Audit Report

OFFICE OF THE INSPECTOR GENERAL

CONGRESSIONAL REQUEST FOR AUDIT OF CONTRACT F04699-91-C-0094 FOR BUILDING RENOVATION AT MCCLELLAN AIR FORCE BASE, CALIFORNIA

Report No. 93-157 August 24, 1993

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Department of Defense

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Acronyms

AFB	Air Force Base
AFR	Air Force Regulation
FOIA	Freedom of Information Act

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202

Report No. 93-157 August 24, 1993

MEMORANDUM FOR ASSISTANT SECRETARY OF THE AIR FORCE
(FINANCIAL MANAGEMENT AND COMPTROLLER)

SUBJECT: Report on Congressional Request for Audit of Contract F04699-91-C-0094 for Building Renovation at McClellan Air Force Base, California (Project No. 3CG-5016)

Introduction

We are providing this final report for your information and use. Senator Orrin G. Hatch requested that the Inspector General, DoD, review a contractor's allegations. The contractor alleged that contracting authorities at McClellan Air Force Base (AFB), California, unjustifiably terminated the contract for default; that the Government did not properly disclose hazardous materials at a renovation site; and that the Government did not respond to requests for information related to this contract in accordance with the Freedom of Information Act (FOIA) and the Privacy Act. The renovation contract was awarded July 24, 1991, and was initially valued at $1.98 million. The undisputed contract value as of June 24, 1993, was $2.47 million.

Audit Results

The three contractor allegations were not substantiated:

o Contract F04699-91-C-0094 for building renovation at McClellan AFB was not terminated. McClellan AFB contracting officials conducted the final inspection of the renovated facility on June 1, 1993.

o The specific hazardous material at issue was lead-based paint. Contracting officials issued a suspension of work before the contractor mobilized at the renovation site and negotiated two contract modifications with the contractor for removal of lead-based paint.

o The McClellan AFB Judge Advocate General reviewed and the FOIA monitor released material according to established FOIA procedures. The Privacy Act was not germane to the contract or to the issues surrounding it.

Objectives

The objectives of the audit were to determine whether contract F04699-91-C-0094 was terminated and if so, why; to determine whether hazardous material abatement information was available before contract award;

and to evaluate whether McClellan AFB officials adhered to the FOIA, the Privacy Act, and implementing regulations throughout contract execution.

Scope

We reviewed documents for the period September 1989 to May 1993, such as contract specifications and modifications, correspondence, and external reports, related to the renovation of building 89 at McClellan AFB. In addition, we reviewed policies, procedures, and records pertaining to FOIA requests and to lead-based paint and asbestos.

This economy and efficiency audit was made from April 1993 through June 1993 in accordance with auditing standards issued by the Comptroller General of the United States as implemented by the Inspector General, DoD. Accordingly, we included such tests of internal controls as were considered necessary. We did not use computer-generated data to perform the audit. Enclosure 4 lists the activities visited or contacted during the audit.

Internal Controls

We evaluated the internal controls for documenting and approving contract actions for contract F04699-91-C-0094, and for reviewing and approving actions for FOIA requests related to the contract. We did not identify any material internal control weaknesses as defined by Public Law 97-255, Office of Management and Budget Circular A-123, and DoD Directive 5010.38.

Prior Audits and Other Reviews

Air Force Audit Agency Report No. 41593026, "Contract Management of Base Infrastructure Maintenance and Repair, Sacramento Air Logistics Center, McClellan AFB, California," April 28, 1993, stated that the base civil engineer did not adequately review designs or identify health hazards for maintenance and repair projects; consequently, contract modifications were necessary. The report recommended that the base civil engineer periodically analyze contract modifications to identify potential system changes, routinely test for lead-based paint, and routinely include contract options for asbestos control and abatement. The base civil engineer agreed with the recommendations and implemented corrective actions.

Background

McClellan AFB contracting officials awarded contract F04699-91-C-0094 on July 24, 1991, to U.S. General, Inc. (the contractor). On September 17, 1991, contracting officials issued a notice to proceed to the contractor effective November 1, 1991. At the time of contract award, the contract specifications and related construction documents identified asbestos as the only hazardous material at the renovation site.

As the result of other construction and renovation underway at McClellan AFB, a civil engineering official directed the contracting officer to request that building 89 be tested for lead-based paint. Contracting officials issued a suspension of work for the renovation of building 89 on November 1, 1991, and suspended work for 7 months while installation managers formulated policy and procedures for handling lead-based paint. The suspension of work was lifted June 9, 1992.

Discussion

Termination for Default. McClellan AFB contracting officials did not terminate contract F04699-91-C-0094 for default. On March 4, 1993, the contracting officer issued a show cause letter regarding anticipatory breach. The contractor returned to the job site March 11, 1993, and the termination action was avoided. McClellan AFB officials conducted the final inspection of the building 89 renovation on June 1, 1993.

Contract Modifications. The contract amount and scope were modified several times during the contract performance period. Three major modifications to the contract specifications, including hazardous material abatement and clean-up, increased the contract amount by $293,353. A unilateral modification issued as an equitable adjustment for claims filed by the contractor increased the contract amount by $197,902 for a contract total of $2,471,255.

Contract Claims. The contract was modified to include language that reserved the contractor's rights to file claims under the Contract Disputes Act of 1978. The contractor filed three claims and expressed the intent to file additional such claims. Final disposition of these claims could further increase the contract amount.

Disclosure of Hazardous Materials. We could not substantiate that contracting authorities failed to properly disclose that building 89 contained hazardous materials. The contract specifications identified asbestos abatement requirements; however, the specifications did not identify lead-based paint abatement requirements. Neither McClellan AFB nor the Air Force had clear policy and procedures for managing lead-based paint at the time this contract solicitation was made. The absence of policy and procedures, rather than an intentional withholding of information, was the reason lead-based paint abatement was omitted from the contract specifications. McClellan AFB personnel did not identify lead-based paint as a hazardous material and did not routinely test facilities for its presence before awarding construction contracts.

Awareness of Lead-based Paint Hazard. McClellan AFB personnel became increasingly aware of the hazards of lead in June 1991, when the old base commissary was demolished. Environmental management personnel had paint chips from the debris tested. The tests identified high levels of lead, which were determined to be hazardous. McClellan AFB personnel concluded that the lead-based paint should be handled according to Federal and California hazardous waste laws.

Investigations conducted after the old base commissary was demolished revealed lead-based paint in housing construction debris, which also was not managed as hazardous material or hazardous waste. Because people who violate hazardous waste laws can be fined or imprisoned, McClellan AFB contracting officials issued suspensions of work to the contractors renovating family housing and building 89. The work stoppage was expected to last 30 to 60 days while McClellan AFB officials, with Headquarters, Air Force officials, developed policy and procedures on lead-based paint.

Contract Modifications Related to Lead-based Paint. McClellan AFB civil engineering and environmental management personnel developed policy on and tested for lead-based paint over several months in order to determine contract requirements. On June 9, 1992, contracting officials issued modification P0003 for $179,813. This modification included removing asbestos from building 89 and removing lead-based paint from the first floor of the building. Modification P0005, issued July 17, 1992, extended the lead-based paint removal requirement to the second floor and added $95,186 to the contract amount. Both modifications were signed by the contractor and McClellan AFB contracting officials. A chronology of events related to lead-based paint and to the execution of contract F04699-91-C-0094 is in Enclosure 1.

Management of Freedom of Information Act Requests. FOIA provides the public a method to obtain information about the Government. DoD Regulation 5400.7-R, "DoD Freedom of Information Act Program," October 3, 1990, established DoD policies and procedures to implement FOIA. According to the regulation, the DoD policy is

> . . . to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A DoD record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall be withheld only when it is exempt from mandatory public disclosure under the FOIA.

DoD and Air Force guidelines require that FOIA offices reply to requests within 10 working days, unless a delay is authorized. In unusual circumstances, the response time may be extended up to 10 additional working days for a maximum of 20 working days processing time allowed.

FOIA offices may refuse to release records under nine exemptions, which are described in Enclosure 2.

Processing Time. Contractor requests for documents under FOIA were not always processed within the 20-day maximum allowable time period prescribed by DoD Regulation 5400.7-R and Air Force Regulation (AFR) 4-33, "Air Force Freedom of Information Act Program," July 31, 1992. McClellan AFB officials exceeded the allowed processing time for six of the seven contractor FOIA requests.

Status of Requests. The FOIA staff made reasonable efforts to process FOIA requests in accordance with DoD and Air Force guidance. We did not identify any cases of information deliberately withheld from the contractor. However, we did not attempt to confirm that all applicable records subject to a particular FOIA request were identified and made available to the contractor. The FOIA staff contacted all offices at the installation that were potential sources for pertinent information, when each FOIA request was received. We believe these actions were adequate. Each of the seven FOIA requests is discussed in Enclosure 3.

Management Comments

Since this report contained no findings or recommendations, written comments were not required and no comments were received.

The courtesies and cooperation extended to the staff are appreciated. If you have any questions on this audit, please contact Mr. Wayne K. Million, Program Director, at (703) 692-2991 (DSN 222-2991) or Ms. Judith Karas, Project Manager, at (703) 692-2994 (DSN 222-2994). Enclosure 5 lists the planned distribution of the report.

Robert J. Lieberman

Robert J. Lieberman
Assistant Inspector General
for Auditing

Enclosures

Chronology: Lead-Based Paint and Building 89 Renovation

Event	Date	Days Elapsed Since Contract Award[1]	Days Elapsed Since Notice to Proceed[2]
Invitation to bid issued on building 89	May 6, 1991	0	0
Hazardous lead levels found in commissary debris	June 1991	0	0
Potentially hazardous levels of lead-based paint found in family housing renovation	July 20, 1991	0	0
Lead-based paint testing requested for building 89	Sep. 12, 1991	50	0
Initial samples from building 89 tested	Oct. 20, 1991	88	0
General lead-based paint guidelines issued	Oct. 23, 1991	91	0
Sample results returned showing lead-based paint action required	Oct. 24, 1991	92	0
Written results arrived on sample	Oct. 30, 1991	98	0
Lead-based paint contract change given to contractor, with detailed procedures but not detailed contamination data	Nov. 25, 1991	124	24
Extensive samples from building 89 tested	Dec. 3, 1991	132	32
Written results arrived on sample	Dec. 10, 1991	139	39
Site visited with contractor	Jan. 15, 1992	175	75
Updated lead-based paint guidelines issued	May 18, 1992	298	198

[1]Contract awarded July 24, 1991.
[2]Notice to proceed issued with an effective date November 1, 1991.

6

ENCLOSURE 1

Freedom of Information Act Exemptions

Documents in the following categories are not subject to release to the general public under the terms of the Freedom of Information Act:

Exemption 1. Documents properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by executive order and implemented by regulations.

Exemption 2. Documents related solely to the internal personnel rules and practices of DoD or any of its components.

Exemption 3. Documents concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld.

Exemption 4. Documents containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest.

Exemption 5. Internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decisionmaking process of an agency, whether within or among agencies, or within or among DoD Components.

Exemption 6. Personnel and medical files, as well as similar personal information in other files, that if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy.

Exemption 7. Documents or information compiled for law enforcement purposes, that is, civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law.

Exemption 8. Documents contained in or related to examinations, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

Exemption 9. Documents containing geological and geophysical information and data (including maps) concerning wells.

Freedom of Information Act Requests Processed

McClellan AFB received and processed seven FOIA requests from the contractor. The disposition of each request is described below.

FOIA Request 92M-201. September 17, 1992, the contractor requested any and all criteria used to calculate the Government estimate for item 002, solicitation F04699-92-B-0022. Item 002 established the cost of extended overhead for a government-caused delay of up to 30 days.

The FOIA manager, in coordination with affected installation managers, fully denied the request October 29, 1992, on the basis that the Government deliberative process used to prepare construction cost estimates would be impeded if the information was released. Cost estimates were used to determine required funding and project feasibility as well as to evaluate bids, the FOIA manager argued. They denied release of the information under United States Code, title 5, sec. 552 (b)(5) and AFR 4-33.

November 3, 1992, the contractor appealed the Government's decision to deny release of the requested data. The contractor withdrew the appeal November 6, 1992. The FOIA manager closed the case.

FOIA Request 92M-257. October 14, 1992, the contractor requested the technical report or merit evaluation the Government prepared on the contractor's first and second claims.

The FOIA manager, in coordination with affected installation managers, denied the request November 6, 1992, because the technical review consisted of civil engineering opinions and evaluations of the claims. Also, the contracting officer had not issued a final decision on the claims. The installation Judge Advocate recommended that the FOIA manager not release the data because the Government's deliberative process would be impaired. The contractor did not appeal and the FOIA manager closed the case.

FOIA Request 92M-260. October 14, 1992, the contractor requested all documents related to the abatement of lead-based paint. The contractor requested that all documents fitting the description, whether generated by or received by the Air Force, be included. Initial research indicated that 2,828 pages of information related to the requested subject area. The estimated cost to the contractor was $2,999 for processing costs. The contractor did not pay to process all the information and did not receive the 2,828 pages.

The FOIA manager closed this request December 9, 1992. The FOIA manager's response to the contractor cited an unclear request as the reason for closing the case. The FOIA manager informed the contractor that laboratory

analysis results from the base commissary demolition project, which identified lead-based paint, were available. The response included a request that the contractor better describe the type of information desired.

FOIA Request 93M-10. November 23, 1992, the contractor requested the early documents that showed when McClellan AFB personnel identified lead-based paint as a base-wide problem and when they decided to initiate cleanup.

The FOIA manager, in coordination with affected installation managers, partially denied the request February 19, 1993. The FOIA manager provided the contractor a schedule of documents they refused to release. The unreleased documents included deliberation and review documents, draft documents, internal audit reports, and attorney-client documents. The documents were not released based on United States Code, title 5, sec. 552(b)(5), which states that internal advice, recommendations, and subjective evaluations that are reflected in records pertaining to the decisionmaking process of an agency do not have to be released to the public. Records pertaining to the attorney-client privilege and the attorney work-product privilege are also exempt. The contractor did not appeal and the FOIA manager closed the case.

FOIA Request 92M-419. December 23, 1992, the contractor requested

> . . . all letters, interoffice memo's, government forms and regulations with regard to the funding, statutory limitation, Congressional spending cap, Government estimate and procurement regulations, including bid results, design estimates and criteria also contingence funds and the requirements necessary to allow the Government to exceed the spending cap on this project.

In addition, the contractor requested the minutes of all meetings Government officials held between April and December 23, 1992, about the funding dilemma faced on this project.

The FOIA manager, in coordination with affected installation managers, denied the request January 15, 1993, on the basis that the requested documents were not available at McClellan AFB. In the response to the contractor, the FOIA manager also explained that no spending cap was exceeded, and no meetings were held about increased costs of the project.

The contractor appealed the refusal to release all requested documents March 11, 1993. April 22, 1993, as a result of the appeal, the FOIA manager and affected installation managers released documents that included regulations outlining policy about project classification as construction or operations and maintenance. The FOIA manager also explained that they had not previously released these documents because they understood the request to be for records pertaining to statutory or Congressional funding limitations. The FOIA

manager and installation managers contacted had no documents fitting that description. The FOIA manager closed the case.

FOIA Request 93M-131. February 12, 1993, the contractor requested documents that discussed defective plans and specifications and change requests. He specifically requested clarifications and decisions made by the general contractor, contracting officials, civil engineering staff, the using agency staff, and the architect.

The FOIA manager and the affected installation managers released the documents May 6, 1993, and closed the case. Although the FOIA manager closed the case, the contractor requested a refund for some of the documents he received that were dated after his request. The contractor also expressed concern that he did not receive any documents from the architect and engineering firm as a result of this request.

FOIA Request 93M-215. March 15, 1993, the contractor requested all records related to Government decisions to abate lead-based paint as a hazardous material.

The FOIA manager notified the contractor June 4, 1993, of the estimated fee and list of the exempted documents. The FOIA manager established a July 6, 1993, response date to avoid canceling the request, and planned to establish a documents review date upon payment of the fee.

Organizations Visited or Contacted

Office of the Secretary of Defense

Director, Safety and Occupational Health Policy, Office of the Deputy Assistant Secretary of Defense (Environment), Washington, DC
Director, Installation Policy, Office of the Deputy Assistant Secretary of Defense (Installations), Washington, DC

Department of the Air Force

Headquarters, Air Force Materiel Command, Wright-Patterson Air Force Base, OH
- Inspector General, Sacramento Air Logistics Center, McClellan Air Force Base, CA
- Contracting Directorate, McClellan Air Force Base, CA
- 2852nd Civil Engineering Squadron, McClellan Air Force Base, CA
- Environmental Management, McClellan Air Force Base, CA
- Freedom of Information Office, Base Information Management Division, McClellan Air Force Base, CA
- Office of the Staff Judge Advocate, McClellan Air Force Base, CA

Area Audit Office, Air Force Audit Agency, McClellan Air Force Base, CA
Systems Engineering Directorate, Air Force Civil Engineering Support Agency, Tyndall Air Force Base, FL

Other Defense Organizations

Headquarters, Defense Contract Audit Agency, Cameron Station, Alexandria, VA
- Lake Valley Branch Office, Defense Contract Audit Agency, Salt Lake City, UT

Office of the Assistant Inspector General for Investigations, Defense Criminal Investigative Services, Arlington, VA

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The Honorable Orrin G. Hatch, U.S. Senate

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