



# Report of Audit

## Contracting Activities at Environmental Research Laboratory Duluth

Audit Report No. E1JBF1-05-0175-2100443

July 7, 1992







UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
THE INSPECTOR GENERAL

July 7, 1992

**MEMORANDUM**

**SUBJECT:** Audit Report No. E1JBF1-05-0175-2100443  
Contracting Activities at Environmental Research  
Laboratory - Duluth

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**TO:** Christian R. Holmes  
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Principal Deputy General Counsel  
Designated Agency Ethics Official

Attached is our report entitled "Contracting Activities at Environmental Research Laboratory - Duluth". The overall objectives were to:

- o evaluate the development and award of Duluth's support service contracts,
- o determine the use and control of work assignments issued under the Duluth toxicological support service contracts, and
- o determine if Duluth employees' Confidential Statements were being appropriately filed and reviewed.

The report contains important findings and recommendations regarding the subject area.

**Action Required**

In accordance with EPA Order 2750, we have designated the Assistant Administrator for Administration and Resources Management as the Action Official for this report. As the Action

Official, he is to provide this office with a written response to the audit report within 90 days of the final audit report date. For corrective actions planned but not completed by the response date, reference to specific milestone dates will assist this office in deciding whether to close this report. We have no objections to further release of this report to the public.

This audit report contains findings and recommendations that describe problems the Office of Inspector General has identified and corrective actions that we recommend. The audit report represents our opinion. Final determinations on matters in this audit report will be made by EPA managers in accordance with established EPA audit resolution procedures. Accordingly, the findings described in this audit report do not necessarily represent the final EPA position.

Should you have any questions about this report, please contact me at 260-1106 or Anthony C. Carrollo, Divisional Inspector General for Audit, Northern Audit Division, at 312-353-2503.

Attachment

## EXECUTIVE SUMMARY

### PURPOSE

The Office of Inspector General decided to perform a review of contracting at the Agency's Environmental Research Laboratory - Duluth, Minnesota (Duluth) as a pilot effort for EPA research facilities. Our decision was based on indicators found during an initial joint survey conducted by our Northern Audit and Investigations Divisions. Our specific audit objectives were to:

- o evaluate the development and award of Duluth's support service contracts,
- o determine the use and control of work assignments issued under the Duluth toxicological support service contracts, and
- o determine if Duluth employees' Confidential Statements of Employment and Financial Interests (Confidential Statements) were being appropriately filed and reviewed.

### BACKGROUND

Duluth, one of twelve Office of Research and Development (ORD) laboratories, conducts research in aquatic toxicology and freshwater ecology. Duluth's mission is to develop a scientific basis for EPA to create environmental policies concerning the use of freshwater resources. The Office of Administration and Resources Management (OARM), Cincinnati Contracts Management Division (Cincinnati) has contracting officers who award and administer Duluth's contracts, with the assistance of project officers and work assignment managers (WAMs) in Duluth. Both Duluth and Cincinnati receive guidance on ethics from the Designated Agency Ethics Official (DAEO), who is located within the Agency's Office of General Counsel (OGC).

Since 1986, EPA has contracted with ASaI Corporation (ASaI) to provide scientific support services for Duluth.<sup>1</sup> ASaI's six Duluth contracts have maximum values totalling about \$21 million (see Exhibit 1). Some of ASaI's contracts fall under the Small Business Administration's (SBA) Section 8(a) Contracting and Business Development Program (8(a)).

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<sup>1</sup>ASaI was originally incorporated as American Scientific International, Inc. In March 1989 it changed its name to ASaI Corporation. For clarity, we use ASaI throughout this report.

## RESULTS-IN-BRIEF

Neither Duluth nor Cincinnati officials fulfilled their responsibilities to ensure that ASCI contracts were awarded and monitored in the best interests of the Government. Without adequate pre-award review of identified potential conflicts of interest, Cincinnati officials recommended that ASCI receive a \$1 million non-competitive contract in 1986. The contract was awarded only eight months after ASCI's owner left the Agency. In 1989, EPA allowed the remaining two years on an existing three-year contract with the University of Wisconsin-Superior (UWS) to lapse and awarded ASCI a \$4.5 million contract to perform essentially the same services. UWS became ASCI's prime subcontractor under the new contract. Then, in 1990, under the guidance of the Duluth Director, Duluth officials split a \$9 million requirement into three contracts to deliberately avoid competition requirements. As a result, ASCI received over \$9 million in contracts without competition. Duluth project officers also proposed work for ASCI that was not within the scope of the contracts. Cincinnati contracting officers approved Duluth's proposals without careful review.

Since 1985, when ASCI made its initial efforts to solicit a contract at Duluth, there has been a series of actual or apparent conflicts of interest involving this contractor and EPA program officials. Agency files contained evidence of each of these conflicts. Yet, neither contracting nor ethics officials took an aggressive stance to review or take appropriate actions to prevent such conflicts. For example, in 1986, prior to ASCI receiving its first Duluth contract, Cincinnati contracting officials:

- o became aware that ASCI's owner was a former EPA employee, but did little to investigate or ameliorate the apparent conflict of interest.
- o did not realize that ASCI's contract proposal showed that ASCI offered the Duluth Director's former spouse employment, even though their files included the employment offer. The Duluth Director (at the time in an acting capacity) was actively involved in this procurement.

ASCI was awarded a three year follow-on contract for Duluth in 1987. In 1989, without adequately inquiring into the nature of the Duluth Director's role in relation to ASCI, Agency ethics officials approved the Duluth Director's request for permission to have his current spouse become an ASCI employee. The Duluth Director had a major role in recommending contract awards to ASCI and performance award fees to ASCI under those contracts.

The overall result of EPA's actions summarized in this report is that (1) the integrity of its acquisition process has been compromised and (2) its general credibility with the public, and its 8(a) Program in particular, have been tarnished.

EPA has acted swiftly to change contracting practices for its laboratories. The Agency, at ORD's request, has chosen not to exercise its option to extend the ASCI Duluth contracts. Instead, these contracts are being rebid as a single, competitive procurement. As a broader measure, ORD has directed that competitive solicitations be initiated to replace all ORD sole-source contracts, to the extent possible and appropriate. Also, laboratory directors must now approve all work assignments and technical directives. Finally, OARM intends to issue additional guidance to contracting officers, and the DAEO intends to issue an additional Ethics Advisory.

The Agency's actions, summarized above, will help (1) assure that support contracts at Duluth and other laboratories are awarded and managed in accordance with Federal contracting regulations and (2) restore the integrity of its acquisition process, its general credibility with the public, and the credibility of its 8(a) Program.

#### PRINCIPAL FINDINGS

##### Potential Conflicts Of Interest Not Investigated In The Award of ASCI's 1986 Duluth Contract

In 1986, ASCI, a firm owned by a former high-level ORD employee, received a non-competitive contract at Duluth. The former employee solicited ORD contracts on behalf of his wholly-owned company while working for EPA. Cincinnati contracting officials knew of these potential conflicts of interest, but did not resolve the issues this raised prior to awarding the contract. This condition occurred because of Cincinnati's reliance on Duluth's statement that OGC approved the contract submittal. However, we found no evidence of any OGC approval. As a result, without proper review, EPA awarded a \$1 million non-competitive contract within eight months after ASCI's owner left the Agency. EPA regulations prohibit non-competitive contract awards to former employees within one year of leaving the Agency, unless the OARM Assistant Administrator waives the prohibition. The former EPA employee acted improperly and may have violated Federal law by representing ASCI in dealings with SBA and EPA during the time he was an Agency employee.

In addition, ASCI offered employment to spouses of Duluth employees, contingent on receiving the contract. In one instance, Cincinnati contract files clearly demonstrated that ASCI intended to offer such employment to the Acting Duluth

Director's former spouse and that this Director was actively involved in the procurement. However, the files showed no action by Cincinnati to resolve this additional conflict.

Existing Chemical Analysis Contract Allowed To Lapse And \$4.5 Million Contract Awarded To ASCI In 1989

In 1989, EPA allowed the remaining two years of an existing three-year contract with UWS to lapse. Concurrently, EPA awarded ASCI a three-year contract worth about \$4.5 million to perform similar work at Duluth. UWS became ASCI's prime subcontractor on this new contract. The contract provided Duluth with essentially the same services that it received under the UWS contract, but at a higher cost to the Government. The condition occurred because the Duluth Director became involved in the bidding process and discouraged UWS from submitting a bid. He also encouraged UWS to become a subcontractor to ASCI. As a result, ASCI gained a competitive advantage over other potential bidders.

At the time of the award, the Duluth Director's spouse served as ASCI's registered agent. Immediately, after EPA awarded ASCI the contract, the Duluth Director's spouse was hired as the firm's only in-house attorney. The Duluth Director's actions resulted in, or created the reasonable appearance of, giving preferential treatment to ASCI. As a result of allowing the UWS contract to lapse, we estimate that the Government paid about an additional \$300,000 for essentially the same services.

\$9 Million In Toxicological Contract Awards To ASCI In 1990 Were Not Competitively Bid

In 1990, EPA (through SBA) awarded ASCI, an 8(a) contractor, three sole-source contracts that totalled over \$9 million, deliberately avoiding competition. Duluth officials proposed multiple contracts because the Duluth Director wanted: (1) the incumbent contractor to continue working at Duluth on all three contracts, and (2) to avoid worrying contractor personnel about job security. The Duluth Director's actions result in, or create the reasonable appearance of, giving preferential treatment to ASCI, which employed his current spouse. Contracting officials approved and processed the three contracts as a group, knowing that Duluth's estimates were just under the competitive threshold. In doing so, the contracting officials did not fulfill their responsibilities to ensure adherence to applicable laws and regulations before entering into contracts. As a result of awarding the contracts sole-source, EPA did not provide other 8(a) firms the opportunity to bid, and cannot be assured that the contracts were awarded in the best interest of the Government. The Business Opportunity Development Reform Act

of 1988<sup>2</sup> requires that the Government competitively bid all 8(a) service contracts that have an estimated value over \$3 million.

EPA's actions in awarding the contract are particularly questionable in light of personal conflicts of interest created by the Duluth Director in procuring and managing the ASCI contracts. Even though his spouse has served as ASCI's only in-house attorney since October 1989, the Duluth Director did not distance himself from issues which might create a conflict of interest. Instead he specifically involved himself in the procurement and management decisions which led to ASCI's being given more than \$142,000 of award fees.

#### Work Assigned To ASCI Was Not Included In Work Assignments Or The Scope Of The Contracts

For several years, Duluth and Cincinnati officials allowed ASCI to conduct work at Duluth that was either not included in the contracts' scope of work or in work assignments. This work included remodeling and maintenance tasks for ASCI, the toxicological support services contractor. Duluth officials believed that their actions were justified as long as Duluth benefitted. Cincinnati contracting officers: (1) did not enforce Agency regulations prohibiting work to start prior to their written approval; and (2) approved the work assignments without reading them, even though the work was not allowable under the contracts' terms. As a result, contracting officers committed the Government to expend funds for unauthorized services. The Duluth contracts clearly forbid ASCI from performing: (1) work until the contracting officer gives written authorization, and (2) additional duties not within the scope of the contract.

#### Duluth Employees' Confidential Statements Were Incomplete

The Deputy Ethics Official (DEO), who is the Duluth Director, did not direct project officers at or below the grade 12 level to file Confidential Statements. Additionally, the DEO did not ensure that Duluth employees disclosed their spouses' employment with organizations doing business with Duluth. Because statements were (1) not filed, or (2) incomplete as to spousal employment, the DEO could not determine whether actual or apparent conflicts of interest existed. Therefore, Duluth's 1990 annual certification was inaccurate and incomplete. EPA regulations and an Agency Ethics Advisory both emphasize to DEOs that employees, such as project officers, whose duties directly affect the financial interests of specific parties, should be required to file Confidential Statements.

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<sup>2</sup>P.L. 100-656, Sec. 303(b), codified at 15 U.S.C. 637(a) (1) (D)



In addition, the Agency did not require WAMs to file Confidential Statements. WAMs prepare work assignments for contractors, and monitor the contractors' performance. Therefore, WAMs can influence a contractors' work and award fees.

#### AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL EVALUATION

The OARM and ORD Assistant Administrators and the DEAO were in substantial agreement with our report, and have already acted, or have agreed to act, to resolve the issues raised in this report.

The only substantive area of disagreement concerned the awarding of the \$4.5 million 1989 contract for chemical analysis to ASOI. OARM and ORD disagree with our finding that the contract was for essentially the same work that had been performed under the UWS contract. Our main point remains that both before and after the new contract, the same UWS employees continued to perform essentially the same work, but at an increased cost. This higher cost, which we estimate at about \$300,000, went to ASOI. This is a firm with which the Duluth Director had a conflict of interest.

#### RECOMMENDATIONS

OARM and ORD actions have resolved the issues raised in this report that relate to them. The Designated Agency Ethics Official has proposed actions that, when implemented, will resolve many of our concerns. In part, the additional actions depend upon the Office of Government Ethics, another government agency, issuing new regulations. These regulations are expected shortly, but since their issuance is outside EPA's control, the DAEO has agreed to put in place interim measures if the regulations are not issued by August 15, 1992. However, additional actions on his part are needed. Our recommendations are summarized below and are detailed in the body of our report.

We recommend that the Designated Agency Ethics Official:

1. Define substantive ethics advice, and require that Deputy Ethics Officials maintain written records when they give employees substantive ethics advice.
2. Put in place interim procedures or Ethics Advisories, if the Office of Government Ethics proposed regulations are not finalized by August 15, 1992.
3. Establish a procedure that requires supervisors of Senior Executive Service

employees to be informed, in writing, of any discussions or decisions regarding potential conflicts of interest.

4. Require the Deputy Ethics Officials to be at least biannually trained and certified regarding Government ethics laws and regulations.

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## CHAPTER 1

### INTRODUCTION

#### PURPOSE

The Office of Inspector General decided to perform a review of contracting at Duluth as a pilot effort for EPA research facilities. Our decision was based on indicators found during an initial joint survey conducted by our audit and investigations staffs. Our specific audit objectives were to:

- o evaluate the development and award of Duluth's support service contracts,
- o determine the use and control of work assignments issued under the Duluth toxicological support service contracts, and
- o determine if Duluth employees' Confidential Statements were being appropriately filed and reviewed.

#### BACKGROUND

Duluth, one of twelve ORD laboratories, conducts research in aquatic toxicology and freshwater ecology. Duluth's mission is to develop a scientific basis for EPA to create environmental policies concerning freshwater resources. Cincinnati contracting officers award and administer Duluth's contracts, with the assistance of project officers and WAMs in Duluth. Both Duluth and Cincinnati receive guidance on ethics from the DAEO.

EPA contracted with SBA to have a small, disadvantaged firm, ASaI, provide on-site toxicological support services for Duluth. The contractor was to provide research support services including: (1) general culturing and animal care, (2) biology and chemistry support, and (3) program support. EPA contracted these services under the 8(a) Program. One of the purposes of the 8(a) Program is to foster business ownership by individuals who are socially and economically disadvantaged.

EPA supports the 8(a) Program by contracting, through SBA, with qualified firms. In fiscal 1990, EPA reported to SBA that it awarded about \$98 million under the 8(a) Program. This was about 8.7 percent of the Agency's procurement contract awards, and meant that EPA exceeded its 8(a) goal of 6.5 percent.

In addition to the 8(a) contracts which EPA awarded to the disadvantaged firm, ASaI, EPA competitively awarded ASaI \$4.5 million chemical analysis support contract. This contract was open to all interested bidders, including non-8(a) firms.

## SCOPE AND METHODOLOGY

To accomplish our first objective, we reviewed the development and award of Duluth's on-site toxicological support service contracts. We discussed with OARM's Procurement and Contracts Management Division (PCMD) officials in Washington and Cincinnati the process for awarding non-competitive sole-source contracts. We also reviewed Cincinnati's negotiation and award files.

To accomplish our second objective, we examined all work assignments that Duluth proposed and Cincinnati approved for these contracts. We compared the work assignments to the contracts' statements of work and reviewed whether the various support services were within the terms and conditions of the contracts. We discussed work assignments with the contracting officers responsible for the prior and current ASOI Duluth contracts, who had the sole authority to issue work assignments.

To accomplish our third objective, we obtained Confidential Statements for those Duluth employees who filed. We examined the procedures and guidance for having employees file. We also compared Agency and contractor employee lists to determine if EPA employees disclosed their spouse's employment. In addition, we met with the Alternate Agency Ethics Official in Washington. We discussed the Agency's position on requiring individuals involved in preparing procurement requests and assessing contractors' performance to file.

We performed our audit in accordance with the Government Auditing Standards issued by the Comptroller General of the United States (1988 revision). This audit is a result of a joint effort between the Office of Inspector General's Northern Audit and Northern Investigations Divisions. The joint effort was an outgrowth of hotline complaints the Office of Investigations received. Some of the information that we used in developing this report was obtained from the Northern Investigations Division. None of this information was obtained through the Grand Jury process.

We did not perform a comprehensive evaluation of Duluth's internal controls and did not verify data from any management information system. However, we did assess the process for preparing contracts and work assignments. We also reviewed Duluth's compliance with the Agency's procedures for disclosing potential conflicts of interest. Additionally, we reviewed the fiscal 1990 annual FMFIA report on internal controls for: (1) the Agency, (2) ORD, and (3) Duluth.

No prior reports on Duluth, Cincinnati, ORD or contracting in general were used as background for this audit.

We conducted our audit between March 14, 1991, and May 1, 1992. We discussed our findings and recommendations with OARM, ORD, and OGC officials in Headquarters during the course of our audit. These discussions included formal briefings about our interim findings during January and February 1992. On February 12, 1992, we issued position papers to these Offices. ORD and OGC formally responded in March and April, respectively. While we were conducting our audit, many corrective actions were initiated. Those actions are described throughout this report.

On May 29, 1992, we issued our draft report. ORD and the DAEO responded on June 29, 1992. OARM responded on June 30, 1992. We held exit conferences with ORD and OARM officials on June 30, 1992. OGC officials were unable to attend. After reviewing the responses and conducting the exit conferences, we made appropriate changes and finalized the report. Agency comments and corrective actions to date are discussed in the body of this report. The Agency responses are included as Appendices 1 through 3 in this report.

On June 4 and June 11, 1992 the Northern Investigations Division issued investigative reports regarding activities at Duluth and Cincinnati. Although the Northern Audit and Northern Investigations Divisions conducted their reviews as a joint effort, the resulting audit and investigative reports are separate actions.



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## CHAPTER 2

### POTENTIAL CONFLICTS OF INTEREST NOT INVESTIGATED IN THE AWARD OF ASCI'S 1986 DULUTH CONTRACT

In 1986, ASCI, a firm owned by a former high-level ORD employee, received a non-competitive contract at Duluth. The former employee solicited ORD contracts on behalf of his wholly-owned company while working for EPA. Cincinnati contracting officials knew that ASCI's owner was a former EPA employee, but did not resolve the issues this raised prior to awarding the contract. This condition occurred because of Cincinnati's reliance on Duluth's statement that OGC approved the contract submittal. However, we found no evidence of any OGC approval. As a result, without proper review, EPA awarded a \$1 million non-competitive contract within eight months after ASCI's owner left the Agency. EPA regulations prohibit non-competitive contract awards to former employees within one year of leaving the Agency, unless the OARM Assistant Administrator waives the prohibition. The former EPA employee acted improperly and may have violated Federal law by representing ASCI in dealings with SBA and EPA during the time was an Agency employee.

In addition, ASCI offered employment to spouses of Duluth employees, contingent on receiving the contract. In one instance, Cincinnati contract files clearly demonstrated that ASCI intended to offer such employment to the Acting Duluth Director's former spouse and that this Director was actively involved in the procurement. However, the files showed no action by Cincinnati to resolve this additional conflict.

### CONTRACTING OFFICIALS DID NOT INVESTIGATE AN EPA EMPLOYEE'S SOLICITATION OF EPA CONTRACTS

EPA (through SBA) awarded ASCI, an 8(a) contractor, its first contract for Duluth in 1986. ASCI's owner solicited contracts at Duluth for his wholly-owned corporation, both during his time as an EPA employee and during his first year of separation. In addition, ASCI offered employment to the former spouse of the then Acting Duluth Director, who was actively involved in the procurement.<sup>3</sup> Although these conditions were documented in their files, Cincinnati contracting officials did not take

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<sup>3</sup>In February 1986 the Associate Director for Research Operations became the Acting Duluth Director. In May 1987 he became the Duluth Director, and remained in that position until March 1992. Elsewhere throughout this report he is referred to as the Duluth Director.

appropriate action to review these potential conflicts of interest prior to awarding the contract.

#### EPA Employee Solicited EPA Contracts

ASCI's owner sought a contract to provide toxicological support services for Duluth while he was an EPA employee in the Headquarters office to which Duluth reports. ASCI's owner was an EPA employee from 1974 to December 6, 1985. He holds a Ph.D. in chemistry, and was a grade 15 staff scientist when he left EPA. He had worked in a variety of EPA Headquarters offices, including ORD's Office of Environmental Effects Processes and Effects Research - the same Office to which Duluth reports. As part of his duties, he visited Environmental Research Laboratories, including Duluth. He also participated in reviewing research projects, including those of the present Duluth Director.

ASCI's owner is its sole shareholder. The company was incorporated in December 1982, but had minimal assets at that time. ASCI performed only a small amount of non-government business. While still employed by EPA, and with his supervisor's knowledge, the owner applied for certification under SBA's 8(a) Program. On June 27, 1985, ASCI received its SBA certification.

While he was still an EPA employee, ASCI's owner specifically requested that SBA officials contact Duluth. According to the owner, SBA officials asked for suggestions of where to send search letters. One of the suggestions that the owner made was that SBA contact Federal officials at Duluth. He also stated that "all Government officials involved were aware of my prior EPA employment and the date I left EPA."

On December 5, 1985, the day before the former EPA employee resigned from EPA, SBA wrote a senior Duluth official requesting Duluth's assistance in the identification of potential procurement opportunities for ASCI under the 8(a) Program. This solicitation resulted in ASCI receiving a sole-source procurement for just under \$1 million in fiscal 1986 (August 21, 1986) and another sole-source for almost \$6 million effective on the last day of fiscal 1987 (See Exhibit 2).

Under 18 U.S.C. 205, Government employees cannot act as an agent before any department or agency on behalf of another individual or corporation in connection with a contract or claim. The former EPA employee acted improperly and may have violated 18 U.S.C. 205 by representing ASCI in dealings with SBA and EPA.

## Potential Post-Employment Restrictions Not Investigated

Cincinnati contracting officials were aware that ASCI's owner was a former EPA employee, and discussed the potential for conflicts of interest with Duluth officials. The Duluth project officer wrote a memo to Cincinnati stating that:

Although the president of ASI [ASCI] is a former EPA employee his direct dealings are with Small Business Administration and EPA is contracting with them. ERL-Duluth has in its files letters from the EPA General Counsel approving the submittal by ASI [ASCI] from a legal standpoint.

However, according to a subsequent Cincinnati memo, "copies of the [OGC] letters have been requested but have not been submitted." The letters were not in the Cincinnati or Duluth files, and OGC has no record of providing a legal opinion on this matter.

In cases involving the appearance of: (1) potential conflicts of interests, (2) favoritism, or (3) preferential treatment, the Federal Acquisition Regulations place certain responsibilities on the contracting officers. Before awarding the contract, contracting officers are required to either obtain authorization from the Agency Head or Designee, or recommend a course of action to resolve instances involving potential conflicts of interest.<sup>4</sup>

EPA has issued acquisition regulations which place additional restrictions on contracts to former employees. The EPA Acquisition Regulations, Title 48 of the Code of Federal Regulations (CFR) 1503.601, prohibit a contract award without competition to a: (1) former EPA employee, (2) firm owned or controlled by the former employee, or (3) firm employing a former employee within 365 calendar days of an employee's termination. Furthermore, this prohibition applies to firms that employ former Agency employees, if the former employee's employment was terminated within one year before submission of the proposal to EPA and either of the following conditions exists:

- o The former employee was involved in developing or negotiating the proposal for the prospective contractor.
- o The former employee will be involved directly or indirectly in the management, administration, or performance of the contract.

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<sup>4</sup>48 CFR Subparts 3.6 and 9.5 (Revised October 1, 1985).

The OARM Assistant Administrator, after consulting with the DAEO, may authorize an exception to the above in writing, provided that the award would be unlikely to involve a violation of law or EPA Standards of Conduct regulations. The waiver may be granted only if there is no indication of improper influence or favoritism and if the award would be in the best interest of the Government.

As noted above, ASaI's owner, through SBA, solicited Duluth contracts on December 5 and resigned from EPA on December 6, 1985. On February 25, 1985, at Duluth's request, Cincinnati officials asked SBA to approve an 8(a) set-aside for ASaI to provide on-site toxicological support services at Duluth. SBA approved the set-aside on March 4, 1986. Effective August 21, 1986, ASaI was awarded a sole source contract (68-03-3373) valued at just under \$1 million. As ASaI's president and sole shareholder, the former employee negotiated the contract on ASaI's behalf. According to ASaI's proposal, the former employee would serve as project manager (off-site) and would be responsible for the effective coordination, supervision and management of the contract.

Rather than assuring that no conflicts of interest existed, Cincinnati contracting officials relied on the Duluth project officer's statement that OGC approved the contract submittal from a legal standpoint. Moreover, even though Cincinnati officials knew that ASaI's owner had recently been a grade 15 employee at EPA, contracting officials did not request the required waiver from the OARM Assistant Administrator. Finally, Cincinnati contracting officials did not assure that OGC had approved the contract submittal.

#### ASaI OFFERED EMPLOYMENT TO THE ACTING DIRECTOR'S FORMER SPOUSE

ASaI's 1986 Duluth contract proposal, which is in Cincinnati's contract files, showed that ASaI proposed the then Acting Duluth Director's former spouse to work on the proposed contract. Cincinnati files further showed that the Acting Director (who became the Duluth Director) was a member of the two-person panel that reviewed ASaI's proposal. According to Cincinnati contracting officials, they did not realize that the proposed employee was the Director's former spouse. As a result, they did not take appropriate action to resolve this matter for potential conflicts of interest prior to the contract award.

On May 21, 1986, ASaI submitted a contract proposal to Cincinnati for toxicological support services. The proposal included the resume of the Acting Director's former spouse. ASaI proposed the former spouse as a key punch operator.



On June 3, 1986, the Duluth project officer notified Cincinnati that he and the then Acting Director would comprise the technical evaluation panel for the ASCI procurement. This panel evaluates and scores the contractor's technical proposal. As part of the June 3 memo, the Duluth staff member stated that "None of the Technical Evaluation Panel [members] have any known conflicts of interest concerning this procurement."

Thirteen days later, on June 16, 1986, ASCI again mentioned the Director's former spouse in a letter to Cincinnati. On this date ASCI's president submitted a letter to Cincinnati stating that he had made job offers to ten individuals to work on the proposed contract and attached the employment offer letters. One of the ten was the former spouse of the Acting Duluth Director. Another of the prospective employees was the spouse of another Duluth employee. The offers were contingent on ASCI receiving the contract.

The last names of the Acting Director and his former spouse were easily recognizable and should have caused contracting officials to question: (1) whether the parties were related, and (2) if a potential conflict of interest existed. The Cincinnati contracting official stated that the contract in question was the first she was responsible for. At the time, she did not comprehend that the individuals may have been related and, therefore, did not review the procurement for a potential conflict of interest.

On June 30, 1992 the OARM Assistant Administrator stated that:

... There was a certification provided by the technical evaluation panel that it was not aware of any conflict of interest. Since the Acting Lab Director was on the panel, this conflict should have been reported to the contracting officer.

We reviewed lists of ASCI employees since 1986. The former spouse was not shown as having been an ASCI employee. Duluth staffing lists showed that she was employed at the Duluth Laboratory, but by another contractor, the Computer Sciences Corporation. The Duluth Director, at the time, had a financial obligation to his former spouse by court order.

#### AGENCY ACTIONS TAKEN DURING OUR REVIEW

On March 16, 1992, the ORD Assistant Administrator provided us with a listing of corrective actions that ORD and its Office of Environmental Processes and Effects Research (OEPER) had already taken. These included:

1. OEPER issued a policy to all OEPER Laboratory Directors requiring that Laboratory employees, including the Laboratory Director, identify to Headquarters any relationship which may lead to a conflict of interest.
2. ORD issued two memoranda that provide for Headquarters' management oversight of the development of Laboratory contracts.

In November 1991, OGC initiated procedures to chronologically log inquiries and advice. On December 30, 1991, the DAE0 issued EPA Ethics Advisory 91-13, which recommended that DEOs create a written record whenever they give substantive ethics advice to Agency employees. Substantive ethics advice, however, was not defined.

### CONCLUSIONS

Officers and employees of the Federal Government must conform to high standards of ethical conduct. Standards of conduct and conflict of interest laws apply to all Government officers and employees. All employees are responsible for knowing these laws and regulations, as well as the specific policies and procedures of EPA. Moreover, Government contracts must be awarded in an atmosphere free of any appearance of favoritism.

When former EPA employees seek contracts with the Agency, contracting officers must assure strict adherence to conflict of interest laws and the EPA Acquisition Regulations. In this case, contracting officials obligated the Government to a contract, based on assurances that OGC approved the submittal without obtaining the OGC opinion. To assure that the interests of the Government are protected, and that contracts are awarded without favoritism, contracting officers must be more diligent.

### AGENCY COMMENTS AND ACTIONS

The OARM and ORD Assistant Administrators either have already acted, or have agreed to act, to resolve the issues discussed above. Those actions, and the dates by when they are to be taken, are summarized below.

#### Office of Administration and Resources Management

The Assistant Administrator agreed with this finding. He stated that the finding showed serious deficiencies in the conduct of contracting officers and that OARM is taking steps to prevent similar events from occurring in the future.

In June 1992, the OARM-Cincinnati Director:

1. Notified all Cincinnati contracting personnel that SBA recommendations and 8(a) certifications are not sufficient safeguards against conflicts of interest or ethics violations; and,
2. Met with contracting personnel to emphasize, among other things, that all work shall be completely analyzed and determined to be in accordance with all contracting statutes and regulations prior to the contracting officer issuing it.

Also, the Assistant Administrator has instructed the PCMD Director to:

1. Issue a special guidance document by mid-August 1992 developing procedures to ensure that contract awards to former EPA employees comply with Government and EPA ethics requirements.
2. Complete a detailed questionnaire by mid-August 1992 that contracting officers are required to use to inquire into program officials' potential conflicts of interest.
3. Develop a special training course by September 30, 1992 for all contracting officials regarding Agency conflict of interest regulations and standards of conduct.

#### Office of Research and Development

ORD actions taken during our review resolved our ORD related concerns. These actions are discussed in the body of this chapter.

#### Designated Agency Ethics Official

The DAEO intends to implement proposed Office of Government Ethics regulations when they are formalized. He anticipates these regulations to be final by July 31, 1992. The regulations are anticipated to set out issues to be considered in approving an employee's participation in matters which specifically involve persons with whom the employee has a "covered relationship."

#### OIG EVALUATION AND RECOMMENDATIONS

The Office of Administration and Resources Management and the Office of Research and Development's actions and proposed

actions, when implemented, will resolve the issues presented in this chapter. However, the Designated Agency Ethics Official must take additional actions. Deputy Ethics Officials must be required to, rather than be recommended to, document substantive ethics advice given. Also, the proposed Office of Government Ethics regulations are under revision. Therefore, we recommend that the Designated Agency Ethics Official:

1. Define substantive ethics advice, and require that Deputy Ethics Officials maintain written records when they give employees substantive ethics advice.
2. Put in place interim procedures, if the Office of Government Ethics proposed regulations are not finalized by August 15, 1992. The interim procedures should minimally include determinations of the information and/or types of information that ethics officials should obtain in dealing with potential conflict of interest situations and require that such information be obtained.

### CHAPTER 3

#### EXISTING CHEMICAL ANALYSIS CONTRACT ALLOWED TO LAPSE AND \$4.5 MILLION CONTRACT AWARDED TO ASCI IN 1989

In 1989, EPA allowed the remaining two years of an existing three-year contract with UWS to lapse. Concurrently, EPA awarded ASCI a three-year contract worth about \$4.5 million to perform similar work at Duluth. UWS became ASCI's prime subcontractor on this new contract. The contract provided Duluth with essentially the same services that it received under the UWS contract, but at a higher cost to the Government. The condition occurred because the Duluth Director became involved in the bidding process and discouraged UWS from submitting a bid. He also encouraged UWS to become a subcontractor to ASCI. As a result, ASCI gained a competitive advantage over other potential bidders.

At the time of the award, the Duluth Director's spouse served as ASCI's registered agent. Immediately, after EPA awarded ASCI the contract, the Duluth Director's spouse was hired as the firm's only in-house attorney. The Duluth Director's actions resulted in, or created the reasonable appearance of, giving preferential treatment to ASCI. As a result of allowing the UWS contract to lapse, we estimate that the Government paid about an additional \$300,000 for essentially the same services.

#### IN 1989 DULUTH SWITCHED CONTRACTORS

Under a cooperative agreement and several contracts, UWS developed over eight years of experience conducting joint studies and related work involving chemical analysis support at Duluth. UWS' last contract award, if all option years were exercised, would have ended in 1991. However, five months after EPA awarded the 1988 contract, Duluth requested that a new contract be procured. The proposed contract included similar work to the work that UWS was already performing. According to OARM and ORD, the contract was needed for anticipated new work. This work, however, never materialized. The Duluth Director anticipated the need for increased sample analysis for marine mammals at Duluth. However, the number of samples analyzed were substantially fewer than Duluth anticipated.

On September 30, 1989, EPA awarded ASCI a \$4.5 million, three-year contract. As a result, EPA did not exercise the option years on the UWS contract. However, UWS personnel continued providing Duluth with the majority of work hours, as the prime subcontractor on ASCI's new contract.

### With Little Notice, EPA Did Not Renew An Existing UWS Contract

UWS first provided Duluth with chemical analysis support under a 1981 cooperative agreement (CR808892). Under the agreement, UWS provided chemical analysis support and began its participation in the National Dioxin Study. On April 20, 1985, UWS signed a three-year, \$1.4 million contract (68-03-6264) to continue work at Duluth. UWS performed mass spectrometer analysis, initiated the second phase of the National Dioxin Study, and developed analytical procedures for foreign contaminants in fish. On June 7, 1988, EPA again awarded UWS a three-year contract (68-C8-0019) to perform similar work. Under this contract, with a potential value of \$1.9 million, UWS continued providing chemical analysis support and personnel for operation of the mass spectrometer at Duluth. In addition, UWS continued work on the National Dioxin Study.

Figure 1: Duluth Chemical Analysis Support

<u>Period</u>	<u>Contractor</u>	<u>Contracting Instrument</u>	<u>Maximum Value</u>
1981-1985	UWS	Cooperative Agreement	\$ 951,011
1985-1988	UWS	Contract 68-03-6264	\$1,374,188
1988-1991 (a)	UWS	Contract 68-C8-0019	\$1,881,995
1989-1992	ASCI (b)	Contract 68-C9-0050	\$4,569,073

(a) On September 29, 1989, EPA chose not to exercise its option to renew the contract.

(b) UWS became ASCI's subcontractor.

UWS also provided Duluth with work under a subcontract to ASCI. During 1988, EPA initiated the Great Lakes Mass Balance Study--Green Bay, Wisconsin (Green Bay Study). Under contract 68-03-3544, a toxicological support service contract, Duluth issued Work Assignment 9 to perform the study. ASCI subcontracted with UWS to do this work.

Duluth, through Cincinnati, initiated steps to replace the 1988 UWS contract, shortly after its June award. The actions of Duluth and Cincinnati officials throughout fiscal 1989 appear contradictory. While Cincinnati competed the new contract, it continued to indicate to UWS that the existing contract would be extended for two years. In the days before the ASCI contract was signed, EPA changed its position, notifying UWS that EPA

would not exercise its option period. This terminated the UWS contract.

In November 1988, just five months after EPA signed its latest contract with UWS, the Duluth Director initiated a procurement request to compete a new \$4.8 million, three-year contract for chemical analysis support. When awarded, this contract would replace the existing UWS contract, and the Green Bay Study work assignment.

While EPA was evaluating the two proposals that it received for the new contract, the Duluth project officer for the UWS contract informed Cincinnati that he intended to exercise the first option period (fiscal 1990) on the UWS contract. On July 12, 1989, Cincinnati wrote UWS that the Government intended to exercise its first option under the current contract. Two days later, Cincinnati wrote UWS that it also intended to exercise the second option.

Just prior to the UWS contract lapsing, the Duluth project officer continued indicating to Cincinnati that Duluth wanted to exercise the contract option. On September 22, 1989, three days after Cincinnati determined that ASCI would be awarded the new contract with UWS as a subcontractor, the project officer wrote Cincinnati regarding funding the first option period for the 1988 UWS contract. The memorandum stated that:

We [Duluth] intend to fund the option period of the subject contract [68-C8-0019] initially in the amount of \$100,000 with additional funding likely to follow. A statement of work and a PR [procurement request] will be sent to you as soon as possible. The nature of this work will allow it to be performed primarily off-site and at this time we do not anticipate that we will require the contractor to perform any on-site work.

Seven days later, on September 29, Duluth changed its position and informed Cincinnati that it did not wish to exercise the UWS contract option period. On that same day, Cincinnati wrote UWS that EPA was not exercising its option. Also on that date, ASCI signed a three-year cost-plus-fixed-fee contract (68-C9-0050) worth about \$4.5 million for chemical analysis work at Duluth. When EPA signed the contract on September 30, ASCI became the new prime contractor with UWS as its main subcontractor.

#### DULUTH DIRECTOR INTERFERED IN THE BIDDING PROCESS AND HAD A CONFLICT OF INTEREST

Although EPA competed the 1989 contract which it awarded to ASCI, the Duluth Director improperly influenced its outcome. He

encouraged UWS to become a subcontractor to ASaI, rather than submitting its own bid. In addition, his spouse's relationship with ASaI created the reasonable appearance of a conflict of interest. At the time that Duluth initiated the procurement request and throughout the period during which Cincinnati evaluated proposals and awarded the 1989 contract to ASaI, the Director's current spouse was working for ASaI in an unpaid position. The Duluth Director never disclosed this relationship to the DAEO. Two days after the contract was signed, his spouse became a salaried ASaI employee. Finally, during this same period, the Duluth Director served as the chairman of the Performance Evaluation Board (PEB) for a separate, existing ASaI contract. During the period that his spouse held the unpaid position with ASaI, the PEB recommended that ASaI receive \$37,521 in award fees.

#### Duluth Director Interfered In The Contract Bidding Process

In November 1988, the Duluth Director initiated a procurement action, which ultimately led to ASaI receiving a \$4.5 million contract. He helped ASaI become a strong candidate for this contract by encouraging UWS, the incumbent contractor, not to submit a bid. This action favored one potential bidder over another. Government officials must conduct business in a manner above reproach and with complete impartiality and preferential treatment for none.

During April 1989, EPA publicized its intention to solicit proposals for the new chemical analysis support contract. One month later, EPA issued a Request for Proposal for these services. Companies were given until June 1 to submit their proposals. Two potential contractors submitted proposals - ASaI and Aspen Research Corporation (Aspen). ASaI's proposal relied heavily on UWS' work experience at Duluth. ASaI proposed UWS as its prime subcontractor.

UWS intended to, but did not, submit a bid for the 1989 Duluth contract. According to the UWS contract manager, it was his understanding that the Duluth Director wanted ASaI to be awarded the contract. According to his sworn affidavit:

UWS was interested in bidding on the new contract.... While preparing our bid to the [Request for Proposal, the Duluth Director] called me and inquired if I would consider becoming a subcontractor to ASaI in a joint bid on the contract.

...[A UWS employee working on site at Duluth] indicated to me that he perceived that [the Duluth Director] wanted ASaI Inc. to be awarded the new



contract<sup>5</sup> ....[The Duluth Director] had indicated to many people that work being done on-site at the EPA lab should go through the in-house contractor [ASCI]....

ASCI's ability to propose UWS as its main subcontractor greatly strengthened its proposal. UWS had provided similar services as the incumbent contractor for the eight previous years. According to the president of Aspen, the competing bidder, a limited number of companies in the United States possessed the experience to compete on the contract. At the time of ASCI's bid, about 90 percent of the individuals that ASCI proposed worked for UWS. In addition, the solicitation indicated that about 67 percent of the technical evaluation points were based on staff experience which ASCI obtained through UWS personnel.

According to one preparer of Aspen's competing proposal, at the time Aspen prepared its bid, it believed that Duluth wanted ASCI to be awarded the contract because ASCI was already doing other contract work at Duluth.

According to 48 CFR 3.101-1, Improper Business Practices and Personal Conflicts of Interest:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships....

The Duluth Director did not conduct himself in a manner above reproach. He discouraged UWS from submitting its own bid for work at Duluth. He also made it known to the contractor community that he preferred ASCI. As a result, ASCI's competitive position was strengthened.

#### Duluth Director Had A Conflict of Interest

While encouraging UWS to join ASCI in bidding for the 1989 chemical analysis support contract, the Duluth Director had a conflict of interest. At the time that Duluth initiated the procurement request and throughout the period during which Cincinnati evaluated proposals and awarded the 1989 contract to

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<sup>5</sup>The UWS employee referred to became ASCI's on-site project manager.

ASCI, the Director's spouse was working for ASCI in an unpaid position. Two days after EPA signed the contract, ASCI hired the Duluth Director's spouse for a paid position as its only in-house attorney.

According to ASCI's corporate minutes, in May 1988 the Duluth Director's spouse became ASCI's registered agent in Minnesota. The Director's spouse confirmed that she did act as ASCI's registered agent, but she placed her starting date as March 1989. In accepting the position, she assumed some legal liability, but received no monetary compensation. Regardless of which date correctly represents her appointment to this position, it predated the Agency's April 1989 public announcement that Duluth was seeking a contractor to perform chemical analysis support. As a result, at the time of the announcement, the Duluth Director had an undisclosed potential conflict of interest.

On September 25, 1989, four days before ASCI signed the new chemical analysis support contract, the Duluth Director requested that the DAEO approve his spouse's future employment with ASCI. His request did not disclose that his spouse was performing work for ASCI prior to this date. He also did not disclose that he was then the PEB chairman for an existing ASCI toxicological support contract. On September 28, 1989, the DAEO approved the Duluth Director's request. On October 2, 1989, the Duluth Director's spouse accepted ASCI's employment offer, and became ASCI's only in-house attorney.

Federal law bars Government employees from participating in matters which affect their spouse's financial interests. According to 18 U.S.C. 208(a), Federal employees are barred from participating, even by advice or recommendation, in contracts which affect their or their spouse's financial interests. EPA has restrictions [40 CFR 3.103(d)] that prohibit its employees from participating in matters that may result in, or create the reasonable appearance of, a conflict of interest. These regulations further provide that employees may not take any action, whether specifically prohibited or not, which would result in, or create the reasonable appearance of: (1) giving preferential treatment to any organization or person, (2) losing independence or impartiality of action, or (3) adversely affecting the confidence of the general public in the integrity of the Government.

The Duluth Director had great influence over ASCI's revenues. ASCI was almost entirely dependent on EPA for its existence. EPA contracts provided for over 90 percent of ASCI corporate revenues (see Exhibit 3) and since ASCI was also his spouse's employer, the Duluth Director's actions resulted in, or created the reasonable appearance of, giving preferential treatment to

ASCI. In addition, EPA could not be assured that the contracts were awarded in the best interests of the Government.

Agency Ethics Officials Did Not Inquire About  
The Nature Of The Duluth Director's Duties

The DAEO's office is responsible for the overall management of the EPA ethics program. According to the Alternate Agency Ethics Official, the decision to grant the Duluth Director's request for approval of his spouse's employment was based solely on the information the Duluth Director submitted. The DAEO's office was unaware that, since April 1988, the Duluth Director had been chairman of the PEB which recommended award fees for the 1987 Duluth toxicological support contract which ASCI held. The DAEO's office was also unaware that a large percentage of ASCI's revenue came from EPA contracts. Finally, the DAEO's office was unaware that the Director's spouse was already ASCI's registered agent in Minnesota. The DAEO could not provide any supporting evidence of conversations between his office and the Duluth Director. Thus, there was no evidence that, prior to approving the Duluth Director's request, the DAEO's office inquired into the nature of the Duluth Director's duties in relation to ASCI. An effective Agency ethics program needs ethics officials to be vigilant for potential conflicts of interest.

On July 5, 1988, the DAEO issued EPA Ethics Advisory 88-5, "Spousal Employment," emphasizing the restrictions of 40 CFR 3.103 to all DEOs, including the Duluth Director, who is a DEO. This advisory on spousal employment, as well as Agency regulations, prohibit any action which might result in, or create the reasonable appearance of, a conflict of interest. By recommending award fees and involving himself in the contract procurement, the Duluth Director violated EPA's regulations and EPA's policy on spousal employment.

DULUTH'S REASONING FOR THE NEW CONTRACT MAY NOT BE JUSTIFIABLE

Duluth justified the need for a new contract for chemical analysis support to Cincinnati officials. Duluth reasoned that the existing UWS contract did not: (1) have sufficient direct labor hours to meet Duluth's future needs, and (2) provide for all work assignments that Duluth had envisioned. However, our analysis showed that Duluth's reasoning for the contract may not have been justifiable.

Work performed under the ASCI contract was similar to that performed under the prior UWS contract. For example, Work Assignment 4 of the 1988 UWS Dioxin Study directed UWS to conduct marine mammal studies. In addition, during the first two years of the ASCI contract, actual level of effort hours

used were within the capacity available under the lapsed UWS contract. Finally, since AS*CI*'s contract used most of the same personnel employed on the prior UWS contract, the technical skill level did not vary. The purpose of the new contract seemed to be the substitution of AS*CI* for UWS as the prime contractor.

#### New Contract Provides Essentially the Same Services as UWS was Already Providing

The 1989 AS*CI* contract consolidated the work UWS was doing as a prime contractor and as a subcontractor to AS*CI*. According to the UWS contract manager, the request for proposal called for essentially the same work as UWS was already performing under its 1988 contract. Our analysis confirmed this. As a subcontractor to AS*CI*, UWS provided personnel who, under AS*CI*'s supervision, analyzed on-site at Duluth for dioxin compounds, furan compounds, pesticides, and other organic compounds, using previously established protocols. These tasks, plus others that UWS performed as a subcontractor, comprised about the same work that UWS had performed as a prime contractor in 1988.

UWS also worked under one work assignment for the AS*CI* 1987 toxicological support service contract (68-03-3544). Under the work assignment, UWS performed the Green Bay Study. AS*CI*'s work assignment plan provided for UWS to incur 92 percent of the labor hours. AS*CI*'s contribution for this work assignment consisted of a technical project leader and a secretary. Duluth continued the study under the new AS*CI* contract (69-C9-0050), again with UWS as its subcontractor.

#### Increased Capacity Requirements Not Evident

The 1989 AS*CI* contract provided for a greater number of potential direct labor hours than the 1988 UWS contract. However, this increased capacity was not used. The actual hours expended during the first two years of the AS*CI* contract were about the same as those that would have been available under the option years of the UWS contract. The 1988 UWS contract provided a potential for 99,840 direct labor hours over the three-year life of the contract. Duluth's request for increased capacity resulted in the newly awarded AS*CI* contract having a total capacity of 145,166 hours. However, as shown in Figure 2, actual use of the AS*CI* contract could have been accommodated under the previous UWS contract.<sup>6</sup>

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<sup>6</sup>We compared the Base and Option Period 1 of the AS*CI* contract to the UWS contract. Option Period 2 of the AS*CI* contract provided an additional 48,052 hours of direct labor. However, since the UWS contract would not have extended into this time frame, we did not include this year in our analysis.

Figure 2: AScI Contract Hours Utilized  
Compared to Available UWS  
Contract Capacity

	UWS Contract <u>68-C8-0019</u>	AScI Contract 68-C9-0050 <u>Base Year</u>	AScI Contract 68-C9-0050 <u>Option 1</u>
Maximum Hours Authorized in Contract	33,280 *	49,062	48,052
Actual Hours Expended - AScI	N/A	32,102	33,926
Percentage of Contract Hours Used versus Available UWS Capacity		96.5	101.9

\* Maximum hours available under the UWS contract included 33,280 hours in each of three years (1 Base + 2 Option) for a total of 99,840 hours.

Contractor Personnel Remain the Same

Personnel performing work under the AScI contract were essentially the same as those working on the prior UWS contract. Personnel described as employed by UWS, in the AScI May 1989 proposal, account for 87 percent of the direct labor hours on the AScI contract. Our analysis showed that sixteen of the eighteen individuals AScI proposed to work on the contract were UWS employees at the time of the proposal. Subsequent to the AScI award, AScI hired six of these individuals directly to work on-site at Duluth. AScI subcontracted all off-site work under the contract directly to UWS. As a result, the composition of the AScI contract work force did not vary significantly from the work force UWS employed under its 1988 contract.

AScI CONTRACT CONTAINED ADDITIONAL COST ELEMENTS

In total, the first two years of the AScI contract provided 532 fewer hours of effort than would have been available under the UWS contract, while costing an additional \$308,236. The UWS contract was a cost reimbursable agreement and the AScI contract was a cost plus fixed fee arrangement. In addition, each contractor had different overhead rates. As a result, it was not possible to directly compare individual billings. However, as previously indicated, the first two years of the AScI contract expended about the same number of hours as would have been available under the UWS contract. Therefore, as shown in Figure 3, the first year of the AScI contract provided 1,178 fewer hours of effort than were available under the UWS

contract, but cost the Government an additional \$124,476. As shown in Figure 4, the second year of the ASCI contract provided 646 additional hours than were available under the UWS contract, but cost the Government \$183,760 in added cost.

Figure 3: ASCI Costs Versus UWS Costs  
Year 1

	<u>Hours</u>	<u>Dollars</u>
Hours Available under UWS - Option 1	33,280	\$627,200
Hours Expended under ASCI - Base	<u>32,102</u>	<u>\$751,676</u>
Variance	<u>1,178</u>	<u>(\$124,476)</u>

Figure 4: ASCI Costs Versus UWS Costs  
Year 2

	<u>Hours</u>	<u>Dollars</u>
Hours Available under UWS - Option 2	33,280	\$651,940
Hours Expended under ASCI - Option 1	<u>33,926</u>	<u>\$835,700</u>
Variance	<u>(646)</u>	<u>(\$183,760)</u>

#### AGENCY ACTIONS TAKEN DURING OUR REVIEW

On March 16, 1992, the ORD Assistant Administrator provided us with a listing of corrective actions that ORD and OEPR have taken. These included:

1. In March 1992 the Duluth Director was detailed into a senior scientist position at the Laboratory.
2. All laboratory solicitations greater than \$250,000 a year must be approved by the OEPR Director.

On December 30, 1991, the DAEO issued EPA Ethics Advisory 91-13, "Keeping Records of Ethics Advice". The Ethics Advisory recommended that DEOs create a written record whenever they give substantive ethics advice to Agency officials and employees.

## CONCLUSIONS

The public is entitled to have complete confidence that official decisions are free from considerations of self-interest or favoritism. Given the circumstances described in this chapter, the Duluth Director's direct participation, in actions that affected the revenues of his spouse's employer, results in or creates the reasonable appearance of a conflict of interest. By recommending award fees and involving himself in the contract procurement, the Duluth Director violated EPA's regulations and EPA's policy on spousal employment.

Agency ethics officials approved the Duluth Director's spouse's employment with AS&I without inquiring into the nature of the Director's duties in relation to the firm. Agency ethics officials must be more vigilant in assuring that the public trust is protected.

Also, in this case, within months of the contract award to UWS, Duluth requested a new contract for similar work. The purpose seems to be to substitute AS&I for UWS as the contractor. In the future, ORD Headquarters and Cincinnati officials must scrutinize Laboratory requests for new procurements.

## AGENCY COMMENTS AND ACTIONS

The OARM and ORD Assistant Administrators, as well as the DAEO, either have already acted, or have agreed to act, to resolve the issues discussed above. These actions, and the dates they are to be taken by, are summarized below.

### Office of Administration and Resources Management

The Assistant Administrator disagreed that the new AS&I contract was for the same work that had been performed under the existing UWS contract. He stated that:

Cincinnati's involvement in this revolves around its participation in the lapsing of the UWS contract and the procurement of the AS&I contract. The original UWS contract prescribed support limited to the National Dioxin Study. The contract eventually won by AS&I was a much larger one involving marine mammal studies support and requiring both on and off-site work .... Based upon the intended purposes of each contract, it would have been improper for the contracting officer to permit the original contract to continue as a larger, more general marine mammal support effort. Cincinnati contracting officials, unaware of the alleged activities of Duluth personnel,

were not at fault in processing what appeared to be a new procurement.

The Assistant Administrator further stated that Cincinnati contracting officers did lead UWS into believing that two of its contract options would be exercised and then not doing so at the last minute.

Finally, the Assistant Administrator stated that OARM will develop guidance, by the end of July 1992, for contracting officers regarding how to proceed when they note potential procurement or contracting irregularities. The guidance will emphasize the vital importance of their responsibility to review contract packages to assure that Government and Agency regulations are followed.

#### Office of Research and Development

The Assistant Administrator agreed that ASCI's employment of the Laboratory Director's spouse and the Director's chairing the PEB created the appearance of a conflict of interest. He disagreed that work properly done under the ASCI contract could have also been properly done under the UWS contract. He further stated that:

The cost comparisons and other conclusions relative to the two contracts would only be valid if work performed under the ASCI contract could have been performed under the UWS contract.

#### Designated Agency Ethics Official

The DAEO intends to issue an EPA Ethics Advisory covering the issues discussed in this chapter, after the Office of Government Ethics regulations become final. He stated that, in cases where the "agency designee" determines that a Senior Executive Service employee should not participate, the employee's supervisor will receive a copy of the determination.

#### OIG EVALUATION AND RECOMMENDATIONS

The Assistant Administrators for Administration and Resources Management and for Research and Development did not agree that Duluth's reasoning for a new contract was not justified. We agree that there may have been a need for a contract for a marine mammal study. UWS was conducting the marine mammal study under its existing contract. The study may have been outside the contract's scope. However, it represented seven percent of the hours under this contract. The remaining 93 percent of the hours were for UWS to conduct the National Dioxin Study. This study was clearly within the contract's scope. The National



Dioxin Study could have continued under the existing UWS contract which EPA allowed to lapse.

Our main point remains that both before and after the new contract, the same UWS employees continued to perform essentially the same work, but at an increased cost. This higher cost, which we estimate at about \$300,000, went to AScI. This was a firm with which the Duluth Director had a conflict of interest.

The Office of Administration and Resources Management and the Office of Research and Development's actions and proposed actions, when implemented, will resolve the issues presented in this chapter. However, the Designated Agency Ethics Official must take additional actions. The proposed Office of Government Ethics regulations are under revision. Therefore, we recommend that the Designated Agency Ethics Official:

1. Issue an interim Ethics Advisory, if the Office of Government Ethics proposed regulations are not finalized by August 15, 1992. The Ethics Advisory should include a checklist of information to be obtained before an employee may participate in matters where there is any potential for a conflict of interest. The Ethics Advisory should also clearly advise employees of their responsibility to keep Agency ethics officials informed about any changes in facts or circumstances.
2. Upon issuance of the Office of Government Ethics regulations, issue an Ethics Advisory with the previous mentioned (a) checklist and (b) advise.
3. Establish a procedure that requires supervisors of Senior Executive Service employees to be informed, in writing, of any discussions or decisions regarding potential conflicts of interest.

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## CHAPTER 4

### \$9 MILLION IN TOXICOLOGICAL CONTRACT AWARDS TO ASaI IN 1990 WERE NOT COMPETITIVELY BID

In 1990, EPA (through SBA) awarded ASaI, an 8(a) contractor, three sole-source contracts that totalled over \$9 million, deliberately avoiding competition. Duluth officials proposed multiple contracts because the Duluth Director wanted: (1) the incumbent contractor to continue working at Duluth on all three contracts, and (2) to avoid worrying contractor personnel about job security. The Duluth Director's actions result in, or create the reasonable appearance of, giving preferential treatment to ASaI, which employed his current spouse.

Contracting officials approved and processed the three contracts as a group, knowing that Duluth's estimates were just under the competitive threshold. In doing so, the contracting officials did not fulfill their responsibilities to ensure adherence to applicable laws and regulations before entering into contracts. As a result of awarding the contracts sole-source, EPA did not provide other 8(a) firms the opportunity to bid, and cannot be assured that the contracts were awarded in the best interest of the Government. The Business Opportunity Development Reform Act of 1988<sup>7</sup> requires that the Government competitively bid all 8(a) service contracts that have an estimated value over \$3 million.

EPA's actions in awarding the contract are particularly questionable in light of personal conflicts of interest created by the Duluth Director in procuring and managing the ASaI contracts. Even though his spouse has served as ASaI's only in-house attorney since October 1989, the Duluth Director did not distance himself from issues which might create a conflict of interest. Instead he specifically involved himself in the procurement and management decisions which led to ASaI's being given more than \$142,000 of award fees.

### DULUTH OFFICIALS SPLIT ONE CONTRACT INTO THREE TO AVOID COMPETITION

Since 1986, EPA has contracted with ASaI, an 8(a) firm headquartered in Virginia, to provide toxicological support services for Duluth. ASaI's toxicological support contracts at Duluth have tripled from slightly under \$1 million annually in fiscal 1987 to about \$3 million in fiscal 1991 (see Exhibit 1). In September 1990, ASaI was awarded three separate sole-source

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<sup>7</sup>P.L. 100-656, Sec. 303(b), codified at 15 U.S.C. 637(a) (1) (D)

contracts to provide toxicological support services to Duluth (see Exhibit 2). The maximum potential value of these contracts is just over \$9 million.

EPA's Estimated Procurement Value For Each Of The Three Contracts Was Just Under The Level For Competition

Instead of grouping all work assignments under one contract, Duluth officials grouped the on-going work assignments into three contracts, each estimated to have a value of just under \$3 million (see Figure 5). This eliminated the need to compete \$9 million worth of contracts. If the estimated procurement value of an 8(a) service contract is under \$3 million, the Government does not have to compete the contract. Cincinnati approved these estimates. As a result, AScI was awarded all three contracts without competition.

Figure 5: Fiscal Year 1990 AScI Contracts for the Duluth Laboratory (In Millions)

<u>Number &amp; Effective Date</u>	<u>Service</u>	<u>Estimated Procurement Value</u>	<u>Contractor's Proposed Value</u>	<u>Contract Value</u>
68-CO-0056 9/20/90	Toxicological Support Services	\$2.81	\$3.16	\$3.13
68-CO-0057 9/20/90	Aquatic Toxicology Testing	\$2.90	\$3.08	\$3.08
68-CO-0058 9/20/90	Toxicity Identification Evaluations	\$2.89	\$3.06	\$3.07
Total		\$8.60 =====	\$9.30 =====	\$9.28 =====

AScI's Work Is the Same, But Under Three Contracts

The three new toxicological contracts require virtually the same work from AScI as the prior single contract. In order for Duluth to continue having AScI as its contractor, Duluth officials reconfigured the work assignments into three new contracts, each just under the \$3 million competitive threshold.

In dividing the work assignments into three contracts, Duluth's choice of which work assignments to place under each contract

was sometimes not logical, other than to assure that the estimate for each contract was under \$3 million. For example, in fiscal 1991, support tasks such as graphics estimated at \$54,000 were included under the Aquatic Toxicology Testing contract, not the Toxicological Support Services contract. On the other hand, more scientific tasks, such as: (1) experimenting with fish in respirometer-metabolism chambers, (2) conducting aquatic toxicity tests with floranthene, and (3) developing a methodology for estimating the effects of global climate change on U.S. fisheries, were included under the Toxicological Support Services contract. These work assignments are estimated at \$361,000.

#### The Duluth Director Wanted To Avoid Competition That Would Be "Unsettling" To The ASCI Staff

The Duluth project officer stated that the Duluth Director decided to split the contracts, keeping each under the competitive bidding limit because, among other things, awarding the contracts sole-source would avoid upsetting current contract personnel about their future job security. The Duluth Director outlined this reasoning in a May 7, 1990 memorandum directing the project officer and the Associate Duluth Director to work with the contracting officer on awarding three contracts rather than one. He stated that:

I am afraid to have our entire lab on one contract which may be driven by only one of two study areas. We would be in boom-or-bust during the competition - and the competition is unsettling to the staff.

The Duluth Director's rationale is not consistent with the intended purpose of the Business Opportunity Development Reform Act of 1988. The Act clearly calls for service contracts over \$3 million to be competitive. In a report accompanying the Act, the Congress endorsed competition among 8(a) participants as beneficial to the Government, stating that competition serves as an effective safeguard against abuses that can flourish in a sole-source contract award environment.

#### Duluth Director's Actions Continued to Create A Personal Conflict Of Interest

As discussed in Chapter 3, on October 2, 1989, ASCI hired the Duluth Director's current spouse as its only in-house attorney. According to ASCI's president, she provides the company with legal services on a variety of matters from personnel to general EPA issues. The spouse was originally hired at \$26.00 per hour and was subsequently raised to \$27.95 per hour. The spouse was hired specifically to work on an Air Force contract. ASCI, based in Virginia, opened an office in Duluth for this contract. In January 1991 the Air Force terminated this contract.

According to ASaI's owner, the company still performs similar work for the Air Force and others. Throughout this time period over 90 percent of ASaI's revenues were from EPA-related work.

The Duluth Director listed four conditions in his September 25, 1989 request that he would abide by in order for his spouse to work for ASaI. One of these conditions was that he immediately notify the DAEO if an issue arose regarding the ASaI contract which might create a conflict of interest. Since that request, the Duluth Director, because of his position, has participated in several procurement actions that influenced the contracts and award fees ASaI received. For example:

- o Since his spouse began working for ASaI in a paid position, the Duluth Director has chaired three PEBs that awarded ASaI a total of about \$142,000 in award fees for the prior cost-plus-award-fee contract. The other members of the PEB report to the Duluth Director. In each case, the PEB evaluated ASaI's performance as "exceeds expectations" for the preceding six months and recommended an award fee payable to ASaI. Based on the PEB decision, the contracting officer accepted the recommendation and authorized the award fee payment to ASaI.
- o In May 1990, the Duluth Director instructed his Associate Duluth Director and the project officer to make renewing the ASaI Duluth contracts their top priority, and to brief him every week. Based on recommendations from the Duluth Director's staff, the contracting officer awarded three \$3 million contracts sole-source.

In May 1991 the Duluth Director's spouse stated that she and her husband have abided by the conditions of EPA's approval of her employment with ASaI. However, according to the DAEO's alternate, the Duluth Director did not inform the DAEO's office of the above actions. The Duluth Director did not abide by his own statement to immediately inform the Agency of issues which may create a conflict of interest involving his spouse's employment.

As discussed in Chapter 3, 18 U.S.C. 208(a) bars Government employees from participating in matters which affect their spouse's financial interests. EPA has additional restrictions in 40 CFR 3.103(d) that prohibit its employees from participating in matters that result in, or create the reasonable appearance of, a conflict of interest. The Duluth Director has great influence over ASaI's revenues. The Duluth Director's actions result in, or create the reasonable appearance of, giving preferential treatment to ASaI. In addition, EPA cannot be assured that the contracts were awarded

in the best interests of the Government. Finally, EPA's credibility with the general public and the credibility of its 8(a) Program have been tarnished.

CINCINNATI CONTRACTING OFFICIALS APPROVED  
DULUTH'S ACTIONS WITHOUT QUESTION

EPA requires contracting officers to ensure that all requirements of laws and regulations have been met prior to entering into a contract. Contracting officers have the sole authority to sign contracts and obligate funds. Cincinnati contracting officials stated that, due to workload pressures, they neither analyzed the Duluth estimates in detail nor questioned the validity of splitting the former contract into three new contracts. They approved these estimates and sent the proposed contracts to SBA. SBA then approved the proposed contracts. As a result, AScI was awarded \$9 million in Government contracts without competition.

Memoranda in files in Cincinnati clearly show that the contracting officials were aware that all three contracts were going to the same contractor. In spite of this, Cincinnati contracting officials accepted Duluth's estimates. The Cincinnati contracting officials were also fully aware that each contract was estimated at just under the competitive threshold for an 8(a) contract. Finally, Cincinnati contracting officials processed all three contracts as a group. The three contracts are numbered consecutively and the same officials signed all three approvals on the same day.

One purpose of the 8(a) Program is to increase the number of minority-owned and small businesses receiving Government business. Since at least 1987, EPA officials have been directed to maximize the number of 8(a) firms receiving contracts. In April 1990, the Administrator encouraged breaking up contracts to "reduce the conflict of interest potential and provide for more involvement of small and minority-owned businesses." However, breaking up the contract, only to award it sole-source to a single firm, conflicts with EPA and the 8(a) Program's policy of increasing the number of minority-owned and small businesses.

AGENCY ACTIONS TAKEN DURING OUR REVIEW

On July 23, 1991, the Assistant Inspector General for Audit wrote the PCMD Director outlining concerns relating to contract splitting. On August 9, 1991, the Director replied that:

The Contracts Management Division at Cincinnati has made a determination not to exercise the renewal

options on these three contracts. Instead, three month extensions will be negotiated for each. During the period of the extensions, [Cincinnati] will conduct a new procurement combining the effort into a single contract. This action will be conducted as a competitive 8(a) procurement. Negotiations for the extensions and processing of the new contract will begin the week of August 12, 1991.

On October 3, 1991, EPA advertised in the Commerce Business Daily that EPA was seeking a qualified contractor to provide technical support services on-site at Duluth. The announcement also stated that the Agency anticipates awarding a cost-plus-award-fee, level of effort, term contract with a base year and four option years. Furthermore, the Agency stated that it is considering setting the procurement aside for qualified 8(a) firms, but reserves the right to make that determination at a later date.

On March 16, 1992, the ORD Assistant Administrator provided us with a listing of corrective actions that ORD and OEPR have taken. These include:

1. ORD Headquarters must approve all on-site support contracts over \$500,000 before the procurement packages are sent to Cincinnati.
2. PEB members must certify that they have no conflicts of interest.

### CONCLUSIONS

Project and contracting officials must conduct Government business in a manner above reproach and with complete impartiality. Government employees must be particularly diligent in assuring that they exercise due care when negotiating and awarding Government contracts. For the three current Duluth toxicological support service contracts, project and contracting officials did not exercise due care in ensuring that contracts were awarded in the best interests of the Government. Instead, the contracts appear to have been split to avoid the competition the Business Opportunity Development Reform Act of 1988 requires.

The Duluth Director's involvement in recommending ASCI for contracts and award fees, without notifying the DAEO, was not in accordance with the agreement approving his spouse's employment with ASCI. The Director's actions resulted in, or created the reasonable appearance of, a personal conflict of interest. Thus, the integrity of the acquisition process has been compromised. In addition, EPA's credibility with the general



public and the credibility of its 8(a) Program have been tarnished.

#### AGENCY COMMENTS AND ACTIONS

The OARM and ORD Assistant Administrators, as well as the DAEO, either have already acted, or have agreed to take actions, to resolve the issues discussed above. Those actions, and the dates they are to be taken by, are summarized below.

##### Office of Administration and Resources Management

The Assistant Administrator agreed with this finding. He also stated that Cincinnati contract officials improperly split Duluth's procurement needs into three separate contracts to avoid competition. He added that Cincinnati contracting officials initially forwarded the three contract actions to SBA to be processed under competitive 8(a) procedures. Nevertheless, he agreed that contracting officials were not aggressive in resolving differences with Duluth and SBA.

The Assistant Administrator stated that:

1. The new Duluth contract will be competitively bid. That contract will be placed from PCMD Headquarters to avoid any appearance of bias.
2. PCMD will complete a revision of its Contracts Management Manual, by December 31, 1992, to require all PEB members to certify that they have no conflicts of interest.
3. PCMD will issue a policy statement to contracting officers, by July 31, 1992, stating that 8(a) procurement estimates should be scrutinized for compliance with the Business Opportunity Development Reform Act of 1988.
4. PCMD plans to issue guidance on the proper use of the 8(a) Program and the need for controls by July 31, 1992.
5. OARM wrote all Cincinnati contracting officers in June 1992 that they cannot rely on SBA alone for resolution of potential conflict of interest or ethics issues concerning 8(a) firms. Also, they should report any attempt to split up 8(a)

requirements to avoid competitive thresholds to a Senior Procurement Manager.

#### Office of Research and Development

The Assistant Administrator stated that he had no information to dispute the findings in this chapter. He acknowledged that breaking up a contract and non-competitively awarding the resulting smaller contracts to the same contractor, in this case ASOI, creates the appearance of favoritism. Finally, he stated that SBA's role in this affair should be submitted to an appropriate entity for investigation.

The Assistant Administrator stated that in addition to ORD'S already taken, he has directed that:

1. No extensions be granted to continue EPA work under Duluth's three non-competitively awarded 8(a) contracts that are scheduled to end June 30, 1992.
2. Competitive solicitations be initiated by September 30, 1992, to replace non-competitively awarded contracts in ORD offices and laboratories, to the extent possible and appropriate.

#### Designated Agency Ethics Official

The DAEO stated that, based on the information in our report, (1) the employment of the Duluth Director spouse's employment created a conflict, (2) the Director should have recused himself regarding ASOI, and (3) concurrence in the spouse's employment should not have been granted.

He stated that his Office will provide detailed information regarding spousal employment questions in an Ethics Advisory addressed to all DEOs.

#### OIG EVALUATION AND RECOMMENDATIONS

The Office of Administration and Resources Management and the Office of Research and Development's, as well as the Designated Agency Ethics Officials's, actions and proposed actions, when implemented, will resolve the issues presented in this chapter. The Designated Agency Ethics Official needs to provide us with a milestone date for his planned Ethics Advisory.

## CHAPTER 5

### WORK ASSIGNED TO ASCI WAS NOT INCLUDED IN WORK ASSIGNMENTS OR THE SCOPE OF THE CONTRACTS

For several years, Duluth and Cincinnati officials allowed ASCI to conduct work at Duluth that was either not included in the contracts' scope of work or in work assignments. This work included remodeling and maintenance tasks for ASCI, the toxicological support services contractor. Duluth officials believed that their actions were justified as long as Duluth benefitted. Cincinnati contracting officers: (1) did not enforce Agency regulations prohibiting work to start prior to their written approval; and (2) approved the work assignments without reading them, even though the work was not allowable under the contracts' terms. As a result, contracting officers committed the Government to expend funds for unauthorized services. The Duluth contracts clearly forbid ASCI from performing: (1) work until the contracting officer gives written authorization, and (2) additional duties not within the scope of the contract.

### WORK CONDUCTED WITHOUT CINCINNATI'S APPROVAL

In 1987 Cincinnati contracting officials had indications that Duluth officials were allowing ASCI to begin work without approved work assignments. Although Cincinnati officials knew of this problem, they did not take explicit actions to correct it. At the end of fiscal 1988, an ASCI report to Cincinnati indicated that ASCI's employees were performing remodeling and maintenance at Duluth. Duluth did not submit a work assignment for the remodeling until the following year. Work assignments that Duluth did submit were outside the scope of ASCI's contracts.

According to the EPA Acquisition Regulation, 48 CFR 1552.212-71, and the contracts between EPA and ASCI, ASCI can not perform work until the contracting officer authorizes it in writing. This work must be defined in work assignments the contracting officer issues. A July 1987 internal memorandum between Cincinnati contracting officials indicted that ASCI was performing work at Duluth prior to the work being authorized in work assignments. According to the memorandum:

The contract [68-03-3373] has been difficult to administer....The process of issuing any work assignments is lengthy; usually, the work begins prior to the approval... Initially, verbal approvals were given because of the urgency on the part of the Program to begin work. However, as problems

multiplied, the Contractor and the Program were told that no verbal approvals would be given and that all documentation would be required in the Contracts office prior to issuance of written approval for WA's [work assignments]. Indications are that work still begins prior to the approval of the WA's.

Under AS*CI*'s next contract (68-03-3544), AS*CI* continued to perform tasks not included in work assignments. At the end of fiscal 1988, AS*CI*'s Technical and Financial Progress Report showed that AS*CI* employees were painting, laying tile, framing and hanging pictures of past and present directors, and constructing rooms. Also, the report stated that:

The small conference room and council meeting room were constructed on the first floor of the annex. The annex was remodeled into a men's locker room. All new construction involved materials planning and picking up supplies.

At the time of AS*CI*'s report, Duluth still had not included the above listed tasks in the work assignments it submitted to Cincinnati. Although AS*CI* reported the work, Cincinnati did not compare AS*CI*'s report to the work assignments under the contract. Even if Duluth had submitted the tasks for approval, the tasks would still have been outside the contract's scope.

#### BEGINNING IN FISCAL 1989 DULUTH INITIATED WORK ASSIGNMENT TASKS OUTSIDE THE CONTRACTS' STATEMENTS OF WORK

In fiscal 1989 Duluth project officers began including remodeling and maintenance tasks in work assignments. Additionally, Duluth proposed several work assignments for tasks, such as providing a receptionist and library services, which were not included in the AS*CI* contracts' statements of work.

The AS*CI* contracts at Duluth clearly forbid AS*CI* from performing duties not within the scope of the contracts. EPA's Contract Administration manual cautions project officers, when preparing work assignments, not to include any tasks outside the scope of the basic contract. Duluth project officers have not followed the terms and conditions of the contracts or the manual's precautionary advice. Instead, they proposed work assignments to the contracting officer that disregarded the contracts' statements of work.

Duluth project officers knowingly initiated at least six work assignments under the prior contract and two under the current contracts that directed AS*CI* to perform tasks which were outside the scope of the contracts' statements of work. The tasks

directed AS*ci*, the toxicological support services contractor, to: (1) remodel and rebuild laboratories and offices, (2) provide a receptionist and assist staff with travel documents, and (3) perform library services (See details of the contracts involved and the specific work assignment numbers in Exhibit 4).

#### AS*ci* "Physical Scientists" Remodeled Offices And Repaired Lawn Equipment

Since fiscal 1989, the statements of work in each AS*ci* contract directed AS*ci* to provide laboratory helpers and instrument technicians. These individuals were to: (1) maintain aquatic organism culturing support systems; and (2) assist contractor technical personnel in simple tasks such as obtaining supplies, receiving samples and cleaning glassware. However, work assignments not only included the above tasks, but also directed AS*ci* to:

1. Assist with the remodeling/rebuilding of existing laboratories, offices, and outbuildings.
2. Assist the carpenters with the construction of the new office complex in the annex.
3. Perform repairs on lawn equipment and other small engines.

The annex was an existing Government structure which EPA had AS*ci* remodel into laboratory office space. The annex currently provides work space for AS*ci*'s employees. AS*ci* assigned three of its employees to remodel the annex.

The work performed under EPA's work assignments clearly did not match the job description of laboratory helpers/instrument technicians in the contract. In fiscal 1989 and 1990, AS*ci* employees with the job title "physical scientist/technician" remodeled the annex. This work was performed under 68-03-3544, which did not include such a job title. Under the current contract (68-C0-0056), these employees are called "laboratory helpers/instrument technicians." In either case, the work performed by these "physical scientists" was not within the terms of the contract.

AS*ci* monthly reports to the Duluth project officers and Cincinnati contracting officials leave no question that AS*ci*'s activities were outside the terms of the contract. These reports showed that the "physical scientists" performed such tasks as carpentry work, maintenance, and furniture moving. In the winter, physical scientists removed snow, and salted and sanded the Laboratory's driveway and walkways. In the spring, they removed debris from the grounds and serviced lawn equipment.

In addition, AS*CI*'s monthly reports show that "physical scientists" performed such duties as the following:

- o "The majority of the month was spent continuing work on the annex building." (January 1990)
- o "Repairs were made to toilets, window blinds, sewer lift pump and exhaust and fresh air fans." (April 1990)
- o "Three more offices in the annex building were sheetrocked-taped-painted and are near completion." (July 1990)
- o "Installed a repaired front driveshaft on the Facility's pick-up." (August 1990)
- o "Created a new office from the end of the library by installing, sheetrocking and painting a wall." (February 1991)

The above tasks do not bear any relationship to the contracts' requirements for maintaining aquatic support systems and assisting contractor technical personnel in simple laboratory tasks.

The EPA Work Assignment Manager Was The Father Of One Of The AS*CI* "Physical Scientists"

The grade 11 Duluth facilities manager oversaw the remodeling of the Duluth offices and its adjacent annex.<sup>8</sup> His son was one of the three AS*CI* "physical science technicians" that remodeled the annex. The father signed the work assignment as the EPA technical project manager, and AS*CI* named the son in its technical proposal as one of the employees to perform the work.

During fiscal 1989 and 1990, Duluth officials modified work assignments to keep AS*CI* employees, including the facilities manager's son, busy during slow periods. They did this even though EPA is not obligated under the contract to provide AS*CI* with any minimum number of work hours. According to the Duluth Associate Director for Program Operations, she and the facilities manager recognized that they did not have enough tasks to cover all the current AS*CI* employees working at Duluth.

One AS*CI* employee affected by this shortage of work was the facilities manager's son. The father initiated an addendum to

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<sup>8</sup>This situation no longer exists. In 1990, the facilities manager retired from EPA, and is deceased.

the work assignment with the concurrence of the Duluth Director and the project officer. The addendum initiated AS*CI*'s remodeling of the Duluth annex. This work was clearly outside the scope of the contract and provided AS*CI* with 5,129 additional work hours.

#### AS*CI*'s "Scientific Outreach" Included A Receptionist

The statements of work in AS*CI*'s prior and current Duluth contracts (68-03-3544 and 68-C0-0058) call for AS*CI* to assist with workshop arrangements. However, the work assignments, entitled "scientific outreach," direct AS*CI* to provide staff to "serve as a laboratory receptionist" and "provide travel services" including preparing travel documents. These duties are not included in the contracts' terms. Therefore, EPA should not have directed AS*CI* to provide these services.

#### AS*CI* Provided Duluth With Library Services

The statement of work in AS*CI*'s prior contract (68-03-3544) did not include any library duties. Yet, Work Assignments 5 in fiscal 1989 and 7 in fiscal 1990, entitled "Technical Information Support," directed AS*CI* to assist with library services, including reprinting requests, filing, typing and answering the phone. In fiscal 1990 this work assignment was closed and the duties were shifted to another contractor.

#### PROJECT OFFICERS KNEW WORK ASSIGNMENTS WERE OUTSIDE THE CONTRACTS' SCOPES

Duluth officials justified work assignments outside the contracts' scopes by stating that Duluth benefitted and AS*CI* employees were kept working during slow periods. For example:

- o The Duluth project officer for the prior contract believed that allowing AS*CI* to perform services outside the contract's scope was proper, as long as Duluth benefitted. He stated that AS*CI* was hired to provide Duluth with "physical science support." As long as the "science part" of Duluth benefitted, he believed this practice was acceptable.
- o Another Duluth project officer, for the current AS*CI* contracts, advised us that he had questioned the work assignments, but still recommended them for approval. He explained that, even though he believed that the work assignments were outside the statement of work, he submitted them to Cincinnati for acceptance based on the guidance of the Duluth Director.

- o The Duluth Associate Director for Program Operations explained that the remodeling of the annex was done because ASCI personnel ran out of things to do, and rather than not expending the funds, the Duluth Director approved the change.

The Duluth officials' reasoning cannot be justified. The statement of work is an integral part of the contract between ASCI and the Government. The statement of work explains the work the Agency envisioned under the contract. EPA project officers cannot direct the contractor to exceed these terms.

Project officers, as representatives of the contracting officer, perform a vital role in assuring proper contract management. Yet, Duluth project officers signed work assignments that they knew were outside the contracts' terms. As a result, the Government expended funds in exchange for services that ASCI was not entitled to perform under its contracts.

#### CONTRACTING OFFICERS SIGNED WORK ASSIGNMENTS WITHOUT REVIEW

Contracting officers approved work assignments without first determining if they were allowable under contract terms. This occurred because contracting officers inappropriately signed work assignments without reading them. Contracting officers have the sole authority to issue work assignments. In approving the work, the contracting officers did not enforce the contract terms and did not fulfill their responsibilities to safeguard the interests of the Government. As a result, the contracting officers committed the Government to expend funds for unauthorized services, and ASCI was directed to perform tasks that were outside the terms and conditions of the contracts.

We discussed work assignments with the contracting officers for the prior and current ASCI Duluth contracts. The contracting officers confirmed that, since fiscal 1989, they issued some work assignments which were outside the contracts' scopes. The contracting officer for the prior contract explained that:

I did not carefully review the contents [of work assignments]. . . . Had I been more diligent I would have rejected them or at a minimum, expressed to the project officer that they were outside the scope of the contract and requested that he clarify their issuance.

Similarly, the current contracting officer stated that as a "normal course of business" he either signed work assignments without reading them, or, at best, "glanced" at them.



Compliance with the terms and conditions of the contract is critical to contract administration. Contracting officials acted inappropriately in obligating Government monies without first determining whether work assignments complied with the statements of work. Cincinnati contracting officials did not protect the Government against potential misuse of the ASCI contracts. Unless contracting officials exercise due care in reviewing work assignments, EPA has very little assurance that work is performed in the most economical and efficient manner.

#### AGENCY ACTIONS TAKEN DURING OUR REVIEW

On July 8, 1991, the Cincinnati contracting officer for the three present contracts wrote the Duluth project officers that the work assignments for "carpentry work" and "lab receptionist work" were outside the scope of their respective contracts. The contracting officer instructed the project officers to immediately implement the following procedures on each future work assignment:

1. Specify the specific part of the contract scope of work that the work falls under; and,
2. Include a written certification that the work to be performed does indeed fall within the contract scope of work. The Duluth Director and Project Officer are the certifying officials on each work assignment.

#### CONCLUSIONS

The Cincinnati contracting officer's instructions to Duluth will help assure that future Duluth work assignments are within the contracts' statements of work. However, this does not relieve contracting officers of their responsibilities to independently assess whether Duluth's actions are within the contracts' terms.

Duluth and Cincinnati officials allowed ASCI to conduct work at Duluth that was neither included in the contracts' scope of work nor in the work assignments. Duluth officials verbally approved tasks that were not submitted in work assignments to Cincinnati. After Cincinnati indicated that no verbal approvals would be allowed, Duluth project officers knowingly proposed work assignments that directed Duluth's toxicological support services contractor to perform such work as carpentry and travel services that was outside the contracts' statements of work. Cincinnati contracting officers approved this work without reading the work assignments. As a result, Duluth and Cincinnati officials did not appropriately safeguard Government funds.

## AGENCY COMMENTS AND ACTIONS

The OARM and ORD Assistant Administrators either have already acted, or have agreed to act, to resolve the issues discussed above. Those actions, and the dates they are to be taken by, are summarized below.

### Office of Administration and Resources Management

The Assistant Administrator stated that he agreed with this finding. He was particularly dismayed that work assignments were issued by contracting officers without being read. Furthermore, he stated that he could not excuse any instance of a contracting officer issuing a work assignment without reading it. This violates a most fundamental responsibility of a contracting officer and cannot in any way be dismissed. His office will address this matter further in its response to the Office of Inspector General's report of investigation.

The Assistant Administrator stated that:

1. PCMD will emphasize to all contracting officers the importance of reviewing work assignments to ensure that work to be performed complies with the contract's statements of work. They will issue the guidance by the end of July 1992.
2. On June 8, 1992, the OARM-Cincinnati Director issued a memorandum to all Cincinnati contracting officers and contracting specialists. He stated that they are responsible for reading and reviewing work assignments before signing to insure that the terms of the basic contract are not being violated.
3. OARM-Cincinnati is now requiring that project officers prepare a work assignment checklist which indicates the exact section of the statement of work which authorized the work assignment being processed. Project officers are to certify that the work is within the scope of the contract. Contracting officials are also required to sign the check list.
4. OARM plans to competitively award two separate contracts--one for maintenance and operations and one for toxicological support services for Duluth.

5. PCMD's Quality Assurance staff will increase its focus on whether work assignments are within a contract's statement of work in its next annual review of Cincinnati contracts.

#### Office of Research and Development

The Assistant Administrator agreed that work at Duluth was permitted outside the scope of the contracts and without having approved work assignments, and that these practices were wrong. He further stated that he:

1. Has reviewed Duluth's procedures for initiating work assignments and found them inadequate, and has issued a new policy which requires the Duluth Laboratory Director to approve all work assignments and technical directives.
2. Will direct that an Alternative Internal Control Review be conducted by December 31, 1992, that addresses accountability and control over Duluth work assignments.
3. Will make the requirement, that all project officers and work assignment managers receive training in contract administration, a performance standard for all laboratory directors beginning next fiscal year. ORD is working with PCMD to develop a training course for ORD project managers.

#### OIG EVALUATION AND RECOMMENDATIONS

The Office of Administration and Resources Management and the Office of Research and Development's actions and proposed actions, when implemented, will resolve the issues presented in this chapter.

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## CHAPTER 6

### DULUTH EMPLOYEES' CONFIDENTIAL STATEMENTS WERE INCOMPLETE

The DEO, who is the Duluth Director, did not direct project officers at or below the grade 12 level to file Confidential Statements. Additionally, the DEO did not ensure that Duluth employees disclosed their spouses' employment with organizations doing business with Duluth. Because statements were (1) not filed, or (2) incomplete as to spousal employment, the DEO could not determine whether actual or apparent conflicts of interest existed. Therefore, Duluth's 1990 annual certification was inaccurate and incomplete. EPA regulations and an Agency Ethics Advisory both emphasize to DEOs that employees, such as project officers, whose duties directly affect the financial interests of specific parties, should be required to file Confidential Statements.

In addition, the Agency did not require WAMs to file Confidential Statements. WAMs prepare work assignments for contractors, and monitor the contractors' performance. Therefore, WAMs can influence a contractors' work and award fees.

### DULUTH DEO DID NOT REQUIRE PROJECT OFFICERS TO FILE

The DEO did not direct project officers at or below grade 12 to file Confidential Statements. Consequently, these project officers did not file. Because the statements were not filed, the DEO could not evaluate employees' holdings and determine whether recusal statements or other actions were needed.

EPA's regulations and Agency policy state that project officers should be required to file Confidential Statements. Title 40 CFR Part 3 details the ethical standards for all EPA employees. Title 40 CFR 3.302(c)(1) states those employees classified at grade 13 and above who perform certain specific duties should be required to file. In addition, 40 CFR 3.302(c)(2) states that employees classified at grade 12 or below whose duties directly affect the financial interests of specific parties should be required to file. Title 40 CFR 3.302(c)(2) is limited to grade 12 or below employees who are contracting officers, project officers, inspectors, auditors, and On-Scene Coordinator representatives.

EPA's DAEO has instructed all DEOs that they should direct project officers at grade 12 or below to file. This instruction was emphasized to DEOs in two Agency Ethics Advisory memoranda dated November 15, 1985, and June 6, 1988.

To evaluate whether the Duluth employees complied with the regulation, we reviewed the Confidential Statements for all employees who filed. Our review showed that the DEO should have required 36 employees to file a Confidential Statement during 1990. However, the DEO reported only 28 employee filings. A 29th filing, for a grade 13, was not found during our audit.<sup>9</sup> Seven of the 8 employees whom the DEO should have reported on were project officers at grade 12 or below.

The staff member who monitors the Confidential Statement reporting requirement for the Duluth DEO stated that she was unaware that project officers at grade 12 or below should have been required to submit a Confidential Statement. She also explained that the DEO instructed her to require only employees at grade 13 or above to file. Finally, she advised us that she had very little training in reviewing Confidential Statements for potential conflicts of interest.

The Duluth DEO stated that he was aware that all project officers should have been required to file Confidential Statements. However, in providing instructions to his staff member, he overlooked the specific instructions that all project officers should be required to file Confidential Statements.

Government employees need to maintain high standards of honesty, integrity, impartiality, and conduct. Without obtaining Confidential Statements from project officers at grade 12 or below, the DEO cannot make an effective evaluation of an employee's holdings and determine whether a recusal statement or other action may be warranted. Removing project officers from the reporting requirements allows actual or apparent conflicts of interest to remain undetected and unresolved.

#### DULUTH DEO FILED AN INACCURATE ANNUAL CERTIFICATION

The Duluth annual certification letter regarding compliance with the Agency's ethics program contained inaccurate representations. The DAEO in the OGC consolidates these annual letters into EPA's annual ethics report to the Office of Government Ethics, another Federal agency. That Office includes EPA's information in its report to Congress. The information the Duluth DEO provided was inaccurate. As indicated above, the DEO did not ensure that all project officers submitted Confidential Statements. Consequently, the Office of Government Ethics will rely on erroneous information provided by the Duluth DEO, through OGC, and report erroneous information to Congress.

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<sup>9</sup>In his reply to our draft report, the ORD Assistant Administrator stated that Duluth has located the misfiled Confidential Statement.

Appendix A to Subpart C, 40 CFR Part 3, requires the DEO to submit an annual certification letter. The letter certifies to the DAEO that each employee who is required to submit a Confidential Statement has done so and that the DEO has reviewed and signed each statement. The DEO also certifies that any necessary remedial actions have been taken.

On July 17, 1990, the Duluth DEO certified to EPA's DAEO that Confidential Statements were required from 28 employees at grade 13 or above. The DEO's certification letter stated that no Duluth employees below grade 13 were required to file. However, the DEO's certification was inaccurate. As we previously stated, eight additional Duluth employees should have been reported on. Seven of those employees were at grade 12 or below and the other employee was at grade 13 or above.

The DEO also certified that all Confidential Statements were reviewed prior to submitting the annual certification letter. We found that 5 of the 28 Confidential Statements (18 percent) were reviewed after the DEO submitted the annual certification letter. Therefore, the annual certification letter also inaccurately represented that all Confidential Statements were submitted timely and analyzed for actual or apparent conflicts of interest.

#### DULUTH EMPLOYEES DID NOT DISCLOSE THEIR SPOUSES' EMPLOYMENT WITH CONTRACTORS

The purpose of financial disclosure is to assist the Agency in preventing actual or apparent conflicts of interest. Financial disclosure requirements are bolstered by 18 U.S.C. 208(a) which applies to all financial interests, including interests not required to be reported. Moreover, even if an employee discloses a financial interest, the employee may not act in matters in which he or she has a financial interest, because 18 U.S.C. 208(a) still applies.

Agency regulations for reporting employment of spouses, minor children, and other relatives are explained in 40 CFR Part 3. Under 40 CFR 3.300, an employee is prohibited from knowingly participating in an EPA activity which the employee, the employee's spouse, or minor child has a financial interest. The size of the financial interest is irrelevant, as is the employee's level of responsibility. Additionally, it does not matter if the organization in which the employee or the employee's spouse, or minor child has a financial interest is a non-profit or public interest group. Finally, under 40 CFR 3.103(d), an employee is prohibited from knowingly participating in an EPA activity in which the employee's relative has a financial interest because it creates the reasonable appearance of a conflict of interest.

EPA had 114 employees reporting to Duluth; ten of these employees are at a suboffice in Michigan. At least nine EPA employees (7.9 per cent) have spouses or relatives working for either: (1) AS&I; (2) Computer Sciences Corporation, another Duluth contractor; or (3) the University of Minnesota, a non-profit organization, under multiple cooperative agreements with Duluth. Of the 36 Duluth employees who should have filed Confidential Statements in 1990, six employees (16 percent) did not disclose that their spouses either worked for a contractor or university doing business with Duluth. In addition, of the 28 employees that did file Confidential Statements, five employees (17.6 percent) did not disclose their spouse's employment with the above-listed organizations. Without such disclosures, EPA ethics officials cannot determine if actions should be taken to eliminate or mitigate actual or apparent conflicts of interest.

#### WORK ASSIGNMENT MANAGERS NEED TO FILE

WAMs can influence the amount of work a contractor can perform and the award fees a contractor will obtain. Currently, 40 CFR 3.302 does not specifically state that WAMs should be required to file Confidential Statements. Therefore, the Duluth DEO did not request that WAMs submit Confidential Statements. However, the regulation does provide for the DEO to seek approval through the DAEO for other employees classified at grade 12 or below to file Confidential Statements. DEOs can seek approval if employees are in positions whose duties and responsibilities require the exercise of judgment in participating in or making Government decisions with respect to initiating procurement requests or evaluating contractors. WAMs at Duluth should be required to file Confidential Statements.

A WAM is an Agency official who prepares written directives (known as work assignments) to contractors under cost-reimbursement level of effort contracts. The WAM monitors the contractor's performance on specific work assignments. At Duluth, WAMs prepare the procurement requests for each work assignment. They also evaluate the contractor's efforts for each work assignment.

The WAM's evaluations form the basis for contractor award fees under a cost-plus-award-fee contract. At the close of each evaluation period, the WAM prepares an evaluation of the contractor's performance. Each WAM submits a contractor evaluation to the project officer, who puts the individual evaluations into a single package for the PEB. The PEB, based on the collective information, recommends the contractor's award fee for that period.



## AGENCY ACTIONS TAKEN DURING OUR REVIEW

On August 20, 1991, the Duluth DEO issued a memorandum to project officers stating that they were required to file Confidential Statements by August 30, 1991.

## CONCLUSIONS

EPA's regulations and policy safeguard against actual or apparent conflicts of interest by requiring certain employees to file Confidential Statements. Ethics officials are required to review the statements and eliminate or mitigate actual or apparent conflicts of interest. Because not all Duluth employees who: (1) should have been required to file did so, and (2) should have disclosed their spouse's employment did so, EPA ethics officials cannot be assured that all actual or apparent conflicts of interest were eliminated or mitigated. Additionally, the DEO's annual certification was inaccurate and not timely reviewed. Since the DEO's certifications are reported to Congress, each DEO must ensure that the annual certification is accurate and timely reviewed. Finally, the Agency should require WAMs to file Confidential Statements because their position can influence the amount of: (1) work a contractor can perform, and (2) the award fees a contractor will obtain.

## AGENCY COMMENTS AND ACTIONS

The ORD Assistant Administrator stated that the findings in this chapter are valid.

The DAEO either has already acted, or has agreed to take actions, to resolve the most of the issues discussed above.

The DAEO stated that the Office of Government Ethics has recently published its long-awaited new procedures for collecting and reviewing confidential financial statements. He has, therefore, issued, on June 18, 1992, EPA's implementing instruction, Ethics Advisory 92-14. This issuance states that any employee grade 15 and below should be required to file if he or she participates in Government actions regarding contracting or procurement. Such employees include contracting officers, project officers, ordering officers, and work assignment managers. The DAEO has also:

1. Recommended, on June 29, 1992, that the Acting Duluth Director, who is also the Acting DEO: (a) ascertain which filers failed to include information about their spouses and minor children in 1990 and 1991; (b) obtain amended statements from these

individuals; (c) review the Confidential Statement reports to ensure that conflict of interest problems have been resolved; and, (d) send new annual report certifications to Headquarters for 1990 and 1991 by July 31, 1992.

2. Will offer annual training to DEOs before they review the Confidential Statements.

#### OIG EVALUATION AND RECOMMENDATIONS

The Designated Agency Ethics Official's actions substantially resolve the findings in this chapter. Deputy Ethics Officials, however, must not only be offered this training, but they must be required to take the training periodically. Therefore, we recommend that the EPA Deputy Ethics Officials be required to be at least biannually trained and certified regarding Government ethics laws and regulations.

ASCI Corporation  
Maximum Dollar Value  
Duluth Contracts

	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>Total</u>
<b>Toxicological</b>								
68-03-3373	\$998,706							\$998,706
68-03-3544		\$1,905,041	\$1,985,354	\$2,077,303				\$5,967,698
68-CO-0056					\$961,390	\$1,039,612	\$1,126,230	\$3,127,232
68-CO-0057					\$952,139	\$1,025,384	\$1,106,374	\$3,083,897
68-CO-0058	<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>	<u>\$942,981</u>	<u>\$1,025,166</u>	<u>\$1,100,905</u>	<u>\$3,069,052</u>
<b>Subtotal</b>	\$998,706	\$1,905,041	\$1,985,354	\$2,077,303	\$2,856,510	\$3,090,162	\$3,333,509	\$16,246,585
<b>Chemical Analysis</b>								
68-C9-0050				\$1,478,299	\$1,513,457	\$1,577,317		\$4,569,073
	<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>	<u>          </u>
<b>Total</b>	<u>\$998,706</u>	<u>\$1,905,041</u>	<u>\$1,985,354</u>	<u>\$3,555,602</u>	<u>\$4,369,967</u>	<u>\$4,667,479</u>	<u>\$3,333,509</u>	<u>\$20,815,658</u>

ASCI CONTRACTS WITH THE DULUTH LABORATORY

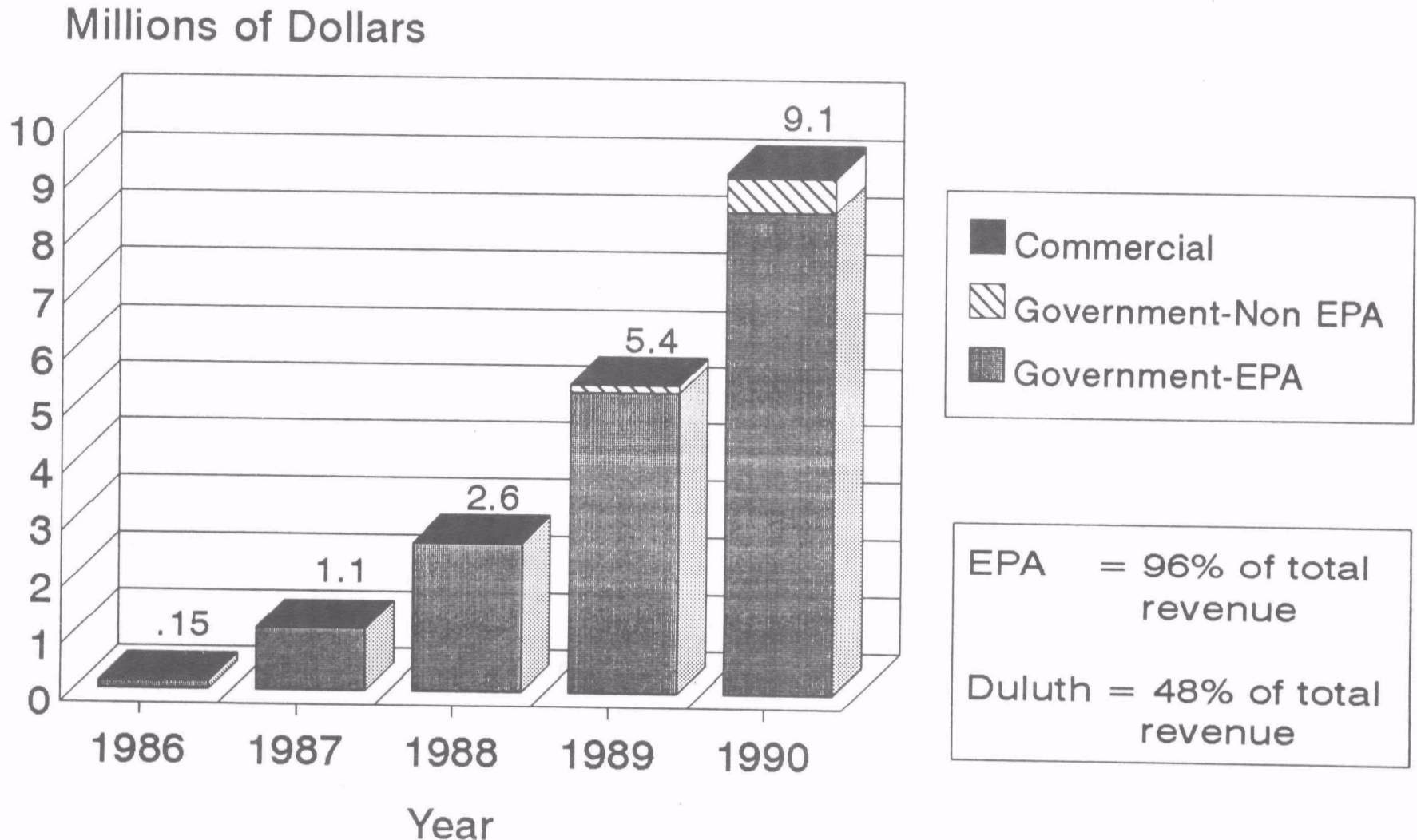
<u>Contract Number</u>	<u>Effective Date (a)</u>	<u>Type of Service</u>	<u>Type of Contract</u>	<u>Maximum Contract Value</u>
68-03-3373	08/21/86	Toxicological Support Service	CPFF (b)	\$ 998,706
68-03-3544	09/30/87	Toxicological Support Service	CPAF (c)	\$ 5,967,698
68-C9-0050	09/30/89	Chemical Analysis Support	CPFF	\$ 4,569,073
68-CO-0056	09/20/90	Toxicological Support Service	CPFF	\$ 3,127,232
68-CO-0057	09/20/90	Aquatic Toxicology Testing	CPFF	\$ 3,083,897
68-CO-0058	09/20/90	Toxicity Identification Evaluations	CPFF	\$ 3,069,052
			Total	\$20,815,658

- (a) Date signed
- (b) Cost plus fixed fee
- (c) Cost plus award fee

# AScl Corporation

EXHIBIT 3  
PAGE 1 OF 1

## 1986-1990 Contract Revenues (\$18.4 M)



WORK ASSIGNMENTS (WA) NOT  
AUTHORIZED IN THE CONTRACT<sup>1</sup>

<u>WA Tasks</u>	<u>WA Title</u>	<u>Contract Numbers</u>	<u>WA FY</u> <u>89 90 91</u>
Provide Travel services: Travel authorizations, expense vouchers; and travel arrangements; Serve as Receptionist; Perform Clerical tasks: reconciliations of travel system reports with other financial reporting systems.	Scientific Outreach, Public Information, Technology Support.	68-03-3544 68-C0-0058	16 3 1
Remodel/rebuild existing and newly constructed laboratories, offices and out buildings; assist carpenters in building cabinets.	Physical Science Support	68-03-3544 68-C0-0056	4 5 4
Assist with Library - Type services, reprinting requests, filing, memo typing and phone answering.	Technical Information	68-03-3544	5 7

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<sup>1</sup>Beginning in FY91, all library-related services have been performed exclusively by the firm of Labat-Anderson, which is under contract with EPA

THE OFFICE OF RESEARCH AND DEVELOPMENT'S  
RESPONSE TO THE DRAFT REPORT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 29 1992

OFFICE OF  
RESEARCH AND DEVELOPMENT

**MEMORANDUM**

**SUBJECT:** Draft Audit Report No. E1JBF1-05-0175  
Contracting Activities at Environmental Research  
Laboratory - Duluth

**FROM:** Erich W. Buetthaus *E. Buetthaus*  
Assistant Administrator  
for Research and Development (RD-672)

**TO:** Kenneth A. Konz  
Assistant Inspector General for Audit (A-109)

I have reviewed the draft report on contracting activities at the Duluth laboratory. I accept all recommendations addressed to the Assistant Administrator for Research and Development.

Attachment 1 provides my comments on some of the findings in the draft report. I am providing these comments to strengthen the final report. ORD previously provided for your information the comments from the current acting Director of the Duluth Laboratory and from the Director of the Office of Environmental Processes and Effects Research. Attachment 2 indicates ORD's planned corrective actions for addressing the recommendations.

I appreciate that the draft report acknowledges corrective actions already taken by the Office of Research and Development during the conduct of the audit. In addition to the actions previously reported, I have:

1. Directed that no extensions be granted to continue EPA work under Duluth's three noncompetitively awarded 8(a) contracts that are scheduled to end on June 30, 1992.
2. Directed that no additional work be funded under the Duluth contract with ASCI for chemical analysis support. The contract will expire on September 29, 1992.
3. Directed that competitive solicitations be initiated by September 30, 1992, to replace noncompetitively awarded contracts in ORD offices and laboratories, to the extent possible and appropriate.

THE OFFICE OF RESEARCH AND DEVELOPMENT'S  
RESPONSE TO THE DRAFT REPORT

2

4. Directed that financial management controls be streamlined and strengthened in ORD by consolidating the six existing ORD allowance holders into one allowance to be administered by the Director, Office of Research Program Management. This consolidation will be implemented by October 1992.
5. Directed that additional policies and procedures be implemented to provide improved financial controls and approval authority over work performed by ORD laboratories for non-ORD organizations.

Your audit staff has brought to our attention some serious internal control and management problems which demand correction. The appearance of conflict of interest is especially disturbing. Likewise, the appearance of government favoritism to any contractor, 8(a) or non-8(a), is not acceptable.

Attachments



THE OFFICE OF RESEARCH AND DEVELOPMENT'S  
RESPONSE TO THE DRAFT REPORT

Attachment 1

Assistant Administrator for Research and Development  
Comment on Findings in Draft Audit Report E1JBF1-05-0175

Chapter 2

Finding: ASCI Offered Employment to the Acting Director's Former Spouse.

There is no disputing that the president of ASCI stated in a letter to contracting officials dated June 16, 1986, that he was "making job offers on a contingent basis" to ten individuals, including the former spouse of the then Acting Director of the laboratory. However, there is no evidence in the report to indicate the Acting Director was aware of the ASCI president's letter or of a proposed job offer to his former spouse. If there is such evidence, it should be added to the report.

Chapter 3

The draft finding that additional costs were incurred rests on the premise that work properly done under ASCI contract could also have been properly done under the UWS contract. However, this premise does not appear to be valid.

The UWS statement of work specifically supported the National Dioxin Study. This Study required analyses of chemical residues of dioxins and furans in fish tissues.

The ASCI statement of work has many similarities with the UWS statement. In addition, it was poorly prepared, with a key section missing on page 14 of Attachment A. However, the ASCI statement specifically supports the EPA Marine Mammals Study and the EPA Green Bay Study. Under these studies, Duluth required analyses of specific PCB congeners and dieldrin in water and sediment samples.

Duluth reports that when they attempted to use the UWS contract for the needed PCB analysis, they were told by the Cincinnati contracts office that such work was outside the scope of the contract. If this is true, then Duluth could not have exercised the UWS option in 1989 to conduct the Green Bay Study and therefore had to arrange for other support.

The cost comparisons and other conclusions relative to the two contracts would only be valid if the work performed under the ASCI contract could have been performed under the UWS contract.

In questioning the validity of the findings relative to the UWS and ASCI contracts, there is no intent to dispute the findings that ASCI's employment of the Laboratory Director's wife

THE OFFICE OF RESEARCH AND DEVELOPMENT'S  
RESPONSE TO THE DRAFT REPORT

and the Director's chairing the Performance Evaluation Board (PEB) created the appearance of a conflict of interest. We agree that the appearance of a conflict of interest was created.

Chapter 4

Finding: \$9 Million in Contract Awards to ASCI in 1990 Were Not Competitively Bid.

We have no information with which to dispute this finding, which is the title of Chapter 4, or other findings in Chapter 4. However, we note the actions of SBA in promoting the original noncompetitive 8(a) contract to a company headed by a former EPA employee and in denying competition for the three follow-on mission support contracts at Duluth. SBA's role in this affair should be submitted to an appropriate entity for further investigation.

The draft report correctly states that EPA policy has been to break up contracts to provide for additional capacity and more involvement of small and minority-owned business. We support this policy. However, we acknowledge that breaking up a contract and noncompetitively awarding the resulting smaller contracts to the same contractor, in this case ASCI, creates the appearance of favoritism.

Chapter 5

Finding: Work Assigned to ASCI Was Not Included in Work Assignments or the Scope of the Contracts.

The findings in this chapter show that work was permitted outside the scope of contracts and without having approved work assignments. These practices are wrong. We will develop and implement internal controls to discourage such activities.

Chapter 6

Finding: Duluth DEO Did Not Require Project Officers to File.

The Duluth laboratory advises that the missing Confidential Statement of the grade 13 project officer has now been located. The statement had apparently been misfiled.

The other findings in this chapter are supported by evidence and are acknowledged as valid.

THE OFFICE OF RESEARCH AND DEVELOPMENT'S  
RESPONSE TO THE DRAFT REPORT

Attachment 2

Assistant Administrator for Research and Development  
Comment on Recommendations in Draft Audit Report EIJBF1-05-0175

The draft audit report makes three recommendations to the Assistant Administrator for Research and Development. All recommendations are accepted. The following actions will be taken in response to the recommendations.

1. Recommendation: The Assistant Administrator for Research and Development should monitor the effectiveness of the newly instituted ORD Headquarters' review of laboratory solicitations for proposals.

The Director of ORD's Office of Research Program Management, who is also ORD's newly appointed Senior Procurement Official, has been directed to assess the newly instituted procedures annually and report his findings to the Assistant administrator. A performance standard requiring this assessment will be added to the Senior Procurement Official's performance agreement.

2. Recommendation: That the Assistant Administrator for Research and Development review the contracting practices of Duluth to assure that it follows all requirements of the 8(a) Program.

This review is underway at the present time. Follow-up reviews at Duluth and all other ORD laboratories will be done regularly in the future as part of ORD's Acquisition Management Improvement Initiative.

3. Recommendation: That the Assistant Administrator for Research and Development:

- a. Formulate a program to review the procedures for initiating work assignments at Duluth. We reviewed Duluth's procedures for initiating work assignments and found them inadequate. New policy now requires laboratory director approval for all work assignments and technical directives.
- b. Schedule an Alternative Internal Control Review (AICR) addressing accountability and control over Duluth work assignments. An AICR will be done by December 31, 1992.
- c. Assure that all project officers and work assignment managers at Duluth receive training in contract administration. Some training has already been conducted. Additional training is needed and will be mandatory in the future. The requirement to ensure that such training is provided will be a performance standard for all laboratory directors, including Duluth's, beginning next fiscal year. Additionally, ORD is working with PCMD to develop a training course for ORD project managers.

THE OFFICE OF ADMINISTRATION AND RESOURCES MANAGEMENT'S  
RESPONSE (WITHOUT EXHIBITS) TO THE DRAFT REPORT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 30 1982

OFFICE OF  
ADMINISTRATION  
AND RESOURCES  
MANAGEMENT

**MEMORANDUM**

**SUBJECT:** Draft Audit Report No. EIJBF1-05-0175  
Contracting Activities at Environmental Research  
Laboratory - Duluth

**FROM:** Christian R. Holmes  
Assistant Administrator *[Signature]*

**TO:** John C. Martin  
Inspector General

I have reviewed the draft report on Contracting Activities at the Environmental Research Laboratory Duluth and have received comments from my staff and the Cincinnati Contracts Management Division.

I am in agreement with all recommendations that were contained in the draft report and addressed to the Assistant Administrator, Office of Administration and Resources Management. As the report reflects, we have already begun to initiate specific action on these recommendations. I have ordered my staff to prepare a full corrective action plan for implementing all recommendations in the draft report.

In addition to addressing the specific recommendations in the report, you are aware of the major initiatives I have undertaken to address contract management throughout the agency. I am confident that these initiatives will help change the agency culture on contract management and preclude the type of findings cited in this draft report from recurring in the future.

I am attaching a copy of our comments to the draft report. I ask that you give these comments careful consideration in the preparation of the final audit report on Duluth.

Thank you for bringing the serious issues cited in the draft report to my attention.

Attachment

THE OFFICE OF ADMINISTRATION AND RESOURCES MANAGEMENT'S  
RESPONSE (WITHOUT EXHIBITS) TO THE DRAFT REPORT

CHAPTER 2

POTENTIAL CONFLICTS OF INTEREST NOT INVESTIGATED  
IN AWARD OF ASCI'S 1986 DULUTH CONTRACT

Findings

The Office of Inspector General's (OIG) draft audit report finds that Cincinnati contracting officials knew of potential conflicts of interest with the owner of ASCI Corporation and failed to resolve them prior to award.

We agree with this finding. In particular, contracts officials relied on verbal statements of Duluth officials that the Office of General Counsel (OGC) had approved ASCI's contract submittal, without obtaining that approval in writing as prudent business judgement would dictate. The contracting officials also misunderstood Small Business Administration (SBA) and EPA regulations governing SBA contracts to former federal employees. These are serious deficiencies in the conduct of contracting officials and we are taking steps to prevent similar events from occurring in the future.

The opening paragraph of this chapter of the draft report implies that Cincinnati contracting officials knew of the activities that the ASCI owner undertook to solicit EPA contracts while he was an EPA employee. This is inaccurate. Cincinnati officials had no specific knowledge of his activities while he was employed at EPA or immediately thereafter. The draft report should reflect this distinction.

The draft report also charges that Cincinnati contracting officials failed to take appropriate action to resolve the matter of ASCI's hiring of the Acting Duluth Director's former wife. It should be noted that the former spouse was proposed as a key punch operator -- a low level, non-critical position. Her involvement was mentioned on one page of a 74-page proposal.

Although the contracting officer bears the ultimate responsibility for the processing of a procurement, this individual is highly dependent on the legal certifications of project officers, auditors, and contractors. Contracting officers do not generally undertake full background investigations of these certifications. In this case, the contracting officer relied upon the technical evaluation panel members' certification that they had no conflict of interest.

While the contracting officer in reading the proposal may not have associated the name of the key-punch operator with the name of the Acting Lab Director, there was a certification provided by the technical evaluation panel that it was not aware of any conflict of interest. Since the Acting Lab Director was on the panel, this conflict should have been reported to the contracting officer. Since the contracting officer relied on the

THE OFFICE OF ADMINISTRATION AND RESOURCES MANAGEMENT'S  
RESPONSE (WITHOUT EXHIBITS) TO THE DRAFT REPORT

panel's certification and also did not make the name association, it is questionable, as the draft report alleges, that the contracting officer "should" have known of the conflict.

Recommendations

The draft audit report recommends that the Assistant Administrator for Administration and Resources Management (OARM) instruct the Director of the Procurement and Contracts Management Division (PCMD) to take three actions. The first is to "develop procedures to ensure that contract awards to former employees comply with Government and EPA ethics requirements." Although, Federal and EPA acquisition regulations already cover this, we will issue a special guidance document on the subject by the middle of August, 1992.

The second recommendation is to develop "a detailed questionnaire that contracting officers are required to use to inquire into program officials' potential conflicts of interest." This, too, we will have completed by the middle of August, 1992.

The third recommendation suggests developing a special training course for all contracting officials regarding Agency conflict of interest regulations and standards of conduct. We are working to have such a course developed by the end of this calendar year.

We also want to mention a few corrective actions we have already taken. All Cincinnati contracting personnel were formally notified by a June 8, 1992 memorandum from the Director, OARM-Cincinnati, that SBA recommendations and 8(a) certifications are not sufficient safeguards against conflicts of interest or ethics violations. The memo is provided as Exhibit I. In addition, the Director personally met with contracting personnel in June, 1992 to emphasize, among other things, that all work shall be completely analyzed and determined to be in accordance with all contracting statutes and regulations prior to issuance by the contracting officer. Finally, to ensure impartiality, all technical evaluation panels for EPA laboratory-related procurements must now include a member from an outside office or lab.

THE OFFICE OF ADMINISTRATION AND RESOURCES MANAGEMENT'S  
RESPONSE (WITHOUT EXHIBITS) TO THE DRAFT REPORT

CHAPTER 3

EXISTING CONTRACT CANCELLED AND  
\$4.5 MILLION CONTRACT AWARDED TO ASCI IN 1989

Findings

This chapter of the draft report discusses a contract held by the University of Wisconsin-Superior (UWS) that was allowed to lapse and a subsequent new contract to ASCI on which UWS was a prime subcontractor. The draft report alleges that the new ASCI contract was for the same work that had been performed under UWS and that the only reason for the change was to give preferential treatment to ASCI.

Cincinnati's involvement in this revolves around its participation in the lapsing of the UWS contract and the procurement of the ASCI contract. The original UWS contract prescribed support limited to the National Dioxin Study. The contract eventually won by ASCI was a much larger one involving marine mammal studies support and requiring both on and off-site work. Attached is a memo dated February 28, 1989 (Exhibit II) discussing this underlying rationale. Based upon the comparisons of the intended purpose of each contract, it would have been improper for the contracting officer to permit the original contract to continue as a larger, more general marine mammal support effort. Cincinnati contracting officials, unaware of the other alleged activities of Duluth personnel, were not at fault in processing what appeared to be a new procurement.

Where Cincinnati contracting officials did fail is in leading UWS into believing that two of its contract options would be exercised and then not doing so at the last minute. Contracting officers should work closely enough with the program to know of their planned actions. In this case, the contracting officer should have known well ahead of time that the contract options might not be exercised and, therefore, not necessarily have issued the notifications to UWS in the first place.

We do have a few other comments on this portion of the draft report. Throughout this chapter and elsewhere in the draft report, there is an improper use of the word "cancel". EPA did not "cancel" an existing contract but merely exercised its unilateral right under the option clause not to continue/renew performance of the contract for additional periods. "Cancellation" involves contract termination which has an entirely different meaning. We suggest that this be clarified in the final report.

On page 15, there is a statement: "He also made it known to the contracting community that he preferred ASCI." The words "contracting community" are ambiguous and could be construed by

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some readers to include the Cincinnati contracting operations. We read it to mean the community of potential contractors that could have submitted proposals. Since the Cincinnati contracting officials did not know of the alleged actions in Duluth, we suggest that the draft report use the words "contractor community".

Recommendations

The draft report makes two recommendations to OARM. The first is to "develop clear guidance to contracting officers regarding how to proceed when they note potential procurement or contracting irregularities." The recommendation specifically suggests that the guidance discuss how issues should be raised through management and organizational chains. We will issue this guidance by the end of July, 1992.

The second recommendation stresses emphasizing to contracting personnel "the vital importance of their responsibility to review contract packages to assure that Government and Agency regulations are followed." We will provide this emphasis in the guidance discussed in the previous recommendation.



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CHAPTER 4

**\$9 MILLION IN CONTRACT AWARDS TO ASCI IN 1990  
WERE NOT COMPETITIVELY BID**

Findings

The draft audit report finds that Cincinnati contracting officials improperly split the Duluth requirement into three separate contracts to avoid competition.

We agree that the requirement was improperly split. Cincinnati officials earlier acknowledged the improper action and took steps to replace the three ASCI contracts with a new competitive contract. The three ASCI contracts will end on June 30, 1992, 15 months before they were intended to expire.

The report indicates that due to workload pressures, Cincinnati contracting officials did not question the validity of splitting the former contracts into three new contracts. The report fails to mention, however, that Cincinnati contracting officials initially forwarded the three contract actions to SBA to be processed under competitive 8(a) procedures. Nevertheless, we agree that contracting officials were not aggressive in resolving differences with Duluth and SBA.

Recommendations

The draft report makes four recommendations to OARM and ultimately, PCMD. The first is that we take action to competitively bid the Duluth toxicological support services contract and ensure that no bias is shown toward any one contractor. In making this recommendation, the OIG also stated that, to the extent possible, officials previously involved with the Duluth procurement should be excluded from the process. The new Duluth toxicological support services contract will be competitively bid. It will be placed from PCMD headquarters to avoid any appearance of bias and will be monitored closely to ensure that the integrity of the procurement is not called into question.

The second recommendation is that all potential Performance Evaluation Board (PEB) members for the new Duluth toxicological support services contract should submit a statement that they are free of bias and any appearance of potential conflicts with the winning contractor. As indicated in the OIG draft report, OARM-Cincinnati has taken corrective action to ensure that all PEB members will be required to certify that they have no conflicts of interest. In addition, PCMD is revising its Contracts Management Manual to make this an Agency-wide requirement. The revision will be completed by the end of December 1992.

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The third recommendation is that we issue a policy statement to contracting officers stating that 8(a) procurement estimates should be scrutinized for compliance with the Business Opportunity Development Reform Act of 1988. In addition, as part of quality assurance reviews, we should plan to periodically review 8(a) contracts verifying the eligibility of those awarded non-competitively.

By the end of July 1992, PCMD will issue policy guidance on the proper use of the 8(a) program and the need for controls. As part of its quality assurance reviews, PCMD looks at whether contracts have been awarded properly and will increase its focus on 8(a) contracts. In addition, OARM-Cincinnati has identified 8(a) set-aside procedures as an area of internal control weakness for FY 92 and a new set of procedures has been developed and implemented to screen all 8(a) set-aside requests.

Lastly, the draft report recommended that we emphasize to project and contracting officers that it is inappropriate to split requirements among multiple contracts to stay below the 8(a) ceiling for sole source contracts. The guidance PCMD will issue by the end of July 1992 will include this requirement. OARM-Cincinnati has also issued a memorandum to its contract staff stressing the need to actively monitor for the potential splitting of contracts to avoid the 8(a) competitive threshold. Any attempt to split up requirements to avoid competitive thresholds shall immediately be reported to a Senior Procurement Manager. The memo also stressed that staff cannot rely solely on the SBA for resolution of potential conflict of interest issues or ethics violations concerning 8(a) firms. (See Exhibit I.)

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CHAPTER 5

WORK ASSIGNED TO ASCI WAS NOT INCLUDED IN WORK  
ASSIGNMENTS OR THE SCOPE OF THE CONTRACTS

Findings

The draft report finds that Cincinnati contracts officials issued work to ASCI that was outside the scope of the contract. They approved work assignments without reading them, thereby authorizing work which was unallowable under the contract, and failed to detect work being performed outside the scope of the contract by not adequately reviewing ASCI's monthly progress reports.

We agree with this finding and are particularly dismayed that work assignments were issued by contracting officers without being read. Contracting officers throughout the agency are managing heavy workloads which at times cause them to review work assignments less thoroughly than should be the case. We are committed to changing the Agency's culture to correct this. However, we cannot excuse any instance of a contracting officer issuing a work assignment without reading it. In the cases cited in the draft audit report, even the most cursory look at the work assignments would have shown them to be outside of the scope of the contract. This violates a most fundamental responsibility of a contracting officer and cannot in any way be dismissed. We will address this matter further in our response to the Inspector General's report of investigation.

We have taken immediate action to make sure that proper review and attention are accorded all contract actions at Cincinnati and that such problems are not allowed to reoccur.

Recommendations

The draft report made four recommendations for OARM. First, it recommended that we emphasize to contracting officers the importance of reviewing work assignments to ensure that work to be performed complies with the contracts' statements of work. PCMD will issue guidance by the end of July 1992 to all contracting officers regarding this requirement. It will also continue to emphasize the need for scrutiny in this area in Contract Administration courses required for all Project Officer and Work Assignment Managers.

OARM-Cincinnati has also taken steps to address this problem. It is now requiring Project Officers to prepare a work assignment check list which indicates the exact Section of the Statement of Work which authorized the Work Assignment being processed, and to certify that, the work is within the scope of

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the contract. This check list is also signed by the Contracting Officer/Specialist once they complete their review. (See Exhibit III)

The Director, OARM-Cincinnati, issued a memorandum, dated June 8, 1992 (See Exhibit I) to all Cincinnati Contract Division employees emphasizing that "Contracting Officers and Contract Specialists are responsible for reading and reviewing work assignments before signing to ensure that the terms of the basic contract are not being violated." The OARM-Cincinnati Director also has met with Cincinnati staff and made it very clear to employees that the operating guidelines are quality and accuracy, and that no work will be pushed through the system just to meet time constraints. All work shall be completely analyzed and determined to be in accordance with all contracting statutes and regulations prior to work being authorized by the contracting officer.

The draft report's second recommendation was that we require contracting officers to review all ASCI work assignments and progress reports for active Duluth contracts to ensure compliance with the contracts' statements of work. EPA has determined that it will not exercise the renewal options on the three ASCI contracts that were awarded on a non-competitive basis in FY 90. These contracts will be shut down, effective June 30, 1992. The ASCI contract which included the subcontract work with UWS will expire on September 30, 1992. In order to preclude any further problems, the contract officials, Duluth Project Officer and other Duluth officials have been ordered to ensure that no work outside of the scope of the contract is performed.

Thirdly, the OIG recommended that we require separate contracts for maintenance and other duties that are not clearly related to toxicological support services. We agree and plan to competitively award two separate contracts -- one for maintenance and operations and one for the toxicological support services.

Lastly, the OIG requested that as part of PCMD's annual review of Cincinnati, we take steps to determine whether work assignments are within the contracts' statements of work. In its contract management reviews, PCMD routinely reviews work assignments to determine whether they are within the contracts' statement of work. Because of the vulnerabilities identified in contracts at Cincinnati, PCMD's Quality Assurance Staff will increase its focus in this area in its next annual review of Cincinnati contracts.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 29 1992

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Draft Audit Report No. E1JBF1-05-0175  
Contracting Activities at Environmental Research  
Laboratory - Duluth

**FROM:** Gerald H. Yamada *Gerald H. Yamada*  
Principal Deputy General Counsel  
Designated Agency Ethics Official (LE-130)

**TO:** Kenneth A. Konz  
Assistant Inspector General for Audit (A-109)

This responds to recommendations to this Office in the subject draft audit report. Each recommendation is discussed by subject in the order of appearance in the report.

First Recommendations

The recommendations at page 10 concern Chapter 2 of the report entitled "POTENTIAL CONFLICTS OF INTEREST NOT INVESTIGATED IN THE AWARD OF ASCI'S 1986 DULUTH CONTRACT" and are as follows:

We recommend that: \* \* \*

2. The Designated Agency Ethics Official:
  - a. Develop procedures to ensure that inquiries and responses regarding contract awards to prior employees are properly documented.
  - b. Determine the information designated ethics officials should obtain in dealing with potential conflict of interest situations.

As regards recommendation 2.a., we have recognized the need for documenting all ethics advice, not only ethics advice regarding contract awards. EPA Ethics Advisory 91-13 of December 30, 1991, recommends that Deputy Ethics Officials maintain written records of oral advice regarding ethics matters. This corresponds to procedures initiated in this Office in November 1991. We now have chronological logs of inquiries and advice, and information from these logs is easily retrievable.

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Recommendation 2.b. is that the DAEO "(d)etermine the information designated ethics officials should obtain in dealing with potential conflict of interest situations." As discussed below, the proposed Office of Government Ethics regulation sets out a list of issues to be considered in approving an employee's participation in matters which specifically involve persons with whom the employee has a "covered relationship."

We would first need to determine whether there is a problem under 18 U.S.C. §208(a), which prohibits employees' participation in "particular matters" which affect the financial interests of themselves, their spouses, or their minor children.

There is no per se restriction against participation in matters which affect the financial interests of a former spouse. Subpart E of proposed Office of Government Ethics regulations published July 23, 1991,<sup>1</sup> Impartiality in Performing Official Duties, describes situations in which an employee's impartiality is likely to be questioned. Before an employee participates in a "specific party" matter (such as a contract) with someone with whom the employee has a "covered relationship," the "agency designee" must make certain determinations. One of these situations would be where an employee is called upon to participate in a matter affecting "a person \* \* \* with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine business transaction." In such case, the following procedure would apply:

(c) Determination by agency designee. Where he has information concerning a potential appearance problem arising from the \* \* \* the role in such matter of a person with whom the employee has a covered relationship, the agency designee may make an independent determination of whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, the agency designee's determination will be initiated by information provided by the employee pursuant to paragraph (a) of this section [which requires employees to report "covered relationships" to the "agency designee"]. However, at any time, including after the employee has disqualified himself from participation in a matter pursuant to paragraph (a) of this section,<sup>2</sup> the agency designee

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<sup>1</sup> See EPA Ethics Advisory 91-1 of August 7, 1991, which describes the proposed regulations and transmits a copy of them.

<sup>2</sup> This bars participation in a "specific party" matter (such as a contract award) where the employee or the agency designee

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may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment.

The "agency designee" then determines whether or not "the employee's impartiality is likely to be questioned." If he decides that it is not, the employee participates in the matter. If the "agency designee" decides that the employee's impartiality is likely to be questioned, the employee may not participate unless the "agency designee" authorizes the employee to do so based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into account include:

- (1) The nature of the relationship involved;
- (2) the effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

A copy of Subpart E of the proposed OGE regulation is attached. It is important to note that matters affecting a spouse's employer also fall under the "covered relationship" procedures. The same considerations apply in determining whether employees should be permitted to participate in matters which affect their spouses' employers.

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has concluded that the relationship "is likely to raise a question in the mind of a reasonable person about his impartiality."

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Second Recommendations

Your recommendations on pages 21 and 22 concern Chapter 3 of the report entitled "EXISTING CONTRACT CANCELLED AND \$4.5 MILLION CONTRACT AWARDED TO ASCI IN 1989" and were as follows:

We recommend that: \* \* \*

3. The Designated Agency Ethics Official:

- a. Develop procedures, including a checklist of information to obtain, prior to approving an employee's spouse's employment in potential conflict of interest situations. This information should include requesting employee's duties and any contacts the employee's, their spouses, or other household members have with the spouse's prospective employer. This information should detail any interest the employee has in the company, as well as how important the company is to EPA, and to the employee's job.
- b. Direct Agency Ethics Officials to make additional inquiries to search out potential conflicts of interest prior to approving employee's spouse's employment. Employees should clearly be advised of their responsibility to keep Agency Ethics Officials informed of any changes in activities which might add to potential conflicts and understand the potential if they do not do so.
- c. Establish procedures for advising supervisors of any potential conflict of interests on the part of Senior Executive Service employees.

As discussed above, Subpart E of the proposed OGE regulation will require written determinations in every case before an employee may participate in a "specific party" matter which affects someone with whom the employee has a "covered relationship" including, among other relationships, "[a] person for whom the employee's spouse \* \* \* is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." All of the considerations discussed above apply in such case, and all of the determinations must be made by the "agency designee."

In making these determinations, the "agency designee" should ordinarily obtain the kind of "checklist" information set out in recommendation 3.a. Each request will necessarily involve a



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case-by-case determination. However, when the OGE regulation becomes final, we plan to issue an EPA Ethics Advisory outlining the Subpart E procedures and specifically discussing issues that are likely to be present in such cases along the lines you recommended. This Ethics Advisory will emphasize the importance of employees' seeking a determination from the "agency designee" before participating in a matter affecting someone with whom the employee has a "covered relationship." The Ethics Advisory will also emphasize the importance of employees' keeping "agency designees" informed of any changes in the facts and circumstances upon which the "agency designee" based an approval to participate. We also will offer annual training to the DEOs before they review the financial statements.

As regards recommendation 3.c., we believe that the recusal procedures which will be invoked by Subpart E accomplish this objective. That is, a determination by the "agency designee" will be required whenever an employee proposes to take part in a "specific party" matter affecting a "covered relationship." Although it is not yet certain who will serve as "agency designees" for purposes of the new OGE regulation, it seems likely that the present Deputy Ethics Officials will generally serve in this role. This means that supervisors of SES personnel are likely to be directly responsible for making the determinations required by Subpart E. If the "agency designee" determines that the employee should not participate, the usual procedure for recusals would apply. That is, the employee would send a memorandum to his supervisor and to those who immediately report to him stating that, to avoid actual or apparent impropriety, he has recused himself from participation in certain described matters. However, in the case where the supervisor of an SES employee would not serve as the "agency designee," we would require that a copy of such determinations be provided to the SES employee's supervisor.

Third Recommendation

Your recommendation on page 29 concerns Chapter 4 entitled "\$9 MILLION IN CONTRACT AWARDS TO ASOI IN 1990 WERE NOT COMPETITIVELY BID" and was as follows:

We recommend that \* \* \*

3. The Designated Agency Ethics Official review the conditions for the approval of the Duluth Director's spouse's employment with ASOI. After completing the review, the DAEO should advise, in writing, whether under the current circumstances, the Duluth Director should recuse himself from any actions involving ASOI to avoid any future actual or reasonable appearance of a conflict of interest.

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As discussed above, we will provide detailed information regarding spousal employment questions in an Ethics Advisory addressed to all Deputy Ethics Officials.

The OGE guidance on which we based EPA Ethics Advisory 88-5, Spousal Employment, of July 5, 1988 (copy attached) was as follows:

Spousal connections should be handled carefully--not in any doctrinaire fashion. The happenstance that one works in the Federal agency and another in a related private field does not create per se a conflict of interest. It is no longer unusual for a married woman to work and to have a career independent of her spouse. In a small community with few opportunities for gainful employment, it is likely that one spouse may be employed by a private employer which has dealings with the Federal agency in which the other spouse works. In such a situation, it is important that a realistic analysis be made by the ethics official as to whether any actual conflict is present. If not, judgment as to an appearance of conflict should not be arrived at unless the government's interests are or could be prejudiced. \* \* \* [Office of Government Ethics, "Ethics Newsgram," Vol. 1, No. 3, November, 1984, p. 3, emphasis added].

The OGE opinions summarized on page 4 of the Ethics Advisory regarding "appearance of impropriety" concern situations where a Federal employee's participation in a matter affecting a spouse's employer would violate 18 U.S.C. §208(a) because the spouse was actually working on the affected project. OGE concluded that an 18 U.S.C. §208(b)(1) waiver generally should not be granted in such cases because of the "appearance of impropriety" which would result.

As provided by Subpart E of the proposed OGE regulation, even to decide that a situation creates a "conflict of interest" does not conclude the inquiry. An "agency designee" must go on to decide whether the employee should participate nonetheless because the agency's interest in the employee's participation outweighs concern about the conflict.

The information discussed in the draft report nonetheless leads us to conclude that the Duluth Director's spouse's employment by ASCI created a conflict. We anticipated that the Duluth Director's general management decisions at the Laboratory would affect the ASCI contract to some degree, but we were not aware that: (1) he was a member of the Performance Evaluation Board at the time he submitted his request; (2) his spouse had been an unpaid ASCI staff member for several months prior to the request; and (3) the Duluth Director was involved in a contract

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award to ASOI which took place four days after his request for our written concurrence in his wife's employment.

In view of these facts, our concurrence should not have been granted under either the standards in 40 C.F.R. §3.103<sup>3</sup> or the standards in Subpart E of the proposed OGE regulations. Although we cannot control whether an employee's spouse accepts employment with anyone, the information disclosed in the draft report leads us to conclude that the Duluth Director should have recused himself from participation in any matter affecting ASOI.

**Fourth Recommendation**

Your recommendations on pages 45 and 56 concerned Chapter 6 entitled "DULUTH EMPLOYEES' CONFIDENTIAL STATEMENTS WERE INCOMPLETE" and were as follows:

We recommend that:

1. The Designated Agency Ethics Official instruct the Deputy Ethics Official at the Duluth Laboratory to:
  - a. Require that all employees who should be required to file under EPA regulations and Agency policy submit Confidential Statements of Employment and Financial Interests.
  - b. Train DBO staff in the appropriate EPA regulations and Agency policy concerning ethical standards for EPA employees.
  - c. Correct the most current certification letter to reflect that (1) additional employees should have reported, and (2) complete review of all Confidential Statements was not conducted prior to certification.
2. The Designated Agency Ethics Official seek permission from the Office of Government Ethics to require EPA Work Assignment Managers to file Confidential Statements of Employment and Financial Interests.

OGE has recently published its long-awaited new procedures for collecting and reviewing confidential financial statements. As discussed on page 2 of EPA Ethics Advisory 92-14 (copy attached), employees at any level should be required to file if they participate "personally and substantially" in "particular

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<sup>3</sup> Under 40 C.F.R. §3.103, employees may not "[t]ake any action, whether specifically prohibited or not, which would result in or create the reasonable appearance of: \* \* \* [l]osing independence or impartiality of action \* \* \*."

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matters" which affect outside financial interests. The Ethics Advisory particularly emphasizes the need to require filing by employees who participate in contract administration activities; viz:

This requirement applies regardless of grade level. Under the current system, only a few categories of employees below GS-13 may be required to file without special OGE approval. In particular, it is important to ensure that employees who exercise significant judgment in awarding or administering contracts or assistance agreements are required to file in October regardless of their grade levels. Such employees include contracting officers, project officers, ordering officers, and work assignment managers.

Filing under the new system begins in October 1992.<sup>4</sup> Ethics Advisory 92-14 is the beginning of our training efforts for Deputy Ethics Officials and their staffs. In addition, we are holding a two-day seminar at the end of June 1992 to explain the recent changes in the ethics statutes and the new Government-wide OGE regulations. Discussion of the new Government-wide system of confidential financial reporting will be an important part of this effort. We will offer annual training to the DEOs before they review the confidential financial statements.

In addition, OGE regulations published April 7, 1992 at 57 Fed. Reg. 11886 (copy attached) implement the requirement of Executive Orders 12674 and 12731 that all employees who are required to file confidential or public financial disclosure reports receive annual ethics training. This will be a major undertaking for all Federal agencies, and we are making plans to carry out this requirement with the advice and assistance of OGE.

Finally, we have annotated the most recent Duluth certification to state that some of the reports were not reviewed prior to certification. We have also sent a memorandum (copy attached) to the Acting Duluth Director which recommends that he:

(1) review the decision to exclude from the filing requirement employees below GS-13<sup>5</sup> (and the one GS-13 employee) who could have been directed to file and obtain statements for 1990 and

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<sup>4</sup> To implement the new requirements, there will be no July 1992 annual filing, pursuant to OGE direction.

<sup>5</sup> Such employees include contracting officers, project officers, inspectors, auditors and On-Scene Coordinator representatives. See 40 C.F.R. §3.303(c)(2).

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1991 from these employees if he determines that the exclusion was inappropriate;

(2) ascertain which filers failed to include information about spouses and minor children in their 1990 and 1991 reports, obtain amended statements from these employees, and consider disciplinary action in appropriate circumstances;

(3) review the reports to ensure that conflict of interest problems have been resolved, particularly emphasizing spousal employment issues under the criteria discussed in EPA Ethics Advisory 88-5; and

(4) send new certifications to me for 1990 and 1991 by July 31, 1992.

\* \* \*

Please call me at 260-8064 if you have any questions

Attachments

ABBREVIATIONS

AScI	AScI Corporation
Aspen	Aspen Research Corporation
Cincinnati	Office of Administration and Resources Management, Cincinnati Contracts Management Division
CFR	Code of Federal Regulations
Confidential Statement	Confidential Statement of Employment and Financial Interests
DAEO	Designated Agency Ethics Official
DEO	Deputy Ethics Official
Duluth	Environmental Research Laboratory- Duluth, Minnesota
8(a)	Section 8(a) of the Contracting and Business Development Program
Green Bay Study	Great Lakes Mass Balance Study, Green Bay, Wisconsin
OARM	Office of Administration and Resources Management
OGC	Office of General Counsel
OEPER	Office of Environmental Processes and Effects Research
ORD	Office of Research and Development
PCMD	Office of Administration and Resources Management, Procurement and Contracts Management Division
PEB	Performance Evaluation Board
SBA	Small Business Administration
UWS	University of Wisconsin-Superior
WAM	Work Assignment Manager

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