costs.

B. Establishing Ceiling Prices at the Task Order Level

To help control costs when using T&M/LH contracts, the FAR¹⁴ states that contracting officers may only use these contract types if the contract includes a ceiling price that the contractor exceeds at its own risk. We found contracting officers did not establish ceiling prices for any of the 22 task orders and 1 of the 6 stand-alone contracts.¹⁵ Contracting officials told us that USPTO’s practice is to establish a ceiling price at the

¹¹ FAR subsection 16.601(d)(1).

¹² Determination and Findings is a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions. The “determination” is a conclusion or decision supported by the “finding.” The findings are a statement of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation.

¹³ CAM 1316.1 § 5.3(a).

¹⁴ FAR subsection 16.601(d)(2).

¹⁵ As of April 30, 2014, USPTO spent approximately \$210.2 million on these task orders and \$6.8 million on the stand-alone contract.

indefinite delivery vehicle (IDV)¹⁶ level instead of for each task order. Despite this practice, for 15 of the 22 task orders reviewed, the IDV required each task order to have an established ceiling price which the contractor may not exceed.

II. Contractor Monitoring and Oversight Was Inadequate

Contracting and surveillance personnel did not follow government established best practices or its own policies on monitoring contractor performance. Specifically, these personnel did not (1) prepare or provide surveillance plans such as QASPs or SLAs, (2) adequately document acceptance of deliverables and contractor performance, and (3) sufficiently document support for invoice payments. Without adequate surveillance, USPTO cannot be assured that the contractors were in full compliance with contract requirements—and that USPTO fully received the services for which it paid.

Also, majority of the Task Order Managers (TOMs) who were unofficially performing contracting officer representative (COR) responsibilities did not receive the required OMB COR training and certification to perform their contract administration role. Additionally, contracting officers did not properly appoint CORs and TOMs delegating their respective contract administration responsibilities.¹⁷

A. Lack of Surveillance Plans

The purpose of surveillance is to ensure that the contractor fulfills the requirements of the contract and the government receives the goods and services as intended and paid. An OMB memorandum¹⁸ and the FAR¹⁹ state agencies must have in place appropriate government surveillance to provide reasonable assurance that efficient methods and effective cost controls are in place. Surveillance plans are used to verify that the contractor met the standards for each performance task. These plans outline the functions, including acceptance of deliverables and inspections, that a COR should perform to determine whether a contractor fulfilled the contract obligations pertaining to quality and quantity. The surveillance plan should also specify how the COR inspects and accepts deliverables to meet the task order performance work standards. In addition, the CAM²⁰ requires that copies of the surveillance plan for T&M/LH contracts be maintained in the contract file.

¹⁶ *Indefinite delivery vehicles* include contracts or agreements such as task and delivery order contracts, GSA federal supply schedules, BPAs, and basic ordering agreements. USPTO did not exceed the ceiling prices established at the IDV level.

¹⁷ Contracting officer representative (COR) refers not only to positions technically designated as CORs but also to contracting officer's technical representatives (COTRs), technical or task order monitors (TOMs), and others who ensure proper development of requirements and assist contracting officers (COs) in managing their contracts.

¹⁸ OMB memorandum, October 27, 2009. "Increasing Competition and Structuring Contracts for the Best Results."

¹⁹ FAR subsection 16.601(c)(1).

²⁰ CAM 1316.1 § 5.3.

We found that contracting officials either did not prepare or did not provide copies of surveillance plans for 17 contracts. For example, on one contract, USPTO spent approximately \$10.6 million for search and information resources administration. Contracting officials told us they did not prepare a surveillance plan.

USPTO senior procurement officials could not explain why surveillance plans were not prepared. Without surveillance plans in place when using T&M/LH contracts, there is no reasonable assurance contractors are making progress in accordance with the contract performance schedules.

B. Lack of Acceptance of Contract Deliverables and Monitoring of Contractors' Performance

The CAM²¹ and USPTO policy memorandums²² state that CORs and TOMs should ensure that all required items, documentation, data, and reports are submitted by the contractor as required by the contract. These criteria also state CORs should perform final inspection and acceptance of all work required under the contract, including the review and approval of reports. The USPTO policy memorandum²³ requires the COR to monitor the contractor's performance to ensure that the contractor is performing the technical requirements of the contract in accordance with the contract terms, conditions, and specifications; inform the contractor of failures to comply with the technical requirements of this contract; and approve invoices for deliverables or level of effort performed to ensure receipt and acceptance of goods and services. The FAR²⁴ requires that the government (1) review the contractor's performance to provide reasonable assurance that the contractor is using efficient methods and cost controls, as well as (2) document decisions regarding the acceptability of products. Documentation is necessary to help ensure accountability over the surveillance process.

We found that CORs and TOMs did not consistently and adequately document acceptance of deliverables or adequately document surveillance of contractor performance.

First, USPTO could not substantiate the acceptance of contract deliverables in accordance with contract requirements. We judgmentally selected 298 deliverables to verify their existence. We found that of the 298 deliverables requested, USPTO only provided 202 (68 percent). Generally, CORs and TOMs were not able to explain why deliverables were missing. Examples include the following:

- USPTO spent \$1.9 million on a task order for functional testing of applications for software deployments. We requested a total of 6 deliverables—2 weekly status reports, 2 monthly status reports, and 2 problem notification reports. The COR only provided the 2 weekly status reports.

²¹ CAM 1301.670 "Appendix H—Sample Nomination, Delegation and Appointment Memorandums."

²² USPTO policy memorandums 10-02 and 10-03, dated March 15, 2010.

²³ USPTO policy memorandum 10-02, dated March 15, 2010.

²⁴ FAR Subsection 46.104.

- USPTO spent approximately \$17.2 million for desktop deployment and related moves. We requested six each of the following deliverables: monthly status reports; root cause analysis reports; telework swap activity reports; and problem change task records reports. The COR only provided five monthly status reports and four telework swap activity reports.

Additionally, USPTO did not consistently follow its policy and contract language calling for documenting, in writing, acceptance of deliverables. USPTO has a defined policy for verifying and accepting deliverables. Specifically, PM-10-02 specifies that, at a minimum, COR files should contain copies of records of inspections and acceptances. Among other things, this policy requires CORs to document actions taken and decisions made and to ensure all required items, documentation, data, and/or reports are submitted as required by the contract. To illustrate: in 5 contracts, the contract language called for the COR or TOM to communicate, in writing, the acceptance of all deliverables. Of the 202 deliverables we verified, 41 applied to these 5 contracts. Only 14 (34 percent) of the 41 deliverables had written documentation of acceptance.

The purpose of contractor deliverable verification and acceptance is to ensure that contractor-provided products and services meet specified requirements and otherwise satisfy the terms of the contract. Without close review of deliverables to ensure all requirements were met, and documentation on deliverable acceptance, USPTO cannot ensure it had received the deliverable for which it paid. Also, by not documenting the acceptance or rejection of deliverables, the USPTO may have difficulty pursuing action against a contractor for nonperformance.

Second, we found that CORs and TOMs did not consistently document the reviews of contractor performance for 24 of the 28 contracts. In general, CORs and TOMs did not maintain complete documentation indicating that they performed surveillance, such as monitoring work progress to support payment for work performed, effectiveness of management, timeliness of performance the specific tasks that the contractor completed, and whether the quality of the contractor's work was acceptable. For 7 of the 24 contracts, CORs and TOMs did not provide any documentation of contractor performance reviews or quality assurance evaluations. To illustrate, USPTO awarded a T&M contract for helpdesk services with an expended amount of approximately \$19.2 million. We requested surveillance documentation but the COR did not provide any. The COR could not explain why the surveillance documentation was missing from the contract file.

For the remaining 17 actions, CORs and TOMs provided limited surveillance documentation. For example, USPTO awarded a T&M contract for computer facilities maintenance services with an expended amount of approximately \$17.5 million. Although the COR provided documentation regarding the contractor's performance in response to alerts from monitoring servers, the COR did not provide documentation verifying that the stated percentage for changes made to the production environment was monitored and tracked.

Contractors performing T&M/LH contracts are paid for the hours applied to the task, regardless of the outcome. Unless appropriate government surveillance of contractor

performance is performed, USPTO cannot be assured that the contractor is using efficient methods and effective cost controls in the accomplishment of the contract requirements. As mentioned previously, USPTO did not prepare QASPs for the majority of the contracts reviewed. Without a surveillance plan, CORs and TOMs may not know what specific contractor activities they should be monitoring and how they should monitor them.

C. *Missing or Inadequate Supporting Documentation for Invoice Payments*

FAR²⁵ states that the government will pay the contractors when they submit vouchers approved by the contracting officer or the authorized representative. According to USPTO policy memorandum 10-02,²⁶ CORs are responsible for approving invoices for deliverables or level of effort performed to ensure receipt and acceptance of goods and services.

The FAR T&M payment clause²⁷ for noncommercial item contracts states that contractors must substantiate vouchers, including any subcontractor hours reimbursed at the schedule's hourly rate, with evidence of actual payment as well as (1) individual daily job timekeeping records, (2) records that verify that employees meet the qualifications for the labor categories specified in the contract, or (3) other substantiation approved by the contracting officer.

For commercial item contracts, the FAR T&M payment clause²⁸ states that, when requested by the contracting officer or COR, the contractor shall substantiate invoices (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment, individual daily job timecards, records that verify the employees meet the qualifications for the labor categories specified in the contract, or other substantiation specified in the contract.

We judgmentally selected 103 invoices paid to contractors and found that documentation for 90 was either missing or inadequate (see table 3). The total value of the 103 invoices sampled was approximately \$35.4 million.

Table 3. Invoices with Missing or Inadequate Supporting Documentation

	Number of Invoices	Dollar Amount Paid (in Millions)
Missing Documentation	42	\$15.5
Inadequate Documentation	48	\$9.1
Total	90	\$24.6

Source: OIG review of USPTO contractor invoices and supporting documentation

²⁵ FAR Subsection 52.232-7.

²⁶ USPTO policy memorandum 10-02, dated March 15, 2010.

²⁷ FAR Subsection 52.232-7(a)5.

²⁸ FAR Subsection 52.212-4 Alt. 1.

First, for 42 invoices, CORs were unable to provide any evidence to support payment of the invoice. We found that the remaining 48 invoices submitted for payment were not supported by individual timesheets outlining the labor category, hourly rate, and daily hours charged. T&M/LH contracts allow the contractor to charge a fixed profit for every labor hour worked. Instead, after discussions with CORs, we found that they primarily relied on contractor-generated summary reports to verify the accuracy of invoices submitted for payment. Appendix C of OMB Circular A-123²⁹ states that when an agency's review is unable to discern whether a payment was proper as a result of insufficient or lack of documentation, this payment must also be considered an improper payment.

In 11 of the 28 contracts, the contracting officer included the appropriate FAR T&M payment clauses in the contract award document. For 2 (1 commercial item contract and 1 non-commercial item contract) of the 11 contracts, the COR substantiated the contractor's invoices for payment by using individual employee timekeeping records. Examples of insufficiently supported contractor invoicing include the following:

- On one noncommercial item contract for providing information and technology resource support—with an expended amount of approximately \$10.7 million—USPTO was billed and paid \$642,748 for four invoices. For one invoice, USPTO provided individual daily job keeping records that identified the employees' names and daily hours worked. However, USPTO was unable to locate any supporting documentation for the remaining three invoices totaling \$510,635.
- On one commercial item task order for facilitating and creating documentation associated with information systems activities—with an expended amount of approximately \$4.5 million—USPTO was billed and paid approximately \$72,500 for a total of 501.5 labor hours. The contractor did not submit any supporting documentation other than a monthly summary report on the invoice that identified the labor category, labor rate, total hours billed, and total costs billed for each labor category. However, the COR could not provide evidence other than the monthly contractor-generated summary report to support the labor charges. The COR did not obtain items such as, daily timekeeping records, to verify the employees' names and hours worked.

Because of the lack of substantiating documentation, the COR could not verify that the contractor's billed labor costs were valid. Rather, the COR had to rely on the contractor to submit and bill the proper amount as well as to ensure whether an authorized employee was actually working on the contract. Contracting officials told us that they did not require daily timesheets because contractor employees were not USPTO employees.

Excluding the appropriate T&M payment clause in contracts, and lacking substantiating supporting documentation necessary to validate and approve submitted invoices by contract administration personnel, increases the risk that invoices may not have been

²⁹ OMB memorandum, April 14, 2011. "Issuance of Revised Parts I and II to Appendix C of OMB Circular A-123."

properly supported before they were approved and paid by USPTO. Although USPTO has indicated that several of its T&M/LH contracts were commercial item contracts that require less documentary support for invoices under the FAR, we based our findings on best practices. Both OMB and OFPP have noted that T&M/LH is one of the riskiest contract types, and USPTO did not minimize this risk by requiring adequate support for its invoices on multimillion-dollar contracts.

According to the 103 invoices we reviewed, USPTO paid contractors approximately \$35.4 million. However, the documentation associated with approximately \$24.6 million lacked adequate support to determine whether payments made to the contractors were warranted.

D. Surveillance Personnel Are Not Adequately Trained, Certified, and Appointed

CORs and TOMs play a critical role in ensuring that contractors meet the commitment of their contracts. USPTO did not ensure that TOMs were properly trained and certified to perform contract surveillance duties and that CORs and TOMs were designated contract administration duties in writing prior to contract awards.

OFPP³⁰ policy requires CORs and TOMs to be appropriately trained and certified under the government-wide Federal Acquisition Certification for Contracting Officer's Representatives (FAC-CORs) program. In September 2011, OFPP³¹ revised the certification program from one tier to three tiers, which Office of Acquisition Management subsequently implemented within the Department in January 2012, through CAM 1301.670. The amount of training and experience an individual needs to have depends on the level of FAC-COR certification sought. The training and experience requirements associated with each of the three FAC-COR certification levels are summarized in table 4 (next page).

³⁰ OFPP memorandum, November 26, 2007. "The Federal Acquisition Certification for Contracting Officer Technical Representatives."

³¹ OFPP memorandum, September 6, 2011. "Revisions to the Federal Acquisition Certification for Contracting Officer's Representatives (FAC-COR)."

Table 4. FAC-COR Three-Tiered Certification Program Training and Experience Requirements

Level	FAC-COR Level I	FAC-COR Level II	FAC-COR Level III
Dollar threshold^a	Up to \$150,000	\$150,000–\$10 million	\$10 million and above
Experience^b	None	1 year of previous COR experience required	2 years of previous COR experience required
Training (hours)^b	8	40	60
Appropriate for:^b	This level of COR is generally appropriate for low-risk contract vehicles, such as supply contracts and orders.	This level of COR is generally appropriate for contract vehicles of moderate to high complexity, including both supply and service contracts.	The most experienced CORs within an agency, this level should be assigned to the most complex and mission critical contracts within the agency.

Sources:

^a CAM 1301.670 § 2.3

^b OFPP memorandum, “Revisions to the Federal Acquisition Certification for Contracting Officer’s Representatives (FAC-COR),” September 6, 2011

Furthermore, OFPP policy requires that CORs and TOMs be appointed in writing by the contracting officer. USPTO uses TOMs, in addition to the COR for the underlying contract, to perform contract surveillance for task or delivery orders. In those cases, the roles and responsibilities of each should be made clear in both the COR and TOM delegation letters. Also, the CAM³² requires an appointment letter for every contract action where the contracting officer delegates contract administration responsibilities to a technical representative such as CORs, assistant and alternate CORs, TOMs, and other surveillance personnel.

First, we found that all 11 CORs were properly trained and certified as required by the FAC-COR certification program. However, USPTO could not provide evidence that 44 of the 57 TOMs were trained and certified to perform contract administration duties for 17 contracts. Of the 44 TOMs, 33 required COR level II certifications, while 11 required level III certifications. For example:

- USPTO paid approximately \$19.2 million on a T&M task order for IT help desk support. The contracting officer assigned a TOM to monitor the contractor’s daily performance; however, the TOM did not receive training and certification to perform COR functions. Due to the amount expended on the contract, the TOM should have been trained and certified at level III.
- USPTO paid approximately \$10.6 million on a T&M task order for program management support services. We found that 2 TOMs assigned to this task order were trained and certified at level I. Based on the expended amount of approximately \$10.6 million, the contracting officer should have appointed level III TOMs to perform the appropriate technical oversight of this task order.

³² CAM 1301.670 § 3.2

- USPTO paid approximately \$17.2 million on a T&M contract for desktop deployment and move. The contracting officials delegated technical oversight to a TOM whose level III certification expired in June 2013, while the contract remained active. As of July 2014, the TOM's certification has not been updated.

Second, we found that either USPTO did not issue written appointment letters or they issued written appointment letters several months after the contract award for 10 CORs³³ and 57 TOMs³⁴ to perform contract administration duties for 27 contracts. Table 5 (below) shows how long each of the 10 CORs performed their contract administration role without written appointment letters that formally delegate COR authority by the responsible contracting officer.

Table 5. Length of Time CORs Performed Duties Without Formal Delegation

Number of Months	Number of CORs ^a
Less than 12	4
12–23	2
24–35	2
36–47	0
48–59	0
60 and up	2
Total	10

Source: USPTO contracting officials

^a Two of the 10 CORs were appointed to more than one contract.

Formally appointing a COR or TOM ensures that they are fully informed of what level of surveillance they can or cannot perform on a particular contract. Formal appointment, combined with appropriate training and certifications, gives CORs and TOMs the tools they need to ensure that the receipt and acceptance of their contract deliverables on behalf of the federal government are appropriate, meet the terms of the contract, and do not result in improper payments.

III. Contract Files Lack Key Documentation

Contracting officers did not follow government established best practices for maintaining comprehensive contract files. We found that contract files lacked documents such as contract award documents, modifications, and surveillance plans. FAR³⁵ requires that documentation in contract files be sufficient to constitute a

³³ USPTO provided appointment dates for CORs assigned to the contracts reviewed.

³⁴ We could not determine the length of time each TOM had performed contract administration duties without an appointment letter because USPTO was unable to provide the appointment dates for the contracts reviewed.

³⁵ FAR subsection 4.801(b).

complete history of the contract transactions to support informed decisions at each step in the acquisition process and provide information for reviews and investigations. In addition, the Government Accountability Office's *Standards for Internal Control in the Federal Government* states that agencies should have internal control activities, such as the creation and maintenance of records that provide evidence of execution of approvals and authorizations. The need for well-maintained and complete contract files is important, not only for day-to-day contract administration but also for when the Department experiences turnover with its contracting staff. Complete contract files help ensure proper transfer of responsibilities among staff and continuity of operations.

Recommendations

We recommend that the Director of Office of Procurement

1. require contracting officers to document the contract file providing the specific justification supporting the decision for choosing a T&M/LH contract type.
2. establish and document ceiling prices in the contract award document for all task orders and stand-alone contracts.
3. require contracting officers to prepare and maintain a surveillance plan in the contract file for T&M/LH contracts.
4. ensure CORs and TOMs document the acceptance of all deliverables in accordance with contract requirements and USPTO policy.
5. reemphasize that CORs and TOMs document surveillance over contractor performance, to ensure work performed on a T&M/LH basis is done in accordance with contract and task order requirements.
6. ensure future T&M/LH contracts include FAR Subsection 52.232-7, the T&M payment clause.
7. require contracting officers to appoint in writing properly trained and certified CORs and TOMs prior to awarding T&M/LH contracts, and remove those who fail to meet those requirements.
8. improve controls to properly maintain and safeguard contract files.

Summary of Agency Response and OIG Comments

OIG received USPTO's comments on the draft report, consisting of its response and a separate document containing technical comments—the first of which we include as appendix D of this final report. Based on USPTO's review of the draft and subsequent discussions, we have made some suggested changes in the report. USPTO concurred with the recommendations in the report.

Appendix A: Objectives, Scope, and Methodology

The objective of our audit was to determine whether USPTO properly awarded and administered T&M/LH contracts. To accomplish our objective, we

- *evaluated USPTO practices against relevant policies and guidance*, including OMB and OFPP memoranda, the FAR, CAM, and USPTO policies and procedures (using guidance from the FAR and CAM as a benchmark for identifying practices that we considered most beneficial to ensure effective use of TM/LH contracts).
- *identified the total number of contracts and net obligations reported as T&M/LH for FY 2012 using the Federal Procurement Data System-Next Generation (FPDS-NG)*; net obligations for T&M/LH contracts during this period were \$129 million, encompassing 416 contracts.
- *judgmentally selected and reviewed 28 of the 416 contracts* with a total expended value of approximately \$247 million.
- *tested the reliability of FPDS-NG data* by comparing information from the contract file with information gained in interviewing contracting officials (although prior GAO and OIG reports noted problems with data quality in FPDS-NG, we found the data sufficient for generalizing issues found in the contracts we reviewed).
- *reviewed acquisition documentation*, such as contract award documents; determination and findings documents; statements of work; price negotiation memorandums; quality assurance surveillance plans; contract deliverables; surveillance documentation; contractor invoices and supporting documentation; voucher payment documentation; and training, certification and appointment requirements for contracting personnel and surveillance personnel.

Further, we obtained an understanding of the internal controls used to award and administer T&M/LH contracts by interviewing the acquisition personnel at the USPTO. While we identified and reported on internal control deficiencies, no incidents of fraud, illegal acts, violations, or abuse were detected within our audit. We identified weaknesses in the controls related to the processes and procedures used to award and administer T&M/LH contracts. We relied on computer-processed data from the FPDS-GN and the USPTO Momentum Financials³⁶ to perform this audit. We conducted the audit fieldwork between October 2013 and August 2014. We did our fieldwork at the USPTO in Alexandria, Virginia. We conducted this audit in

³⁶ Momentum Financials is a subsystem of the Consolidated Financial System. This subsystem allows employees to process requisitions, procurement and non-procurement obligations, receivers, invoices, payments, billing documents for receivables; to record payroll transactions; for planning and budget execution; to record and depreciate assets; and to disburse payments. Momentum Financials houses the general ledger that is updated as financial transactions are processed. In addition, Momentum Financials has extensive querying capabilities including activities by vendor, general ledger, and budget execution.

accordance with generally accepted government auditing standards. We complied with those standards that require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions, based on our audit objectives. We performed our work under the authority of the Inspector General Act of 1978, as amended, and Department Organizational Order 10-13, April 26, 2013.

Appendix B: Summary of Findings by Contract

Contract No.	Contract Type	Specific Product or Service	Total Amount Expended on Contracts as of April 30, 2014	Contract Type Not Justified	Ceiling Price Not Established in Contract Award	Lack of Surveillance Plans	Lack of Monitoring Contractors' Performance	Missing or Inadequate Supporting Documentation for Invoice Payments	Surveillance Personnel Not Adequately Trained, Certified, and Appointed
1	56PAPT120 0323	Labor Hours	Information Technology Security Program Support	\$ 4,509,367.46	X	X	X	X	X
2	56PAPT100 0314	Time and Materials	Desktop Deployment and Move	17,236,803.87	X	X		X	X
3	45PAPT120 0072	Labor Hours	Project Functional Testing Support	2,488,123.08	X	X	X	X	X
4	56PAPT110 6011	Labor Hours	Infrastructure Engineering Design	3,823,432.36	X	X	X	X	X
5	56PAPT090 5004	Labor Hours	HW/SW Maintenance Consolidation	44,615,612.11	X	X	X	X	X
6	56PAPT120 0385	Labor Hours	Administrative Support Services	2,565,838.62	X	X		X	X
7	56PAPT110 0380	Time and Materials	Training and Patent Libraries Support	11,483,214.81	X	X			
8	56PAPT090 5103	Time and Materials	Voice PBX Network Support	8,267,386.28	X	X	X	X	X
9	56PAPT110 0333	Time and Materials	Computer Facilities Maintenance Services	17,545,175.25	X	X	X	X	X
10	56PAPT100 0326	Time and Materials	Support Services for Search and Information Resources Administration program	16,577,384.67	X	X	X	X	X
11	56PAPT120 6009	Labor Hours	Infrastructure Engineering Design	3,444,710.89	X	X		X	X
12	44PAPT100 0012	Labor Hours	Enterprise Configuration Management	4,436,930.89	X		X	X	X
13	45PAPT120 0046	Labor Hours	Support to Functional Testing Division	1,978,956.57	X	X	X	X	X
14	45PAPT100 0073	Labor Hours	IT Support Services to EDW	14,026,655.84	X	X	X	X	X

Contract No.	Contract Type	Specific Product or Service	Total Amount Expended on Contracts as of April 30, 2014	Contract Type Not Justified	Ceiling Price Not Established in Contract Award	Lack of Surveillance Plans	Lack of Monitoring Contractors' Performance	Missing or Inadequate Supporting Documentation for Invoice Payments	Surveillance Personnel Not Adequately Trained, Certified, and Appointed
15	56PAPT100 0025	Time and Materials	Project System Support	4,988,522.55	X	X	X	X	X
16	56PAPT090 5086	Time and Materials	Help Desk Services	19,178,818.95	X	X		X	X
17	44PAPT100 0008	Labor Hours	Product Verification Testing	8,659,095.88	X		X	X	X
18	44PAPT080 9004	Labor Hours	SIRA MOBIS Program Management Support Services	10,658,355.14	X		X	X	X
19	56PAPT100 0319	Time and Materials	Network Operations	17,713,423.74	X	X		X	X
20	56PAPT120 0317	Labor Hours	HR Support Services	3,607,515.11	X	X		X	X
21	56PAPT110 0450	Labor Hours	Database Services	3,915,155.01	X	X	X	X	X
22	45PAPT120 0028	Labor Hours	Migrate Legacy Data to COTS	1,793,724.64	X	X	X	X	X
23	56PAPT090 5087	Time and Materials	Advance Problem Resolution Services	8,915,370.26	X	X		X	X
24	44PAPT100 9008	Time and Materials	IT Security Support Services	5,269,029.15	X		X	X	X
25	50PAPT110 0007	Labor Hours	User Interface Design	6,789,601.50	X	X		X	X
26	45PAPT120 0048	Labor Hours	Create Reports EDW FPNG	902,856.65	X	X	X	X	X
27	50PAPT120 2232	Labor Hours	Clerical and Administrative Operational Support	936,773.91					X
28	56PAPT110 4014	Labor Hours	TRINet Core Services Maintenance	\$ 615,288.49	X	X	X	X	X
TOTALS			\$246,943,123.68	27	23	17	24	25	27

Source: OIG review of contract files

Appendix C: Potential Monetary Benefits

	Unsupported Costs	Funds Put to Better Use
Finding II	\$24,631,770	

Appendix D: Agency Response



UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

November 5, 2014

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

FROM: Michelle K. Lee *Michelle K. Lee*
Deputy Under Secretary of Commerce for Intellectual Property and
Deputy Director of the United States Patent and Trademark Office

SUBJECT: Response to Draft Report: *The U.S. Patent and Trademark Office's
Awarding and Administering of Time-and-Materials and Labor-Hour
Contracts Needs Improvement* (Issued September 2014)

Executive Summary

We appreciate the effort you and your staff have made in reviewing the United States Patent and Trademark Office's (USPTO's) time-and-material and labor-hour contracts for fiscal year 2012. We have carefully considered the eight recommendations made in the subject draft report.

The USPTO has made significant progress in award and administration of T&M/LH contracts since 2012, and has likewise improved its documentation of such contracts. Recently implemented policy for Contracting Officer's Representatives (CORs) and Task Order Managers (TOMs) will result in further improvements, ensuring that USPTO's contracts provide goods and services required to foster innovation, competitiveness and economic growth for American companies, innovators and entrepreneurs.

The USPTO generally agrees with the recommendations provided in the report, as noted in our detailed responses below. However, the USPTO requests the OIG amend the report with respect to the characterization of improper payments, as the findings set forth in the Draft report are not consistent with the definition of improper payments prescribed by the Office of Management and Budget. Specifically, the Draft report does not contain any findings that identify any specific instances of payments by the USPTO that were made to ineligible recipients, had incorrect amounts, or were used in an improper manner by the recipients.

Our response to each recommendation is discussed in detail below.

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Response to Recommendations

Recommendation no. 1. IG Recommendation that the Director of the Office of Procurement of United States Patent and Trademark Office (USPTO): Require contracting officers to document the contract file providing the specific justification supporting the decision for choosing a T&M/LH contract type.

USPTO Response: The USPTO concurs with this recommendation. In 2013, the Office of Procurement developed a standard method for contracting officers to document the myriad decisions and determinations they are required to make to award contracts. The Acquisition File Documentation (AFD) form required contracting officers to document their discussions and thought processes that supported their selection of a T&M/LH contract type under Block 27 *Type of Contract*. After review of this draft report, the AFD has been modified to include an additional text block under Block 27 to require contracting officers to further explain the specific circumstances of the instant procurement that require use of a T&M/LH contract.

Recommendation no. 2. IG Recommendation that the Director of the Office of Procurement of USPTO: Establish and document ceiling prices in the contract award document for all task orders and stand-alone contracts.

USPTO Response: The USPTO concurs with this recommendation. The Office of Procurement will clarify the requirement that all T&M/LH contracts and orders must include a ceiling price that the contractor exceeds at its own risk pursuant to Federal Acquisition Regulation (FAR) 16.601(d)(2). This guidance will be incorporated into the Office of Procurement's AFD Training scheduled for the first quarter of Fiscal Year 2015. Furthermore, the requirement will be included in Part 16 of the Patent and Trademark Office Acquisition Manual (PTAM), when PTAM Part 16 is implemented in FY 2016.

Recommendation no. 3. IG Recommendation that the Director of the Office of Procurement of USPTO: Require contracting officers to prepare and maintain a surveillance plan in the contract file for T&M/LH contracts.

USPTO Response:

The USPTO concurs with the recommendation. The Office of Procurement will develop standardized templates based on the surveillance plan requirements contained in the Commerce Acquisition Manual (CAM) 1316.1-5.3(b) and the template included in Appendix B to CAM 1316. Guidance and training will be provided in FY 15.

Recommendation no. 4. IG Recommendation that the Director of the Office of Procurement of USPTO: Ensure CORs and TOMs document the acceptance of all deliverables in accordance with contract requirements and USPTO policy.

USPTO Response:

The USPTO concurs with this recommendation. However, as background information, in FY 2012 (and continued through the present), the Contracting Officer Representatives (CORs) have had a process in place for the inspection and acceptance of deliverables. The CORs access multiple data sources to document their acceptance of deliverables. Upon receipt of deliverables, TOMs have routinely taken action to determine the acceptability of deliverables. Some Task Order Managers (TOMs) review the deliverable against requirements then recommend

acceptance/rejection to CORs. Some CORs and TOMs provide deliverables to Project Technical Leads (PTL) for initial review. The PTL informs the TOMs or CORs if deliverables are unacceptable. On September 11, 2014, the USPTO issued Procurement Memorandum (PM) 2014-14 *USPTO's Contracting Officer Representative (COR), Task Order Manager (TOM), and Point of Contact (POC) Roles and Responsibilities*. Attachment 3 of the PM provides CORs and TOMs with specific guidance regarding their responsibility for reviewing and accepting deliverables, specifically requiring them to "Ensure all required deliverables or other items, documentation, data, and/or reports are submitted to you as required by the contract." (Attachment 3, paragraph C8) and to "Perform final inspection and acceptance of all work required under the contractual action, including review and approval of reports..." (Attachment 3, paragraph C14). Detailed guidance to document both review and acceptance of deliverables will be added to PM 2014-04.

Recommendation no. 5. IG Recommendation that the Director of the Office of Procurement of USPTO: Reemphasize that CORs and TOMs document surveillance over contractor performance, to ensure work performed on a T&M/LH basis is done in accordance with contract and task order requirements.

USPTO Response:

The USPTO concurs with this recommendation. On September 11, 2014, the USPTO issued Procurement Memorandum (PM) 2014-14 *USPTO's Contracting Officer Representative (COR), Task Order Manager (TOM), and Point of Contact (POC) Roles and Responsibilities*. Attachment 3 of the PM provides CORs and TOMs with specific guidance regarding their responsibility to document the contract file, including documentation of contractor surveillance and performance. (Attachment 3, paragraphs C11 and C14). Additional guidance was provided to CORs and TOMs in a training session held on October 16, 2014. The Director of Procurement will amend PM 2014-04 to clarify the requirements contained in FAR Subsection 52.232-7(a)(5) and to reemphasize that invoices must substantiate the request for payments.

Recommendation no. 6. IG Recommendation that the Director of the Office of Procurement of USPTO: Ensure future T&M/LH contracts include FAR Subsection 52.232-7, the T&M payment clause.

USPTO Response:

The USPTO concurs with this recommendation with regard to non-commercial T&M/LH contracts, and will include in future non-commercial T&M/LH contracts FAR clause 52.232-7, *Payments under Time-and-Materials and Labor-Hour Contracts*, as described in FAR 32.111(a)(7). With regard to commercial T&M/LH contracts, a different provision is required, and USPTO will include clause 52.212-4 Alt. 1 in commercial contracts, as described in FAR 12.301(b)(3).

Guidance will be provided to Office of Procurement staff at a staff meeting and reinforced by our internal level of above review for contractual actions. For fiscal year 2015, the Office of Procurement will conduct two random audits of T&M/LH contracts and orders to ensure the clause is included.

Recommendation no. 7. IG Recommendation that the Director of the Office of Procurement of USPTO: Require contracting officers to appoint in writing properly trained and certified CORs and TOMs prior to awarding T&M/LH contracts, and remove those who fail to meet those requirements.

USPTO Response:

The USPTO concurs with this recommendation. On September 11, 2014, the USPTO issued Procurement Memorandum (PM) 2014-14 entitled *USPTO's Contracting Officer Representative (COR), Task Order Manager (TOM), and Point of Contact (POC) Roles and Responsibilities*. PM 2014-04 requires CORs and TOMs to be certified at the appropriate level as described in CAM 1301.670. The PM also released specific forms for Delegating/Appointing the COR/TOM (USPTO-OP-005), Evaluating the COR/TOM's performance (USPTO-OP-007), and terminating a COR/TOM (USPTO-OP-008) to promote consistent application of the policy across OP.

Recommendation no. 8. IG Recommendation that the Director of the Office of Procurement of USPTO: Improve controls to properly maintain and safeguard contract files.

USPTO Response:

The USPTO concurs with this recommendation. Cypher locks have been ordered and will be added the Office's file room doors to ensure proper maintenance and safeguarding of contract files.

Conclusion

In closing, we thank the Principal Assistant Inspector General for Audit and Evaluation for providing us with this report. We are confident in our abilities to meet the recommendations concurred with above in a timely manner and look forward to working with your office in the future in our efforts to improve the process by which we award and administer T&M/LH contracts.