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Inspector General

United States
Department of Defense



Report No. 11-INTEL-02
December 3, 2010

DEPUTY INSPECTOR GENERAL FOR INTELLIGENCE

Report of the National Security Agency Texas Cryptologic Center Construction Project (U)

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INSPECTOR GENERAL
 DEPARTMENT OF DEFENSE
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December 3, 2010

MEMORANDUM FOR COMMANDER, UNITED STATES PACIFIC COMMAND
 DIRECTOR, NATIONAL SECURITY AGENCY/CHIEF
 CENTRAL SECURITY SERVICE
 COMMANDER, UNITED STATES ARMY CORP OF
 ENGINEERS

SUBJECT: (U//~~FOUO~~) Report of the National Security Agency Texas Cryptologic Center Construction Project (Report No. 11-INTEL-02).

(U//~~FOUO~~) **Background:** This review was conducted as part of our audit of the National Security Agency (NSA) Cryptologic Center construction projects. This report focuses on the National Security Agency Texas (NSAT) construction project. We issued a report on the NSA Georgia Cryptologic Center military construction (MILCON) project on August 6, 2010. We do not intend to review the military construction of the NSA Hawaii Cryptologic Center due to competing resource requirements. We found no significant issues with the NSA Georgia or Texas facilities, and the Hawaii MILCON is complete.

(U//~~FOUO~~) The existing NSAT building is located at the Medina Training Annex of Lackland Air Force Base (AFB) in Northwest San Antonio, Texas. NSAT conducts Signals Intelligence and Computer Network Operations worldwide, in support of National and tactical decision-makers and customers/partners. NSAT applies geographic and functional expertise in exploiting targets operating in the Western Hemisphere and those posing a threat to Homeland Security.

(U//~~FOUO~~) On January 31, 2005, Acting USD (AT&L) wrote to the Deputy Secretary of Defense stating that the United States Army Corps of Engineers (USACE), on behalf of NSA, proposed relocating NSA: (b)(3), 50 U.S.C. § 402 Note from Lackland AFB to a commercial-leased facility in San Antonio, Texas. Lackland AFB was deemed inadequate to accommodate mission growth and to consolidate all NSA personnel assets in the area into one facility. NSA stated that there was no Government-owned or controlled space available within a 20 mile radius to satisfy the 480,000 square-foot requirement due to the robust infrastructure and Anti-Terrorism Force Protection needs of NSA. On February 5, 2005, the Office of the Deputy Secretary of Defense notified the Chairmen and Ranking Members of the Defense and Intelligence Committees that DoD USACE planned a lease acquisition on behalf of NSA.

(U//~~FOUO~~) **Objective:** To determine if the NSA appropriately leased a facility by using Operations and Maintenance (O&M) funding instead of using MILCON funding for the relocation of the NSAT Cryptologic Center.

(U//~~FOUO~~) **Scope/Methodology:** The DoD OIG Fort Meade team met with the USACE, Baltimore District to discuss the lease and use of O&M funding of the NSAT Cryptologic Center. Specifically, we discussed why the USACE leased a commercial building instead of purchasing, or building on a military installation and why O&M funding was used as opposed to MILCON funding. These decisions were based on economic analyses, federal law, legal opinions, and Defense authorizations.

(U) RESULTS:

(U//~~FOUO~~) **Economic Analyses.** The USACE deemed Lackland Air Force Base inadequate to accommodate mission growth and to consolidate all NSA personnel assets in the area into one facility. In accordance with DoD Instruction 7041.3, the USACE conducted an economic analysis of the lease and MILCON scenario for NSAT. The Economic Analysis of Alternative Facilities Study, dated December 2004, reported a

NSA: (b)(3), 50 U.S.C. § 402 Note

[REDACTED]. However, the study provided a sole MILCON option of a privately owned parcel of land located adjacent to, but outside of the Lackland AFB property boundary. This scenario would involve government acquisition of the parcel, incorporating it into Lackland AFB, and providing infrastructure for development. The total for the land acquisition and construction cost of a 436,000 square foot building was estimated to be \$160 million. This cost did not include access roads and infrastructure outside of the development complex. The total net present value of this MILCON project (including 20 year and initial fit-up O&M expenses, and \$160 million initial construction) was \$316,424,536. This MILCON would pay for construction costs up front; however, the report stated that time used for congressional approvals for MILCON will extend the occupancy date and increase costs. The December 2004 analysis also reported a net present value of \$248,650,509 to lease the Sony (microelectronic facility in San Antonio, Texas) building for 20 full service years (including fit-up expense). Therefore, MILCON processes were considered less attractive because the proposed site would have cost more than leasing and the processing time had the potential to increase estimated costs. Since no existing military installations were available for construction of the NSAT Cryptologic Center within a 20 mile radius, MILCON funds could not be used. However, if NSA decided to initially purchase the Sony building, MILCON funding was appropriate.

(U//~~FOUO~~) During 2007, Grubb and Ellis Company prepared a Lease-Purchase Analysis of the Sony building for USACE. Given similar assumptions, the 20-year lease cash flow had a net present value of \$997,680,895¹ where the net present value to purchase the Sony building was \$954,356,466². This is a four percent difference which we consider to

¹ The lease cost includes rent, utilities (electricity, fuel costs and water/sewer charges), maintenance, other expenses (janitorial, landscaping, general and administrative), real estate tax, tenant (tenant improvement) contribution, and landlord (tenant improvement) contribution.

² The purchase cost includes land value, existing building value, building shell upgrades, equipment upgrades, additional tenant improvements, utilities, maintenance, and other expenses.

be insignificant for a billion dollar cost estimate over a 20-year period. This analysis has a higher value than the USACE study conducted in December 2004 because it includes the NSA Data Center. NSA decided to lease because time was an essential decision factor. According to the Lease-Purchase Analysis, Federal government construction projects are highly regulated and tend to take longer to execute than similar projects executed by the private sector developers. This additional time exposes the government to substantial risk from rising construction costs. In addition, DoD Directive 4275.5 states that it is DoD policy to minimize Government ownership of facilities in consonance with the need to ensure economical support of essential peacetime, surge, and mobilization requirements.

~~(U//FOUO)~~ **Legal Opinions.** On September 18, 2007, a USACE Senior Attorney Advisor wrote a legal opinion for the Chief, USACE Real Property Services Field Office (RSFO) on whether it was appropriate to use O&M appropriations to pay for build-out of leased space, or whether MILCON appropriations should be used for this purpose in the event the cost of such build-out exceeds the MILCON threshold of \$750,000. The Attorney made reference to five questions that should be answered to make the determination that leases entered into are in agreement with policy-based fiscal law principles:

1. Are appropriations "otherwise available" for this purpose? As a general principle, appropriations available for operations and maintenance are available to pay for the costs associated with the leasing of facilities (10 USC 2661).
2. Are the improvements incident to, and essential for, the accomplishment of the appropriation? This answer is closely aligned with the necessary expense rule and relates to the mission planned to occupy the leased space.
3. Will the improvements be for the principal benefit of the government? This is a judgment call, however since most of the build-out that is performed by USACE-RSFO for its clients is specialized, secure space, this question can clearly be answered in the affirmative.
4. Are the interests of the government in the improvements adequately protected? The standard leasehold instrument in the RSFO provides for termination by the government only and is typically for a minimum of ten years. Further, all leases entered into by the RSFO require the Lessor to maintain insurance coverage and therefore places the burden of risk of loss or damage upon the Lessor.
5. Are the costs of the improvements in reasonable proportion to the cost of the lease? This question calls for a subjective assessment and is the most difficult to answer due to the lack of definitive standards. This is further complicated by the fact that guidance is vague for addressing reasonableness with respect to "leasing." GAO policy states that improvements made to the property that can be removed from the property are not considered "permanent improvements." GAO does not state that they must be removed from the property at the expiration of the lease only that the government must reserve the right to remove them. Therefore,

such temporary improvements would not be counted in any analysis of "reasonable."

(U//~~FOUO~~) Both the NSA Deputy Associate General Counsel (Acquisition & Logistics), and the Washington Headquarters Services Senior General Counsel agreed.

(U//~~FOUO~~) Under 10 USC 2801, MILCON appropriations are defined as funds that are to be used for construction projects on a military installation. A military installation is under the jurisdiction of a military department. Since leased space on private property does not fall within the statutory intent that MILCON appropriations only be used for projects on military installations, MILCON appropriations are not the proper source of funds to pay for build-out of leased space. O&M is the appropriate source of funding for the build-out and lease of real property.

(U//~~FOUO~~) The DoD Associate Deputy General Counsel, in a related legal opinion about alterations to two other NSA leased facilities raised concerns with the fifth question related to reasonableness of improved costs related to the costs of the lease. He stated that, while decisions of the Comptroller General do not establish any definitive standards for determining when the cost of improvements is in reasonable proportion to the cost of the lease, in none of these reported decisions does the ratio of the cost of improvements to the cost of the lease (whether compared to the annual lease costs or the lease costs for the full period of the lease) approach the level in this case, with the annual cost of improvements for the first three years of the lease averaging more than 200 percent of the cost of the basic lease. If it was determined by appropriate authority that the costs of the improvements to the leased space were not in reasonable proportion to the basic cost of the underlying lease, and therefore that the funding of the improvements was not in accord with established fiscal policy, it follows that the use of appropriated funds to pay for the improvements in this case must be found to have been improper, absent specific statutory authority. The fiscal policy relating to the use of appropriated funds to pay for improvements to privately-owned, government-leased space is policy-based, not the result of any statutory prohibition.

(U) **Federal Law.** 10 USC 2661 states that appropriations for operation and maintenance of the active forces shall be available for the repair of facilities and the installation of equipment in public and private plants. The Secretary of Defense and the Secretary of each military department may provide the leasing of buildings and facilities. However, the USC does not state the type of funding that should be used for the leasing of buildings and facilities.

(U) Under 10 USC 2801, MILCON includes construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road. A military construction project includes all military construction work, or any contribution authorized by this chapter, necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Military

installation includes a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or the Secretary of Defense.

(U) 10 USC 2813 allows for using funds appropriated for a military construction project authorized by law for a military installation, to acquire an existing facility (including the real property on which the facility is located) at or near the military installation instead of carrying out the authorized military construction project if the Secretary determines that:

1. The acquisition of the facility satisfies the requirements of the military department concerned for the authorized military construction project; and
2. It is in the best interests of the U.S. to acquire the facility instead of carrying out the authorized military construction project.

This USC does not address cases of leasing as opposed to purchasing the facility or land, where the facility is located.

(U) CONCLUSION:

(U//~~FOUO~~) Legal opinions showed that NSA appropriately funded the leased Sony building using O&M appropriations instead of MILCON. Also, economic analyses demonstrated that leasing was the best method of acquiring a facility, based on assumptions of availability and costs versus time constraints.

(U) No written responses to this report were required, and none were received. Therefore, we are publishing this report in final form.

(U) We appreciate the courtesies extended to the staff. Questions should be directed to me at (703) 604-8800 (DSN 664-8800).


Patricia A. Brannin
Deputy Inspector General
for Intelligence

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