

Naval Audit Service



Auditor General Advisory Report



Service Contracts for the Communications-On-the-Move Network Digital Over-the-Horizon Relay (CONDOR) Project

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N2009-0019
24 February 2009

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NAVAL AUDIT SERVICE
1006 BEATTY PLACE SE
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MEMORANDUM FOR THE COMMANDANT OF THE MARINE CORPS

Subj: **SERVICE CONTRACTS FOR THE COMMUNICATIONS ON-THE-MOVE NETWORK DIGITAL OVER-THE-HORIZON RELAY (CONDOR) PROJECT (AUDITOR GENERAL ADVISORY REPORT N2009-0019)**

Ref: (a) 22 February 2008 GAO Memo

Encl: (1) Summary of Work
(2) Criteria
(3) Commandant of the Marine Corps 28 January 2009 Response to Draft Advisory Report

1. In accordance with reference (a), we conducted a limited-scope review of selected service contracts for the CONDOR Project at the Marine Corps Systems Command (MCSC) based on a hotline complaint we received from the Government Accountability Office. The objectives were to verify that MCSC:

- Met requirements concerning the authorized use of selected service contracts;
- Assigned project management personnel had the proper training and experience to oversee the program; and
- Identified and avoided potential conflicts of interest concerning service contracts awards.

2. The results of our analyses are included in Enclosure (1). We are making suggestions to the Commandant of the Marine Corps that address the issues found during our work and discussed in this report. Because this report is advisory in nature, and contains suggestions rather than recommendations, the report will not be included in the official followup tracking system in accordance with SECNAV Instruction 7510.F, "Department of the Navy Internal Audit." Accordingly, a formal management response to the recommendations is not required. However, we would appreciate receiving your

Subj: **SERVICE CONTRACTS FOR THE COMMUNICATIONS ON-THE-MOVE NETWORK DIGITAL OVER-THE-HORIZON RELAY (CONDOR) PROJECT (ASSIST REPORT N2009-0019)**

comments regarding what actions you plan to take to address the issues raised in the report and our suggested actions. As a result of the audit, the Marine Corps issued new guidance and established internal controls that will correct some of the weaknesses identified in the report (see Enclosure (3)). However, further improvements are needed to address the remaining problems and recommendations the new guidance does not address. Additionally, we may followup on actions taken by the MCSC at a future time to ensure that internal control weaknesses identified in this report have been corrected.

3. If you have any questions regarding our results, please contact [REDACTED] Project Manager, at [REDACTED]. Please provide all FOIA (b)(6) correspondence to the Assistant Auditor General for Internal Controls and Command Support Audits Installations and Environment Audits, [REDACTED] by e-mail at [REDACTED] with a copy to the Director, Policy and Oversight, [REDACTED] by e-mail at [REDACTED]. Please submit correspondence in electronic format (Microsoft Word or Adobe Acrobat file), and ensure that it is on letterhead and includes a scanned signature.

4. Any requests for this report under the Freedom of Information Act must be approved by the Auditor General of the Navy as required by reference (b). This audit report is also subject to follow up in accordance with reference (b).

5. We appreciate the cooperation and courtesies extended to the auditors.

[REDACTED]

FOIA (b)(6)

[REDACTED]

Assistant Auditor General
Internal Controls and Command Support Audits

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Enclosure 1 - Summary of Work

1. **Purpose.** The purpose of our work was to provide assistance to the Government Accountability Office (GAO) by providing a limited-scope review of selected service contracts for the CONDOR Project. CONDOR is a Marine Corps Systems Command (MCSC)-managed project that uses commercial off-the-shelf equipment to link existing Marine Corps radio systems and data networks and provide the over-the-horizon communications capability necessary to link Enhanced Position Location Reporting System (EPLRS) line-of-sight radio users.

2. **Objectives.** The objectives of the review were to verify that MCSC:

- Met requirements concerning the authorized use of selected service contracts;
- Assigned project management personnel had the proper training and experience to oversee the program, and;
- Identified and avoided potential conflicts of interest concerning service contracts awards.

3. **Criteria.** Enclosure (2) provides Federal Acquisition Regulation (FAR) requirements concerning the authorized use of service contracts, training, and experience of acquisition management personnel, and potential conflicts of interest. Paragraph 5 of this enclosure summarizes the criteria as it relates to each issue discussed.

4. **Scope and Methodology.** This assist effort was based on a 22 February 2008 GAO memo, outlining a hotline complaint which made certain allegations concerning a certain contract employee who was working for the MCSC Project Office for CONDOR. That contractor, hereafter referred to in this report as “the contractor,” is no longer employed in the CONDOR office. We developed the objectives shown in Paragraph 2 based on the allegations in the hotline complaint. The complainant contended that the contractor was inappropriately performing inherently Governmental functions (participating in project management), project management personnel did not have the proper training and experience to oversee the CONDOR program, and that the contractor had a conflict of interest because his company was working on CONDOR projects. As noted below, we reviewed the contractor’s efforts during the period October 2004 (when he was first identified as CONDOR Assistant Project Officer (APO)) to December 2007. The contractor left the CONDOR position in January 2008. The contractor’s services were provided under a Blanket Purchase Agreement (BPA) that the MCSC Acquisition Center for Support Services (ACSS) administered (M67854-02-A-9010). Specifically, three Task Orders (TOs) under this BPA related to the contractor’s CONDOR services (FY 2003-Task Order 0002, FY 2004-Task Order 0006, and FY’s 2005-2007-Task Order 00)

Per the assist request, we focused on MCSC service contracts that involved the contractor (contracts for his services and other contracts in which he was involved, as discussed in paragraph 5.a.ii). To address our objectives on the authorized use of selected service contracts (prohibiting service contractors from performing inherently Governmental functions and prohibited personal services contract functions) and potential conflicts of interest, we reviewed:

- Selected contract Statements of Work (SOW) and contract documentation for any evidence of inherently Governmental functions, personal services contracts (Paragraph 5.a. iii in this report defines personal services contracts and provides related criteria), or potential conflicts of interest based on functions performed by the contractor. We noted that MCSC uses a central department within their command – the Acquisition Center for Support Services (ACSS) – to award, oversee, and evaluate service contracts. The CONDOR Project Office requests services, but actual award and administration of the work is through ACSS. We reviewed the Blanket Purchase Agreement (BPA) that ACSS administered and the three Task Orders (TOs) under this BPA that related to CONDOR for Fiscal Years (FYs) 2003-2007.¹
- The contractor’s e-mail correspondence for the period October 2004 through December 2007² (provided by GAO) to determine if there were any issues related to authorized use of selected service contracts, personal services contracts or potential conflicts of interest, such as what functions he performed and how he presented himself and his responsibilities to personnel outside of the CONDOR management team, etc.;
- A Project Officer (PO) position description provided by MCSC personnel and descriptions of Military Occupational Specialty (MOS) codes for acquisition management personnel, to determine the functions of a PO and an Assistant Project Officer (APO) (Paragraph 5.a.); and
- MCSC guidance related to service contracts.

To address our objective on training and experience of CONDOR management personnel, we reviewed job descriptions and Defense Acquisition Workforce Improvement Act (DAWIA) certifications for key supervisor positions (Program Manager (PM), Team Leader (TL), and Project Officer (PO))³ within the CONDOR team from FY 2003 to FY 2007. As noted in paragraph 5.b., DAWIA certifications cover both training and experience requirements.

¹ Note that our review focused on work for October 2004 to December 2007, the period the contractor was on the CONDOR management team as discussed in footnote 2.

² The contractor was first identified as CONDOR Assistant Project Officer (APO) in October 2004 per records reviewed (APO responsibilities are discussed in Paragraph 5 below concerning inherently governmental functions), and left his position on the CONDOR management team in December 2007.

³ CONDOR management team from higher to lower authority levels.

5. Results of Analysis. Following are the results of our limited-scope review of selected service contracts for the CONDOR Project at the MCSC, by assist objective.

a. *Authorized Use of Service Contracts.* Based on our review of contract SOWs, position descriptions, and other contract documentation, as well as the contractor's e-mails,⁴ we concluded that he appeared to be inappropriately performing inherently Governmental functions. We also concluded that the manner in which the contractor was managed by MCSC officials appeared to result in a prohibited personal services contract (Paragraphs 5.a.i and 5.a.iii). The following shows each area in which we concluded he appeared to be performing these functions and summarizes related FAR criteria for which we did not believe he met the spirit or intent for his service contracts.

i. *Selection or Non-selection of Federal Government Employees.* We concluded that the contractor appeared to be inappropriately directly involved in the hiring process for Federal Government employees. A 4 May 2007 e-mail showed that on 1 May 2007, a Space and Naval Warfare Systems Command (SPAWAR) Project Engineer (PE) sent the contractor and the CONDOR Team Leader (TL) 10 resumes for use in selecting an applicant for a Federal Government civilian position.⁵ The 4 May 2007 e-mail showed that the contractor had reviewed the resumes and made recommendations in a 1 May 2007 e-mail to the TL regarding which applicants appeared not to be good candidates and which ones should be interviewed. Specifically, the CONDOR TL were asked in the 1 May 2007 SPAWAR PE e-mail to "Please look them over (the resumes) and see if you like any of them. The ones you like we can set up interviews with." The contractor did so and told the TL which one had "the chops to be a possible." He also said, "If we are going to talk to anyone from this group my 2 cents say it would be him." The CONDOR TL then asked the contractor to pick three more as well for interviews.

FAR Subpart 7.503 states that the selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment, is inherently Governmental. The contractor, and the individual who was the TL during the time period in question, were no longer involved with CONDOR by the time of our review, so we could not interview them to determine their exact roles in the process. However, while we could not determine if the contractor actually interviewed the applicants or made a subsequent hiring recommendation, it was clear that he was directly involved in the selection process for Federal Government employees.

⁴ E-mails to and from the contractor.

⁵ SPAWAR awarded contracts for the CONDOR system.

Our interpretation of the FAR requirements is as follows. To avoid having a contractor perform inherently Governmental work, as well as to avoid having a contractor perform prohibited personal services, the project office could have either: (i) specified the criteria for the contractor's recommendations on who to interview; or (ii) required the contractor to tell Government personnel what criteria were used in making recommendations, why such criteria were used, and how the applicants measured up against those criteria. In either case, Government personnel could make an informed decision on whether or not to use the contractor's recommendations. Our e-mail review, as indicated, showed no evidence that either of these conditions occurred. We therefore concluded that, for all intents and purposes, the contractor appeared to have inappropriately performed an inherently Governmental function and appeared to have provided prohibited personal services, particularly since this occurred during a period when the Project Officer (PO) position was vacant and it appeared the contractor had taken over PO management responsibilities (See paragraph 5.a.ii.).

- ii. ***Direction and Control of Federal Employees (Management Responsibilities)***. Based on our review of several e-mails, and PO and APO position descriptions, we concluded that the contractor appeared to have inappropriately performed, and held out to others that he was performing, the management function of directing and controlling Federal employees. This function should be performed by Government employees.

(a) ***The Contractor - Direction of Federal Employees.***

(1) In a 16 December 2004 e-mail, a Marine Corps civilian employee (in response to an e-mail from the contractor in which the contractor had referred to his position as CONDOR APO), told the contractor that he needed to be clear in e-mails that it he is a contractor. The employee informed the contractor that "any place that identifies you using a title that would otherwise be staffed by a Government employee (such as Assistant Project Officer for the CONDOR program), like your e-mail signature file, needs to also reflect that you are a support contractor." The employee said his purpose in making this comment was to avoid the contractor inappropriately receiving information concerning another contractor. In a 19 June 2005 e-mail to his PO, the contractor specifically stated that he told a SPAWAR civilian employee to take direction from him. When another contractor told him that he could not be in charge, he said he was the APO. In fact, in the same e-mail, the contractor further complained that a Marine Corps

Captain was trying to take leadership on issues in which the contractor was involved. In a 16 March 2007 e-mail, the contractor tasked a different contractor to route all of the former PO's tasks to him after the PO had left the CONDOR management team. In a 5 November 2007 e-mail, the contractor informed personnel that he would "answer for projects" if the PO was out and that other managers would answer for projects if he and the PO were out. He signed this email as "Deputy Team Lead."

(2) Our review of the PO position description provided by MCSC personnel, and descriptions of MOS codes for acquisition management personnel showed that, contrary to the way in which the contractor executed the role as indicated in the e-mails above, the APO function was clearly intended to be a non-management role. The APO provides "expertise in highly technical functional areas that pertain to the acquisition of equipment and weapons systems. The responsibilities may range from providing assistance in the areas of project initiation, systems development, systems engineering, test and evaluation management, integrated logistics support management, systems manpower and training requirements, life-cycle system support management, etc., to the management of project technical data and documentation."

(3) Conversely, these position and MOS code descriptions show that the PO is "assigned responsibility for management of equipment or weapon systems acquisitions." This includes "establishing schedules for planning, coordination and accomplishment of work and initiating action to ensure that cost and schedule procedures and policies are current and implemented." Therefore, while essentially acting inappropriately in the role of the PO (see paragraphs 5.a.ii.(a) and 5.a.ii.(b)), he was performing functions that these position descriptions described as clearly having inherently Governmental acquisition management responsibilities.

- (b) ***The Contractor - Designation as Management Official to Third Parties.*** Our overall e-mail review showed that, in addition to performing management tasks (see paragraph 5.a.ii.(a)), the contractor generally held himself out as a CONDOR management official to third parties. He referred to himself as CONDOR APO, which would likely indicate a management position to a third party. For example, his e-mails showed him as "CONDOR Assistant Project Officer (Ctr EMA) MARCORSYSCOM, PGD CINS, PM CNS 2200 Lester St Quantico, VA." Further, when the PO

position was vacant (March-November 2007), the contractor referred to himself as Deputy PO (DPO), as opposed to APO, and reverted back to APO when the new PO arrived in November 2007. For example, his E-mails showed him as “Deputy Project Officer, Tactical Data Radio Systems, MARCORSSYSCOM, PGD CINS, PM CNS.” As noted above, the contractor had considered himself as CONDOR *management* personnel before and after that time period. However, during that period in particular, he had a contractor route all of the former PO’s program-related tasks to him (as “DPO”), so he clearly was identifying himself as a part of the management team when the PO position was vacant. Some of the e-mails with his APO signature also were addressed to higher ranking civilian and military members associated with the CONDOR project (Program Manager (PM) (GS-14 level), Team Leader (TL) (LTC level), and Project Officer (PO) (Major level))⁶, so he was addressing himself as APO/DPO with their knowledge.

- (c) **Summary.** Based on our overall e-mail and position/MOS description reviews, particularly the previously cited examples, we concluded that the contractor appeared to have inappropriately performed the inherently Governmental function (cited in FAR Subpart 7.503) of providing direction and control to Federal employees (i.e., management responsibilities). Also, contrary to FAR Subpart 37.114 requirements, even though third parties knew he was a contractor (which was indicated on his e-mails, as noted), the contractor clearly held himself out to these third parties as CONDOR management personnel (i.e., a Government official). As noted in Paragraph 5.a.ii (b) above, we also concluded that CONDOR project management personnel were aware of his apparently improper actions and took no corrective actions. FAR Subpart 37.114 shows that it must be clear to third parties that the service contractor is not a Government official and that Government officials must properly exercise their authority by not letting non-Government personnel inappropriately exercise that authority. The absence of action by the CONDOR project management personnel demonstrates a lack of understanding on their part of the contracting rules governing inherently Governmental functions and personal services. It also demonstrates the need for training and oversight to preclude

⁶ CONDOR management team from higher to lower authority levels.

recurrence of the problems identified by the hotline complaint on future contracts at MCSC.

iii. Avoiding Personal Services by Contractor Employees. We concluded that by their inaction as well as their actions, CONDOR project management personnel allowed the service contractor's contract to become a prohibited personal services contract. For example, during the period March to November 2007, when as noted in paragraph 5.a.ii.(b), the contractor referred to himself as DPO, we found two separate E-mails (dated 21 March 2007 and 13 April 2007) in which he held himself out to the PM as DPO. As noted, the PM is the highest level of management on the CONDOR Project Office. A personal services contract is one that, by its express terms or as administered, makes contractor personnel appear, in effect, to be Government employees (FAR Part 37.101, 37.104(a)). The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws (FAR Part 37.104(a)). Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract. Agencies may not award personal services contracts unless specifically authorized by statute to do so (FAR Part 37.104(b); *Encore Management, Inc.*, Comptroller General Decision B-278903.2, 99-1 CPD Paragraph 33 (12 February 1999)). A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel (FAR Part 37.104(a); *Logistical Support, Inc.*, Comptroller General Decision B-224592, Dec. 23, 1986, 86-2 CPD Paragraph 709). The FAR provides that the "key question" in determining if a contract is for personal services is whether the Government will exercise "relatively continuous supervision and control of contractor personnel performing the contract" (FAR Part 37.104(c)(2)). The FAR also enumerates several other factors to be considered in making this judgment, including whether performance is on-site and whether the principal tools for contract performance are furnished by the Government (FAR Part 37.104(d)(1) and (2); *Information Ventures, Inc.*, Comptroller General Decision B-241641, 91-1 CPD Paragraph 173 (14 February 1991); *Carr's Wild Horse Center*, Comptroller General Decision B-285833, 2000 CPD Paragraph 210 (3 October 2000)). When contractor personnel are used interchangeably with Government employees, i.e., when the Government acts as though there is an employer-employee relationship between the Government and the contractor's personnel, when the contractor's personnel work at the agency's offices alongside the Government's employees performing the same or similar work and using the Government's supplies and equipment, and when the Government's managers supervise contractor personnel by directing, reviewing, and approving their work, the Government runs a risk of

converting a valid support services contract into a prohibited personal services contract.

b. ***Training and Experience of CONDOR Management Personnel.*** We concluded that the CONDOR Program Manager, Team Leader, and Project Officer's training and experience were generally sufficient for their job descriptions, except for specific training weaknesses identified concerning managing support service contractors discussed in Paragraph 5 of this memorandum. As required, the Program Manager and Team Leader both held a DAWIA Level III⁷ Program Management certificates and the Project Officer held a Level II Program Management certificate. In addition, the Program Manager held a Level II certificate in Systems Engineering – a certification that does not appear to be a requirement for the position but provides further evidence of training and experience. Therefore, based on our review of training documents, CONDOR management personnel had sufficient training and experience to supervise the CONDOR project in areas other than managing service contractors. However, as noted in Paragraph 5.d., CONDOR project management personnel needed training concerning the authorized management and use of service contractors with regard to restrictions on performing inherently Governmental functions, avoiding unauthorized personal services contracts, and potential conflicts of interest regarding service contract awards or performance.

c. ***Potential Conflicts of Interest.***

(1) We concluded that the contractor had an apparent potential conflict of interest concerning CONDOR-related contracts, based on FAR requirements. First, our review of the contractor's e-mails showed that in his APO/DPO role (see paragraph 5.a.ii), he had several opportunities to influence the CONDOR contracting process or acquire "insider" information concerning these contracts.⁸ A 23 December 2004 e-mail showed that he was involved in drafting a source selection plan for a CONDOR contract. E-mails dated 2 May 2005 showed that he was involved in preparing a Statement of Work (SOW) for a CONDOR contract. A 19 June 2005 e-mail showed that the contractor, in his APO role, asked CONDOR project engineers to review contract technical requirements prepared by a SPAWAR service contractor, and then discussed this issue directly with the SPAWAR service contractor. A 21 March 2007 e-mail showed that the contractor, in his role as DPO, provided a draft source selection plan for a CONDOR contract to the CONDOR PM for review. The plan included the contractor as an advisor to the source selection team. A 19 September 2007 e-mail showed that the contractor, while identifying himself as DPO, provided the CONDOR Systems Engineering Plan and Test and Evaluation Master Plan (TEMP) to a MCSC

⁷ DAWIA Program Management certificates have three levels. Certificate III is the highest level and I is the lowest level.

⁸ Note that we did not determine for which CONDOR contracts the contractor performed these functions or whether his company bid on, or was awarded, these specific contracts. The basis for our conclusion on "potential" conflicts of interest based on FAR requirements is shown in paragraph 5.c.2.

employee. A 22 September 2007 e-mail showed that the contractor, in his role as DPO, sent a CONDOR Configuration Management (CM) plan to an MCSC employee.

(2) Secondly, while, as noted, we did not determine if the contractor's company bid on or was awarded any of these specific CONDOR contracts, we found that overall he had contacts with his company concerning CONDOR contracts. For example, 2 May 2005 e-mails showed that the contractor contacted another individual from his company (based on PO direction) to find out if they would bid on a CONDOR contract. He stated in this email that this contact was based on concerns about his involvement in the SOW process and any potential insider information he may possess. A 19 June 2005 e-mail showed that the contractor had discussed contract information on a contract previously awarded to another contractor with officials from his company. Specifically, he told his company officials that it was in his company's best interest to get the contract moving and to speed it up. Also, his company was, in fact, working on several CONDOR related contracts while he was APO/DPO.

(3) We concluded that, due to (a) the contractor's "insider" knowledge and influence concerning CONDOR technical requirements in his APO/DPO role as described above; (b) contacts he had with his company; and (c) the fact that his company was working on several CONDOR contract awards; there was a potential conflict of interest that could have impacted his company's bid or decision not to bid on a given CONDOR contract.

Section Two of the Blanket Purchase Agreement (BPA), under which the contractor was employed, in the "Limitation of Future Contracting" section prescribes that, to the extent that the work under this contract requires access to proprietary, business confidential, or financial data of other companies, and as long as these data remain proprietary or confidential, the contractor shall protect these data from unauthorized use and disclosure and agrees not to use them to compete with those other companies. It further states in the subsection "Organizational Conflicts of Interest (OCI)" under the Administration section that it is the responsibility of the contractor to assess potential OCI restrictions that might emerge from their participation in a Commercial Enterprise Omnibus Support Services (CEOSS) task and to make a determination as to the impact on their future business. Restrictions may be placed on contractors at the discretion of the Government should issues of OCI be confirmed.

Further details of conflict of interest principles are outlined in the FAR. Details are:

- Underlying conflict of interest principles are to prevent conflicting roles that might bias a contractor's judgment and prevent unfair competitive advantages concerning proprietary information and source selection; and

- Conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition.

Further, the FAR specifically state that providing systems engineering and technical direction, preparing work statements, and gaining access to proprietary information and source selection information as examples of functions that create potential conflicts of interest.

d. ***Internal Controls and Training Need Improvement.*** MCSC did not have sufficient internal controls and training procedures to prevent service contractors from: (1) performing inherently Governmental functions and performing prohibited personal services; or (2) having potential conflicts of interest concerning CONDOR related contracts in terms of inappropriately sharing “insider information” with the service contractor’s company to influence potential bids. We note that these internal control and training improvements are particularly important, as our review of three task orders under which the contractor worked, disclosed that the MCSC uses service contractors for several Program Managers (PMs) for similar functions under the same service contract task orders. The value of the FY 2003, FY 2004 and FY 2005 (Paragraph 4) service contract task orders we reviewed, which included the contractor’s efforts, totaled \$4.6 million, \$6.2 million and \$7.6 million respectively. These values were significant and grew each year. As shown in Enclosure (2), and summarized below, the FAR did not mandate, but encouraged such procedures and internal controls. Overall, FAR Subpart 37.102(f) states that agencies shall establish effective management practices to prevent fraud, waste, and abuse in service contracting. Following are FAR provisions which encouraged procedures and internal controls concerning specific areas addressed:

- ***Authorized Use of Service Contracts.*** FAR Subpart 37.114 states that contracts for services that require the contractor to provide advice, opinions, recommendations, ideas, reports, analyses, or other work products have the potential for influencing the authority, accountability, and responsibilities of Government officials. These contracts require special management attention to ensure that they do not result in performance of inherently Governmental functions by the contractor, and to ensure that Government officials properly exercise their authority. It further states that Government personnel must oversee contractor activities, especially those that involve support of Government policy or decisionmaking.
- ***Potential Conflicts of Interest.*** FAR Subpart 9.502 (c) states that an organizational conflict of interest may result when factors create an actual or

potential conflict of interest on a contract, or when the nature of the work to be performed on the contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required. FAR Subpart 9.505-4 states that when a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. Based on the instances shown in Paragraph 5.c., we concluded that such restrictions were needed. Specifically, as the contractor noted, as part of his APO/DPO work performed concerning CONDOR contracts, was in a position to acquire knowledge and exercise influence that could have helped him on his company's contracts.

(1) Internal Controls - Inherently Governmental Functions/Personal Services. We identified internal control breakdowns and are suggesting improvements to prevent service contractors from performing inherently Governmental functions or prohibited personal services in the future as follows:

- ***Selection or Non-selection of Federal Government Employees.*** MCSC did not have procedures to either prevent service contractors from participating in this process; or if permitted, to ensure that Government personnel (i) specify the criteria for the contractor's recommendations on who to interview; or (ii) require the contractor to tell Government personnel what criteria were used in making recommendations, why such criteria were used, and how the applicants measured up against those criteria.
- ***Direction and Control of Federal Employees (Management Responsibilities)/Avoiding Personal Services.*** MCSC did not include requirements and controls in the service contracts' Statements of Work (SOW) under which the contractor performed, to prevent service contractors from: (1) performing prohibited management functions, such as directing and controlling Federal employees; or from holding themselves out to others as having these management responsibilities, or (2) performing personal services. Specifically, the SOWs for the three task orders we reviewed (Paragraph 4.), only stated that "the contractor is responsible for providing suitable program management, financial management, acquisition logistics, analytical technical expertise to support ongoing responsibilities delineated by activity, as well as variances in the scope of activity." These SOW provisions did not include FAR requirements to prevent the service contractor from performing prohibited functions, such as directing and controlling Federal employees; holding themselves out to others as having these management responsibilities; or

performing personal services. Provisions to add this type of clarity to the SOW are needed, as demonstrated by our analyses of the contractor's service contract efforts (Paragraph 5.a.ii and 5.a.iii). FAR subpart 37.114 states that during the performance of service contracts, the functions being performed shall not be changed or expanded to become inherently Governmental. We concluded that this strongly appeared to have occurred, as the contractor went beyond the SOW requirements to provide "technical expertise" into inherently Governmental functions.

(2) **Internal Controls-Potential Conflicts of Interest.** Contrary to our conclusions concerning contract SOWs in the areas of prohibited management functions and personal services, we found that the BPA SOW concerning potential service contractor conflicts of interest ("sharing insider information") (Paragraph 5.c.) contained clear guidance to the service contractors. Based on our analyses of the contractor in this area (Paragraph 5.c.), we concluded that these provisions were not enforced. In fact, as noted, we found that the contractor inappropriately contacted his company based on the PO's direction, so the PO had full knowledge of this fact. Enforcement by Government officials is particularly important as the SOW provision itself, while spelling out clear restrictions, relied on the contractor to police themselves in this area. Self-policing is not an effective control, and did not work in the case of the contractor.

(3) **Training.** MCSC also did not have any mandated training for PM personnel (PO, TL, PM) in the areas of authorized use of service contracts, to include performing inherently Governmental functions or prohibited personal services; and concerning avoiding potential service contractor conflicts of interest. FAR Subpart 37.102(h) states that agencies shall ensure that sufficiently trained and experienced officials are available within the agency to manage and oversee the contract administration process for service contracts. We noted that MCSC legal personnel had developed a training presentation that covered both areas very well and could be used to train MCSC project management and ACSS personnel.

6. Suggested Actions: We suggest that the Commandant of the Marine Corps (CMC) use the lessons learned from problems identified during our review of the subject hotline complaint to establish effective internal controls and oversight over MCSC contract management and CONDOR project management, to prevent recurrence of those problems in the future. These problem areas included apparent: (1) improper performance of inherently Governmental functions by contractors; (2) management of contractor personnel in a manner that leads to performance of prohibited personal services; and (3) potential conflicts of interest by service contractors who have support contracts with project offices and also have contracts for completion of the projects themselves. In particular, we suggest that CMC:

- a. Establish procedures and oversight responsibilities to ensure that they are enforced, to ensure that service contractors do not participate in selecting Government employees; or that if permitted to do so, Government personnel establish proper restrictions on this process.
- b. Require that Statements of Work (SOWs) for service contracts include FAR requirements to prevent service contractors from performing prohibited functions, such as directing and controlling Federal employees; holding themselves out to others as having these management responsibilities; or performing personal services. Establish oversight responsibilities to ensure that these provisions are enforced once they are established; and procedures to hold PM management personnel accountable when they are aware that these provisions are being violated.
- c. Establish oversight procedures to ensure that service contract SOWs concerning potential conflicts of interest are enforced, to include holding accountable management officials who are aware of or actually direct a contractor to violate the provision.
- d. Provide mandatory comprehensive training to MCSC project management personnel (PO, TL, and PM) regarding inherently Governmental functions, conflicts of interest, and personal services to ensure that they do not allow the problems that we found with the CONDOR Project to recur in the future. Also, establish controls and provide oversight to ensure that the training is completed by all responsible personnel.

7. Commandant of the Marine Corps (CMC) Comments. A 28 January 2009 Marine Corps response to our 9 January 2009 draft advisory report (provided to CMC for informal comment) stated that since FY 2004, MCSC has strengthened many processes and internal controls in the area of training, policy and contract structure to prevent the type of problems discovered in our advisory report (Appendix 1). The response included a brief description of some of the internal controls in those key areas. Accordingly, the response cited guidance, issued after our review, that required:

- MCSC ACSS personnel to address Task Order (TO) requirements, roles of all parties-and in particular, potential conflict of interest, personal services and inherently Governmental function requirements-in ACSS orientation briefs with the contractor and COR when the TO is awarded; and to discuss potential conflict of interest and personal services requirements at BPA mid-term briefs. The cited ACSS CEOS 2009 handbook was issued 29 January 2009 and represented a revision to the 13 September 2007 ACSS CEOS 2008 handbook in effect at the time of our review.

- MCSC Program Offices to fully train CORs prior to contract award. Every PO (COR) must have completed, at a minimum, Federal Acquisition Institute (FAI) course CLC 106 (Basic COR Training) or equivalent. The response provided details on MCSC internal controls established to ensure this training is taken. Internal controls included a mandated pre-award task order package to be included in the contract files, signed by the COR, which certifies that the COR took the required training. Also, when a COR leaves the position, ACSS personnel must certify the replacement has taken the required COR training. Further, POs must be evaluated concerning their COR duties in their performance assessments. These requirements were included in MCSC Contracting Policy Notice Number 09-02, issued 9 October 2008. This guidance was based on 6 October 2008 Assistant Secretary of the Navy (Research, Development and Acquisition (ASN (RD&A))) guidance, which resulted from a DoD Panel on Contracting Integrity and prior audits concerning surveillance of service contracts.

The cited improvements in internal controls and training, issued after our review, should help with the issues we discussed in the advisory report. However, there are still opportunities for continued improvement. Specifically, our suggested actions 6.a. and 6.b. were still needed. Further, concerning suggested action 6.c., cited PO performance assessments concerning COR duties are a very good accountability measure, but the Marine Corps needs to ensure they specifically address potential conflicts of interest as part of the COR duties. Finally, concerning suggested action 6.d., we concluded that the cited COR training course was comprehensive concerning personal services, but was not sufficient in the areas of inherently Governmental functions or potential conflicts of interest to meet the intent of our suggested action. As noted, the suggested MCSC legal personnel training presentation provided thorough coverage of all of these areas. Also, the TL and PM should receive such training, not just the PO (COR).

Enclosure (2) - Criteria

a. *Authorized Use of Service Contracts.*

1. Federal Acquisition Regulations (FAR) Subpart 37.1 and Subpart 7.5 provide criteria concerning the authorized use of service contracts. FAR Subpart 37.102 c states that agencies shall not award a contract for the performance of an inherently Governmental function and references Subpart 7.5 for details. FAR Subpart 37.114 states that contracts for services that require the contractor to provide advice, opinions, recommendations, ideas, reports, analyses, or other work products have the potential for influencing the authority, accountability, and responsibilities of Government officials. These contracts require special management attention to ensure that they do not result in performance of inherently Governmental functions by the contractor and that Government officials properly exercise their authority. All contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public or Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. They must also ensure that all documents or reports produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed.

2. FAR Subpart 7.503 (a) also prohibits contractors from performing functions that are inherently Governmental. Subpart 7.503 (c) provides examples of inherently Governmental functions. These examples include: (1) the direction and control of Federal employees; (2) the selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment; and (3) participating as a voting member on any source selection boards.

3. FAR Subpart 7.503 (d) includes examples of functions generally not considered to be inherently Governmental functions. However, they may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. These examples are: (1) services in support of acquisition planning; (2) contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors); (3) contractors providing technical evaluation of contract proposals; and (4) contractors providing assistance in the development of statements of work.

b. *Training and Experience of CONDOR Management Personnel.* The Navy's 19 February 2008 Defense Acquisition Workforce Improvement Act (DAWIA) Operating Guide addresses certification requirements for acquisition related personnel

under DAWIA.⁹ Certificates are awarded for Levels I to III in order of increasing difficulty. These certificates are based on both training and experience requirements.

c. ***Potential Conflicts Of Interest.***

i. ***General.*** FAR Subpart 9.5 prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. Subpart 9.502 (b) states that organizational conflicts of interest are more likely to occur in contracts involving management support services, consultant or other professional services, contractor performance of or assistance in technical evaluations, or systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production. Subpart 9.502 (c) states that an organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required. Subpart 9.505 states that the two underlying principles concerning conflicts of interest are:

(1) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(2) Preventing unfair competitive advantage. An unfair competitive advantage exists where a contractor competing for award of any Federal contract possesses:

(a) Proprietary information that was obtained from a Government official without proper authorization; or

(b) Source selection information that is relevant to the contract but is not available to all competitors, and such information would assist that contractor in obtaining the contract.

ii. ***Systems Engineering and Technical Direction.*** Subpart 9.505-1 states that a contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not:

(1) Be awarded a contract to supply the system or any of its major components; or

⁹ CONDOR Program Manager, Team Leader and Project Officer, whom we reviewed, fall under this category.

- (2) Be a subcontractor or consultant to a supplier of the system or any of its major components.

Technical direction includes developing work statements and directing other contractors' operations. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore, this contractor should not be in a position to make decisions favoring its own products or capabilities.

- iii. **Work Statements.** Subpart 9.505-2 states that agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in paragraph (b)(1) of this section. Subpart (b)(1) states that if a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services – or provides material leading directly, predictably, and without delay to such a work statement – that contractor may not supply the system, major components of the system, or the services unless:

- (1) It is the sole source;
- (2) It has participated in the development and design work; or
- (3) More than one contractor has been involved in preparing the work statement.

- iv. **Access to Proprietary Information.** Subpart 9.505-4 states that when a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. Further, a contractor that gains access to proprietary information of other companies in performing advisory and assistance services for the Government must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. Finally, contractors also obtain proprietary and source selection information by acquiring the services of marketing consultants which, if used in connection with an acquisition, may give the contractor an unfair competitive advantage. Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage.

**Enclosure 3 - Commandant of the Marine Corps
28 January 2009 Response to Draft Advisory Report**



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON, DC 20350-3000

IN REPLY REFER TO
7500
RFR-80
28 Jan 09

From: Commandant of the Marine Corps (P&R (RFR))
To: Naval Audit Service

Subj: NAVAL AUDIT SERVICE GAO ASSIST - SERVICE CONTRACTS FOR
THE COMMUNICATIONS ON-THE-MOVE NETWORK DIGITAL OVER THE
HORIZON RELAY (CONDOR) PROJECT (N2008-NMC000-0080.005)

Ref: (a) NAVAUDSVC electronic memoranda of 9 - 12 Jan 2009

Encl: (1) Marine Corps response

1. Reference (a) provided the Marine Corps an opportunity to comment on the subject draft Advisory Report.
2. Enclosure (1) provides the official Marine Corps response from the Marine Corps Systems Command for Naval Audit Service's consideration in formulating the final report.
3. The Marine Corps appreciates the opportunity extended by Naval Audit Service to comment on the report.
4. Point of contact for this matter is [REDACTED]
email [REDACTED] or phone [REDACTED]

FOIA (b)(6)

[REDACTED]
[REDACTED]
By direction



UNITED STATES MARINE CORPS
MARINE CORPS SYSTEMS COMMAND
2200 LESTER ST
QUANTICO, VIRGINIA 22134-6050

IN REPLY REFER TO:
4290
DRM
28 Jan 2009

From: Commander, Marine Corps Systems Command
To: Naval Audit Service (NAS)
Via: Headquarters, U.S. Marine Corps (Code P&R)

Subj: NAVAL AUDIT SERVICE GAO ASSIST: SERVICE CONTRACTS
FOR THE COMMUNICATIONS ON-THE-MOVE NETWORK DIGITAL
OVER THE HORIZON RELAY (CONDOR) PROJECT (N2008-
NMC000-0080.005)

Ref: (a) Naval Audit Advisory Report Service Contracts for
the Communications-On-the-Move Network Digital
Over-the-Horizon Relay (CONDOR) Project

1. The Naval Audit Service (NAS) CONDOR advisory concludes that Marine Corps Systems Command (MCSC) Internal Controls and training need to be improved to prevent service contractors from performing inherently governmental functions, personal services, and incurring conflicts of interest. Since the significant growth in Global War On Terror (GWOT) supplemental funding and associated growth in support contractors since FY 2004, MCSC has strengthened many processes and internal controls in the area of training, policy and contract structure to prevent the type of problems discovered in the advisory. While not exhaustive, the following is a brief description of some of our internal controls in those key areas:

a. Training. Marine Corps Systems Command Order 4290.1A provides guidance on the procedures and policy governing communications with contractors and other non-government personnel and the release of acquisition information.

Organizational Conflicts of Interest (OCI), vendor management, and program responsibilities are addressed in the Acquisition Center for Support Services (ACSS) Commercial Enterprise Omnibus support services (CEOs) 2009 Handbook and annual updates. This handbook is available to both the vendor and the Contracting Officer's Representative (COR) as a standard part of the MCSC blanket purchase agreements (BPA) award process. When a Task Order (TO) is awarded, vendors and CORs are provided an orientation brief by ACSS. The brief addresses not only the specific requirements of the TO, but also emphasizes the proper roles of all parties to the

Subj: NAVAL AUDIT SERVICE GAO ASSIST: SERVICE CONTRACTS
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NMC000-0080.005)

contract with specific attention to OCI matters and impermissible actions resulting in personal services and inherently governmental functions. A checklist of the topics discussed during the briefs is signed by the Vendor Representative and the COR and maintained on file. In addition, a Mid-Term brief provided at the BPA level, extensively discusses OCI and guidance with respect to non-personal services contracts.

MARCORSYSCOM Contracting Policy Notice Number 09-02, requires program offices to fully train CORs prior to contract award. Project Officers (POs) are evaluated on their COR duties as part of their performance assessments. COs are responsible for ensuring that only trained CORs are designated and assigned to contracts. Every PO must have completed, at a minimum, Federal Acquisition Institute (FAI) CLC 106 or equivalent before becoming a COR. A Designation of Contracting Officer's Representative (COR) memo is included in the TO package. This extensive list of responsibilities includes maintaining documents supporting completion of training, including required refresher training. This memo must be signed by the COR, returned to the CO within 3 working days of receipt, and kept on file. Currently, MCSC requires training to have been completed within 3 years prior to designation. In addition to training, the COR must document experience related to duties in the COR nomination letter. After verification the CO issues the COR appointment letter, which documents the responsibilities the COR must perform and the requirements they must adhere to.

When the COR leaves the position, ACSS ensures that the replacement has met the COR requirements before processing a unilateral modification to the TO. The change of designation can be done within days and is usually completed in advance of the original COR's departure. Individual levels of training and dates of completion are maintained by MCSC Workforce Development. Upon completion, the system is automatically updated. The system allows the CO and ACSS to readily verify COR training before delegation and filing. Attendance at all briefs is recorded and filed with the ACSS COR.

b. Policy. Each BPA outlines the contractor's responsibilities with respect to Organizational Conflicts of

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OVER THE HORIZON RELAY

Interest and Non-Disclosure Agreements. The language requires the contractor to receive and maintain Nondisclosure Agreements. This confidentiality document must be signed by all contracted employees. The Command requires the COR to have an Annual Confidential Financial Disclosure Report (OGE 450) on file. Both documents identify possible conflicts of interest.

The TO Request for Quotation (RFQ) criteria establishes best-value objectives, delineates terms and conditions for performance, identifies potential OCI provisions and proprietary data issues, and establishes performance expectations and metrics. The RFQ is provided to every competing BPA vendor and is very specific in terms of organizational and consultant conflicts of interest. The RFQ includes the Quality Assurance Surveillance Plan (QASP) which serves as the government's principal basis for assessing overall contractor performance quality associated with the effort. It delegates government responsibilities, methods of surveillance, and documentation.

c. Contract Structure. The ACSS serves as the principal interface between the Government and the professional services sector for Marine Corps Systems command. The office includes an overarching CO and an ACSS COR. The ACSS and the CO are responsible for the execution of the CEOss program, an indefinite delivery/indefinite quantity business model intended to serve as the Command's principal medium for acquiring non-personal contractor support services. The CEOss provides the regulatory foundation which authorizes MCSC to use BPAs for this purpose. Upon contract award, technical performance responsibilities are assigned to the responsible COR within the program office. The CEOss Acquisition Strategy requirements document is signed by the PO, ACSS Program Analyst, and the ACSS CO and kept on file.

The PO is responsible for the day-to-day technical direction and management of the work awarded. As the TO COR, this individual serves in a subordinate capacity to the ACSS COR and in a supporting role to the CO. The COR is responsible for ensuring overall task execution compliant with the SOW, conformance task metrics in the QASP, and resolution of performance issues in collaboration with the ACSS COR.

2. In conclusion, MARCORSYSCOM is continuously working to advance our training, policy and contract structure to prevent

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any potential weakness in our system of Internal Controls.
It is a continual process of keeping pace with the volume and
complexity of workload, but we are committed to maintaining a
process of internal controls that upholds the high standards
of this Command.

[REDACTED]

[REDACTED]
Executive Director

FOIA (b)(6)

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