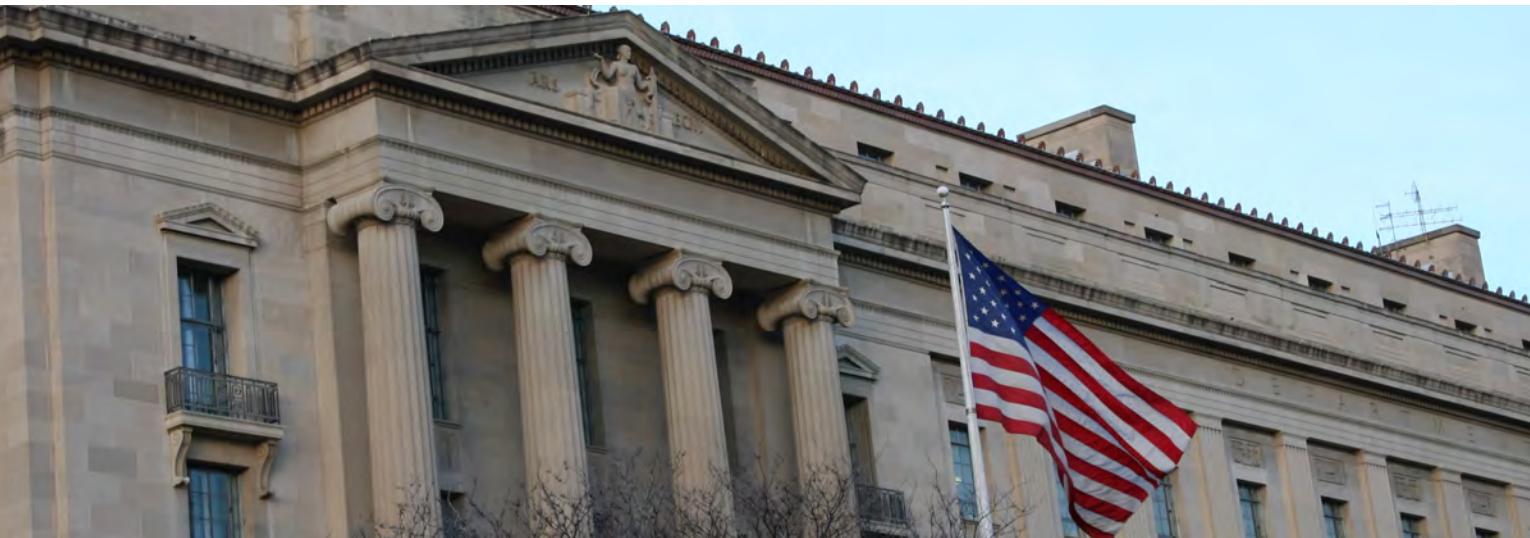




Office of the Inspector General
U.S. Department of Justice

OVERSIGHT ★ INTEGRITY ★ GUIDANCE



Audit of the Drug Enforcement
Administration's Asset Forfeiture
Program Task Orders Awarded to
Maximus, Inc., for Financial
Investigative Services

REDACTED FOR PUBLIC RELEASE

Redactions were made to the full version of this report. The redactions in the body of the report are on page 19 only and are of company proprietary information. The redactions in the auditees' responses, Appendices 5 and 6, are of individuals' names and an email address for privacy reasons, and of the identity of a company.

Audit Division 18-26

April 2018



Executive Summary

Audit of the Drug Enforcement Administration's Asset Forfeiture Program Task Orders Awarded to Maximus, Inc., for Financial Investigative Services

Objectives

The Department of Justice Office of the Inspector General completed an audit of two task orders issued by the Drug Enforcement Administration (DEA) to Maximus, Inc. (Maximus), under the Justice Management Division's (JMD) Professional Assistance Contracts (PACS) Number DJJ-08-C-1659.

The objectives of this audit were to assess: (1) the adequacy of JMD's and the DEA's administration and oversight of the PACS and its task orders; (2) **Maximus's compliance with the PACS and its task orders' terms and conditions, as well as applicable laws and regulations;** and (3) **Maximus's performance on the task orders, including financial management, monitoring, reporting, and progress toward meeting the contract goals and objectives.**

Results in Brief

We identified a number of concerns regarding the administration and oversight of the PACS task orders. First, the DEA was highly involved in the hiring of contract personnel, many of whom were former DEA employees. Such a role should be assessed to safeguard the integrity of the hiring process and mitigate the appearance of conflicts of interest. Second, the manner in which the DEA administered the task orders demonstrated several characteristics of a personal services contract, which federal rules prohibit. Third, the DEA approved Maximus charging rates for two contract personnel that did not meet specific PACS labor category qualifications without a required waiver, which placed the government at risk of overpaying for services. Several factors also raised questions regarding whether task order personnel were properly classified as independent contractors rather than employees.

Recommendations

Our report contains 11 recommendations to improve how JMD and the DEA administer and oversee Asset Forfeiture Program contract awards and performance.

Audit Results

In support of the Department of Justice's Asset Forfeiture Program (AFP), the DEA awarded a series of time and material task orders to Maximus to procure personnel to identify assets eligible for seizure and forfeiture by analyzing evidence and third-party databases. In FYs 2014 and 2015, the DEA issued task orders DJD-08-59-14-D-001 and DJD-08-59-15-D-002 under the competitively awarded PACS Indefinite Delivery/Indefinite Quantity contract vehicle through written delegated procurement authority acquired from JMD. The PACS includes a base period of 1 year with 6 additional 1-year option periods and a contract ceiling of \$475 million.

Maximus and its subcontractor Professional Risk Management, Inc. (PRM), provided 82 contract personnel to work on these task orders at DEA offices across the United States largely to support financial investigations. As of the completion date of the last PACS task order, the DEA had paid over \$85 million to Maximus for work performed. The DEA administratively closed the task orders and de-obligated all remaining funds effective June 27, 2017. This audit examined two of the task orders, under which Maximus had received as of January 2016 over \$26 million in AFP proceeds for work performed.

Hiring of Task Order Personnel - Despite contract terms that assigned prime contractor Maximus the responsibility of hiring task order personnel, DEA officials, mainly field office supervisors, remained decisively involved in selecting the personnel who worked on the task orders. Further, of the 82 personnel working under the task orders, 33 (40 percent) were former DEA employees with an average of 22 years working at the DEA. Of these 33 task order workers, 21 reported to the same DEA office in which they worked as full-time DEA employees prior to their retirement from the DEA. Because the DEA did not keep a record of the résumés it received from Maximus for each vacancy, and Maximus did not track which résumés it sent the DEA for each vacancy, we could not compare the qualifications of former DEA employees selected for task order work to other applicants who did not have DEA experience and whom



Executive Summary

Audit of the Drug Enforcement Administration's Asset Forfeiture Program Task Orders Awarded to Maximus, Inc., for Financial Investigative Services

Maximus designated as “best-qualified.” While we did not find evidence that the DEA officials’ roles in selecting contract personnel violated ethics rules, to protect the integrity of the process used to select task order personnel, we believe that JMD needs to assess the propriety of the DEA’s level of involvement in the selection of individuals hired by Maximus and PRM and assigned to the task orders. If JMD concludes that the DEA’s involvement is appropriate, we believe that JMD should establish standards for how the DEA documents its review of candidates’ qualifications and its approval of candidates to work under the task orders.

Personal Services - We determined that the DEA needs to strengthen its oversight of AFP task orders to ensure that it is not awarding and administering task orders in a manner that creates personal services contracts. The FAR defines a personal services contract as a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, government employees. Personal services contracts are unallowable without statutory authorization, which the DEA does not have. The FAR offers six indicators to identify a personal services contract. Based on these indicators, which we assessed in light of the evidence we acquired throughout the audit, we believe that the manner in which the DEA administered the task orders demonstrated several characteristics of a personal services contract.

Classification of Task Order Workers - We noted that Maximus and PRM classified all of the personnel charging costs to the subject task orders as independent contractors. According to the U.S. Department of Labor, individuals are employees, not independent contractors, if the nature of their work falls within the Fair Labor Standards Act (FLSA) definition of employment, with the overarching question being whether the totality of the worker’s circumstance indicates that the worker is economically dependent on the employer (an employee) or in business for themselves (an independent contractor). We found that the task order workers demonstrated characteristics suggesting a high level of economic dependence on Maximus and PRM.

Both JMD and DEA officials stated that they did not review the classification of Maximus and PRM contract workers prior to awarding the task orders. JMD contract officials further stated that they believed contractors such as Maximus could determine how to classify their workers and, even if they were to be considered “employees,” such workers qualified as “professionals” and thus should be exempt from FLSA and other federal protections. However, based on our review, we question whether the exemptions cited by JMD officials would apply to the task order workers.

Task Order Costs – We reviewed some of the expenses charged to the task orders and found that Maximus and PRM generally complied with contract terms and conditions. However, Maximus hired two Subject Matter Experts who did not meet PACS qualifications of having a Master’s Degree. Although Maximus notified the DEA of the particular qualifications of these individuals, the DEA did not provide a written waiver, as required by the PACS, prior to approving these individuals to serve as Subject Matter Experts. We also noted that both of the individuals met the qualifications for Senior Investigators. Therefore, without the required waiver, the DEA effectively paid a premium of \$485,386 over what it would have paid these individuals had they served as Senior Investigators. We believe that the lack of a process to ensure that the DEA documented these waivers unnecessarily placed the government at risk of appearing to overpay for AFP services.

While the PACS expressly prohibited paying local travel costs, Maximus incurred and the DEA paid such costs resulting from work performed away from the normal job site. We found that the PACS did not define local travel costs and only provided a single line item for Maximus to bill these and other direct costs. According to the DEA, this made it difficult to distinguish local from non-local travel costs billed to the task orders.

**AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S ASSET
FORFEITURE PROGRAM TASK ORDERS AWARDED TO
MAXIMUS, INC., FOR FINANCIAL INVESTIGATIVE SERVICES**

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AUDIT OF THE DRUG **ENFORCEMENT ADMINISTRATION'S ASSET FORFEITURE PROGRAM TASK ORDERS AWARDED TO MAXIMUS, INC., FOR FINANCIAL INVESTIGATIVE SERVICES**

INTRODUCTION

The Department of Justice (Department or DOJ) may seize property associated with violations of federal law, and then assume title to that property through a process known as asset forfeiture. The primary objectives of the **Department's Asset Forfeiture Program** (AFP) are to: (1) punish and deter criminal activity by depriving criminals of property used or acquired through illegal activities; (2) improve how foreign, federal, state, and local law enforcement agencies work together by sharing equitably assets recovered under the program; and (3) use seized and forfeited proceeds to compensate victims of associated crimes and to benefit federal, state, and local law enforcement. Several DOJ components seize assets as part of the AFP, including the Drug Enforcement Administration (DEA); Bureau of Alcohol, Tobacco, Firearms and Explosives; Federal Bureau of Investigation; U.S. Marshals Service; and the United States Attorneys' Offices. The success of the AFP hinges not only on how well federal, state, and local governments cooperate to investigate and prosecute complex criminal cases, but also on the ability of law enforcement to identify, seize, and safeguard criminally-derived assets.¹

The Justice Management Division's (JMD) Asset Forfeiture Management Staff (AFMS) manages the Assets Forfeiture Fund (AFF), which holds the proceeds of forfeited assets. Recognizing that DOJ must administer the AFP in a fiscally responsible manner and use asset forfeiture funds to supplement (rather than supplant) appropriated funds, the *Attorney General's Guidelines on Seized and Forfeited Property* (Guidelines) establish the rules by which a component may use AFF proceeds to support law enforcement activities. To mitigate concerns that law enforcement might target valuable assets for seizure instead of seeking assets tied to crimes and criminal organizations (a practice referred to as "bounty hunting"), the Guidelines generally prohibit DOJ components from using asset forfeiture funds to pay employee salaries. However, the Guidelines permit components to use asset forfeiture funds to pay for certain non-personnel costs associated with identifying, locating, and seizing property subject to forfeiture, including contracted services necessary to identify potential assets.²

The DEA enforces the controlled substances laws and regulations of the United States. As part of its mission, the DEA seeks to disrupt the financial

¹ In March 2017, we released a review that evaluated the Department's oversight of cash seizure and forfeiture activities. See U.S. Department of Justice Office of the Inspector General, [Review of the Department's Oversight of Cash Seizure and Forfeiture Activities](#), Evaluation and Inspections Division 17-02 (March 2017).

² The Attorney General's Guidelines on Seized and Forfeited Property, July 1990 (amended November 2005) at VII.B. and D.; cf. 28 U.S.C. § 524(c) (2016).

dealings and dismantle the financial infrastructure of illegal drug traffickers, which it accomplishes in part through asset seizures and forfeitures.

AFP Professional Assistance Contracts

In March 2008, the AFMS announced its intent to acquire specific, case-related professional support services for federal law enforcement agencies using up to \$475 million in asset forfeiture funds. To accomplish this, the AFMS established the Professional Assistance Contracts (PACS) Indefinite Delivery/Indefinite Quantity (ID/IQ) contract vehicle with a base period of 1 year with 6 additional option years. Under the PACS, contractors would provide professional support services on a task-order basis. Of the 12 firms that responded to the solicitation, JMD awarded 4 firms the right to compete for PACS task orders, including Maximus Federal Services (Maximus), a wholly-owned subsidiary of Maximus, Inc., located in Reston, Virginia.

Using delegated procurement authority that it acquired from JMD, under the PACS, the DEA began issuing to Maximus a series of time-and-material task orders for financial investigative support services at its Special Operations Division (SOD) in Chantilly, Virginia and across its field offices nationwide.³ Specifically, the DEA task orders sought contracted personnel to organize, research, and examine asset information associated with targeted drug investigations. To accomplish this work, these personnel would assist the DEA by sifting through and analyzing evidence, investigation records, and third-party databases for information pertaining to assets that might be eligible for civil or criminal seizure and forfeiture. As of the completion date of the last PACS task orders, in late March 2017, Maximus had received over \$85 million for work performed for the DEA.⁴

Professional Risk Management, Inc. (PRM), a firm located in Leesburg, Virginia, served as Maximus's subcontractor on the DEA task orders. PRM specializes in financial investigative services and related staffing solutions. Between October 2013 and September 2015, Maximus and PRM supplied 82 contract personnel across 3 PACS-defined labor categories to work on the DEA task orders.⁵ DEA officials told us that the DEA relied on these contract personnel to research the financial elements of criminal investigations necessary to link seized property to drug crimes because it lacked the time, skills, and capabilities to do so.⁶

³ While the AFMS is responsible for awarding and administering AFP contracts, the AFMS permits certain components participating in the AFP to issue task orders under a written delegated procurement authority that passes contract monitoring and oversight responsibility to the issuing component. Appendix 2 lists the task orders issued by the DEA to Maximus.

⁴ The original final option year under the PACS ended September 30, 2014. However, the DEA and JMD extended performance under the Maximus task orders until awarding the follow-on contract vehicle to the PACS.

⁵ Of these 82 contract workers, Maximus provided both of the 2 Junior Professionals and 1 Subject Matter Expert; PRM provided 1 Subject Matter Expert and all 78 Senior Investigators.

⁶ The federal government risks losing seized property or proceeds if it does not file a forfeiture claim within 90 days after a seizure. 18 U.S.C. § 983(a)(3) (2016).

Table 1
Summary of Task Order Personnel

Labor Category and Responsibilities	Number of Personnel
Junior Professionals gather and correlate basic data and perform analysis.	2
Subject Matter Experts conduct: (1) detailed examinations of information generated during complex criminal and civil investigations, and (2) financial analysis for law enforcement personnel pursuing civil and criminal forfeiture matters.	2
Senior Investigators conduct and complete financial investigations. ^a	78
Total	82

^a DEA, Maximus, and PRM personnel refer to the Senior Investigators as Senior Financial Investigators. For the purposes of this report, we apply the PACS-defined labor category of Senior Investigator to these contract personnel.

Sources: The PACS and contractor personnel roster

As described in the Federal Acquisition Regulation (FAR) 16.601(c)(1), because a time-and-materials contract bases payment on the specified price per hour for labor, such contracts provide no positive-profit incentive for contractors to limit work time and control costs. While permissible, services procured under such contracts must be managed carefully to control costs. Therefore, agencies entering into a time-and-materials contract must, among other oversight measures, obtain a reasonable assurance that the contractor uses efficient methods and effective cost controls. As the issuing component for these task orders, the DEA was primarily responsible for monitoring and overseeing the performance of Maximus and PRM.

According to the DEA, Maximus completed all work under the two task orders and subsequent modifications as of June 27, 2017. The DEA accepted all of **Maximus' services, administratively closed the task orders, and de-obligated all residual funds following that date.**

Office of the Inspector General Audit Approach

The objectives of the audit were to assess: (1) the adequacy of JMD's and **DEA's administration and oversight of the PACS and its task orders;** (2) **Maximus's** compliance with the PACS and its task orders terms and conditions, as well as applicable laws and regulations; and (3) **Maximus's performance on the task orders,** including financial management, monitoring, reporting, and progress toward meeting the contract goals and objectives.

To accomplish our objectives, we evaluated JMD's Request for Proposal, the contractor's proposal package, the PACS contract, task orders and related statements of work, contract files, and resulting billings. Additionally, we interviewed DEA and JMD contracting officials responsible for administering the task orders, Maximus and PRM managers who hired and oversaw contract personnel

performing the procured services, and contract personnel and DEA supervisors at 9 DEA field offices across the United States. We also assessed the personnel files, including résumés, of contract personnel. See Appendix 1 for further discussion of the audit objectives, scope, and methodology.

The Audit Results section of this report details how JMD and the DEA administered the task orders, how DEA employees interfaced with contract personnel, and addresses the method by which Maximus and sub-contractor PRM hired contract personnel to work on the task orders.

AUDIT RESULTS

We found that the DEA is highly involved in the process of selecting task order workers, many of whom were former DEA employees, and we believe JMD **needs to assess the contracting agency's role to ensure it is appropriate and to** safeguard the integrity of the contract personnel selection process. In addition, we believe that the manner in which the DEA has administered the task orders demonstrated several characteristics of a personal services contract, and that the DEA and JMD therefore need to take action to ensure compliance with federal rules prohibiting personal services contracts and prohibiting contract personnel from performing inherently governmental functions.

Furthermore, we found that the DEA approved and paid invoices submitted by Maximus for two contract personnel who did not meet specific PACS labor category qualification requirements. The DEA paid \$1,130,707 for Subject Matter Expert services without granting a waiver prior to its approval of these individuals to serve in the labor category, as specified in the contract, to document the decision to deviate from the qualification requirements. Although Maximus provided the DEA with a notice of the qualifications of these individuals, the lack of a process to ensure that the DEA documented required waivers placed the government at unnecessary risk of overpaying for services. In addition, both of the individuals who provided services as Subject Matter Experts could have still served on the task orders as Senior Investigators. Without a waiver, the DEA effectively paid a premium of \$485,386 over what it would have paid these individuals had they served as Senior Investigators. We separately found that although the PACS prohibited charging local travel costs, the PACS did not define such costs. The PACS further only provided a single line item for Maximus to bill all other direct costs, which the DEA stated made it difficult to distinguish between local and non-local travel costs.

We also identified several factors that raised questions about the classification of personnel hired to work on the task orders as independent contractors rather than employees. We believe JMD should enhance its process for pre-award analysis to ensure that contracting officials review AFP bids for indications of potentially misclassified contract workers.

DEA Task Orders

As a part of its mission to enforce federal controlled substances laws and regulations, the Drug Enforcement Administration (DEA) is authorized to seize assets derived from illegal drug trafficking. In support of the Department of **Justice's (DOJ) Asset Forfeiture Program (AFP), the DEA awarded a series of time-and-material task orders with Maximus Federal Services, Inc. (Maximus), to** procure contract personnel to identify assets eligible for civil or criminal seizure and forfeiture by sifting through and analyzing evidence and third-party databases. Between October 2013 and September 2015, Maximus and its subcontractor Professional Risk Management, Inc. (PRM), provided DEA with 82 contract personnel to work on the DEA task orders at DEA offices across the United States.

Of these contract workers, 78 served as Senior Investigators charged with conducting financial investigations. Upon Maximus's completion of all services, as of late March 2017, the DEA had paid over \$85 million to Maximus across the life of the PACS. This audit focused on two task orders and extensions under which, as of January 2016, Maximus had received over \$26 million in AFP proceeds for work performed.

As time-and-materials awards issued under the PACS, the task orders obligated JMD and the DEA to monitor contract personnel performance carefully to protect the government's interest. To assess compliance with PACS terms and conditions, we evaluated how the DEA administered the task orders' performance and payments by reviewing the contract solicitation package, the task orders and accompanying work statements, employment opportunity announcements at the DEA and other federal law enforcement agencies, and the résumés or worker qualifications of all contract personnel and interviewed personnel working on the task orders regarding their respective professional qualifications.

In addition, we interviewed the 2 Junior Professionals, 2 Subject Matter Experts, and a judgmental selection of 22 of the 78 Senior Investigators regarding the work they performed and supervision they received under the task orders. We also interviewed the DEA Contracting Officer's Representative (COR) and 15 DEA supervisors at 9 different DEA office locations to ascertain how they monitored task order performance and evaluated task order costs.⁷

Identifying and Selecting Contract Personnel

Under the PACS, contractors are responsible for performing all activities associated with recruiting and hiring staff, such as advertising, screening applicants, interviewing, and reference checking.⁸ With the exception of the portion of the PACS that allows the government to require the contractor to remove contract personnel for cause, the PACS does not reserve a role in the hiring process for the contracting agency. Specifically, in the PACS, the government reserves the right to require the contractor to reassign contractor employees who are deemed incompetent, careless, unsuitable or otherwise objectionable, or whose continued use under the contract is deemed contrary to the best interests of the government.⁹

DEA Involvement in Contractor Hiring Decisions

In practice, we found that the DEA was deeply involved in the process for selecting contract personnel. According to Maximus, for nearly all vacancies, after receiving a résumé, PRM identified and assessed the skills, experience, work ethic,

⁷ DEA employees interviewed included Special Agents-in-Charge, Assistant Special Agents-in-Charge, Special Agent Group Coordinators, and a Unit Chief.

⁸ PACS § C.5.1(a), *Contract Administration General Requirements*.

⁹ PACS § C.6.6, *Reassignment of Contractor Personnel*.

and demeanor of potential candidates to determine whether the candidate would be suitable to work on the task order, and it submitted to the DEA COR, through Maximus, a group of résumés for the candidates it believed were the best-qualified for each task order announcement so the DEA could select from multiple candidates.¹⁰ The DEA COR then forwarded these résumés and the associated job vacancy announcement to DEA supervisors in the field office. DEA supervisors decided which candidate to select for the open position, and the DEA COR notified Maximus of their decision and Maximus or PRM subsequently hired the candidate as an independent contractor. Maximus officials told us that the DEA office involved usually had worked with the selected candidate previously, but in some cases, DEA officials may have asked to interview the candidate. Maximus and PRM officials told us that they would not hire a candidate without the DEA's prior approval.

To assess whether controls are in place to ensure hiring decisions were based on merit, and whether the analysis of who to hire was documented and clearly demonstrates that the DEA received the best value for the services received, we reviewed all 82 contract worker résumés. We determined that 33 individuals (40 percent) were former DEA employees. These 33 individuals, which included both of the Subject Matter Experts and 31 Senior Investigators, worked an average of 22 years with the DEA prior to working on the task orders. Of the 31 Senior Investigators who were former DEA employees, 21 reported as contractors to the same DEA office in which they worked as full-time DEA employees.

We also interviewed several Senior Investigators who confirmed that they worked with the same DEA employees they served with or even supervised while they were at the DEA. For example, one Senior Investigator told us that she began working on the task orders at the same DEA office the week after she retired as a DEA supervisor. Prior to retirement, this employee told us that her Assistant Special Agent-in-Charge recommended that she apply to PRM for the contract position. Additionally, several Senior Investigators obtained notices of task order work opportunities due to their previous relationships with DEA personnel. For example, a Senior Investigator informed us that a friend who also worked as a Senior Investigator told him about the open task order position. He was hired after this friend urged him to contact the field office's Assistant Special Agent-in-Charge to apply for the vacated, full-time contract position. Another Senior Investigator, once a DEA supervisor at the same office he now works at as a contractor, told us that his friendships and experience with DEA employees have proven critical in obtaining task order work.

The PACS stipulates that contractors are responsible for performing all activities associated with recruiting and hiring workers under the task orders. The PACS is largely silent regarding the DEA's formal role in the task order worker

¹⁰ To identify applicants, PRM maintained an applicant pool of potential task order candidates with financial investigation, analysis, and asset forfeiture experience. PRM also recruited new candidates by posting announcements on various professional websites, including those focused on hiring retired federal law enforcement personnel. PRM further solicited interest from those with experience in the military, private sector, and state and local law enforcement agencies.

selection process. In light of our findings about the DEA's involvement in hiring decisions and the frequency with which former DEA employees are selected as contract personnel, we recommend that JMD, as the component responsible for overseeing the PACS, assess the DEA's level of involvement in the selection of task order workers hired by the contractors to determine if the DEA's participation is appropriate.

Lack of Support for DEA Task Order Worker Selection Decisions

We attempted to examine a sample of résumés that Maximus sent to the DEA COR for each vacancy to determine whether controls were in place to ensure hiring decisions were based on merit – the best qualified candidate – and not favoritism or prior relationships with former DEA employees. However, we could not readily perform this examination because the DEA told us that it did not keep a record of the résumés it received for each vacancy, and Maximus told us it did not track which résumés it sent for each vacancy.¹¹ The DEA therefore could not provide to us the basis for its analysis in determining the contract personnel selected were indeed the best qualified candidates. As a result, the DEA cannot demonstrate that it evaluated all task order candidates based on their respective knowledge, skills, and abilities in accordance with statement of work requirements.

Maintaining a complete contract file that allows for appropriate monitoring and oversight is an essential component of good contract management. For that reason, FAR 4.801(b) requires that government contract files contain documents that are sufficient to constitute a complete history of the contract action for the purpose of: (1) providing a complete background as a basis for informed decisions made at each step in the acquisition process, (2) supporting actions taken, (3) providing information for reviews and investigations, and (4) furnishing essential facts in the event of litigation or congressional inquiries. Whenever contract files are decentralized across outside offices – as in the case of the delegated procurement authority that the DEA has received from JMD – the responsibility for maintaining complete records of contract decisions must be assigned.¹² At the organizational level, contract files must be maintained to ensure effective documentation of contract actions.¹³

We believe that the principles underlying this provision of the FAR clearly apply to the contractor personnel decisions made under the DEA's task orders. For

¹¹ While Maximus maintains copies of all résumés it sent forward to the DEA, it does not maintain a record of which résumés it sent to the DEA for a specific task order opportunity. If a candidate was not selected, Maximus reports that the candidate's résumé is returned to its potential candidate portfolio.

¹² FAR 4.802(d), *Contract Files*. The JMD AFMS Contracting Officer and COR provided us with a memorandum that delegated procurement authority for the PACS task orders to the DEA's Contracting Office. According to JMD, the memorandum gives the DEA contracting officials the primary responsibility for contract file maintenance for the task orders. This is consistent with FAR 1.602-1(a) and 1.602-2(d), which require that Contracting Officers and CORs receive clear instructions in writing regarding the limits of their authority.

¹³ FAR 4.802(c)(1), *Contract Files*.

that reason, if JMD determines it is appropriate for DEA officials to continue having an extensive role in selecting contract personnel, we believe that the DEA should maintain the documents necessary to demonstrate, for each task order vacancy, why its officials selected a certain candidate over other Maximus and PRM-designated candidates. In our opinion, vital elements of a contract file for the task orders should include résumés or staff qualifications for all contract workers presented for consideration to the DEA, staff referral listings, and other personnel documents, coupled with any other information necessary to document the basis for decision and demonstrate that consistent and appropriate evaluation criteria were used in selecting the workers to fill each task order vacancy. We believe such a file will better ensure that the DEA comports with the principles expressed in **FAR 4.801(b) and support the DEA's selection of contract personnel as the best candidate based on merit.**

Selecting Former Employees Subject of Ongoing Investigation

We further found that one DEA Special Agent who was a subject of an OIG investigation regarding the use of limited confidential sources retired after an interview with the OIG and shortly thereafter became a Senior Investigator with PRM.¹⁴ Specifically, this individual was interviewed by the OIG in 2014, retired as a Special Agent 5 days after this interview, received an offer from PRM to work on the task orders on that same day, and reported to the DEA for duty as a contract Senior Investigator 1 month later.¹⁵ We confirmed that this individual received **clearance from the DEA's Office of Security Programs on January 3, 2014**, to return to the DEA as a contractor on the task orders even though this individual was the subject of an ongoing OIG investigation.¹⁶

A DEA official told us that the DEA has recently implemented a practice of not permitting employees who resigned or retired in lieu of termination to return to the DEA as a contract worker. In line with this practice, we believe that the DEA should

¹⁴ The OIG investigation concluded in January 2015 and determined that, over a period of 20 years, this individual and another DEA Special Agent paid an Amtrak employee \$854,460 for information that was available at no cost to the government in violation of federal regulations relating to the use of government property, thereby wasting substantial government funds. The OIG investigation also concluded that the DEA agents exceeded the terms of the Amtrak employee's confidential sources classification when they directed him to gather specific information for them. See U.S. Department of Justice Office of the Inspector General, *Investigative Summary, Findings Concerning the DEA's Use of Amtrak Employees as Paid Confidential Sources*, Investigations Division (January 2016).

¹⁵ We discussed this issue with DEA officials who told us that documents show that this individual had been contemplating retirement for approximately 6 months.

¹⁶ In September 2016, we issued an audit report on the Drug Enforcement Administration's oversight of its Confidential Source Program as a follow up to our July 2015 report on the same subject. See U.S. Department of Justice Office of the Inspector General, *Audit of the Drug Enforcement Administration's Confidential Source Policies and Oversight of Higher-Risk Confidential Sources*, Audit Division, 15-28 (July 2015), and *Audit of the Drug Enforcement Administration's Management and Oversight of its Confidential Source Program*, Audit Division, 16-33 (September 2016).

avoid allowing an employee who is a subject of an ongoing investigation to separate from and return to the DEA as a contract worker. Employees under investigation who voluntarily separate may be seeking to escape potential administrative discipline, including a possible termination that would bar them from serving as a DEA contract employee. We therefore recommend that the DEA institute a process to identify former employees who are currently, or were at the time of their departure from the DEA, the subject of an investigation and review the circumstances of the investigation to determine whether the DEA should authorize the former employee subsequently to work on a DEA contract.¹⁷

Avoiding Post-Employment Conflicts of Interest

Former executive branch employees are subject to certain post-employment restrictions to avoid conflicts of interest stemming from misuse of their prior official position for personal benefit or to benefit another employer. Former employees are generally disqualified from working the same government matters that they worked on as employees during post-government employment. In addition, former employees may be prohibited from engaging in certain activities with the government for a period of time. As such, it is critical that all current and former employees seeking outside work or working with the government in a private capacity be aware of these rules to avoid prohibited conflicts of interest.

In April 2013, the DEA began requiring that all employees leaving employment work with its ethics office to complete a questionnaire to identify potential conflicts of interest regarding future work that might involve the DEA.¹⁸ **In September 2014, the DEA's Office of Acquisition and Relocation Management (OARM) issued a policy letter stating that individuals who had been DEA employees within the past 2 years must first be cleared of potential conflicts of interest by its ethics office before being authorized to support a DEA contract.** The OARM also issued a special clause that the DEA must include in all solicitations, contracts, and other service agreements. This clause requires that contractors ensure that any personnel working on a DEA award who had worked for the DEA within the last 2 years submit DEA Ethics Questionnaires to DEA's ethics office.¹⁹

¹⁷ We note that the intent of this recommendation is consistent with §1140 of the National Defense Authorization Act for Fiscal Year 2017, 130 Stat. 1999, 2471 (December 23, 2016), which separately obligates federal agencies to make a permanent notation in an employee's official personnel record file if the employee resigns from government employment prior to the resolution of a personnel investigation of which the employee is the subject, and that investigation results in an adverse finding against the employee.

¹⁸ The Ethics Questionnaire provides the DEA Deputy Ethics Official the information needed to write an ethics opinion on the applicability of the Procurement Integrity Act, 41 U.S.C. § 423 (2016) and post-employment restrictions under 18 U.S.C. § 207 (2016). The DEA Deputy Ethics Official advises employees that separate from the DEA on potential violations of post-employment restrictions or other applicable laws if allowed to work on matters involving the DEA in the future.

¹⁹ The DEA reports that it is in the process of extending the length of time covered by this clause from 2 to 5 years.

We found that many of the former DEA employees that the DEA requested Maximus select to serve as contract personnel lacked essential knowledge of the rules to avoid conflicts of interest with their former federal employer. Of the 24 Senior Investigators and Subject Matter Experts we interviewed, only 7 (29 percent) indicated that they knew of the DEA policies, while only 6 of 15 (40 percent) of the DEA supervisors interviewed stated that they were aware of them.

While we did not identify specific conflicts of interest between the DEA and those working on the task orders, we note that only some of the former DEA employees who served as contract personnel on the task orders completed the DEA Ethics Questionnaire because they left DEA employment before the questionnaire was required. Because a number of contract and DEA personnel remain unaware of the DEA Ethics Questionnaire and related policies regulating post-government employment, we recommend that the DEA require that AFP contract personnel who are former DOJ employees complete the required DEA Ethics Questionnaire and confirm that they have no conflicts of interest.²⁰

Personal Services

Federal agencies are normally required to obtain their employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, risks circumventing the purpose of those laws unless Congress has specifically authorized an agency to acquire the services by contract. Without such approval, contracting agencies are expressly prohibited from awarding personal services contracts.²¹

FAR 2.101 defines a personal services contract as a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, government employees. FAR 37.104(a) further states that a personal services contract is characterized by the employer-employee relationship it creates **between the government and the contractor's personnel**. An employer-employee relationship under a service contract occurs when contractor personnel are subject to the relatively continuous supervision and control of a government officer or employee, as the result of: (1) the contract's terms or (2) the manner of its administration during performance. However, the FAR cautions that each contract arrangement must be judged in the light of its own facts and circumstances, giving particular attention to whether an agency exercises relatively continuous supervision and control over the contractor personnel performing the contract.²²

²⁰ In its response to a draft of this report, the DEA updated its policy to require that contractors and other firms performing work with the DEA submit completed ethics questionnaires and resumes for review for conflicts of interest. We detail additional analysis of this action in Appendix 7.

²¹ FAR 37.104(a) and (b), *Personal Services Contracts*. The PACS at § H.14 also explicitly prohibits agencies from using it as a vehicle to solicit contractors to perform personal services and requires that contractors notify the government if they believe they are performing personal services.

²² FAR 37.104(c)(2), *Personal Services Contracts*.

The FAR provides six descriptive elements that characterize personal services contracts. An individual element does not conclusively indicate personal services; instead, the elements must be considered in the aggregate.

Table 2
Descriptive Elements of Personal Services Contracts

- | |
|--|
| <ol style="list-style-type: none">1. Performance on site.2. Principal tools and equipment furnished by the Government.3. Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.4. Comparable services, meeting comparable needs are performed in the same or similar agencies using civil service personnel.5. The need for the type of service provided can reasonably be expected to last beyond 1 year.6. The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, government direction or supervision of contractor employees in order to: (i) adequately protect the government's interest, (ii) retain control of the function involved, or (iii) retain full personal responsibility for the function supported in a duly authorized federal officer or employee. |
|--|

Source: FAR 37.104(d)

As detailed below, we considered and applied in aggregate the six descriptive elements outlined by the FAR to assess PACS task order performance and ascertain whether the totality of the circumstances indicated that the DEA administered the PACS in a way that characterized a personal services contract. We concluded based on the information we collected during this audit that the DEA needs to strengthen its oversight of future AFP task orders to ensure that it is not awarding and administering task orders in a manner that transgresses the prohibition on personal services contracts.

Elements 1 and 2: DEA Provides Office Space, Tools, and Equipment

The FAR advises that an indicator of personal services is whenever services are performed on site and the government furnishes the principal tools and equipment used by those working on the contract. We found that Maximus contract Senior Investigators work almost exclusively at DEA facilities. In addition, according to the DEA COR, the DEA furnishes nearly all the tools and equipment contracted personnel use to accomplish task order work, including computer terminals, telephones, and software, as well as software licenses and access to proprietary databases needed by contract personnel.²³ The DEA COR also told us

²³ Such databases include the Financial Crimes Enforcement Network (FinCEN), LexisNexis Accurint, and Thomson Reuters CLEAR.

that for each software or database, the DEA COR contacts the vendor, establishes the account, and provides the individual contracted employee with the login information.

The PACS stipulates that contractors should be responsible for procuring all items and services required by task orders. However, a former DEA official, who now works at PRM, stated that due to the sensitive nature of ongoing criminal investigations, contract personnel are required to work in DEA secure office space and only use DEA-supplied equipment. This practice is consistent with task order work statements and contract personnel agreements, which state that contract personnel must work primarily at DEA facilities. In addition, the DEA Chief Financial Officer (CFO) Bulletin states that contract employees may utilize workspace with computer, printer, telephone, and other office supplies if work is performed at a DEA worksite.

Accordingly, even though the DEA's administration of the task orders appears to align with the contract personnel agreements and the DEA's internal policy, those agreements and policy do not appear to comport with the PACS clauses that address the procurement of contractor materials, or with the FAR governing personal services.

Element 3: Contracted Services Directly Apply to DEA Mission

The FAR also prescribes that a contract in which services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of the **agency's assigned function or mission as potentially indicative of a contract that is personal in nature.**

To accomplish its mission of enforcing controlled substances laws and regulations, the DEA seizes assets derived from, traceable to, or intended to be used for illicit drug trafficking.²⁴ To disrupt the flow of money and dismantle the supply chains of illegal drug suppliers, the DEA Administrator issued an agency-wide policy in May 2004 that required all DEA investigations to focus on identifying and seizing the proceeds of illegal drug sales. The policy also emphasized that the DEA needed to build financial investigative competency by hiring new Special Agents with financial backgrounds and training current DEA employees on how to identify and gather intelligence regarding drug crimes.

The DEA also maintains and participates in a number of inter-agency task forces that carry out its mission and identify drug proceeds and assets. DEA Financial Investigation Teams (FIT) guide personnel in the financial aspects of **investigations, conduct sophisticated financial analysis, and serve as a DEA office's local point of contact with financial institution leaders.** DEA Tactical Diversion Squads (TDS) focus on investigating the illegal diversion of pharmaceuticals or listed chemicals. The DEA also supports Organized Crime Drug Enforcement Task

²⁴ The federal government may use information gathered after a seizure to support a forfeiture action in such cases. 18 U.S.C. § 983(c)(2) (2016).

Force Strike Forces in key cities that target high-level drug trafficking organizations. All of the 22 **Senior Investigators we interviewed were deeply integrated in DEA's mission** essential functions while most reported being embedded integrally on FITs, TDSs, or Strike Forces. The Senior Investigators told us that they spend most of their official time researching asset and bank databases to identify accounts, real estate, and personal property potentially paid for with drug proceeds.

Additionally, FAR 7.503(a) states that contracts "shall not be used for the performance of inherently governmental functions," and FAR 7.503(c)(1) lists as an example of an inherently governmental function "[t]he direct conduct of criminal investigations." Yet several Senior Investigators reported assisting in areas beyond just the financial aspects of an investigation to support the DEA's mission. Seven of 22 Senior Investigators told us they have drafted subpoenas and affidavits for Special Agent signature, while 2 assisted in performing surveillance, which we later confirmed with a DEA supervisor. Also, 5 of 22 Senior Investigators informed us that they prepare DEA Forms-6, *Report on Investigation*, for Special Agent signature.²⁵

The FAR allows the government to use contractors, such as Maximus and PRM, to support government efforts by gathering information. However, in our opinion, the contractors' execution of the investigative actions resulting from their information gathering raises concerns about whether contract workers are at risk of inappropriately performing inherently governmental functions that should be performed by DEA personnel.

Element 4: Comparable Services Performed at Similar Federal Agencies

Another indicator of a service contract that is personal in nature is whether comparable services, meeting comparable needs, are performed in the same agency or at similar agencies using civil service personnel. We reviewed announcements for federal employment opportunities at other criminal investigative agencies, namely the Executive Office for U.S. Attorneys and the Bureau of Alcohol, Tobacco, Firearms and Explosives, regarding financial research and identified several full-time positions that appear to perform services similar or comparable to those provided by contracted Senior Investigators and Subject Matter Experts. Duties for these positions that are similar to those performed by Senior **Investigators and Subject Matter Experts contracted through the DEA's PACS** included: (1) planning and conducting forensic financial investigations on criminal suspects, (2) identifying and tracking criminal proceeds, (3) preparing financial reviews for investigations, (4) assisting Special Agents in preparing subpoenas and executing search and seizure warrants, and (5) serving as a key member of criminal investigation teams.

²⁵ DEA Form-6, *Report of Investigation*, documents the events surrounding each investigation. This document allows the investigating agents to establish an unimpeachable record for the chain of custody and processing of drug exhibits. Required elements include descriptions of seized items, including the gross weight of drugs seized, amount of cash seized, and witnesses present.

Additionally, between 2003 and 2008, the DEA recruited Special Agents with finance and accounting backgrounds to enhance the financial investigative skills of agency employees and build an internal financial investigative knowledge base. The DEA also has enrolled over 4,500 Special Agents, Task Force Officers, Intelligence Analysts, and Diversion Investigators, in a comprehensive financial investigation curriculum to bolster the efficacy of financial investigations critical to its mission. Several DEA supervisors confirmed that DEA employees have the skills and abilities to perform the same or similar functions as contracted Senior Investigators, and in fact do perform them. Out of 15 DEA supervisors interviewed, 10 (67 percent) told us that they themselves performed, as full-time DEA employees, duties similar or identical to those performed by Senior Investigators.

Moreover, our review of all 78 Senior Investigator résumés identified 45 individuals who performed as federal employees at other agencies the same or similar work that they now perform as DEA contract personnel. Our review also identified 31 Senior Investigators who previously performed the same or similar work as DEA employees.

Element 5: Length of Contracted Service Exceeded 1 Year

The FAR states that work reasonably expected to last beyond 1 year is a characteristic of a contract that is personal in nature. Both task orders, as modified, had performance periods of 1 year (beginning October 1 and ending September 30) that could be renewed, after the first year, in 1-year increments at **the DEA's option, for up to 6 additional years (i.e. the period of performance for the PACS)**. Notably, 23 of the 24 Senior Investigators and Subject Matter Experts we spoke to told us that they had worked at the DEA under these task orders for more than 1 year. Given this sample, and given that the length of time worked by these personnel likely facilitates their performance of mission-required financial reviews for DEA investigations conducted by inter-agency task forces, we think it is unlikely the DEA in fact could reasonably expect the work conducted pursuant to the task orders to be complete in under a year.

Element 6: DEA Responsible for Supervising Contract Personnel

FAR 37.104(d)(6) cautions that a service contract is likely personal in nature if the type or manner of providing the service reasonably requires government direction or supervision of contractor employees to: (1) adequately protect the **government's interest**, (2) retain control of the function involved, or (3) retain full personal responsibility for the function supported by a duly authorized federal officer or employee. To that end, the PACS states that contract personnel should perform activities on their own initiative and exercise professional judgment and discretion in making decisions and recommendations regarding the successful completion of their work, and that agency employees should provide contractor performance feedback and direction through the COR. Consistent with this requirement, the statements of work issued for each task order state that DEA Special Agents would be available to provide contract personnel technical advice and assistance. However, all of the contracted Senior Investigators and Subject

Matter Experts we interviewed reported that DEA employees directly assigned their daily activities and approved their timesheets.

Further, the terms of the PACS required Maximus to designate an individual as its contract manager and allowed for the appointment of additional project managers. However, the terms of the PACS did not provide an example of an appropriate ratio of contract and program managers to contract workers. For the task orders under audit, we found that Maximus and PRM supervision of the 82 contract workers, assigned to DEA offices nationwide, was limited to 1 Washington D.C. based individual that served as contract and project manager. We believe that this arrangement was inadequate to mitigate the risks of an employer-employee relationship developing between the government and contract workers given that all contract workers have a DEA supervisor on site.

In addition, under the terms of the PACS, the COR is responsible for addressing individual contract personnel conduct and performance concerns with the Maximus project manager. Although the DEA COR e-mailed DEA field office supervisors to request feedback regarding the overall performance of personnel working on the task orders, we identified various instances where DEA supervisors bypassed the DEA COR and directed Maximus to reprimand, reassign, or dismiss Senior Investigators for misconduct.

The DEA's Administration of the PACS Task Orders May Be Creating the Appearance of Employer-Employee Relationships

Based on the totality of our analysis of the FAR's descriptive elements of personal services, we believe that the terms of the DEA PACS task orders and the manner in which the DEA administered these task orders demonstrated several characteristics of a personal services contract. Specifically, and as described above:

- Contract performance occurred almost exclusively in DEA offices and the DEA provided nearly all the tools and equipment used by contract personnel;
- Contract personnel conducted financial reviews that directly applied to **DEA's integral efforts and mission**;
- Because financial reviews conducted by contract personnel played such an important part in its mission, the DEA should have anticipated requiring these services beyond 1 year – and arguably did by including 6 additional option periods;
- Contract personnel provided services comparable to services performed by other federal employees; and
- Some DEA employees also directly supervised and guided contract personnel.

Unless specifically authorized by statute, agencies may not award personal services contracts.²⁶ In October 2003, the DEA's CFO issued an agency-wide bulletin regarding how DEA employees should interact with contractors working on-site.²⁷ Without explicitly citing specific FAR clauses prohibiting the contracting of personal services, the bulletin stated that the DEA did not have the statutory authority to administer personal service contracts and thus advised DEA employees to not supervise the day-to-day activity of contractors and maintain independent time and attendance records to verify contractor-billed hours. The bulletin also stated that contractors should only perform contracted tasks and that their work be clearly distinct from that of other DEA employees. The bulletin also expressly advised contract personnel from performing functions that significantly affect the life, liberty, or property of citizens.

We found that the DEA has not adequately trained its employees and supervisors on its provisions or updated the CFO Bulletin since it was issued in October 2003. Only 3 of the 15 DEA supervisors we interviewed informed us that they were aware of policies and procedures regarding personal services. Further, of these 15 DEA supervisors, only 5 (33 percent) told us that they received training on PACS terms and conditions. Because the DEA has embedded contracted Senior Investigators and Subject Matter Experts on drug investigation teams with full-time DEA employees, we believe both DEA employees and supervisors require training to ensure that they work with contract personnel appropriately and avoid creating the appearance of employer-employee relationships indicative of personal services. We therefore recommend that the DEA: (1) update its policy regarding personal services to reflect the increased interaction between employees and contractors, and (2) require that employees regularly receive training regarding how best to manage contract personnel to avoid personal services. In our opinion, such an updated policy should provide employees with specific citations to the FAR to help DEA personnel better understand the importance of avoiding creating the appearance of personal services.

Additionally, the PACS explicitly prohibits contract workers from soliciting or performing personal services. As the primary contracting office for the PACS, JMD should reevaluate how contract personnel work with federal employees in support of asset forfeiture activities. We recommend that JMD enhance its monitoring and procurement policies to avoid creating the appearance that AFP contractors perform prohibited personal services or inherently governmental functions. Moreover, we further recommend that JMD advise agencies participating on the PACS and future AFP contracts that they must not exceed their authority by administering the task orders to procure prohibited personal services.

The PACS further specifies that all contractors need to provide to their personnel contract-specific training on quality and performance standards, including

²⁶ FAR 37.104(b).

²⁷ DEA Financial Management Division CFO Bulletin No. 2003-04, *Guidelines for Managing Contract Employees* (October 17, 2003).

the prohibition of personal services. We therefore recommend that the DEA ensure that its AFP contractors develop and provide training to all contract personnel regarding the characteristics of personal services, and the rules for who may supervise and review their work on the task orders.

While a PRM official stated that he had worked with the DEA to address performance concerns, we noted that Maximus did not have policies and procedures in place to assess the quality of the work performed by contract personnel, as required by the PACS.²⁸ We therefore recommend that the DEA ensure that AFP contractors implement a standard method to: (1) evaluate individual contract personnel work, and (2) share the results of such assessments with the DEA COR to enhance DEA task order oversight efforts.

Task Order Payments

Maximus submits monthly invoices to the DEA that detail the hourly charges for all task order workers by PACS contract line item number (CLIN). Maximus also includes with the invoice: (1) timesheets completed by each task order worker detailing the hours he or she worked each day and a brief description of the work performed; and (2) supporting receipts and invoices pertaining to other direct costs, particularly travel costs, that could not be allocated to labor costs. Upon receipt, the DEA COR told us that a Maximus Junior Professional and the DEA COR review the invoice for accuracy. If complete and correct, the DEA COR approves the invoice to be paid.

²⁸ See the PACS § C.6.7(a), *Quality Assurance and Quality Control*.

Labor Costs

Contract workers from three PACS labor categories charged time to the task orders: Senior Investigators, Junior Professionals, and Subject Matter Experts. The PACS established specific qualifications and hourly rates for each labor category as detailed in Table 3.

Table 3
Qualifications and Hourly Rates by PACS Labor Category

Labor Category and Qualifications	Option Year 6 Hourly Rate ^a
Senior Investigators require: (1) at least 10 years of law enforcement experience planning, conducting, and participating in complex investigations; (2) 5 years of experience in a specialized area such as Forfeiture, Organized Crime, White Collar Crime, Fraud, Drug, Money Laundering, or similar area of criminal activity; and (3) a working knowledge of current investigative techniques including the use of commercial databases and other sources of information.	[REDACTED]
Junior Professionals are workers who have less than 3 years of experience participating in short term studies.	[REDACTED]
Subject Matter Experts require: (1) significant knowledge and skills in the specified field that the professional community generally recognizes as an expert in the subject matter; (2) a minimum of 3 years in-depth experience directly related to the specific subject matter; and (3) a Master's Degree or higher in field of expertise.	[REDACTED]

^a PACS hourly rates for Option Year 6, which were applicable for all task orders, modifications, and extensions issued during fiscal years (FY) 2014 and 2015. The PACS period of performance ended in FY 2014. The PACS task orders were extended into FY 2015, using the negotiated rates from FY 2014. PACS § B.3.2, *Pricing Table*.

Sources: PACS and task order statements of work

Under the FAR, all costs billed to a contract must be reasonable, allocated properly, and comply with the terms of the contract.²⁹ To assess the support provided for charged labor costs, we first reviewed a sample of 25 invoices for task order work that occurred between October 2013 and September 2015. For each sampled invoice, we traced the hours billed to timesheets prepared by each worker and approved by a DEA supervisor. We found that Maximus allocated tested labor costs to the proper CLIN and sufficiently supported the labor costs with authorized timesheets. Moreover, our review of contract personnel résumés found that all Senior Investigators and Junior Professionals met the qualifications for their respective PACS labor category.

As shown in Table 3, the hourly rate for Subject Matter Experts [REDACTED] is 75 percent greater than the hourly rate for Senior Investigators [REDACTED]. In addition, a Subject Matter Expert requires a Master's Degree, which is unique among the three labor categories. However, we found that neither of the Subject Matter Experts had the required Master's Degree. The PACS states that

²⁹ FAR 31.201-2, *Determining Allowability*.

professional certification or licenses, or very significant experience, may be substituted for a Master's Degree in "unusual situations," and only with the prior written approval of the DEA COR.³⁰ We also found that the DEA COR did not approve in writing an exception for either Subject Matter Expert. Between October 2013 and September 2015, Maximus billed the DEA a total of \$1,130,707 in hourly rates associated with these two Subject Matter Experts.

After we inquired about this matter, in February 2016, Maximus submitted to JMD a request to waive the Master's Degree requirement for its Subject Matter Experts. JMD officials subsequently told us that they do not believe a waiver was necessary because the DEA knew the background of the individuals and believed their experience met the Subject Matter Expert qualifications even though both lacked the Master's Degrees that were required in the contract.

To support this position, JMD officials cited a technical evaluation report that the DEA prepared during the task order procurement process to assess Maximus's proposal. However, we found that the DEA was unable to provide us with evidence supporting that it was aware the Subject Matter Experts did not meet the educational requirements of the PACS when it accepted and paid for the services. For example, the technical evaluation report specified neither the name nor educational background of the individuals Maximus proposed to serve as Subject Matter Experts. The technical evaluation report only stated that the individuals proposed by Maximus had the "depth of experience to fulfill all aspects of contract (sic) and meet all criteria." We also noted that an e-mail from the DEA COR attached to the technical evaluation report stated that the individuals were "generally recognized in the professional community as an expert (sic) in this field." However, the technical evaluation report and supporting documents did not identify these individuals as the proposed Subject Matter Experts and did not state that the respective experiences of these individuals were sufficient to substitute or waive the PACS requirement of a Master's degree for this labor category. Therefore, we do not believe that the technical evaluation report and supporting documents constitute the waiver explicitly required by the PACS. As a result, we found that the DEA did not provide the required written waivers before retaining as Subject Matter Experts individuals who did not meet PACS education requirements.

JMD officials stated that the purpose of the written waiver provision was to protect the government's interest. According to JMD officials, the government did not forfeit the protective benefits of the waiver provision because Maximus was transparent about the fact that its Subject Matter Experts lacked Master's Degrees, and the DEA approved these individuals to serve as Subject Matter Experts knowing that each lacked a Master's degree. Even so, this explanation does not address the fact that the DEA did not meet an explicit PACS contractual requirement for these Subject Matter Experts.

Without a Master's degree, both of the individuals who provided services as Subject Matter Experts could have still supported the task orders as Senior

³⁰ PACS § C.6.3, Education/Experience Requirements of Labor Categories.

Investigators, who are paid at a lower rate than Subject Matter Experts. Therefore, without a waiver, the DEA effectively paid a premium of \$485,386 over what it would have paid had these individuals served as Senior Investigators. The lack of a process to ensure that the DEA documented required waivers before hiring and subsequently paying these individuals as Subject Matter Experts placed the government at an unnecessary risk of overpaying for services.

As stated previously, after accepting all services provided by the Maximus and PRM contract workers, the DEA administratively closed both task orders and deobligated all residual funds effective June 27, 2017. We believe that this action may have affected its ability to ratify the task orders or recoup the excess funds paid to Maximus.³¹ To best ensure compliance with qualification requirements stated in its contracts, we recommend that the DEA establish a process to ensure that it properly assesses the qualifications of individuals proposed to provide contracted AFP services to ensure compliance with explicit contractual education requirements.

Other Direct Costs

The PACS established one CLIN for all other direct costs to capture non-labor costs incurred by a contractor directly related to contract work. Based on our review of invoices and interviews with contract personnel, a large portion of the other direct costs Maximus allocated to the task orders comprised travel costs.

Although the PACS permits contractors to be reimbursed for travel costs associated with airfare and lodging directly related to contract work, it generally prohibits the reimbursement of local travel costs. Because of this, such costs and any directly-associated costs are considered “expressly unallowable” or “mutually agreed to be unallowable.” Contractors must therefore take care to identify and exclude such costs from their billings.³²

While the PACS does not specifically define local travel costs, it provides two examples: (1) travel to and from a normal job site, and (2) supervisory travel to a government or alternative facility to oversee operations. The PACS also stipulates that personnel working temporarily at a government or alternative facility must consider that facility as their normal job site, and therefore are ineligible to receive local travel costs.³³

³¹ A Contracting Officer may approve an unauthorized commitment, such as the acceptance of services that did not meet contract requirements, through a formal process referred to as ratification under FAR 1.602-3. Such a process would involve both the government and contractor, and may only be performed **when, among other things, “funds are available and were available at the time the unauthorized commitment was made.”**

³² FAR 31.201-6, *Accounting for Unallowable Costs*.

³³ PACS § B.3.1(c), *Travel*.

In addition, under the Federal Travel Regulation, each federal agency must define the local travel radius from a worker's duty station.³⁴ DOJ defines local travel as travel to any area within 50 miles from an employee's duty station or residence.³⁵ Because the PACS examples of local travel comport with the DOJ definition of local travel, we applied the DOJ definition of local travel to assess the allowability of travel costs Maximus charged to the task orders.

To ascertain the level of unallowable local travel costs included in Maximus's invoices, we judgmentally selected 4 of 24 total monthly invoices that covered the 2-year scope of our audit. The sample identified \$982 in local travel costs out of \$21,170 in other direct costs included in the 4 invoices tested. Under the PACS, such local travel costs should not have been allowable. Maximus billed a total of \$107,488 in other direct costs in the 20 invoices not included in our sample. Based on our sample, these remaining invoices potentially included unallowable local travel costs that should not have been allocated to the task orders.

DEA officials told us that contract workers routinely received reimbursement for mileage associated with wire-taps, stakeouts, and other engagements that occurred less than 50 miles from their normal job site. Although DEA officials also told us that they reviewed invoiced travel costs for support documents, they did not consider whether the invoiced costs constituted unallowable local travel under the PACS. DEA officials stated that a single CLIN for other direct costs made it difficult for them to ascertain which travel costs were local or non-local.

We believe it is important that the DEA review all AFP invoices carefully for unallowable local travel costs before payment. If local travel costs were to be incurred to support task order work, the DEA should have stipulated such in its task orders. Considering that all task order work has been concluded and the DEA has administratively closed the task orders, we recommend that the DEA: (1) work with JMD to ensure that future AFP contract terms and line item numbers address potential travel costs incurred as a result of work performed away from the normal job site and (2) implement controls to ensure that it properly identifies, segregates, and excludes unallowable costs from future AFP invoices.

³⁴ 41 C.F.R. § 300-304 (2016).

³⁵ JMD Financial Management Policies and Procedures Bulletin No. 06-10, *Reimbursement of Expenses in the Local Travel Area* (March 15, 2006).

Classification of Task Order Workers as Independent Contractors

According to the Department of Labor (DOL), individuals are employees if the **nature of their work falls within the Fair Labor Standards Act's (FLSA) definition of employment** with the overarching question being whether the totality of the **worker's circumstance indicates that the worker is economically dependent on the employer or in business for themselves**. Employees are economically dependent on employers, whereas independent contractors are not, and independent contractors are typically not entitled to receive many benefits, protections, and privileges that employees are entitled to, such as Social Security and Medicare matching payments, health insurance, unemployment insurance, minimum wage, and overtime pay.

In addition, the Service Contract Labor Standards (SCLS) require employees working on federal service contracts in excess of \$2,500 not be paid less than the wages and fringe benefits required by law to prevent contractors from being able to underbid each other for contract opportunities (not including individuals employed in a bona fide executive, administrative, or professional capacity).³⁶

According to JMD and DEA officials, Maximus and PRM classified all 82 contract workers on the task orders as independent contractors because they considered the labor categories to be professional in nature and thus, even if the **workers were "employees," they would be exempt from FLSA and SCLS requirements.**³⁷

During our review, we identified several factors that appear to contradict **Maximus and PRM's classification of independent contractors hired to work on the task order.**

Contractor Control Over Task Order Workers

Maximus and PRM classified all of the 82 contract personnel working on the subject task orders as independent contractors. To assess whether Maximus and PRM properly classified these contract workers as independent contractors, we reviewed the employer-worker relationship between the independent contractors and Maximus and PRM using the economic realities factors that, as summarized by

³⁶ 41 U.S.C. § 6701 et seq., 29 C.F.R. § 4.104 (2016), 29 C.F.R. § 4.113, and 29 C.F.R. § 4.160-4.162 (2016).

³⁷ The FLSA and SCLS exempt certain executive, administrative, professional, information technology, and sales employees from federal minimum wage and overtime requirements. 29 C.F.R. §§ 541.0 and 4.156 (2016). An employer who claims such an exemption has the burden of showing that such an exemption applies. 29 C.F.R. § 779.101 (2016). Because the contract personnel were believed to be exempt from SCLS requirements, the SCLS clause requiring minimum wages and fringe benefits was not incorporated into the PACS contracts and task orders.

DOL, courts have analyzed to evaluate employer-worker relationships.³⁸ In addition, we: (1) **analyzed the contract solicitation package, contractor's** management plan, and work statements; (2) assessed and verified the résumés of all contract personnel that worked on the task orders; (3) interviewed a cross-section of 15 DEA employees and 24 contract personnel regarding training, policies and procedures, duties, timekeeping, and supervision; and (4) reviewed the consultant agreements for 66 of 82 task order workers.³⁹

Our review focused on the economic dependence of the independent contractors vis-à-vis Maximus and PRM and revealed that these task order workers:

- Provided financial investigative services that Maximus and PRM respectively advertised as integral to the course of their businesses.
- Were required to enter into consultant agreements that: (1) paid them a fixed hourly rate, (2) precluded them from working for other clients or hiring assistants or subcontractors to help fulfill task order duties without Maximus or PRM approval, (3) expressly required that they relinquish rights to any work products, proprietary inventions, discoveries, concepts, and methods that come into existence during the contract period, (4) required that they perform work at DEA facilities during normal workday hours, and (5) not solicit or hire other Maximus or PRM contract workers for 2 years without written consent from Maximus and PRM.
- Largely did not report having either current or ongoing financial investigations business activities separate or discernable from Maximus or PRM.
- Almost always worked indefinitely and full-time on the task orders until resigning or being terminated by Maximus or PRM similar to at-will employees.

The U.S. Department of Labor's Wage and Hour Division (WHD) enforces federal minimum wage, overtime pay, and recordkeeping tenets of the FLSA and prevailing wage requirements of various laws applicable to federal service contracts. The above results suggest that task order workers exhibited characteristics with respect to Maximus and PRM that are consistent with what the WHD, summarizing applicable legal authorities, has characterized as economic

³⁸ DOL Wage and Hour Division Administrator's Interpretation Memoranda Nos. 2015-1 (July 15, 2015) and 2015-12 (July 15, 2015). Our audit covered task orders issued in FYs 2014 and 2015, which coincides with the aforementioned interpretations. In June 2017, the U.S. Secretary of Labor withdrew this guidance but noted that the removal does not change the legal responsibilities of employers under the Fair Labor Standards Act and other authorities, as reflected in the DOL's long-standing regulations and case law.

³⁹ Maximus and PRM were only able to provide 66 of 82 consultant agreements for its contract workers because it destroyed 16 agreements once the consultants separated from work.

dependence.⁴⁰ We believe that this raises a concern that Maximus and PRM contract workers may not have been properly classified as independent contractors. If classified as employees, such personnel could be entitled to FLSA and SCLS protections, as discussed in more detail below.⁴¹

Applicability of FLSA and SCLS Exemptions

We discussed our concerns about the classification of contract workers as independent contractors with DEA officials responsible for awarding Maximus the subject PACS task orders and JMD officials responsible for administering the PACS. DEA officials stated that they did not review the classification of Maximus and PRM contract workers prior to awarding the task orders. JMD contract officials similarly told us that they did not review worker classifications because they believed PACS contractors such as Maximus could determine how to classify their contract workers **and because, even if they were to be considered “employees,” such contract workers qualified as “professionals” and thus are exempt from FLSA and SCLS protections.**

However, based on our review, we question whether the FLSA and SCLS exemptions cited by JMD officials would apply to the task order workers. The exempt or nonexempt status of any particular employee is determined based on **whether the employee’s salary and primary duties meet regulatory requirements**, and the regulations provide that employees who perform investigations or inspections for violations of law, work to prevent or detect crimes, conduct surveillance, prepare investigative reports, or conduct other similar types of work do not typically qualify as exempt because they cannot meet the primary duty requirements for the executive, administrative, or professional exemptions.⁴² Such duties largely mirror what task order Senior Investigators and Subject Matter Experts told us they performed to fulfill task order requirements. Specifically, the task order workers we interviewed stated that, while embedded on DEA Tactical Diversion Squads, Financial Investigations Teams, and Organized Crime Drug Enforcement Task Forces, they:

- Participated in investigations to detect violations of money laundering statutes and Attorney General Exempted Operation;
- Conducted investigations of criminal activity based on reviews of Suspicious Activity Reports provided by financial institutions that are indicative of possible violations of law or regulation;

⁴⁰ DOL Wage and Hour Division Administrator’s Interpretation Memoranda Nos. 2015-1 (July 15, 2015) and 2015-12 (July 15, 2015).

⁴¹ As noted subsequently in this report, PRM advised that it has reclassified as an employee almost every worker currently performing services. Such work would be taking place under the Asset Forfeiture Investigative Services ID/IQ, which is a follow-on contract to the PACS.

⁴² 29 C.F.R. § 541.2 and 29 C.F.R. § 541.3(b)(1), (2) (2016).

- Participated in surveillance activities such as wire taps and stake outs; and
- Prepared draft affidavits, subpoenas, and DEA *reports on investigations*.

We recognize that the task order workers we interviewed may have emphasized to us the nature of the investigative duties they performed for the DEA, and underemphasized the more administrative duties they perform. Yet, based on the evidence we acquired throughout the audit, the task order workers appeared to have served as investigators who meaningfully supported mission-critical DEA activities.⁴³

In response to a draft of this report, PRM advised that it reclassified as an employee almost all of the workers performing AFP contract services for the DEA.⁴⁴ JMD has further acknowledged that questions regarding the propriety of **contractors' worker classifications is a recurring issue that would be best addressed** before it awards a contract. Therefore, we recommend that JMD enhance its process for pre-award analysis to ensure that contracting officials review AFP bids for indications of potentially misclassified contract workers and, as appropriate, solicit WHD guidance on applicable labor laws and exemptions.

⁴³ Our concern regarding proper contract worker classification may have also affected the pre-award analysis of the fairness and reasonableness of proposed and subsequently negotiated PACS labor rates, as required by FAR Subpart 15.402. As a part of pre-award analysis, to ensure fair and reasonable prices, FAR 37.115 requires that contracting officers conduct a risk assessment to ensure that bidders do not propose unrealistically low labor rates or other costs. JMD contracting officials told us that, despite a significant price variance among the historical and current bids received, they did not incorporate the propriety of contract worker classification in its pre-award analysis because they considered this issue a business decision of the bidding entity.

⁴⁴ Specifically, PRM stated that it reclassified workers on the ongoing Asset Forfeiture Investigative Services ID/IQ, which is a follow-on contract to the PACS.

CONCLUSION AND RECOMMENDATIONS

Despite the PACS, which makes contractors responsible for recruiting and hiring staff, our audit revealed that the DEA has had a decisive role in selecting the contract personnel who have worked on the task orders. We believe that JMD **needs to revisit the DEA's level of involvement in the hiring process for contract personnel** to determine whether such participation is appropriate. If JMD concludes **that the DEA's involvement is appropriate, we believe that JMD should establish standards for the requisite documents that the DEA must preserve to document its review of candidates' qualifications to work under the task order, and its rationale for specific selections.**

With regard to billings, although we found that Maximus and PRM generally complied with contract terms and conditions, Maximus hired two Subject Matter Experts who did not meet contract qualifications. Although Maximus provided the DEA with notice of the qualifications of these individuals, the DEA did not provide a waiver in advance, which the PACS required, for them to serve as Subject Matter Experts under the task orders. The lack of a process to ensure that the DEA documented these waivers placed the government at unnecessary risk of overpaying for services. We also found that Maximus included unallowable local travel costs in some of its invoices.

The FAR defines a personal services contract as a contract that, by its express terms or as administered, makes contract personnel appear to be, in effect, government employees. Unless specifically authorized by statute, agencies may not award personal services contracts. Based on our application of descriptive elements of personal service detailed in the FAR, we believe that the terms of the PACS task orders and the manner in which the DEA administered these awards demonstrated several characteristics of a personal service contract. We believe that the DEA and JMD need to take action to ensure that the employees and supervisors that interact with task order personnel avoid creating the appearance of personal services.

Contract workers hired as employees are entitled to benefits such as Social Security and Medicare matching payments, health insurance, unemployment insurance, and overtime pay. Independent contractors are not entitled to such benefits. We found that Maximus and PRM classified all of the personnel working on the subject task orders as independent contractors even though the task order workers demonstrated a high level of economic dependence on Maximus and PRM, who, for example, precluded them from working for other clients or from hiring others to perform their duties. Such findings raise a concern that Maximus and PRM contract workers may not have been properly classified as independent contractors.

We discussed our concern with DEA and JMD officials, who told us that they believed that task order workers were exempt from the FLSA and SCLS because they qualified as professionals. However, the contract workers told us that they

performed investigations to detect crimes, conducted surveillance, and prepared investigative reports, or conduct other similar types of work.⁴⁵ As such, task order workers appeared to have served as investigators, which leads to questions about the applicability of FLSA and SCLS exemptions.

We recommend the DEA:

1. Institute a process to identify former employees who are currently, or were at the time of their departure from the DEA, the subject of an investigation and review the circumstances of the investigation to determine whether the DEA should authorize the former employee subsequently to work on a DEA contract.
2. Require that AFP contract personnel who are former DOJ employees complete the required DEA Ethics Questionnaire and confirm that they have no conflicts of interest.
3. Update its policy regarding personal services to reflect the increased interaction between employees and contractors, and require that employees regularly receive training regarding how best to manage contract personnel to avoid personal services.
4. Ensure that AFP contractors develop and provide training to all contract personnel regarding the characteristics of personal services, and the rules for who may supervise and review their work on the task orders.
5. Ensure that AFP contractors implement a standard method to: (1) evaluate individual contract personnel work, and (2) share the results of such assessments with the DEA COR to enhance DEA task order oversight efforts.
6. Establish a process to ensure that it properly assesses the qualifications of individuals proposed to provide contracted AFP services to ensure compliance with explicit contractual education requirements.
7. Work with JMD to ensure that future AFP contract terms and line item numbers address potential travel costs incurred as a result of work performed away from the normal job site and implement controls to ensure that it properly identifies, segregates, and excludes unallowable costs from future AFP invoices.

We recommend JMD:

8. **Assess the DEA's level of involvement in the selection of task order workers hired by the contractors to determine if the DEA's participation is appropriate.** If JMD determines it is appropriate for DEA officials to continue having an extensive role in selecting contract personnel, we believe that the

⁴⁵ 29 C.F.R. § 541.3(b)(1) (2016).

DEA should maintain the documents necessary to demonstrate, for each task order vacancy, why its officials selected a certain candidate over other AFP contractor candidates.

9. Enhance its monitoring and procurement policies to avoid creating the appearance that AFP contractors perform prohibited personal services or inherently governmental functions.
10. Advise agencies participating on the PACS and future AFP contracts that they must not exceed their authority by administering the task orders to procure prohibited personal services.
11. Enhance its process for pre-award analysis to ensure that contracting officials review AFP bids for indications of potentially misclassified contract workers and, as appropriate, solicit guidance from the U.S. Department of **Labor's** Wage and Hour Division on applicable labor laws and exemptions.

STATEMENT ON INTERNAL CONTROLS

As required by the *Government Auditing Standards*, we tested, as appropriate, internal controls significant within the context of our audit objectives. A deficiency in an internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to timely prevent or detect: (1) impairments to the effectiveness and efficiency of operations, (2) misstatements in financial or performance information, or (3) violations of laws and regulations. Our evaluation of the Justice Management Division, the Drug Enforcement Administration, Maximus, Inc., and Professional Risk Management, Inc., was *not* made for the purpose of providing assurance on its internal control structure as a whole. Management at the aforementioned components and contractor is responsible for the establishment and maintenance of internal controls.

As noted in the Findings and Recommendations section of this report, we **identified deficiencies in the components' and contractors' internal controls that are significant within the context of the audit objectives.** Specifically, we found deficiencies in policies and procedures for contract administration and oversight at the DEA and JMD. These weaknesses in internal controls are detailed within our report and we believe the weaknesses should be addressed.

Because we are not expressing an opinion on the internal control structure of these components and the contractor as a whole, this statement is intended solely for the information and use of the auditees. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

STATEMENT ON COMPLIANCE WITH LAWS AND REGULATIONS

As required by the *Government Auditing Standards* we tested, as appropriate given our audit scope and objectives, selected transactions, records, procedures, and practices, to obtain reasonable assurance that the Justice Management Division (JMD), the Drug Enforcement Administration (DEA), Maximus, Inc. (Maximus), and Professional Risk Management, Inc. (PRM), management complied with federal laws and regulations, for which noncompliance, in our judgment, could have a material effect on the results of our audit. Management at these components and the contractor are responsible for ensuring compliance with applicable federal laws and regulations. In planning our audit, we identified the following laws and regulations that concerned the operations of the auditees and that were significant within the context of the audit objectives:

- 29 C.F.R. § 4 (2016)
- 29 C.F.R. § 41 (2016)
- 29 C.F.R. § 779 (2016)
- 41 C.F.R. § 300-304 (2016)
- 18 U.S.C. § 207 (2016)
- 18 U.S.C. § 983 (2016)
- 28 U.S.C. § 524 (2016)
- 41 U.S.C. § 423 (2016)
- Federal Acquisition Regulation (FAR), including:
 - FAR 1.6, Career Development, Contracting Authority, and Responsibilities
 - FAR 2.101, *Definitions*
 - FAR 4.8, *Government Contract Files*
 - FAR 7.5, *Inherently Governmental Functions*
 - FAR 15.402, *Contract Pricing*
 - FAR 16.601, *Time and Materials Contracts*
 - FAR 31.201-2, *Determining Allowability*
 - FAR 31.201-6, *Accounting for Unallowable Costs*
 - FAR 37.104, *Personal Services Contracts*
 - FAR 37.115, *Uncompensated Overtime Employees*.

Our audit included examining, on a test basis, JMD, DEA, Maximus, and PRM's compliance with the aforementioned laws and regulations that could have a material effect on JMD, DEA, Maximus, and PRM's operations. We interviewed auditee personnel, assessed internal control procedures, examined procedural practices and accounting records.

As noted in the Findings and Recommendations section of this report, we found that the DEA and JMD, did not have controls in place to ensure compliance with the FAR, C.F.R., and U.S.C. Specifically, we noted deficiencies in the DEA and JMD's policies and procedures governing contract and task order administration as well as oversight. This led to: (1) the appearance of the award and performance of

prohibited personal services, (2) potential non-compliances with the FLSA and SCLS, (3) reimbursement of unallowable local travel costs, and (4) payment of unallowable hourly labor rates.

APPENDIX 1

OBJECTIVES, SCOPE, AND METHODOLOGY

Objectives

The objectives of our audit were to assess: (1) the adequacy of the Justice Management Division's (JMD) and the Drug Enforcement Administration's (DEA) administration and oversight of the Professional Assistance Contracts (PACS) and its task orders; (2) Maximus, Inc.'s (Maximus) compliance with the PACS and its task order terms and conditions as well as applicable laws and regulations; and (3) Maximus's performance on the task orders, including financial management, monitoring, reporting, and progress toward meeting the contract goals and objectives.

Scope and Methodology

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

This was an audit of Task Order DJD-08-59-14-D-001 and its extension, Task Order DJD-08-59-15-D-002, issued by the DEA, under PACS Number DJJ-08-C-1659, awarded to Maximus by JMD. Our audit covered, but was not limited to, investigative services supporting the Asset Forfeiture Program (AFP) from October 1, 2013, through September 30, 2015, and included four entities: (1) JMD, the contracting office; (2) the DEA, the contracting agency; (3) Maximus, the prime contractor; and (4) Professional Risk Management, Inc. (PRM), the subcontractor.

Contract Administration and Oversight

To assess the adequacy of JMD and the DEA's administration and oversight of the PACS and its task orders, we reviewed the memorandum that delegated procurement authority from JMD to DEA and gained an understanding of the division of responsibility between the two contracting components. In addition, we attended walkthroughs of the PACS and task orders proctored by contracting officials from JMD and the DEA to gain an understanding of the contractual oversight requirements and actual monitoring practices undertaken by the contracting components. We also reviewed the DEA's internal policies and procedures that establish guidelines for proper supervision and interaction with contract personnel.

Interviews

We conducted over 40 interviews of officials, supervisors, and contract personnel from the DEA, Maximus, and PRM in the Washington, D.C. metropolitan area and at 6 DEA field offices across the country. We interviewed the **DEA Contracting Officer's Representative (COR) and 15 DEA employees** who supervise the contract personnel. We also interviewed 2 Subject Matter Experts, 2 Junior Professionals, and 22 Senior Investigators, totaling 26 of 82 (over 30 percent) contract workers charging costs to the contract across the country. These interviews with DEA supervisors and contract personnel allowed us to obtain an understanding of the scope of work performed under the task orders as well as the internal controls incorporated in the monitoring processes implemented by the contracting components. Areas discussed included training, site visits, performance evaluations, and financial control activities. We subsequently performed further analysis based on risk areas identified during the interviews.

Within the Washington, D.C. metropolitan area, we interviewed all of the locally-contracted Subject Matter Experts, Junior Professionals, and Senior Investigators who worked on the task orders.⁴⁶ We also interviewed the six DEA employees responsible for supervising the local contract personnel.

For contract personnel outside of the Washington, D.C. metropolitan area, we determined that a judgmental selection was the most appropriate method as the group of task order workers that we examined performed like tasks in the same type of environment. Specifically, the contracted Senior Investigators are responsible for providing identical investigative services under a DEA supervisor at DEA field offices around the country. We did not intend to project this sample to the universe of all contract personnel working on the audited task orders. We sought optimal universe coverage in terms of geographical location. We also took into account variation in the number of contract personnel assigned to each DEA office. We selected offices that had the greatest and least number of contract personnel to determine whether this impacted the extent and quality of oversight. We also considered the ratio of DEA supervisors to assigned contract personnel and interviewed a combination of individuals in offices with the highest and lowest ratios. Additionally, we selected offices in both high drug trafficking areas and areas with lower trafficking volumes, with the goal of including offices responsible for varying amounts of seizures and forfeitures.

We conducted interviews of non-local contract personnel and their designated DEA supervisors at six DEA field offices: Chicago, New Orleans, New York City, Philadelphia, Seattle, and Tampa. Of the 59 Senior Investigators stationed outside of the Washington, D.C. metropolitan area, we interviewed 17 Senior Investigators

⁴⁶ There were two Subject Matter Experts, two Junior Professionals, and seven Senior Investigators assigned to DEA locations within the Washington, D.C. metropolitan area. The Subject Matter Experts and Junior Professionals within the local area comprised the entire universe of contract workers assigned to those labor categories for the task orders under audit.

assigned to these 6 DEA offices. We also interviewed the 9 DEA employees responsible for supervising these non-local contract personnel.

Billing

To ensure compliance with contract and task order requirements for billings and payments, we assessed the adequacy of the DEA's payments on monthly invoices that Maximus submitted. As part of our review, we tested whether Maximus and PRM used the appropriate negotiated hourly labor rate for contract personnel by job category. To gain further assurance of accurate billing, we reviewed the work history and education portions of the résumés for all contract personnel to determine whether each worker satisfied the mandatory education and experience requirements for each billable job category stipulated in the contract. From fiscal years 2014 through 2015, Maximus submitted 24 monthly invoices, totaling \$128,657, to the DEA. We reviewed a judgmental selection of invoices for 4 months, totaling \$21,170, to test whether all costs Maximus submitted to the DEA for reimbursement were in accordance with the terms and conditions of the contract. We selected invoices from across the performance period of the task orders. We did not intend this sample to be projected to the universe of invoices submitted under the audited task orders.

Personal Services

To determine whether the DEA, JMD, and Maximus complied with the contractual and regulatory limitations on performing and procuring personal services, we designed procedures to gain an understanding of the nature, timing, and extent of the investigative services provided under the task orders. Specifically, we reviewed interviews of personnel from the DEA, JMD, Maximus, and PRM; announcements for federal employment opportunities similar to those performed under the task orders; and the DEA's mission statement, strategic planning documents, and program area descriptions. We evaluated this information using the six descriptive elements prescribed in FAR 37.104(d), *Personal Services Contracts*. Those indicators were: (1) Contract performance occurs on site; (2) The federal government furnishes the principal tools and equipment used by contracted personnel; (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission; (4) Civil service personnel at the same or a similar federal agency provide comparable services that meet comparable needs; (5) The agency's need for the contracted service can reasonably be expected to last beyond 1 year; and (6) The inherent nature of the contracted service reasonably requires directly or indirectly, government direction or supervision of contractor employees to protect the government's interest, retain control of the function involved, or retain full personal responsibility for the function supported in a duly authorized federal officer or employee. We considered the six descriptive elements in aggregate to determine whether the work performed by the contract personnel was personal in nature.

Classification of Task Order Workers as Independent Contractors

To conduct a preliminary assessment of whether Maximus and PRM complied with applicable labor laws, we reviewed the Fair Labor Standards Act (FLSA), Service Contract Labor Standards (SCLS), and related prescriptive guidance from the U.S. Department of Labor (DOL). We additionally consulted with a labor expert from DOL regarding proper application of the labor laws and accompanying guidance.

Using economic realities factors that, as summarized by the U.S. Department of Labor's Wage and Hour Division (WHD) Administrator's interpretive guidance, courts have analyzed for determining whether a worker is economically dependent on an employer (an employee) or is truly in business for him or herself (an independent contractor), we conducted a preliminary assessment of whether Maximus and PRM appear to have properly classified their contract personnel as independent contractors. We applied the economic realities factors to evaluate the employer-worker relationship between Maximus and PRM and the task order workers designated as independent contractors. More specifically, we:

- (1) analyzed the contract solicitation package, contractor's management plan, and work statements; (2) assessed and verified the résumés of all 82 contract personnel who worked on the task orders; (3) reviewed the interviews of a cross-section of DEA supervisors and contract personnel for information regarding training, policies and procedures, duties, timekeeping, and supervision; and (4) reviewed the consultant agreements for 66 of 82 task order workers.⁴⁷

Using evaluation factors for SCLS applicability from the DOL guidance, we:

- (1) reviewed the contract and its task orders for incorporation of the SCLS;
- (2) reviewed Maximus, PRM, and contracting component justifications for SCLS exemptions; and (3) conducted meetings with JMD contracting officials to discuss exclusion of the SCLS from the contract.

Contractor Performance

In order to assess the contractor's performance on the task orders, we worked to identify any standards that the DEA and Maximus implemented to measure the overall success of the task orders in terms of meeting contract goals and objectives. We also sought and reviewed the results of any such performance evaluations. In addition, through interviews, we obtained the perspective of both DEA and contract personnel on the value of the audited task orders to the Department of Justice.

To gain an understanding of the Maximus performance measurement processes, we requested the contractor's policies and procedures related to financial management, subcontractor management, training, monitoring, and quality standards. We also reviewed the Contract Management Plan that Maximus

⁴⁷ Maximus and PRM were only able to provide 66 of 82 consultant agreements for its contract workers because it destroyed 16 agreements once the consultant separated from PRM.

submitted to JMD in its original proposal for the PACS. During our reviews of this material, we looked for indicators of standard evaluation criteria that established expectations for the contract personnel to meet satisfactorily contractual requirements, including performance reporting. During our interviews of personnel from the DEA, JMD, Maximus, and PRM, we inquired about any individual performance evaluations for contract personnel that the DEA or Maximus conducted, as well as any reassessments and dismissals related to misconduct or underperformance. We also reviewed examples of the performance assessments **that the DEA Contracting Officer's Representative (COR) conducted via e-mail** to monitor the task orders. We reviewed the e-mails to determine whether the DEA COR provided guidance to the DEA supervisors responsible for evaluating the contract personnel, and whether the DEA applied uniform metrics consistently. In addition, we reviewed all Contractor Performance Assessment Reporting System forms that the DEA COR completed for the task orders based on input from the DEA supervisor and the Maximus Program Manager.

APPENDIX 2

DEA ASSET FORFEITURE PROGRAM TASK ORDERS TO MAXIMUS FEDERAL SERVICES, INC.

Task Order	From	To	Total Obligated ^a
DJD085914D001	09/18/2013	11/25/2014	\$13,331,251
DJD085915D002	10/22/2014	01/13/2016	13,247,932
DJJ08C5913T01	10/26/2012	01/28/2015	12,651,564
DJD085916D001	09/28/2015	09/30/2016	12,560,129
DJJ08C5912T01	10/01/2012	09/30/2012	12,157,414
DJJ08C5911T02	10/28/2010	09/30/2011	10,762,574
DJD085916D004	11/09/2016	03/31/2017	5,500,749
DJJ08C5910T01	03/30/2010	09/30/2011	5,084,989
DJJ08C5912T02	10/01/2012	01/8/2013	82,492
DJD085916D002	10/27/2015	12/17/2015	1,088
DJJ08C5912T03	10/01/2012	08/30/2012	402
DJJ08C5911E05	01/31/2014	11/15/2014	0
Total			\$85,380,583

^a Differences in totals are due to rounding.

Source: Federal Procurement Data System as of March 31, 2017.

APPENDIX 3

DRUG ENFORCEMENT ADMINISTRATION'S RESPONSE TO THE DRAFT AUDIT REPORT⁴⁸



U. S. Department of Justice
Drug Enforcement Administration

www.dea.gov

Washington, D.C. 20537

JAN 19 2018

MEMORANDUM

TO: Jason R. Malmstrom
Assistant Inspector General
For Audit

FROM: Mary B. Schaefer *Mary B. Schaefer*
Chief Compliance Officer
Office of Compliance

SUBJECT: DEA Response to the OIG Formal Draft Report: "Audit of the Drug Enforcement Administration's Asset Forfeiture Program Task Orders Awarded to Maximus, Inc. for Financial Investigative Services"

The Drug Enforcement Administration (DEA) has reviewed the Department of Justice (DOJ) Office of the Inspector General's (OIG), Audit Division, report entitled "*Audit of the Drug Enforcement Administration's Asset Forfeiture Program Task Orders Awarded to Maximus, Inc. for Financial Investigative Services.*" DEA acknowledges and is appreciative of the role the OIG played in identifying areas of weakness to assist DEA in improving contract administration and oversight over professional assistance contracts.

While the OIG did not find evidence that DEA officials' roles in selecting contract personnel violated ethic rules, there is room for improvement. DEA will further examine its processes to ensure the integrity of the contract personnel selection process.

OIG made eleven recommendations in this report. DEA provides the following responses to the 7 recommendations made to DEA:

Recommendation 1. Institute a process to identify former employees who are currently, or were at the time of their departure from the DEA, the subject of an investigation and review the circumstances of the investigation to determine whether the DEA should authorize the former employee subsequently to work on a DEA contract.

DEA RESPONSE

⁴⁸ Attachments referenced in this response were not included in this final report.

The Office of Security Programs (IS) instituted a process to conduct suitability reviews of background material related to all individuals submitted for contract employee positions, including Task Force Officers (TFOs), to determine whether the individual has engaged in behavior deemed unacceptable for employment with DEA. The office is currently codifying the process into a standard operating procedure (SOP) and will provide supporting documentation upon completion.

Recommendation 2. Require that AFP contract personnel who are former DOJ employees complete the required DEA Ethics Questionnaire and confirm that they have no conflicts of interest.

DEA RESPONSE

DEA concurs with the recommendation. In 2013, the Office of Acquisition and Relocation Management (FA) implemented DEA clause "2852.203-70 Former Employment or Assignment with the DEA." The clause required that any prospective or current DEA contractor seeking to employ a person who is currently a DEA employee or has been employed by DEA, must ensure that the prospective employee completes a Contractor Ethics Questionnaire with submittal to the Contracting Officer. The contractor is prohibited from employing the prospective employee for work under the DEA contract until they have received written approval. In addition, DEA issued a personnel policy which requires individuals to receive post-employment ethics training highlighting their responsibility to receive an ethics review to avoid potential conflicts of interest prior to employment as a contractor on a DEA contract. In 2016, the Department of Justice (DOJ) updated the "DOJ Ethics Handbook for On and Off-Duty Conduct" and the "Post employment rules which led to DEA issuing an Acquisition Policy Letter: 2018-03 - Notice Regarding Employment of Current or Former DEA Employees under DEA Contracts, Blanket Purchase Agreements and Orders. This policy requires all new service contracts to include the DEA clause and extends the post-employment period of review from 2 to 5 years. DEA has provided OIG supporting documentation of the policies under separate cover.

DEA requests that this recommendation be closed upon issuance of the final report as DEA has implemented processes and updated policy to address former DEA employees who are then employed as contract support personnel on contracts awarded by DEA.

Recommendation 3. Update its policy regarding personal services to reflect the increased interaction between employees and contractors, and require that employees regularly receive training regarding how best to manage contract personnel to avoid personal services.

DEA RESPONSE

DEA concurs with this recommendation. FA issued a brochure entitled the "Contractor Personnel Quick Guide." The brochure instructs government and contractor personnel on the appropriate guidelines for maintaining a proper government-contractor relationship, and establishes best practices for overseeing tasks performed by contract personnel. The referenced guide will be distributed on an annual basis. Additionally, training has been provided to appropriate Government managers on how to manage their interactions with contract support

personnel in a manner that does not create a personal service environment. The brochure has been provided to OIG under separate cover.

DEA requests closure of this recommendation upon issuance of the final report as DEA has instructed government and contractor personnel on the appropriate guidelines for maintaining a proper government-contractor relationship.

Recommendation 4. Ensure that AFP contractors develop and provide training to all contract personnel regarding the characteristics of personal services, and the rules for who may supervise and review their work on the task orders.

DEA RESPONSE

The DEA concurs with the recommendation. The DEA Program Office and FA will modify the contract with the current AFP Contractor to require training on the characteristics of personal service contracts, and ensure the contractor's staff knows who may supervise and review their work. Upon completion, DEA will provide OIG supporting documentation to close this recommendation.

Recommendation 5. Ensure that AFP contractors implement a standard method to: (1) evaluate individual contract personnel work, and (2) share the results of such assessments with the DEA COR to enhance DEA task order oversight efforts.

DEA RESPONSE

DEA concurs with the recommendation. DEA will ensure that the AFP Contractor provides a monthly report to the COR that documents each individual's contributions to the overall contractor's efforts so that the COR maintains oversight of the contractor's performance. Upon completion of these tasks, DEA will provide OIG supporting documentation to close this recommendation.

Recommendation 6. Establish a process to ensure that it properly assesses the qualifications of individuals proposed to provide contracted AFP services to ensure compliance with explicit contractual education requirements.

DEA RESPONSE

DEA concurs with the recommendation. The Contracting Office and Program Office will review the current methodology for approving education waivers for each position and will update its procedures as appropriate. DEA will document the approval of education waivers while ensuring contractual standards are met and consistently applied across all task orders. Supporting documentation will also be maintained for each waiver. Upon completion of these tasks, DEA will provide OIG supporting documentation to close this recommendation.

Recommendation 7. Work with JMD to ensure that future AFP contract terms and line item numbers address potential travel costs incurred as a result of work performed away from the

normal job site and implement controls to ensure that it properly identifies, segregates, and excludes unallowable costs from future AFP invoices.

DEA RESPONSE

DEA concurs with the recommendation. DEA has issued a modification to the Statement of Work that revises the contract language to more correctly describe the allowable and non-allowable local travel costs that are eligible for reimbursement. This language clearly defines allowable costs for work performed away from the normal job location and non-allowable travel such as transit to and from a contractor's place of residence to the normal work site. Additionally, the modification implements a control procedure that requires that all travel must be authorized in advance and submitted for approval to the COR. The modification has been provided to OIG under separate cover.

Based on this response and supporting documentation, DEA request closure of this recommendation.

Thank you for the opportunity to respond and address the OIG's concerns. If you have any questions regarding this response, please contact DEA's Audit Liaison Team on 202-307-8200.

APPENDIX 4

JUSTICE MANAGEMENT DIVISION'S RESPONSE TO THE DRAFT AUDIT REPORT



U.S. Department of Justice
Justice Management Division
Asset Forfeiture Management Staff

Washington, D.C. 20530

January 26, 2018

MEMORANDUM

TO: JASON R. MALMSTORM
ASSISTANT INSPECTOR GENERAL FOR AUDIT
OFFICE OF THE INSPECTOR GENERAL
Kenneth A. Arnold
FROM: KENNETH A. ARNOLD
DIRECTOR

SUBJECT: Response to Office of Inspector General Draft Audit Report, Audit of the Drug Enforcement Administration's Asset Forfeiture Program Task Orders Awarded to Maximus, Inc., for Financial Services

The Department of Justice (Department), Justice Management Division (JMD), Asset Forfeiture Management Staff (AFMS) has reviewed the Office of the Inspector General's (OIG's) Draft Audit Report – Audit of the Drug Enforcement Administration's Asset Forfeiture Program Task Orders Awarded to Maximus, Inc., for Financial Services (Report). The Report identifies 11 recommendations, of which 4 (Recommendations 8 – 11) apply to JMD AFMS. As explained below, JMD AFMS agrees with the Report's findings and concurs with the recommendations.¹ The following is brief summary of steps JMD has undertaken or will undertake to implement them.

¹ However, as written, we believe some of the report language gives the misimpression that the Department unknowingly accepted contract services from two Subject Matter Experts who did not meet minimum qualification requirements under the contract. This is inaccurate. For example, page 5 of the draft report states "DEA approved and paid invoices...for two contract personnel who did not meet specific...labor category requirements" and the draft report concludes these payments effectively amounted to payment of "a premium" that "placed the government at unnecessary risk." We disagree with this characterization, especially as laid out in the summary narrative of the "Audit Results" section at the very beginning of the draft report. As noted much later on page 20 of the draft report, "[the contractor] was transparent about the fact that its [two] Subject Matter Experts lacked Master's Degrees, and...DEA approved these individuals to serve as Subject Matter Experts knowing that each lacked a Master's degree." The contract expressly allowed DEA to accept those services from Subject Matter Experts without Master's Degrees if other factors, such as equivalent experience, qualified as an adequate substitute for the educational requirement. This is a common practice in all government hiring, whether federal or contractor personnel, and that was the situation here. The only issue is whether the Government's knowing acceptance of those substitute qualifications was sufficiently documented.

Recommendation 8: The Report recommends that JMD assess the level of involvement in the selection of task order workers hired by the contractors to determine if DEA's participation is appropriate and, if JMD determines it is appropriate for DEA officials to continue having an extensive role in selecting contractor personnel, it should ensure that DEA maintain the documents necessary to demonstrate why its officials selected a certain candidate over other Asset Forfeiture Program (AFP) contractor candidates. JMD AFMS will increase its efforts in assessing and coordinating with DEA, including the dissemination of applicable training and reference materials regarding the appropriate role of DEA in the selection of staff hired by contractors, and the need to maintain any relevant selection and recommendation documents.

Recommendation 9: The Report recommends that JMD enhance its monitoring and procurement policies to avoid creating the appearance that AFP contractors perform prohibited personal services or inherently governmental functions. JMD AFMS and JMD Procurement Services Staff (PSS) will increase its efforts in coordinating on a routine basis with customers utilizing its contracts and contractors to prevent, and if necessary correct, situations that may create the appearance of AFP contractors performing prohibited personal services or inherently governmental functions. Such coordination includes the dissemination of applicable training and reference materials, as well as regular site visits by the JMD Contracting Officer (CO) and CO's Representative (COR).

Recommendation 10: The Report recommends that JMD advise agencies participating on the PACS and future AFP contracts that they must not exceed their authority by administering the task orders to procure prohibited personal services. JMD AFMS will increase its efforts in coordinating on a routine basis with customers utilizing its contracts to ensure they are fully advised of the prohibition against exceeding their authority by administering task orders to procure prohibited personal services. Such coordination and advice will include the dissemination of applicable training and reference materials.

Recommendation 11: The Report recommends that JMD enhance its process for pre-award analysis to ensure that contracting officials review AFP bids for indications of potentially misclassified contract workers and, as appropriate, solicit Department of Labor, Wage and Hour Division (WHD), guidance on applicable labor laws and exemptions. JMD AFMS, in conjunction with the JMD PSS, will increase its pre-award analysis efforts to ensure that contracting officials review AFP bids for indications of potentially misclassified contract workers and, as appropriate, solicit WHD guidance on applicable labor laws and exemptions.

JMD appreciates the opportunity to comment on the OIG's Draft Report. We also appreciate the time and effort of the OIG Audit Staff in its review of the Department's AFP. We believe that the implementation of these recommendations will improve the AFP. Should you have any questions regarding this topic, including JMD's comments, please do not hesitate to contact Richard Theis, Department of Justice, Audit Liaison, on (202) 514-0469

APPENDIX 5

MAXIMUS FEDERAL SERVICES, INC.'S RESPONSE TO THE DRAFT AUDIT REPORT⁴⁹



February 14, 2018

Via email

Department of Justice
Office of the Inspector General
Washington Regional Audit Office

Attn: [REDACTED] Assistant Regional Audit Manager

Re: Draft Audit Report - Drug Enforcement Administration's ("DEA") Asset Forfeiture Program Task Orders Awarded to MAXIMUS Federal Services, Inc. ("MAXIMUS") for Financial Investigative Services

Dear [REDACTED]

This is the MAXIMUS response to the above-referenced Draft Audit Report. To the extent that the issues addressed below have already been addressed by you in response to our earlier comments on the Draft Audit Report, please ignore them.

MAXIMUS agrees with each of the eleven recommendations listed at pp. 28-29 of the Draft Audit Report. MAXIMUS no longer has a contract with DEA for these services and so has no role in the implementing the recommendations. MAXIMUS does believe that implementation of the recommendations in the Draft Audit Report will improve the process for both the Drug Enforcement Administration and the contractor.

As summarized below, we don't agree with some of the analysis in the Draft Audit Report. We acknowledge that OIG has made its assessments in good faith—we simply disagree on some points of the analysis.

A. CLASSIFICATION OF CONTRACTOR PERSONNEL AS INDEPENDENT CONTRACTORS

MAXIMUS disagrees with the suggestion that Contractor Personnel¹ may not have been properly classified as independent contractors.² The case that the investigators were properly classified as independent contractors is summarized below.

¹ The term "Contractor Personnel" is the term most commonly used in the Contract DJU-08-C-169 (the "prime contract") under which the two DEA Task Orders for investigative services were issued. This term and the prime contract are both neutral as to the status of the investigators as independent contractors or employees. We use the terms "Contractor Personnel" and "investigators" interchangeably in this response.

² We understand that the current contractor has elected to hire employees rather than retain independent contractors for most of the investigators. That election is not dispositive. We believe the current contractor made the change primarily as a customer accommodation to DEA.

⁴⁹ Attachments to this response were not included in this final report.

1. The Investigators are Fair Labor Standards Act ("FLSA") Exempt Personnel

These investigators are highly skilled and experienced. Many of them are former DEA agents and officials. They all have bachelor's degrees and have considerable investigative experience. Many such investigators work as independent contractors in the commercial marketplace as private investigators. As an occupational group, these investigators include many independent contractors. While not controlling, these industry practices are informative and relevant to the question of whether the investigators were properly classified as independent contractors.

The DEA prime contract for these exempt professional services is evidence of this general market condition. The contract does not include the Service Contract Act ("SCA") prevailing wage requirements, presumably because the contracting agency agreed that the work was principally for exempt services and thus was exempt from the SCA. There is no SCA wage determination attached to the contract. The DEA Clause Matrix for Award Against Multiple Award Schedule Contracts (7/25/2014) has a block to check for the clause at DEA-2852.222-70 APPLICABLE WAGE DETERMINATION (SERVICE CONTRACT ACT STANDARDS (JUNE 2014). That block was not checked in the two DEA AFISS task orders we reviewed and the tables for applicable Wage Determinations were left blank.

Employees that are exempt from the SCA are also exempt from the FLSA minimum wage and overtime requirements. The white-collar exemptions in the two laws are exactly the same. Thus, if these investigators qualify as executive, administrative, or professional exempt personnel, they are exempt from both the SCA and the FLSA.

The Office of Personnel Management ("OPM") has determined that these kinds of investigators are exempt from the FLSA when working in-house for the U.S. Government. See, OPM Decision No. F-1810-12-01 from June 26, 2001, which confirms the exempt classification of investigator work.

The investigators used on this DEA contract are exempt executives and thus exempt from the FLSA. The test for exempt executive's states:

The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act also includes any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management. 29 CFR § 541.101.

Notably, "business owners" need not be paid on a salary basis to be exempt. They can be paid by the hour. *Id.*

Here, the investigators at issue are "business owners." They are not economically dependent on MAXIMUS or PRM. They are free to provide their services to any person or organization they wish. As expressly stated in 29 CFR § 541.101, the business owner exemption is available "regardless of whether the business is a corporate or other type of organization." *Id.* An unincorporated sole proprietorship satisfies the definition of a business for this purpose. All that is required is that the business owner manages his business. Here, the investigators obviously do that.

and DOJ to eliminate further disagreement, not because they agreed with the suggestions in the Draft Audit Report.

To recap: (i) the government contract itself has determined that the investigators are exempt personnel; (ii) investigators have been determined by OPM to be an exempt occupation; (iii) these are very skilled, well-trained investigators; and (iv) the Contractor Personnel retained here as independent contractors manage their own businesses and can work for multiple employers. Accordingly, they are executive exempt personnel.

2. The Classification of Investigators as Independent Contractors was Proper

It is not unusual that subcontractors, including individual sole proprietors, are working on this contract. Government contractors often hire independent contractors to perform services on government contracts and it is a rare government contract that does not involve some kind of lower-tier independent contractor (i.e., subcontractors) furnishing services. As to the classification of Contractor Personnel as independent contractors, the Draft Audit report indicates that your analysis relied heavily on the various provisions in the contracts with the independent contractors. We address these provisions in turn.

a. The Conflicts of Interest Clause is Not Relevant to the Classification of Investigators

MAXIMUS reviewed the language in the one independent contractor agreement that PRM provided and in a PRM contract form that we had in our files. The Draft Audit Report misinterprets the Conflicts of Interest clause and the nature of the agreement itself.

The relevant conflicts of interest clause actually addresses only three narrow categories in which the independent contractor's freedom to work for others is restricted. See below.

Conflicts of Interest. The Independent Contractor warrants and represents that (i) the work hereunder will not create an actual or apparent conflict of interest with any other work he or she might perform, (ii) the Independent Contractor is not presently subject to any agreement with a competitor or potential competitor of PRM or with any other party that will prevent the Independent Contractor from performing in full accord with this agreement and (iii) the Independent Contractor is not subject to any statute, regulation, ordinance or rule that will limit his or her ability to perform the obligations under this agreement. The parties agree that the Independent Contractor shall be free to accept other work during the term hereof; provided, however, that such other work shall not interfere with the provision of services hereunder and further provided that, without the prior consent of PRM, the Independent Contractor shall not accept other work with any competitor of PRM that creates a conflict of interest with PRM. [Underlining supplied.]

This is standard language in any arms-length contract between independent entities. The operative language affirmatively states that the "Independent Contractor shall be free to accept other work during the term...." The only exceptions are for work that either interferes with the provision of services to PRM or creates a conflict of interest with PRM. The law does not favor restrictions on competition and courts are loath to enforce them. These particular exceptions are narrowly drawn and would be narrowly enforced by the courts. Interference with the provision of services would require that the independent contractor's work for others diverts essential resources from the timely completion of the independent contractor's work for PRM. A conflict of interest would require more than mere competition. It must be a tangible conflict of interest, such as, a contract with a third party for independent validation and verification of the work the contractor did for PRM. It is not a broad restriction on competition with PRM or on contracting to provide services to other customers. This is consistent with Federal Acquisition Regulations ("FAR") restrictions on organizational conflicts

of interest ("OCI") that are applicable to the work done by PRM and MAXIMUS under the prime contract. These FAR OCI restrictions apply to the independent contractors by law—at least insofar as the conflicts involved work for the federal government.

The use of covenants not to compete between contractors and subcontractors is an ordinary and regular business practice. The FAR recognizes this fact and imposes limits on the right of prime contractors to restrict their subcontractors. See FAR 52.203-6 - *Restrictions on Subcontractor Sales to the Government*. The FAR clause only restricts limits on sales of "items or process (including computer software)...." *Id.* It doesn't restrict non-compete provisions on services. The clause states "this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation." *Id.* Contrary to the assertion in the Draft Audit Report, the use of these kinds of covenants in service subcontracts is permissible. In no case is the use of such restrictive contractual language deemed to be evidence that the subcontractor is anything other than an independent contractor. It is irrelevant to the legal issue of whether the subcontractor is a bona fide independent contractor. If the conflicts of interest provision contributed to the stated concern that Contractor Personnel may not have been properly classified as independent contractors, that concern is unfounded and unsupported by the applicable law. The degree of control expressed in the provision is very limited and does not adversely affect the classification of the Contractor Personnel as independent contractors.

b. The Six Factor Common Law Test is Relevant to Proper Classification of Contractor Personnel

In determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act, courts consider the "economic realities" of the relationship between the worker and employer. See *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006). Specifically, courts will look at "whether the worker 'is economically dependent on the business to which he renders service or is, as a matter of economic [reality], in business for himself.'" See *id.* (citation omitted). In conducting this analysis, courts have developed a six-factor test:

- (1) The degree of control that the putative employer has over the manner in which the work is performed;
- (2) The worker's opportunities for profit or loss dependent on his managerial skill;
- (3) The worker's investment in equipment or material, or his employment of other workers;
- (4) The degree of skill required for the work;
- (5) The permanence of the working relationship; and
- (6) The degree to which the services rendered are an integral part of the putative employer's business.

See *id.*, at 304-05; see also Wage and Hour Division (WHD) Fact Sheet 13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA), available at <https://www.dol.gov/whdregs/compliance/whdfs13.htm> ("WHD Fact Sheet").

We respectfully submit that the investigator positions satisfy this test.

First, the sample independent contractor agreement we provided reveals much more that is relevant to a fair and proper classification of Contractor Personnel as independent contractors. This particular contract is written between PRM and a separate legal entity, a limited liability company with its own Federal Tax ID Number. We haven't done a full review of all of these contracts, but a number of others are contracts between separate legal entities, such as, limited liability companies or

corporations.³ Legally, it does not matter that some individuals entered into these contracts as sole proprietorships. As noted above, they are entitled to do that under the applicable law and they can still take deductions from their taxes for business related expenses.

Second, the sample independent contractor agreement follows all of the formalities one would expect for a contract with independent contractors, such as, but not limited to:

- Invoicing as a condition for payment
- Statement of status of both parties as independent contractors
- Termination if the prime contract is terminated or if the prime contractor directs termination of the contractor's services [These terms are not usual to employment contracts]
- Formal Change Orders
- Warranty of Performance
- Assignment of intellectual property rights [This is not necessary in an employment relationship. Under the Copyright Act, works created by an employee for an employer belong to the employer as "works made for hire." No contract term is required.]
- Indemnification by the Independent Contractor
- Compliance
- Notices
- Records and Inspection

Third, these terms are entirely inconsistent with an employment relationship. To paraphrase an old aphorism—if it looks like an independent contractor agreement and it says it's an independent contractor agreement, it is an independent contractor agreement.

c. The Six Factor Test Clearly Favors Classification as Independent Contractors

We are not going to parse all six factors of the test, but we do want to make a few points about the independent contractor agreements.

Regarding the degree of control, please note that these investigators exercised considerable scope of discretion and independent judgment. Please review the sample DEA Form 19 we provided for a senior investigator, who was certainly performing high level duties during this travel since the Requisition says he is "accompanying case agent to meet AFMLS Attorney in Las Vegas, NV and to assist in interview of IRS Revenue Agent." The investigator worked closely with the customer applying his specialized knowledge, and completely controlling his own work. There is little contractor supervision, if any. In fact, the only way that PRM or MAXIMUS would be involved is if the DEA customer raised an issue about the quality of the work. The essence of the independent

³ According to the information PRM has provided to us for calendar year 2014, 24 of 85 independent contractors were contracted with PRM as corporations or limited liability companies. We have not independently verified this information, but we have no reason to believe it is incorrect.

contractor test is the right of control. These investigators worked autonomously, reported directly to the Government customers, and are not under the exclusive control of MAXIMUS or PRM.⁴

The scope of work for the independent contractor agreements provides that subcontractors will "identify appropriate financial investigative techniques...." That confirms use of discretion on the part of the subcontractor, not control by PRM or MAXIMUS. The agreements also provide that the subcontractor will "conduct financial investigations." It does not provide specifics as to how those investigations will be carried out. That is left to the discretion of the independent contractor. The Independent Contractor Agreement Exhibits state:

Conducting financial investigations

Subcontractor will conduct financial investigations for DEA to help ensure optimum benefits from the strategic use of forfeiture as a law enforcement tool. The Subcontractor will conduct comprehensive financial analyses of the targets of investigations and will provide case specific advice and guidance and identify appropriate financial investigative techniques for use in cases of the DEA, enabling DEA to maximus enforcement and use of forfeiture authorities available under the law.

The scope of work also states the subcontractor will assist in preparing financial investigative reports, but again, does not provide specifics beyond:

All reports and other documentation prepared as may be required will be prepared in such a manner as to make the information easily understood and the conclusions that can be drawn from them readily apparent.

The independent contractors are free to do their work within the general scope of the SOW as they deem appropriate.

Regarding the independent contractors' investment in equipment or material, this factor does not apply to this case. Because of the sensitive and classified nature of the work, the work had to be performed in secure government facilities using appropriate secure government systems. The investigators were not given the opportunity to work with their own equipment or facilities. Multiple courts have found that when the government provides equipment or facilities, as opposed to a contractor providing its own equipment and facilities, that arrangement weighs in favor of an independent contractor relationship. *See, e.g., Gavrilovic v. Worldwide Language Resources, Inc.*, 441 F. Supp. 2d 163, 175-76 (D. Me. 2006).

Regarding the degree of skill, the Independent contractor agreement explicitly recognizes the "special skill" and "expertise" needed to perform the contract:

⁴ It appears that the Draft Audit Report may have unconsciously attributed the alleged excessive control exercised by some government customer personnel over some of the investigators to the prime contractors. This is not appropriate. The government is not an agent of the prime contractors. To the extent the government actually did exercise too much control over Contractor Personnel, that is exclusively an issue for the government under its personal services rules. The government's activities cannot be attributed to the prime contractors for purposes of determining the proper classification of Contractor Personnel as independent contractors.

Standard of Performance. Independent Contractors warrants and represents that he or she possess the special skill and professional competence, expertise, and experience to undertake the obligations imposed by this agreement

The agreement also provides the scope of work for the subcontractors. It clearly requires skill and specialized knowledge, including conducting financial investigations, preparing reports on those investigations, and conducting reviews to assist in identifying assets subject to forfeiture.

Regarding the permanence of the working relationship, the independent contractor agreement includes the following:

Term. This agreement shall be effective as of April 1, 2016 and shall continue until September 30, 2016 unless earlier terminated as provided in paragraph 5 below. PRM shall have the option to extend the agreement yearly beginning each October 1st. Notice of the decision will be sent to the Independent Contractor prior to October 1st each year

Also note that either party can terminate the contract for convenience with 30 days written notice.

Most important of all, the agreement provides that the parties agree that the independent contractor can accept other work (as long as there is no conflict of interest). *See, the discussion above at A.2.a* (noting "The parties agree that the Independent Contractor shall be free to accept other work during the term hereof...."). The investigators are free agents and can and do work for others.

d. DOL Policy for Classification of Independent Contractors has Changed

We presume that the IG findings arise, at least in part, from the Obama-era Department of Labor ("DOL") emphasis on severely limiting the use of the independent contractor classification. DOL issued Administrator's Interpretation No. 2015-1 with policy guidance by means of a July 15, 2015 memorandum to prevent businesses from classifying workers as independent contractors. Aggressive DOL enforcement actions ensued.

The DOL Administrator's Interpretation No. 2015-1 was recently withdrawn. On or about June 7, 2017, DOL removed that policy from its website and announced that:

*The Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors were withdrawn effective June 7, 2017. Removal of the two administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act or Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the Department's long-standing regulations and case law. The Department will continue to fully and fairly enforce all laws within its jurisdiction including the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.

<https://www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm#foot>. There is a new regime in charge of DOL, and the old enforcement policies are withdrawn. Reliance on the prior enforcement scheme for this IG finding would be unsupported.

e. Other Factors

The Draft Audit Report addresses five other factors to support its suggestions that the investigators may not have been properly classified as independent contractors. See Draft Audit Report at page 24. We briefly address each of these possible indicia of employment below in italics.

- (1) Paid them a fixed hourly rate.

Independent contractors are frequently paid a fixed hourly rate, particularly for professional services such as those sought by AFISS—that doesn't make the independent contractors employees. Indeed, the FAR has a whole section devoted to these types of contracts. See, FAR 16.6 Time-and-Materials, Labor-Hour, and Letter Contracts. These payment terms are as common independent contractor agreements of all kinds.

- (2) Precluded investigators from working for other clients or hiring assistants or subcontractors to help fulfill task order duties without Maximus or PRM approval.

The contract actually states that the independent contractors are "free to accept other work..." with very limited exceptions. The anti-assignment clause is included in virtually every subcontract. See the discussion above at A.2.a. It prevents the assignment of the work to others without the approval of the prime contractor. This is absolutely essential because the prime contractor is legally responsible to the agency for proper completion of the work in accordance with the prime contract. The prime contractor must ensure that the contractors and personnel performing the work have the professional qualifications, the clearances, are legally available to do the work (e-verify, no conflicts of interest, no debarments or suspensions, etc.), and that any lower-tier subcontracts apply the appropriate prime contract terms and terms required by law. Both of these clauses are commonly included in most commercial and government contracts. Neither is common in contracts of employment. Employees work for their employers and so work for others is not an issue. Employees have no right to assign their employer's work to others so that is not an issue either. Both are issues when a company contracts for service with an independent contractors and both must be addressed in the independent contractor agreement.

- (3) Expressly required that they relinquish rights to any work products, proprietary inventions, discoveries, concepts, and methods that come into existence during the contract period.

An ownership clause is included in virtually every modern subcontract. Prime contractors must include these clauses to comply with various prime contract clauses addressing the customer's ownership interests and license rights in materials developed under the prime contract. In fact, this is a much better indicator of an independent contractor relationship than an employment relationship. Under the Copyright Act, work by employees is a "work made for hire" and is owned by the employer as a matter of law. No separate agreement or clause is required to transfer ownership from the employee to the employer.

- (4) Required that they perform work at DEA facilities during normal workday hours

This requirement is related solely to the government's need to protect sensitive classified information. If it were not for this government requirement, the work would have been done in the independent contractor's facilities.

- (5) Not solicit or hire other Maximus or PRM contract personnel for 2 years without written consent from Maximus and PRM.

A non-solicitation clause is very common in contracts and subcontracts. Companies invest a great deal in hiring, training, and placing employees and in identifying and building commercial relationships with subcontractors and vendors who are reliable. They protect that investment by imposing limited time, place, and circumstance prohibitions on solicitation of personnel or their vendors and subcontractors. These clauses protect a legitimate business interest and prevent competitors from abusing the relationship with a prime contractor. These clauses also aid in limiting personnel turnover that can disrupt the prime contract work.

In sum, these five factors do not provide any rational bases from which to classify Contractor Personnel as employees. They are entirely consistent with independent contractor relationships.

B. DEA Waiver of the Degree Requirements for Subject Matter Experts ("SMEs")

The Draft Audit Report defines "waiver" too narrowly. The term "waiver," can refer to the document that provides the waiver, but waiver also refers to the actual waiving of contract requirements. It is well established that such waivers of contract requirements can be either express or implied.

"Waiver consists of a voluntary and intentional relinquishment of a known right." Cherokee Nation v. United States, 174 Ct.Cl. 131, 355 F.2d 945, 950 (1966) (citations omitted). Waiver may be either express or implied. See, e.g., Am. Airlines, Inc. v. United States, 77 Fed.Cl. 672, 681 (2007) ("A waiver need not be express, but may be inferred from a pattern of conduct.") (citations omitted), aff'd, 551 F.3d 1294 (Fed.Cir.2008).

Based on the information provided in the Draft Audit Report, there is no question that the DEA knowingly waived the requirement for a master's degree for the two SME's. The DEA admits it was on notice that the two individuals did not have master's degrees and were being submitted for the SME positions at a much higher rate than the Senior Investigator positions for which they would also qualify. DEA approved these personnel for the positions. If DEA was unwilling to accept these individuals for these positions because of the missing master's degrees, DEA should have rejected them and stated the reasons for the rejection. In approving these individuals for the position, DEA both expressly and impliedly waived the requirement for a master's degree. Were DEA now to change its mind, it would prejudice MAXIMUS. MAXIMUS relied on the DEA's knowing approval to contract for these specific individuals at a higher rate and has paid for these individuals' professional services at the higher rate. MAXIMUS cannot now recover those payments. If DEA had rejected the individuals, then MAXIMUS could have sought other qualified individuals for the SME positions or the parties might have reached some other accommodation. DEA didn't reject these two candidates so the parties never even discussed possible alternative contractual agreements. The fact that these individuals might have qualified for Senior Investigator positions at a lower rate is irrelevant. First, because DEA did not reject these individuals for the SME positions, the parties have no way of knowing if these individuals would have agreed to work at the lower rates. In many cases, very senior individuals will not agree to do that for a variety of reasons, not the least of which are (i) a desire to be compensated fairly for the very high level of skills, experience, and qualifications they bring to the bargained exchange, and (ii) avoid reducing future rate of compensation by setting a lower bar for potential future customers. Second, for all practical purposes DEA's approval terminated the possibility of filling these positions with any personnel in the Senior Investigator

category. Had DEA asked we might have done so, but DEA did not ask. The parties cannot go back now and wonder what they might have agreed to do. MAXIMUS and PRM relied on DEA's approval and DEA is bound by that approval.

None of this is to suggest that the DEA decision to approve these two individuals and waive the requirement for a master's degree was unreasonable. Looking at these individuals' extensive experience, a waiver of the requirement for a master's degree was quite reasonable. Nor would we go so far as to say it would not have been better administrative practice to have created a formal document titled "waiver." We are just observing that a separate document titled "waiver" was not required to affect the enforceable waiver of the contract requirement.

The cases we have reviewed on waiver note that the same conclusions can be reached under a theory of equitable estoppel. See, e.g., A.C. Aukerman Co. v. R.L. Chaires Constr. Co., 960 F.2d 1020, 1041 (Fed.Cir.1992) (The elements of equitable estoppel are: "1) The actor, who usually must have knowledge of the true facts, communicates something in a misleading way, either by words, conduct or silence. 2) The other relies upon that communication. 3) And the other would be harmed materially if the actor is later permitted to assert any claim inconsistent with his earlier conduct.") (citing D.B. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 2.3, at 42 (1973)). Here (1) DEA having knowledge of the true facts, approved the two candidates for the SME position; (2) MAXIMUS and PRM relied on that approval; and (3) MAXIMUS and PRM will be materially harmed if DEA is later permitted to assert any claim inconsistent with its earlier conduct. We relate this only to establish that equitable estoppel would apply here. As we understand it, DEA is standing by its decision to approve the two SMEs. We appreciate the DEA's honesty and integrity in doing so. The analyses on pp. 19 and 20 of the Draft Audit Report should be rewritten accordingly.

C. TRAVEL COSTS WERE APPROVED BY DEA

As to the travel costs noted in the Working Draft, PRM advised us that all travel was documented and approved on *DEA Form 19 - Requisition for Equipment, Supplies, or Services*. He provided a sample form for travel by, which we have already provided to you. The sample form was for a senior investigator who was performing high level duties during his travel. The Requisition Form states he was "accompanying case agent to meet AFMLS Attorney in Las Vegas, NV and to assist in interview of IRS Revenue Agent." If this form is representative of the costs in question, it seems beyond dispute that these costs were incurred on behalf of DEA, approved by DEA, and necessary for the project.⁵

Please note that the PRM independent contractor agreements include provisions which require that the independent contractor receive pre-approval for all expenses, including travel and other associated costs. The independent contractor agreement we reviewed states:

Reimbursable Expenses. All expenses must be pre-approved and in accordance with the existing funding for the task(s) the Independent Contractor is operating under. As such, PRM shall reimburse the Independent Contractor for pre-approved, reasonable, necessary and substantiated expenses incurred by the Independent Contractor for out-of-town travel, lodging, meals, automobile rentals and administrative expenses in connection with the service rendered hereunder; provided, however, that any expense in excess of \$25.00 will not be reimbursed

⁵ We have not reviewed all of these Form 19s and don't have sufficient information about the questioned costs to do so. However, if PRM is correct, DEA should be able to review a representative sample of these Form 19s to see if any further reconciliation is necessary.

without receipts, and all expenses shall only be reimbursed according to the Federal Travel Regulations

Travel

Independent Contractors are required to request authorization (DEA Form 19) for any official travels requested by their DEA Supervisor. The local supervisor is required to request authorization from the Asset Forfeiture Unit at DEAHQ, with a copy to the COTR at DEAHQ. A PDF copy of the DEA form 19 should be faxed to [REDACTED]. Approval for such travel will be forwarded to the DEA Supervisor, PRM and the Independent Contractor.

PRM has advised us that DEA or JMD should have copies of the DEA Form 19 documents detailing the travel expenses and DEA approvals. You might check before including this item in the final Audit Report. Alternatively, DEA or JMD might audit a representative sample of these Form 19s to see if additional verification of the invoiced charges is warranted. If the travel was approved by DEA in other instances in the same manner as shown in the sample DEA Form 19 that PRM has provided, you should be able to resolve this item and delete it before you issue a final Audit Report.

PRM has also advised us that they did not claim any reimbursement for the two items specifically called out as examples in the Draft Audit Report: (1) travel to and from the normal assigned office, or (2) travel associated with supervision or management. PRM advised us that DEA provided them with a copy of *DEA CFO Bulletin No. 06-10 Reimbursement of Expenses in the Local Travel Area*. According to PRM, they provided this Bulletin to their personnel as guidance on local travel. Based on information provided by PRM, we believe that (i) in each case in which non-local travel costs were submitted for payment, they were pre-approved by DEA, and (ii) PRM provided its personnel with the guidelines that DEA provided to PRM for local travel reimbursement, specifically, *DEA CFO Bulletin No. 06-10 Reimbursement of Expenses in the Local Travel Area*. The analysis of travel costs on pages 21-22 should be adjusted in accordance with the guidance DEA provided PRM.

D. MISCELLANEOUS

1. Personal Services

As to sections of the Draft Audit Report addressing personal services, MAXIMUS takes no position. Contractors must rely on the government to make the appropriate determinations before the government publishes a solicitation or awards a contract and to administer the contract in an appropriate manner to avoid personal services. As a clarification regarding page 13, we think the Draft Audit Report should note that the use of government office space, tools, and equipment is driven entirely by the sensitive classified nature of the information. The only other way to perform this work would be to require the contractors to provide a Sensitive Compartmented Information Facility ("SCIF"). Requiring the contractors to provide their own SCIF would have substantially increased the cost to the government and would limit the competition for the services. This situation negates the application of Elements 1 and 2 of the personal services analysis and the similar elements of the independent contractor analysis. If it weren't for the classified nature of the work, the contract personnel could perform the work from commercial office space or from their home offices. In short, the locations for the performance of the services were dictated solely to accommodate the government's need for security, not to address the independent contractors' need for the government's office space and equipment.

2. Ratification

As to ratification under the FAR 1-602-3, we have two comments. First, as discussed above at Item 2, DEA effectively waived the requirement for a master's degree for the SMEs. Under these circumstances, no subsequent ratification is required. Second, we reviewed FAR 1-602-3. Draft Audit Report footnote 30 states that ratification can only be performed "before the contract has been administratively closed." FAR 1-602-3 states no such requirement. If the other requirements are met, an unauthorized commitment may properly be ratified. The FAR does state that a requirement that "[f]unds are available and were available at the time the unauthorized commitment was made." In the typical case, the current availability of funds is necessary because the contractor has not yet been paid and available funds are necessary to make the payment. That is not the case here because ratification would not encumber any new funds.

3. Terminology

The Draft Audit Report uses the word "hire" and "hiring" throughout. These terms suggest an employment relationship where an employment relationship is possible, but is not required. In this regard, we note that the Task Orders and the DEA FAR Supplement clauses use the terms "Contractor Personnel" and "Personnel" fairly consistently. The Task Orders do not require that MAXIMUS "hire" the Contractor Personnel. They merely require that MAXIMUS provide the Contractor Personnel. DEA most certainly did not "hire" the Contractor Personnel. At most, DEA participated in the selection of those Personnel. We noted the same issues with the use of the term "worker" rather than the term "personnel." We recommend that you replace these terms in the Draft Audit Report with more appropriate terms.

E. SUMMARY

The major points in this MAXIMUS response are summarized below.

Draft Audit Report Recommendations

MAXIMUS agrees with each of the eleven recommendations listed at pp. 28-29 of the Draft Audit Report. MAXIMUS has no role in the implementing the recommendations. MAXIMUS believes that implementation of the recommendations in the Draft Audit Report will improve the process for both the DEA and its contractors.

The Investigators are Exempt Professionals

The prime contract and task orders are for exempt professional services and aren't covered by the SCA. The investigator job duties are sophisticated and exempt in nature.

The Investigators are Independent Contractors

The investigators were properly classified as independent contractors. They are owners of their own business enterprises –corporations, limited liability companies, and sole proprietorships. These investigators objectively are bona fide independent contractors and not nonexempt employees. The independent contractor agreements are plain as to their non-employment status, and that classification is correct as a matter of law.

DEA Waived the Requirement for Masters' Degrees for Subject Matter Experts

DEA knowingly waived the master's degree requirements for the two SMEs and that waiver is effective under well-established contract principals of waiver and estoppel as articulated by federal courts applying these concepts to government contracts.

Travel Costs

Based on the information provided by PRM, MAXIMUS believes that the travel cost were approved and reimbursed in accordance with the guidelines DEA provided PRM in *DEA CFO Bulletin No. 06-10 Reimbursement of Expenses in the Local Travel Area*. PRM has also stated that they did not claim any reimbursement for the two items specifically called out as examples in the Draft Audit Report: (1) travel to and from the normal assigned office, or (2) travel associated with supervision or management. The Draft Audit Report should be revised accordingly.

Thank you for your consideration of this MAXIMUS response to the Draft Audit Report. Again, though we disagree with some of the elements of the Draft Audit Report, your auditors have been professional and courteous throughout the audit process. They have operated in good faith and they welcomed our input. We appreciate their openness. Most importantly, we think that the implementation of the audit recommendations will improve the process and contract administration for both DEA and its contractors.

We hope you find our response helpful. Please feel free to call me at 303.285.7557 if you have any questions.

Respectfully,

Charles K. Sweeney II

Charles K. Sweeney II
Assistant General Counsel

cc: John Manning, Regional Audit Manager, US DOJ OIG Audit Division
[REDACTED] Program Manager, US DOJ OIG Audit Division
Adam Eastridge, Director, Accounting, MAXIMUS
Peter Vaeth, VP, Contracts, MAXIMUS
file

PROFESSIONAL RISK MANAGEMENT, INC.'S RESPONSE TO THE DRAFT AUDIT REPORT⁵⁰



RESPONSE TO THE AUDIT REPORT

Since the Draft Audit Report did not contain any recommendations for Professional Risk Management, Inc. (PRM), we will not address them. However, we will offer our comments on the issues raised in the report that concern PRM.

Independent Contractors versus Employees

Except for one individual, PRM now has an all-employee AFISS workforce. The one exception is working full-time for PRM but is also providing some limited services to other clients. PRM has hired a full-time Human Resource manager and has an ADP-managed payroll system. Additionally, our employees now have a comprehensive benefits package to include the following:

Workers' Compensation Insurance

ACA-Compliant Health, Dental and Vision Insurance

Professional Liability Insurance

Life Insurance

Long Term Disability Insurance

401k Program

In addition, it should be noted that there was a great deal of confusion on the issue of whether independent contractors could be hired for AFISS the follow on to the PACs contract. The issue of independent contractors versus employees was a matter of debate during the AFISS kick off meeting at DOJ on March 4, 2016. Following the meeting, the DOJ Contracting Officer, [REDACTED] furnished the following guidance on March 21, 2016 which appeared to indicate independent contractors could be hired for AFISS task orders:

TO ALL:

At the recent kick-off meeting, a number of you asked whether the National Defense Authorization Act of 2013, Pub. L. No. 112-239, §1651, 126 Stat. 1632, 2080 (Jan. 2, 2013) (NDAA), applies to your contracts and, if so, how it applies to independent contractors (so-called 1099s, or ICs) hired by primes. Specifically, you

⁵⁰ Attachments to this response were not included in this final report.



asked whether, if the NDAA is applicable, the Department considers ICs to be "similarly situated" for the purposes of applying the subcontracting limitation requirement under the AFISS contracts.

The Department considers the NDAA to be applicable to this procurement. In applying the NDAA to the AFISS contracts, the Department considers ICs to be "similarly situated." Under the statute, a "similarly situated" subcontractor is a small business concern that has the same small business program status as the prime contractor. The Department considers an IC, by definition, a small business, and thus, for this general small business set-aside procurement, to be "similarly situated" with the AFISS prime contractors. In other words, if an AFISS prime contractor subcontracts to an IC under its AFISS contract, the Department considers the IC to be a participant of the same small business program that qualified the prime contractor as an eligible offeror, and thus the IC subcontract may be included in the calculation of the percentage of the award amount of the prime contractor for the sake of compliance with the limitation on subcontracting requirement. As subcontractors, ICs are encouraged, but not required, to register in the Government's System for Award Management (SAM).

Pursuant to the NDAA, the limitation on subcontracting for both services and supplies is set at 50% of the dollar amount of any award received by the prime contractor. Compliance will be determined for each contract period --the base period and each subsequent option period -- based on the total dollar amount of all awards received by a contractor during the period in question. In order to determine whether AFISS prime contractors are complying with this requirement, each contractor must provide a summary for the base and each option period of the award amount received by the prime contractor under the contract and the amounts paid to similarly situated subcontractors and to other than small subcontractors. This summary must be provided to the Contracting Officer no later than sixty days after conclusion of the period of performance in question.

DEA Involvement in the Hiring Process

In 2002, PRM began staffing positions at DEA field divisions. At that time, PRM selected the candidates and following DEA headquarters concurrence, they commenced work. In 2008, this changed when DEA headquarters began sharing the resumes of proposed candidates with the management of field divisions. Then some field managers began asking for a number of resumes to choose from and the ability to interview prospective candidates. This decision to share the resumes with field management resulted in the field having a greater say as to who would be hired. Throughout this period, PRM raised the issue of too much involvement by the field in hiring to DEA headquarters.



Beginning in 2017, DEA headquarters reversed this policy. Now, once PRM has recruited, interviewed, and selected the SFI or FI candidate, the Asset Forfeiture Section at headquarters is furnished with the resume of the candidate for review. As per DEA policy on hiring former employees, a DEA Ethics Questionnaire is required to be submitted to DEA if the candidate is a current or former DEA employee who served within the past five years.

Following these steps, PRM submits the candidates' resume and completed DEA Ethics Questionnaire (if applicable) to DEA Chief Counsel and DEA Contracting for ethics approval. The Asset Forfeiture Section is also copied on this transmittal for coordination.

Upon the Ethics clearance notification, PRM submits a required DEA Security Clearance Package to the Asset Forfeiture Section that consists of the following:

Applicant's Name
Social Security Number
AFISS Labor Category
DEA Division/Office Assigned
Contract Employee's Authorization to Conduct Agency Specific Record Checks
PRM Joint Personnel Adjudication System Summary Verification Letter
DEA Response to Former Employment/DEA Contractor Ethics Questionnaire
DEA Drug Use Statement
Department of Justice Form 555
Fair Credit Reporting Act of 1970 Release

Following review, the Asset Forfeiture Section then submits these materials to DEA Security Programs for final approval and a check with the Inspection Division to determine if the candidate is or was subject to an investigation. Following that approval, the Asset Forfeiture Section advises PRM, via email, that the candidate was approved or not selected. If selected, PRM is instructed to establish a reporting date with the appropriate field DEA manager. PRM then notifies the new employee and contacts the DEA manager to confirm a start date.

Current Hiring Process

1. Job opening
2. PRM registers with the ESDS (Employment Service Delivery System) in the state where the opening will be listed on state job banks (www.careeronestop.org) as required by the Vietnam Era Veterans Readjustment Act.



3. PRM posts the opening on the state ESDS and requests veteran's priority. This will allow veterans to view the posting for at least 24 hours before it is available to the general public.
4. After the veteran's priority expires, PRM conducts outreach within the state and posts the opening to various sites that will allow other protected groups to view the listing.
5. Since one of the AFISS job requirements is ten year of law enforcement experience, the job openings are posted on the following web sites:

The Association of Federal Narcotics Agents (AFNA)

<https://www.afna.org/>

The National Association of Black Narcotics Agents (NABNA)

<http://nabna.org/>

The National Organization of Black Law Enforcement Executives (NOBLE)

<http://noblenational.org/>

The Association of Retired IRS Special Agents

<https://www.afsa-irs.org/>

Women in Federal Law Enforcement (WIFLE)

www.wifle.org

The Society of Former Special Agents of the FBI

www.socxfbi.org

6. All postings will contain PRM's website, which direct applicants to our "Careers" page, which then redirects the applicant to www.ADP.com where applicants can view job openings and apply.
7. Job openings typically remain active for a period of two weeks to thirty days.
8. Applications that progress past the minimum requirement questions on the application are reviewed and scheduled for a phone interview.
9. Phone interviews are conducted with the applicant by:



[REDACTED] - Partner

[REDACTED] - Partner

[REDACTED] – Human Resources

10. Applicants are evaluated by the interviewers, and a candidate is selected based on experience and knowledge that will enable them to be successful in the position.

11. A written record is created containing the reasons for the selection.

12. The identities of applicants who were not selected are recorded and the reason for non-selection documented.

Subject Matter Experts (SMEs)

Two SMEs worked on the DEA task order issued to Maximus, [REDACTED] and [REDACTED]. [REDACTED] was a direct hire by Maximus. [REDACTED] was a PRM hire. PRM readily admits that since neither [REDACTED] nor [REDACTED] had a master's degree, per contract requirements, they needed a waiver by DEA to work as SMEs. That said, both men had worked at DEA headquarters and were well known both at DEA and in the federal law enforcement community for their expertise in financial crimes related to drug trafficking.

[REDACTED] a career special agent with the IRS Criminal Investigation Division (IRS CID), served as the DEA's, Deputy Administrator for Financial Operations. [REDACTED] is the founder and owner of [REDACTED] a firm providing financial consulting services to government and industry.

[REDACTED] a career DEA agent served as the DEA Country Attaché in Switzerland where he worked closely with Swiss and other European partners on countering international money laundering. Additionally, he established and led the Multi Agency Financial Investigative Center (MAFIC) at DEA headquarters. MAFIC brought together the FBI, US Customs Service, IRS CID, US Postal Inspectors, DOJ, and the CIA. It served as the coordination center for international financial investigations related to drug trafficking being pursued by the participating agencies. Following that assignment, [REDACTED] was named Special Assistant to the Director of the Financial Crimes Enforcement Network (FINCEN) whose mission is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities. [REDACTED] retired from DEA in 1997 and went to



work in the Money Laundering Section of the National Drug Intelligence Center. Following 9/11, [REDACTED] was hired by the US Customs Service and detailed to the National Security Council (NSC) to assist in constructing the National Terrorist Funding Strategy (NTFS). In 2002, he was detailed to the Central Intelligence Agency's Counter Terrorism Center to help implement the NTFS.

The PACs RFP states, "In unusual situations, very significant experience may be substituted for degree requirements, with prior written approval of the COTR." PRM believes that these individuals met the "very significant experience" standard, and the failure to grant the waiver was an oversight.

Personal Services Contracts

PACs required the contractor to perform on site and use Government furnished equipment. It expected the contractor to supply mission critical services such as:

- Providing advice and guidance to fully develop the forfeiture aspects of an on-going investigation
- Analyzing financial records obtained by the investigating agencies through internal and external data bases and submitting reports documenting the results
- Reviewing, processing, and analyzing information sufficient to 1) assist in determining the amount to seek for forfeiture; 2) identify and trace assets during the course of investigations; and 3) assist the Government in perfecting its interest in the property
- Assisting in the location and repatriation of assets that are subject to forfeiture
- Identifying the individuals and entities making deposits and all related bank accounts, properties, investments, and any other assets that may be identified from the documentation
- Maintaining detailed case documentation and database files of financial investigative research to trace proceeds of criminal activities and investigative interests in targeted property

These requirements made it very difficult for the contractor to avoid the appearance of performing personal services.

Local Travel

While PRM claimed reimbursement for local travel, PRM never claimed any reimbursement for the two items specifically cited examples in the draft audit report. PRM did not claim travel to and from the normal assigned office, or for any travel associated with supervision or management. PRM furnished its personnel with the



DEA Bulletin CFO No. 06-10 (copy attached) as guidance regarding local travel.

Percentage of Former DEA Employees Hired Under PACs

The OIG determined 40% of the personnel hired for the DEA task order were former DEA employees and implied that personal friendship may have played a role in hiring. In contrast, PRM believes that friendship should not be a disqualifier for those with top flight credentials.

As PRM has described, the hiring process has been totally revamped and the role of DEA field management has been eliminated. However, PRM's knowledge of industry hiring practices leads us to believe that the OIG would find that the 40% number may be low in comparison with other PACs/AFISS vendors. For example, many of the Senior Financial Investigator (SFI) activities cited in the ATF AFISS Statement of Work (SOW) are similar to those for the SFI in the DEA AFISS SOW and are focused on asset forfeiture and financial analysis:

- Assisting special agents in identifying for seizure and/or forfeiture all assets and investments that have been legally or illegally acquired by individuals and criminal groups
- Assisting special agents in identifying, tracing, seizing, and forfeiting all proceeds deposited into traditional and/or non-traditional financial institutions
- Tracing and forfeiting all stocks, bonds, securities, and other investments related to criminal activity
- Assisting special agents in disrupting and destroying known criminal organizations by targeting their financial infrastructure and seeking criminal, civil, or administrative forfeiture actions to accomplish the mission
- Providing commercial accounting, auditing, and/or business analysis, expertise, and assistance to special agents in support of specific cases, in order to prosecute individuals and businesses and/or seize assets associated with illegal activities
- Assisting special agents by conducting analyses of seized records to determine the amount of illegal proceeds subject to forfeiture
- Assisting special agents in the pre-seizure analysis of assets to determine which assets will result in the Government assuming unacceptable liabilities



- Assisting special agents in debriefing undercover operatives, confidential informants, cooperating defendants, and witnesses to identify assets
- Assisting special agents in the preparation of affidavits in support of asset seizure

However, the ATF AFISS SFI job description cited below (emphasis added) all but eliminates candidates who have not served in ATF and describes asset forfeiture experience as merely desirable:

SFI candidates must have a minimum of 10 years of law enforcement experience planning, conducting, and participating in complex financial investigations, with a minimum of 5 years in a specialized area of expertise, such as forfeiture, organized crime, white collar crime, fraud, drug, money laundering, or similar area of criminal activity. An undergraduate degree is required. The investigator must possess a working knowledge of current financial investigative techniques, including the use of commercial databases and other sources of information, and a valid driver's license. Foreign language skills are preferred, but not mandatory. Investigative experience should be within the following areas: alcohol, firearms, arson, explosives, tobacco, narcotics, complex/multi-defendant, and financial investigations. Experience in asset forfeiture is also desirable.

APPENDIX 7

OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The OIG provided a draft of this audit report for review and response to the Drug Enforcement Administration (DEA), Justice Management Division (JMD), prime contractor Maximus Federal Services, Inc. (Maximus), and subcontractor Professional Risk Management, Inc. (PRM). We received responses from each of these entities and respectively incorporated the responses in Appendices 3 through 6 of this final audit report. The DEA, Maximus, and PRM also attached additional support to their responses that we considered but did not include as appendices to this report. In response to our audit report, the DEA, JMD, and Maximus explicitly concurred with, or identified appropriate corrective action in response to, all 11 recommendations. Based on our analysis of actions offered by the DEA and JMD, the status of the report is resolved.

Analysis of Responses

The responses we received from the DEA, JMD, Maximus, and PRM provided additional comments that do not specifically pertain to a particular recommendation. As such, this section presents an analysis of these comments.

Waivers for Minimum Qualification Requirements

JMD, Maximus, and PRM provided additional comments regarding the PACS's minimum qualification requirement of a Master's Degree for Subject Matter Experts. Specifically, JMD's response stated that it believed our audit report offers a "misimpression" that the Department of Justice (DOJ) unknowingly accepted contract services from two Subject Matter Experts who lacked Master's Degrees. JMD stated that the PACS "expressly allowed" for the DEA to accept services from the Subject Matter Experts if other factors, such as experience, qualified as an adequate substitute for the educational requirement. Maximus stated that the report defined "waiver" too narrowly. Maximus provided examples of cases where courts found that a waiver can refer to a documented waiver and also the act of waiving, whether express or implied, of a contract requirement. Maximus also stated that the DEA knowingly waived the requirement for a Master's Degree for the two Subject Matter Experts by its action of accepting their services. PRM's response, however, agreed that neither individual hired as Subject Matter Experts had the required Master's Degree and thus required a prior written waiver by the DEA. PRM detailed the qualifications of both individuals and stated that it believed that the DEA's failure to grant a prior written waiver was an oversight.

Our report does not take issue with whether the DEA knew that it accepted services from Subject Matter Experts who lacked minimum qualification requirements. Similarly, the report does not fault either Maximus or PRM in providing the individuals both firms did to serve as Subject Matter Experts.

Nevertheless, we believe that contract terms matter and that the PACS specifically required a contemporaneous, written acknowledgment from the Contract Officer's Representative (COR) in the "unusual situations" when "very significant experience" of a specific Subject Matter Expert candidate should be substituted for a Master's Degree. Such a document should assess the respective experience of each candidate based on the PACS minimum qualification requirement. As the report details, the evidence that the DEA provided as proof of a contemporaneous waiver did none of these things. Lacking such a document, the DEA could not affirmatively demonstrate that, at the time it approved these individuals, the DEA had determined that: (1) these individuals had the "very significant experience" that PACS required for candidates to have as a substitute for a Master's Degree and (2) the DEA was positioned to receive Subject Matter Expert services commensurate with those contemplated under the PACS. Due to these issues, the report provides recommendations that, if implemented, will help the DEA ensure proper documentation of labor category qualifications of contract personnel.

Local Travel Costs

Maximus and PRM provided additional comments regarding the reimbursement of local travel costs for official business. Maximus stated that the contracts it and PRM established with their personnel required that travel expenses be pre-approved and that the DEA authorized independent contractor travel. PRM stated it did not claim travel for unallowable purposes. Maximus and PRM both cite internal DEA local travel reimbursement guidance to suggest that it was proper that the DEA reimburse Maximus and PRM task order personnel for local travel expenses.

The DEA guidance cited by Maximus and PRM specifically applies only to DEA employees and not to contract workers. No provision of the PACS provided the DEA with the ability to bypass contractors such as Maximus and set payment terms directly with the task order workers. Instead, such payment terms must be established by the PACS or its task orders, none of which authorized reimbursement for local travel costs. As such, the audit did not take issue with the appropriateness of or the support provided for local travel charges incurred by task order personnel. Instead, this audit is concerned with the allowability of costs under agreed-to PACS and task order terms. The recommendation we offered therefore seeks to clarify invoicing to prevent this issue from happening again on future Asset Forfeiture Program contracts.

Task Order Worker Classification

Both Maximus and PRM provided additional comments on the classification of task order workers. PRM's response stated that, save for one individual, it has an all-employee workforce serving on the Asset Forfeiture Investigative Support Services (AFIIS) contract vehicle, which is a follow-on to the PACS. While PRM does not indicate why it has transitioned from hiring independent contractors under the PACS to hiring employees under AFIIS, PRM confirmed that there was initially a

“great deal of confusion” regarding whether contractors could hire independent contractors under AFISS.

In its response, Maximus asserted that it properly classified its contract personnel as independent contractors and that many of the facts discussed in the report are consistent with independent contractor relationships. The following responds to what we believe are the critical points that Maximus included in its draft audit report response on this issue.

Maximus made a number of arguments in support of its claim that the workers were properly classified and disagreeing with our stated concern that the workers may not have been properly classified as independent contractors. First, based on a review of sample contracts, Maximus argued that the restrictions on performing work for others that were imposed on the workers under the independent contractor agreements are standard contractual provisions and that the workers were, in fact, free to work for others if there were no conflicts of interest. Maximus also argued that the formalities of the independent contractor agreements at issue are inconsistent with an employment relationship. In addition, Maximus disagreed with our high-level review of the factors that appeared to contradict Maximus and PRM’s classification of workers as independent contractors. In support of its contrary view, Maximus stated that contract investigators exercised considerable discretion and independent judgment and were not under the exclusive control of either Maximus or PRM; that use of the government’s, not the workers’, equipment and materials was appropriate to the sensitive nature of the work they performed; that special skill and expertise were required to perform the investigative work; and that the contractual term of the agreements was limited. Maximus briefly addressed several other factors that we had identified relating to whether the independent contractor classification was proper, and it argued that these factors are either common to contracts of this type or are necessary due to the sensitivity of the work that the investigators were performing. Finally, Maximus noted that the DOL Administrator’s Interpretation No. 2015-1 was rescinded on June 7, 2017, which is a fact that we also address in the report.

To assess worker classification, we focused on the economic dependence of workers to Maximus or PRM under the task order. As the report details, the worker classification analysis included much more than reviewing the agreements that Maximus and PRM established with its independent contractors. Specifically, we also assessed and verified the résumés of contract personnel and interviewed a cross-section of contract workers who provided financial investigative services and on-site DEA employees who supervised their work to obtain information on training, policies and procedures, duties, timekeeping, and supervision. This overall assessment, of which reviewing the agreements was one part, identified various concerns that we believe merit revisiting the proper classification of workers under the PACS task order. Maximus’s arguments detailed above do not change this view.

Maximus also stated that task order investigators should be exempt from both Service Contract Act (SCA) prevailing wage requirements and Fair Labor Standards Act (FLSA) minimum wage and overtime requirements.⁵¹ Maximus pointed out that the PACS and the task orders did not include these requirements and cited a 2001 U.S. Office of Personnel Management (OPM) decision that found a full-time Department of Defense Investigator engaged in security clearance background investigations performed functions that met FLSA requirements for the administrative exemption. Maximus further stated that its contract personnel, many of whom were unincorporated sole proprietors, were “business owners,” and therefore served in an executive capacity that Maximus stated satisfied the FLSA executive exemption.

However, the fact that neither the PACS nor the task orders invoked the SCA or the FLSA does not affect whether task order workers should have been exempt from these requirements. Contracting officials told us that they did not review worker classification prior to issuing the task orders. Moreover, the report merely questions whether the exemptions might apply. Maximus’s arguments do not change our view. The 2001 OPM administrative decision is not persuasive, given that it predates a major revision in 2004 of the Department of Labor’s regulations defining and delimiting the exemptions for “white collar” executive, administrative and professional employees, which inserted a new subsection 29 C.F.R. § 541.3(b) providing that the exemptions do not apply to police officers and similar public safety employees who perform work such as conducting investigations or inspections for violations of law and preparing investigative reports.⁵² In addition, for the executive exemption at 29 C.F.R. § 541.101 for “business owners” to apply on the basis of a 20 percent equity interest in the business in which the employee is employed, the task order workers would have to such an equity interest in Maximus or PRM itself. Since the exemptions only apply in the present circumstance if the independent contractor classification is misapplied and the task order workers are considered “employees” of Maximus or PRM, it is an ownership interest in Maximus or PRM that would qualify them as executives within the meaning of the regulation.

Other Issues

In its response, Maximus provided additional information regarding contract ratification under FAR 1.602-3. We considered this information and updated the final draft report to clarify the circumstances under which a contract ratification may take place.

Maximus also recommended that we replace the terms “worker” and “hire” throughout the report with “personnel” and “select,” respectively. Maximus suggests that our use of “worker” and “hire” suggests an employment relationship.

⁵¹ The Service Contract Labor Standards (SCLS) is formerly known as the Service Contract Act (SCA) of 1965.

⁵² Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22121, 22123 (Apr. 23, 2004) (to be codified at 29 C.F.R. Part 541).

We did not replace these terms as: (1) both “worker” and “hire” are readily understandable to lay readers and (2) “personnel” is a term we generally used in other areas of the report to refer to DEA employees.

Recommendations for the DEA:

- 1. Institute a process to identify former employees who are currently, or were at the time of their departure from the DEA, the subject of an investigation and review the circumstances of the investigation to determine whether the DEA should authorize the former employee subsequently to work on a DEA contract.**

Resolved. Although the DEA neither concurred nor disagreed with the recommendation, the DEA stated that its Office of Security Programs has instituted a process to conduct suitability reviews of background material related to all individuals submitted for contract employee positions. The purpose of the suitability reviews will be to determine whether the individual engaged in behavior deemed unacceptable for employment with the DEA. The DEA advises that its Office of Security Programs is codifying the process into a standard operating procedure and will provide to us supporting documentation when it is completed.

This recommendation is resolved based on the DEA’s action to implement a process to review the background of all individuals submitted for contract positions, including former employees, to determine whether the DEA should authorize the individual to work on a DEA contract or task order. This recommendation can be closed once the DEA provides evidence that this process assesses whether employees who were the subject of an investigation should subsequently work on a DEA contract or task order.

- 2. Require that AFP contract personnel who are former DOJ employees complete the required DEA Ethics Questionnaire and confirm that they have no conflicts of interest.**

Closed. The DEA concurred with our recommendation and updated its policies and procedures regarding the hiring of contract personnel who were DEA or other federal employees within the past 5 years. The DEA provided to us a copy of its updated ethics questionnaire as well as its new policy, DEA Clause 2852.203-70, which requires that firms who plan to use former DEA employees who are still within the 5-year post-employment period on a contract or other agreement must electronically submit the individual’s résumé and completed DEA ethics questionnaire to the DEA contracting officer and the DEA Ethics Officer. The DEA Ethics Officer, in turn, reviews this material to confirm that the prospective employee has no conflicts of interest. Under this policy, the prospective contract worker will not be approved to work under the DEA contract or agreement until that worker’s questionnaire is submitted, reviewed, and approved by the DEA.

The DEA also provided evidence that it has amended its current AFP contract for financial investigative services to require that the contractor submit ethics questionnaires for its personnel who were former federal employees.

In response to this recommendation, the DEA also issued Acquisition Policy Letter 2018-03 to formally incorporate DEA Clause 2852.203-70 in all of its contract personnel hiring procedures.

The DEA's response to this recommendation and attachments demonstrates that this updated policy affirmatively requires contractors seeking to hire a former employee to submit a completed ethics questionnaire. As a result, this recommendation is closed.

3. Update its policy regarding personal services to reflect the increased interaction between employees and contractors, and require that employees regularly receive training regarding how best to manage contract personnel to avoid personal services.

Resolved. The DEA concurred with our recommendation. In its response, the DEA stated that it issued a brochure entitled "Contractor Personnel Quick Guide" that instructs personnel on best practices for maintaining appropriate government-contractor relationships. The DEA states that the guide will be distributed on an annual basis.

The DEA also stated that it has provided training to appropriate government managers on how to interact with contract personnel in a manner that does not create a personal service environment. The DEA requested closure to this recommendation based on these actions, however it did not provide sufficient evidence of the training for us to close the recommendation.

To close this recommendation, the DEA should provide evidence of (1) the training provided to managers on how to interact with contract personnel and (2) how it ensures that managers who interact with contract employees have received or will be receiving such training.

4. Ensure that AFP contractors develop and provide training to all contract personnel regarding the characteristics of personal services, and the rules for who may supervise and review their work on the task orders.

Resolved. The DEA concurred with our recommendation. The DEA stated that it will modify the contract with its current AFP contractor to require training on the characteristics of personal services contracts, including who should supervise and review contract personnel work.

To close this recommendation, the DEA should provide evidence that it has modified the task order with its current AFP contractor to address this training need.

- 5. Ensure that AFP contractors implement a standard method to: (1) evaluate individual contract personnel work, and (2) share the results of such assessments with the DEA COR to enhance DEA task order oversight efforts.**

Resolved. The DEA concurred with our recommendation. The DEA stated that it will work with its current AFP contractor to provide a monthly report to the COR that documents each individual's contributions to the overall contractor's efforts on the contract. The DEA stated that this, in turn, will ensure that the COR maintains oversight of the contractor's performance.

To close this recommendation, the DEA needs to provide evidence that its AFP contractor, via its Project or Contract Manager, is reporting to the COR the monthly accomplishments of each individual working on the contract.

- 6. Establish a process to ensure that it properly assesses the qualifications of individuals proposed to provide contracted AFP services to ensure compliance with explicit contractual education requirements.**

Resolved. The DEA concurred with our recommendation. The DEA stated that it will review the current method used to determine if waivers are required for each contract personnel position and will update its procedures to ensure that contract standards are met and applied consistently across all task orders.

To close this recommendation, the DEA needs to provide the results of its procedural review regarding the documenting of contract waivers and resulting changes to the procedure to ensure that it meets and consistently applies AFP contract standards.

- 7. Work with JMD to ensure that future AFP contract terms and line item numbers address potential travel costs incurred as a result of work performed away from the normal job site and implement controls to ensure that it properly identifies, segregates, and excludes unallowable costs from future AFP invoices.**

Resolved. The DEA concurred with our recommendation. Included with its response, the DEA provided a copy of the modification it issued to the current AFP task order that revised the Statement of Work to describe travel costs eligible for reimbursement. Specifically, the task order modification defines allowable costs to include costs associated with traveling to work performed away from the normal job sites. Under this modification, work performed away from the normal job site that required local travel must be approved by the DEA COR. Non-allowable travel costs under the modification include any costs associated with normal commuting costs.

The DEA's response to this recommendation and accompanying attachments demonstrate that it updated AFP task orders to provide additional guidance on what constitutes as a reimbursable travel cost. However, with regard to contract line item numbers (CLIN), the DEA only revised the names of each CLIN to delineate between "Full Time Travel" and "Part Time Travel" and not the actual identifying number. We believe that establishing the same numerical identifier for multiple cost elements is not an adequate control to ensure that potentially unallowable local travel costs are properly identified, segregated, and excluded from AFP invoices. The DEA's response also offers no information regarding coordination with JMD to ensure that corresponding separate CLINS (i.e., name and number) are established at the ID/IQ level. For example, as of the date of this analysis, the AFISS ID/IQ has only a single line item for travel and does not differentiate between the types of travel.

To close this recommendation, the DEA needs to provide evidence that it has worked with JMD to ensure that there are corresponding separate CLINs at the ID/IQ and task order level for local and long distance travel.

Recommendations for JMD:

- 8. Assess the DEA's level of involvement in the selection of task order workers hired by the contractors to determine if the DEA's participation is appropriate. If JMD determines it is appropriate for DEA officials to continue having an extensive role in selecting contract personnel, we believe that the DEA should maintain the documents necessary to demonstrate, for each task order vacancy, why its officials selected a certain candidate over other AFP contractor candidates.**

Resolved. JMD concurred with our recommendation to assess the DEA's level of involvement in selecting task order workers. In its response, JMD stated that it will increase its efforts in assessing and coordinating with the DEA, including providing training and reference materials regarding the appropriate role of the DEA in the selection of staff hired by the contractors and the need to maintain any relevant documents pertaining to contractor hiring decisions.

To close this recommendation, JMD should provide evidence regarding its assessment and subsequent action taken to ensure the appropriate level of involvement by DEA in selecting task order workers ultimately hired by AFP contractors.

9. Enhance its monitoring and procurement policies to avoid creating the appearance that AFP contractors perform prohibited personal services or inherently governmental functions.

Resolved. JMD concurred with our recommendation. In its response, JMD stated that it will provide training and reference materials and conduct regular site visits with contractors and components using AFP contracts to prevent and correct situations that may create the appearance of AFP contractors performing prohibited personal services or inherently governmental functions.

To close this recommendation, JMD should provide evidence of its enhanced monitoring of AFP contractors and component partners to avoid creating the appearance of performing personal services or inherently governmental functions.

10. Advise agencies participating on the PACS and future AFP contracts that they must not exceed their authority by administering the task orders to procure prohibited personal services.

Resolved. JMD concurred with our recommendation. In its response, JMD stated that it will provide training and reference materials to AFP-participating agencies regarding the prohibition of personal services.

To close this recommendation, JMD should provide evidence of its work to advise agencies participating in the AFP not to use contracts or task orders to procure prohibited personal services.

11. Enhance its process for pre-award analysis to ensure that contracting officials review AFP bids for indications of potentially misclassified contract workers and, as appropriate, solicit guidance from the U.S. Department of Labor's Wage and Hour Division (WHD) on applicable labor laws and exemptions.

Resolved. JMD concurred with our recommendation and stated that it will enhance the AFP pre-award analysis performed by contracting officials to review bids for indications of potentially misclassified contract workers and, as appropriate, solicit WHD guidance on applicable labor laws and exemptions.

To close this recommendation, JMD should provide evidence of its efforts to ensure that AFP bids are reviewed for indications of potentially misclassified contract workers, including evidence of guidance provided to contracting officials regarding AFP contract pre-award analysis, if such guidance is solicited.



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