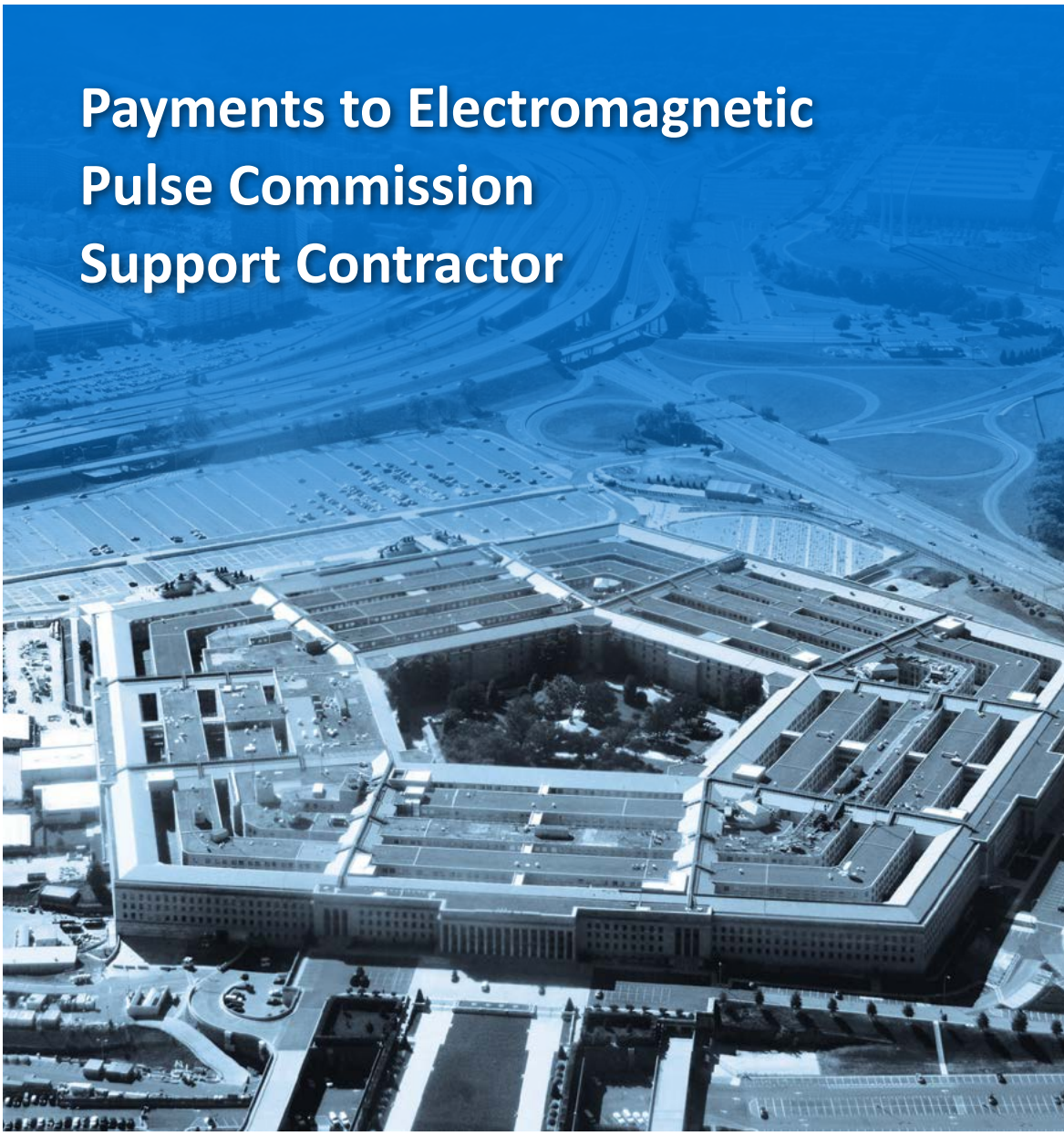
Report No. DODIG-2018-103

INSPECTOR GENERAL

U.S. Department of Defense

APRIL 6, 2018

Payments to Electromagnetic Pulse Commission Support Contractor



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Results in Brief

Payments to Electromagnetic Pulse Commission Support Contractor

April 6, 2018

Objective

We determined whether the Washington Headquarters Services (WHS) properly reviewed contractor invoices for work performed under a support contract for the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack (EMP Commission III). The Chairman, Committee on Armed Services, U.S. House of Representatives, requested that we conduct this audit. After discussions with staff from the Committee on Armed Services, U.S. House of Representatives, we focused our audit on reviewing time charges for one subject matter expert (SME) employed by the support contractor.

Background

The EMP Commission III identifies steps it believes should be taken by the U.S. Government to better protect military and civilian systems from EMP attack. An EMP attack could involve a burst of electromagnetic radiation created by nuclear explosions. An EMP can temporarily disrupt or permanently damage electronic equipment by generating high voltage and high current surges. The effects of immediate damage can range from imperceptible to the eye to devices being blown apart.

Findings

We determined that the WHS contracting officer did not effectively review contractor invoices for work performed under the support contract. Specifically, one SME employed by the support contractor submitted questionable hours on time cards. WHS contracting officials:

- directed the contracting officer's representative (COR) to approve payment requests for a contractor SME that included hours beyond an 8-hour day, 40-hour week, including hours claimed on holidays and weekends, even though the COR had concerns about the reasonableness of those hours,
- did not require the contractor to submit payment requests to the Defense Contract Audit Agency for review and approval. The contracting officer stated that this was an oversight, and
- relied on the signatures from the EMP Commission III Chair and the contractor to support all hours submitted by one SME, without obtaining documentation supporting the hours worked.

These deficiencies occurred because the WHS contracting officials used the wrong sections of the Federal Acquisition Regulation to justify payments to the contractor and incorrectly believed that they had to pay the contractor for all hours that the SME submitted on his time cards because the order was a time-and-materials order.

In addition, we identified two potential Antideficiency Act violations that may have occurred. The first violation, valued at $15,645, may have occurred in May 2017 when the SME claimed 149 hours after the subcontract between the SME and the contractor ran out of funds. The second violation, valued at $22,680, may have occurred in July 2017 when the SME performed "pro bono" (voluntary) services that were not permitted by the contract or authorized by statute.

Results in Brief

Payments to Electromagnetic Pulse Commission Support Contractor

Findings (cont'd)

As a result, WHS contracting officials might have paid the contractor $118,755 more than it should have because it paid for claimed work past 40 hours in a workweek and may have to pay for the unpaid hours that the SME submitted on his time card for May 2017, and the voluntary services performed in July 2017.

Recommendations

We recommend that the WHS Director:

- Issue a memorandum precluding the contracting officer from delegating invoice approval authority to the COR for time-and-materials contracts.
- Modify blanket purchase agreement HQ0034-16-A-0002, order 0001, to require the contractor to submit payment requests to the Defense Contract Audit Agency.
- Review the performance of the Acquisition Directorate branch chief and contracting officer involved with blanket purchase agreement HQ0034-16-A-0002, order 0001 and, if appropriate, initiate action to hold these personnel accountable for the contracting problems identified in this report.
- Initiate a preliminary review to determine whether the unbilled hours the SME worked in May 2017 resulted in an Antideficiency Act violation and provide the results of the review to the DoD Office of Inspector General.
- Initiate a preliminary review to determine whether the "pro bono" hours the SME worked in July 2017 resulted in an Antideficiency Act violation, and provide the results of the review to the DoD Office of Inspector General.
- Ensure that any future contract for services in support of future EMP Commission requirements does not allow hours worked on previous contracts to be paid under the future contract.

Management Comments and Our Response

The WHS Deputy Director agreed with the recommendations and agreed to issue a memorandum clarifying invoice approval authority, review the performance of the Acquisition Directorate branch chief and contracting office, and initiate the preliminary Antideficiency Act reviews. The recommendations are resolved but remain open. We will close the recommendations once we verify that the information provided, and the actions that the WHS takes, fully address the recommendations.

In addition, the WHS modified the order to require the contractor to submit invoices to the Defense Contract Audit Agency. Therefore, the recommendation to modify the order is closed.

The WHS Deputy Director also agreed that it would be improper to allow payment for work under a previous contract to be paid under a future EMP Commission contract. Therefore, he stated that, if WHS receives a future request for support, the administering division and contracting support team (to include the contracting officer, contract specialist, and contracting officer's representative) will be advised to review and approve invoices consistent with regulation. Therefore, the recommendation to ensure that any future contract for services in support of future EMP Commission requirements does not allow hours worked on previous contracts to be paid under the contract is closed.

In addition, the EMP Commission III Chair provided unsolicited comments to our draft report. The Chair's comments concerned issues that were outside the scope of our audit. However, we summarize and address these comments in Appendix C.

Please see the Recommendations Table on the next page for the status of the recommendations.

Recommendations Table

Management	Recommendations Unresolved	Recommendations Resolved	Recommendations Closed
Director, Washington Headquarters Services	None	1.a, 1.c, 1.d, 1.e	1.b, 1.f

Note: The following categories are used to describe agency management's comments to individual recommendations:

- **Unresolved** – Management has not agreed to implement the recommendation or has not proposed actions that will address the recommendation.
- **Resolved** – Management agreed to implement the recommendation or has proposed actions that will address the underlying finding that generated the recommendation.
- **Closed** – OIG verified that the agreed upon corrective actions were implemented.

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April 6, 2018

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS
ASSISTANT SECRETARY OF DEFENSE FOR NUCLEAR, CHEMICAL, AND BIOLOGICAL DEFENSE PROGRAMS
DIRECTOR, WASHINGTON HEADQUARTERS SERVICES
CHAIRMAN, COMMISSION TO ASSESS THE THREAT TO THE UNITED STATES FROM ELECTROMAGNETIC PULSE ATTACK

SUBJECT: Payments to Electromagnetic Pulse Commission Support Contractor (Report No. DODIG-2018-103)

We are providing this report for your information and use. We conducted this audit in accordance with generally accepted government auditing standards.

We considered management comments on a draft of this report when preparing the final report. Comments from the Washington Headquarters Services conformed to the requirements of DoD Instruction 7650.03; therefore, we do not require additional comments.

We appreciate the courtesies extended to the staff. Please direct questions to me at (703) 604-9187 (DSN 664-9187).

Michael J. Roark
Assistant Inspector General
Readiness and Global Operations

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INSPECTOR GENERAL
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Introduction

Objective

We determined whether the Washington Headquarters Services (WHS) properly reviewed contractor invoices for work performed under a support contract for the Commission to Assess the Threat to the United States from Electromagnetic Pulse Attack (EMP Commission III). The Chairman, Committee on Armed Services, U.S. House of Representatives, requested this audit. After discussions with staff from the Committee on Armed Services, U.S. House of Representatives, we focused our audit on reviewing time charges for one subject matter expert (SME) employed by the support contractor who submitted potentially excessive hours on time cards beyond an 8-hour day, 40-hour week, and included hours claimed on holidays and weekends. See Appendix A for a discussion of the scope and methodology. See Appendix C for a summary of the unsolicited comments from the EMP Commission III Chair about the scope of the audit.

Background

Commission to Assess the Threat to the United States from Electromagnetic Pulse Attack

The EMP Commission III identifies steps it believes should be taken by the U.S. Government to better protect military and civilian systems from EMP attack. An EMP attack could involve a burst of electromagnetic radiation created by nuclear explosions. An EMP can temporarily disrupt or permanently damage electronic equipment by generating high voltage and high current surges. The effects of immediate damage can range from imperceptible to the eye to devices being blown apart. The EMP Commission was established in 2001 and again in 2006.[1] The EMP Commission was reestablished for a third time in FY 2016 (EMP Commission III) and was required to provide a final report to Congress, which was due in June 2017.[2] Its charter was amended to assess the following:[3]

- The vulnerability of electric-dependent military systems in the United States to a manmade or natural EMP event, giving special attention to the progress made by the DoD, other U.S. Government departments and agencies, and entities of the private sector in taking steps to protect such systems from such an event.

[1] Public Law 106-398, "The National Defense Authorization Act for Fiscal Year 2001," Title XIV, "Commission to Assess the Threat to the United States From Electromagnetic Pulse (EMP) Attack," October 30, 2000.
Public Law 109-163, "The National Defense Authorization Act for Fiscal Year 2006," Section 1052, "Reestablishment of EMP Commission," January 6, 2006.

[2] As of January 16, 2018, the EMP Commission III had not submitted the report to Congress. According to the Chair, the commission submitted the report to the DoD for a security classification review in September 2017.

[3] Public Law 114-92, "The National Defense Authorization Act for Fiscal Year 2016," Section 1089, "Reestablishment of Commission to Assess the Threat to the United States From Electromagnetic Pulse Attack," November 25, 2015..

- The evolving current and future threat from state and non-state actors of a man-made EMP attack employing nuclear or non-nuclear weapons.
- New technologies, operational procedures, and contingency planning that can protect electronics and military systems from the effects of a manmade or natural EMP event.
- The degree to which state grids are protected against man-made or natural EMP, and determine which U.S. states should receive highest priority for protecting critical defense assets.
- The degree to which vulnerabilities of critical infrastructure systems create cascading vulnerabilities for military systems.

The EMP Commission III consists of nine unpaid commissioners. If a commissioner steps down, the Secretary of Defense will appoint a new commissioner. The Commission Chair may appoint a staff director and additional personnel necessary to enable the Commission to perform its duties. The Commission approves the appointment of a staff director. The DoD is required to provide any administrative and support services, on a reimbursable basis, requested by the Commission. For FY 2017, DoD provided administrative and management services under a support contract.

Congress appropriated $2 million of FY 2016 operations and maintenance funds for EMP Commission III work performed by the contractor. However, WHS personnel spent only $393,000 to prepare a secure workspace and provide computer equipment before the remaining funds expired. In FY 2017, the DoD provided $1.8 million of operations and maintenance funds to support the EMP Commission III.

Office of the Assistant Secretary of Defense (Nuclear, Chemical, and Biological Defense Programs)

On April 15, 2016, the Under Secretary of Defense for Acquisition, Technology, and Logistics tasked the Office of the Assistant Secretary of Defense for Nuclear, Chemical, and Biological Defense Programs (OASD[NCB]) as the liaison to the EMP Commission III. As the liaison office, OASD(NCB) personnel worked with the WHS to award a support contract, identified appropriate facilities for Commission staff, expedited security clearances, and ensured that funding was available.

EMP Commission III Contract Support

On September 29, 2016, a WHS contracting officer issued order 0001, a time-and-materials order with a total estimated value of $702,169 for the base year and two option years, against a blanket purchase agreement (BPA).[4] Government agencies and organizations use BPAs to simplify the

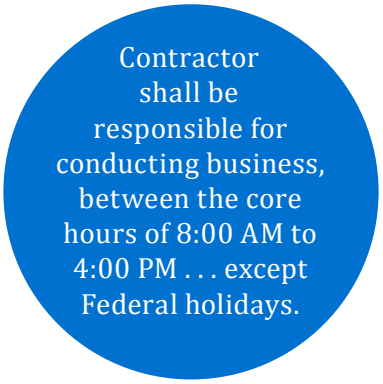
[4] BPA HQ0034-16-A-0002

purchase process. The purpose of the order was for the contractor to provide administrative and management services to the EMP Commission III. Those services included providing personnel (including SMEs and administrative support personnel), computer equipment, and secure workspace. In addition, the contractor was required to provide non-disclosure agreements, written monthly status reports, and quarterly meeting minutes, which the contractor provided to WHS contracting officials. On January 5, 2017, the WHS Acquisition Directorate branch chief designated a contracting officer's representative (COR) in OASD(NCB) to monitor contractor performance for the order, in accordance with the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS).[5]

Performance Work Statement Requirements

The performance work statement (PWS) included in order 0001 contained detailed guidance about the contractor's hours of operations and when contractor employees were authorized to work. Specifically, the PWS authorized contractor employees to work within the following guidelines.

> Hours of Operation: Contractor shall be responsible for conducting business, between the core hours of 8:00 AM to 4:00 PM, arriving no earlier than 6:30 AM and departing no later than 6:30 PM Monday thru Friday, except Federal holidays [10 holidays listed] or when the Government facility is closed due to local or national emergencies, administrative closings, or similar Government directed facility closings. For other than firm fixed price contracts, Contractor will not be reimbursed when the Government facility is closed for the above reasons. Contractor must at all times maintain an adequate workforce to provide uninterrupted performance of all tasks defined within this PWS when the Government facility is not closed for the above reasons.



[5] FAR 1.602-2(d) states that contracting officers shall designate and authorize in writing and in accordance with agency procedures, a COR on all contracts and orders other than those that are firm-fixed-price contracts and orders as appropriate, unless the contracting officer retains and executes the COR duties. DFARS 201.602-2 "Responsibilities" requires contracting officers to inform individuals performing on their behalf of their delegated roles and responsibilities, and the relationships among the parties.

The PWS also states that fiscal year end or short-term situations may require performance in excess of 8-hours per day, 40-hours per week. The PWS did not require the COR to preapprove hours that contractor personnel planned to work in excess of a 40-hour week.

Subject Matter Experts Added to Contract

In December 2016, the WHS Acquisition Directorate branch chief modified order 0001 to incorporate a revised PWS that added SMEs to the order. According to the PWS, the SME services that the contractor shall provide include, but are not limited to:

- Providing SME advice and recommendations on EMP activities.
- Conducting and participating in special assignments and studies of the Commission's interest on a wide variety of mission critical tasks.
- Analyzing and helping assess the effects of natural and manmade EMP on military forces, operations, and civilian critical infrastructures.
- Maintaining familiarity with the work and reports of the Congressional EMP Commission produced during the period 2001-2008 as a necessary foundation for carrying-on the work of the reestablished EMP Commission.
- Preparing congressional testimony, as directed by the EMP Commission Chair.
- Traveling to locations by the direction of the Commission Chair to conduct research and draft and review Commission work products.
- Serving as the liaison to Congress for the EMP Commission at the direction of the Commission Chair.
- Drafting, reviewing, and editing reports.
- Attending all meetings and providing subject matter expertise.
- Responding to any direct support requests from the Commission.
- Preparing detailed reporting as required by leadership.

The contractor has up to six SMEs supporting EMP Commission III. According to the December 2016 through February 2017 monthly status reports, the number of hours the other SMEs worked were within 160 hours per month (40-hour week).

Review of Internal Controls

DoD Instruction 5010.40 requires DoD organizations to implement a comprehensive system of internal controls that provides reasonable assurance that programs are operating as intended and to evaluate the effectiveness of the controls.[6] We identified an internal control weakness. The WHS contracting officer directed the OASD(NCB) COR to approve contractor invoices for payment that included 1,131 hours, totaling $118,755, even though the contractor did not adequately support the hours as being reasonable. We will provide a copy of the final report to the senior official responsible for internal controls at OASD(NCB) and WHS.

[6] DoD Instruction 5010.40, "Managers' Internal Control Program Procedures," May 30, 2013.

Finding

WHS Contracting Officials Approved Contractor Invoices That Included Questionable Hours

The WHS contracting officer did not effectively review contractor invoices for work performed under the support contract. Specifically, one SME employed by the support contractor submitted questionable hours on time cards. WHS contracting officials:

- Directed the OASD(NCB) COR to approve payment requests for a contractor SME that included hours beyond an 8-hour day, 40-hour week, including hours claimed on holidays and weekends, even though the COR had concerns about the reasonableness of those hours.
- Did not require the contractor to submit payment requests to the Defense Contract Audit Agency (DCAA) for review and approval. The contracting officer stated that this was an oversight.
- Relied on the signatures from the EMP Commission III Chair and the contractor to support all hours submitted by one SME, without obtaining documentation supporting the hours worked.

These deficiencies occurred because the WHS contracting officials used the wrong sections of the FAR to justify payments to the contractor and incorrectly believed that they had to pay the contractor for all hours that the SME submitted on his time cards because the order was a time-and-materials order.

In addition, we identified two potential Antideficiency Act violations that may have occurred. The first violation, valued at $15,645, may have occurred in May 2017 when the SME claimed 149 hours after the subcontract between the SME and the contractor ran out of funds. The second violation, valued at $22,680, may have occurred in July 2017 when the SME performed "pro bono" (voluntary) services that were not permitted by the contract or authorized by statute.

As a result, WHS contracting officials might have paid the contractor $118,755 more than it should have because it paid for claimed work past 40 hours in a workweek, and may have to pay for the unpaid hours that the SME submitted on his time card for May 2017 and the voluntary services performed in July 2017.

SME Time Cards Included Questionable Hours

The WHS contracting officer directed the COR to approve payment requests for a contractor SME, that included 1,131 hours, totaling $118,755, even though the COR questioned whether the hours were reasonable. Specifically, the contractor did not provide adequate support for hours that one contractor SME submitted on time cards from December 19, 2016, through September 30, 2017, that included hours well beyond an 8-hour day, 40-hour week, and hours claimed on holidays and weekends. Examples of the questionable hours claimed included:

The WHS contracting officer directed the COR to approve payment requests for a contractor SME that included 1,131 hours, totaling $118,755, even though the COR questioned whether the hours were reasonable.

- 12 hours each on New Year's Day, the Government observances of New Year's Day; and Martin Luther King Jr. day;
- 18 hours on Inauguration Day;
- 13 hours on President's Day;
- between 9 and 18 hours each day from December 19, 2016, through April 30, 2017, except for 5 days;[7]
- between 10 and 11 hours each weekday in May 2017, including Memorial Day;
- 8 hours each on Independence Day and Labor Day;
- 12 hours on two weekdays, 8 hours on two Saturdays, and 8 hours on one Sunday for September 2017.

The COR approved the invoices the contractor submitted for the 2,475 hours that the SME submitted on his time cards from December 19, 2016, through September 30, 2017. This included 1,131 hours we determined were above an 8-hour day, 40-hour week, and hours claimed on holidays and weekends. The table on the next page shows the number of hours the SME submitted on time cards from December 2016 through September 2017.

[7] Two of the 5 days were on a weekend.

Table 1. Comparison of Hours That SME Submitted on Time Cards to an 8-Hour Day, 40-Hour Week

Month	No. of Hours on Time card	Costs of Hours on Time card[1]	Standard Hours[2]	Standard Costs[3]	Hours in Excess of an 8-Hour Day, 40-Hour Week	Costs for Hours Above 8-Hour Day
December 2016	126	$13,230	72	$7,560	54	$5,670
January 2017	468	49,140	152	15,960	316	33,180
February 2017	334	35,070	144	15,120	190	19,950
March 2017	403	42,315	176	18,480	227	23,835
April 2017	382	40,110	160	16,800	222	23,310
May 2017	250	26,250	176	18,480	74	7,770
June 2017	*No Time Card Submitted*					
July 2017	168	17,640	160	16,800	8	840
August 2017	184	19,320	184	19,320	0	0
September 2017	160	16,800	120	12,600	40	4,200
Total	**2,475**	**$259,875**	**1,344**	**$141,120**	**1,131**	**$118,755**

[1] Calculated by multiplying the number of hours on time card by the SME's billing rate of $105 per hour.
[2] Calculated based on an 8-hour day, excluding weekends, holidays, Government observances of holidays, and days not claimed by the SME.
[3] Calculated by multiplying the standard hours by the billing rate of $105 per hour.

In addition, some information on the time cards was inaccurate. For example, the December 2016 time card included hours for the SME to attend a meeting on January 26-27, 2017. The SME should not have claimed the meeting on his December 2016 time card.

COR Identified Problems When Reviewing Contractor Documentation

In March 2017, the OASD(NCB) COR expressed his concerns about the hours for one SME when he was reviewing contractor monthly status reports for December 2016 through February 2017. The contractor e-mailed the combined December 2016 and January 2017 monthly status report to the COR on February 16, 2017, and the February 2017 monthly status report on March 17, 2017. The contractor's monthly status reports claimed 928 hours for the SME from December 19, 2016, through February 28, 2017. On March 17, 2017, the COR e-mailed the contracting officer about his concerns. In his e-mail, the COR stated:

> Basically, I don't think I can certify an invoice that I don't think is accurate (hours billed by [SME]). Over the 72 day period (19 Dec to 28 Feb) he billed 928 hrs. That's an average of 12.88 hours EVERY SINGLE day. Jan was his busiest month. For the 31 day period, he averaged 15.09 hours EVERY SINGLE day. I really doubt those figures.

Between March and June 2017, the COR and the contracting officer repeatedly contacted the contractor requesting detailed information to support the reasonableness of the hours the SME submitted on his time cards beyond an 8-hour day, 40-hour week; however, they were unsuccessful in their attempts. The contracting officer agreed with the COR's concerns until July 2017.

WHS Contracting Officer Directed COR to Approve Invoices That Included Questionable Hours

The WHS contracting officer directed the COR to approve the invoices that included the questionable hours. On July 11, 2017, the WHS contracting officer, the WHS Acquisition Directorate branch chief, the COR, and the contractor had a teleconference to discuss the reasonableness of the hours on the SME's time cards and proposed changes to the PWS. Shortly after the teleconference ended, the COR e-mailed the contracting officer summarizing what the COR believed the contracting officials directed him to do. Specifically, the COR stated in his e-mail:

> I just want to summarize what I think are my directions from WHS for a way ahead. . . . According to [WHS Acquisition Directorate Branch Chief-Services] since this is a T&M [time-and-materials] contract, and the hours for [SME] have already been worked, claimed, and verified by [SME], [EMP Commission III Chair], and [contractor] I am directed to approve those hours when they show up on successive invoices.

The contracting officer responded to the COR in an e-mail:

> Yes, based on the meeting and the following information you've identified below will be the way forward. Once the contractor submit their invoices in WAWF [Wide Area Workflow], please review/ approve the invoices for the hours they've incurred and performed.

The contractor submitted the following invoices for hours that the SME submitted on his time cards from December 19, 2016, through September 30, 2017, which included 1,131 questionable hours. See table above for the summary of hours for each month and Appendix B for the SME time cards the contractor used to support the hours on the invoices.

- **Invoice No. M050-6A (December 19, 2016, through February 28, 2017).** This invoice was for 928 hours. The 928 hours included 560 hours, totaling $58,800, that the COR had questioned as

being reasonable because the SME claimed he worked between 8 and 18 hours per day for 68 of the 72 calendar days. The 68 days included weekends and holidays.

- **Invoice No. M050-6C (March 1, 2017, through April 30, 2017).** This invoice was for 785 hours. The 785 hours included 449 hours, totaling $47,145, that the COR had questioned as being reasonable because the SME claimed he worked between 8 and 16 hours per day for 60 of the 61 calendar days. The 60 days included weekends.
- **Invoice No. INV-0000003040 (May, August, and September 2017).** This invoice was for 683 hours. The 683 hours included 250 hours the SME submitted on time cards for May; 184 hours for August; and 160 hours for September. We questioned the reasonableness of 114 hours, totaling $11,970, for May and September 2017. We questioned 74 hours in May because the SME claimed he worked between 10 and 11 hours per day for every weekday in May, including Memorial Day. We questioned 40 hours in September because the SME claimed he worked 32 hours on weekends and on Labor Day, and he claimed 12 hours for two weekdays.[8]
- **Invoice No. M050-7 (July 2017).** This invoice was for 240.9 hours. The 240.9 hours included 168 hours the SME submitted on his time card. We questioned the reasonableness of 8 hours, totaling $840, because the SME claimed 8 hours on Independence Day.

There was no time card for the SME for June 2017. The COR approved all of these invoices.

WHS Contracting Officer Did Not Direct the Contractor to Submit Payment Requests to the DCAA

WHS contracting officer did not require the contractor to submit payment requests to the DCAA for review and approval. Specifically, the DoD Financial Management Regulation states:[9]

> The Defense Contract Audit Agency (DCAA) has sole authority for verifying claimed costs and provisionally approving interim payment requests under cost reimbursement, time and materials, and labor-hour type contracts. . . A Contracting Officer's Representative (COR) may not be delegated authority to approve these types of payments.

[8] We questioned 4 of the 12 hours on each day.

[9] DoD 7000.14-R, Volume 10, "Contract Payment Policy," Chapter 10: "Payment Vouchers-Special Applications," 100502, "Authority to Review and Approve Vouchers."

Also, the DoD COR Handbook states:[10]

> CORs can approve invoices on fixed-price contracts. However, for cost reimbursement, time and materials, and labor-hour contracts, CORs can review—but not approve—invoices. For other than fixed-price contracts, DCAA has the sole authority for verifying claimed costs and approving interim payment request. Only the contracting officer can approve final payment requests.

Furthermore, a Defense Procurement and Acquisition Policy Memorandum states that the DCAA has sole authority for verifying claimed costs and approving interim payment requests for cost reimbursement, time-and-materials, and labor-hour contracts; however, the administrative contracting officer has the sole authority for approving final payment requests.[11] The memorandum further states that CORs shall not be delegated authority to approve payments for these types of contract. The WHS Director should issue a memorandum precluding the contracting officer from delegating invoice approval authority to the COR for any time-and-materials contracts.

The contracting officer stated that not requiring the contractor to submit payment requests to the DCAA for review and approval was an oversight. The contracting officer stated that WHS contracting officials are in the process of modifying the task order to require the contractor to submit payment requests to the DCAA. WHS contracting officials also updated the COR designation letter on November 21, 2017, so that the COR was no longer authorized to approve payments for the time-and-material task order. The WHS Director should modify BPA HQ0034-16-A-0002, order 0001, to require the contractor to submit payment requests to the DCAA.

WHS Contracting Officials Relied on Signatures Instead of Documentation to Support SME Hours

WHS contracting officials relied on the signatures from the EMP Commission III Chair and the contractor to support all hours submitted by one SME, without obtaining documentation supporting the hours worked. The FAR defines reasonable as:[12]

> A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their

[10] DoD COR Handbook, March 22, 2012.

[11] Defense Procurement and Acquisition Policy Memorandum, "Approving Payments Under Cost-Reimbursement, Time-and Materials, and Labor-Hour Contracts," April 14, 2008.

[12] FAR Part 31, "Contract Cost Principles and Procedures," Subpart 31.2, "Contracts with Commercial Organizations," 31.201-3, "Determining reasonableness."

> separate divisions that may not be subject to effective competitive restraints. *No presumption of reasonableness shall be attached to the incurrence of costs by a contractor.* If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

We determined that the EMP Commission III Chair's signature, the contractor's signature, and the brief description of tasks that the SME performed which were included on the SME's time cards did not adequately support the reasonableness of the hours as required by the FAR. Specifically, the FAR states that the Government will pay the contractor once the contracting officer or COR approves a substantiated voucher.

WHS Contracting Officials Used the Wrong Criteria to Justify Payments to the Contractor

WHS contracting officials used the wrong sections of the FAR to justify payments to the contractor. During the audit, the contracting officer and the WHS Acquisition Directorate branch chief stated that FAR Clause 52.232-7, "Payments under Time-and-Materials and Labor-Hour Contracts;" required WHS to pay all costs on the contractor invoices as long as the costs did not exceed the total value of the contract. That clause states:

> The Contractor shall substantiate vouchers . . . by evidence of actual payment and by—
>
> (i) Individual daily job timekeeping records;
>
> (ii) Records that verify the employees meet the qualifications for the labor categories specified in the contract; or
>
> (iii) Other substantiation approved by the Contracting Officer.
>
> (6) Promptly after receipt of each substantiated voucher, the Government shall, except as otherwise provided in this contract, and subject to the terms of paragraph (e) of this clause, pay the voucher as approved by the Contracting Officer or authorized representative.

That clause requires costs to be substantiated before payment. However, that clause was not included as part of the BPA, the order, or the modifications until the contracting officer modified the order on November 9, 2017. Nevertheless, on November 28, 2017, contracting officials stated that the correct clause was actually FAR Clause 52.212-4, "Contract Terms and Conditions – Commercial Items (May 2015) (Alternate I)." This clause states:

> When requested by the Contracting Officer or the authorized representative, 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.

This clause also allows for the use of time cards as a method for substantiating costs. We do not question the use of time cards as a method for substantiating the hours that the SME worked. However, according to the FAR, the burden of proof was on the contractor to establish the reasonableness of the hours after the COR raised his concerns about the hours worked beyond an 8-hour day, 40-hour week, and hours claimed on holidays and weekends. The WHS Director should review the performance of the Acquisition Directorate branch chief and contracting officer involved with order 0001 and, if appropriate, initiate action to hold these personnel accountable for the contracting problems identified in this report.

Actions Taken to Improve Contract Surveillance Requirements

During the audit, the WHS contracting officer took steps to improve contract surveillance requirements and to protect the Government's interest.
The December 19, 2016, modification to the order that incorporated the revised PWS and added SMEs, did not require the contractor to obtain COR preapproval of SME hours beyond a 40-hour week. In addition, the PWS placed the SME under the direction of the EMP Commission III Chair instead of the contractor that employed the SME. The problems the COR identified related to the SME's questionable hours may not have occurred had the PWS required the contractor to get preapproval from the COR before allowing the SME to work hours beyond a 40-hour week.

On July 11, 2017, the contracting officer e-mailed the contractor with instructions to request permission from the COR before allowing the SME to work more than 40 hours in a week. The contracting officer also modified the order on August 4, 2017, to require the COR to preapprove hours more than a 40-hour week. Specifically, the contracting officer revised the PWS to add the following detailed information needed for COR approval:

- what the SME had done in accordance with the contract,
- how much extra time the SME would need to complete the work,
- what the product or services would be,
- why this service was needed, and
- the deadline for this service and why it could not be spread over a longer period to avoid the extra hours.

The contracting officer removed the following statement from the PWS, "5.3.11 Aid, advise, and execute any and all directives from the Chairman of the Congressional EMP Commission to establish and manage the operations and substantive work of the Commission, including by EMP Commissioners and Staff." However, shortly after the contracting officer modified the order, another problem occurred involving the same SME, which was related to hours that the contractor reported on the July 2017 monthly status report. Specifically, the COR identified that the SME was still working hours beyond an 8-hour day, 40-hour week and was claiming the excess hours as "pro bono" (voluntary) services. This situation created a potential Antideficiency Act (ADA) violation because "pro bono" (voluntary) services were not authorized under the terms and conditions of the order or authorized by statute.

Potential Antideficiency Act Violations Occurred

Two potential ADA violations may have occurred on this contract in May and July of 2017, valued at $38,325.

Potential ADA No. 1. A potential ADA, valued at $15,645, may have occurred in May 2017 when the SME claimed 149 hours after the subcontract between the SME and the contractor ran out of funds. The SME initially submitted a time card for May that included 399 hours. The SME revised the time card to 250 hours. The contractor invoiced only for the 250 hours. The contractor did not bill for the 149 hours.

Potential ADA No. 2. A potential ADA, valued at $22,680, may have occurred in July 2017 when the SME performed "pro bono" (voluntary) services that were not authorized under the terms and conditions of BPA HQ0034-16-A-0002, order 0001 or authorized by statute. Specifically, the July 2017 contractor monthly status report showed that the SME had performed 216 hours, totaling $22,680, of voluntary services. The SME had not notified the contractor, WHS contracting officer, or the COR before working the "pro bono" hours. The contractor monthly status report stated:

> Although [SME] worked 384 hours for the EMP Commission in July 2017, he is donating most of his time pro bono, as is done by all of the EMP Commissioners, and charging for only 168 hours.

The COR e-mailed the contracting officer about the situation on the same day, and suggested that the contracting officer request legal assistance because the SME could not perform "pro bono" work. On August 18, 2017, the contracting officer

e-mailed the COR to confirm that the contractor was not allowed to perform "pro bono" work and stated that the contractor needed to comply with the terms of the contract.

On August 24, 2017, the COR e-mailed the contractor to ask why the contractor had not obtained permission from the COR, as required by the revised PWS, before allowing the SME to work hours beyond a 40-hour week that the SME worked during the second half of July. The contractor replied to the COR:

> First, he billed us for 168 hours, which I think fits the 40 hrs/week for July. That said, he felt the need to let us know he was donating additional effort, which I then reported to you. He differentiated between "billing" and "working," which I know can be a difficult line.
>
> . . .
>
> I understand that contractors cannot get paid for pro bono work, and [SME] is very clear that he cannot get paid for more than 40 hours/week. [EMP Commission III Chair] is also aware of this situation and approves it. I am helpless, however, in controlling the devotion he has to the work and his desire to complete the Commission reports in the time allotted.

The COR then e-mailed the contractor to immediately stop working the excess hours. Specifically, the COR stated:

> I'm confident that you received the guidance that contractors cannot do pro bono work. Additionally, I'm also sure you remember that in my 10 Aug email, I agreed to no more than 40hrs/week for [SME] for the month of Aug. I would like you to ask him if he is working in excess of 40 hrs/week. If he is, then he needs to immediately stop working the excess hours.
>
> . . .
>
> It is not a matter of whether or not [SME] gets paid for pro bono work, it is that [SME] cannot DO pro bono work. I'm assuming, as the PM, you have the authority and the responsibility to effectively address this situation.

We did not find written authority that would allow the SME to perform voluntary services for some of the work under a contract while simultaneously being paid for other work on the same contract. The United States Code states that an officer or employee of the U.S. Government may not "accept voluntary services [for the United States]" except for certain emergencies involving the protection of human life or property, or unless authorized by law.[13] This may lead to an Antideficiency Act violation if the contractor requested payment for the "pro

[13] 31 U.S.C. § 1342, "Limitation on voluntary services."

bono" hours at the end of the fiscal year where funds were not available to pay for the "pro bono" hours.[14] In an October 2, 2017, e-mail to us, the WHS contracting officer stated,

> if the contractor request [sic] to receive payment for working pro bono hours, and the Government received a benefit, the Government will process this action as an unauthorized commitment pursuant to subpart FAR 1.602-3-Ratification of Unauthorized Commitments.

On November 1, 2017, the contractor e-mailed a revised monthly status report for July 2017 to the COR that did not include any mention of working "pro bono" hours. However, revising monthly status report does not eliminate the fact that the SME worked hours for which he was not paid and the potential ADA.

On November 28, 2017, the WHS contracting officer e-mailed the following information to us, explaining that the contractor re-characterized the "pro bono" hours as at-risk hours. The e-mail stated:

> [Contractor] confirms that we will not bill the Government for labor hours performed at-risk by any subcontractors. Please recall that no pro bono hours were performed. In the original monthly status report for July 2017, 216 hours were erroneously identified as pro bono; [SME] noted he worked 384 hours and billed 168 hours. [SME] spent these at-risk hours on research and analysis tasks (PWS 5, 6). Upon receipt of the monthly status report that described the labor hours as pro bono, the COR informed [contractor] that this was incorrect. A revised monthly status report was issued for July 2017.

This information contradicted information the contractor provided to the COR on August 24, 2017, where the contractor stated that the SME had donated additional hours. In addition, while the WHS contracting officer stated that the contractor would not bill the Government for hours performed at-risk by subcontractors, including the SME, the WHS contracting officer also provided us with other information indicating that the SME was attempting to receive pay for the "pro bono" hours. Specifically, the WHS contracting officer provided us with a May 26, 2017, e-mail from the SME to the EMP Commission III Chair indicating that the contractor is considering a way to pay the SME for all hours he worked in 2016 and 2017 for which he was not paid. Specifically, the SME stated:

> . . . maybe [contractor] can take her scheme about changing my contract from hours to fixed price so I can get paid for last year and this year.

[14] DoD Financial Management Regulation, Volume 14, "Administrative Control of Funds and Antideficiency Act Violations," Chapter 2, "Antideficiency Act Violations," Paragraph 020101.

The SME forwarded the above e-mail to the contractor on May 29, 2017. Even though the contractor told the contracting officials that they did not intend to bill for those hours; the e-mail shows that the contractor and SME were trying to find a way to be paid for the unbilled hours. The WHS Director should initiate a preliminary review to determine whether the unbilled hours the SME worked in May 2017 resulted in an ADA violation. The WHS Director should also initiate a preliminary review to determine whether the "pro bono" hours the SME worked in July 2017 resulted in an ADA violation. The WHS Director should ensure that any future contract for services in support of future EMP Commission requirements do not allow hours worked on previous contracts to be paid under the future contract.

Conclusion

WHS contracting officials might have paid the contactor $118,755 more than it should have and may have to pay for the unpaid hours that the SME submitted on his time card. On November 28, 2017, WHS contracting officials provided us with e-mails and documents received from the contractor on November 17, 2017, to show that adequate support existed for the hours on the invoices. The e-mails and documents provided some detail about the hours that the SME submitted on his time cards from December 2016 through May 2017. However, the contractor should have provided the e-mails and documents to the COR when the COR requested information to support the hours on the invoices and the SME's time cards. WHS contracting officials need to ensure that the contractor and SMEs working for the contractor perform the work in accordance with the contract terms and the FAR.

Recommendations, Management Comments, and Our Response

Recommendation 1

We recommend that the Director, Washington Headquarters Services:

a. Issue a memorandum precluding the contracting officer from delegating invoice approval authority to the contracting officer's representative for any time-and-materials contracts.

Washington Headquarters Services Comments

The WHS Deputy Director agreed, stating that WHS will issue a procurement notice providing guidance and direction on approving invoices and payments for commercial time-and-materials contracts. The notice will require contracting officers to delegate commercial time-and-materials invoice acceptance to the DCAA. Additionally, the contracting officer modified the COR designation letter on November 22, 2017, to remove the COR's duty to approve invoices under the order.

Our Response

Comments from the WHS Deputy Director addressed all specifics of the recommendation. We verified that the contracting officer modified the COR designation letter. This recommendation is resolved but will remain open until we verify that the procurement notice has been issued.

b. Modify blanket purchase agreement HQ0034-16-A-0002, order 0001, to require the contractor to submit payment requests to the Defense Contract Audit Agency.

Washington Headquarters Services Comments

The WHS Deputy Director agreed, stating that WHS modified the order to require the contractor to submit invoices to the DCAA.

Our Response

Comments from the WHS Deputy Director addressed all specifics of the recommendation. We verified that the contracting officer modified the order on February 8, 2018; therefore, this recommendation is closed.

c. Review the performance of the WHS Acquisition Directorate branch chief and contracting officer involved with blanket purchase agreement HQ0034-16-A-0002, order 0001, and, if appropriate, initiate action to hold these personnel accountable for the contracting problems identified in this report.

Washington Headquarters Services Comments

The WHS Deputy Director agreed, stating that the WHS Director will review the performance of the Acquisition Directorate branch chief and contracting officer involved in the order. The WHS Deputy Director also stated that, based on the results, the WHS will take personnel action appropriate to the findings. In addition, the WHS Acquisition Directorate will issue guidance and provide periodic training on approving invoices and payments for commercial time and materials contracts.

Our Response

Comments from the WHS Deputy Director addressed all specifics of the recommendation. This recommendation is resolved but will remain open until we verify that the performance of the Acquisition Directorate branch chief and contracting officer has been reviewed, the guidance has been issued, and training was provided.

d. Initiate a preliminary review to determine whether the unbilled hours the SME worked in May 2017 resulted in an Antideficiency Act violation and provide the results of the review to the DoD Office of Inspector General.

Washington Headquarters Services Comments

The WHS Deputy Director agreed, stating that the WHS will review whether the unbilled hours the SME worked in May 2017 resulted in an ADA violation and will provide the DoD OIG with a complete report of its findings within 120 days of release of this final report. The hours performed by the SME were not authorized in accordance with the contract. As a result, the prime contractor provided a Release of Claim letter on February 15, 2018, and the DoD will not be billed for the $15,645 for 149 hours performed at risk by the SME. The SME exceeded the total hours in his subcontract agreement with the prime contractor.

Our Response

Comments from the WHS Deputy Director addressed all specifics of the recommendation. We verified that the contractor provided the Release of Claims letter. This recommendation is resolved but will remain open until we receive the results of the preliminary review.

e. Initiate a preliminary review to determine whether the "pro bono" hours the SME worked in July 2017 resulted in an Antideficiency Act violation and provide the results of the review to the DoD Office of Inspector General.

Washington Headquarters Services Comments

The WHS Deputy Director agreed, stating that the WHS will review whether the unbilled hours the SME worked in July 2017 resulted in an ADA violation and provide the DoD OIG with a complete report of its findings within 120 days of release of this final report. The hours performed by the SME were not authorized in accordance with the contract. As a result, the prime contractor provided a Release of Claim letter on February 15, 2018, and the DoD will not be billed for the $22,680 for 216 hours performed at risk by the SME. The SME exceeded total hours in his subcontract agreement with the prime contractor.

Our Response

Comments from the WHS Deputy Director addressed all specifics of the recommendation. We verified that the contractor provided the Release of Claims letter. This recommendation is resolved but will remain open until we receive the results of the preliminary review.

f. Ensure that any future contract for services in support of future Electromagnetic Pulse Commission requirements does not allow hours worked on previous contracts to be paid under the future contract.

Washington Headquarters Services Comments

The WHS Deputy Director agreed, stating that the WHS Acquisition Directorate agrees that it would be improper to allow payment for work under a previous contract to be paid under a future EMP Commission contract. Therefore, if the Acquisition Directorate receives a future request for support, the administering division and contracting support team (including the contracting officer, contract specialist, and contracting officer's representative) will be advised to review and approve invoices consistent with regulation.

Our Response

Comments from the WHS Deputy Director addressed all specifics of the recommendation. The WHS Acquisition Directorate will ensure that the administering division and contracting support team will be advised to review and approve invoices consistent with regulation. Therefore, this recommendation is closed.

Appendix A

Scope and Methodology

We conducted this performance audit from June 2017 through February 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Work Performed

We collected, reviewed, and analyzed documentation from the contract files and information that WHS contracting officials and the OASD(NCB) COR provided to us. We determined whether WHS contracting officials and the COR protected DoD's interests when resolving questionable hours for one contractor SME.

We reviewed the original and revised PWSs for order 0001 to identify tasks the SME could perform to support EMP Commission III. We reviewed the COR designation letter to determine the date and the duties. We reviewed contractor monthly status reports from December 2016 through September 2017 to identify whether the contractor submitted hours for the SME; we then compared those hours to hours that the SME submitted on his time cards. We reviewed the SME's time cards from December 19, 2016, through September 30, 2017, to identify hours claimed over an 8-hour day, 40-hour week and hours claimed on weekends and holidays. We reviewed Wide Area Workflow records to identify whether the COR approved contractor invoices that included potentially excessive hours that the SME submitted on time cards from December 2016 through September 2017. We reviewed documentation dated from October 2000 to December 2017.

We used the following criteria as the basis for our analysis:

- 10 U.S.C. § 1588, "Authority to Accept Certain Voluntary Services";
- 31 U.S.C. § 1342, "Limitation on Voluntary Services";
- FAR 1.602-1, "Authority";
- FAR 1.602-2, "Responsibilities";
- FAR 16.601, "Time-and-Materials Contracts";
- FAR 31.201-3, "Determining Reasonableness";
- DFARS 201.602-2, "Responsibilities";
- DFARS 242.8, "Disallowance of Costs";

- DoD Financial Management Regulation, Volume 10, "Contract Payment Policy," Chapter 10, "Payment Vouchers–Special Applications";
- DoD Financial Management Regulation, Volume 14, "Administrative Control of Funds and Antideficiency Act Violations," Chapter 2, "Antideficiency Violations";
- DoD COR Handbook, March 22, 2012; and
- Defense Procurement and Acquisition Policy Memorandum, "Approving Payments Under Cost-Reimbursement, Time-and-Materials, Labor-Hour Contracts," April 14, 2008.

We interviewed WHS contracting officials, the OASD(NCB) COR, and the OASD(NCB) EMP Liaison to obtain information related to their efforts to resolve the situation involving the hours that the COR identified. We contacted the EMP Commission III Chair several times; however, he declined to be interviewed unless the DoD OIG agreed to some pre-conditions and to provide documentation that the agency was not authorized to provide.

Use of Computer-Processed Data

We did not use computer-processed data to perform this audit.

Use of Technical Assistance

We did not require technical assistance for this audit.

Prior Coverage

No prior coverage has been conducted on the EMP Commission III support contractor during the last 5 years.

Appendix B

Subject Matter Expert's Time Cards

The table below shows the number of hours the SME submitted on his time cards for each day from December 19, 2016, through September 30, 2017. The information under "Tasks completed during this period" is the contractor's description of the work performed by the SME during each month.

TIME CARD – DECEMBER 2016								
Week	**SUN**	**Mon**	**TUES**	**WED**	**THURS**	**FRI**	**SAT**	**TOTAL HRS**
Dec 19-24		18	12	12	12	12	0	**66**
Dec 25-31	0	0	12	12	12	12	12	**60**
							Total Hours	**126**

Tasks completed during this period:

During the months of December and January, [SME], with the concurrence of the Chairman of the EMP Commission and in furtherance of its objectives, carried out the following tasks:

- Assisted the Chairman to organize and arrange briefers for the first meeting of the Commission (PWS 1, 2, 3)
- Briefed the Commission on Congressional and State legislative issues (PWS 7, 13)
- Briefed the Commission on EMP in Combined-Arms Cyber Warfare (PWS 5, 6)
- Did research and drafted memos, articles, and reports in support of the Commission (PWS 4, 5, 6, 14)
- Arranged and participated in meetings with key Senators and Members of Congress (PWS 2, 13)
- Arranged and participated in meetings with the Office of the Vice President and National Security Council (PWS 2, 3, 4)
- Helped with administrative matters necessary to the operation of the EMP Commission (PWS 3, 9)
- Attended the first meeting of the Commission on January 26-27, 2017 (PWS 15)
- Traveled to support these activities (January 22-27, 2017) (PWS 12)

TIME CARD – JANUARY 2017								
WEEK	SUN	MON	TUES	WED	THURS	FRI	SAT	TOTAL HRS
Jan 1-7	12	12	12	12	12	18	18	**96**
Jan 8-14	18	12	12	12	12	18	18	**102**
Jan 15-21	12	12	12	12	18	18	18	**102**
Jan 22-28	18	18	18	18	18	18	18	**126**
Jan 29-31	18	12	12					**42**
						Total Hours		**468**

Tasks completed during this period:

During the months of December and January, [SME] in his role as Chief of Staff: Helped the Chairman work on organizing the first meeting of the Commission, including briefings to the Commission; briefed the Commission on EMP in Combined-Arms Cyber Warfare; did research and drafted memos, articles, and reports in support of the Commission; arranged and participated in meetings with key Senators, Members of Congress, the Office of the Vice President, and the National Security Council; and helped with administrative matters necessary to the operation of the EMP Commission.

TIME CARD – FEBRUARY 2017								
WEEK	SUN	MON	TUES	WED	THURS	FRI	SAT	Total Hrs.
Feb 1-4				10	11	14	9	**44**
Feb 5-11	8	14	13	12	14	14	10	**85**
Feb 12-18	8	16	16	16	12	0	10	**78**
Feb 19-25	8	13	14	14	12	14	15	**90**
Feb 26-28	8	16	13					**37**
						Total Hours		**334**

Tasks completed during this period:

During the month of February 2017, [SME] in his role as Chief of Staff: Helped the Chairman work on organizing the second meeting of the Commission, including briefings to the Commission; did research and drafted memos, articles, and reports in support of the Commission; arranged and participated in meetings with key Senators, Members of Congress, the National Security Council, and industry; and helped with administrative matters necessary to the operation of the EMP Commission.

TIME CARD – MARCH 2017								
WEEK	SUN	MON	TUES	WED	THURS	FRI	SAT	Total Hrs.
Mar 1-4				10	11	14	9	**44**
Mar 5-11	12	14	13	12	14	14	9	**88**
Mar 12-18	12	16	16	16	16	0	16	**92**
Mar 19-25	12	14	13	14	12	14	15	**94**
Mar 26-31	9	14	16	14	16	16		**85**
							Total Hours	**403**

Tasks completed during this period:

During the month of March 2017, [SME] in his role as Chief of Staff: Helped the Chairman work on organizing the third meeting of the Commission, including briefings to the Commission; did research and drafted memos, articles, and reports in support of the Commission; arranged and participated in meetings with key Senators, Members of Congress, the National Security Council, and industry; and helped with administrative matters necessary to the operation of the EMP Commission.

TIME CARD – APRIL 2017								
WEEK	SUN	MON	TUES	WED	THURS	FRI	SAT	Total Hrs.
Apr 1							9	**9**
Apr 2-8	8	12	10	14	15	15	15	**89**
Apr 9-15	8	12	16	16	12	10	12	**86**
Apr 16-22	8	12	16	16	16	16	12	**96**
Apr 23-29	8	12	16	16	16	14	12	**94**
Apr 30	8							**8**
							Total Hours	**382**

Tasks completed during this period:

During the month of April 2017, [SME] drafted reports, articles, letters, and memoranda; attended meetings, conferences, and gave interviews; gave testimony and provided analytical and policy support to EMP protection initiatives in Texas, Louisiana, and at the Department of Homeland Security; and arranged and participated in meetings with Congress, at the direction of the Chairman of the EMP Commission and in furtherance of its objectives.

TIME CARD – MAY 2017								
WEEK	SUN	MON	TUES	WED	THURS	FRI	SAT	Total Hrs.
May 1-6		11	11	11	11	11	0	55
May 7-13	0	11	11	11	11	11	0	55
May 14-20	0	11	11	11	11	11	0	55
May 21-27	0	11	11	11	11	11	0	55
May 28-31	0	10	10	10				30
							Total Hours	**250**

Note: This is the revised time card for the month of May 2017 provided in October 17, 2017.

Tasks completed during this period:

During the month of May 2017, [SME], with the concurrence of the Chairman of the EMP Commission and in furtherance of its objectives, carried out the following tasks:

- Assisted the Chairman to organize and arrange briefers for the fourth meeting of the Commission (PWS 1, 2, 3)
- Did research and drafted memoranda, letters, articles, and reports in support of the Commission (PWS 4, 5, 6, 14)
- Attended meetings and conferences (PWS 8, 12)
- Provided expertise, stimulated discourse, and elicited feedback for Commission assessments via media interviews (PWS 1, 2)
- Provided analytical and policy support to EMP protection initiatives in Texas and Louisiana (PWS 7)
- Arranged and participated in meetings with the Department of Homeland Security (PWS 3, 4)
- Arranged and participated in meetings with key Senators and Members of Congress (PWS 13)
- Traveled to support these activities (May 2-3, May 11-12, May 14-19, 2017) (PWS 12)

Tasks in the Performance Work Statement (5.3.XX)

1. Review, prioritize, evaluate, and assess a wide variety of complex and sensitive projects, studies and actions concerning subject matter material.
2. Provide subject matter expert advice and recommendations on electromagnetic pulse activities.
3. Conduct and participate in special assignments and studies of the Commission's interest on a wide variety of mission critical tasks.
4. Analyze and help assess the effects of natural and manmade EMP on military forces, operations, and civilian critical infrastructures

5. Analyze the effects of hybrid warfare combining EMP with cyber and physical attacks on military forces, operations, and civilian critical infrastructures
6. Analyze and help assess the role of EMP and hybrid warfare in foreign military doctrine, writings, training, and operations
7. Analyze and help assess those States of the United States whose electric grids and civilian critical infrastructures are most important to sustaining Department of Defense assets, forces, and power projection capabilities
8. Maintain in-depth knowledge of natural and manmade electromagnetic pulse phenomenology and its micro and macro effects on electronic systems, electric grids, and other critical infrastructures
9. Maintain familiarity with the work and reports of the Congressional EMP Commission produced during the period 2001-2008 as a necessary foundation for carrying-on the work of the re-established EMP Commission
10. Prepare Congressional testimony, as directed by the EMP Commission Chairman
11. (deleted)
12. Travel to locations at the direction of the Commission Chairman to conduct research and draft and review Commission work products
13. Serve as the liaison to Congress for the EMP Commission at the direction of the Commission Chairman
14. Draft, review, and edit reports
15. Attend all meetings and provide subject matter expertise.

TIME CARD – July 2017								
WEEK	**SUN**	**MON**	**TUES**	**WED**	**THURS**	**FRI**	**SAT**	**Total Hrs.**
July 1-2								0
July 2-8		8	8	8	8	8		40
July 9-15		8	8	8	8	8		40
July 16-22		8	8	8	8	8		40
July 23-29		8	8	8	8	8		40
July 30-31		8						8
							Total Hours	**168**

Tasks completed during this period:

During the month of July 2017, [SME], with the concurrence of the Chairman of the EMP Commission and in furtherance of its objectives, carried out the following tasks:

- Drafted and edited EMP Commission reports and staff papers (PWS 1, 2, 14)
- Conducted research and analyzed EMP and hybrid warfare in foreign military doctrine (PWS 5, 6)
- Attended meetings and conferences (PWS 2, 3, 8)
- Provided analytical and policy support to EMP protection initiatives at the Department of Homeland Security and Defense Threat Reduction Agency (PWS 3, 7)
- Arranged and participated in meetings with key Senators and Members of Congress (PWS 13)
- Traveled to support these activities (PWS 12)

Tasks in the Performance Work Statement (5.3.XX)

1. Review, prioritize, evaluate, and assess a wide variety of complex and sensitive projects, studies and actions concerning subject matter material.
2. Provide subject matter expert advice and recommendations on electromagnetic pulse activities.
3. Conduct and participate in special assignments and studies of the Commission's interest on a wide variety of mission critical tasks.
4. Analyze and help assess the effects of natural and manmade EMP on military forces, operations, and civilian critical infrastructures
5. Analyze the effects of hybrid warfare combining EMP with cyber and physical attacks on military forces, operations, and civilian critical infrastructures
6. Analyze and help assess the role of EMP and hybrid warfare in foreign military doctrine, writings, training, and operations
7. Analyze and help assess those States of the United States whose electric grids and civilian critical infrastructures are most important to sustaining Department of Defense assets, forces, and power projection capabilities
8. Maintain in-depth knowledge of natural and manmade electromagnetic pulse phenomenology and its micro and macro effects on electronic systems, electric grids, and other critical infrastructures

9. Maintain familiarity with the work and reports of the Congressional EMP Commission produced during the period 2001-2008 as necessary foundation for carrying-on the work of the re-established EMP Commission
10. Prepare Congressional testimony, as directed by the EMP Commission Chairman
11. (deleted)
12. Travel to locations at the direction of the Commission Chairman to conduct research and draft and review Commission work products
13. Serve as the liaison to Congress for the EMP Commission at the direction of the Commission Chairman
14. Draft, review, and edit reports
15. Attend all meetings and provide subject matter expertise.

TIME CARD – AUGUST 2017								
WEEK	**SUN**	**MON**	**TUE**	**WED**	**THURS**	**FRI**	**SAT**	**Total Hrs.**
August 1-5			8	8	8	8		**32**
August 6-12		8	8	8	8	8		**40**
August 13-19		8	8	8	8	8		**40**
August 20-26		8	8	8	8	8		**40**
August 27-31		8	8	8	8			**32**
						Total Hours		**184**

Tasks completed during this period:

During the month of August 2017, [SME], with the concurrence of the Chairman of the EMP Commission and in furtherance of its objectives, carried out the following tasks:

- Drafted and edited EMP Commission reports and staff papers (PWS 1, 2, 14)
- Conducted research and analyzed EMP and hybrid warfare in foreign military doctrine (PWS 5, 6)
- Attended meetings and conferences (PWS 2, 3, 8)
- Provided analytical and policy support to EMP protection initiatives at the Department of Homeland Security and White House Military Office (PWS 3, 7, 8)
- Arranged and participated in meetings with key Senators and Members of Congress (PWS 13)
- Traveled to support these activities (PWS 12)

Tasks in the Performance Work Statement (5.3.XX)

1. Review, prioritize, evaluate, and assess a wide variety of complex and sensitive projects, studies and actions concerning subject matter material.
2. Provide subject matter expert advice and recommendations on electromagnetic pulse activities.
3. Conduct and participate in special assignments and studies of the Commission's interest on a wide variety of mission critical tasks.
4. Analyze and help assess the effects of natural and manmade EMP on military forces, operations, and civilian critical infrastructures
5. Analyze the effects of hybrid warfare combining EMP with cyber and physical attacks on military forces, operations, and civilian critical infrastructures
6. Analyze and help assess the role of EMP and hybrid warfare in foreign military doctrine, writings, training, and operations
7. Analyze and help assess those States of the United States whose electric grids and civilian critical infrastructure are most important to sustaining Department of Defense assets, forces, and power projection capabilities
8. Maintain in-depth knowledge of natural and manmade electromagnetic pulse phenomenology and its micro and macro effects on electronic systems, electric grids, and other critical infrastructures
9. Maintain familiarity with the work and reports of the Congressional EMP Commission produced during the period 2001-2008 as necessary foundation for carrying-on the work of the re-established EMP Commission
10. Prepare Congressional testimony, as directed by the EMP Commission Chairman
11. (deleted)
12. Travel to locations at the direction of the Commission Chairman to conduct research and draft and review Commission work products
13. Serve as the liaison to Congress for the EMP Commission at the direction of the Commission Chairman
14. Draft, review, and edit reports
15. Attend all meetings and provide subject matter expertise.

TIME CARD – SEPTEMBER 2017								
WEEK	WED	THU	FRI	SAT	SUN	MON	TUE	Total Hrs.
September 1-5			8	0	0	8	8	**24**
September 6-12	8	8	8	0	0	0	0	**24**
September 13-19	0	0	8	0	8	8	12	**36**
September 20-26	12	8	8	8	0	0	8	**44**
September 27-30	8	8	8	8				**32**
							Total Hours	**160**
							Overall Hours Claimed	**2,475**

Tasks completed during this period:

During the month of September 2017, [SME], with the concurrence of the Chairman of the EMP Commission and in furtherance of its objectives, carried out the following tasks:

- Drafted and edited EMP Commission reports and staff papers (PWS 1, 2, 14)
- Conducted research and analyzed EMP and hybrid warfare in foreign military doctrine (PWS 5, 6)
- Attended meetings and conferences (PWS 2, 3, 8)
- Provided analytical and policy support to EMP protection initiatives at the Department of Homeland Security (PWS 3, 7, 8)
- Arranged and participated in meetings with key Senators and Members of Congress (PWS 13)
- Traveled to support these activities (PWS 12)

Tasks in the Performance Work Statement (5.3.XX)

1. Review, prioritize, evaluate, and assess a wide variety of complex and sensitive projects, studies and actions concerning subject matter material.
2. Provide subject matter expert advice and recommendations on electromagnetic pulse activities.
3. Conduct and participate in special assignments and studies of the Commission's interest on a wide variety of mission critical tasks.
4. Analyze and help assess the effects of natural and manmade EMP on military forces, operations, and civilian critical infrastructures
5. Analyze the effects of hybrid warfare combining EMP with cyber and physical attacks on military forces, operations, and civilian critical infrastructures

6. Analyze and help assess the role of EMP and hybrid warfare in foreign military doctrine, writings, training, and operations
7. Analyze and help assess those States of the United States whose electric grids and civilian critical infrastructure are most important to sustaining Department of Defense assets, forces, and power projection capabilities
8. Maintain in-depth knowledge of natural and manmade electromagnetic pulse phenomenology and its micro and macro effects on electronic systems, electric grids, and other critical infrastructures
9. Maintain familiarity with the work and reports of the Congressional EMP Commission produced during the period 2001-2008 as necessary foundation for carrying-on the work of the reestablished EMP Commission
10. Prepare Congressional testimony, as directed by the EMP Commission Chairman
11. (deleted)
12. Travel to locations at the direction of the Commission Chairman to conduct research and draft and review Commission work products
13. Serve as the liaison to Congress for the EMP Commission at the direction of the Commission Chairman
14. Draft, review, and edit reports
15. Attend all meetings and provide subject matter expertise.

Appendix C

EMP Commission III Chair Comments and Our Response

The EMP Commission III Chair provided unsolicited comments in response to a draft of this report. His comments were similar to those he e-mailed to us during the audit. The EMP Commission III Chair stated that the audit was an attempt to characterize part of the work of the EMP Commission III in the framework of a standard DoD contract and that such a characterization is not appropriate. In addition, the Chair stated that the audit did not address the failure of the DoD to follow the statutory mandate to provide support to the commission at the direction of the Commission Chair, which delayed the beginning of the DoD's support for the EMP Commission III for one full year. The Chair also stated that our audit report did not identify a major DoD conflict of interest caused by the DoD appointing the Office of the Assistant Secretary of Defense for Nuclear, Chemical, and Biological Defense Programs (OASD(NCB)) to support the commission, even though the commission was to review and report on the work of that office.

While most of these comments related to issues outside the scope of this audit, we e-mailed the EMP Commission III Chair several times during the audit in an attempt to set up an interview to discuss his concerns. The EMP Commission III Chair, however, did not agree to be interviewed unless we agreed to pre-conditions, which included submitting our questions in writing and providing DoD and Congressional documents that we were not authorized to provide him.[15] We referred the EMP Commission III Chair to DoD and Congress to obtain these documents. As a result, we were not able to interview the EMP Commission III Chair.

Overall, the Chair's comments addressed issues that were outside the scope of this audit and outside of the Congressional request to us.

In addition, we disagree with the substance of the Chair's comments. He stated in his comments on our report that, while our report "makes frequent reference to the Defense Federal Acquisition Regulations, which are only advisory within the DoD, it ignores the statutory mandate instructing the DoD to provide support to the Commission at the direction of the Commission Chairman, which is federal law." Yet, contrary to the Commission III Chair's assertions, the DFARS is not advisory on the DoD. The DFARS contains requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies and procedures that the DoD must follow.

[15] The documents were a DoD response to concerns raised by the EMP Commission III Chair and the Congressional request to the DoD OIG to conduct our review, both of which we were not authorized to disclose.

The Commission III Chair also asserted that the:

- DoD failed to follow the statutory mandate to provide support to the commission, which in turn delayed the beginning of the DoD's support for the EMP Commission III for one full year and
- WHS did not authorize and approve the execution of a DoD support contract with an organization in the National Capital Region until precisely one year and one day from the date of appropriation of funds for the reconstituted EMP Commission III, December 19, 2016.

These assertions are not completely accurate and do not provide the full context of the DoD's support for the EMP Commission III. The Under Secretary of Defense for Acquisition, Technology, and Logistics tasked the OASD(NCB) to support the EMP Commission in April 2016. The OASD(NCB) liaison began working with the WHS to identify the support that the commission would need and to award a support contract. Both the OASD(NCB) and the WHS are required to comply with Federal law for obligating and disbursing Operations and Maintenance funds and are required to comply with the FAR[16] and the DFARS when awarding and administering contracts.

According to an information paper the OASD(NCB) prepared on May 16, 2017, the DoD was prepared to support the work of the EMP Commission on July 13, 2016, with funding and a support contract. Additionally, the information paper and other documents we obtained indicate that:

- The FY 2016 Omnibus Appropriations bill was signed on December 18, 2015.
- The funding line for the EMP Commission III was established February 5, 2016. About $400,000 of the original $2.0 million was used for the support contracts awarded in FY 2016.
- The WHS provided an additional $1.9 million from the DoD's Operation and Maintenance account for FY 2017 after the initial congressional funds expired.
- The WHS awarded an order[17] to provide management and administrative support to the EMP Commission on June 6, 2016. However, on June 20, 2016, the Commission III Chair notified the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics that he was not satisfied with the initial contractor. Ultimately, WHS tasked the contractor with other non-commission related work.

[16] FAR Part 1, "Federal Acquisition Regulation System," Subpart 1.1, "Purpose, Authority, Issuance," paragraph 1.104, "Applicability."

[17] BPA HQ0034-14-A-0016 order 0002.

After the Commission III Chair rejected that contractor, WHS began working to award a new order. WHS awarded the current order to support the commission on September 29, 2016, and modified the order on December 19, 2016, to add SMEs.

In sum, we believe the Chair's comments are not completely accurate or supportable, and do not provide the full context for the interactions between the DoD and the Commission. In addition, the issues raised by the Chair were outside the scope of the audit.

Management Comments

Washington Headquarters Services

DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

MAR 0 2 2018

MEMORANDUM FOR INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Washington Headquarters Services Response – Payments to Electromagnetic Pulse Commission Support Contractor by Washington Headquarters Services Acquisition Directorate (Project No. D2017-D000CF-0160.000)

The Washington Headquarters Services (WHS) response to the DOD IG Draft Report is attached. It includes detailed comments to the recommendations in the draft report, and the responses pertaining to potential Antideficiency Act violations.

Thank you for the opportunity to comment on the draft report. Our point-of-contact is [redacted]

Marcia A. Case
Deputy Director

Attachment:
Response to IG recommendations

Washington Headquarters Services (cont'd)

Response to IG Recommendations

Washington Headquarters Services Response – Payments to Electromagnetic Pulse Commission Support Contractor by Washington Headquarters Services (Project No. D2017-D000CF-0160.000)

Recommendations and Agency Management Response

Recommendation 1.a - Issue a memorandum precluding the contracting officer from delegating invoice approval authority to the Contracting Officer's Representative (COR) for any time-and-material contracts.

Agency Response. Agree. The Acquisition Directorate will issue a Procurement Notice providing guidance and direction on approving invoices and payments for commercial time-and-materials (T&M) contracts. The guidance will require CO's to delegate commercial T&M invoice acceptance to the Defense Contract Audit Agency (DCAA). Additionally, the CO modified the COR's designation letter on November 22, 2017 to remove the COR's duty to approve invoices under task order no. HQ0034-16-A-0002-0001.

Recommendation 1.b - Modify blanket purchase agreement HQ0034-16-A-0002, order 0001, to require the contractor to submit payment requests to the Defense Contract Audit Agency.

Agency Response. Agree. WHS Acquisition Directorate has issued a modification on February 09, 2018 to the Blanket Purchase Agreement Task (BPA) Order HQ0034-16-A-0002-0001, which requires the contractor to submit invoices to DCAA in accordance with DFARS WAWF Clause 252.232-7006.

Recommendation 1.c - Review the performance of the WHS Acquisition Division Branch Chief and Contracting Officer involved with Blanket Purchase Agreement HQ0034-16-A-0002, order 0001.

Agency Response. Agree. The WHS Director will review the performance of the Acquisition Division Branch Chief and Contracting Officer involved in HQ0034-16-A-0002, Task Order 0001. Based on the results, the Acquisition Directorate will take personnel action appropriate to the findings. Before making payment, the CO received and relied on contractor timecards validated by the EMP III Commission Chairman to make determination on invoice certification. Further, WHS Acquisition Directorate will also issue guidance and provide periodic training on approving invoices and payments for commercial time-and-materials contracts.

Recommendation 1.d - Initiate a preliminary review to determine whether the unbilled hours the Subject Matter Expert (SME) worked in May 2017 resulted in an Antideficiency Act violation and provide the results of the review to the DoD Office of Inspector General.

2

Washington Headquarters Services (cont'd)

Agency Response. Agree. WHS will review whether the unbilled hours the SME worked in May 2017 resulted in an Antideficiency Act violation and provide the DoD IG with a complete report of its findings within 120 days of release of the final IG Report. The hours performed by the SME were not authorized, in accordance with the contract. As a result, the vendor provided a Release of Claim Letter on February 15, 2018 and Government will not be billed in amount of $15,645 for 149 hours performed at risk by the SME. The SME exceeded total hours listed in his subcontract agreement with the prime contractor.

Recommendation 1.e - Initiate a preliminary review to determine whether the "pro bono" hours the SME worked in July 2017 resulted in an Antideficiency Act violation and provide the results of the review to the DoD Officer of Inspector General.

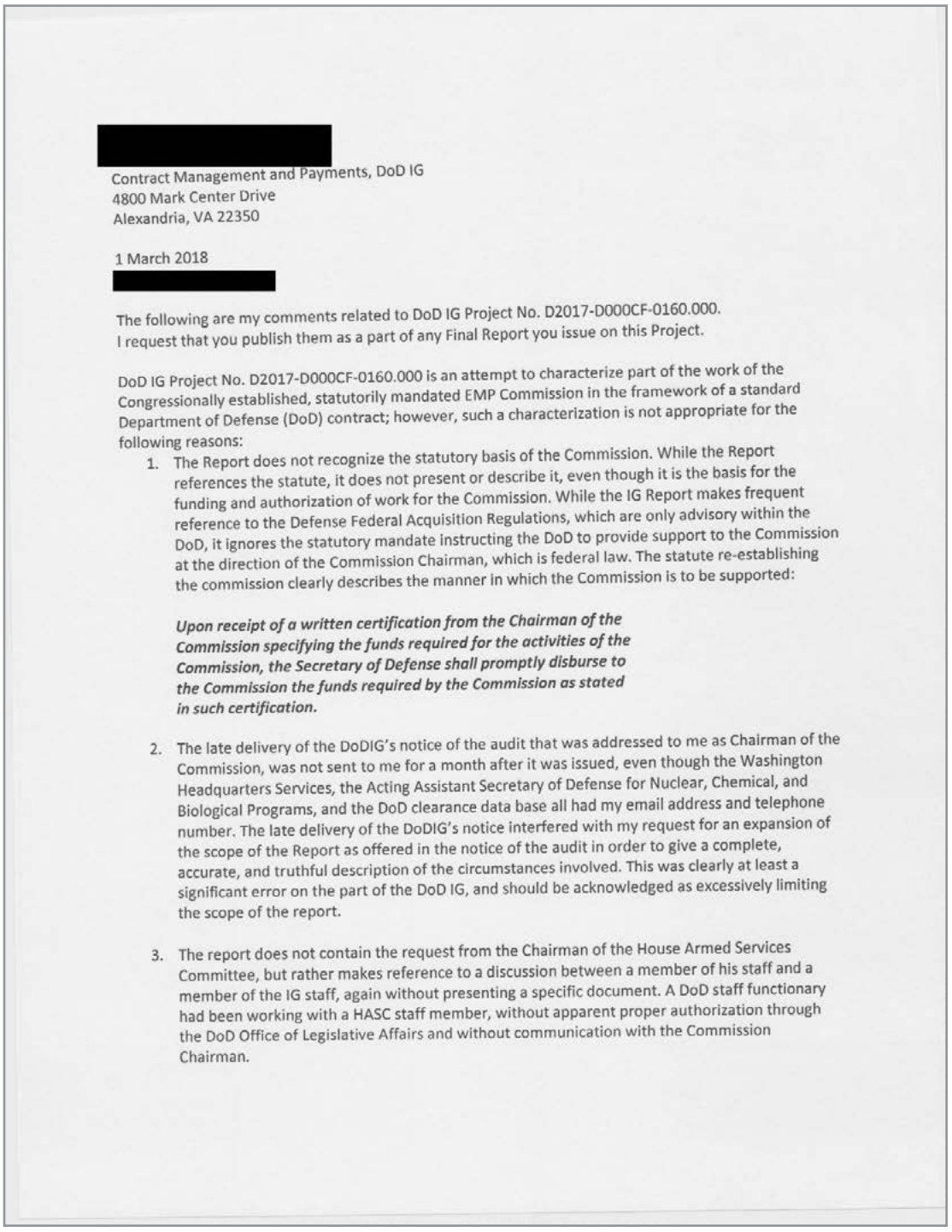
Agency Response. Agree. Washington Headquarters Services will review whether the unbilled hours the SME worked in July 2017 resulted in an Antideficiency Act violation and provide the DoD IG with a complete report of its findings within 120 days of release of the final IG Report. The hours performed by the SME were not authorized, in accordance with the contract. As a result, the vendor provided a Release of Claim Letter on February 15, 2018 and Government will not be billed in amount of $22,680 for 216 hours performed at risk by the SME. The SME exceeded total hours listed in his subcontract agreement with the prime contractor.

Recommendation 1.f - Ensure that any future contract for services to support future Electromagnetic Pulse Commission requirements does not allow hours worked on previous contracts to be paid under the future contract.

Agency Response. Agree. WHS Acquisition Directorate agrees that it would be improper to allow payment for work under a previous contract to be paid under a future Electromagnetic Pulse Commission contract. Therefore, if the Acquisition Directorate receives a future request for support, the administering Division and contracting support team (to include the contracting officer, contract specialist, and contracting officer's representative) will be advised to review and approve invoices consistent with regulation.

3

Electromagnetic Pulse Commission III Chair



[redacted]
Contract Management and Payments, DoD IG
4800 Mark Center Drive
Alexandria, VA 22350

1 March 2018
[redacted]

The following are my comments related to DoD IG Project No. D2017-D000CF-0160.000.
I request that you publish them as a part of any Final Report you issue on this Project.

DoD IG Project No. D2017-D000CF-0160.000 is an attempt to characterize part of the work of the Congressionally established, statutorily mandated EMP Commission in the framework of a standard Department of Defense (DoD) contract; however, such a characterization is not appropriate for the following reasons:

1. The Report does not recognize the statutory basis of the Commission. While the Report references the statute, it does not present or describe it, even though it is the basis for the funding and authorization of work for the Commission. While the IG Report makes frequent reference to the Defense Federal Acquisition Regulations, which are only advisory within the DoD, it ignores the statutory mandate instructing the DoD to provide support to the Commission at the direction of the Commission Chairman, which is federal law. The statute re-establishing the commission clearly describes the manner in which the Commission is to be supported:

   Upon receipt of a written certification from the Chairman of the Commission specifying the funds required for the activities of the Commission, the Secretary of Defense shall promptly disburse to the Commission the funds required by the Commission as stated in such certification.

2. The late delivery of the DoDIG's notice of the audit that was addressed to me as Chairman of the Commission, was not sent to me for a month after it was issued, even though the Washington Headquarters Services, the Acting Assistant Secretary of Defense for Nuclear, Chemical, and Biological Programs, and the DoD clearance data base all had my email address and telephone number. The late delivery of the DoDIG's notice interfered with my request for an expansion of the scope of the Report as offered in the notice of the audit in order to give a complete, accurate, and truthful description of the circumstances involved. This was clearly at least a significant error on the part of the DoD IG, and should be acknowledged as excessively limiting the scope of the report.

3. The report does not contain the request from the Chairman of the House Armed Services Committee, but rather makes reference to a discussion between a member of his staff and a member of the IG staff, again without presenting a specific document. A DoD staff functionary had been working with a HASC staff member, without apparent proper authorization through the DoD Office of Legislative Affairs and without communication with the Commission Chairman.

Electromagnetic Pulse Commission III Chair (cont'd)

4. The Report does not address the failure of the DoD to follow the statutory mandate, and to delay the beginning of support of for the Commission for one full year, even though funds were available and the Commission was required to produce a report in 18 months.

5. The Report does not identify the major DoD conflict of interest caused by the DoD appointing the office of the Acting Assistant Secretary of Defense for Nuclear, Chemical, and Biological Defense Programs to support the Commission, even though the Commission was to review and report on the work of that office. Predictably, that support was not in keeping with the statutory mandate, but rather was contentious, counterproductive, and wasted the time of the Commission.

6. The Report has the characteristics of a vendetta against a single Commission staff subject matter expert arranged by a congressional staff member, a DoD Acting Assistant Secretary, and an IG staff member. For example: The Report provides no evidence of inappropriate action, but makes extensive use of the phrases "questionable costs" and "potentially excessive hours beyond 8 hours/day, 40 hours per week", without noting that because of DoD failure to provide funding to the Commission staff for a year, the Commission had seven months to complete eighteen months work. At its foundation, the Report attempts to denigrate the Commission senior subject matter expert for being too dedicated to the Commission's mission and for working too hard. If the DoD had a serious interest in the appropriateness of Commission staff time charges, and in contradiction to the statutory mandate was unwilling to accept the Chairman's certification of charges, it could have directed the Defense Contract Audit Agency to review the charges without the fanfare and disparaging implication of inappropriate charges.

7. The IG Report raises an issue of the Commission's senior subject matter expert volunteering time to support the Commission, and casts such contribution of personal time as a possible violation of the Anti-deficiency Act; however, the Report fails to recognize that the staff member was volunteering his time to the Commission, and not to the Commission support contractor. Others who volunteered their time to the Commission without compensation but not mentioned by the Report included the private individuals who met with and testified before the Commission, and the Commissioners themselves, who served over seventeen years on the Commission *pro bono*.

   The Anti-Deficiency Act has been improperly utilized by opponents of the EMP Commission within the Department of Defense to defeat the purpose of the United States Congress in reauthorizing the Congressionally-mandated EMP Commission per Section 1089 and the National Defense Authorization Act for Fiscal Year 2016. That section provided requirements for research, assessments, and reports to the Congress no later than June 30, 2017. President Obama signed the National Defense Authorization legislation on November 25, 2015, and the pertinent appropriations act on December 18, 2015. The appropriations act earmarked $2 million for the revived EMP Commission, so the reconstituted Commission had both a lawful authorization and a lawful appropriation.

   Consequently, the Anti-Deficiency Act was inapplicable because under Title 31 United States Code section 1341(a)(1)(B), expenditures by the Commission did not occur before both a lawful authorization and appropriation.
   Officials within the Department of Defense utilized another provision of the Anti-Deficiency Act, Title 31 U.S.C. section 1342 to block the availability of funds for expenditures supporting the EMP Commission: Washington Headquarters Services did not authorize and approve the

Electromagnetic Pulse Commission III Chair (cont'd)

execution of a defense support contract with an organization in the National Capital Region until precisely one year and one day from the date of appropriation of funds for the reconstituted EMP Commission, December 19, 2016.
Buttressing the preclusion of the funded restart of the EMP Commission, the General Counsel of the Washington Headquarters Services issued a legal opinion on May 17, 2016 advising that (in the absence of a contract authorizing expenditure of funds earmarked for the Commission), voluntary services of Commission staff would violate the provision of the Anti-Deficiency Act's section 1342.
Section 1342 provides that "an officer or employee of the United States government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." The subject matter expert who volunteered his services was at no time either an officer or employee of the United States government.

8. Finally, the Report notes in two footnotes that "As of January 16, 2018, the EMP Commission had not submitted the Report to Congress"; however, it fails to note that that twelve Commission and staff reports had been submitted to the DoD for security classification review by mid-September, 2017, and that the DoD has withheld the reports for over five months without either discussing, redacting, or releasing those reports.

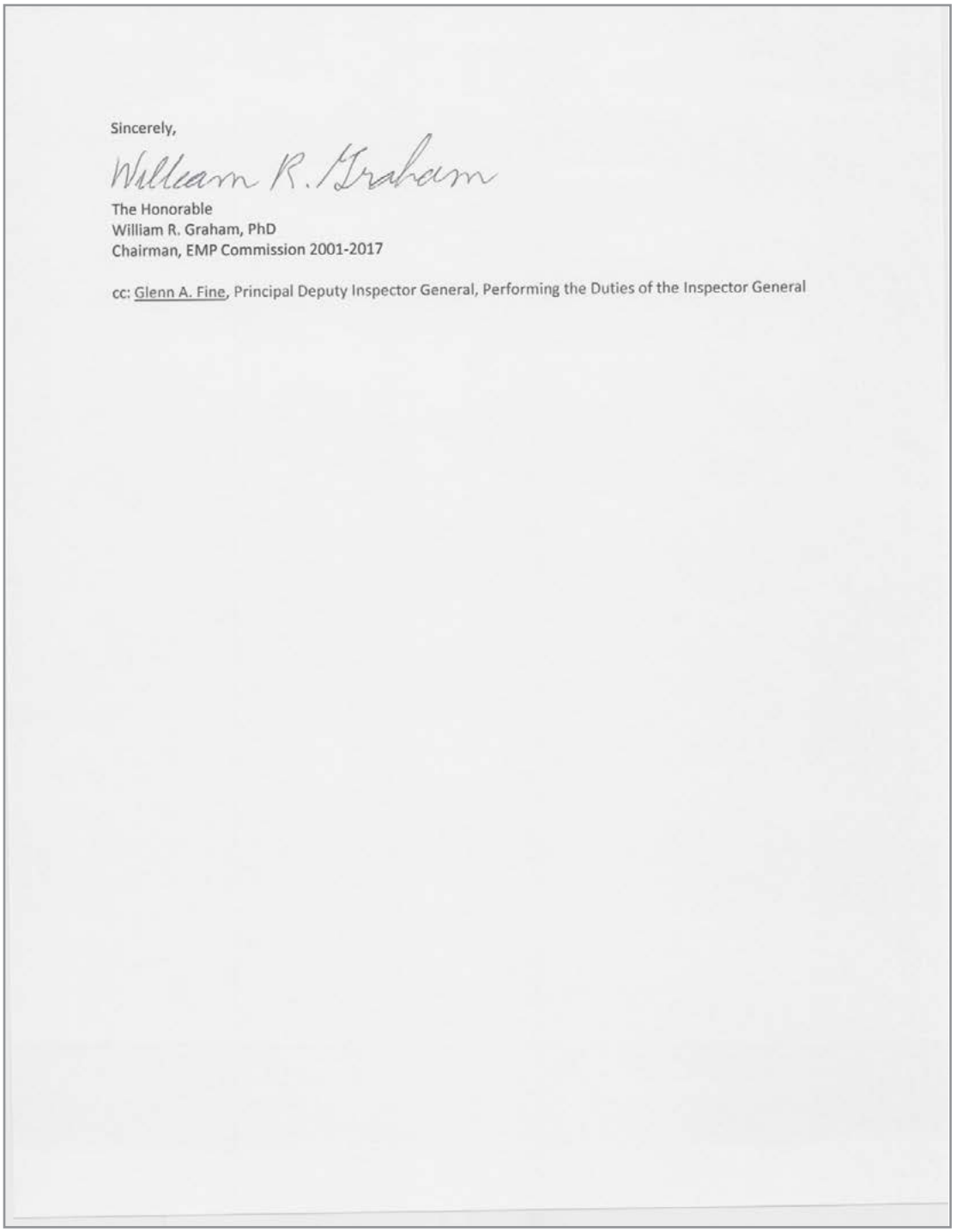
In response to the IG staff request to respond specifically to the Report recommendations:

Recommendation 1: Not germane to support for the Commission in accord with its statutory mandate, but no objection as an internal DoD activity provided it does not impede the work of the Commission.
Recommendation 2: Not germane to support for the Commission in accord with its statutory mandate, but no objection as an internal DoD activity provided it does not impede the work of the Commission.
Recommendation 3: Not germane in that the "contract problems" identified in the Report violate the Commission's statutory mandate and therefore are not neither valid nor lawful.
Recommendation 4: Not germane in that *pro bono* hours indicated were voluntary contributions to the Commission, not to the support contractor or the DoD.
Recommendation 5: Not germane in that *pro bono* hours indicated were voluntary contributions to the Commission, not to the support contractor or the DoD.
Recommendation 6: Provided all charges authorized by the Commission Chairman are paid promptly by the DoD in the future, no objection.

Missing Recommendations:

1. The DoD IG should recommend that the DoD obey the legal statute that directs timely support to the Commission, and reprimand the WHS and its superiors for failing to adhere to the statute governing Commission support between late 2015 and late 2016.
2. The DoD IG should recommend that the DoD not provide statutory support to any Congressionally Mandated Commission by assigning to its support offices and personnel that have a direct conflict of interest with the work and findings of the Commission.
3. The Report should inform the Congress that in the future the DoD will not place Congressionally Mandated Commissions under the administrative control of DoD staff as it attempted to do with respect to the EMP Commission, so that Congress will be able to mandate Commission studies that are not influenced or controlled by the DoD, but instead will maintain full respect for the separation of powers as established in the U.S. Constitution.

Electromagnetic Pulse Commission III Chair (cont'd)



Sincerely,

William R. Graham

The Honorable
William R. Graham, PhD
Chairman, EMP Commission 2001-2017

cc: Glenn A. Fine, Principal Deputy Inspector General, Performing the Duties of the Inspector General

Acronyms and Abbreviations

ADA	Antideficiency Act
BPA	Blanket Purchase Agreement
COR	Contracting Officer's Representative
DCAA	Defense Contract Audit Agency
DFARS	Defense Federal Acquisition Regulation Supplement
EMP	Electromagnetic Pulse
FAR	Federal Acquisition Regulation
OASD(NCB)	Assistant Secretary of Defense for Nuclear, Chemical, and Biological Defense Programs
PWS	Performance Work Statement
SME	Subject Matter Expert
WHS	Washington Headquarters Services

INSPECTOR GENERAL
INTEGRITY
EFFICIENCY
DEPARTMENT OF DEFENSE

Whistleblower Protection
U.S. Department of Defense

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For more information about DoD OIG reports or activities, please contact us:

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