

April 10, 2003



Acquisition

Cooperative Agreements Supporting
the Mentor Protégé Program
(D-2003-077)

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Acronyms

DoDGARs	DoD Grant and Agreement Regulations
FAR	Federal Acquisition Regulation
GAO	General Accounting Office
HBCU/MI	Historically Black Colleges and Universities/Minority Institutions
ISO	International Organization for Standardization
MOLIS	Minority On-line Information Service
OSD	Office of the Secretary of Defense
SADBU	Small and Disadvantaged Business Utilization
UNCF	United Negro College Fund
USAMRAA	U.S. Army Medical Research Acquisition Activity



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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ARLINGTON, VIRGINIA 22202-4704

April 10, 2003

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR ACQUISITION,
TECHNOLOGY, AND LOGISTICS
UNDER SECRETARY OF DEFENSE
(COMPTROLLER)/CHIEF FINANCIAL OFFICER
AUDITOR GENERAL, DEPARTMENT OF THE ARMY
DIRECTOR, DEPARTMENT OF DEFENSE, SMALL AND
DISADVANTAGED BUSINESS UTILIZATION OFFICE


SUBJECT: Report on Cooperative Agreements Supporting the Mentor Protégé Program
(Report No. D-2003-077)

We are providing this report for your review and comment. We performed the audit in response to a request from the current Director of the Office of Small and Disadvantaged Business Utilization, Office of the Secretary of Defense. We considered management comments from the Army on a draft of this report when preparing the final report. However, the Under Secretary of Defense for Acquisition, Technology, and Logistics; the Under Secretary of Defense (Comptroller)/Chief Financial Officer; and the Director, Office of Small and Disadvantaged Business Utilization, Office of the Secretary of Defense did not respond to the draft report.

DoD Directive 7650.3 requires that all recommendations be resolved promptly. We request that the Army reconsider its position on Recommendation 1.b. We also request that the Under Secretary of Defense for Acquisition, Technology, and Logistics; the Under Secretary of Defense (Comptroller)/Chief Financial Officer; and the Director, Office of Small and Disadvantaged Business Utilization, Office of the Secretary of Defense provide comments on the final report by June 10, 2003.

If possible, please send management comments in electronic format (Adobe Acrobat file only) to Audcm@dodig.osd.mil. Copies of the management comments must contain the actual signature of the authorizing official. We cannot accept the / Signed / symbol in place of the actual signature. If you arrange to send classified comments electronically, they must be sent over the SECRET Internet Protocol Router Network (SIPRNET).

We appreciate the courtesies extended to the staff. Questions should be directed to Mr. Timothy E. Moore, at (703) 604-9282 (DSN 664-9282) or Mr. Terry L. McKinney, at (703) 604-9288 (DSN 664-9288). See Appendix B for the report distribution. The team members are listed inside the back cover.


Lt Col David K. Steensma
Deputy Assistant Inspector General
for Auditing

Office of the Inspector General of the Department of Defense

Report No. D-2003-077

April 10, 2003

(Project No. D2002CF-0116)

Cooperative Agreements Supporting the Mentor Protégé Program

Executive Summary

Who Should Read This Report and Why? Contracting and grants officers that award cooperative agreements and Military Department and Defense agency Small and Disadvantaged Business Utilization officials that oversee Mentor Protégé Program efforts should read this report. The report discusses the inappropriate use of cooperative agreements and Mentor Protégé Program funds.

Background. The FY 1991 National Defense Authorization Act, Public Law 101-510, established the Mentor Protégé Program. The purpose of the Program is to encourage major DoD contractors to assist in improving the capabilities of small disadvantaged businesses to perform as responsive subcontractors and suppliers. The Office of the Secretary of Defense Small and Disadvantaged Business Utilization assists small disadvantaged businesses and coordinates the Mentor Protégé Program. The DoD Mentor Protégé Program receives approximately \$31 million annually from Congress. The Director, Office of the Secretary of Defense Small and Disadvantaged Business Utilization requested that the Inspector General of the Department of Defense audit two cooperative agreements entered into under the Mentor Protégé Program to determine whether work was performed as specified and whether the work provided value to the Government.

A cooperative agreement is a legal instrument that is used to form a relationship where the principal purpose is to provide value or assistance to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States. In FY 1998, the Office of the Secretary of Defense Small and Disadvantaged Business Utilization entered into cooperative agreements with ScienceWise, Incorporated, cooperative agreement DAMD17-98-2-8011 with a final value of \$2,887,539, and the United Negro College Fund, cooperative agreement DAMD17-98-2-8012 with a final value of \$4,392,036. The U.S. Army Medical Research Acquisition Activity awarded the cooperative agreements for the Office of the Secretary of Defense Small and Disadvantaged Business Utilization using Mentor Protégé Program funds.

Results. The DoD Mentor Protégé Program was not properly managed. The U.S. Army Medical Research Acquisition Activity disregarded applicable regulations in awarding cooperative agreements in support of the Office of the Secretary of Defense Small and Disadvantaged Business Utilization when competitive contracts would have been the correct contract instruments. The cooperative agreements did not contain statements of work with specific performance standards, but rather provided general tasks for the support of historically black colleges and universities and minority institutions. Therefore, there were inadequate means to determine if the Office of the Secretary of Defense Small and Disadvantaged Business Utilization obtained the services and performance levels it intended to receive. However, we did determine that the work performed did not relate to the Mentor Protégé Program. In addition, the U.S. Army Medical Research Acquisition Activity and the Office of the Secretary of Defense Small

and Disadvantaged Business Utilization did not exercise sound business practices in administering or overseeing the cooperative agreements. Further, the Office of the Secretary of Defense Small and Disadvantaged Business Utilization inappropriately used Mentor Protégé Program funds.

As a result, potential Antideficiency Act violations may have occurred. Further, an assessment of any benefits derived from the monies spent could not be made. The U.S. Army Medical Research and Materiel Command needs to review all active cooperative agreements to identify any other inappropriate agreements and terminate them and negotiate contracts at the next available option period. Officials should initiate appropriate administrative action against U.S. Army Medical Research Acquisition Activity personnel responsible for the approval, award, and administration of cooperative agreements DAMD17-98-2-8011 and DAMD17-98-2-8012. A command instruction addressing cooperative agreement preparation at the U.S. Army Medical Research Acquisition Activity would help ensure similar problems do not reoccur. In addition, the Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer must initiate a preliminary review of potential Antideficiency Act violations. An operating budget should be developed for the Office of the Secretary of Defense Small and Disadvantaged Business Utilization. Both the U.S. Army Medical Research Acquisition Activity and the Office of the Secretary of Defense Small and Disadvantaged Business Utilization need to ensure that management controls exist so that program budgeting and contracting processes are performed correctly. (See the Finding section of the report for detailed recommendations.)

Management Comments and Audit Response. The Principal Assistant Responsible for Contracting, U.S. Army Medical Research and Materiel Command concurred with all recommendations directed to the U.S. Army Medical Research and Materiel Command and the Director, U.S. Army Medical Research Acquisition Activity except the recommendation to initiate appropriate administrative action against officials responsible for the approval, award, and administration of the cooperative agreements. The Principal Assistant argued that, in the instances cited, the law did not require competitive contracts and that there was no evidence of intentional misconduct or gross negligence as personnel were executing a request from high-level DoD procurement officials to use assistance agreements. We disagree and feel that the contracting officials involved in the award of the agreements should have known better. The Principal Assistant also contended that the report stated that cooperative agreements were used when prohibited. We disagree; the report stated that cooperative agreements were used when it was clearly in the best interest of the Government to use contracts that would have helped ensure that the Government received specific services that represented adequate value. We request that the U.S. Army Medical Research and Materiel Command reconsider its position and provide additional comments on the final report by June 10, 2003. See the Finding section of the report for a discussion of management comments and the Management Comments section of the report for the complete text of the comments.

We provided a draft of this report to the Under Secretary of Defense for Acquisition, Technology, and Logistics; the Under Secretary of Defense (Comptroller)/Chief Financial Officer; and the Director, Office of Small and Disadvantaged Business Utilization, Office of the Secretary of Defense on January 15, 2003. As of April 4, 2003, we had not received management comments from those offices. We request that those offices provide comments on the final report by June 10, 2003.

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Background

This audit was performed at the request of the current Director of the Office of the Secretary of Defense (OSD) Small and Disadvantaged Business Utilization (SADBU). The Director requested that we audit two OSD SADBU office cooperative agreements to determine whether work was performed as specified in the agreements and to determine whether the work provided value to the Government. The U.S. Army Medical Research Acquisition Activity (USAMRAA) awarded the two cooperative agreements in FY 1998 using Mentor Protégé Program funds. The cooperative agreements are between the OSD SADBU office and ScienceWise, Incorporated (ScienceWise), cooperative agreement DAMD17-98-2-8011, and between the OSD SADBU office and the United Negro College Fund (UNCF), cooperative agreement DAMD17-98-2-8012.

OSD SADBU Office. The OSD SADBU office mission is to enable the warfighter to gain access to the efficiency, innovation, and creativity of small businesses. The OSD SADBU office is authorized to employ 11 Government employees and also has contracted for 10 support staff. The office does not have an operating budget beyond receiving funds for payroll and travel, but receives approximately \$31 million annually in Mentor Protégé Program funds and also \$1 to \$2 million annually in Small Business Innovation Research funds. The OSD SADBU office supports such programs as the Mentor-Protégé Program, Small Business Innovation Research and Small Business Technology Transfer, Women-Owned Small Businesses, Historically Black Colleges and Universities/Minority Institutions (HBCU/MI), Indian Incentive Program, and Comprehensive Subcontracting Plan Test Program.

The OSD SADBU office assists numerous small businesses and disadvantaged businesses with issues related to DoD procurement. Small disadvantaged businesses are those small businesses owned and controlled by socially and economically disadvantaged individuals. In addition, the OSD SADBU office coordinates the DoD Mentor Protégé Program through policy guidance to Military Departments and Defense agencies and authorizes the use of Mentor Protégé Program funds. Each Military Department has a SADBU office that reports to the Military Department Secretary; however, each Military Department's SADBU office also coordinates with the OSD SADBU office. The OSD SADBU Director reports to the Under Secretary of Defense for Acquisition, Technology, and Logistics.

USAMRAA. The USAMRAA mission is to provide high-quality, timely, customer-focused contracting guidance and acquisition solutions to the U.S. Army Medical Research and Materiel Command. USAMRAA also supports the Fort Detrick Garrison and its military tenant activities, Army-wide projects sponsored by the Army Surgeon General, and numerous congressionally mandated programs, such as the Mentor Protégé Program.

Mentor Protégé Program. The FY 1991 National Defense Authorization Act (Public Law 101-510), section 831, established the Mentor Protégé Program. The purpose of the Program is to encourage major DoD contractors to assist in

improving small disadvantaged businesses' capabilities to perform as responsive subcontractors and suppliers. The DoD Comptroller provides funds to the OSD SADBUs office, which provides a portion of the funds to Military Departments and Defense agencies. The Mentor Protégé Program receives approximately \$31 million annually, which is used to fund cooperative agreements, the OSD SADBUs office support contract and other administrative costs, and mentor programs in the Military Departments and Defense agencies.

Cooperative Agreements. DoD 3210.6-R, "DoD Grant and Agreement Regulations," April 13, 1998 (DoDGARs), which implements the Federal Grant and Cooperative Agreement Act, provides DoD guidance for grants and cooperative agreements. Prior to April 13, 1998, an interim guidance version of DoD 3210.6-R was in effect. DoDGARs defines a cooperative agreement as a legal instrument that is used to enter into a relationship where the principal purpose is to provide value or assistance to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States. For cooperative agreements, substantial involvement is expected between a DoD organization and the recipient. Unlike contracts, the principle purposes of cooperative agreements are not for the direct benefit of the Government. Furthermore, the DoDGARs regulate cooperative agreements, whereas the Federal Acquisition Regulation (FAR) regulates contracts.

Cooperative Agreement DAMD17-98-2-8011. On April 2, 1998, USAMRAA awarded cooperative agreement DAMD17-98-2-8011 for \$603,049 to Federal Information Exchange, Inc., now known as ScienceWise. The purpose of the cooperative agreement was to promote the participation of HBCU/MI in Federal research, education, and assistance programs, principally through the Minority On-line Information Service (MOLIS), a database containing the capabilities of the HBCU/MI and faculty profiles. An HBCU is a historically black college or university that was established prior to 1964, is accredited, and whose principal mission was, and is, the education of African Americans. An MI is an institution of higher education whose enrollment of a single minority or a combination of minorities exceeds 50 percent of the total enrollment. After a base year, 2 option years, and a 1-year extension, the total value of the cooperative agreement reached \$2,887,539.

Cooperative Agreement DAMD17-98-2-8012. On April 30, 1998, USAMRAA awarded cooperative agreement DAMD17-98-2-8012 to UNCF for \$1,048,434. UNCF is an African-American education assistance organization. The purpose of the cooperative agreement was to offer technical assistance to HBCU/MI regarding DoD programs, requirements, procurement procedures, and proposal submissions. UNCF planned to provide the technical assistance by hosting conferences and workshops at various HBCU/MI located in different regions of the country. The cooperative agreement contained a base year and 3 option years. The total value of the cooperative agreement reached \$4,392,036, and a 1-year, no-cost extension was exercised at the end of the third option year.

Objectives

Our overall audit objectives were to determine whether the work as specified in the agreements was performed and whether the Government received adequate value from the work. In addition, we reviewed the legal uses of Mentor Protégé Program funds. We also reviewed management control programs related to the overall objective. See Appendix A for a discussion of the audit scope and methodology, review of the management control programs, and prior coverage related to the objectives.

Mentor Protégé Cooperative Agreements

The DoD Mentor Protégé Program was not properly managed. USAMRAA disregarded applicable regulations in awarding and administering cooperative agreements. USAMRAA and the OSD SADBUs office:

- used the Mentor Protégé Program to obtain services from contractors that were not qualified to participate in the Program,
- did not follow provisions of either the FAR or the DoDGARs and improperly awarded cooperative agreements when competitive contracts should have been used to obtain services, and
- did not exercise sound business judgment in administering or overseeing the cooperative agreements.

Both USAMRAA and the OSD SADBUs office did not adequately administer the agreements because of inadequate management controls. As a result, USAMRAA awarded legal instruments with little control over public funds and placed the Government at serious risk for lawsuits. In addition, the OSD SADBUs office used Mentor Protégé Program funds provided by Congress for efforts unrelated to the Program and violations of the Antideficiency Act may have occurred. Also, USAMRAA awarded approximately \$1 million of Government funds without proper authority, the OSD SADBUs office denied Mentor Protégé Program participants approximately \$12 million of Mentor Protégé Program funds, and a small business stated that it was put out of business by the OSD SADBUs office.

Federal Regulations and Cooperative Agreements

When the principal purpose of a transaction is the acquisition of services for the direct benefit of the Government, a contract shall be used. Contracts, as defined by the FAR, are mutually binding relationships obligating the seller to furnish supplies or services and the buyer to pay for them. Contracts include various types of commitments that obligate the Government to an expenditure of appropriated funds and, unless otherwise authorized, are in writing. However, contracts do not include grants and cooperative agreements, which are discussed in section 63, title 31, United States Code.

DoDGARs 22.305 states that grants officers shall use merit-based, competitive procedures to award grants and cooperative agreements in every case where required by statute, and to the maximum extent practicable, in all cases where not required by statute. DoDGARs 21.220 states that grants officers are responsible for ensuring that individual grants and cooperative agreements are used effectively in the execution of DoD programs, and are awarded and administered in accordance with applicable laws, executive orders, regulations, and DoD

policies. In addition, section 21.115 states that the head of each DoD Component that awards or administers grants and cooperative agreements, or his or her designee, is responsible for ensuring compliance with the DoDGARs within that DoD Component. DoDGARs 34.18 states that, “in accordance with 32 CFR [Code of Federal Regulations] 22.205(b), grants and cooperative agreements shall not provide for the payment of fee or profit to the recipient.” DoDGARs 34.12 states that the preferred method of payment is the “reimbursement method.” The “advance payment method” may be used in exceptional circumstances.

ScienceWise Cooperative Agreement. In August 1997, ScienceWise submitted an unsolicited proposal that resulted in a total value of \$2,067,349 for a cooperative agreement with the OSD SADBUs office to expand the MOLIS HBCU/MI database. USAMRAA awarded cooperative agreement DAMD17-98-2-8011 from April 15, 1998, through January 14, 1999, with 2 option years.

Under the agreement, ScienceWise maintained MOLIS, a database consisting mainly of minority universities. The database included institutional information for each university such as a general description, academic programs, degrees, accreditation, and research capabilities. MOLIS was used to electronically deliver, through e-mail, contract and grant information to HBCU/MI. MOLIS could also be used to electronically notify more than 40,000 HBCU/MI faculty and administrators about Government contract and grant opportunities. Prior to the cooperative agreement, DoD was funding the MOLIS effort through a cooperative agreement between ScienceWise and the Department of Energy.

UNCF Cooperative Agreement. In August 1997, UNCF submitted an unsolicited proposal that resulted in a total value of \$4,411,095 to the OSD SADBUs office for a cooperative agreement to provide technical assistance to HBCU/MI. USAMRAA awarded cooperative agreement DAMD17-98-2-8012 for \$1,048,434 from May 1, 1998, through April 30, 1999, with 3 option years.

Under the agreement, UNCF worked with the OSD SADBUs office and HBCU/MI to host conferences and workshops that provided information on Government grants and contracts available to HBCU/MI. UNCF had received a previous contract from DoD to strengthen the capacity of UNCF members to compete for DoD grants and contracts. The UNCF DoD Infrastructure Development Assistance Program existed to increase HBCU participation in DoD programs. The 1997 unsolicited proposal contained similar tasks.

Mentor Protégé Program

Cooperative agreements, with Mentor Protégé Program funding, were awarded to contractors that were not eligible as mentors, to develop opportunities for institutions of higher learning and nonprofit organizations that were not eligible as protégés, and for purposes other than furthering the objectives of the Mentor Protégé Program.

Mentor Protégé Program Eligibility. As provided by the FY 1991 National Defense Authorization Act, section 831, prospective mentor firms must meet eligibility requirements in order to furnish assistance to small disadvantaged businesses as part of the Mentor Protégé Program. To be eligible as mentors,

during the fiscal year preceding the fiscal year in which the mentor firm enters into the agreement, the total amount of the Department of Defense contracts awarded such mentor firm and the subcontracts awarded such mentor firm under Department of Defense contracts was equal to or greater than \$100,000,000

The prospective protégé firms must be small disadvantaged business concerns. Mentors and protégés enter into mentor protégé agreements that include developmental programs for the protégés, including factors to assess the developmental progress of the firms under the Program and the anticipated number and types of subcontracts to be awarded to protégé firms. The OSD SADBUs office is responsible for reviewing and approving applications from prospective mentor firms.

HBCU/MI Assistance. USAMRAA and the OSD SADBUs office awarded cooperative agreements to ScienceWise and UNCF for efforts in support of the HBCU/MI programs and not the Mentor Protégé Program. The HBCU/MI program is one of the six programs administered by the SADBUs office. However, HBCUs and MIs were not eligible as protégés, as they were not small disadvantaged business concerns, but nonprofit institutions.* ScienceWise and UNCF did not qualify as mentor firms because there was no evidence that either met the statutory requirements for becoming a mentor. The statutory purpose of the Mentor Protégé Program was not met as the cooperative agreements did not involve major DoD contractors furnishing assistance to disadvantaged small business concerns. In addition, section 831 of the FY 1991 National Defense Authorization Act does not provide for cooperative agreements to be used in support of the Mentor Protégé Program.

Award of Cooperative Agreements

USAMRAA improperly awarded cooperative agreements when competitive contracts should have been used to obtain services. Cooperative agreements set generalized requirements while contracts usually have specific statements of work, require competition, and contain performance measures to evaluate contractor performance. The agreements also included provisions that are counter to Federal regulations for grants and cooperative agreements. The ScienceWise cooperative agreement allowed profit/fee to be included in the agreement under the guise of cost of money and increased labor rates, allowed advance payments to a for-profit organization without justification, and was extended for an additional year without legal authority.

*Business concerns are defined by the Small Business Administration as small businesses which are “organized for profit.”

Cooperative Agreements Versus Contracts. Prior to contacting USAMRAA, officials from the OSD SADBUs office, including the former Director, approached at least one other contracting activity, Defense Contracting Center-Washington, D.C. (formerly the Defense Supply Service-Washington). The officials were requesting two cooperative agreements be awarded, one to ScienceWise for the maintenance of the MOLIS and one to UNCF for technical assistance to HBCU/MI. The Defense Contracting Center declined to award the cooperative agreements because it did not believe that there was any specific statutory authority to award the cooperative agreements. The Defense Contracting Center believed contracts were the correct vehicle for obtaining the services. DoD Directive 5335.2, "Defense Supply Service-Washington," April 21, 1993, states that DoD Components located within the National Capital Region shall use the services of Defense Contracting Center-Washington, D.C., to the maximum extent practicable. It appears that the former Director of the OSD SADBUs office desired cooperative agreements and "shopped" for a contracting activity that would award cooperative agreements without regard for the correct contracting vehicle.

There was no specific statute authorizing the use of those two cooperative agreements. Although USAMRAA cited section 2358, title 10, United States Code, "Research and Development Projects," as an authorizing statute, it was not a proper statutory authority since the cooperative agreements were not for research and development projects. USAMRAA routinely awarded cooperative agreements for medical research in support of the U.S. Army Medical Research and Materiel Command and obtained legal approval of the agreements from USAMRAA counsel during the cooperative agreement award process. The USAMRAA cooperative agreement award process included a legal review by the Judge Advocate Division. However, the USAMRAA counsel that approved the two agreements in question stated that in 1998 he had little experience with cooperative agreements and should not have approved either the ScienceWise or UNCF cooperative agreement.

According to the FAR, a contract should be used when the Government is purchasing services. The services included in the ScienceWise and UNCF cooperative agreements, MOLIS maintenance and HBCU/MI assistance, clearly were functions that could be contracted. Contracts require specific statements of work describing the services required, market research to determine if other sources of those services exist, and price negotiations to assure the Government received fair and reasonable prices. Cooperative agreements do not. The OSD SADBUs office used unsolicited proposals provided by the contractors instead of developing specific statements of work that defined the tasks to be accomplished. FAR 2.101 defines an unsolicited proposal as a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror. The OSD SADBUs office was responsible for determining requirements and developing statements of work that could be used in competitive contracting processes. The cooperative agreements did not contain specific statements of work; therefore, we could not determine if the tasks performed were the tasks that the OSD SADBUs office had planned when the cooperative agreements were awarded. In addition, the cooperative agreement files did not contain official justifications for sole source selections, or certifications that the Government had paid a fair and reasonable price for the services obtained.

A contributing factor to the USAMRAA award of the cooperative agreements was the 2 percent surcharge it receives from non-Fort Detrick commands for processing and administering cooperative agreements. USAMRAA contracting officials stated that they receive significant income from the 2 percent surcharge, without which they could not meet payroll requirements for contracting personnel. USAMRAA received approximately \$145,592 for awarding and administering the two cooperative agreements. If the Defense Contracting Center-Washington, D.C., had awarded contracts for the ScienceWise and UNCF efforts, it is likely that the \$145,592 would have been put to better use, there would have been specific statements of work, and there would have been increased assurance that the Government would receive measurable value from the work.

Competition Requirements. Although DoDGARs states that it is DoD policy to maximize competition when awarding cooperative agreements, grant officials at USAMRAA did not attempt to compete the requirement for the maintenance and expansion of the MOLIS when they awarded cooperative agreement DAMD17-98-2-8011. However, both USAMRAA and OSD SADBUs officials agreed that the requirement could have been competed. No official documentation existed as to why competition was not used and there was no evidence that other contractors had been contacted. The fact that ScienceWise submitted an unsolicited proposal for the requirement was not a valid justification for the Government to award sole source to ScienceWise. The use of cooperative agreement procedures allowed USAMRAA to bypass the requirements of FAR Subpart 15.6 pertaining to unsolicited proposals. The ScienceWise unsolicited proposal was for continuation of efforts to maintain and expand the MOLIS database, not for a new or unique idea. If ScienceWise's proposal had been subjected to normal FAR procedures, it would have had to be competed or a sole source procurement would have to be documented and justified.

Grant officials at USAMRAA did not attempt to compete the requirement for providing technical assistance to HBCU/MI when they awarded cooperative agreement DAMD17-98-2-8012. There are other organizations, including the American Indian Higher Education Consortium, the Hispanic Association of Colleges and Universities, and the National Association for Equal Opportunity that were capable of meeting the requirements of the cooperative agreement. No documentation existed as to why competition was not used. The fact that UNCF submitted an unsolicited proposal for the requirement was not justification for the Government to award sole source to UNCF. There was no reason that the OSD SADBUs office could not have developed a statement of work to competitively seek out contractors capable of efforts such as training HBCU/MIs in obtaining DoD contracts.

Performance Measures. The OSD SADBUs office did not effectively review efforts performed under the cooperative agreements and was unaware that ScienceWise had not fulfilled all of its proposed efforts. A disadvantage to the Government for using cooperative agreements versus procurement contracts is that performance measures are normally not required in assistance-type instruments such as cooperative agreements. There were no defined performance measures for either of the two cooperative agreements and contractor performance was not effectively monitored. For example, the ScienceWise

proposal included an easily measurable task to expand the MOLIS during the 3 years of the cooperative agreement by adding 150 additional HBCU/MI to the 214 already included, for a total of 364 participating HBCU/MI. However, the MOLIS was expanded by only 44 HBCU/MI during the 4-year period ScienceWise worked on the project. When questioned, the OSD SADBUs office had no knowledge of how many HBCU/MI had been added to the MOLIS during the 4 years of the agreement and had no explanation as to why the MOLIS was not expanded by the 150 HBCU/MI as stated in the ScienceWise proposal.

Disregard for the Regulations. In addition to awarding cooperative agreements when contracts would have been the proper vehicle, USAMRAA also disregarded Federal regulations relating to the cooperative agreements. On the ScienceWise cooperative agreement, USAMRAA allowed payments for profit/fee and made advance payments without justification in violation of DoDGARs. In addition, USAMRAA executed a 1-year extension of the cooperative agreement in violation of item 4 of the cooperative agreement, which cited controlling administrative and cost principles of Office of Management and Budget Circular No. A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," revised November 19, 1993, as further amended September 30, 1999. These are serious violations and the commanding officer of USAMRAA should perform a review and initiate appropriate administrative action against the responsible officials.

Profit/Fee. ScienceWise received over \$203,000 of profit/fee during the 4 years of the cooperative agreement. In FY 1997, ScienceWise delivered an unsolicited proposal to the OSD SADBUs office. In the unsolicited proposal, ScienceWise included an 8 percent profit/fee cost. However, when informed by USAMRAA that profit/fee is not an allowable cost in cooperative agreements, ScienceWise threatened to withdraw its proposal. To avoid losing the 2 percent administrative fee earned on non-Fort Detrick organizations' cooperative agreements that they administer, USAMRAA officials suggested that ScienceWise revise its proposal to include "cost of money" to compensate for the loss of profit/fee. Cost of money is an allowable cost. However, the use by ScienceWise was not documented or justified in the agreements officer's file. To make up for the balance of profit/fee not covered by the addition of cost of money to the agreement, ScienceWise also increased its labor rates. Some of the increased labor rates were reduced in subsequent ScienceWise proposals to levels closely resembling the initial proposed labor rates, thereby giving the appearance that the labor rates were increased on the revised proposal solely to compensate for the loss of profit/fee from the initial proposal.

The proposed profit/fee of 8 percent for the base year, 2 option years, and the 1-year extension would have totaled \$206,157 if ScienceWise had been paid according to the initial proposal. However, a total of \$203,059 was paid to ScienceWise for cost of money (\$119,189) and increased labor cost (\$83,870) during this same period. Therefore, USAMRAA officials knew that DoD regulations did not allow profit/fee to be paid to ScienceWise, but circumvented the prohibition by substituting cost of money and labor costs for profit/fee.

Payment Methods. Two payment methods are available for cooperative agreements between the Government and for-profit organizations: reimbursement and advance payments. Under the reimbursement method, the recipient requests reimbursement for costs incurred during a time period. Under the advance payments method, a DoD Component makes payment to a recipient based upon projections of the recipient's cash needs, or uses a predetermined payment schedule when the timing of the recipient's needs can be determined with sufficient accuracy.

ScienceWise was paid quarterly in advance for the services it would be providing over the next quarter. According to DoDGARs, the grants officer in consultation with the program official must judge that advance payments to for-profit organizations are necessary. The rationale for the judgment should be documented in the award file. However, USAMRAA officials did not document in the award file their rationale for allowing advance payments to ScienceWise, a for-profit organization. Their explanation for allowing advance payments was that they regularly do so; however, USAMRAA does business mostly with nonprofit organizations. Based on the fact that advance payments to for-profit organizations should only be allowed in exceptional circumstances, USAMRAA officials were negligent in allowing such payments since the reimbursement method would have been more advantageous for the Government.

Cooperative Agreement Extension. USAMRAA officials executed a 1-year extension of cooperative agreement DAMD17-98-2-8011 in violation of Federal regulations. Office of Management and Budget Circular A-110 states that a one-time extension of the expiration date of the award of up to 12 months may not be initiated if the extension requires additional Federal funds. USAMRAA officials violated this regulation by making two modifications to the cooperative agreement on September 11, 2000, and February 13, 2001, which resulted in an extension for an additional year, from January 15, 2001, through January 14, 2002, with an added cost of \$750,190. In addition, section 31 of the cooperative agreement, "Option to Extend the Term of the Cooperative Agreement," stated that the total duration of the agreement, including the exercise of any options, should not exceed April 14, 2001. Therefore, USAMRAA officials had no legal authority to extend the cooperative agreement beyond April 14, 2001.

Administration of Mentor Protégé Cooperative Agreements

USAMRAA and the OSD SADBUs did not follow sound business practices and improperly encouraged ScienceWise to continue performance in the absence of a contract or other assistance instrument. USAMRAA and the OSD SADBUs improperly allowed ScienceWise to continue performance to the company's detriment. USAMRAA did not designate grant officer representatives and the services provided by the cooperative agreement with UNCF were duplicative of services provided by other SADBUs.

Negotiations With ScienceWise. When the time period of the unauthorized final extension to the agreement began to expire, USAMRAA and the OSD SADBUs office began negotiations with ScienceWise to further continue the MOLIS effort.

In July 2001, ScienceWise submitted an unsolicited proposal to the OSD SADBUs office to continue the effort from January 16, 2002, through January 15, 2003, with 2 additional option years. However, the award of a new contracting instrument was delayed because of disagreement within USAMRAA as to whether a cooperative agreement or procurement contract should be awarded. The USAMRAA legal office nonconcurred with the use of a cooperative agreement. However, ScienceWise believed all was going fine and that a new award was imminent. A USAMRAA contract specialist was the main Government point of contact with ScienceWise. The USAMRAA contract specialist inappropriately told ScienceWise that a new contracting instrument could be backdated to cover ScienceWise for efforts expended after the expiration of cooperative agreement DAMD17-98-2-8011. The USAMRAA contract specialist stated that there was a good faith agreement between the OSD SADBUs office and ScienceWise for continued assistance until the new contracting vehicle was awarded even though the SADBUs office has no authority to award contracts or assistance agreements. Therefore, ScienceWise continued working on the MOLIS through March 8, 2002, after expiration of cooperative agreement DAMD17-98-2-8011 on January 14, 2002, in anticipation of being awarded a new cooperative agreement. However, the OSD SADBUs office ultimately decided not to fund the MOLIS effort past January 14, 2002.

ScienceWise has an outstanding \$95,000 claim against the Government for services provided from January 16, 2002, through March 8, 2002. ScienceWise is planning legal action against the Government to recoup the \$95,000 plus costs for damages suffered. According to the former owner of ScienceWise, the \$95,000 in lost revenue resulted in him selling his business and ceasing all MOLIS operations. The consequences of the handling of the situation by the OSD SADBUs office and USAMRAA are best summed up in two e-mails from the former President and principal owner of ScienceWise to the Director, OSD SADBUs office:

. . . in my 30 years of working with the Federal Government in many capacities, this has been the worst treatment of a small business and the minority community, minority online information service, that I have ever seen, heard of or been associated with.

It seems ironic that the Office of Small and Disadvantaged Business put a small business out of business.

Designation of a Grant Officer Representative. USAMRAA did not formally designate an OSD SADBUs office grant officer representative that was instructed in the restrictions of a grant officer representative's authority. Although not required, USAMRAA grant officials stated that they normally designate grant officer representatives because it is a good business practice. However, no formal designation of grant officer representatives was made for cooperative agreements DAMD17-98-2-8011 and DAMD17-98-2-8012 due to what USAMRAA officials deemed "a clerical oversight." Although OSD SADBUs individuals were acting in that capacity, they never received formal written designation from the USAMRAA grants officer and, therefore, had no authority to perform grant officer representative functions. Typically, a grant officer representative would be delegated authority and duties such as:

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- coordinating and consulting with the grantee on all programmatic and technical matters which may arise in the administration of the grant or cooperative agreement;
 - evaluating project performance to ensure compliance with the grant or cooperative agreement terms and conditions; and
 - receiving and reviewing required grantee reports (progress, financial, or other) on behalf of the Government to ensure that they are timely and complete.

The written designation would also list the limitations of what the grant officer representative could approve and what must be approved by an authorized grants officer. Designation letters usually specify that the grant officer representative cannot:

- modify or alter the grant/cooperative agreement or any of its terms or conditions;
- waive the Government's rights with regard to the grantee's compliance with stated grant program or financial requirements or with grant terms or conditions; or
- approve any actions which would result in increased cost of performance.

A formal written designation would have provided the OSD SADBUs individuals with written guidelines as to their authority and responsibilities, which may have helped to avoid some of the problems identified during the audit.

Services Provided. The services provided by the UNCF cooperative agreement to HBCU/MI were, in many cases, duplicative of services available through other SADBUs offices. For example, the Defense Logistics Agency SADBUs office operates Procurement Technical Assistance Centers, which are available throughout the country to assist small businesses in doing business with the Government. Although Procurement Technical Assistance Centers are aimed to assist businesses, they are available to assist HBCU/MI that want to participate in DoD contracting. Many of the technical assistance services provided by UNCF can be obtained from Procurement Technical Assistance Centers including training in electronic research administration, fundamentals of sponsored programs administration, and developing winning proposals.

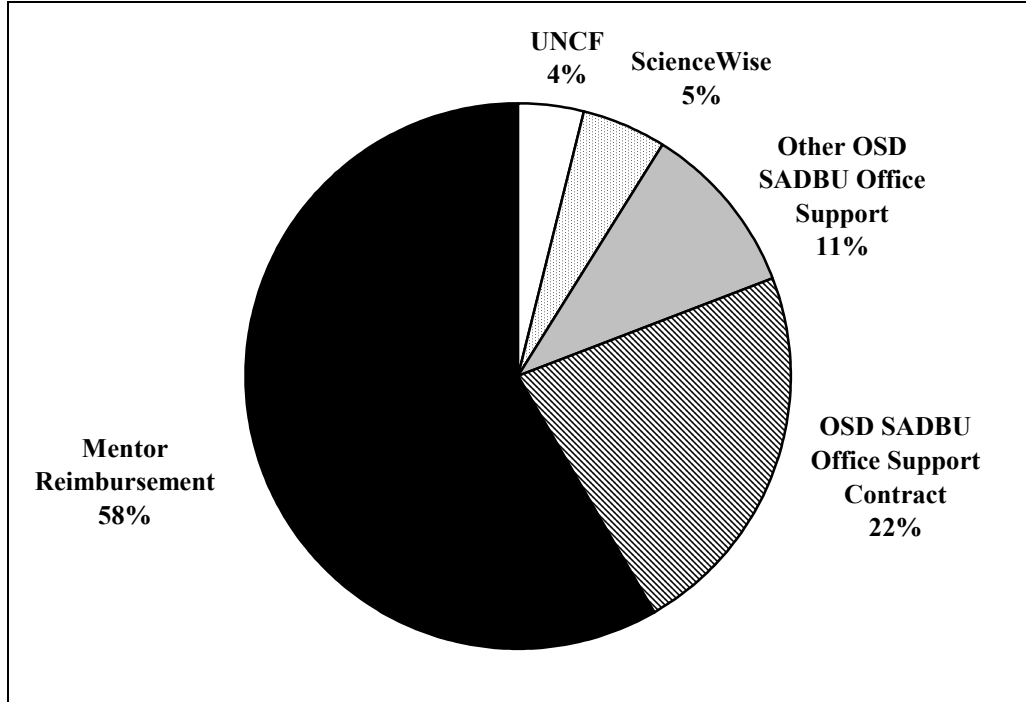
Mentor Protégé Program Funds

A potential Antideficiency Act violation may have occurred. The Under Secretary of Defense (Comptroller)/Chief Financial Officer should initiate a preliminary review of the potential violation. DoD 7000.14-R, "DoD Financial Management Regulation," volume 14, March 1998, establishes procedures for DoD Components to use in identifying, investigating, reporting, and processing

violations of the Antideficiency Act. The OSD SADBUs office did not employ Mentor Protégé Program funds according to statute. The OSD SADBUs office, in the absence of an operating budget, authorized Mentor Protégé Program funds for the cooperative agreements with ScienceWise and UNCF. The use of Mentor Protégé Program funds for the cooperative agreements and for OSD SADBUs office support was questionable because the Act does not allow the use of Mentor Protégé Program funds for other programs or purposes. In addition, the existing audit trail of financial documents from the OSD SADBUs office and the Washington Headquarters Service is insufficient to accurately trace the distribution of Mentor Protégé Program funds to the Military Departments and Defense agencies.

The OSD SADBUs office authorized \$7.3 million of Mentor Protégé Program funds to support cooperative agreements with ScienceWise and UNCF over the life of the agreements. By using Mentor Protégé Program funds for the cooperative agreements and other administrative purposes, it denied mentor firms approximately \$12 million that could have been used to assist in the development of protégé firms. Instead of applying all of the funds to mentor reimbursements, the OSD SADBUs office authorized 42 percent of Mentor Protégé Program funds for the cooperative agreements with ScienceWise and UNCF, an OSD SADBUs office support contract, and various other OSD SADBUs office support expenses.

Other Uses of Mentor Protégé Funds. Our review concentrated on the budgets of Mentor Protégé Program funds from FY 2000 through FY 2002 as older documentation was insufficient to analyze the purposes for which funds were budgeted or used. In addition to supporting the cooperative agreements, the OSD SADBUs office authorized FY 2000 through FY 2002 Mentor Protégé Program funds for mentor reimbursement, an OSD SADBUs office support contract, and other OSD SADBUs office support. The following figure illustrates the purposes for which the OSD SADBUs office authorized FY 2000 through FY 2002 Mentor Protégé Program funds.



Use of Mentor Protégé Program Funds (FY 2000 – FY 2002)

UNCF. As of April 29, 2002, the OSD SADBUs office had authorized \$1.1 million in FY 2000 through FY 2002 Mentor Protégé Program funds for the cooperative agreement with UNCF. The \$1.1 million represented 4 percent of the total \$28.7 million that the OSD SADBUs office had authorized.

ScienceWise. As of April 29, 2002, the OSD SADBUs office had authorized \$1.4 million in FY 2000 through FY 2002 Mentor Protégé Program funds for the cooperative agreement with ScienceWise. The \$1.4 million represented 5 percent of the total \$28.7 million that the OSD SADBUs office had authorized.

Other OSD SADBUs Office Support. As of April 29, 2002, the OSD SADBUs office had authorized \$3 million in FY 2000 through FY 2002 Mentor Protégé Program funds for various forms of OSD SADBUs office support in addition to services provided under the annual OSD SADBUs office support contract. The \$3 million represented 11 percent of the total \$28.7 million that the OSD SADBUs office had authorized. The various OSD SADBUs office support services, which included advertising and travel expenses, did not involve mentor reimbursements.

OSD SADBUs Office Support Contract. As of April 29, 2002, the OSD SADBUs office had authorized \$6.4 million in FY 2000 through FY 2002 Mentor Protégé Program funds for the OSD SADBUs office support contract. The office support contract was established to obtain professional services and systems in support of the management, implementation, and execution of OSD SADBUs office programs. Specific tasks to be performed by the contractor included database management, statistical analysis and reporting, outreach,

conference and symposia, and program management. The \$6.4 million represented 22 percent of the total \$28.7 million that the OSD SADBUs office had authorized. Although some tasks included support of the Mentor Protégé Program or efforts with a clear nexus with the Mentor Protégé Program, the OSD SADBUs office support contract did not solely support the Mentor Protégé Program or involve mentor reimbursements.

Mentor Reimbursement. As of April 29, 2002, the OSD SADBUs office had authorized payments totaling \$28.7 million in FY 2000 through FY 2002 Mentor Protégé Program funds. Of the \$28.7 million, the OSD SADBUs office used \$16.7 million, or 58 percent, for reimbursing mentors under Military Department and Defense agency mentor protégé agreements. The OSD SADBUs office used the remaining \$12 million, or 42 percent, for payment of various forms of OSD SADBUs office support.

Budget Documentation. The OSD SADBUs office personnel did not maintain sufficient documentation to determine whether the Military Departments and Defense agencies received Mentor Protégé Program funds as budgeted. The OSD SADBUs office uses the Washington Headquarters Service to process funding documents. However, existing documentation did not facilitate a viable comparison between the amount of Mentor Protégé Program funds that was budgeted for each Military Department or Defense agency and the amount that was authorized for mentor reimbursement under Military Department and Defense agency mentor protégé agreements. For instance, the FY 2000 Mentor Protégé Program budget stated that the Navy would receive \$7.0 million in FY 2000 Mentor Protégé Program funds for Navy mentor protégé agreements. As of April 29, 2002, records at the OSD SADBUs office and at the Washington Headquarters Service appeared to indicate that the Navy had received less than \$1 million of the budgeted \$7.0 million. However, Navy SADBUs officials reported that, as of July 25, 2002, nearly \$5.7 million in FY 2000 Mentor Protégé Program funds was obligated to the Navy and an additional \$1.3 million had been identified for the Navy. In addition, OSD SADBUs office and Washington Headquarters Service records could not be used to determine the amount of Mentor Protégé Program funds that was received by the Army Mentor Protégé Program. The Air Force received its budgeted Mentor Protégé Program funds at one time each fiscal year, a method that made the funding easily traceable.

USAMRAA and OSD SADBUs Office Management Controls

USAMRAA Management Controls. The management control program at USAMRAA did not include the award and administration of cooperative agreements as an area of review. Therefore, the management control program was inadequate to provide reasonable assurance that DoDGARs and other Federal regulations were properly adhered to during the cooperative agreement award and administration process. In FY 2001, according to USAMRAA personnel, USAMRAA awarded approximately \$548 million in grants and cooperative agreements. Management controls could have eliminated the grants officer violations, which cost the Government close to \$1 million, a combination of the

\$750,000 cost of the unauthorized year extension and the \$203,000 of profit/fee paid ScienceWise, and could have prevented the Government from being at risk for a \$95,000 claim/lawsuit.

The USAMRAA uses standards developed by the International Organization for Standardization (ISO) as the basis for its management control program. Those standards include eight guiding principles: customer focus, leadership, involvement of people, process approach, system approach to management, continual improvement, factual approach to decision making, and mutually beneficial supplier relationship.

OSD SADBUs Office Management Controls. The OSD SADBUs officials were unaware of any management control program. The lack of a management control program contributed to the inappropriate use of cooperative agreements, the inadequate administration of the agreements, and the questionable use of Mentor Protégé Program funds.

Conclusion

The OSD SADBUs office did not responsibly manage the Mentor Protégé Program and failed in its stewardship responsibilities for taxpayers' monies. In addition, USAMRAA awarded cooperative agreements, legal devices that give financial assistance to organizations performing public services used only when authorized by law, to contractors providing services to the Government, which violated Federal regulations. The use of cooperative agreements resulted not only in the problems that there were no specific statements of work, no performance measures, and no certifications of reasonable costs, but also in the lack of controls inherent with cooperative agreements. USAMRAA also allowed costs of approximately \$1 million to be charged to the Government for inappropriate profit/fee and an inappropriate extension of performance on a cooperative agreement. In addition, from FY 2000 through FY 2002, the OSD SADBUs office denied Mentor Protégé Program participants approximately \$12 million of Mentor Protégé Program funds and may have violated the Antideficiency Act.

Management Comments on the Finding and Audit Response

U.S. Army Medical Research and Materiel Command Comments. The Principal Assistant Responsible for Contracting, U.S. Army Medical Research and Materiel Command responded to the draft report finding on Mentor Protégé Cooperative Agreements. The Principal Assistant stated that the draft report only briefly addressed the objectives of the audit and concluded that, because there were not specific statements of work or certifications in the acquisition files, the audit team could not determine whether the work as specified in the agreements was performed or whether the Government received adequate value from the work. The Principal Assistant noted that the U.S. Army Medical Research and

Materiel Command never received any complaints of non-performance or lack of value, and that the draft report cited no examples of required work that was not performed or that the amount paid was not fair value.

The Principal Assistant nonconcurred with the draft report comment that cooperative agreements do not bring a direct benefit to the Government and stated that there is no prohibition against the Federal government receiving direct benefit for participating in a cooperative agreement. He quoted section 6303, title 31, United States Code, which states:

An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when (1) the principal purpose is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government

The Principal Assistant disagreed with the draft report statement that the DoDGARs regulate cooperative agreements and the FAR regulates contracts, stating that, “there is an absolute relationship between the DoDGAR and FAR.” The Principal Assistant also disagreed with the conclusion that using cooperative agreements avoided the requirements of FAR 15.6, stating that, “the cooperative agreements were written under the authority . . . [of section 2302, title 10, United States Code] and DoDGAR, which have very little to do with the FAR.”

The U.S. Army Medical Research and Materiel Command nonconcurred with the statement that USAMRAA improperly awarded cooperative agreements and disagreed with the statement that USAMRAA awarded legal instruments with little control over public funds, stating that, “the cost principles referenced in the agreement provide the same level of control as would any contract issued in its stead.” The Principal Assistant argued that competitive contracts were not required by law and that to fault the contracting activity for selecting cooperative agreements and then for an additional error for every difference between cooperative agreements and procurement contracts was unfair.

The Principal Assistant also stated that required exceptional circumstances existed that justified advance payments to ScienceWise. The Principal Assistant emphatically denied the allegation that USAMRAA was influenced by receiving a 2 percent surcharge to administer cooperative agreements and requested that the final report be amended to delete any such insinuation. The Principal Assistant stated that the draft report incorrectly interpreted Office of Management and Budget Circular A-110 as prohibiting all contract extensions when it actually only prohibits more than one unilateral, no-cost extension.

USAMRAA nonconcurred that the appointment of a Grant Officer’s Representative would have resulted in different outcomes resulting from the awards of the cooperative agreements stating that there was no requirement to appoint a representative in these cases. USAMRAA nonconcurred that lack of management controls cost \$1 million. The Principal Assistant stated that the draft

report was incorrect in noting that award and administration of cooperative agreements was not an area of review for management controls, stating that USAMRAA is the Army's only acquisition activity meeting international quality standards.

USAMRAA nonconcurred with the draft report statement that there was no specific statute authorizing the use of cooperative agreements for the Mentor Protégé Program. The Principal Assistant stated that there was an incorrect citation used in the request for approval for an award of a cooperative agreement, stating that the correct citation was section 2302, title 10, United States Code.

Audit Response. At the heart of this report regarding USAMRAA is the question of when it is appropriate to use cooperative agreements and competitive contracts. As stated in the draft report, cooperative agreements are used to provide assistance to the recipient to carry out a public service. Contracts are mutually binding documents obligating the seller to furnish supplies or services and the buyer to pay for them. When an activity has stewardship responsibilities over taxpayers' funds, as all contracting activities do, that activity has an obligation to use the contracting vehicle that is in the best interest of the Government. The point of disagreement with the U.S. Army Medical Research and Materiel Command is not that cooperative agreements were used when prohibited, but that cooperative agreements were used when it was clearly in the best interest of the Government to use contracts, thereby ensuring the Government received specific services and that those services represented adequate value.

Our objectives reflected the concerns of the current OSD SADB Director, who requested this audit. We agree with U.S. Army Medical Research and Materiel Command comments that required specificity of cooperative agreement statements of work are less than those for contracts and that there is no requirement to ensure fair and reasonable prices are paid for services received under cooperative agreements. Therefore, we reiterate that for the services received through these cooperative agreements, we are not able to determine whether the work was performed or had value equal to the costs to the Government.

We revised the final report to read, "Unlike contracts, the principal purposes of cooperative agreements are not for the direct benefit of the Government." However, the mentor protégé cooperative agreements were used to acquire, by purchase, services for the direct benefit of the Government, which section 6303, title 31, United States Code does not prohibit, but does state clearly that it is not the reason for which cooperative agreements are to be used. We agree that there is a relationship between the DoDGARs and the FAR but disagree that cooperative agreements with general statements of work and without certified reasonable prices have cost principles with equivalent levels of control to those of competitive contracts.

If exceptional circumstances that justified advance payments to ScienceWise existed, there was no documentation of those circumstances in the award file. As stated in the draft report, such documentation is required. During the audit, USAMRAA officials stated that the revenue from the 2 percent surcharge was necessary to fund salaries and other expenses of acquisition personnel. The

USAMRAA reliance on the 2 percent surcharge to meet payroll expenses creates an appearance that USAMRAA may unduly accommodate customers to receive additional funds. Therefore, the draft report was not revised. The U.S. Army Medical Research and Materiel Command's comments regarding the interpretation of Office of Management and Budget Circular A-110 seem to suggest that modifications to cooperative agreements are bilateral agreements. We do not agree.

Section 2302, title 10, United States Code does not authorize mentor protégé cooperative agreements.

Recommendations, Management Comments, and Audit Response

1. We recommend that the Commanding Officer, U.S. Army Medical Research and Materiel Command:

a. Conduct a review of all active cooperative agreements awarded by the U.S. Army Medical Research Acquisition Activity to identify agreements that provide direct benefit to the Government or should have been awarded by contract. If other improper agreements are found, action should be initiated to terminate and negotiate a contract at the next available option period.

Management Comments. The Principal Assistant Responsible for Contracting, U.S. Army Medical Research and Materiel Command concurred, stating that the review will be completed in the next 60 days. He commented that the selection of procurement versus assistance is a timely issue.

b. Initiate appropriate administrative action against U.S. Army Medical Research Acquisition Activity officials responsible for the approval, award, and administration of cooperative agreements DAMD17-98-2-8011 and DAMD17-98-2-8012.

Management Comments. The Principal Assistant Responsible for Contracting, U.S. Army Medical Research and Materiel Command nonconcurred, stating that, based on the information available, there was no evidence of any intentional misconduct or gross negligence. At worst, personnel uncritically, and in good faith, accepted the recommendations and executed the requests of very high-level DoD officials in the procurement chain, whose correspondence stated that assistance agreements were the appropriate instruments.

Audit Response. The U.S. Army Medical Research and Materiel Command identified two memorandums from the Deputy Assistant for Procurement, Office of the Under Secretary of Defense for Acquisition and Technology dated October 6 and October 7, 1997, as critical documents in the acquisition files for the cooperative agreements. These high-level DoD official memorandums were both addressed to the Director, OSD SADB, and were forwarded to USAMRAA. An OSD SADB office employee who, in 1997, reported to a

previous OSD SADBUDirector, not the OSD Director of Procurement Policy, signed those memorandums. Although the letterhead and the signature block on the memorandums might have been misleading to the uninformed, USAMRAA coordination with the OSD SADBUDoffice should have made it obvious that USAMRAA was dealing with an OSD SADBUDofficial, not a DoD procurement policy official. On January 23, 2003, the previous OSD SADBUDDirector was indicted on 12 counts, including bribery and money laundering. The employee who signed the memorandums continued to work for the OSD SADBUDoffice.

Despite any confusion that may have been created by the memorandums, USAMRAA contracting officials should have known better than to award the agreements. The services provided under the agreements clearly should have been contracted; USAMRAA legal counsel stated that a contract would have been the appropriate vehicle. In addition, the requirements under the agreements could have been competed but no documentation existed as to why competition was not used. Further, as stated in the report, neither agreement met the requirements of the Mentor Protégé Program. We believe that USAMRAA contracting officials awarded agreements when their training should have armed them with knowledge that the awards were improper. In holding warrants, USAMRAA contracting officials had a responsibility to use the contractual instruments that were in the best interest of the Government. We request that the U.S. Army Medical Research and Materiel Command reconsider its position and provide additional comments on the final report.

2. We recommend that the Director, U.S. Army Medical Research Acquisition Activity:

a. Establish management controls that ensure decisions on contract and assistance instruments are reviewed by well-trained, capable personnel throughout the review process, including legal review.

Management Comments. The Principal Assistant concurred, stating that the Legal Office and USAMRAA had entered into a Memorandum of Understanding in 2002 to maximize the use of the command’s legal assets. New initiatives include the creation of a five-lawyer acquisition legal support team, daily on-site legal support, increased legal reviews, and legal education programs for USAMRAA key staffs.

b. Develop a command instruction that addresses when to use cooperative agreements and issues that should be addressed within cooperative agreements. The instruction should cover the basic fundamentals of DoD 3210.6-R, “DoD Grant and Agreement Regulations,” April 13, 1998, with particular emphasis on the difference between for-profit and nonprofit organizations, competition of cooperative agreements, and preferred payment methods.

Management Comments. The Principal Assistant concurred, stating that the command instruction had been completed in the spring of 2001. Further, USAMRAA plans to schedule and complete additional cooperative agreement training for all personnel within the next 60 days.

3. We recommend that the Under Secretary of Defense for Acquisition, Technology, and Logistics ensure funding is budgeted for the operations and maintenance of the Office of Small and Disadvantaged Business Utilization, Office of the Secretary of Defense.

4. We recommend that the Under Secretary of Defense (Comptroller)/Chief Financial Officer initiate a preliminary review to determine whether the improper use of Mentor Protégé Program funds resulted in an Antideficiency Act or other funding violation in accordance with DoD 7000.14-R, “Financial Management Regulations.”

5. We recommend that the Director, Office of Small and Disadvantaged Business Utilization, Office of the Secretary of Defense:

a. Discontinue use of Mentor Protégé Program funds for purposes other than mentor reimbursement of costs associated with providing assistance to protégés.

b. Establish procedures that ensure clear Mentor Protégé Program documentation exists in order to improve oversight of the purposes for which Mentor Protégé Program funds are used.

c. Employ adequate management controls to ensure contracts and allocated funds are used and administered appropriately.

Management Comments. As of March 24, 2003, the Under Secretary of Defense for Acquisition, Technology, and Logistics; the Under Secretary of Defense (Comptroller)/Chief Financial Officer; and the Director, Office of Small and Disadvantaged Business Utilization, Office of the Secretary of Defense had not responded to a draft of this report. We request that the Under Secretary of Defense for Acquisition, Technology, and Logistics; the Under Secretary of Defense (Comptroller)/Chief Financial Officer; and the Director, Office of Small and Disadvantaged Business Utilization, Office of the Secretary of Defense provide comments in response to the final report.

Appendix A. Scope and Methodology

We researched applicable laws, regulations, and directives concerning DoD use of contracts, cooperative agreements, and grants. We reviewed cooperative agreements DAMD17-98-2-8011 and DAMD17-98-2-8012. We reviewed Mentor Protégé Program budgeting data from FY 1998 through FY 2002, funding authorization documents, and Standard Forms 272, Report of Federal Cash Transactions. We evaluated the amount of interaction between the OSD SADBUs office, ScienceWise, and UNCF.

During our audit, we visited the OSD SADBUs office; the Military Department and Defense agency SADBUs offices; USAMRAA; ScienceWise; UNCF; Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics; Defense Contracting Command – Washington; Defense Criminal Investigative Service; Washington Headquarters Service; and Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer. We interviewed USAMRAA contracting personnel and legal counsel, Directors or Deputy Directors of the Military Department and Defense agency SADBUs offices, a Defense Criminal Investigative Service investigator, and ScienceWise and UNCF personnel.

We addressed cooperative agreements DAMD17-98-2-8011 and DAMD17-98-2-8012 and Mentor Protégé Program funding from FY 1998 to FY 2002. We did not address OSD SADBUs office operations other than to determine the types of funding used and the OSD SADBUs office role in the two cooperative agreements. In addition, we did not examine the Military Department SADBUs offices or Military Department Mentor Protégé Programs.

We evaluated the methods USAMRAA used to award two cooperative agreements between the OSD SADBUs office and ScienceWise, DAMD17-98-2-8011, and UNCF, DAMD17-98-2-8012, using Mentor Protégé Program funding. Specifically, we analyzed whether the appropriate contract vehicle was used, whether the Government received a benefit from the cooperative agreements, and whether Mentor Protégé Program funding was properly allocated.

We reviewed ScienceWise and UNCF unsolicited proposals, statements of work, annual reports, cost proposals, and budgeted and actual expenses for the UNCF conferences. We also reviewed Mentor Protégé Program funding data from FY 1998 through FY 2002, funding authorization documents, and Standard Forms 272, Report of Federal Cash Transactions.

We performed this audit from April 2002 through January 2003 in accordance with generally accepted government auditing standards. Accordingly, we included tests of management controls considered necessary.

Use of Computer-Processed Data. We did not use computer-processed data to perform this audit.

General Accounting Office High-Risk Area. The General Accounting Office has identified several high-risk areas in DoD. This report provides coverage of the DoD Contract Management high-risk area.

Management Control Program Review

DoD Directive 5010.38, “Management Control (MC) Program,” August 26, 1996, and DoD Instruction 5010.40, “Management Control (MC) Program Procedures,” August 28, 1996, require DoD organizations to implement a comprehensive system of management controls that provides reasonable assurance that programs are operating as intended and to evaluate the adequacy of the controls.

Scope of the Review of the Management Control Program. We reviewed the USAMRAA ISO 9002 procedures relating to processing cooperative agreements and the adequacy of the OSD SADBUs office management control procedures related to the Mentor Protégé Program. We also reviewed management’s self-evaluation applications of those controls.

Adequacy of Management Controls. We identified material management control weaknesses at USAMRAA and the OSD SADBUs office, as defined by DoD Instruction 5010.40.

The USAMRAA management controls were inadequate to ensure that USAMRAA complied with applicable regulations in awarding and administering cooperative agreements. Recommendations 1.a., 2.a., and 2.b., if implemented, will correct the identified weaknesses and could result in significant savings for USAMRAA in the acquisition of services. A copy of the report will be provided to the senior official responsible for management controls in the U.S. Army Medical Command.

The lack of OSD SADBUs office management controls contributed to the use of questionable funding and improper uses of cooperative agreements. Recommendations 5.a., 5.b., and 5.c., if implemented, will correct the identified weaknesses and restore approximately \$4 million to the Mentor Protégé Program annually. A copy of the report will be provided to the senior official responsible for management controls in the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.

Adequacy of Management’s Self-Evaluations. The USAMRAA officials did not identify the procedures for awarding and administering cooperative agreements as an assessable unit or as an area to be reviewed under the ISO procedures and, therefore, did not identify or report the management control weaknesses identified by the audit.

The OSD SADBUs office did not have a discernable management control program and, therefore, did not identify or report the management control weaknesses identified by the audit.

Prior Coverage

During the last 5 years, the General Accounting Office (GAO) issued two reports discussing the Mentor Protégé Program. Unrestricted GAO reports can be accessed over the Internet at <http://www.gao.gov>.

General Accounting Office

GAO Report No. GAO-01-767, “Contract Management: Benefits of the DoD Mentor-Protégé Program Are Not Conclusive,” July 19, 2001

GAO Report No. GAO/NSIAD-98-92, “Defense Contracting: Sufficient, Reliable Information on DOD's Mentor-Protégé Program Is Unavailable,” March 30, 1998

Appendix B. Report Distribution

Office of the Secretary of Defense

Under Secretary of Defense for Acquisition, Technology, and Logistics
Director, Office of Small and Disadvantaged Business Utilization
Under Secretary of Defense (Comptroller)/Chief Financial Officer
Deputy Chief Financial Officer
Deputy Comptroller (Program/Budget)
Director for Acquisition Initiatives

Department of the Army

Assistant Secretary of the Army (Financial Management and Comptroller)
Auditor General, Department of the Army
Commanding Officer, U.S. Army Medical Command
Commanding Officer, U.S. Army Medical Research and Materiel Command
Director, U.S. Army Medical Research Acquisition Activity

Department of the Navy

Naval Inspector General
Auditor General, Department of the Navy

Department of the Air Force

Assistant Secretary of the Air Force (Financial Management and Comptroller)
Auditor General, Department of the Air Force

Other Defense Organizations

Director, Defense Contract Audit Agency

Congressional Committees and Subcommittees, Chairman and Ranking Minority Member

Senate Committee on Appropriations
Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Governmental Affairs
House Committee on Appropriations
House Subcommittee on Defense, Committee on Appropriations
House Committee on Armed Services
House Committee on Government Reform

Congressional Committees and Subcommittees, Chairman and Ranking Minority Member (cont'd)

House Subcommittee on Government Efficiency and Financial Management, Committee on Government Reform

House Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform

House Subcommittee on Technology, Information Policy, Intergovernmental Relations, and the Census, Committee on Government Reform

U.S. Army Medical Research and Materiel Command Comments



DEPARTMENT OF THE ARMY
US ARMY MEDICAL RESEARCH AND MATERIEL COMMAND
504 SCOTT STREET
FORT DETRICK, MARYLAND 21702-5012

REPLY TO
ATTENTION OF:

MCMR-AAP

13 March 2003


MEMORANDUM THRU ^{for ALB} Commander, US Army Medical Research and Materiel
Command, 504 Scott Street, Fort Detrick, MD 21702-5012

FOR Inspector General, Department of Defense, 400 Army Navy
Drive, Arlington, VA 22202-4702

SUBJECT: Report on Cooperative Agreements Supporting the Mentor
Protégé Program (Project No. D2002CF-0116)

1. Reference: DODIG letter dated January 15, 2003.
2. The references memorandum solicited comments from this
Activity regarding subject report. Those comments are enclosed.

Encl


KENNETH B. CONNOLLY
Principal Assistant
Responsible for Contracting

CF:
MCMR-ZA
MCMR-ZB
MCMR-ZC
MCMR-JA
MCMR-IR

U N C L A S S I F I E D

EXECUTIVE SUMMARY

(MCMR-AAP)

12 March 2003

(U) AGENCY COMMENTS ON THE REPORT ON COOPERATIVE AGREEMENTS SUPPORTING MENTOR PROTÉGÉ PROGRAM, DODIG. The report makes it difficult to decipher the findings from opinions and discussions related to the findings. Therefore, the following is presented as a distillation of the findings presented in the report and the US Army Medical Research Acquisition Activities position on those findings.

a. The OSD SADBUs may have misused the funding appropriated for the Mentor-Program leading to the possibility that an Anti-Deficiency Act violation may have occurred.

b. The OSD SADBUs inappropriately identified the ScienceWise and UNCF proposals as Mentor Protégé Program proposals.

c. The OSD SADBUs and USAMRAA did not maintain proper internal controls for the administration of the instrument.

d. The Cooperative Agreement awarded by USAMRAA was not the appropriate instrument.

e. USAMRAA did not follow assistance agreement cost principles when negotiating the agreement.

f. USAMRAA did not properly administer the agreement, because of inadequate management controls, mainly by not appointing a Grant Officer Representative.

g. USAMRAA awarded \$1 million of Government funds without proper authority.

U N C L A S S I F I E D

Agency Comments on the Report on
Cooperative Agreements Supporting Mentor Protégé Program, DODIG

1. Overview: The comments contained in this document are keyed to the pages of the draft report, Project No. D2002CF-0116. The guidance in the January 15, 2003 memo suggests that all comments from the Agency ". . . should indicate concurrence or non-concurrence with the finding and each applicable recommendation. Comments should describe actions taken or planned in response to agreed-upon recommendations and provide the completion date of the actions." Further, the comments shall ". . . state specific reasons for any non-concurrence and propose alternative actions, if appropriate."

a. Audit Objectives: In its out briefing, the DOD IG identified only two Objectives of the Audit. They are to determine whether the work specified in the agreements was performed and whether the Government received adequate value from the work. In its Draft Report, it identifies these Objectives as its first two, and primary Objectives (DR, p. 3).

b. However, as to these Objectives, the Draft Report merely concludes, in a few sentences on page 7 under the heading "Award of Cooperative Agreements," that, because there were not "specific statements of work," or "certifications" in the acquisition file that the government paid fair and reasonable prices, it cannot resolve those issues (DR, p. 7). This command never received any complaints of non-performance or lack of value, and the Draft Report cites no reports or complaints, even anecdotal, that the required work was not performed, or that the amount paid was not fair value.

2. Background:

a. The Federal Information Exchange (FIE) Award (DAMD17-93-2-8011).

(1). On 29 August 1997 FIE submitted an unsolicited proposal to the DOD for a cooperative agreement to expand the information gathering and reporting effort it was already performing concerning the research capabilities of historically black colleges and universities (HBCUs) and Minority Institutions (MIs).

(2). The purpose of this effort was to help HBCUs and MI to become more competitive for the award of government contracts, and thereby increase minority participation in federal contracting, a public good urged by the President (EO 12876) and Congress 10 USC §2323(a).

(3). The Deputy Assistant for Procurement, OUSD Acquisition and Technology, reviewed the FIE proposal. In his Memorandum of 6 October 1997, the Deputy reported to the OSD SABU that, in the past, data on the research capabilities of HBCUs and MIs had been collected "...through contracts and grants..." and the information was reported as required by the "contract or grant." The Deputy praised FIE's proposal; endorsed FIE, and recommend that a cooperative agreement be awarded to FIE. The OSD SADBUs subsequently forwarded a request for the award of a cooperative agreement, to FIE, to this command.

b. The College Fund/United Negro College Fund (CF/UNCF) Award (DAMD17-98-2-8012).

(1). On 13 August 1997, the CF/UNCF submitted an unsolicited proposal to DOD to collect and provide information about HBCUs/MIs to DOD and to assist those institutions in becoming more aware of, and competitive for, DOD contracts. The purpose of this effort was the same as the effort proposed by FIE.

(2). The Deputy Assistant for Procurement, OUSD Acquisition and Technology, reviewed the CF/UNCF proposal. In his Memorandum of 7 October 1997, the Deputy reported to the OSD SADBUs, that, in his opinion, the proposal presented great value for DOD and recommended that the CF/UNCF proposal be accepted in the form of a cooperative agreement. He also stated that this type of assistance had been provided thru contracts and grants. In that Memorandum, the Deputy also described the proposed approach as "innovative and comprehensive," and described the proposed recipient, CF/UNCF, as being "uniquely suited." The OSD SADBUs subsequently forwarded this request for execution to this command.

c. The request for cooperative agreements was staffed through this command, to include legal review. The instruments were awarded and administered. At no time did this command receive complaints from the "customer" (OSD SADBUs), or anyone else, that the recipients were not performing.

d. When, in 2001, the relationship with EIS (which by then had then become Sciencewise) was presented to counsel (the same one who reviewed these matters in March 1998), USAMRMC counsel nonconcurred in the use of a cooperative agreement, and USAMRAA supported him. This decision was based on all the surrounding circumstances," that USAMRAA should change the nature of instruments, See Matter of Maritime Administration Award-Cooperative Agreement for Privatization of Computer Aided Operations Research Facility - Reconsideration, B-227084.6, Dec. 19, 1988 at p. 4. Therefore, USAMRAA, on its own, had already taken the initiative that the Draft Report makes as its first recommendation, See Recommendation 1a.

e. USAMRAA advised OSD SADBUE that we should proceed along procurement contract lines. OSD SADBUE then decided to discontinue the effort.

3. Reference the Draft Report (DR, p.2):

a. Non-concur with the comment: "Unlike contracts, cooperative agreements do not bring a direct benefit to the Government." 31 U.S.C.6303 states that

"An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when -

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement."

b. The Draft Report makes the following statement about Cooperative Agreements (DR, p.2). "DOD 3210.6-R, "DOD Grant and Agreement Regulations," April 13, 1998 (DODGAR), which implements the Federal Grant and Cooperative Agreement Act,

provides DOD guidance for grants and cooperative agreements. Prior to April 13, 1998, an interim guidance version of DOD 3210.6-R was in effect. DODGAR defines a cooperative agreement as a legal instrument that is used to enter into a relationship where the principal purpose is to provide value or assistance to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States. For cooperative agreements, substantial involvement is expected between a DOD organization and the recipient. Unlike contracts, cooperative agreements do not bring a direct benefit to the Government. Furthermore, the DODGAR regulates cooperative agreements, whereas the Federal Acquisition Regulation (FAR) regulates contracts."

Non-concur with this statement. There is no prohibition against the federal government receiving direct benefit for participating in a cooperative agreement. A desired product from many cooperative agreements is intellectual property or a mutually beneficial outcome, both of which are direct benefit to the federal government. In fact, the DOD can only award agreements which are of interest to the Department.

c. Further, the statement that the DODGAR regulates cooperative agreements and the Federal Acquisition Regulation regulates contracts, tends to leave the reader with the assumption that there is no relationship between the DODGAR and FAR. This assumption is incorrect. There is an absolute relationship between FAR and DODGAR. For example: DODGAR §34.17 Allowable costs. [For Profit Organizations] cites the FAR as the regulation controlling cost principles for determining the allowability of cost on cooperative agreements with for-profit organizations. Also, in the absence of any guidance or direction pertaining to assistance agreements, the grants specialist will normally turn to the FAR for that guidance. Also many of the provisions recited in following OMB circulars for non-profit organizations are similar to those presented in the FAR:

Non-Profit Organizations follow:

- A-122 for cost principles
- A-110 for administrative requirements, and
- A-133 for audit requirements

d. There was intended from the very outset in its request to USAMRAA that the OSD SADBUE would be very much involved in the process to carry out the public purpose of support for the

Mentor Protégé Program. The instrument chosen to meet this public purpose was correctly a cooperative agreement. While arguable that a contract might have been another option, there is no evidence that a cooperative agreement was incorrect.

4. The Draft Report (DR,p.4), states that the DOD Mentor Protégé Program was mismanaged; and then states that USAMRAA, ". . . improperly awarded cooperative agreements. . ." USAMRAA nonconcur. Perhaps a case can be made that OSD SADBUD office did not monitor the progress of the effort, such does not support the conclusion of an improperly awarded action. In fact, the DODIG report later states that ". . . USAMRAA awarded legal instruments with little control over public funds. . ." The cost principles referenced in the agreement provide the same level of control as would any contract issued in its stead. As to issue of Anti-Deficiency, the contracting officer possessed a duly certified document indicating that the funds provided were appropriate and available to support this effort. The OSD SADBUD and the certifying official are the responsible parties for the fund citation. The report, 3 lines later, states that USAMRAA awarded \$1M without proper authority. These conclusions require some reconciliation; the Activity does not understand to what this refers.

5. The Draft Report (DR, p.4) states that competitive awards are mandatory where required by statute, but then fails to note which statute applies to the cooperative agreement cited in the Draft Report. The Draft Report further faults USAMRAA for the lack of competition in these awards (DR, p.8). The Federal Grant and Cooperative Agreement Act does not require competition, as does the Competition in Contracting Act. This was not a case where competition was required by law for the award of an assistance agreement, e.g., 10 USC §2361. Higher headquarters requested an award to two specific recipients -one of whom apparently was already being funded by DOD under a grant from the DOE. USAMRAA nonconcur.

6. The Draft Report (DR, p.5) states that advance payments (DODGAR 35.12) may be made only in exceptional cases. The DODGAR then goes to list the criteria of what constitutes "exceptional." The Draft Report does not explain its conclusion that these criteria were not satisfied. USAMRAA believes they were.

7. The OSD SADBUD had requested the award of a cooperative agreement, and USAMRAA appropriately examined that request and agreed to accommodate that request. This issue was the subject of intensive discussion between the OSD SABDU Office and USAMRAA staff. The OSD SADBUD presented a strong case for the instrument and supported its requests with documents contained in the file. The USAMRAA grants officer did properly seek authority to award a cooperative agreement in support of the OSD SADBUD's mentor protégé program. The grants officer's recommendation and USAMRAA Director's subsequent approval to award a cooperative agreement was based on the following information that was available to the grants officer and the approving official at the time that the decision was made.

a. The OSD SADBUD (DOD Senior Advisor and Program Manager for the Small Business Mentor-Protégé Program) evaluated the proposals and advised the grants officer that proposals met the criteria for inclusion and funding for the OSD Mentor-Protégé Program. (This is supported by the IG on page 6, 12th line, of its report.)

b. The OSD funds certifying official certified that the funds were available and for the purpose intended.

c. The Office of the Deputy Assistant for Procurement in OSD Acquisition and Technology, in October 1997 recommended the use of a Cooperative Agreement to the OSD SADBUD. The OSD SADBUD then concurred and directed the use of funds for HBCU/MI technical support be utilized to support a cooperative agreement.

d. DOE previously awarded a DOD-funded cooperative agreement for the same effort.

e. 10 USC 2302 authorized the use of a cooperative agreement in support of the mentor-protégé program.

f. The USAMRMC Legal Advisor concurred with use of a cooperative agreement.

8. The Draft Report (DR, p.6) discusses the selection of the award instrument. The selection of an assistance relationship is not as obvious as the Draft Report would suggest.

a. In addition to the rather authoritative pronouncements, and specific requests, from the highest levels of the DOD

Acquisition community to this subordinate command, in 1997-98, that these relationships should be cooperative agreements, there are other legitimate considerations that could support that decision.

b. The entire impetus of the Federal Grants and Cooperative Agreements Act was in reaction to the disparity in the federal government in the selection of assistance agreements and procurement contracts. In 1972, the Commission on Government Procurement reported that the relationship of grant activities to procurement was unclear and that agencies' uses of these instruments were inconsistent. The Commission specifically cited confusion in grant-type assistance relationships and procurement, and the lack of government-wide guidance for federal relationships and transactions.¹ As a result, on 3 February 1978, Congress passed the Federal Grant and Cooperative Agreements Act of 1977. Congress characterized the Act as "an initial step to eliminate the...confusion over the definition and understanding of legal instruments to carry put transactions and reflect the basic relationships between the Federal Government and non-federal entities."²

c. However, as the history of acquisition after the Act has shown, there still remains a great of confusion over whether and when to select an assistance agreement or a procurement contract. See Agencies Need Better Guidance for Choosing Among Contracts, Grants and Cooperative Agreements, Report of the Comptroller General, GGD-81-88, September 4, 1981. GAO often acknowledges the difficulty in making the proper selection, See e.g., Maritime Administration Award - Cooperative Agreement for Privatization of Computer-Aided Operations Research facility - Reconsideration, B-227084.6, Dec. 19, 1988.

d. A federal agency has broad flexibility and discretion in determining whether a transaction is procurement or assistance when it creates a relationship with a non-federal entity, Montana Human Rights Commission, HUDBCA No. 90-5305-C8, May 16, 1991, 91-2 BCA ¶23,993; Electronic Space Systems Corp., B-207122, 61 Comp. Gen. 428 (1982), 82-1 CPD ¶505. The way an agency classifies a transaction is a public statement of how the agency views its mission, its responsibilities and its relationship with the non-federal recipient, 2 US Code Cong. & Ad. News, 20.

¹ The Report of the Commission on Government Procurement, vol. I, pp. vii-viii, December 1972.

² S. Rep. No. 95-499, 95th Cong., 2d Sess., reprinted in 2 US Code Cong. & Ad. News 11 (1978)

e. As the Comptroller General has stated, the key question is not the benefit received, See Electronic Space Systems Corporation, B-207112, May 28, 1982 at p. 4, but rather whether the principal purpose of the arrangement is to serve the immediate needs of the federal government, or to provide assistance to a non-federal entity serving a public purpose. B-257430, Sept. 12, 1994 at p. 12.³ Here, the sole purpose of the effort was to enlarge and diversify the realm of federal recipients to include classes that the President and Congress have repeatedly said are under-represented. The payments to EIS and CF/UNCF were furthering a public purpose, as defined at the highest levels of the Executive and Legislative branches.

f. The Draft Report repeatedly cites the lack of similarity between the cooperative agreements and procurement contracts, e.g., in terms of competition, statements of work, etc., and faults USAMRAA for not having awarded an instrument with the characteristics of a procurement contract. These were intended to be cooperative agreements (just as high-level OSD personnel - to include the Deputy Assistant for Procurement, OUSD Acquisition and Technology - requested). If that was the incorrect acquisition vehicle, that is one thing, but the Draft Report is written so as to find an additional ground of fault for every point where cooperative agreements and procurement contracts differ. USAMRAA believes this is unfair criticism. USAMRAA cannot accept being faulted for selecting cooperative agreements, nor for an additional error for every difference between Cooperative agreements and procurement contracts (in fact, the Draft Report states that the specificity of our cooperative agreements met the "generalized requirements" standard for cooperative agreements, DR at Executive Summary Results, pp. 6, 7, 8).

9. The Draft Report (DR, p.7 and p.8) discusses a surcharge for services rendered by USAMRAA. The Draft Report alleges that a "contributing factor" for USAMRAA's actions was the two percent surcharge (DR, pp. 7-8). The clear import of this statement is that USAMRAA deliberately looked the other way, or bent the rules, etc. in order to collect fees. USAMRAA

³ USAMRAA disagrees with the Draft Report at p. 2 when it states that the receipt of a direct benefit by the United States precludes the use of an assistance agreement.

emphatically denies this allegation. It is requested that the Final Report be amended to delete any such insinuation.⁴

10. The Draft Report (DR, p.6) notes that the cooperative agreement allowed profit/fee to be included in the agreement. This is factually incorrect. It is true that the element of Cost of Money was proposed and considered in the negotiations of the agreement with ScienceWise, but no provisions were made to "approve" these costs. The supporting documentation and the contract specialist state that the Cost of Money was considered as a number to develop the overall award amount and budgetary ceiling, but the cost principles must still be adhered to. The final audit of the costs incurred in this agreement will advise on the allowability, reasonability and allocability of all costs. USAMRAA concurs that this is an area for improvement in training the contract specialists in the Activity.

11. The Draft Report (DR, p.7) states that there was no specific statute authorizing the use of cooperative agreements. USAMRAA nonconcur. There was incorrect citation used in the request for approval for an award of a cooperative agreement. The correct citation was 10 USC 2302.

12. Further, the Draft Report (DR, p.7) makes several references to FAR and FAR-like provisions regarding sole source and fairness and reasonableness of price. This discussion is not germane to the issue of a cooperative agreement.

13. The Draft Report (DR, p.7 and p.8) concludes that if no surcharge had been paid by OSD SADB to USAMRAA, it would have likely been put to better use. USAMRAA believes this is an issue for OSD SADB to address; but offers the following comments. The IG report appeared to confuse the issue of expense and opportunity costs, because the expense to DOD to award and administer the cooperative agreements over the 4 year period would probably be about the same, regardless which office handled the business. However, which funding was used to pay that expense would impact the opportunity costs for that fund.

14. The Draft Report concludes (DR, p.8) that the action as processed avoids the requirements of FAR 15.6, which deals with unsolicited proposals. The cooperative agreements were written

⁴ While USAMRAA would not deliberately bend the rules in any situation, it is noted that the amount in question is an insignificant number in the Activity's budget.

under the authority 10 USC 2302 and the DODGAR, which have very little to do with the FAR.

15. The Draft Report (DR, p.8) next discusses performance measures. It is the USAMRAA belief, in supporting the needs of the OSD SADBUs, that the statement of work (if a contract) or the description of the scope of the cooperative agreement would have been essentially the same, irrespective of the instrument. The available facts at the time were that the assistance agreement sought by the OSD SADBUs was within the law and the OSD SADBUs were carrying out its responsibility to encourage and support small and disadvantaged businesses. The OSD SADBUs correctly sought assistance in this effort through the award of cooperative agreements to carry out this public purpose. How effectively the OSD SADBUs accomplished its oversight and significant involvement is not disputed.

16. The Draft Report (DR, p. 9), incorrectly interprets the applicable Office of Management and Budget (OMB) Circular. The extensions in this case were not those contemplated under the OMB Circular, but rather the parties had agreed to this mechanism at the very outset of the agreement. The language of OMB Circular A-110 was never intended to exclude all other extensions, except unilateral, no-cost ones.

17. The Draft Report (DR, p.10) concludes that advance payments are only allowed in exceptional circumstances. This is a repeat of the finding on page 5 of the Draft Report; and here also this conclusion is not supported by the facts presented in the report.

18. The Draft Report (DR, p.11) states that the Contract Specialist coaxed ScienceWise to keep performing. That is not so. While she did inform ScienceWise that she expected OSD SADBUs to fund a new instrument (because that is what OSD SADBUs led her to believe), she did not encourage ScienceWise to perform without an award. We know of no "claim" from ScienceWise, and if ScienceWise sues, its case will be resolved against it on motion for summary judgment once it is shown that, even if ScienceWise's version of conversations was accepted, the Contract Specialist had no actual authority to obligate the United States in the absence of an award.

19. The Draft Report (DR, p. 10) criticizes USAMRAA for failure to appoint a Grants Officers Representative. Nothing in the

report established the program management and grants management skills of the OSD SADBUs office. OSD SADBUs involvement did occur; the contract specialists dealt with the OSD staff. At least quarterly through the performance period, they were queried regarding their satisfaction with the performance under the cooperative agreement(s). There was no requirement to appoint a representative in these cases. The "customer" (OSD SADBUs) was in a cooperative agreement with the recipients. It was in the best position to assess performance. Also, if USAMRAA had appointed a representative, the OSD SADBUs, in accordance with standard practice, would have been the office we requested to nominate and provide the representative. USAMRAA nonconcurrs that the appointment of a GOR would have resulted in any different outcome in these awards.

20. The Draft Report (DR, p.12) discusses potential antideficiency issues and states that USAMRAA misused Mentor Protégé Program funds (DR, p. 4).

a. OSD SADBUs provided this command with fund cites of 97 (DOD) 6 (FY 96) 0300 (three-year other procurement) money. DOD is specifically authorized to use procurement funds for the purpose of HBCU/MI efforts (10 USC §2323(b)(1)(A)). Furthermore, the fund cites were certified, thus entitling this organization to assume that they were the correct funds to be obligated.

b. If OSD SADBUs violated the Purpose Statute in such a manner that triggers a violation of the Antideficiency Act, USAMRAA was not, in any manner whatsoever, a culpable participant. It is requested that the Final Report make it clear that USAMRAA is not responsible for any Purpose Statute or Antideficiency Act violations.

21. The Draft Report (DR, p.15) states that a \$1M was lost. USAMRAA non-concurrs. As noted above, the extension was not inappropriate and the cost issue is subject to final audit. As to a claim, none exists.

22. Further, the Draft Report (DR, p.15) notes that USAMRAA did not include award and administration of cooperative agreements as an area of review. This statement is incorrect. As the Army's only acquisition activity meeting international quality standards, it has adopted quality continuous improvement in its procurement and business oversight. Over the last 5 years, it has established quality procedures and plans affecting its

entire procurement and assistance operations. It has integrated its assistance agreements into Standard Procurement System (SPS). It conducts quarterly reviews of its procurement and assistance pre- and post-award files. The Head of the Contracting Activity (HCA), through the Principal Assistant Responsible for Contracting (PARC) conducts annual Procurement Management Reviews. USAMRAA conducts semiannual reviews of its business and quality assurance processes by trained internal auditors and annually by an external ISO Registrar Auditor. It has a resident DCAA Financial Liaison Advisor (FLA) to assist in contract audit functions, source selections, and contractor rate advice. USAMRAA has co-located attorney advisors, who review all transactions over \$100,000.00. The legal staff participates and assists DOD and other federal agencies in assistance agreement policies, procedures, and training. The staff guest lectures on procurement and assistance agreements to such entities as the Army War College. Also, as was pointed out to the IG, approximately a year ago, USAMRAA awarded a Mentor-Protégé contract for the DA SADB. This contract was awarded under 10 USC 2302. (10 USC 2302 no longer authorizes the use of cooperative agreements to support the Mentor-Protégé Program), and the contract is administered by DCMA.

23. Finally, as noted in the Conclusion of the Draft Report, there remains an issue of whether the cooperative agreements were appropriate. Over five years ago, USAMRAA relied on the OSD SADB's knowledge of its own program and its knowledge of the appropriate use and authority for the use cooperative agreements. This authority to use cooperative agreements was correctly and completely staffed through the US Army Research and Materiel Command's Staff Judge Advocate and was subsequently approved. It is clear that the recipients of the awards did actively pursue the efforts to further the intended mission of the OSD SADB, consistent with the authority of the DODGAR, and related regulatory guidance. The OSD SADB was satisfied with that effort, and continued to support the work by funding optional periods.

Comments Specific To The Recommendations

a. Recommendation: 1a. That MRMC conduct a review of all active cooperative agreements to ensure that they meet the criteria for a cooperative agreement. While USAMRAA nonconcur with many of the Draft Report's Findings and Recommendations, the Audit has addressed an issue, the selection of procurement vs. assistance, that is timely and on which training is always appropriate. In conjunction with the training outlined in response to Recommendation 2d, below, we will conduct a review of active cooperative agreements to review their statutory authority and whether the criteria for their use has been satisfied. We expect this to be completed in the next 60 days.

b. Recommendation: 1b. That MRMC initiate appropriate administrative action against command personnel who were responsible for the approval, award and administration of the cooperative agreements. Non-Concur. Based on the information available, there is no evidence of any intentional misconduct or gross negligence. At worst, personnel uncritically, and in good faith, accepted the recommendations, and executed the requests, of very high-level DOD officials in the procurement chain, whose correspondence stated that assistance agreements were the appropriate instruments and that they had been used for these efforts in the past.

c. Recommendation 2a. That USAMRAA establish management controls that ensure an adequate level of trained personnel and legal support. Concur that there is always a need to "improve." As to "establish," as reported above in response to the Findings, USAMRAA already has in place substantial management controls. As to legal support, the Legal Office and USAMRAA entered into a Memorandum of Understanding last summer to maximize the use of the command's legal assets. Those initiatives include the creation of a five-lawyer acquisition legal support team; daily on-site legal support; increased legal reviews; legal education programs for USAMRAA and key staffs, etc. The command is also in the process of recruiting an additional experienced acquisition attorney.

d. Recommendation 2b. That USAMRAA develop command instruction on the proper use of assistance agreements. This has been done, and was in fact first offered, command-wide at the MRMC USAMRAA Conference in spring 2001. USAMRAA will

schedule, and complete, additional training for all USAMRAA personnel on this subject within the next 60 days. Its focus will be on the criteria for selecting procurement contracts, grants and cooperative agreements.

d. No comment on Recommendation Number 3. (Does not pertain to USAMRAA)

e. No comment on Recommendation Number 4. (Does not pertain to USAMRAA)

f. No comment on Recommendation Number 5. (Does not pertain to USAMRAA)

Team Members

The Contract Management Directorate, Office of the Assistant Inspector General for Auditing of the Department of Defense prepared this report. Personnel of the Office of the Inspector General of the Department of Defense who contributed to the report are listed below.

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