

CONTRACT RATIFICATIONS

EXECUTIVE SUMMARY

We reviewed contract ratifications to identify additional management controls needed to prevent such ratifications (approved after the fact of unauthorized commitments). We commend the Office of Administrative Services (OAS) and Division of Enforcement for their considerable efforts to increase awareness regarding this issue and discourage these improper actions.

To enhance these efforts, we are making several recommendations including (1) strengthening existing guidance pertaining to unauthorized commitments and contract ratifications, (2) examining contracting authority and procurement processes in the regional offices, (3) adopting best practices from the Department of Justice (DOJ), and (4) implementing management controls to increase management and employee accountability for unauthorized commitments.

Commission management generally agreed with our findings and recommendations and in many instances were already taking corrective actions. As a result, some of our recommendations refer to work in progress, while others refer to tasks that still need to be addressed. The Office of Financial Management's formal written response is included as Appendix 1.

OBJECTIVE AND SCOPE

Our objective was to determine if additional management controls could be implemented to help reduce unauthorized commitments at the Commission. The evaluation was initiated based on concerns expressed by the Commission's Senior Procurement Executive (Associate Executive Director for the Office of Administrative Services) regarding a number of recent contract ratification requests.

During the inspection, we interviewed headquarter Commission staff and staff in the Los Angeles, Chicago, and New York Regional Offices (the sampled regional offices). We also interviewed procurement officials at the Department of Justice's Civil Division to identify best practices to prevent unauthorized commitments due to the similarity of their operations to those of the Commission's Division of Enforcement.

We reviewed available ratification documentation maintained by the Procurement and Contracting (P&C) Branch of OAS and the sampled regional offices. Our scope was limited to contract ratifications recorded by P&C from March 2005 to February 2007, since earlier data had not been maintained. The evaluation was performed

from March to July 2007 in accordance with *Quality Standards for Inspections*, January 2005 edition, issued by the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency.

BACKGROUND

The Commission requires goods and services from outside vendors to support its operations and help carry out its mission. This is accomplished either through purchases by authorized purchase card holders, or through the issuance of a legally binding contractual document by an authorized procurement official. The only individuals with authority to enter into and to modify contracts with vendors on behalf of the Commission are designated officials in P&C and the Regional Offices (i.e. individuals who have been delegated express written authority in form of a warrant issued by the Commission's Senior Procurement Executive).

If a Commission employee without contracting authority enters into a contractual agreement with a vendor on behalf of the Commission or instructs the vendor to perform work outside the scope of the contract, an unauthorized commitment has occurred. For example, unauthorized commitments occur when employees accept or order goods prior to processing a requisition or obtaining necessary authorizations, approve work beyond the scope or dollar value of an existing contract, or authorize a contractor to perform work after the expiration date of the contract.

When work is performed as a result of an unauthorized commitment, the vendor cannot be paid for the work until a legitimate contract is established through a "ratification." In a contract ratification action, the ratifying official reviews the facts pertaining to the unauthorized commitment and determines whether to make the action whole and legally binding after the fact. The Senior Procurement Executive is the only individual authorized to approve ratification requests for the Commission.

While an unauthorized commitment is not an appropriate method of obtaining goods or services, Commission regulation SECR 10-2, *Contracting Authority and Responsibilities*, provides procedures for ratification of unauthorized commitments. These procedures require the office that made the unauthorized commitment to submit information to P&C regarding the nature of the unauthorized commitment (e.g. why it occurred, dollar amount, vendor involved, etc.). In turn, P&C reviews the ratification request to ensure it contains all required information, works with offices to obtain any missing or unclear information, coordinates with the applicable contracting officer and Office of General Counsel to obtain required approvals, and provides a package of information (containing all required elements of SECR 10-2) to the Senior Procurement Executive for a ratification decision. Under current procedures, the Senior Procurement Executive cannot take action on a ratification request until P&C has completed the necessary support work. From March 2005 to February 2007, the Senior Procurement Executive approved 26 contract ratification requests. Historical data was unavailable for comparison purposes.

Title 48 of the Code of Federal Regulations, *Federal Acquisition Regulation (FAR)*, Subpart 1.602-3, requires agencies to take positive actions to preclude, to the maximum extent possible, the need for ratification actions.

The FAR also emphasizes that while ratification procedures are provided for use in cases where ratification of an unauthorized commitment is necessary, the procedures may not be used in a manner that encourages such commitments being made by Government personnel.

INSPECTION RESULTS

We found that the Commission should implement additional management controls to help preclude unauthorized commitments. Despite efforts by OAS, the Division of Enforcement, and some program officials to prevent them, unauthorized commitments still continue to occur. As a result, the Commission violated Federal regulations and its own policies, incurred unwarranted expense, and potentially damaged its reputation with vendors. The ratification process is time consuming, requires considerable documentation and often harms the Government's ability to conduct future business with the contractors involved due to payment delays. On a positive note, we found that all contract ratifications were for operational related expenditures.

We are recommending that the Commission (1) strengthen existing guidance pertaining to unauthorized commitments and contract ratifications, (2) examine contracting authority and procurement processes in the regional offices, (3) adopt best practices from DOJ to preclude contract ratifications, and (4) implement management controls to increase management and employee accountability for unauthorized commitments.

Ratification Activity

The Commission approved 26 contract ratifications totaling approximately \$1.7 million from March 2005 to February 2007. A total of 12 potential contract ratifications were pending as of March 2007.

However, the true number of contract ratifications during this same period may be much higher due to the past treatment of unauthorized commitments. We understand that instead of processing formal ratifications, some offices have used alternative procedures that were not in conformance with the FAR. For example, an office may have predated a contract's effective date prior to its execution (signed date), thus authorizing work that had already been performed without processing a ratification.

Data compiled from P&C's records (see table below), indicate that the Division of Enforcement submitted the largest number of contract ratification requests between March 2005 - March 2007. These requests related to contracts for expert witness, foreign counsel, and reporting services. Regional offices accounted for the largest number of pending contract ratifications as of March 2007.

Contract Ratifications by Division/Office			
<i>Division/Office</i>	<i>Approved Ratifications from March 2005-March 2007</i>	<i>Pending Ratifications as of March 2007</i>	<i>Nature of Pending/Approved Ratifications</i>
Division of Enforcement	10	2	Expert witnesses, foreign counsel and reporting services costs. Expert witness and foreign counsel contracts accounted for 9 out of the 10 approved ratifications
Office of Administrative Services	5	0	Rental of a security booth, award framing, IT move related services, furniture storage, mold remediation work in a regional office.
Office of Information Technology	3	0	Internet service, pagers, IT maintenance
Regional Offices	5	7	Building services, expert witness services, electrical work, copying fees for a subpoena
Office of General Counsel	2	0	Analysis of intellectual property issues, mediation services
Equal Employment Opportunity Office	1	0	EEO investigation
Office of Human Resources	0	3	Unauthorized payment of a daycare subsidy, arbitration cases, interagency agreement
Totals	26	12	

A basic cause for many contract ratifications is a lack of procurement planning and knowledge by program officials of the procurement process. Some specific situations resulting in contract ratifications included:

- Program offices failed to anticipate future needs relating to existing contracts by extending the period or performance and/or increasing funding (e.g., unauthorized individuals voluntarily accepted goods or services from contractors after the expiration date of a contract and/or expiration of funding).
- Program offices with pressing program requirements mistakenly did not believe that enough time was available to complete required procurement procedures (e.g., offices did not take the time to process requisitions and/or obtain proper authorizations prior to accepting goods or services).
- Program offices did not begin the procurement process for new requirements

in sufficient time to allow P&C to award the procurement to be awarded by P&C prior to their need for a particular good or service (e.g., an unauthorized individual proceeded with ordering/accepting a service unknown to P&C while the contract is being processed).

Regardless of the cause, the FAR, Subpart 1.602-3, requires agencies to preclude to the maximum extent possible, the need for ratification actions.

Policy and Procedures Regarding Unauthorized Commitments and Ratifications

In April 1998, the Commission published SECR 10-2, *Contracting Authority and Responsibilities*, which established policy and delegated authority and accountability for the management of contracting functions. Attachment 1 to SECR 10-2 lists information required to be included by program offices in contract ratification requests. Program officials we interviewed believed that SECR 10-2 provided helpful guidance for drafting a contract ratification request. However, we believe the policy should be updated and operating procedures put in place to help ensure adherence to the policy. Enhanced guidance will help (1) ensure Commission employees understand what actions constitute an unauthorized commitment, (2) inform employees on ways to avoid making unauthorized commitments, and (3) provide the Senior Procurement Executive with complete information to make an informed contract ratification decision. The guidance should:

- Cite examples of actions that would constitute unauthorized commitments and describe best practices to avoid contract ratifications. OAS and the Division of Enforcement have already provided this information informally (emails, memoranda, etc.) to Commission employees.
- Specifically prohibit actions by program officials that are designed to avoid processing formal contract ratifications such as predating contracts, and warn of potential disciplinary action if such actions occur.
- Address handling of emergency requirements as defined by the FAR, as well as situations involving a pressing need for a good or service to accomplish the Commission's mission.
- Expand the Office of Financial Management's (OFM's) budget execution procedures to ensure that when the obligating document is sent to OFM for certification they are able to make a determination whether the unauthorized commitment resulted in a violation of Commission Regulation SECR 14-1, *Commission's Administrative Controls of Funds*. This regulation contains procedures related to violation of the Antideficiency Act. It also states on page 4 that "violations not in violation of the Antideficiency Act are subject to administrative discipline if the circumstances warrant." We believe that OFM is in the best position to interpret the regulation and determine if an unauthorized commitment has violated the provisions of SECR 14-1.
- Require that the Contracting Officer's determination of price reasonableness be supported by appropriate information in accordance with FAR, Subpart 15.4, *Contract Pricing*. The supporting documentation should accompany the

contract ratification. We found that many contract ratification requests did not clearly show that the Contracting Officer found the contractor's price to be reasonable and did not provide a basis for price reasonableness.

- Incorporate applicable requirements of the September 13, 2005, Memorandum of Understanding between OAS and the Office of General Counsel¹, regarding legal reviews of procurement actions (i.e. legal reviews of unauthorized contractual commitments over \$10,000 and non-ratifiable commitments of any amount).
- Require that ratification requests be signed by the individual who made the unauthorized commitment and his or her supervisor, in addition to the office head. We found that often the individual who made the unauthorized commitment and his or her immediate supervisor were not identified in the contract ratification requests.
- Include an electronic form listing required information and approvals, as well as a checklist of required documents that should be included in the ratification package. While Attachment 1 of SECR 10-2 contains a list of required information, we found many ratification requests did not include all required information, resulting in processing delays. Also, P&C's files did not always show that required approvals (i.e. by OGC and the contracting officer) for contract ratification requests had been obtained.

Recommendation A

OAS should update SECR 10-2 and establish procedures to incorporate the above requirements, after consultation with affected program offices.

Recommendation B

OFM should establish procedures to review all ratification requests submitted by OAS to determine if any violations of SECR 14-1 have occurred and notify appropriate parties (i.e. applicable division/office, OGC and OAS) of the results of the review.

Field Office Contract Authority

Senior-level officials in the Regional Offices (typically the Regional Director and select Associate Regional Directors) have been delegated contracting authority in the form of a warrant for services limited to expert witness, foreign counsel, depositions, and transcript services up to \$100,000. P&C administers and awards all other contracts. Regional Offices also have authority to award and administer purchases under the micro-purchase threshold (currently \$3,000) through designated purchase card holders.

The Regional Offices we visited primarily used one individual from their

¹ The Memorandum of Understanding established Commission policy for the conditions under which the Office of General Counsel would perform legal reviews of procurement actions proposed by the P&C Branch and Construction and Real Property Branch within the Office of Administrative Services.

Administrative Group (an SK-303-07, Program Support Assistant) to process procurements (e.g. complete necessary paperwork, communicate with appropriate parties to obtain funding and organizational budget approvals, and enter required data into the Commission's financial system of record). The senior-level officials then reviewed and approved procurements for which they had contracting authority.

In April 2005, the Office of Federal Procurement Policy published Policy Letter 05-01, *Developing and Managing the Acquisition Workforce*, which required the Federal Acquisition Institute and Chief Acquisition Officer's Council to approve a program that standardized the education, training, and experience requirements for contracting professionals in an effort to improve workforce competencies. In January 2007, OAS modified the contracting authority in the regional offices and determined the modified authority was so limited it fell outside the scope of the Federal Acquisition Certification in Contracting Program (the Program). While providing extensive training to applicable regional office staff in accordance with the Program may not be cost-effective for the Commission, we are concerned that regional office staff with contracting authority and administrative staff who prepare procurement actions may not have the required skills to perform their procurement responsibilities successfully.

The officials we interviewed with contracting authority and administrative staff who prepare procurement actions had received little or no formal procurement or contract training related to their procurement responsibilities, other than a recent three-day Introduction to Federal Contracting course.

Also, current contracting authority does not appear to effectively meet the needs of the regional offices. While regional offices are authorized to process procurements up to \$100,000 for expert witness, foreign counsel, transcript, and deposition services, they do not have contracting authority to procure other goods and services under the micro-purchase threshold when a credit card is not accepted by the vendor. Many time-sensitive goods and services (such as subpoena services and document copying) under the micro-purchase threshold (\$3,000) cannot be procured with a government credit card and/or the cost cannot be estimated upfront with accuracy. As a result, regional offices are following temporary procedures developed by P&C, in consultation with OFM, for these time-sensitive goods and services. These procedures require a regional office to notify P&C via email upon completing a requisition (with a "not to exceed" amount) for the good or service and obtaining necessary budgetary and organizational approvals. P&C then reviews the information from the regional office and emails it an authorization to proceed. The regional office obtains the goods or services and creates a purchase order for the exact dollar amount reflected on the vendor's invoice. The purchase order is then sent to P&C for signature.

This process can be time-consuming and inefficient. Also, we understand that some regional office staff have paid personally for goods and services and subsequently received reimbursement from the Commission by completing a Standard Form 1164, Claim for Reimbursement.

As shown in the table on page three, seven potential contract ratifications were pending from regional offices as of March 2007. We believe that the insufficient training and contract authority in the field offices may lead to unauthorized commitments.

Recommendation C

OAS, in consultation with the regional offices, should reevaluate contracting authority and procurement processes in the regional offices (i.e. determine whether the appropriate individuals have contracting authority and whether that authority should include micro-purchases where a government credit card cannot be used).

Recommendation D

OAS, in consultation with the regional offices, should (1) develop operating procedures to guide procurement activities in the regional offices (i.e. procedures should clearly define the roles and responsibilities of the regional offices in procuring goods and services and incorporate applicable provisions of the FAR and Commission policy), and (2) provide necessary on-the-job training (e.g. conference calls, site-visits by OAS staff, etc.) and recommend formal procurement training to staff with contracting authority as well as administrative staff who prepare procurement actions in the regional offices.

Recommendation E

OFM, in consultation with OAS, should determine if other funding vehicles such as debit cards could be effectively utilized to assist regional offices in meeting their needs for time-sensitive goods and services below the micro-purchase threshold that cannot be procured with the government purchase card.

Best Practices for Reducing Contract Ratifications

DOJ's Civil Division has instituted procedures to reduce contract ratifications related to expert witness contracts. DOJ awarded approximately 1,000 expert witness type contracts within the last year and processed only one contract ratification.

DOJ procurement officials stated that this was a significant improvement from prior years. They attributed the improvement to (1) the adoption of a new contract tracking system, (2) inclusion of a cover letter on all expert witness contracts specifying key responsibilities of the vendor and DOJ, and (3) creation of detailed policies containing guidelines for procurement of expert witness services. Since DOJ's operations are similar to those of the Division of Enforcement, the Commission should consider adopting similar practices.

Tracking System- DOJ procurement officials worked with their information technology group to develop a contract tracking system that generates monthly reports showing key data for contracts expiring within 30 days and contracts that have already expired. The reports are emailed monthly to the applicable office

heads. These offices are required to take action to modify expiring contracts or to cease further work under expired contracts.

Cover Letter- DOJ attaches a cover letter to each of its expert witness/foreign counsel contracts. This cover letter requires the vendor to notify the contracting officer when 75% of the funds have been expended under the contract, spells out what the technical point of contact on the contract (trial attorney) is or is not authorized to do, and specifies what information should be included on invoices to ensure timely processing by DOJ.

Policies- DOJ developed detailed policies containing guidelines for procuring expert witness services that are provided to its attorneys.

A Commission P&C official attended the meeting with the OIG at DOJ concerning best practices for preventing contract ratifications. P&C has implemented a contract tracking reporting feature within the Strategic Acquisition Manager (SAM) system and has included language from DOJ's cover letter in the Commission's cover letters for expert witness contracts. Also, the Administrative Group within the Division of Enforcement has taken the lead to develop new expert witness guidelines for the Commission using DOJ's policies as the framework. These draft guidelines have been provided to P&C for comment with regard to procurement policy.

Recommendation F

The Division of Enforcement should also share its draft expert witness guidelines with OFM and the Regional Offices for comment and set a goal to finalize the expert witness guidelines within 120 days.

Accountability Issues

Points of Contact/Inspection and Acceptance Officials/COTRs

We found that contracting officer's technical representatives (COTRs) were not appointed for the expert witness contracts we reviewed during the inspection. Instead, a point of contact (normally the trial attorney) was referenced in the contract and was responsible for the technical details within the scope of the contract, reviewing bills and charges submitted by the vendor, and inspection and acceptance of final delivery.

SECR 10-15, *Contracting Officer's Technical Representative (COTR) and Inspection and Acceptance Official (IAO)*, requires COTRs and IAOs to take contracts-related training prior to their appointments and refresher training periodically. Points of contact (who perform many COTR functions) on expert witness contracts are generally not taking any Commission sponsored contract-related training prior to or after their appointments. Also, OAS does not currently provide appointment letters to POCs and IAOs that clearly describe the responsibilities of these individuals.

This lack of training may be one cause of contract ratifications. The point of contact may not fully understand the scope of their duties.

Recommendation G

OAS, in consultation with the Division of Enforcement and regional offices, should determine what training should be required for points of contact on expert witness contracts. The training should be done in conjunction with the issuance of the expert witness guidelines developed from Recommendation F.

Recommendation H

OAS should consider requiring appointment letters for IAOs and POCs that clearly describe the responsibilities of these individuals (what they are and are not authorized to do). The employee and their supervisor should be required to countersign the appointment letter to certify they have read, understand, and accept the duties, responsibilities and limitations of the appointment.

Disciplinary Action

We found that OAS and some officials in the Division of Enforcement and regional offices have taken numerous informal steps (through email, memoranda, and newsletters) to advise employees that unauthorized commitments are serious matters that could result in discipline. Nevertheless, unauthorized commitments still continue to occur. Generally, employees making unauthorized commitments were counseled (verbally reprimanded by their supervisor) no matter how severe or frequent the violation and the counseling was not documented.

Recommendation I

OAS should add language to its ratification guidance to remind Commission management that they are responsible for taking appropriate disciplinary action against employees who make unauthorized commitments (particularly if the action was done knowingly or contrary to Commission policies and procedures) and that they should do so in consultation with OHR, as appropriate.

Contract Ratification Reporting

We found that P&C does not routinely report contract ratification data to the Executive Director. Summary data are needed by senior management to (1) monitor contract ratification activity to identify patterns of abuse (by office, individual, vendor, etc.); (2) determine if newly implemented management controls are working and to modify, delete, or add new management controls as necessary; and (3) ensure appropriate personnel action is taken against Commission officials that have been found to routinely perpetuate unauthorized commitments and/or commit egregious actions.

The summary data would be broken down by office/division and show the number, amount, and dates of approved and pending ratifications as well as the parties involved (both Commission employees as well as contractors).

Appropriate office heads should receive the data for their offices, so that they will be aware of any significant issues and can take necessary action on problems within their offices.

Recommendation J

OAS should implement procedures to compile contract ratification data semi-annually, and provide the data to the Senior Procurement Executive, Executive Director, and appropriate office heads for their information and corrective action.