

Audit



Report

OFFICE OF THE INSPECTOR GENERAL

**DOD PAYMENT PROTECTIONS FOR CONSTRUCTION
SUBCONTRACTORS AND SUPPLIERS**

Report Number 93-057

February 19, 1993

Department of Defense



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

February 19, 1993

MEMORANDUM FOR DIRECTOR OF DEFENSE PROCUREMENT

SUBJECT: Audit Report on DoD Payment Protections for
Construction Subcontractors and Suppliers
(Report No. 93-057)

We are providing this final report for your information and use. The audit was required by the FYs 1992 and 1993 National Defense Authorization Act.

Comments from the Director of Defense Procurement on a draft of this report were considered in preparing the final report. We request that the Director provide the estimated date for completion of her planned action on the recommendations by April 20, 1993.

The courtesies extended to the audit staff are appreciated. If you have any questions on this audit, please contact Ms. Patricia A. Brannin, Program Director, at (703) 692-3206 (DSN 222-3206) or Ms. Macie J. Rubin, Project Manager, at (703) 692-3222 (DSN 222-3222). The planned distribution of this report is listed in Appendix C.

Robert J. Lieberman

Robert J. Lieberman
Assistant Inspector General
for Auditing

cc:
Secretary of the Army
Secretary of the Navy
Secretary of the Air Force

The following acronyms are used in this report.

DFARS.....Defense Federal Acquisition Regulation Supplement
FAR.....Federal Acquisition Regulation

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The Contract Management Directorate, Office of the Assistant Inspector General for Auditing, DoD, prepared this report. Copies of the final report can be obtained from the Secondary Reports Distribution Unit, Audit Planning and Technical Support Directorate, (703) 614-6303 (DSN 224-6303).

Office of the Inspector General, DoD

Audit Report No. 93-057
(Project No. 2CD-9005)

February 19, 1993

DOD PAYMENT PROTECTIONS FOR
CONSTRUCTION SUBCONTRACTORS AND SUPPLIERS

EXECUTIVE SUMMARY

Introduction. Congress enacted laws, such as the Miller Act (United States Code, title 40, section 270) and the Prompt Payment Act (United States Code, title 31, sections 3903 and 3905), to ensure that construction contractors pay subcontractors in a timely manner. In FYs 1990 through 1992, DoD awarded construction contracts totaling about \$19 billion. The audit was required by the FYs 1992 and 1993 National Defense Authorization Act, section 806, "Payment Protections for Subcontractors and Suppliers." Effective September 8, 1992, provisions of the Act dealing with prompt payments for construction contractors were incorporated into the Defense Federal Acquisition Regulation Supplement subpart 228.1, "Bonds," and section 232.970, "Payment of Subcontractors."

Objective. The overall objective was to determine the extent to which DoD used payment protections for construction subcontractors and suppliers and the adequacy of internal control procedures related to payment protections.

Audit Results. We visited 41 contracting offices that received complaints of nonpayment from subcontractors and determined that all offices were making efforts to provide protection to subcontractors and suppliers. The Defense Federal Acquisition Regulation Supplement was revised in September 1992; therefore, contracting offices were still in the process of implementing all provisions for subcontractor payment protections. In the offices visited, the contracting officers were not aware of available administrative and judicial remedies to deter false payment certifications. As a result, subcontractors and suppliers were not afforded all protections provided by the Prompt Payment Act.

We did not identify any contracts with payment bonds issued by individuals instead of bonding companies. Therefore, we could not comment on the use of remedies to deter false statements related to the payment bonds issued by individuals.

Internal Controls. No material internal control weaknesses were identified. See Part I for details of the internal controls reviewed.

Potential Benefits of Audit. Implementation of the recommendations will help deter potential false payment certifications submitted by prime contractors and enhance payment protections for construction subcontractors and suppliers. The potential benefits of the audit are described in Appendix A.

Summary of Recommendations. We recommended establishing procedures to verify the accuracy of payment certifications and to identify the appropriate administrative and judicial remedies for false payments certifications.

Management Comments. The Director of Defense Procurement partially concurred with the recommendations and agreed to issue a policy memorandum informing construction contracting officers how to verify payment certifications and actions to take if a false certification is made. A summary of the management comments and audit response is in Part III of the report. The complete text of the comments is in Part IV.

We request that the Director of Defense Procurement provide a completion date for issuing the policy memorandum, or a copy if it has been issued, by April 20, 1993.

PART I - INTRODUCTION

Background

DoD awarded approximately \$19 billion in construction contracts in FYs 1990 through 1992. Construction contracts are administered for the Navy by the Naval Facilities Engineering Command, and for the Army by the Corps of Engineers. Generally, contracts funded by the Air Force and Defense Agencies for new construction projects are administered by either the Naval Facilities Engineering Command or the Army Corps of Engineers. Contracting offices at Air Force facilities administer local renovation contracts.

Policies governing subcontractor payment. Congress enacted laws and regulations to ensure that construction subcontractors and suppliers (subcontractors) are paid promptly. The Miller Act, August 24, 1935, (U.S.C., title 40, section 270) requires prime contractors to obtain payment bonds for all construction contracts exceeding \$25,000. Bonds are defined by the Federal Acquisition Regulation (FAR) part 28, "Bonds and Insurance," as written agreements executed by a contractor (the principal) and a second party (the surety) to ensure fulfillment of the principal's obligation to a third party (the subcontractor). A payment bond ensures payments required by law to all persons supplying labor or material for work provided in the contracts. The bond gives the subcontractors the right to sue the surety for work completed but not paid. Bonds can be issued by either corporate bonding companies or by individuals.

Progress payment certification requirements. The Prompt Payment Act, as amended October 17, 1988, (U.S.C., title 31, section 3903) requires prime contractors, at the time of a progress payment request, to certify that subcontractors have been paid from the previous progress payment. FAR subsection 52.232-5, "Payments Under Fixed-Price Construction Contracts," implements the certification requirements, stating that:

- o the amount of progress payment requested is only for the cost of performing in accordance with the specifications, terms, and conditions of the contract,

- o subcontractors have been paid from a previous prime contractor's payment received under the contract,

- o timely subcontractor payments will be made from the proceeds of the prime contractor's payment covered by the certification, and

- o the request for progress payments does not include any amounts that the prime contractor intends to withhold or retain from a subcontractor in accordance with the terms and conditions of the subcontract.

Subcontractor payment requirements. Defense Federal Acquisition Regulation Supplement (DFARS) subpart 228.1, "Bonds," and section 232.970, "Payment of Subcontractors," implemented section 806, "Payment Protection for Subcontractors and Suppliers," of the FYs 1992 and 1993 National Defense Authorization Act (Public Law 102-190). The Act directed DoD to establish procedures to verify certification, take action, and provide information when subcontractors asserted nonpayment. DFARS subpart 228.1 allows subcontractors, by written or oral request, to obtain from contracting officers:

- o name and address of the surety on the payment bond,
- o penal amount of the payment bond, and
- o copy of the payment bond.

DFARS section 232.970 requires the contracting officer, upon assertion by a subcontractor that payment has not been made, to:

- o encourage the contractor to make timely payment, and
- o determine the accuracy of the contractor's payment certifications.

Administrative and judicial remedies. Public Law and the FAR provide for remedies in the event the contractor falsely certifies that subcontractors were paid. U.S.C., title 31, section 3905 (a)(2) provides for interest penalties to be charged to the prime contractor when a subcontractor was not paid for work completed. Interest penalties are computed on the amounts the Government pays to the prime contractor for work performed by, but not paid to, subcontractors. The prime contractor must pay the subcontractor interest in the same amount.

DoD Directive 5505.5, "Program Fraud Civil Remedies Act," implements Public Law 99-509, October 21, 1986, and gives DoD authority to impose civil penalties against contractors that submit false statements. In addition, DoD can initiate prosecution under U.S.C., title 31, section 3729, "False Claims," and U.S.C., title 18, section 287, "False, Fictitious, or Fraudulent Claims."

Objective

The FYs 1992 and 1993 National Defense Authorization Act, section 806 requires the Office of the Inspector General, DoD to report on payment protections for subcontractors. Specifically, the audit objective was to determine to what extent DoD used payment protections for construction subcontractors and suppliers. We also evaluated the applicable internal control procedures related to subcontractor payment protections.

We were not able to satisfy our first objective as it relates to payment bonds issued by individuals. We did not identify any individuals that were sureties. The payment bonds for 101 contracts from 41 contracting offices were issued by corporate bonding companies rather than individuals. All of the bonding companies were in the Department of the Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies," July 1, 1992. No discrepancies were found in the penal amounts assessed for payment bond protection. FAR part 28 defines "penal amount" as the amount of money specified in a bond as the maximum payment for which the surety is obligated.

Scope

Universe and sample. We identified 51,316 construction contracts totaling approximately \$19 billion awarded by DoD from FYs 1990 through 1992. From this data base, we selected 68 contracting offices and contacted them to determine whether they had received complaints of nonpayment since October 1, 1989.

Contracting officers did not maintain centralized files of nonpayment complaints filed by the subcontractors. Therefore, we had to rely on the contracting officers' memory or check each contract file to determine if a complaint had been made. All complaints were not annotated in the contract file. Our report is qualified to the extent that we were not able to establish a universe of subcontractor complaints. Therefore, we cannot comment on the extent of violations of prompt payment protections for subcontractors at these 68 offices.

From our initial contact with contracting offices, we identified 41 contracting offices (13 Army, 24 Navy, and 4 Air Force) that had received complaints of nonpayment from subcontractors. We visited the 41 contracting offices. Activities visited or contacted are listed in Appendix B.

Documents reviewed. We reviewed a total of 101 contracts at the 41 contracting offices with complaints. We determined whether these offices or their contracting officers had developed procedures for handling subcontractor nonpayment complaints. We also reviewed payment bonds to determine whether the bonds were issued at the amount required by FAR subsection 28.103-3, "Payment Bonds." We did this to determine whether the amounts were adequate to protect labor and materials suppliers.

Use of technical staff. Office of Inspector General technical staff assisted in this review. Specifically, the contract specialist in the Inspector General, DoD, Technical Assessment Division provided clarification of applicable FAR provisions on whether progress payments for construction contracts can be withheld when payment certifications are questioned.

Computer-generated data. We used a computer-processed data base of contract actions awarded at \$25,000 and above (DD Form 350, "Individual Contract Action Report,") to identify the contracts. We did not establish data reliability because our primary purpose was to estimate the number of construction contracts and their dollar value. However, any errors in the data base will not affect the results of our audit and the validity of the recommendations.

Auditing standards. This program audit was made from August to November 1992, in accordance with auditing standards issued by the Comptroller General of the United States as implemented by the Inspector General, DoD. Accordingly, we included such tests of internal controls as were considered necessary.

Internal Controls

The audit evaluated internal controls procedures for:

- o validating prime contractor certifications related to progress payment requests,
- o approving sureties for payment bonds, and
- o handling payment complaints from subcontractors.

No material internal control weaknesses were identified.

Prior Audits or Other Reviews

The FYs 1992 and 1993 National Defense Authorization Act required the General Accounting Office to audit delayed payment problems for subcontractors under Federal contracts. The General Accounting Office was conducting its review at the date of this report.

Other Matters of Interest

The Assistant Secretary of Defense (Production and Logistics) and the Military Departments developed an improved contractor performance appraisal form DD 2626, "Construction Contractor Performance Appraisal," to replace the existing SF 1420 with the same title. The DD 2626 uses the same performance elements as the SF 1420, but breaks down each element into subparts. One of the subparts relates to subcontractor management and requires contracting officers to provide comments on untimely payment to subcontractors. The Military Departments are prepared to begin using the DD 2626 but await Defense Acquisition Regulations Council approval of the form.

The Army Corps of Engineers, North Pacific Division, Portland, Oregon, maintains the consolidated automated data base of all contractor appraisals for construction contracts (based on the SF 1420). Contracting officers throughout DoD can access

this data base to assist in preaward surveys. The SF 1420 does not provide sufficient detail to identify prime contractors with subcontractor payment problems; however, the lack of data will be corrected when contracting officers begin using the DD 2626.

Once the consolidated data base is drawn from the DD 2626, construction contracting officers can make better informed decisions before contract award about a potential contractor's history of untimely subcontract payments. Also, if a contract is awarded to a prime contractor with a known history of problems with timely subcontractor payments, the contracting officer will then be aware of the problem and can closely monitor the contractor to ensure timely payments.

PART II - RESULTS OF AUDIT AND RECOMMENDATION

PRIME CONTRACTOR PAYMENT CERTIFICATIONS

Administrative contracting officers for construction contracts did not verify payment certifications for work performed by subcontractors and did not take appropriate action in every case to deter false statements by prime contractors. Although the September 1992 DFARS revision added the requirement to verify the accuracy of the prime contractor certifications, the revised DFARS did not provide procedures on how to verify the certifications and did not specify the appropriate actions to take in the event of a false certification. As a result, subcontractors were not afforded all payment protections provided by the Prompt Payment Act, and prime contractors had more potential opportunity to submit false statements without timely detection.

DISCUSSION OF DETAILS

Contracting Officer Actions

Although the revised DFARS became effective only in September 1992, the 41 offices were making efforts to provide protection to subcontractors. We found in 39 of 41 offices, contracting officers provided the payment bond information to subcontractors upon request, and in 37 of 41 offices, contracting officers contacted the prime contractor to encourage prompt payment to the subcontractors once a subcontractor had asserted that the payment was late. However, discussions with contracting officers disclosed that contracting officers did not follow up on the subcontractor assertions. They assumed the subcontractors had been paid and most did not determine the accuracy of the prime contractor payment certifications. Contracting officers in only 13 of the 41 offices reviewed the prime contractor certification for accuracy and then took administrative action as required by the DFARS.

The following represents the actions initiated by contracting officers after they determined that certifications were not accurate.

Retained interest. Four offices assessed interest penalties because of nonpayment to subcontractors.

Legal prosecution, suspension, and debarment. Five offices referred instances of nonpayment to subcontractors to legal counsel for prosecution for false certification. In two of these cases, the prime contractor was being considered for debarment.

Progress payment withholding. Four offices withheld the amount owed to subcontractors from the prime contractor's next progress payment request. However, according to FAR paragraph 28.106-7(a), "Withholding Contract Payments," "agencies shall not

withhold payments due contractors or assignees with payment bonds because subcontractors or suppliers have not been paid." Also, the revised DFARS specifically states that, "withholding contract payments may be appropriate in **other than construction contracts** [emphasis added]." We did not identify any regulations that allow withholding progress payments on construction contracts.

Conclusion

Contracting officers were providing payment bond information to subcontractors and were encouraging prime contractors to make prompt payments to subcontractors in accordance with the revised DFARS. Although the DFARS requirement to verify the accuracy of the certification was only effective since September 1992, the prime contractor certification and prompt payment of subcontractors was required since April 1989. Furthermore, interest application and remedial actions are long-standing requirements for nonpayment of subcontractors and false certifications. We believe construction contracting officers need additional guidance. This is demonstrated by the following.

- o Only 4 of 41 offices assessed interest penalties.
- o Of the 41 offices, 4 incorrectly withheld progress payments.

We believe that specific guidance should be provided to contracting officers detailing the procedures to be used to verify the accuracy of certifications and specify the administrative or remedial actions to be taken.

RECOMMENDATION, MANAGEMENT COMMENTS, AND AUDIT RESPONSE

We recommend the Director of Defense Procurement provide guidance to the Military Departments and Defense Agencies to:

1. Establish the procedures that contracting officers should use to verify the accuracy of the payment certifications made in accordance with the Federal Acquisition Regulation paragraph 52.232-5(c), "Payments Under Fixed-Price Construction Contracts," when a subcontractor or supplier asserts that a prime contractor has not made payment in accordance with the payment terms of the subcontract.

2. List the appropriate judicial or administrative actions a contracting officer should take when a prime contractor has made a false payment certification concerning payments to subcontractors.

Management comments. The Director of Defense Procurement agreed to issue a policy memorandum to construction contracting officers that specifies how to verify the accuracy of a payment certification and what actions to take if the certification is deemed false.

The Director stated that the contracting officers did not have sufficient time to implement the September 1992 revised DFARS and that the evidence did not show that contracting officers had failed to take aggressive actions in response to subcontractors' allegations of nonpayment. The Director also stated that the revised DFARS met the intent of Recommendation 1. and that Recommendation 2. was unnecessary because construction payment certifications were no different than other payment certifications. The full text of the comments is in Part IV.

Audit response. The policy memorandum proposed by the Director of Defense Procurement meets the intent of our recommendations. We request the Director to provide the planned completion date for the memorandum or a copy of the memorandum, if it has been issued, by April 20, 1993.

The contracting officers were encouraging the contractors to pay the subcontractors as required by the revised DFARS. However, we determined that contracting officers did not maintain records of complaints and did not verify certifications. We also agree that construction contract payment certifications are no different than other payment certifications: if the contractor has falsely certified, administrative and judicial actions may be taken. However, the actions that can be taken are not the same for construction contracts as other contracts. For example, withholding only applies on nonconstruction contractors. We found that 4 of 41 offices incorrectly withheld payments.

PART III - ADDITIONAL INFORMATION

APPENDIX A - Summary of Potential Benefit Resulting From Audit

APPENDIX B - Activities Visited or Contacted

APPENDIX C - Report Distribution

APPENDIX A - SUMMARY OF POTENTIAL BENEFIT RESULTING FROM AUDIT

<u>Recommendation Reference</u>	<u>Description of Benefit</u>	<u>Amount and/or Type of Benefit</u>
1. and 2.	Internal Control. Ensures that appropriate actions are taken in the event subcontractors are not promptly paid.	Nonmonetary.

APPENDIX B - ACTIVITIES VISITED OR CONTACTED

Office of the Secretary of Defense

Director of Defense Procurement, Washington, DC
Assistant Secretary of Defense (Production and Logistics),
Washington, DC
Comptroller of the Department of Defense, Washington, DC

Department of the Army

Inspector General, Department of the Army (Operations Division),
Washington, DC
Headquarters, U.S. Army Corps of Engineers, Washington, DC
U.S. Army Corps of Engineers District Offices at:

Anchorage, AK
Baltimore, MD
Chicago, IL
Detroit, MI
Ft. Worth, TX
Kansas City, MO
Little Rock, AR
Los Angeles, CA
Louisville, KY
Memphis, TN
Mobile, AL
Nashville, TN
New Orleans, LA
New York, NY
Norfolk, VA
Omaha, NE
Philadelphia, PA
Pittsburgh, PA
Rock Island, IL
Sacramento, CA
San Francisco, CA
Seattle, WA
St. Louis, MO
Tulsa, OK
Vicksburg, MS
Walla Walla, WA
Waltham, MA

Department of the Navy

Headquarters, Naval Facilities Engineering Command,
Alexandria, VA
Atlantic Division, Norfolk, VA
Oceana, VA
Portsmouth Naval Hospital, Portsmouth, VA

APPENDIX B - ACTIVITIES VISITED OR CONTACTED (cont'd)

Department of the Navy (cont'd)

Chesapeake Division, Washington, DC
Naval Maritime Intelligence Center, Suitland MD
Naval Research Lab, Washington, DC
Ordnance Plant, Indian Head, MD
North Division, Philadelphia, PA
Groton, CT
Newport, RI
Philadelphia Naval Shipyard, Philadelphia, PA
Warminster, PA
Pacific Division, Pearl Harbor, HI
Officer in Charge of Construction, Mid-Pacific, HI
Kaneohe, HI
Pearl Harbor, HI
Pearl Harbor Shipyard, HI
South Division, Charleston, SC
Corpus Christi, TX
Gulfport, MS
Jacksonville, FL
Memphis, TN
New Orleans, LA
Orlando, FL
Southwest Division, San Diego, CA
29 Palms, CA
Barstow, CA
Bridgeport, CA
Camp Pendleton, Oceanside, CA
Coronado, CA
El Centro, CA
El Toro, CA
Long Beach, CA
San Diego, CA
West Division, San Bruno, CA
Mare Island, North Bay, Vallejo, CA
Oakland, CA

Department of the Air Force

Contracting offices at:

Eglin AFB, FL
Hanscom AFB, MA
Hurlburt Field, FL
Keesler AFB, MS

APPENDIX B - ACTIVITIES VISITED OR CONTACTED (cont'd)

Department of the Air Force (cont'd)

MacDill AFB, FL
Plattsburgh AFB, NY
Randolph AFB, TX
Robins AFB, GA
Westover AFB, MA

Other Defense Agencies

Director, Defense Contract Audit Agency, Alexandria, VA
Director, Defense Logistics Agency, Alexandria, VA

Non-DoD

U.S. General Accounting Office, Washington, DC
Senate Committee on Small Business, Washington, DC

Non-Government Activities

American Subcontractors Association, Inc., Alexandria, VA

APPENDIX C - REPORT DISTRIBUTION

Office of the Secretary of Defense

Secretary of Defense
Under Secretary of Defense for Acquisition
Director of Defense Procurement
Deputy Director, Defense Acquisition Regulations Systems
Assistant Secretary of Defense (Production and Logistics)
Comptroller of the Department of Defense

Department of the Army

Secretary of the Army
Assistant Secretary of the Army (Research, Development,
and Acquisition)
Inspector General, Department of the Army (Operations Division)
Chief of Engineers, Army Corps of Engineers
Auditor General, U.S. Army Audit Agency

Department of the Navy

Secretary of the Navy
Assistant Secretary of the Navy (Financial Management)
Assistant Secretary of the Navy (Research, Development,
and Acquisition)
Commander, Naval Facilities Engineering Command
Auditor General, Naval Audit Service

Department of the Air Force

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

Non-DoD

Office of Management and Budget
U. S. General Accounting Office, National Security and
International Affairs Division, Technical Information Center

APPENDIX C - REPORT DISTRIBUTION (cont'd)

Chairman and Ranking Minority Member of each of the following
Congressional Committees:

Senate Committee on Appropriations
Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Small Business
Senate Committee on Governmental Affairs
Senate Subcommittee on Military Construction,
Committee on Appropriations
House Committee on Appropriations
House Subcommittee on Defense, Committee on Appropriations
House Committee on Armed Services
House Committee on Small Business
House Committee on Government Operations
House Subcommittee on Legislation and National Security,
Committee on Government Operations
House Subcommittee on Military Construction,
Committee on Appropriations

PART IV - MANAGEMENT COMMENTS

Director of Defense Procurement

Director of Defense Procurement Comments



ACQUISITION
DP/CPF

OFFICE OF THE UNDER SECRETARY OF DEFENSE
WASHINGTON, DC 20301

JAN 19 1993

MEMORANDUM FOR ASSISTANT INSPECTOR GENERAL FOR AUDITING, DEPARTMENT
OF DEFENSE

THRU: CHIEF, CONGRESSIONAL ACTIONS AND INTERNAL REPORTS *by [unclear] 1/9-93*

SUBJECT: Draft Audit Report on DoD Payment Protections for
Construction Subcontractors and Suppliers (Project
No. 2CD-9005)

This is in response to your December 18, 1992, request for our
comments on the subject draft report. Our responses to the report
findings and recommendations are attached.

Thank you for the opportunity to comment on the draft report.

Eleanor R. Spector

Eleanor R. Spector
Director, Defense Procurement

Attachment

Director of Defense Procurement Comments (cont'd)

DIRECTOR OF DEFENSE PROCUREMENT
COMMENTS ON DRAFT DODIG REPORT ON
PAYMENT PROTECTIONS FOR CONSTRUCTION
SUBCONTRACTORS AND SUPPLIERS (PROJECT NO. 2CD-9005)

FINDING: Guidance to Construction Contracting Officers Regarding
Payments to Subcontractors

Contracting officers were providing payment bond information to subcontractors and were encouraging prime contractors to make prompt payments to subcontractors in accordance with the revised DFARS. Although the DFARS requirement to verify the accuracy of the certification was only effective since September 1992, the prime contractor certification and prompt payment of subcontractors was required since April 1989. Furthermore, interest application and remedial actions are long-standing requirements for nonpayment of subcontractors and false certifications. We believe construction contracting officers need additional guidance. This is demonstrated by the following.

- o Only 4 of 41 offices assessed interest penalties.
- o Of the 41 offices, 4 incorrectly withheld progress payments.

We believe that specific guidance should be provided to contracting officers detailing the procedures to be used to verify the accuracy of certifications and specify the administrative or remedial actions to be taken.

DDP RESPONSE: Partially concur. As noted in the draft report, the audit was conducted from August to November 1992. The DFARS changes implementing new statutory requirements for construction contracting were not issued until September 1992. The actions contained in the draft report, however, preceded the date the revised DFARS was issued. Consequently, at the time the audit was in process, we do not believe there had been sufficient time for contracting officers to modify all of their procedures to comply with the revised DFARS requirements. Moreover, the draft report did not present any factual evidence that contracting offices did not take action when it was warranted. Instead, it indicated that a significant number of contracting offices had taken aggressive actions in response to subcontractor allegations of nonpayment. Accordingly, we believe the revised DFARS provides sufficient guidance to construction contracting officers on verifying the accuracy of payment certifications. We agree, however, that a

Attachment

Director of Defense Procurement Comments (cont'd)

separate memorandum might be an effective means to emphasize the DFARS changes.

RECOMMENDATION 1: We recommend the Director of Defense Procurement provide guidance to the Military Departments and Defense Agencies to establish the procedures that contracting officers should use to verify the accuracy of the payment certifications made in accordance with the Federal Acquisition Regulation paragraph 52.232-5(c), "Payments Under Fixed-Price Construction Contracts," when a subcontractor or supplier asserts that a prime contractor has not made payment in accordance with the payment terms of the subcontract.

DDP RESPONSE: Partially concur. We believe that the DFARS revision issued in September 1992 accomplishes the intent of this recommendation. Nonetheless, we are willing to issue a policy memorandum to review with construction contracting officers the actions that should be taken to verify the accuracy of payment certifications.

RECOMMENDATION 2: We recommend the Director of Defense Procurement provide guidance to the Military Departments and Defense Agencies to list the appropriate judicial or administrative actions a contracting officer should take when a prime contractor has made a false payment certification concerning payments to subcontractors.

DDP RESPONSE: Partially concur. We believe that construction contract payment certifications are no different than payment certifications for other contract types. We will, however, mention the subject matter of this recommendation in our policy memorandum to construction contracting officers.

AUDIT TEAM MEMBERS

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