

April 25, 2003



# Financial Management

Joint Operation Planning and  
Execution System Funding  
(D-2003-082)

Office of the Inspector General  
of the  
Department of Defense

Constitution of  
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Article I, Section 9

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### **Acronyms**

COTS	Commercial Off-the-Shelf
DISA	Defense Information Systems Agency
FMR	Financial Management Regulation
GCCS	Global Command and Control System
JOPES	Joint Operation Planning and Execution System
O&M	Operation and Maintenance
RDT&E	Research, Development, Test, and Evaluation



INSPECTOR GENERAL  
DEPARTMENT OF DEFENSE  
400 ARMY NAVY DRIVE  
ARLINGTON, VIRGINIA 22202-4704

April 25, 2003

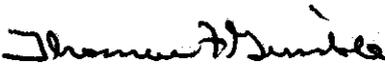
MEMORANDUM FOR UNDER SECRETARY OF DEFENSE (COMPTROLLER)/  
CHIEF FINANCIAL OFFICER

SUBJECT: Report on the Joint Operation Planning and Execution System Funding  
(Report No. D-2003-082)

We are providing this report for your information and use. We considered management comments on the draft of this report when preparing the final report.

The Under Secretary of Defense (Comptroller)/Chief Financial Officer comments conformed to the requirements of DoD Directive 7650.3; therefore, additional comments are not required. The complete text of the comments is in the Management Comments section of the report.

We appreciate the courtesies extended to the staff. Questions should be directed to Ms. Evelyn R. Klemstine at (703) 604-9172 (DSN 664-9172) or Mr. Hugh G. Cherry at (703) 604-9614 (DSN 664-9614). See Appendix C for the report distribution. The team members are listed on the inside back cover of this report.

  
David K. Steensma

Deputy Assistant Inspector General  
for Auditing

# Office of the Inspector General of the Department of Defense

Report No. D-2003-082

April 25, 2003

(Project No. D2001LG-0101.03)

## Joint Operation Planning and Execution System Funding

### Executive Summary

**Who Should Read This Report and Why?** This report should be read by DoD information technology and accounting officials responsible for the classification, recording, and reporting of maintenance and development costs associated with information technology. Proper classification and recording is critical for accurate financial statements and for reporting information technology costs to Congress.

**Background.** This is one in a series of reports the Inspector General of the Department of Defense is issuing on the policies and procedures that govern the Global Command and Control System. The military leadership uses the Global Command and Control System in planning and executing worldwide joint military operations. The Joint Operation Planning and Execution System (JOPES) is a Global Command and Control System component system used to plan and execute joint deployments. JOPES Classic supports the deployment process, and JOPES 21 is the proposed system designed to improve support to the JOPES user community.

**Results.** The Defense Information Systems Agency inappropriately spent about \$28.4 million of Operation and Maintenance funds, rather than Research, Development, Test, and Evaluation funds, to develop JOPES 21 from FY 1998 through FY 2002. As a result, an Antideficiency Act violation may have occurred. The Under Secretary of Defense (Comptroller)/Chief Financial Officer needs to investigate whether the use of Operation and Maintenance funds was an Antideficiency Act violation. (See the Finding section of the report for the detailed recommendation.)

**Management Actions.** According to Defense Information Systems Agency management officials, starting with the FY 2003 budget, Research, Development, Test, and Evaluation funds are being applied to JOPES 21 contract actions. The Under Secretary of Defense (Comptroller)/Chief Financial Officer and the Associate Deputy General Counsel (Appropriations and Authorization Matters), Office of the Deputy General Counsel (Fiscal) reviewed a discussion draft of this report and concluded that an Antideficiency Act violation had not occurred.

**Management Comments and Audit Response.** The Under Secretary of Defense (Comptroller)/Chief Financial Officer stated that his office reviewed the facts presented and obtained copies of budget justification material. The Under Secretary of Defense (Comptroller)/Chief Financial Officer determined that there was no violation of the Antideficiency Act. See the Finding section of the report for a discussion of management comments and the Management Comments section of the report for the complete text of the comments. The Under Secretary of Defense (Comptroller)/Chief Financial Officer review constituted a preliminary investigation; his actions were responsive to the intent of the recommendation.

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## Background

**Global Command and Control System.** The Global Command and Control System (GCCS) is the DoD joint command and control system used to provide accurate, complete, and timely information for the operational chain of command. GCCS incorporates systems that provide situational awareness, support for intelligence, force planning, readiness assessment, and deployment applications that battlefield commanders require to effectively plan and execute joint military operations.

**Joint Operation Planning and Execution System.** As one of the many component systems that resides on GCCS, the Joint Operation Planning and Execution System (JOPES) helps senior-level decision makers and their staffs to plan and conduct joint military operations. War planners use JOPES to identify types of forces and logistics support required, establish the sequence for moving forces, and manage the deployment process to sustain an operation plan. JOPES has supported the joint planning and execution community for 13 years.

**JOPES 21.** In 1998, the Defense Information Systems Agency (DISA), as the centralized program manager for GCCS, started development of JOPES 2000, a significant enhancement and product improvement of JOPES, using available Operation and Maintenance (O&M) funds. In March 2002, the Director for Operations (J-3), Joint Staff renamed the system JOPES 21. For this report, we use JOPES 21 to refer to the new system and JOPES Classic to refer to the original system.

**Congressional Concerns.** House Appropriations Committee Report (H. Rept. 105-591) accompanying the DoD Appropriations Bill, 1999 (H.R. 4103) questions the adequacy of DoD oversight of its information technology systems. In reviewing the budgets of individual systems, the Committee identified instances where agencies and departments were using Operation and Maintenance funds for purposes inconsistent with that appropriation. The Committee Report stated that DoD Regulation 7000.14-R, "Financial Management Regulation," (FMR) provided clear guidance that the cost of new equipment or systems, the replacement of equipment or systems, and even software changes designed to "improve system performance" are "Investments" and should be paid for with either Procurement or Research, Development, Test, and Evaluation (RDT&E) funds. In H. Rept. 106-244 accompanying the DoD Appropriations Bill, 2000 (H.R. 2561), the Committee criticized DoD for not taking corrective actions in response to H. Rept. 105-591 and directed DoD to submit reprogrammings to the FY 2000 appropriations bill to bring DoD into compliance with the Committee's direction.

## Objectives

This is one in a series of reports the Inspector General of the Department of Defense is issuing on the policies and procedures that govern GCCS. The overall objective for the series was to evaluate the joint functionality, system integration,

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and operation of GCCS. The specific objective for this segment of the audit was to review additional data from the DISA Comptroller in response to a potential Antideficiency Act violation. Our review of management controls at the Joint Staff and DISA related to GCCS is in Report No. D-2003-078, "Global Command and Control System Joint Operation Planning and Execution System," April 15, 2003. See Appendix A for a discussion of the audit scope and methodology. See Appendix B for prior coverage related to the audit objectives.

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## Potential Funding Violation

DISA inappropriately spent about \$28.4 million of O&M funds, rather than RDT&E funds, to develop JOPES 21<sup>1</sup> from FY 1998 through FY 2002. DISA used O&M funds because DISA management classified JOPES 21 as an improvement to an existing information technology system, thereby qualifying for the use of O&M funds, rather than the development of a new system requiring the use of RDT&E funds. As a result, an Antideficiency Act violation may have occurred.

## DoD Financial Management Regulation

The FMR provides guidance on the type of appropriated funds that should be used for development of an information technology system, for funding commercial off-the-shelf (COTS) systems, and for product improvement of items in the operational inventory. The FMR also cites actions required in cases of Antideficiency Act violations.

**Information Technology System Investments.** FMR volume 2A, “Budget Formulation and Presentation,” June 1998, chapter 1, section 010201, “Criteria for Determining Expense and Investment Costs,” defines expense and investment costs. The criteria for cost definitions consider the innate qualities of the item, such as durability in the case of an investment cost or consumability in the case of an operating cost, and the conditional circumstances under which an item is used or the way it is managed. All costs are classified as either an expense or an investment. In all cases where the definitions appear to conflict, conditional circumstances will prevail. Costs budgeted in the O&M appropriation are considered expenses. Costs budgeted in the RDT&E appropriation are considered both expenses and investments. The FMR defines expense and investment costs as follows:

1. Expenses are the costs incurred to operate and maintain the organization, such as personal services, supplies, and utilities.
2. Investments are the costs that result in the acquisition of, or an addition to, end items. These costs benefit future periods and generally are of a long-term character such as real property and personal property.

The FMR also states that the following conditional case takes precedence over the criteria for expense and investment costs:

[T]echnology refreshment that significantly changes the performance envelope of the end item is considered a modification and, therefore, an

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<sup>1</sup> In comments on Report No. D-2003-078, DISA stated that JOPES 21 expenditures totaled \$15.2 million. We were unable to verify the means DISA used to segregate JOPES Classic and JOPES 21 costs.

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investment. . . . This definition applies equally to technology insertion by commercial firms as part of contractor logistics support, prime vendor, and similar arrangements and to technology insertion that is performed internally by the Department.<sup>2</sup>

FMR section 010212 C.7. states that existing off-the-shelf equipment may be procured with Procurement funds, and items that require engineering design, integration, test, or evaluation effort shall be procured with RDT&E funds in sufficient numbers to support such effort.

**COTS System Funding.** The FMR provides that when COTS items are modified to satisfy users' requirements, the costs of acquiring, modifying, and testing the commercial items should be budgeted in the RDT&E appropriation. Further, the RDT&E appropriation should be used in the following cases.

- If COTS systems require engineering design, integration, test, and evaluation to achieve the objective performance.<sup>3</sup>
- If an end item requires design and development in order to accept the COTS system. In such cases, the entire effort is not COTS, and funding for that effort should be budgeted in the RDT&E appropriation.
- If commercially available items must be modified to satisfy user requirements. Such items are classified as "modified COTS" articles; modification of the first article, and first article testing, should be budgeted in the RDT&E appropriation.

**Product Improvement Funding.** The FMR provides that when major end items or major components of major end items currently in production or in the operational inventory are improved, the costs should be funded in the following manner.

- Engineering services applied to an item currently in production to extend its useful military life within the current performance envelope should be funded by Procurement appropriations. However, when developmental testing or operational test and evaluation by an independent operational test agency is required, RDT&E should be budgeted to finance the improvement.
- Engineering services applied to an out-of-production, but still operational item to extend its useful military life within the current performance envelope should be financed by O&M appropriations. However, when developmental testing or operational test and

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<sup>2</sup> The technology insertion policy in FMR section 010201 D.3. was added in the June 2000 edition of the regulation.

<sup>3</sup> The COTS policy in FMR section 010211 B.1. was added in the June 2000 edition of the regulation.

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evaluation by an independent operational test agency is required, RDT&E should be budgeted to finance the improvement.

**Action Required for Suspected Antideficiency Act Violations.** An Antideficiency Act violation, as codified in section 1341, title 31, United States Code, is the obligation, expenditure, or authorization of funds in excess of the amount available in an appropriation or fund by an officer or U.S. employee. FMR volume 14, “Administrative Control of Funds and Antideficiency Act Violations,” October 2002, chapter 2, “Violations of the Antideficiency Act,” states that a potential violation “shall be reported and investigated when charges to a currently available appropriation would have resulted in a violation of the Antideficiency Act had they been charged to the applicable expired account.”

FMR volume 14, chapter 4, “Beginning a Formal Investigation,” section 0401, states that a formal investigation is required whenever a preliminary review determines there may be a violation of the Antideficiency Act. Volume 14 also states, in section 0402, that an appointed investigating officer shall perform a formal investigation. Volume 14, chapter 4, October 2002, section 0402, provides the procedures for selecting an investigating officer, including the role of the Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer in assisting in finding a qualified investigator.

FMR volume 14, chapter 10.D., “Corrective Action,” describes procedural corrections to correct the adverse funding condition. The procedural corrections may include training or changes in procedures to preclude similar violations.

## **DISA Operation and Maintenance Funding**

DISA spent \$28.4 million to develop JOPES 21. DISA designed, integrated, tested, evaluated, and modified JOPES 21 COTS products with O&M funds. The appropriate source of funding for all or part of the \$28.4 million may have been RDT&E funds. The \$28.4 million in purchases made with O&M funds to develop JOPES 21 were used to significantly modify the performance envelope of JOPES Classic. In January 2000, the U.S. Central Command performed an independent test of the JOPES 21 development effort. In February 2000, the Joint Interoperability Test Command provided an independent verification and validation of the U.S. Central Command’s January 2000 test. In August 2000, the Joint Interoperability Test Command conducted an operational evaluation of JOPES 21. The FMR addresses DoD policies for funding investments that significantly modify the performance envelope and product improvement efforts for end items in development or in the operational inventory. Such investments and efforts should not use O&M funds but rather RDT&E funds. However, some purchases may have legitimately used O&M funds. DISA records we reviewed were not complete enough to make an adequate assessment.

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## DISA Management Criteria

The Joint Staff tasked DISA to look at technical solutions to improve JOPES Classic. The resulting study suggested that DISA would need to redesign the JOPES database structure, set up a testing network to support the redesigned JOPES database hosted on the new system architecture, conduct a demonstration, and field the capability. The Joint Staff recommended the use of COTS technology to replace the JOPES Classic government off-the-shelf products.

DISA classified JOPES 21 as an improvement to an existing information technology system, rather than as a new system. Therefore, DISA funded the COTS systems for JOPES 21 with the O&M appropriation. DISA claimed an exception to the RDT&E rule for funding COTS information technology systems, citing FMR volume 2A, chapter 1, section 010201,<sup>4</sup> which states:

Continuous technology refreshment is the intentional, incremental insertion of newer technology to improve reliability, improve maintainability, reduce cost, and/or add minor performance enhancement, typically in conjunction with depot or field level maintenance. The insertion of such technology into end items as part of maintenance is funded by the operation and maintenance appropriations.

However, section 010201 D.3. states that technology refreshment that significantly changes the performance envelope of the end item is considered a modification and, therefore, an investment. In addition, the House Committee Report (H. Rept. 106-244) accompanying H.R. 2561, the DoD Appropriations Bill, 2000, addresses the Appropriations Committee's concerns on the use of O&M funds versus RDT&E funds for information technology systems:

In last year's report this Committee highlighted its concern that the Department's use of operation and maintenance funds to develop and modernize its information technology systems was inconsistent with the Financial Management Regulations and directed the Department to correct this in its fiscal year 2000 budget submissions. The Department failed to do so. The Committee is concerned the continuation of this practice undermines the most basic distinction between appropriations and puts the Department in jeopardy of committing anti-deficiency violations. Consistent with last year's report the Committee directs the Department to submit prior approval reprogrammings as necessary to bring its programs into compliance. The Committee, however, remains prepared to work with the Department to realign funding between appropriation accounts prior to the completion of the fiscal year 2000 defense appropriations bill in order to bring the Department into compliance with the least disruption.

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<sup>4</sup> DISA claimed the exception rule in section 010201 for FY 2000 funding. For FY 1999, according to Inspector General of the Department of Defense Report No. D-2000-063, DISA claimed the exception rule in section 010212 C.10.b(1)(a) of the 1998 edition of the FMR. That related exception rule was not included in the June 2000 FMR.

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The JOPES 21 development effort was intended to improve the performance envelope of JOPES Classic. The formal requirement for JOPES 21 stated in the “Global Command and Control System Requirements Identification Document Phase III,” December 22, 1998, and the “Global Command and Control System (GCCS) Transitional Evolutionary Phased Implementation Plan (EPIP) for Phase III,” September 29, 2000, (the Plan) was to achieve significant improvement in performance. As stated in the Plan, JOPES 21 is a reengineered version of JOPES Classic and “will provide substantial improvement in performance, reliability, database synchronization, and integrity.” The Plan states that JOPES 21 will upgrade the JOPES Classic database servers as well as many of the JOPES applications. The FMR defines the cost for development of new equipment or systems, the replacement of equipment or systems, and even software changes designed to improve system performance as investments that should be funded through the RDT&E appropriation.

## **Potential Antideficiency Act Violation**

DISA contended that funding for COTS for JOPES 21 was continuous, incremental technology refreshment and, therefore, should be funded through the O&M appropriation. DISA classified the cost of acquiring COTS systems as an expense. However, the FMR states that when the insertion of such technology significantly changes the product, as is the case with JOPES 21, then the technology is considered an investment. Investments of that type require the use of RDT&E funds. Also, the software engineering and support provided were RDT&E tasks subject to RDT&E funding; therefore, an Antideficiency Act violation may have occurred.

## **Management Actions**

The Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) completed a review of the GCCS program in June 2001 and determined that the program lacked the proper appropriation funds to conduct systems engineering and integration activities. The Assistant Secretary directed DISA to establish an RDT&E funding line in the GCCS program element for all future fiscal years. According to DISA management officials, starting with the FY 2003 budget, the GCCS program has RDT&E funds and is applying those funds to JOPES 21 contract actions. We did not verify whether DISA was spending FY 2003 RDT&E funds on JOPES 21.

The Under Secretary of Defense (Comptroller)/Chief Financial Officer and the Associate Deputy General Counsel (Appropriations and Authorization Matters), Office of the Deputy General Counsel (Fiscal) reviewed a discussion draft of this report and concluded that an Antideficiency Act violation had not occurred. In a memorandum, “Discussion Draft of a Proposed Report (Project No. D2001LG-0101.03),” February 20, 2003, to the Inspector General of the Department of Defense, the Under Secretary of Defense (Comptroller)/Chief Financial Officer stated that after carefully reviewing the facts presented and

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obtaining budget justification material from DISA, the Comptroller and the Associate Deputy General Counsel did not believe that there was an Antideficiency Act violation in this case.

## **Recommendation, Management Comments, and Audit Response**

**We recommend that the Under Secretary of Defense (Comptroller)/Chief Financial Officer investigate whether the use of approximately \$28.4 million of Operation and Maintenance funds was an Antideficiency Act violation in accordance with chapter 10 of DoD Regulation 7000.14-R, “Financial Management Regulation,” volume 14, August 1995.**

**Under Secretary of Defense (Comptroller)/Chief Financial Officer Comments.** The Under Secretary of Defense (Comptroller)/Chief Financial Officer stated that his office reviewed the facts presented and obtained copies of budget justification material. The Under Secretary of Defense (Comptroller)/Chief Financial Officer determined that there was no violation of the Antideficiency Act.

**Audit Response.** The Under Secretary of Defense (Comptroller)/Chief Financial Officer review constituted a preliminary investigation; his actions were responsive to the intent of the recommendation.

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## Appendix A. Scope and Methodology

We reviewed applicable guidance and regulations that the Under Secretary of Defense (Comptroller)/Chief Financial Officer and DISA used to monitor funding issues; the Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer memorandum “Clarification of Policy – Budgeting for Information Technology and Automated Information Systems,” October 26, 1999; the Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer memorandum “FY 2001 Budget Justification Book Material for the Congress,” January 31, 2000; DISA Budget Justification Book (OP-5) submissions for FYs 2000 through 2003; and “FY 2002-2007 POM [Program Objective Memorandum] Preparation Instructions, Office of the Secretary of Defense,” February 24, 2000.

We also reviewed the “JOPES Strategic Plan,” April 2000, and the FMR editions from 1998 through 2002.

We reviewed implementing guidance developed by DISA. We reviewed the “Global Command and Control System (GCCS) Transitional Evolutionary Phased Implementation Plan (EPIP) for Phase III,” September 29, 2000; the “Global Command and Control System (GCCS) Evolutionary Phase Implementation Plan (EPIP) for Phase IV, Draft (GCCS Versions 3.4.0 through 4.2.0),” June 29, 2001; The “Global Command and Control System (GCCS) Evolutionary Acquisition Strategy, Revision 2.2,” July 14, 2000; the “Global Command and Control System (GCCS) Requirements Identification Document (RID) for Phase III,” December 22, 1998; the “Global Command and Control System (GCCS) Phase IV Requirements Identification Document (RID),” October 6, 2000; and Defense Acquisition Executive Summary reports, December 1999 through March 2002.

We analyzed JOPES Classic and JOPES 21 contracts DCA100-97-D-0043 (covering April 1998 through May 2002), DCA100-97-D-0026 (covering February 1998 through April 2002), and GS-35F-4810G (covering April 2002 through September 2002).

To identify dollar amounts, redesign activities, and funding policies, we:

- met with DoD officials at the DISA Comptroller’s Office, the Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, and the Office of the Assistant Secretary of Defense (Command, Control, Communications and Intelligence); and
- reviewed contracts DCA100-97-D-0043, DCA100-97-D-0026, and GS-35F-4810G to identify the costs of developing JOPES 21 and the amounts spent for the maintenance of JOPES Classic since 1998.

We performed this audit from December 2002 through February 2003 in accordance with generally accepted government auditing standards.

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

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

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## Appendix B. Prior Coverage

During the last 5 years, the Inspector General of the Department of Defense (IG DoD), the Army Audit Agency, and the Air Force Audit Agency have issued eight reports discussing GCCS. Unrestricted IG DoD reports can be accessed at <http://www.dodig.osd.mil/audit/reports>. Unrestricted Army Audit Agency reports can be accessed at <https://www.aaa.army.mil/reports.htm> from certain domains. Unrestricted Air Force Audit Agency reports can be accessed at <https://www.afaq.hq.af.mil/afck/plansreports/reports.shtml> from certain domains.

### IG DoD

IG DoD Report No. D-2003-078, “Global Command and Control System Joint Operation Planning and Execution System,” April 15, 2003

IG DoD Report No. D-2002-133, “Global Command and Control System Readiness Assessment System Output Tool,” July 24, 2002

IG DoD Report No. D-2002-084, “Guidance for the Global Command and Control System Common Operational Picture,” May 1, 2002

IG DoD Report No. D-2001-168, “Acquisition Management of the Global Transportation Network,” August 2, 2001

IG DoD Report No. D-2001-157, “Global Command and Control System – Meteorological and Oceanographic Application,” July 11, 2001

IG DoD Report No. D-2000-063, “Information Technology Funding in the Department of Defense,” December 17, 1999

### Army

Army Audit Agency Report No. AA 99-87, “Global Command and Control System-Army Program,” January 22, 1999

### Air Force

Air Force Audit Agency Report No. 00058001, “Maintenance of Time-Phased Force and Deployment Data Files,” November 23, 2000

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## **Appendix C. Report Distribution**

### **Office of the Secretary of Defense**

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Under Secretary of Defense (Comptroller)/Chief Financial Officer  
    Deputy Chief Financial Officer  
    Deputy Comptroller (Program/Budget)  
Assistant Secretary of Defense (Command, Control, Communications, and Intelligence)

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### **Department of the Navy**

Naval Inspector General  
Auditor General, Department of the Navy

### **Department of the Air Force**

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Auditor General, Department of the Air Force

### **Other Defense Organizations**

Director, Defense Information Systems Agency  
    Comptroller/Chief Financial Executive, Defense Information Systems Agency

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## **Congressional Committees and Subcommittees, Chairman and Ranking Minority Member**

Senate Committee on Appropriations

Senate Subcommittee on Defense, Committee on Appropriations

Senate Committee on Armed Services

Senate Committee on Governmental Affairs

House Committee on Appropriations

House Subcommittee on Defense, Committee on Appropriations

House Committee on Armed Services

House Committee on Government Reform

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

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

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



# Under Secretary of Defense (Comptroller)/ Chief Financial Officer Comments



COMPTROLLER

UNDER SECRETARY OF DEFENSE  
1100 DEFENSE PENTAGON  
WASHINGTON DC 20301-1100

APR 3 2003



MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Draft Report on the Joint Operation Planning and Execution System (JOPES)  
Funding (Project No. D2001LG-0101.03)

This is in response to the subject draft report issued March 5, 2003. As discussed in a meeting between our staffs, and in our response to the discussion draft, we reviewed the facts presented and obtained copies of budget justification material. This review constituted a preliminary ADA violation investigation that determined that there was no violation of the ADA. Attached is the Office of the General Counsel (Fiscal) determination.

My staff point of contact for this matter is Ms. Becky Allen. She can be reached at 703-697-0718 or email: allenr@osd.pentagon.mil.

A handwritten signature in black ink, appearing to read "Dov S. Zakheim".

Dov S. Zakheim

Attachment





DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

February 6, 2003

MEMORANDUM FOR REBECCA ALLEN, SUPERVISOR FOR ACCOUNTING  
AND FINANCE POLICY, ODCFO, OUSD(C)

SUBJECT: Potential Anti-Deficiency Act Violation Involving DISA JOPES/COTS

We have serious doubts that there is an anti-deficiency act violation in this case.

There are several reasons for this.

The first reason is that the determination of which appropriation may be, or should be, used depends largely on a subjective evaluation of the degree of performance enhancements contemplated by the JOPES/COTS acquisition. As a general rule, considerable deference should be paid to those evaluations, which should be overturned only when clearly erroneous. COTS can properly be procured with O&M, Procurement or RDT&E funds, depending on specific facts. Aside from expense/investment threshold determinations, all of the determinative factors concerning whether any of the three appropriations would be used are subjective. In this regard DISA determined that JOPES/COTS was properly funded in O&M. Accordingly, JOPES/COTS was budgeted for in O&M and went through the entire budgetary process as an O&M item. The ultimate result of this was that funds for JOPES/COTS were appropriated as O&M funds.

Second, it seems that for at least part of the time that the JOPES/COTS was funded with O&M funds, this funding was in accordance with policy and funding practices which were known and accepted within the Department, its budgetary community, and by the appropriations committees. Moreover, when the policy for purchasing COTS was clarified in the October 26, 1999, USD(C) memorandum, the memorandum indicated that any errors in choosing O&M funding, when RDT&E funding was proper "would be corrected during the FY 01 budget review." Given this statement, the fact that funding for the JOPES/COTS was included within the DISA O&M budget submissions for FY 01 and 02, and the fact that this funding was not "corrected" during the budget review or at any other time during the budget process, up to and including the time that funds were appropriated, and, thereafter, presumably, apportioned, allocated, or allotted to DISA as O&M funds makes it difficult to say that, as a matter of law, the funds were not used for the purpose for which they were appropriated and, thereafter, provided to DISA.



Third, the ADA is a criminal statute. Criminal statutes should be strictly construed. While reporting of an ADA is not a criminal proceeding requiring proof beyond a reasonable doubt, nevertheless, any violations of it should be supported by a preponderance of clear and convincing evidence which will support a finding that there was an Antideficiency act violation. In this case, as the record now stands, it seems that there is more evidence to support a finding that funding for the JOPES/COTS in O&M was proper than there is to support a finding that it was not. Indeed, the fact that funding for the JOPES/COTS was clearly identified and justified in the DISA budget justifications for its O&M appropriations; was appropriated in those appropriations; and thereafter provided to DISA in those appropriations creates an almost irrefutable presumption that O&M funding was proper.

In summary, in view of the totality of the information which has been supplied concerning the JOPES/COTS, it is extremely difficult to conclude that this information supports a finding that there was a purpose violation in the use of O&M funds for JOPES/COTS (i.e., that DISA made or authorized an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation. (31 U.S.C. 1517(a)(1)(A)). At most there may have been a policy violation with respect to the two budget years after the issuance of the policy "clarification" on October 26, 1999, fiscal years 2001 & 2002. Under the facts of this case as they now stand, however, any such policy violation would not rise to the level of an antideficiency act violation.

Finally, notwithstanding the foregoing, there are undoubtedly facts surrounding this issue which are not contained in either the draft IG report or any of the other materials which have been furnished for review. Although what has been furnished indicates most strongly that there was no ADA violation in this case, there is, of course, always the possibility that there may be some fact or facts which would prove otherwise. Accordingly, there is no legal impediment to directing either a preliminary or formal ADA investigation to determine whether there might be any other evidence (which it is suggested, would have to be extremely strong and convincing) to support a finding that there was an ADA violation in this case.

  
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