

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**CMS DID NOT ADMINISTER AND
MANAGE STRATEGIC COMMUNICATIONS
SERVICES CONTRACTS IN ACCORDANCE
WITH FEDERAL REQUIREMENTS**

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Office of Inspector General

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Report in Brief

Date: July 2020

Report No. A-12-19-20003

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL



Why OIG Did This Audit

HHS is one of the largest contracting agencies in the Federal Government and in fiscal year 2019 awarded contracts totaling approximately \$27 billion, of which \$7 billion related to Centers for Medicare & Medicaid Services (CMS) contracts. Congress has expressed concerns about and the media has reported on CMS's awarding of contracts for strategic communications services. Separately, OIG had begun preliminary work to review the strategic communications services contracts during CMS Administrator Seema Verma's tenure. Based on this preliminary work, we conducted an audit of these CMS contracts.

Our objective was to determine whether CMS awarded contracts for strategic communications services in accordance with Federal statutes, Federal regulations, and HHS (including CMS) policies and procedures.

How OIG Did This Audit

We audited three contracts, totaling \$6.4 million, awarded for strategic communications services from June 2017 through April 2019. We reviewed contracts, including task orders and modifications; invoices and deliverables; and documentation maintained in the contract files. We conducted interviews with CMS and HHS officials and contractor and subcontractor personnel. We also reviewed emails of select CMS officials. Our audit did not assess the allowability of all contract costs.

CMS Did Not Administer and Manage Strategic Communications Services Contracts in Accordance With Federal Requirements

What OIG Found

CMS prepared the required documentation for awarding contracts for strategic communications services in accordance with the Federal Acquisition Regulation (FAR). However, CMS (including the CMS Administrator and other senior leaders) did not administer and manage the contracts in accordance with Federal requirements. Specifically, CMS allowed a subcontractor individual to perform inherently governmental functions, such as making managerial decisions and directing CMS employees. CMS also administered its strategic communications services contracts as personal services contracts. CMS officials exerted a level of control over the contractors' work that exceeded what is allowed under service contracts; in essence, CMS administered these contracts as if the services had been procured under CMS's statutory authority to contract for experts and consultants. Lastly, CMS did not comply with FAR requirements in managing contract deliverables and approving the use of a subcontractor, did not maintain complete working files for all three contracts, and paid some questionable costs.

What OIG Recommends and Agency Comments

We make recommendations to both HHS and CMS to address the significant deficiencies we identified. Specifically, we recommend that HHS determine whether any HHS contractors or subcontractors are performing inherently governmental functions and whether any active CMS service contracts or task orders are being administered as personal services contracts, and take action to correct their administration. We also make recommendations to both HHS and CMS to improve contract management and provide training related to contract administration. Our specific recommendations to HHS and CMS are listed in the report.

In written comments on our draft report, HHS concurred with our recommendations and described actions that it planned to take to implement the recommendations in an effective and efficient manner. However, CMS did not concur with our findings, neither concurred nor non-concurred with three of our recommendations, concurred with one of our recommendations, and non-concurred with two of our recommendations. CMS offered corrective action plans for four of our recommendations. After considering CMS's comments, we maintain that our findings and recommendations are valid. We conducted this audit in accordance with generally accepted government auditing standards and stand by our audit methodology and procedures. Both sets of agency comments, along with OIG's response, are discussed in the report.

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INTRODUCTION

WHY WE DID THIS AUDIT

The Department of Health and Human Services (HHS) is one of the largest contracting agencies in the Federal Government and in fiscal year 2019 awarded contracts totaling approximately \$27 billion. Of this amount, \$7 billion related to Centers for Medicare & Medicaid Services (CMS) contracts. Congress has expressed concerns about and the media has reported on CMS's awarding of contracts for strategic communications services,¹ specifically related to compliance with Federal regulations. Separately, the Office of Inspector General (OIG) had begun preliminary work to review the strategic communications services contracts during CMS Administrator Seema Verma's (CMS Administrator's) tenure.² Based on our preliminary work, we conducted an audit of these CMS contracts.

OBJECTIVE

Our objective was to determine whether CMS awarded contracts for strategic communications services in accordance with Federal statutes, Federal regulations, and HHS (including CMS) policies and procedures during our audit period, June 1, 2017, through April 30, 2019. As part of this audit, we reviewed the work assigned to contractors and subcontractors under these CMS contracts and reviewed the related deliverables accepted by the agency.

BACKGROUND

Centers for Medicare & Medicaid Services

Within HHS, CMS oversees the two largest Federal health care programs, Medicare and Medicaid, as well as the Children's Health Insurance Program and health insurance marketplaces. CMS provides direction and technical guidance for the administration of the Federal effort to plan, develop, manage, and evaluate health care financing programs and policies. To this end, CMS procures a wide range of supplies and services to support Medicare and Medicaid. CMS carries out these responsibilities through internal activities and through grants and contracts that support numerous health-care-related programs. CMS relies on contractors to assist in carrying out its basic mission, including program administration, program management, and oversight of its health programs.

¹ Strategic communications services include developing strategic plans, identifying strategic opportunities for public engagement, and interacting with the media. These services ensure that external communications about CMS's programs and services are consistent, reliable, accurate, timely, and understandable to various audiences.

² The CMS Administrator, a political appointee, was confirmed by the Senate on March 13, 2017.

CMS Components

OIG identified three components within CMS that were involved in the awarding of contracts for strategic communications services: the CMS Office of the Administrator, the CMS Office of Communications, and the CMS Office of Acquisition and Grants Management (OAGM). The following sections describe the roles and responsibilities of these components.

CMS Office of the Administrator

The CMS Office of the Administrator directs the planning, coordination, and implementation of CMS programs and directs the development of effective relationships between these programs and private and federally supported health-related programs. Within broad HHS policy and guidelines, the CMS Office of the Administrator oversees the establishment of program goals and objectives and the development of policies, standards, and guidelines; evaluates progress in the administration of CMS programs; and ensures that required actions are taken to direct or redirect efforts to achieve program objectives. The CMS Office of the Administrator works with the States, other Federal agencies, and other concerned nongovernmental organizations in administering health care financing programs.

CMS Office of Communications

The CMS Office of Communications advises the CMS Administrator on all activities related to the media and provides consultation, advice, and training to CMS's senior staff with respect to relations with the news media. The CMS Office of Communications serves as CMS's focal point for internal and external strategic and tactical communications. Within the CMS Office of Communications, there are eight groups:³

- **Business Operations Staff:** Manages internal communications for CMS. Works with other components to develop strategic internal communication plans for significant CMS issues.
- **Integrated Communications Management Staff:** Initiates and oversees the creation of a CMS approval process and clearinghouse for all outgoing speeches delivered by agency executives, including managing the agency's electronic database for tracking partner outreach and education events.
- **Media Relations:** Prepares and edits relevant materials, including press releases, factsheets, and speeches about CMS and its policies, actions, and findings. Provides the materials to the public through the print and broadcast media. Arranges formal interviews for journalists with the CMS Administrator or other appropriate senior CMS

³ For purposes of this report, we provide high-level descriptions of groups within the Office of Communications based on documentation that CMS provided to us. These descriptions are not intended to be reflective of all responsibilities of each group.

staff, identifies for interviewees the issues to be addressed, and prepares or obtains background materials as needed.

- **Strategic Marketing:** Provides communication, public relations, and advertising contracts for CMS-wide use, which help programs plan and implement outreach and education activities.
- **Creative Services:** Provides consultation and support to the CMS Office of Communications and other CMS components in achieving strategic communications objectives. Manages the operations of creative services, including publications and dissemination strategies, training, and graphics. Serves as the input lead for CMS in receiving requests for communications services.
- **Web and New Media:** Coordinates the formulation of website policies, strategies, goals, and standards for Medicare.gov and cms.gov. Explores and examines the realm of social media to incorporate emerging technologies into websites to better educate and inform beneficiaries and stakeholders.
- **Call Center Operations:** Develops and implements broad-scope contract requirements and defines and implements appropriate contract arrangements for Beneficiary Contact Center contractors to ensure that call centers operate at maximum effectiveness and efficiency.
- **Partner Relations:** Serves as the resource to CMS for facilitating collaborative relationships between CMS and a variety of national, State, and local organizations, as well as between all CMS components, to promote awareness of CMS programs and initiatives.

From March 31, 2017, through June 30, 2019, the CMS Office of Communications had from 221 to 234 filled full-time equivalent (FTE) positions and 8 to 15 vacant FTEs. Among these FTEs were the Deputy Director and the Director positions within the Office of Communications, which were filled in January and March 2019, respectively. CMS stated that it requested contract support for strategic communications services because of the needs of the Office. CMS further stated that with the large amount of outreach needed, the CMS Office of Communications could not manage everything with the number of staff it had.

CMS Office of Acquisition and Grants Management

OAGM is a service component within CMS. OAGM negotiates and administers hundreds of contracts, grants, interagency agreements, and intra-agency agreements.⁴ OAGM advises and assists the CMS Administrator, senior staff, and agency components on acquisition- and grant-

⁴ An intra-agency agreement is a written agreement between or among HHS components, all of which must have the statutory authority to engage in the arrangement.

related issues. OAGM also develops policy and procedures for acquisition staff and internal CMS staff necessary to maintain efficient and effective acquisition and grant programs.

Within OAGM, the contracting officer is responsible for all necessary contracting actions, including ensuring compliance with the terms of the contract and safeguarding the interests of the Government in its contractual relationships.⁵ The contracting officer designates and authorizes in writing a contracting officer's representative (COR) to perform specific tasks in accordance with the Federal Acquisition Regulation (FAR). Specifically, the COR assists with technical monitoring and contract administration and acts on behalf of the contracting officer with respect to technical and administrative matters.^{6, 7}

Overview of the Contracting Process

The FAR guides the acquisition process by which Federal executive agencies acquire goods and services through contracts and subcontracts⁸ using appropriated funds. The HHS Acquisition Regulation establishes uniform HHS acquisition policies and procedures that implement and supplement the FAR.⁹ The contract life cycle includes many acquisition and administrative activities:

- Before awarding a contract, an agency identifies a need for services, which is the basis for developing an acquisition plan (approved in final by the contracting officer or other designee); develops a requirements package; determines the method of contracting; solicits and evaluates bids or proposals; and ultimately awards the contract.
- After awarding the contract, the agency performs contract administration, which involves holding a kickoff meeting and monitoring the contractor's performance, as well as reviewing and approving (or disapproving) the contractor's request for payment.

See Figure 1 on the following page for an overview of CMS's contracting process, from the identification of a need for services to the approval of a contractor's invoice for payment.

⁵ Federal Acquisition Regulation (FAR) § 1.602-2.

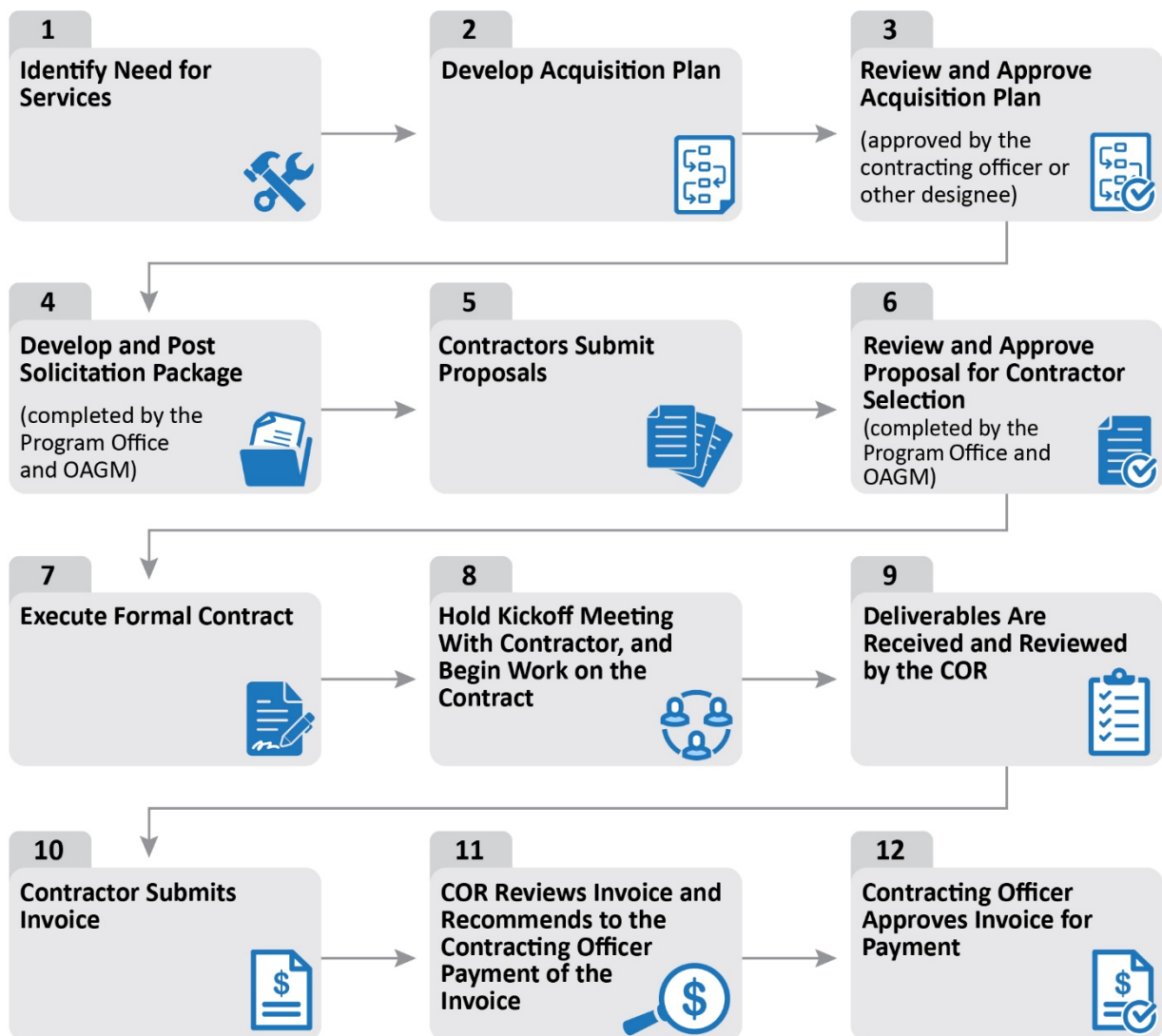
⁶ CMS COR Appointment Memorandum. *See also* HHS Acquisition Regulation, subpart 302.1—Definitions, (b) Contracting Officer's Representative.

⁷ CMS stated that it uses the CMS manual *Guidance Acquisition Policy*, which is maintained on a CMS SharePoint site and provides guidance for contracting officers and CORs. The manual provides guidance related to the contracting process and includes links to applicable FAR regulations, contract-specific documentation, and checklists available to assist in the awarding process.

⁸ Contractors may use subcontractors to perform certain tasks.

⁹ 48 CFR chapter 3.

Figure 1: Twelve Steps in CMS's Contracting Process



Types of Contracts

The FAR groups contracts into types, including fixed-price contracts, cost reimbursement contracts, and time-and-materials contracts (FAR part 16, Types of Contracts). (See Appendix B for a glossary of key contract terms used in this report.) When an agency does not know the exact times or exact quantities of future deliverables when the contract is awarded, it may use an indefinite-delivery contract for services and supplies. An indefinite-delivery, indefinite-quantity (IDIQ) contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. An indefinite-quantity contract may also specify maximum or minimum quantities that the agency may order under each task-order contract (task order) and the maximum quantity that it may order during a specific period of time (FAR § 16.504). Task orders we reviewed for CMS's strategic communications services were all awarded under IDIQ contracts as time-and-materials contracts.

Contracts for Strategic Communications Services

CMS procured strategic communications services through two IDIQ contracts.

The First Indefinite-Delivery, Indefinite-Quantity Contract

The first IDIQ contract was available for Government-wide acquisition.¹⁰ The Program Support Center (PSC)¹¹ within HHS issued a task order on this contract to Deloitte Consulting (Deloitte) to procure Department-wide workforce planning services. Subsequently, HHS modified the task order to procure strategic communications services on behalf of CMS, referred to as “TO 1” (for task order 1) throughout this report.¹²

To use TO 1, CMS and the HHS Immediate Office of the Secretary established an intra-agency agreement. According to CMS, this agreement was established because CMS needed a vehicle to fund its new “cross-cutting” strategic communications work, but there were no task orders in place for this type of cross-agency work. CMS further stated that when the agreement was established, it was working to align strategic communications work with efforts at the Department level; because HHS already had a contract in place for this type of work, CMS’s work was added to the HHS task order. (See Appendix C for a timeline of actions related to the intra-agency agreement and TO 1 for procurement of CMS strategic communications services.)

The Second Indefinite-Delivery, Indefinite-Quantity Contract

The second IDIQ contract was a multiple award issued to five contractors. CMS used one of these contractors, Porter Novelli, on the IDIQ contract to procure different services, including strategic communications services. CMS issued eight task orders to Porter Novelli. However, only two of these related to CMS’s overall strategic communications strategy and were within our audit period (June 2017 through April 2019).

¹⁰ In May 2012, the National Institutes of Health awarded a Government-wide acquisition IDIQ contract for information technology solutions and services. Any Federal agency was authorized to issue a task order under this contract.

¹¹ PSC is a multifunction shared service provider to the Federal Government. PSC provides support services, such as acquisition planning; soliciting and assessing offers; and negotiating, awarding, administering, and closing Government contracts, so agencies can focus on their core missions.

¹² Through an email review, we discovered that HHS and CMS received services from Nahigian Strategies before awarding TO 1. Nahigian Strategies later became a subcontractor under TO 1. Without a contract in place, the acceptance of these services may have been inappropriate. To conclusively determine whether services provided were inappropriate, the audit team would need to perform additional audit work at HHS, which was beyond the scope of the current audit. The scope of our audit did not include a review of HHS contracts, how HHS utilized Nahigian Strategies before the awarding of TO 1, and what communications HHS had with CMS to use Nahigian Strategies to carry out Department and CMS initiatives. We will provide information gathered during the audit to HHS for further review.

- CMS awarded a task order to provide the support services necessary for a national integrated multimedia campaign related to open enrollment for Medicare beneficiaries. This task order was subsequently modified to increase funding by \$4.5 million to procure services for a mobile office tour¹³ to advance CMS’s strategic initiatives. Throughout this report, we refer to this task order modification as “TO 2.”
- CMS awarded a task order to obtain technical professional services for developing an agency-wide strategic communications plan in support of CMS’s overall goals, objectives, and initiatives and to integrate the agency’s programs and public education efforts. Throughout this report, we refer to this task order as “TO 3.”

See Appendix D for a timeline of contract actions related to TO 2 and TO 3.

Description of Service Contracts

All contracts awarded under both IDIQ contracts for CMS’s strategic communications strategy were awarded as service contracts. The FAR defines a service contract as a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. The FAR identifies different areas in which a service contract can be used, including communication services.¹⁴

A service contract may be either a nonpersonal or personal services contract:

- A **nonpersonal services contract** is a contract under which the personnel providing the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees (FAR § 37.101).
- A **personal services contract** is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel. This relationship may be created when contractor personnel are subject to relatively continuous supervision and control by a Government officer or employee during contract performance (FAR § 37.104).

¹³ The mobile office tour was intended for CMS to speak directly to Medicare beneficiaries about major initiatives happening in the agency. The tour would have included enrollment fairs, roundtables, and listening sessions, as well as meetings with local officials, stakeholders, and others to advance CMS’s strategic initiatives.

¹⁴ The FAR identifies nine areas as examples where service contracts can be used: (1) maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment; (2) routine recurring maintenance of real property; (3) housekeeping and base services; (4) advisory and assistance services; (5) operation of Government-owned equipment, real property, and systems; (6) communication services; (7) architect-engineering; (8) transportation and related services; and (9) research and development (FAR § 37.101).

The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract (FAR § 37.104(a)).

Although HHS, and in turn CMS, has the authority to use personal services contracts for experts and consultants,¹⁵ the contracts used for strategic communications services were issued under two pre-existing IDIQ contracts, which were not awarded as personal services contracts. Any task orders issued under a pre-existing IDIQ contract would need to align with the nature and type of services covered by the base contract. Both of the pre-existing IDIQ contracts included language prohibiting the performance of personal services.

CMS procured strategic communications services, through nonpersonal services contracts, totaling \$6.4 million. See Table 1 for details.

Table 1: Contracts for CMS Strategic Communications Services

Task Order	Award Date	Performance Period	Awarded/ Obligated	Allocated for Strategic Communications Services	Costs Incurred	Contractor and Subcontractor*
TO 1	6/15/2017	6/15/2017–6/16/2018	\$688,917	\$688,916	\$688,755	Deloitte and Nahigian Strategies
TO 2	9/15/2015	9/15/2015–9/14/2018 [‡]	32,481,490	3,482,312 [^]	3,269,875	Porter Novelli and Nahigian Strategies
TO 3	8/31/2018	9/15/2018–8/31/2019	2,249,952	2,249,952	1,132,279 ^{**}	Porter Novelli and Nahigian Strategies
			\$35,420,359	\$6,421,180	\$5,090,909	
<p>* The subcontractor Nahigian Strategies was used by both Deloitte and Porter Novelli.</p> <p>[‡] For TO 2, the period of performance related to strategic communications services during our audit period was September 15, 2017, through September 14, 2018.</p> <p>[^] CMS modified this contract to add \$4,500,000 for strategic communications services on September 15, 2017, under TO 2. Of this amount, \$1,017,688 was de-obligated on May 4, 2018.</p> <p>^{**} CMS issued a stop-work order on April 3, 2019. As of June 12, 2020, CMS made one additional payment to Porter Novelli for \$387,747, which is included in this amount.</p>						

For TO 1, TO 2, and TO 3, CMS stated that it needed to contract some of its communications services because it did not have the expertise for the work being performed and the projects were short-term. CMS also stated that it was hard to keep its employees full-time on one project and that employees who supervised contractors performed monthly oversight but then had to go back to their regular duties. The CMS Administrator provided additional rationale for

¹⁵ P.L. No. 102-394, § 503.

using specialized expertise during her testimony at an October 23, 2019, congressional hearing.¹⁶ Specifically, the CMS Administrator stated that the need for contractors arose when CMS required “specialized expertise that [CMS] may not have in-house” or when CMS required “some short-term help.” The CMS Administrator stated that she felt that it was “important that the American people understand” the work of CMS. As noted previously in the report, CMS had from 8 to 15 vacant FTEs that it could have used to hire individuals with specialized expertise.

HOW WE CONDUCTED THIS AUDIT

We audited three contracts, totaling \$6.4 million, awarded for strategic communications services during our audit period (June 1, 2017, through April 30, 2019): TO 1, TO 2, and TO 3. To determine whether these contracts were awarded in accordance with Federal statutes, Federal regulations, and HHS (including CMS) policies and procedures, we reviewed task orders and modifications; invoices and deliverables; and documentation maintained in the contract files. Our audit did not assess the allowability of all contract costs; rather, we reported only on questioned costs that came to our attention through reviewing invoices. We also conducted interviews with CMS and HHS officials, contractor personnel, and subcontractor personnel. Additionally, we requested and reviewed emails of select CMS officials for the period December 15, 2016, through September 15, 2018,¹⁷ to obtain any insights regarding CMS’s decision to (1) procure strategic communications services, (2) award the contracts to selected contractors, and (3) use an intra-agency agreement.

Throughout this report, we have changed the names of contractor and subcontractor personnel in keeping with OIG practice to protect the identities of lower-level persons who are not the subject of a particular audit. The pseudonyms are shown in quotation marks.

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

Appendix A contains the details of our audit scope and methodology.

¹⁶ *Sabotage: The Trump Administration’s Attack on Health Care*. Hearing before the U.S. House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, October 23, 2019; hearing record, preliminary transcript. Available at <https://docs.house.gov/meetings/IF/IF02/20191023/110123/HHRG-116-IF02-Transcript-20191023.pdf>. Accessed on January 28, 2020.

¹⁷ We requested emails for a 6-month period before the awarding of each of the three task orders. These periods covered December 15, 2016, through June 15, 2017, for TO 1; March 15 through September 15, 2017, for TO 2; and March 15 through September 15, 2018, for TO 3.

FINDINGS

CMS prepared the required documentation for awarding contracts for strategic communications services in accordance with the FAR. However, CMS (including the CMS Administrator and other senior leaders) did not administer and manage the contracts in accordance with Federal requirements.

Specifically, CMS allowed a subcontractor individual to perform inherently governmental functions, such as making managerial decisions and directing CMS employees. CMS also administered its strategic communications services contracts as personal services contracts. During the performance periods of the service contracts, CMS officials exerted a level of control over the contractors' work that exceeded what is allowed under service contracts; in essence, CMS administered these contracts as if the services had been procured under CMS's statutory authority to contract for experts and consultants.¹⁸ However, because CMS did not use that authority to award the contracts, CMS should have managed the contracts with greater reliance on contracting officers and CORs, and with less day-to-day supervision by other CMS officials. Obtaining personal services by contract, rather than by direct hire, circumvents the civil service laws that require hiring Federal employees under competitive appointment or other allowable procedures.¹⁹ We also found that CMS did not comply with FAR requirements in managing contract deliverables and approving the use of a subcontractor, did not maintain complete working files for all three contracts, and paid some questionable costs.

CMS ALLOWED A SUBCONTRACTOR INDIVIDUAL TO PERFORM INHERENTLY GOVERNMENTAL FUNCTIONS ON THE STRATEGIC COMMUNICATIONS SERVICES CONTRACTS

The FAR states that contracts must not be used for the performance of inherently governmental functions (FAR § 7.503(a)).²⁰ The FAR defines an inherently governmental

¹⁸ P.L. No. 102-394, § 503.

¹⁹ The FAR does not establish a materiality threshold when assessing the occurrence of (1) inherently governmental functions, (2) the six descriptive elements characterizing personal services, or (3) contract costs that may be questionable in nature.

²⁰ The topic of inherently governmental functions has been of interest to both the legislative and executive branches, particularly within the last decade. In 2009, section 321 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (P.L. No. 110-417) directed the Office of Management and Budget (OMB) to review existing definitions of "inherently governmental function" and develop a "single consistent definition" that would address any deficiencies in existing definitions. President Obama's March 4, 2009, "Memorandum to the Heads of Executive Departments and Agencies – Subject: Government Contracting," similarly charged OMB with clarifying when it is "appropriate" to contract out work. In response, OMB's Office of Federal Procurement Policy issued a policy letter to provide guidance to Federal agencies on managing the performance of inherently governmental and critical functions. The policy letter advises agencies that although contractors should not perform inherently governmental functions, they may perform functions that are closely associated with governmental functions. This allows an agency to benefit from a contractor's knowledge and skills without the contractor intruding on the roles of Federal employees. The policy letter also recognizes that effective risk management for contractors performing inherently governmental functions can be achieved if agencies are

function as follows: “. . . a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government.”²¹ The FAR also provides a list of examples of functions considered to be inherently governmental or that must be treated as such²² and as closely related to inherently governmental functions.²³ In particular, the direction and control of Federal employees is inherently governmental,²⁴ and contractors participating in any situation where it might be assumed that they are agency employees is closely related to inherently governmental functions.²⁵

From our email review, we found that CMS allowed “Brian Smith,” a subcontractor individual, to perform inherently governmental functions on the strategic communications services contracts, which included making CMS managerial decisions and instructing CMS employees on specific contract tasks. “Brian Smith” was also authorized to “clear social and media responses” in the absence of the CMS Deputy Administrator and Deputy Chief of Staff.²⁶

Below are further details for these examples,²⁷ demonstrating how CMS allowed “Brian Smith” to perform an inherently governmental function that required either the exercise of discretion in applying Government authority or making value judgments in making decisions for the Government (a list of examples and details are in Appendix E):

- In an email dated July 6, 2018, the Acting Director and Deputy Director of the CMS Media Relations Group contacted “Brian Smith” regarding a reporter’s request to

mindful of their responsibility to give special consideration to Federal employee performance and effectively apply special management attention when contractor performance is determined to be appropriate. (76 Fed. Reg. 56227 (effective Oct. 12, 2011))

²¹ FAR § 2.101.

²² FAR §§ 7.503(c)(1) through (20).

²³ FAR §§ 7.503(d)(1) through (19).

²⁴ FAR § 7.503(c)(7).

²⁵ FAR § 7.503(d)(13).

²⁶ The CMS Deputy Administrator and Deputy Chief of Staff held this position from August 2018 to November 2019. As of November 2019, the title has changed to CMS Deputy Administrator and Chief of Staff. From January to March 2017, this employee held the position of Senior Advisor at HHS Office of the Secretary, and from March 2017 to August 2018, held the position of CMS Deputy Chief of Staff.

²⁷ We did not reach a conclusion based solely on these two email examples. Although inherently governmental functions and personal services are each prohibited by the FAR for service contracts, activities identified may not be mutually exclusive to each prohibition. Email examples we use later in the report for personal services can also be used to show “Brian Smith” performing functions that are closely related to inherently governmental functions.

interview the CMS Administrator about changes to Medicare Advantage programs. “Brian Smith” informed a CMS employee that the CMS Administrator would be interested in doing the interview and instructed two additional CMS employees to begin working on various preparations, such as scheduling and preparing talking points. In later emails, “Brian Smith” made a management decision on how long the interview should be, advised CMS employees on who should be involved in preparations, and recommended that CMS staff draft responses to the reporter’s questions. The direction and control of CMS employees by “Brian Smith” was inherently governmental.

- In an email dated June 29, 2018, the CMS Deputy Administrator and Deputy Chief of Staff stated to CMS’s Office of Communications staff that she would be out of the office until July 10 and requested that Office of Communications staff work with the CMS Principal Deputy Administrator for Policy and Operations and “Brian Smith” until she came back. The CMS Deputy Administrator and Deputy Chief of Staff also indicated that the CMS Principal Deputy Administrator for Policy and Operations or “Brian Smith” “can clear social and media responses.” This type of responsibility granted to “Brian Smith”—that was equal in nature to the same responsibility provided to a CMS senior leader—suggested that “Brian Smith” had the authority to make CMS management decisions and thus was performing an inherently governmental function.

Although several contributing factors allowed “Brian Smith” to perform inherently governmental functions, the primary cause was the familiarity between the CMS Administrator and “Brian Smith.” Specifically, the two had a working relationship before the contractual relationship began. As mentioned later in this report, the CMS Administrator had worked with “Brian Smith” before CMS awarded contracts for strategic communications services on which “Brian Smith” worked. In addition, according to the CMS Director of the Strategic Marketing Group, the CMS Office of the Administrator trusted “Brian Smith,” and many tasks were assigned to him. As such, the familiarity between the CMS Administrator and “Brian Smith” created an environment that promoted the assignment of inherently governmental functions and tasks to “Brian Smith.”

Creating an environment in which Federal employees and contractors work closely together to achieve similar goals is appropriate when effectively managed. However, it could lead to the risk that contractors will perform services like those of Federal employees. If that risk is not managed appropriately, contractor personnel could perform inherently governmental functions, which is prohibited by the FAR. As noted previously in the report, CMS had from 221 to 234 FTEs dedicated to Office of Communications functions, with 8 to 15 vacant FTEs. To prevent contractors from performing inherently governmental functions, CMS could have used the vacant FTEs to hire individuals with specialized expertise. Furthermore, when contractors provide services that closely support inherently governmental functions, there is an increased risk of loss of Government control over and accountability for mission-related policy and program decisions. For example, during our review of emails, we identified an instance when “Brian Smith” retweeted an opioid-related post from the CMS Administrator’s Twitter handle, @SeemaCMS, which CMS had not intended to be retweeted. While CMS personnel were aware

not to retweet opioid-related posts from @SeemaCMS, this instruction had not been communicated to “Brian Smith.” This example illustrates the risk of loss of Government control when contractors provide services that closely support inherently governmental functions and are not managed appropriately, as “Brian Smith” had the ability to post to the @SeemaCMS Twitter account without prior approval. The @SeemaCMS Twitter handle at the end of the tweet identified CMS to the intended audience as the source of the information. By allowing “Brian Smith” to post tweets from the @SeemaCMS Twitter account, CMS effectively gave control of the CMS Administrator’s messaging on Twitter to “Brian Smith.”

CMS ADMINISTERED STRATEGIC COMMUNICATIONS SERVICES CONTRACTS AS PERSONAL SERVICES CONTRACTS

Although CMS prepared required documentation for the awarding of strategic communications services contracts in accordance with the FAR,²⁸ based on the totality of the information provided, CMS administered all three service contracts as personal services contracts. Although HHS, and in turn CMS, has the authority to use personal services contracts for experts and consultants,²⁹ the contracts used for strategic communications services were issued under two pre-existing IDIQ contracts, which were not awarded as personal services contracts. Any contracts issued under a pre-existing base contract would need to align with the nature and type of services covered by the base contract. Both of the pre-existing IDIQ contracts included language prohibiting the performance of personal services, as all three service contracts were awarded as nonpersonal services contracts.

By interacting with the contractors under the services contracts as if they had been contracted to provide personal services, CMS officials exerted a level of control over the contractors’ work that was inappropriate for a nonpersonal services contract. For a nonpersonal services contract, personnel providing the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees. In combination with the design of the Statements of Work (SOWs), the way in which CMS administered the strategic communications services contracts suggests the need for services to be procured under personal services contracts. However, CMS did not use its authority to contract for personal services and instead issued services contracts under the IDIQ. As a result, CMS improperly administered the contracts and created improper employer-employee relationships between CMS and the contractors.

²⁸ For TO 2 and TO 3, CMS developed the required acquisition plans (see Figure 1, step 2) and solicitation documents (see Figure 1, step 4) for the awarding of contracts. Additionally, the services procured were within the scope of the CMS IDIQ contract. For TO 1, CMS provided documentation to support its justification. CMS also prepared the Statement of Work (SOW) for TO 1, and the services procured were within the scope of the existing HHS IDIQ contract.

²⁹ P.L. No. 102-394, § 503.

Based on our analysis, we found that CMS’s administration of these strategic communications services contracts (1) created the appearance of an employer-employee relationship between the Government and contractor personnel and (2) met five of the six descriptive elements outlined in the FAR that characterize personal services contracts. Both of these areas are further discussed in the following sections.

CMS Created the Appearance of an Employer-Employee Relationship Between the Government and Contractor Personnel

Federal Requirements

The FAR defines a personal services contract as a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees (FAR § 2.101).³⁰ A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel. The FAR further explains that an employer-employee relationship under a service contract occurs when, as a result of the contract’s terms or the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee (FAR § 37.104(c)(1)).

For nonpersonal services contracts, an inappropriate employer-employee relationship may develop through the actions of Government personnel, such as those in supervisory roles (e.g., agency senior management and program managers). When contractor personnel are continuously supervised by a Government employee, as though the contractor employee is a civil servant employee, the contract can have characteristics of a personal services contract. An example of how a nonpersonal services contract might improperly expand into a personal services area includes when contractor personnel fall under the direct supervision and control of agency management. Such control is evidenced by the Government employee, for example, specifying the contractor personnel’s duties. Although the Government is responsible for oversight of its contracts, Government employees who are not officially appointed as the contracting officer or COR must avoid direct supervision of contractor employees to fill the Government’s contract requirements. Government personnel can work directly with the contractor and assign tasks; however, those tasks would need to be communicated to the contracting officer or COR in a timely manner to ensure appropriate contract management.

³⁰ The inherent risks in using contractors and the difficulty in separating contractor employees from Government employees have been reported by the Government Accountability Office (GAO). See GAO, *Defense Contracting: Army Case Study Delineates Concerns with Use of Contractors as Contract Specialists*, GAO-08-360 (Washington, D.C.: Mar. 26, 2008). Importantly, such risks include loss of Government control over and accountability for mission-related policy and program decisions. *Id.* at 1. Additionally, GAO reported that when the line separating contractor personnel from Government employees is not clear, it can result in the appearance of contractor employees speaking for the Government. *Id.* at 4.

Contract Terms Required “Relatively Continuous Supervision” by CMS

The terms of the contracts required relatively continuous supervision and control of contractor personnel by CMS employees, leading to an employer-employee relationship under a service contract, which is prohibited by the FAR. For instance, the TO 2 and TO 3 SOWs required CMS to provide input and approval throughout the performance of each task, as well as act as the “final reviewer” of media plans, communications plans, and associated deliverables. Further, given the importance of the communications tasks performed under the contracts, CMS created the need for Government officials to exercise continuous supervision and control over the contractor. Although TO 1 did not specifically include this language, we identified instances during our email review of communications evidencing employer-employee relationships³¹ in which the CMS Administrator directly assigned tasks to “Brian Smith.” Two examples follow:

- In an email dated August 20, 2017, the CMS Administrator stated to “Brian Smith” regarding a speech: “Need a lot of work. Did not include hardly anything on Medicare and is missing many of the items that we discussed. Please get with [CMS Senior Advisor to the Administrator] and also review the outline I gave you on Friday. Need draft by the end of day. You should get with technical people asap.”
- In an email dated September 13, 2017, the CMS Administrator stated to “Brian Smith” and the CMS Deputy Administrator and Deputy Chief of Staff: “Need this [calendar] no later than tomorrow at noon. I really need to know where we are on rollouts, strategic plan etc. I am finding it difficult to do my job without this.”

In addition, we noted that the CMS Deputy Administrator and Deputy Chief of Staff directly assigned tasks to “Brian Smith,” giving the appearance of an employer-employee relationship. For example, the CMS Deputy Administrator and Deputy Chief of Staff requested that “Brian Smith” take the lead to edit a draft statement related to Hurricane Harvey in Texas. In another example, the CMS Deputy Administrator and Deputy Chief of Staff requested that “Brian Smith,” along with two other CMS senior leaders, prepare a proposed rollout of the CMS Administrator’s priority projects that would be communicated to CMS employees.

Government personnel who are not officially appointed as the contracting officer or COR may exert inappropriate control over contractor personnel through their day-to-day interactions with the contractors. Based on our review of emails between CMS senior leaders and “Brian Smith,” neither the contracting officer nor the COR was included on these emails. If the contracting officer and the COR are not included on the emails, they may not be able to perform their oversight duties and ensure that tasks assigned to the contractors fall within the scope of the contract.³²

³¹ FAR § 37.104(c)(1).

³² The COR is required to thoroughly review and approve or reject contractor invoices. By directly assigning tasks to the contractor and not communicating those assignments to the COR, CMS prevented the COR from effectively managing the contract, as the COR would not be aware of the assigned tasks and allowable costs.

Further, we found that CMS's Office of the Administrator and Office of Communications directly assigned multiple tasks to Deloitte instead of communicating those tasks through the COR, as required by the contract for TO 1.³³

In July 2017, Deloitte informed the CMS COR that it had "gotten multiple [23] ad-hoc/quick turnaround requests." The CMS COR determined that within 22 days of awarding TO 1, approximately 20 percent of labor hours had been used to fulfill the 23 ad hoc requests and had not been used for procured services related to "calendar and messaging." At the time of the communication in July 2017, the CMS COR had yet to see any deliverables related to the 23 ad hoc requests.

The COR is responsible for communicating technical direction to the contractor verbally or in writing. Verbal direction should also be communicated by the COR in writing within 5 days, as required by the terms and conditions of the IDIQ contract.

CMS effectively condoned this practice of officials assigning tasks directly to the contractor by accepting the ad hoc services and disregarding the requirement that requests for tasks flow through the COR.³⁴ Because ad hoc requests were performed without COR consultation and approval, the COR was unable to accurately monitor and administer specified aspects of contractor performance, including whether the performance met the standards set forth in the contract and whether the services fell within the scope of performance. As such, CMS placed the Government at risk by creating a liability for services that may have been outside of the scope of the contract.

CMS's Administration of Strategic Communications Services Contracts Met All but One of the Federal Acquisition Regulation's Descriptive Elements Characterizing Personal Services Contracts

Federal Requirements

The FAR identifies six descriptive elements that, along with other definitional and descriptive sections of FAR part 37, should be considered when assessing whether a contract is personal in nature (FAR §§ 37.104(d)(1) through (6)), including whether contract services were performed

³³ For TO 1, there were seven deliverables on the SOW to be completed by Deloitte, including the strategic calendar and messaging plans. The SOW described the strategic calendar as a document to "assist in the development and coordination of strategic calendars that streamline for each agency the engagement and leveraging of key outside newsmakers, such as industry groups and patient advocacy networks." The messaging plans were intended to "assist in the development and coordination of messaging plans for key priorities."

³⁴ From our review, it appeared that none of the invoices submitted for this work were rejected, and payment was provided to Deloitte.

onsite at Federal locations and whether principal tools and equipment were furnished by the Government. (The complete list of elements is shown in Figure 2.)

Figure 2: Descriptive Elements for Personal Services Contracts Identified in CMS Strategic Communications Services

Identified	Descriptive Elements That Characterize Personal Services Contracts (FAR § 37.104(d))
✓	1. Contract services performed onsite at Federal locations
✗	2. Principal tools and equipment that are furnished by the Government
✓	3. Contract services that are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission
✓	4. Contracts that provide comparable services, meeting comparable needs, that are performed in the same or similar agencies using civil service personnel
✓	5. Contracts for which the need for the type of service provided can reasonably be expected to last beyond “1 year”
✓	6. Contracts in which the inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to (1) adequately protect the Government’s interest, (2) retain control of the function involved, or (3) retain full personal responsibility for the function supported in the duly authorized Federal officer or employee

Five of the Six Descriptive Elements Outlined in the Federal Acquisition Regulation Were Present in the Strategic Communications Services Contracts

CMS’s administration of the strategic communications services contracts met five of the six descriptive elements outlined in the FAR that characterize personal services contracts.³⁵ An individual element does not conclusively indicate personal services; instead, the FAR directs that the elements are a guide and therefore we considered the six descriptive elements in the aggregate.³⁶

Through reviewing emails and analyzing documentation, we found the presence of five of the six descriptive elements outlined in the FAR. Figure 2 summarizes our analysis of whether CMS’s administration of the strategic communications contracts included the six FAR descriptive elements that characterize personal services contracts. As detailed below, we considered and applied in aggregate the six descriptive elements outlined by the FAR to assess whether the totality of the circumstances indicated that CMS administered the contracts in a manner characteristic of personal services contracts.

³⁵ From our email review and audit analysis, the FAR element that was not present for the strategic communications contracts we reviewed was element 2, “principal tools and equipment furnished by the Government.” We discuss FAR element 2 later in this report.

³⁶ The FAR directs that the descriptive elements should be used as a guide in assessing whether a proposed contract is personal in nature; however, the FAR does not direct that the presence of one element equals a personal services contract or that all elements must be present for a personal services contract. We utilized a conservative approach in applying auditor’s judgment and prudent due diligence to assess whether the totality of the circumstances indicated that CMS administered the contracts in a manner characteristic of personal services contracts.

Contract Services Were Performed Onsite at Federal Offices (Element 1)

Contract services performed onsite at Federal locations is a descriptive element that characterizes personal services contracts (FAR § 37.104(d)(1)).

From our review of the TO 1 SOW, we found language that specifically stated that “work will be conducted at the [G]overnment site” and “at the contractor site.”³⁷ In addition, during our interviews, multiple CMS employees separately confirmed that “Brian Smith” worked at CMS offices in Washington, DC, 4 to 5 days per week. CMS stated this occurred from the awarding of TO 1 through the other two strategic communications services contracts (TO 2 and TO 3) until CMS issued the stop-work order in April 2019 for TO 3. Similarly, we learned that for TO 2 and TO 3, “Linda Nelson,” an employee of Porter Novelli, also worked at the CMS offices in Washington, DC, until the stop-work order was issued.

CMS employees stated that neither “Brian Smith” nor “Linda Nelson” was assigned designated office space; rather, each individual worked at a vacant space, office, or cubicle when onsite. The FAR descriptive element related to performing contractor services onsite does not solely relate to a contractor having designated space at the Federal agency but also would include a determination as to whether the contract services were performed onsite and on a regular basis, regardless of the existence of designated space. This was the case for certain CMS contractor and subcontractor personnel.

Principal Tools and Equipment Were Not Furnished by CMS (Element 2)

Principal tools and equipment furnished by the Government is a descriptive element that characterizes personal services contracts (FAR § 37.104(d)(2)).

During our audit, CMS officials stated that CMS did not furnish equipment to contractors and subcontractors or their staff, which was supported by the language that was in each of the three contracts and required the contractor to furnish all necessary equipment. We also did not identify the existence of this element during the performance period of the contracts. Although CMS did not directly furnish physical equipment, two individuals from Nahigian Strategies were furnished with the user ID and password to one of CMS’s Twitter accounts to perform contract tasks and were authorized by CMS to post tweets on behalf of CMS.

Contract Services Were Directly Applied to CMS Mission (Element 3)

Contract services that are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission is a descriptive element that characterizes personal services contracts (FAR § 37.104(d)(3)).

³⁷ We did not find similar language related to TO 2 and TO 3.

From our email and documentation review, we found that the contract language for TO 1, TO 2, and TO 3 outlined communications services to be procured that would require the integration of CMS's programs and public education efforts.

For example, TO 3 SOW stated the following:

. . . the purpose of this task order is to obtain technical professional services for the development of an agency wide strategic communications plan in support of CMS' overall goals, objectives and initiatives New communications plans will position CMS to be more proactive and strategic when communicating with consumers, media, social media, and stakeholders about CMS' programs and services. As these new initiatives continue to take shape in 2019, the overarching strategic communications plan will require refinement.

Similar language was also included in TO 2 and in the contract that CMS used for TO 1.

In addition, we found several examples of emails in which CMS senior leaders requested that Nahigian Strategies work on tasks that applied directly to the integral effort of CMS in furthering its mission. The following are two illustrative examples related to contract services provided under TO 1:

- In an email dated July 17, 2017, the then CMS Chief of Staff stated to Nahigian Strategies that the CMS Administrator would like the subcontractor to "take master on the draft CMS strategic plan and to edit as you [Nahigian Strategies] see fit." The CMS strategic plan provides a framework of how to advance CMS priority projects and allows CMS to further the President's Agenda of providing quality, affordable health care.
- In an email dated August 16, 2017, the CMS Administrator tasked "Brian Smith" and the CMS Deputy Administrator and Deputy Chief of Staff with developing a plan to identify resources for some upcoming major program initiatives. Specifically, the CMS Administrator stated:

Need for both of you to identify some resources to help us on writing. We have some major items coming up (drug pricing, CMMI and reg reform). I would like to see a plan asap. I have heard you reference it, but have not seen it. Can we plan on having a meeting early next week with the plan? Also, per the writing resources, we need to be more technical in our approach and focus more on health. Going forward we need to have the input of subject matter experts. At a minimum we should be involving the senior policy advisors on reviewing remarks, etc.

In both examples, the types of tasks assigned to Nahigian Strategies would generally be performed by Federal employees, who would have the breadth and knowledge of CMS's programmatic operations and would be best positioned to identify resources to carry out major

program priorities integral to CMS’s mission. From March 31, 2017, through June 30, 2019, the CMS Office of Communications had from 221 to 234 filled FTE positions, with only 8 to 15 vacant FTEs, that could perform core agency functions. Using contractors to perform core agency functions,³⁸ such as developing CMS’s strategic plan, would be an inherently governmental function,³⁹ which is an element that characterizes a personal services contract.

Comparable Services Were Performed Within the Office of Communications (Element 4)

Contracts that provide comparable services, meeting comparable needs, that are performed in the same or similar agencies using civil service personnel is a descriptive element that characterizes personal services contracts (FAR § 37.104(d)(4)).

CMS’s Office of Communications provides overall communications support for CMS, including media support to the CMS Administrator. The CMS Office of Communications works with other CMS components to develop strategic internal communications plans for significant CMS issues. Specifically, the CMS Office of Communications develops, manages, and coordinates marketing campaigns for CMS programs, as well as plans, implements, tests, and assesses a variety of communication and educational activities from the development to the testing of a product. Further, the CMS Office of Communications serves as CMS’s focal point for internal and external strategic and tactical communications, providing leadership for CMS in the areas of customer service; website operations; traditional and new media, including web initiatives, such as social media supported by innovative, increasingly mobile technologies; media relations; call center operations; consumer materials; public information campaigns; and public engagement. Lastly, the CMS Office of Communications regularly prepares and edits speeches, press releases, and factsheets; implements digital marketing campaigns; and advises the CMS Administrator on all activities related to the media.

From our review of TO 1, TO 2, and TO 3, we found that the contractor services procured were comparable to the responsibilities carried out by five of the eight groups⁴⁰ within the CMS Office of Communications, as shown in Table 2 on the following page.

³⁸ Although the FAR does not define what constitutes “the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission,” we determined that performing agency core functions would meet this established criteria.

³⁹ Although personal services and inherently governmental functions are each prohibited by the FAR for service contracts, an activity may violate one or both prohibitions.

⁴⁰ We did not identify contract services comparable to those performed by three CMS Office of Communications groups—Integrated Communications Management Staff, Call Center Operations, and Creative Services. For a description of each of the eight CMS Office of Communications groups, see the “CMS Components” section of the report.

Table 2: Comparison of Contractor Tasks for Strategic Communications Services With the CMS Office of Communications' Responsibilities

CMS Office of Communications Group	Group's Operational Responsibility	Tasks Procured for CMS Strategic Communications Services Contracts
Media Relations	<p>Serves to promote through the media the work performed by CMS, in maintaining and improving the Nation's health care. Collaborates with the CMS Administrator, CMS components and the Department, and White House press offices in (1) strategic messaging, (2) developing relevant materials, and (3) responding to inquiries from a broad array of news media in furtherance of CMS goals</p> <p>Prepares and edits materials (including speeches about CMS and its policies, actions, and findings) and provides them to the public through print and broadcast media</p>	<p>Develops new communications plans that will position CMS to be more proactive and strategic when communicating with consumers, media, social media, and stakeholders about CMS's programs and services</p> <p>Develops "Earned Media Plan," identifying markets to target, tactics, and justification for recommendations</p> <p>Provides speechwriting support</p>
Strategic Marketing	Develops, manages, and coordinates traditional and digital marketing campaigns to heighten awareness of CMS programs	CMS Messaging Architecture: develops and coordinates an overarching Messaging Architecture that highlights key messages for key audiences
Web and New Media	Explores and examines the realm of social media to incorporate emerging technologies into websites to better educate and inform beneficiaries and stakeholders	Oversees social media strategy and recommendations
Partner Relations	Manages and coordinates staffing of key conferences	Manages and coordinates staffing for various events
Business Operations Staff	Provides support to leadership in their strategic and business planning efforts, including operating plan management, document management, and development of cross-cutting operational tools and tactics	Develops strategic communications plans: establishes goals, defines targets and messaging, identifies opportunities for public interaction, and recommends social media tactics and analysis

As an illustrative example, on August 28, 2018, the CMS Deputy Director of the Office of Communications provided lists of tasks to be assigned to Porter Novelli and to Nahigian Strategies under TO 2. The tasks included “writing social media,” “oversee social media strategy and recommendations,” speech writing, “National media pitching for Administrator,” and coordinating special events. These tasks are similar in nature to the types of services that CMS’s Office of Communications employees perform.

Additionally, CMS hired an employee of Nahigian Strategies as one of its employees. As a CMS employee, this individual performed services comparable to those the individual performed as an employee of Nahigian Strategies. Based on our review of the individual’s resume and the CMS position description, the individual was required to develop and advise on marketing strategies, plan and develop marketing campaigns, and manage social media. In addition, during July and August 2017, CMS explored bringing on “Brian Smith” as a Federal employee, but that did not happen. Instead, he continued to perform work for CMS under TO 1, TO 2, and TO 3.

Need for the Type of Service Provided Can Reasonably Be Expected To Last Beyond 1 Year (Element 5)

Contracts for which the need for the type of service provided can reasonably be expected to last beyond 1 year is a descriptive element that characterizes personal services contracts (FAR § 37.104(d)(5)).

CMS contracted for a continuous need for strategic communications services from June 15, 2017, to August 31, 2019, using multiple contracts. Specifically, CMS fulfilled its needs for strategic communications services through TO 1, which was awarded on June 15, 2017, and had a performance period through June 16, 2018.⁴¹ Although TO 1 was ongoing, CMS modified one of its contracts, TO 2, on September 15, 2017, to continue with similar strategic communications services through September 14, 2018.⁴²

CMS explained that it decided to modify an existing task order, creating TO 2 after TO 1 was already awarded, because the “work evolved to a listening tour that involved the Administrator, CMS Regional offices and others in the Office of Communications.” At that point, CMS decided that using its own contracting vehicle was best from a management perspective. On

⁴¹ TO 1 had a performance period from June 15, 2017, through June 16, 2018, which was 1 year and 2 days. Although severable services (i.e., help-desk support or janitorial services) can cross fiscal years, they may not exceed a period of performance of 12 months. However, work was not performed or billed for on those 2 days.

⁴² As discussed later in the report, TO 1 and TO 2 had overlapping performance periods from September 15, 2017, through June 16, 2018, for similar services procured related to a mobile bus tour, social media reports, strategic plans, and messaging plans. Further, CMS initially used TO 1, rather than TO 2, to procure the necessary strategic communications services. During an interview with the Office of Communications, CMS officials stated: “TO 2 was campaign specific strategic communications for Medicare open enrollment. CMS did not feel like they had [a] contract in place that was appropriate.”

August 31, 2018, CMS then awarded TO 3, with a period of performance from September 15, 2018, through August 31, 2019, as a “logical follow-on”⁴³ to continue to fulfill the same strategic communications services needs procured under TO 2.

Additionally, as mentioned earlier in the report, each of these three task orders used to procure strategic communication services was awarded under an IDIQ contract. Each IDIQ contract included option years, which would allow for CMS to extend the length of time services are procured.⁴⁴ CMS’s use of an IDIQ contract indicates that CMS recognized that the need for communications services was recurring. Further, CMS was aware of vacant FTEs in the Office of Communications, and the need for specialized expertise. As a result, CMS should have reasonably known these services were a recurring need as they were awarding contracts for communications services that spanned more than 1 year and did not have the necessary staffing to perform the strategic communications services procured.

Collectively, CMS procured strategic communications services for more than a 2-year period, from June 15, 2017, through August 31, 2019, which was beyond 1 year and an element that characterizes a personal services contract. Based on our analysis of the three contracts, CMS should have reasonably known that its needs for strategic communications services would exceed 1 year when it modified TO 2 to include strategic communications services.

The Inherent Nature of Strategic Communications Services Required Close Government Direction or Supervision (Element 6)

A descriptive element that characterizes personal services contracts is that the inherent nature of the service or the manner in which it is provided reasonably requires, directly or indirectly, Government direction or supervision of contractor employees to (1) adequately protect the Government’s interest, (2) retain control of the function involved, or (3) retain full personal responsibility for the function supported in a duly authorized Federal officer or employee (FAR § 37.104(d)(6)).⁴⁵ The FAR also requires the Government to ensure sufficient surveillance of contractor performance for time-and-materials contracts (FAR 16.601(c)(1)).⁴⁶

⁴³ TO 3 was described in the acquisition plan as a “logical follow-on” to the original task order.

⁴⁴ An IDIQ contract is used to procure services for which a Federal agency is unsure of the length of time or quantity of services required; it allows the agency to retain technical expertise for an indefinite period. IDIQ contracts are utilized when an agency cannot determine, above a specified minimum, the precise quantities of services it will require during the contract period. See FAR subpart 16.5—Indefinite-Delivery Contracts.

⁴⁵ Additionally, attributes of this element closely align with inherently governmental functions (FAR § 7.503). Although personal services and inherently governmental functions are each prohibited by the FAR for service contracts, activities identified may not be mutually exclusive to each prohibition.

⁴⁶ Each of the task orders was issued as a time-and-materials contract.

From our review of contract documents, we determined that CMS recognized the need for heightened Government control.⁴⁷ CMS specifically expressed in the SOWs for TO 2 and TO 3 its role in oversight of the contractor, including providing input on and approval of all stages of development. The “Requirements” section of each of the SOWs states:

throughout the entire task order, CMS will provide input, approve all stages of development and act as final reviewer of all creative, media plans and associated deliverables. As such, the Contractor shall be required to meet regularly with other contractors and subcontractors and CMS staff. As directed by CMS, the Contractor shall also collaborate with the other complementary campaigns and its applicable contractors for national campaign efforts that target specific populations.

Although TO 1 did not specifically identify the need for regular meetings between CMS and the contractor, Deloitte documented weekly meetings with CMS on its status reports submitted to CMS. In addition, the acquisition plan for TO 3 also stated that there would be substantial Government oversight during task order performance, a characteristic of a personal services contract.

From our email review, we found instances related to TO 1 that illustrated the contract services required Government direction from CMS, either indirectly or directly, to adequately protect CMS’s interests and retain control of the function involved, a characteristic of a personal services contract. For example, the email exchange below illustrates that the nature of the services provided directly related to messaging CMS’s core mission activities and thus required Government direction from CMS.

- In an email dated August 18, 2017, “Brian Smith” emailed the CMS Administrator a draft regulatory blog post and stated “for your review.” The CMS Administrator subsequently sent this blog post to the CMS Principal Deputy Administrator for Policy and Operations for her review. She responded: “. . . [T]he tone was far too strident with respect to the all regulations are bad [and] all providers are good language. We need to reduce burden, but we are a regulatory agency so you need to still show regulations (in moderation) are important.”

⁴⁷ GAO has recognized the inherent tension existing among the Government’s (1) responsibility to refrain from and not exercise relatively continuous supervision and control over contractor employees under FAR § 37.104, (2) duty to ensure sufficient surveillance of contractor performance for time-and-materials contracts per FAR § 16.601(c)(1), and (3) obligation to provide enhanced oversight when contracting for functions that closely support inherently governmental functions. FAR § 7.503(d) and FAR § 37.114(b). GAO found that these types of risks must be mitigated to ensure that the Government does not lose accountability over policy and program decisions. See GAO, *Defense Contracting: Army Case Study Delineates Concerns with Use of Contractors as Contract Specialists*, GAO-08-360 (Washington, D.C.: Mar. 26, 2008).

Similarly, in another example, we identified an email that illustrated that the contractor reasonably required CMS to provide an increased level of Government direction, as well as CMS's need to retain control of assigned tasks.

- In an email dated August 15, 2017, the CMS Administrator responded to an email from "Brian Smith," who provided edits to a different draft blog post related to the "health care system." Specifically, the CMS Administrator stated: "[I]ts still sort of trite and doesn't say much, just sort of rah rah health care system." She requested that "Brian Smith" add more policy to "bolster it up" or "tie it to the bill and indicate how our health system needs certainty."

Under a nonpersonal services contract, contractor personnel are expected to perform activities on their own initiative and exercise professional judgement and discretion in making decisions and recommendations regarding the completion of their work. However, as illustrated by these examples,⁴⁸ the Federal Government exerted heightened control, directly or indirectly, to adequately protect the Government's interest or retain control of the function involved.

Based on the totality of the information we reviewed and our overall assessment of the six FAR elements that characterize personal services contracts, we conclude that CMS administered all three service contracts in a manner consistent with personal services contracts, thereby violating the terms of the IDIQ contracts prohibiting their use for personal services. The administration of strategic communications contracts as personal services contracts creates risks that the Government needs to consider and manage.⁴⁹ One risk is the cost to the Government of hiring contractors rather than Government personnel. Specifically, this risk includes not only cost considerations but also unknown liabilities.⁵⁰ Obtaining personal services

⁴⁸ For these examples, neither the contracting officer nor the COR was included on the emails. This may have hindered the ability of the contracting officer and the COR to perform their oversight duties and to ensure that tasks assigned to the contractors fell within the scope of the contract.

⁴⁹ CMS is statutorily authorized to procure personal services contracts, which is an exception to the FAR prohibition on personal services. (See FAR § 37.104(b); P.L. No. 102-394, § 503.) CMS did not use that authority; instead, CMS issued task orders on an existing services IDIQ contract and administered the task orders as though awarded under its statutory authority to procure personal services contracts.

⁵⁰ Federal courts and the Equal Employment Opportunity Commission (EEOC) have long permitted contractor employees to sue Federal Government agencies for employment discrimination claims, even without a formal employment relationship between the contractor employee and the Federal Government. See *Redd v. Summers*, 232 F.3d 933, 936 (D.C. Cir. 2000); *Park v. Dep't of the Army*, EEOC Appeal No. 01A10015 (Sept. 27, 2001). Where the decisions find that the Federal Government is a contractor employee's joint employer, the contractor employees are deemed *de facto* Government employees when their employment rights are violated. For instance, the EEOC has found that a Federal agency will qualify as a joint employer of a contractor if the agency has the requisite means and manner of control over the individual's work, regardless of whether the contractor individual is on the Federal payroll. See generally, *Baker v. Dep't of the Army*, EEOC Appeal No. 01A45313 (Mar. 16, 2006). Therefore, a broad range of remedies is available to contractors for employment discrimination arising from work on a Federal contract, including, among others, backpay, reinstatement, and attorneys' fees. See, e.g., 42 U.S.C. § 2000e-16.

by contract, rather than by direct hire, circumvents civil service laws⁵¹ that require hiring Federal employees under competitive appointment or other allowable procedures. Another risk is the loss of Government control over and accountability for mission-related policy and program decisions, which may increase vulnerability to waste, fraud, or abuse.

Factors That Contributed to the Appearance of Strategic Communications Services Contracts as Personal Services Contracts

Two factors contributed to the appearance of strategic communications services contracts as personal services contracts. First, the contractor had direct access to CMS senior leadership, which in part, created the scenario where contractors and subcontractors were subject to the relatively continuous supervision and control of a Federal employee and participated in situations that had the appearance of an employer-employee relationship. Second, the CMS Administrator, CMS Deputy Administrator and Deputy Chief of Staff, and other CMS officials had either previously worked in the private sector with “Brian Smith” or had recommended “Andy Tyler,” who later became a subcontractor of Deloitte, and “Sue Jones,” who later became an employee of Porter Novelli, for the strategic communications services contracts.

“Brian Smith’s” Former Relationship With the CMS Administrator

“Brian Smith” worked at the CMS Administrator’s previously owned consulting firm (SVC Inc.), which the CMS Administrator founded in 2001. He began working with Nahigian Strategies on March 5, 2017, after being introduced during the confirmation hearing preparation for the CMS Administrator.⁵² According to the CMS Director of the Strategic Marketing Group, “Brian Smith” regularly attended meetings with the CMS Administrator and her staff and often relayed information and direction to CMS employees that the CMS Administrator had directly communicated to him.

⁵¹ FAR § 37.104(a).

⁵² All executive branch employees are subject to the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635. Pursuant to 5 CFR § 2635.502, an employee must take appropriate steps to avoid an appearance of loss of impartiality in the performance of her official duties. According to the HHS Ethics Division, the CMS Administrator completed ethics training on March 15, 2017, which covered the Standards of Ethical Conduct and impartiality provisions. We inquired with the HHS Ethics Division if any impartiality concerns were raised regarding “Brian Smith’s” former relationship with the CMS Administrator. The HHS Ethics Division did not have all the facts to make such a determination during our audit. OIG plans to conduct followup at a later date.

CMS's Recommendation of "Andy Tyler" To Fill a Subcontractor Position

"Andy Tyler" had been recommended to Deloitte by the CMS Deputy Administrator and Deputy Chief of Staff and the CMS Director of the Strategic Marketing Group. Based on our review of emails, we found that both of these CMS employees reached out to Deloitte to recommend "Andy Tyler" as well as to direct the number of hours that Deloitte should allocate to him.

Specifically, in an email dated September 8, 2017, the CMS Director of the Strategic Marketing Group inquired with Deloitte regarding the number of hours that "Andy Tyler" could work on the contract and stated that "40 hours seems on the light side." In response, Deloitte stated: "I also just received a call from [the CMS Deputy Administrator and Deputy Chief of Staff] about this and discussed this with her." When we asked the CMS Director of the Strategic Marketing Group about this instance, he stated that this was not typical; rather, CMS will generally provide the number of hours for a specific skill set. Deloitte also stated that it is not common for the Federal Government to suggest the number of hours that should be directed to a subcontractor's level of effort. In a later email, "Andy Tyler" stated to Porter Novelli: "My understanding from the CMS Deputy Administrator and Deputy Chief of Staff is that my current role of consulting for the Administrator will now fall under [Porter Novelli's] contract," which would be for TO 2.

"Sue Jones's" Prior Relationship With the CMS Administrator Before CMS Recommended Her to the Contractor

"Sue Jones," an employee of Porter Novelli, had been recommended by the CMS Administrator. After we inquired with the CMS Deputy Administrator and Deputy Chief of Staff, she stated: "[Sue Jones] was known to have good national media contacts to help the Agency explain initiatives to the broader public . . . [and] was suggested as a possible contractor by the Administrator to meet this identified need." We also inquired with Porter Novelli, which stated that it had followed the company's vetting process and did its due diligence regarding "Sue Jones" before bringing her onboard. Porter Novelli hired "Sue Jones" on August 8, 2018.

Before being employed with Porter Novelli, in May 2017, "Sue Jones" reached out to CMS on two separate occasions to help arrange a meeting with the editor of *Woman's Day Magazine* and the CMS Administrator and to help coordinate an interview with a "USA Today" journalist and the CMS Administrator.⁵³ Furthermore, an email dated June 12, 2017, from the then CMS Special Assistant to the Administrator to the HHS Office of General Counsel's Attorney Advisor mentioned that "Sue Jones" was a "personal friend" of the CMS Administrator, as part of

⁵³ CMS stated that it regularly receives requests from the media and external stakeholders for meetings and interviews with the CMS Administrator and other senior officials.

requesting permission for the CMS Administrator to attend a “Girls Night Out” event⁵⁴ at the home of a national correspondent for CBS. Later that same day, the Attorney Advisor provided approval for the CMS Administrator to accept the social invitation based on a confirmation from the CMS Special Assistant that the Administrator’s relationship with “Sue Jones” was a professional one.

CMS DID NOT COMPLY WITH THE FEDERAL ACQUISITION REGULATION IN MANAGING CONTRACT DELIVERABLES AND APPROVING THE USE OF A SUBCONTRACTOR

CMS (1) did not ensure the completeness of some deliverables for two contracts; (2) did not provide written consent for the use of a subcontractor before the subcontractor provided services for one contract; and (3) did not adequately manage two contracts that used the same subcontractor, resulting in potential duplicate payments for billed services.

CMS Did Not Ensure the Completeness of Some Deliverables for Two Contracts

Federal Requirements

The SOWs for TO 2 and TO 3 require the prime contractor to provide electronic copies of the updated “Monthly Expenditure and Status Reports” to the COR no later than the 15th of each month following the first full month after the effective date of the award. The expenditure report must include the following five data elements:

- funding spent or obligated to date,
- expected expenditures over the next 30 days,
- funding remaining in task order,
- correlation of activities to cost, and
- status of current activities and deliverables.

The FAR states that only contracting officers may modify the contract and those modifications must be in writing.⁵⁵ In addition, other Government personnel must not execute modifications or direct a contractor to engage in work that should require a modification.⁵⁶ The terms and conditions of the IDIQ contract state that the COR must issue all technical directions in writing or confirm those directions in writing within 5 working days after verbally communicating them.

⁵⁴ According to CMS, the event “Girls Night Out” is a large bipartisan networking event of approximately 50 to 75 women, including media, legislators, and Administration officials.

⁵⁵ FAR § 43.102(a); FAR § 2.101 Definitions, “Contract Modification.”

⁵⁶ FAR §§ 43.102(a)(1) and (3).

The Monthly Expenditure and Status Reports Did Not Contain Two of the Five Required Data Elements

All 16 of the required “Monthly Expenditure and Status Reports” submitted for TO 2 and TO 3 did not include the required data,⁵⁷ and some of these reports were submitted late.⁵⁸ Specifically, the reports did not include two of the five required data elements: expected expenditures over the next 30 days and the status of current activities and deliverables. CMS stated that it did not require Porter Novelli to submit the missing information; however, CMS did not document the revised requirements in the SOW.⁵⁹

From our review of the contract files, we found that the contracting officer or the COR did not document changes made to the SOWs related to TO 2 and TO 3. Rather, CMS officials provided verbal changes to the contractor to modify various deliverables required by the SOWs. However, the COR did not document those changes in writing within 5 days of the verbal communication, as required by the contract terms.

CMS stated that once TO 3 was awarded, it determined that some deliverables were not needed, but it did not explain why these changes were not documented. When we asked CMS, it stated that the deliverables listed in a SOW represent “a framework for how the contract will be managed” and that CMS often makes adjustments based on the type of work and interaction with the contractor. However, no modifications for the type of work to be performed under the contracts were made to the SOWs. Also, CMS stated that some deliverables were no longer needed; however, we did not see any modifications to the SOWs in writing.

Without properly documenting and formalizing changes to the SOW in accordance with the FAR, CMS could not ensure that the contractor was complying with the terms of the contract. CMS’s failure to properly manage its contracts did not ensure that the Government received and paid for contracted services.

⁵⁷ Twelve of the sixteen monthly expenditure reports related to TO 2, and the remaining four related to TO 3.

⁵⁸ Porter Novelli submitted 13 of 16 “Monthly Expenditure and Status Reports” (10 for TO 2 and 3 for TO 3) after the established due date (no later than the 15th of each month following the first full month after the effective date of the award). For TO 2, the number of days exceeding the required timeframe ranged from 6 to 16 days. For TO 3, the number of days exceeding the required timeframe ranged from 11 to 20 days.

⁵⁹ The SOW reflects the terms and conditions of the contract, and when there are changes to the SOW, they must be made by the contracting officer in writing.

CMS Did Not Provide Written Consent for the Use of a Subcontractor Before the Subcontractor Provided Services for One Contract

Federal Requirements

The FAR states that prime contractors are responsible for managing their subcontracts (FAR § 42.202(e)(2)). As a prime contractor, subcontracting out part of the award may require consent from the contracting officer in certain scenarios (FAR § 44.201-1).⁶⁰ The contracting officer responsible for providing any necessary consent must review the contractor's notification and supporting data to ensure that the proposed subcontract is appropriate for the risks involved and consistent with current policy and sound business judgment (FAR § 44.202-1(b)).

The umbrella IDIQ⁶¹ contract for TO 2 and TO 3, as well as TO 2 and TO 3 themselves, contain section C-17 ("Subcontract Consent"), which requires that the contractor submit the information required by FAR clause 52.244-2 ("Subcontracts")⁶² to the contracting officer in order to facilitate review of a proposed subcontract by both the COR and the contracting officer. The IDIQ contract also states that the contracting officer shall review the request for subcontract approval, along with the COR's recommendation, and advise the contractor, in writing, of the decision to consent to or dissent from the proposed subcontract. Further, the IDIQ concludes the section by stating that "subcontractors will need to be approved on a task order by task order basis." Therefore, the prime contractor should not award a subcontract or direct a subcontractor to begin work before receiving written consent from the contracting officer.

Written Consent for a Contractor To Use a Subcontractor Was Not Provided Before the Subcontractor Started Work

The CMS contracting officer did not provide written consent for Porter Novelli to use Nahigian Strategies as a subcontractor before Nahigian Strategies started work on TO 2, as required by the terms of the IDIQ and task orders.⁶³ Nahigian Strategies began work on September 15, 2017; however, the contracting officer's written approval was not given until over 7 months later, on May 4, 2018, when CMS executed a contract modification that

⁶⁰ For instance, the contracting officer may require consent to subcontract if the contracting officer has determined that an individual consent action is required to protect the Government adequately because of the subcontract type, complexity, or value, or because the subcontract needs special surveillance (FAR § 44.201-1(a)).

⁶¹ Any task orders issued under a pre-existing IDIQ contract contain the same terms and conditions as the IDIQ contract, unless specifically noted in the task orders.

⁶² The clause requires such information as a description of the supplies or services to be subcontracted, identification of the proposed subcontractor, and the proposed subcontract price, among other things.

⁶³ For TO 3, CMS provided written consent for Porter Novelli to subcontract with Nahigian Strategies before Nahigian Strategies began work.

“definitized,”⁶⁴ or formally provided written consent to approve, the prime contractor’s use of its subcontractor.⁶⁵

The COR stated that CMS was aware of Porter Novelli’s use of Nahigian Strategies as a subcontractor when TO 2 was executed and that the initial consent had been communicated verbally. CMS later stated that Porter Novelli did not submit a written request to CMS to use Nahigian Strategies. Although CMS is not required to show consent for use of a subcontractor through a contract modification before the start of work, it is required to show that approval was granted in writing, per the terms of the IDIQ and task orders. As a result, CMS approved payments totaling \$1,070,338 for invoices that Porter Novelli submitted for reimbursement, which included charges for services⁶⁶ that Nahigian Strategies performed before CMS’s approval of Nahigian Strategies as a subcontractor.

Furthermore, in the contractor invoices submitted (see Figure 1, step 10) for payment before written consent was given, CMS approved and paid Porter Novelli (see Figure 1, steps 11 and 12) an excess of \$5,867 for 11 events that occurred under TO 2 related to the listening sessions tour.⁶⁷ The purpose of the tour was to hear feedback from key target audiences and incorporate what was learned into policy and outreach and enrollment communication efforts.

Without giving written consent to Porter Novelli to use Nahigian Strategies as a subcontractor, CMS could not ensure that the subcontract was appropriate for the risks involved and consistent with current policy and sound business judgment.⁶⁸

⁶⁴ “Definitized” is a term that CMS used to mean that a contract was finalized. The purpose of the contract modification, executed on May 4, 2018, was to finalize changes made to TO 2, including Porter Novelli’s use of Nahigian Strategies as a subcontractor and the negotiation of agreed-upon rates.

⁶⁵ TO 2, awarded September 15, 2017, procured services related to a mobile office tour, at which point the subcontractor began work. CMS later executed two additional modifications, one that procured strategic communications services and one that replaced the mobile office tour with a listening tour.

⁶⁶ Services included speechwriting, campaign attendance, bus tour labor hours, and a bus tour cancellation fee.

⁶⁷ Porter Novelli submitted an invoice to CMS that included charges for 11 events that occurred from October to December 2017, with a per-event-day cost of \$38,865. On February 20, 2018, CMS and Porter Novelli agreed to a decreased cost per event-day of \$38,332. After reviewing documentation, we notified both Porter Novelli and CMS that it appeared the error was never corrected. In response, Porter Novelli stated that it agreed to credit CMS for the overpayment of \$5,867. However, when we asked the contractor whether the funds were ever credited, it stated that the “credit was inadvertently omitted from subsequent invoices.” On January 9, 2020, CMS confirmed that it had received reimbursement from Porter Novelli. CMS also stated that before our audit, CMS had not reached out to Porter Novelli to recoup the overpayment.

⁶⁸ FAR § 44.202-1(b).

CMS Did Not Adequately Manage Two Contracts That Used the Same Subcontractor, Resulting in Potential Duplicate Payments for Billed Services

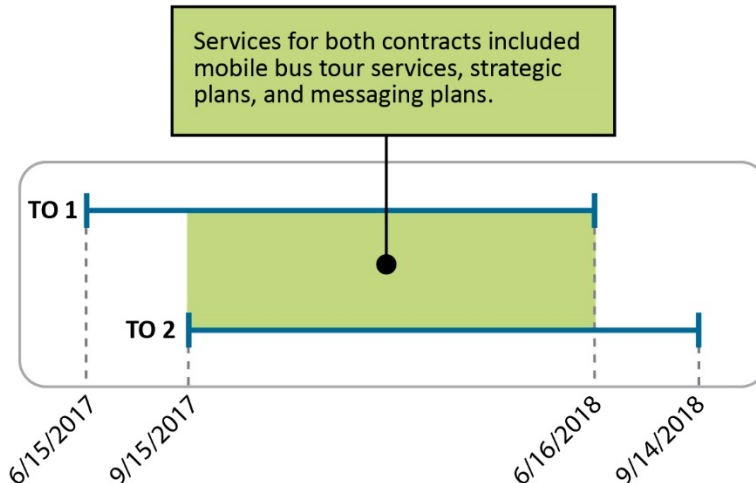
Federal Requirements

The FAR requires that costs chargeable to a contract, in order to be allowable, are reasonable, allocable, and comply with the terms of the contract (FAR § 31.201-2). Also, the FAR requires that agencies ensure that supplies or services tendered by contractors meet contract requirements (FAR § 46.102(b)). The agency contracting offices must perform all actions necessary to verify whether the supplies or services conform to contract quality requirements (FAR § 46.104(b)).

Two Contracts Were Not Adequately Managed That Used the Same Subcontractor

CMS did not adequately manage two contracts that used the same subcontractor to ensure that similar services billed were discrete and did not result in potential duplicate payments. TO 1 and TO 2 had overlapping performance periods from September 15, 2017, through June 16, 2018, for similar services procured related to a mobile bus tour, social media reports, strategic plans, and messaging plans, as shown in Figure 3.⁶⁹

Figure 3: Overlap of Performance Periods for Two Contracts Using the Same Subcontractor



For example, for September 2017, CMS paid to Deloitte and Porter Novelli subcontractor reimbursement of \$106,330 for services performed under TO 1 and \$86,958 for services performed under TO 2. CMS could not provide documentation to show that payments made to Nahigian Strategies for labor hours billed were for services that were discrete and related to the contract under which the payment was made. During September 2017, Nahigian Strategies

⁶⁹ Although overlap of the performance periods ranged from September 15, 2017, through June 16, 2018, Deloitte billed for services performed under TO 1 only through February 2018.

billed a total of 245 hours for “Brian Smith”; 185 hours were billed under TO 1 and 60 hours were billed under TO 2. When we requested supporting documentation for the billed hours, CMS provided a schedule showing the 185 hours worked. However, the documentation did not provide a breakdown of hours per day or evidence that the services performed related only to TO 1. Further, CMS could not provide a breakdown of the 60 hours billed under TO 2 or show that those services performed during the overlap of performance periods related only to TO 2. If the billed hours cannot be associated with a deliverable, the COR would be unable to know whether the charge to the contract was allowable and reasonable.

When we asked Nahigian Strategies about the total hours billed under TO 1 and TO 2, it did not provide any additional documentation (beyond what we were able to obtain from CMS or both contractors, Deloitte and Porter Novelli) to demonstrate that the labor hours billed were for services that were discrete and clearly applicable to either TO 1 or TO 2, or both. During our review of Nahigian Strategies’ labor hours billed for other employees, we noted similar issues on invoices for which we could not determine whether those labor hours billed were for services performed under TO 1 or TO 2 or both.

The contracting officer is responsible for quality assurance, inspection, and acceptance of products and services that the contractor delivers to the Government. This task was delegated to the COR as part of the COR Delegation Memorandum for TO 1 and for TO 2. After inspection and acceptance of products or services, the COR reviews and recommends approval of invoices to the contracting officer for payments. Our review of the invoices showed that although the number of labor hours was included, there was no detailed description of the labor hours, which raises a concern as to how the COR ensured that billed labor hours for similar services under two contracts were charged to the correct contract. However, the CMS CORs for TO 1 and TO 2 stated they were aware of the work being conducted under the respective contracts and made every effort to ensure that there was no overlap in services performed or billed.

Without Nahigian Strategies’ invoices that detailed specific services performed under TO 1 and TO 2, CMS could not ensure that the total payment of \$193,288 (\$106,330 + \$86,958) for Nahigian Strategies’ labor hours billed for services provided in September 2017 was not for the same services provided under both contracts, thereby increasing the risk of duplicate payments.

CMS CONTRACTING OFFICER’S REPRESENTATIVES DID NOT MAINTAIN COMPLETE WORKING FILES FOR ALL THREE CONTRACTS

The FAR requires the COR to maintain a file for each assigned contract (FAR § 1.604). Also, the “Duties and Responsibilities” appendix of the COR Appointment Memo, which is signed by the COR, states that the COR must maintain a complete working contract file, which includes a deliverables file and a correspondence file.⁷⁰

⁷⁰ The COR Appointment Memo states that a deliverables file contains the official contract draft and interim and final technical reports, as well as documentation of acceptability or unacceptability of deliverables. A correspondence file must include copies of technical guidance letters and emails.

The CMS CORs did not maintain complete working contract files for TO 1, TO 2, or TO 3 as required by the COR Appointment Memo. Specifically, the COR Appointment Memo states that a working contract file consists of a copy of the contracting officer's COR Appointment Memo, a copy of the contract, task orders and all respective modifications, a deliverables file and correspondence file, and contractor performance and evaluation reports. During our review of the contract files, we noted that a deliverables file and a complete correspondence file were not maintained in the working contract files:

- For TO 1, the COR did not maintain copies of all deliverables in the working contract file, including strategic communications plans, internal communications plans, and a strategic calendar.
- For TO 2 and TO 3, the COR did not maintain copies of all deliverables in the working contract file, including the "CMS Messaging Document," "*Washington Post* Live Talking Points," "BCBS [Blue Cross Blue Shield] Event Planning and Briefing Book," "Medicare Trustees Report Talking Points," and "CY [Calendar Year] 2019 Medicare Rules Communications Plan."⁷¹
- For TO 2 and TO 3, the COR did not maintain emails between CMS and Porter Novelli related to the submission of deliverables or meetings held and decisions made based on those meetings. However, the COR did maintain technical direction letters as required by the COR Appointment Memo.

For TO 1, two CORs were assigned: a CMS COR and an HHS COR. The lack of clarity in roles and responsibilities of each COR was evident in our interviews. The CMS COR stated that HHS had an overall COR that "was the main COR and managed the deliverables on the contract." The CMS COR also stated that "the HHS COR was responsible for ensuring all deliverables received tracked to the SOW and that all invoices received were reviewed and paid accordingly." The HHS COR stated that she did not maintain copies of deliverables. To provide us with copies of the deliverables, the HHS COR had to contact Deloitte to obtain them. While the CORs and the key roles and responsibilities were identified in the intra-agency agreement, we were unable to determine which party assumed responsibility for ensuring the management of deliverables and payment of invoices.

For TO 2 and TO 3, the CMS COR stated that the technical lead, who provided technical support on the contract, such as review of proposals and invoices, maintained copies of deliverables. However, we learned from the technical lead that these copies were not maintained in all instances. The CMS COR also stated that CMS's common practice was to collect emails and deliverables when closing out a contract. This practice raises questions as to how the COR

⁷¹ Based on our review of selected deliverables that we identified in the respective status reports and SOWs, we requested that CMS provide us with 55 deliverables. CMS did not provide 10 deliverables for TO 2 and TO 3: 9 of 39 deliverables for TO 2 and 1 of 16 deliverables for TO 3. Further, 2 of the 10 deliverables could not be provided because CMS stated that it did not require them; however, we did not see any modifications to the SOWs to reflect these changes, which is discussed earlier in this report.

reasonably ensured that payments made to the contractor were for services provided. Further, waiting until the end of the contract could result in incomplete contract files and may limit CMS's ability to ensure that it has received all required contract deliverables.

Maintaining incomplete working files for all three contracts hindered the ability of the contracting officer and CORs to perform their oversight duties, including verifying deliverables before approving invoices for payments and properly evaluating a contractor's performance.

CMS PAID SOME QUESTIONABLE COSTS

For one contract, CMS paid for a cancellation fee without sufficient documentation. For another contract, CMS paid for travel costs incurred before the period of performance.⁷²

CMS Paid \$150,000 for a Cancellation Fee Without Sufficient Documentation for One Contract

The FAR requires a contractor to maintain records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles. The contracting officer may disallow all or part of a claimed cost that is inadequately supported (FAR § 31.201-2(d)).

For a bus tour that was canceled at CMS's request, CMS approved and paid a cancellation fee of \$150,000. The purpose of the bus tour was to hold enrollment fairs, roundtables, and listening sessions. The tour would have also involved meetings with local officials, stakeholders, and others to advance CMS's strategic initiatives. CMS based its approval and payment of the cancellation fee on the invoice and other supporting documentation that Porter Novelli submitted.

CMS provided us a copy of the written agreement to procure the bus tour services, which included the fees that could be incurred if the contract were canceled. CMS also provided us the invoice from the bus tour company, which stated that the cancellation fee was 50 percent of the cost of the tour, totaling \$150,000, which was the same as the cancellation fee in the agreement.⁷³ However, both the agreement and the invoice lacked the appearance of an official document, because neither had a business letterhead or other indication of authorship. Additionally, the agreement was not signed by the parties involved.

CMS stated that it requested documentation from Porter Novelli to substantiate the costs. Based on Porter Novelli's certification of the invoice and review of the supporting documentation provided, no concerns were brought to the contracting officer's attention. In

⁷² Our audit did not assess the allowability of all contract costs; rather, we reported only on questioned costs that came to our attention through reviewing invoices.

⁷³ The invoice included a separate charge of \$24,800 for additional costs incurred, such as insurance, workstation fabrication, wireless internet, and an in-motion satellite.

addition, the CMS “COR Invoice Approval Operating Guidance”⁷⁴ does not include what is acceptable documentation for approval of contractor costs. Acceptance of inadequate invoice documentation to support incurred contractor costs increases the risk of improper payments.

CMS Paid \$8,887 for Travel Costs Incurred Before the Period of Performance for One Contract

The FAR requires that costs chargeable to a contract, in order to be allowable, are reasonable, allocable, and comply with the terms of the contract (FAR § 31.201-2). A contractor is also responsible for appropriately accounting for costs and demonstrating that the costs claimed are allocable to the contract. The contracting officer may disallow all or part of a claimed cost that is inadequately supported (FAR § 31.201-2(d)). In addition, the umbrella IDIQ contract for TO 2 and TO 3 includes an invoice section, which requires that contractor invoices include information such as the name and address of the contractor, the invoice date and number, the contract number, contract line-item number, and if applicable, the order number and a description and price for each item delivered.

CMS approved payment for an invoice related to travel expenses, totaling \$8,887, that the subcontractor incurred before the beginning of the performance period for TO 3 (September 15, 2018). The travel was from September 11 through September 13, 2018. CMS should have been able to determine that the dates on the invoice were not covered by the period of performance for TO 3. However, CMS expended funds for travel costs outside of the award period, which could lead to payments for expenses without an approved obligation. Porter Novelli also failed to submit an accurate invoice that appropriately accounted for allocable costs to TO 3.

After reviewing documentation, we notified CMS about the incorrect charge to TO 3. In response, the COR stated that Porter Novelli made a clerical error on the invoice when identifying the related task order for the performance period. The COR also stated that the charges were valid but should have been assigned to TO 2. On January 10, 2020, CMS provided documentation showing that Porter Novelli had reimbursed CMS \$8,887 for the travel costs identified. Further, CMS stated that Porter Novelli would resubmit an invoice for the correct task order. Although this issue is being resolved, this type of practice could create fiscal issues if not addressed and corrected.

CONCLUSION

Although CMS prepared required documentation for the awarding of strategic communications services contracts, it did not administer and manage the contracts in accordance with Federal requirements. Specifically, (1) CMS allowed a subcontractor individual to perform inherently

⁷⁴ CMS provided its “COR Invoice Approval Operating Guidance,” which outlines the routing of vendor invoices for approval using CMS’s intranet-based Windows software tool called the Comprehensive Acquisition Management System (CAMS). CAMS includes contract management capabilities to support FAR contracts, and tracks and reports on CMS procurement activity, including invoice approvals.

governmental functions, (2) CMS administered service contracts as personal services contracts, and (3) CMS's administration of these contracts put the Government at increased risk for waste and abuse.

RECOMMENDATIONS

We make recommendations to both the Department of Health and Human Services and the Centers for Medicare & Medicaid Services to address the significant deficiencies we identified.

We recommend that the Department of Health and Human Services:

- determine whether any HHS contractors or subcontractors are performing inherently governmental functions and whether any active CMS service contracts or task orders are being administered as personal services contracts, and take action to correct their administration;
- work with CMS's Office of the Administrator, in consultation with the HHS Office of Grants and Acquisition Policy and Accountability and the HHS Office of General Counsel, to improve contract management and ensure compliance with the FAR; and
- provide training to political appointees and senior leaders related to proper contract administration.

We recommend that the Centers for Medicare & Medicaid Services:

- provide training to program staff and contracting personnel, such as the contracting officers and CORs, on FAR requirements (1) specifying that contracts must not be used for the performance of inherently governmental functions and (2) related to written consent for the use of subcontractors;
- ensure that contracting personnel, such as the contracting officer, review contracts before they are awarded to determine whether they include language that could lead to those contracts being administered as personal services contracts;
- ensure that for all future contracts (1) CMS receives and accepts deliverables in accordance with the SOW, (2) CORs maintain working contract files, and (3) CORs document all changes made to the SOW;
- review contractor costs incurred under TO 1 and TO 2 during the overlap of performance periods to determine whether duplicate payments were made and take appropriate action, as necessary;

- expand the “COR Invoice Approval Operating Guidance” to include a description of acceptable documentation to support contractor payments; and
- review contractor invoices identified in this report that contained questionable costs, determine the allowability of those costs, and take appropriate action to recoup any improperly paid amounts.

DEPARTMENT OF HEALTH AND HUMAN SERVICES COMMENTS

In written comments on our draft report, HHS concurred with our three recommendations. HHS stated that the recommendations would strengthen the Department’s contracting activities and described the actions that it planned to take to implement the recommendations in an effective and efficient manner. Specifically, HHS stated that it will commit to review its contracts for services to identify areas at risk of contracts for inherently governmental functions and for entering into personal services contracts that might require exercise of statutory exceptions under FAR § 37.104(b). HHS will review its contracts management process and policies with particular reference to personal services contracts and inherently governmental functions. Lastly, going forward, HHS intends to require a separate training session on the contracting process and the rules that govern it as part of its overall training of all political appointees. HHS will also make training materials available to other senior leaders.

HHS’s comments are included in their entirety as Appendix F.

CENTERS FOR MEDICARE & MEDICAID SERVICES COMMENTS

In written comments on our draft report, CMS did not concur with our findings, neither concurred nor non-concurred with three of our recommendations, concurred with one of our recommendations, and non-concurred with two of our recommendations. CMS offered corrective action plans for four of our recommendations. In its comments, CMS stated that it has deep concerns with OIG’s findings and believes the report’s conclusions are based on unsubstantiated assumptions and incomplete analyses. Additionally, CMS stated that the report relies on mischaracterizations of contractor tasks and duties as well as misinterpretations of the FAR and its requirements. CMS further stated that OIG incorrectly claimed that some of CMS’s strategic communications contracts included work that was inherently governmental or personal services and that our last three audit findings portray the indication of mismanagement where none existed. Throughout the comments, CMS expresses concerns about the number of instances that OIG identified related to (1) inherently governmental functions, (2) the six descriptive elements characterizing personal services, and (3) questionable costs in OIG’s report. CMS also questioned releasing the report during an unprecedented global pandemic.

CMS concurred with our third recommendation and described a corrective action it plans to take to implement the recommendation, which includes bolstering the COR appointment memorandum to more explicitly address the FAR provisions reviewed by OIG. CMS did not

explicitly concur or not concur with our first, second, and fifth recommendations, but did describe corrective actions it plans to take to implement them. For example, CMS stated that it will continue to strengthen its existing training to reinforce the principles identified in the report and will expand the “COR Invoice Approval Operating Guidance” to include a description of acceptable documentation to support contractor payments. CMS did not concur with our fourth and sixth recommendations, stating that it properly identified any duplicate and questioned costs during its normal invoice review.

CMS provided specific comments on our findings related to inherently governmental functions and personal services contracts, which are described in more detail below.

Inherently Governmental Functions

CMS stated that OIG’s finding of a subcontractor individual performing inherently governmental functions is based on insufficient evidence. CMS further stated that the FAR does not consider the activities described in the report as inherently governmental.

Personal Services Contracts

CMS claimed that OIG implies that no one besides the contracting officer or COR are allowed to communicate with the contractor. CMS stated that OIG claimed that Government personnel who are not the contracting officer or COR may exert inappropriate control over contractor personnel through day-to-day interactions. CMS also stated that OIG’s analysis of the FAR elements that are used as a guide in assessing whether contracts are personal in nature is insufficient. Further, CMS stated that OIG makes an unsubstantiated claim about “Brian Smith’s” previous relationship with agency leadership services as the “primary cause” for the contracts being administered as personal services contracts.

CMS also provided technical comments on our draft report, which we have incorporated into this report, as appropriate.

CMS’s comments are included in their entirety as Appendix G.

OFFICE OF INSPECTOR GENERAL RESPONSE

After considering CMS’s comments, we maintain that our findings and recommendations are valid. We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We stand by our audit methodology and procedures. Further, our analysis and resulting audit findings related to inherently governmental functions and personal services contracts are consistent with deficiencies in Federal agencies’ contract management practices reported by other audit agencies. We, along with other Offices of Inspector General and the Government Accountability Office (GAO), have issued reports on similar issues related

to inherently governmental functions and personal services contracts.⁷⁵ Our analysis and resulting conclusions related to these areas are similar in nature to the approaches used by these audit organizations to identify noncompliance with FAR requirements. The FAR does not establish a materiality threshold when assessing the occurrence of (1) inherently governmental functions, (2) the six descriptive elements characterizing personal services, or (3) contract costs that may be questionable in nature. We presented the findings identified within the scope of our audit. The scope of our audit did not include a review of all emails or a review of all costs claimed during the contracts' periods of performance.

HHS annual contract spending totals more than \$27 billion, and HHS is the fourth largest contracting agency in the Federal Government. This is one of several reports that OIG has issued related to some portion of CMS contracting.⁷⁶ In addition, OIG has issued reports about contracting by other HHS operating divisions.⁷⁷ In a number of these reports, we provide recommendations to improve contracting and management practices. This audit of CMS's administration and management of three contracts for strategic communications services is no exception. At the Department level, HHS concurred with our recommendations in its written response and stated that it plans to take the proposed action to strengthen its contracting system.

⁷⁵ See GAO, *DHS Service Contracts: Increased Oversight Needed to Reduce the Risk Associated with Contractors Performing Certain Functions*, GAO-20-417 (May 7, 2020); General Services Administration OIG, *Audit of the Public Building Service's Use of Contract Employees in the New England and Northeast and Caribbean Regions*, A160134/P/2/R19001 (Dec. 12, 2018); U.S. Department of Justice OIG, *Audit of the Drug Enforcement Administration's Asset Forfeiture Program Task Orders Awarded to Maximus, Inc., for Financial Investigative Services*, Audit Division 18-26 (Apr. 12, 2018); U.S. Securities and Exchange Commission (SEC) OIG, *Audit of SEC's Controls over Support Service, Expert and Consulting Service Contracts*, Report Number 513 (Mar. 29, 2013); HHS-OIG, *Review of the Centers for Disease Control and Prevention's Compliance With Appropriations Laws and Acquisition Regulations—Contractor A*, A-04-08-01059 (Jan. 12, 2010); GAO, *Defense Contracting: Army Case Study Delineates Concerns with Use of Contractors as Contract Specialists*, GAO-08-360 (Mar. 26, 2008).

⁷⁶ Other recent OIG reports related to CMS contracting are as follows: HHS-OIG, *The Centers for Medicare & Medicaid Services Did Not Identify and Report Potential Antideficiency Act Violations for 12 Contracts Used To Establish the Federal Marketplace Under the Affordable Care Act*, A-03-16-03001 (Feb. 28, 2020); HHS-OIG, *CMS Has Not Performed Required Closeouts of Contracts Worth Billions*, OEI-03-12-00680 (Dec. 2, 2015); HHS-OIG, *CMS Did Not Identify All Federal Marketplace Contract Costs and Did Not Properly Validate the Amount To Withhold for Defect Resolution on the Principal Federal Marketplace Contract*, A-03-14-03002 (Sept. 18, 2015); HHS-OIG, *CMS Did Not Always Manage and Oversee Contractor Performance for the Federal Marketplace as Required by Federal Requirements and Contract Terms*, A-03-14-03001 (Sept. 14, 2015); HHS-OIG, *Federal Marketplace: Inadequacies in Contract Planning and Procurement*, OEI-03-14-00230 (Jan. 20, 2015); HHS-OIG, *An Overview of 60 Contracts That Contributed to the Development and Operation of the Federal Marketplace*, OEI-03-14-00231 (Aug. 26, 2014).

⁷⁷ See HHS-OIG, *CDC Reimbursed Contractors for Some Unallowable World Trade Center Health Program Administrative Costs*, A-02-16-02012 (Feb. 8, 2019); HHS-OIG, *The National Institutes of Health, Division of Financial Advisory Services Did Not Always Establish Final Indirect Cost Rates in Accordance With Federal Requirements*, A-04-17-04059 (May 4, 2018); HHS-OIG, *Contract Pharmacy Arrangements in the 340B Program*, OEI-05-13-00431 (Feb. 4, 2014); HHS-OIG, *World Trade Center Health Program: CDC Should Strengthen Efforts To Monitor and Evaluate Clinic Compliance With Contract Terms*, A-02-11-02003 (Jan. 29, 2014); HHS-OIG, *Centers for Disease Control and Prevention Did Not Fully Monitor Some of Its Contracts*, A-04-12-01012 (July 24, 2013).

Throughout this report process, we recognized the important role that CMS plays in serving beneficiaries and avoided imposing any unnecessary burdens. We completed data collection related to this audit before the global pandemic. As CMS was responding to the global pandemic when the draft report was completed, we provided CMS additional flexibility with the report response time and granted all requested extensions.

Inherently Governmental Functions

CMS alleges that OIG relied on insufficient evidence and “hand-picked e-mails.” OIG provided CMS with a specific timeframe and query of terms related to our audit for identification of emails. We requested email communications for a 6-month period before the awarding of each of the three task orders included in the scope of our audit. We relied on CMS to provide us all relevant emails. From the universe of emails that CMS provided, we identified multiple examples that evidenced conduct that did not align with FAR requirements. The FAR does not establish a numeric threshold for the number of instances required to determine that a contractor performed inherently governmental functions. CMS further alleges that the identified conduct is not inherently governmental. Both FAR § 7.503(c) and the Office of Federal Procurement Policy’s Policy Letter 11-01, “Performance of Inherently Governmental and Critical Functions” (76 Fed. Reg. 56227 (effective Oct. 12, 2011)), provide that direction of Federal employees and policy decisions are inherently governmental functions.

Personal Services Contracts

The type of direction that CMS officials provided to CMS’s contractors was consistent with the administration of a personal services contract. Although personnel other than the contracting officer and COR can interact with a contractor, the degree and type of interactions revealed in this report were not appropriate for a services contract. In the report, we discuss 23 ad hoc requests that were performed without COR consultation and approval. The COR was unable to accurately monitor and administer specified aspects of contractor performance, including whether the tasks performed met the standards set forth in the contract and whether the services fell within the scope of performance. This lack of awareness limits the ability of the contracting officer and the COR to manage the contract and manage contract costs. The responsibilities to supervise and control the contract rest with the contracting officer (and his or her appointed CORs).

FAR § 37.104 states that the six descriptive personal services elements should be used as a guide in assessing whether a proposed contract is personal in nature. The FAR does not prescribe that the presence of one element or all six elements is required to classify a contract as a personal services contract. Accordingly, we applied a totality-of-the-circumstances approach to determine whether CMS administered the contracts in a manner consistent with personal services contracts. Using this approach, we concluded that CMS’s administration of the contracts included five of the six descriptive elements, supporting our determination that the contracts were for personal services.

Lastly, the relationship of “Brian Smith” and the CMS Administrator spans from his serving as a communications strategy and messaging consultant for SVC, Inc., to his preparing the CMS Administrator for her 2017 confirmation hearing, to his time at Nahigian Strategies providing communications strategy support directly to the CMS Administrator. Because of this established relationship, “Brian Smith” appeared to be, and was treated as, a CMS employee. Thus, the CMS Administrator and other senior leaders directed “Brian Smith” to perform tasks that were inherently governmental or closely related to inherently governmental.

APPENDIX A: AUDIT SCOPE AND METHODOLOGY

SCOPE

We reviewed three contracts awarded for strategic communications services during our audit period (June 1, 2017, through April 30, 2019). Our audit included the review of modifications to an HHS task order (TO 1) and two CMS task orders (TO 2 and TO 3), totaling \$6,421,180, for CMS's overall strategic communications services. We reviewed CMS's process of awarding contracts, work assigned to the contractors under each contract, and the related deliverables accepted by the agency. Our audit did not assess the allowability of all contract costs; rather, we reported only on questioned costs that came to our attention through reviewing invoices.

We did not assess CMS's overall internal control structure. Rather, we limited our review of internal controls to those applicable to our audit objective.

We conducted our fieldwork from June 2019 through February 2020, which included fieldwork performed at CMS's offices in Baltimore, Maryland.

METHODOLOGY

To accomplish our objective, we:

- interviewed CMS officials within the CMS Office of Communications and OAGM;
- interviewed current and former officials of HHS's Immediate Office of the Secretary;
- reviewed the responsibilities of CMS Office of Communications staff and compared them with the services procured under TO 1, TO 2, and TO 3;
- interviewed prime contractors and subcontractors related to TO 1, TO 2, and TO 3;
- reviewed task orders and modifications to determine whether these contract actions aligned with services procured under the respective base contracts of the IDIQ contracts;
- reviewed justifications for CMS's use of TO 1, TO 2, and TO 3;
- confirmed the total amounts awarded and obligated and the costs incurred for TO 1, TO 2, and TO 3;
- reviewed TO 1 deliverables provided by HHS to ensure alignment with services procured in the SOW;

- reviewed SOWs to identify corresponding tangible deliverables⁷⁸ for TO 2 and TO 3;
- reviewed all invoices and status reports for strategic communications services to identify any additional tangible deliverables for TO 2 and TO 3;
- selected and reviewed a nonstatistical sample of tangible deliverables that we identified from the status reports for TO 2 and TO 3;
- reviewed all invoices to determine whether they included required data identified in the FAR and were approved by required CMS or HHS officials;
- requested and reviewed emails of select CMS officials from the CMS Office of the Administrator, CMS Office of Communications, and OAGM from December 15, 2016, through September 15, 2017, and March 15 through September 15, 2018, to obtain any insights regarding CMS’s decision to (1) procure strategic communications services, (2) award the contracts to selected contractors, and (3) use an intra-agency agreement; and
- discussed the results of our audit with HHS and CMS officials.

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

⁷⁸ For purposes of this report, “tangible” refers to a physical deliverable (electronic or hardcopy) that can be reviewed.

APPENDIX B: GLOSSARY OF KEY CONTRACT TERMS USED IN THIS REPORT

Contracting officer. A person with the authority to enter into, administer, and terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

Contracting officer's representative. An individual who is designated and authorized in writing by the contracting officer to perform specific technical or administrative functions.

Contract modification. Any written change in the terms of a contract.

Cost reimbursement contract. A contract that provides for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the contracting officer's approval.

Fixed-price contract. A contract that provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places on the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides a maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden on the contracting parties.

Intra-agency agreement. A written agreement between or among HHS components, all of which must have the statutory authority to engage in the arrangement.

Prime contract. A contract or contractual action entered into by the Federal Government to obtain supplies, materials, equipment, or services of any kind.

Prime contractor. An entity that has entered into a prime contract with the Federal Government.

Prime contractor individual. An officer, a partner, an employee, or an agent of a prime contractor.

Subcontract. A contract or contractual action entered into by a prime contractor or a subcontractor to obtain supplies, materials, equipment, or services of any kind under a prime contract.

Subcontractor. An entity other than the prime contractor that offers to furnish or furnishes supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with the prime contract.

Subcontractor individual. An officer, a partner, an employee, or an agent of a subcontractor.

Task order. An order for services placed against an established contract or with Government sources.

Technical direction. The term “technical direction” is defined to include the following: (1) providing direction to the contractor that redirects contract effort, shifts work emphasis between work areas or tasks, requires pursuit of certain lines of inquiry, fills in details, or otherwise serves to accomplish the contractual SOW; (2) providing written information to the contractor that assists in interpreting drawings, specifications, or technical portions of the work description; and (3) reviewing, and where required by the contract, approving, technical reports, drawings, specifications, and technical information to be delivered by the contractor to the Government.

Time-and-materials contract. A contract for acquiring supplies or services on the basis of direct labor hours at specified fixed hourly rates that includes (1) wages, overhead, general and administrative expenses, and profit and (2) the actual cost for materials.

**APPENDIX C: TIMELINE OF ACTIONS RELATED TO THE INTRA-AGENCY AGREEMENT AND
TASK ORDER 1⁷⁹**

Effective Date	Action Description
6/15/2017	CMS and HHS established an intra-agency agreement to fund new cross-cutting CMS strategic communications work.
6/15/2017	A modification (TO 1) to an existing HHS contract added funding for HHS/CMS strategic communications services. The performance period was 6/15/2017 through 12/15/2017.*
6/15/2017	Deloitte entered into an agreement with Nahigian Strategies, which was later signed on 7/19/2017.
6/15/2017	CMS and HHS executed a modification to the intra-agency agreement on 4/18/2018, modifying the performance period (6/15/2017 through 6/16/2018) and adding an explanation of overhead fees and charges. No funding was added.
6/26/2017	CMS and HHS executed a modification to the intra-agency agreement on 9/14/2017 related to a modification to TO 1. This modification increased the level of effort and added additional funding.
9/8/2017	CMS's Office of Communications contacted Deloitte to negotiate hours for "Andy Tyler."
9/29/2017	A modification to TO 1 added more funding for HHS/CMS strategic communications services and extended the end of Deloitte's performance period from 12/15/2017 to 6/16/2018.
10/9/2017	Deloitte entered into an agreement with "Andy Tyler," previously identified by CMS's Office of Communications on 9/8/2017 (see above).
6/16/2018	The intra-agency agreement's performance period ended.

* The base award for TO 1, which was used to procure CMS's strategic communications services, was issued to Deloitte on 9/30/2015.

⁷⁹ In May 2012, the National Institutes of Health awarded a Government-wide acquisition IDIQ contract to Deloitte for information technology solutions and services. Any Federal agency was authorized to issue a task order under this IDIQ contract. HHS used this contract to issue a task order to support Department-wide strategic communications work, and HHS later modified this task order to procure strategic communications services for CMS. The modification was funded through an intra-agency agreement between HHS and CMS.

APPENDIX D: TIMELINE OF CONTRACT ACTIONS RELATED TO TASK ORDERS 2 AND 3⁸⁰

Effective Date	Action Description
9/15/2017	CMS modified TO 2 to continue with similar strategic communications services and add a mobile office tour. CMS stated that the mobile office tour was part of the overall strategic communications work. The base award for TO 2 was awarded to Porter Novelli for “National Multimedia and Education Campaign” and Medicare open enrollment in September 2015. Porter Novelli began using Nahigian Strategies for this work; however, CMS did not formally approve the use of the subcontractor until 5/4/2018.
10/5/2017	CMS issued a technical direction letter to Porter Novelli to cease work on all activities related to the mobile office tour.
10/13/2017	A modification to TO 2 removed the mobile office tour from the SOW and incorporated a listening session tour.
12/7/2017	A modification to TO 2 incorporated strategic communications services tasks related to the listening session tour, including developing and coordinating a strategic communications calendar.
5/4/2018	A modification to TO 2 “definitized” the mobile office tour and listening session tour and the addition of Nahigian Strategies.
8/31/2018	CMS awarded TO 3 as a “logical follow-on” to TO 2 to continue to fulfill the same strategic communications services needs. The performance period was 9/15/2018 through 8/31/2019.
9/16/2018	CMS approved Porter Novelli to work with Nahigian Strategies for one event for TO 3.
9/14/2018	The TO 2 performance period ended.
10/12/2018	CMS approved Porter Novelli to work with the same subcontractor for the rest of TO 3.
4/3/2019	CMS issued a stop-work order to Porter Novelli for a period of 90 days.
7/2/2019	CMS extended the stop-work order to the end of the contract period (8/31/2019).

⁸⁰ In September 2011, CMS awarded Porter Novelli an IDIQ contract for “National Multimedia and Education Campaign and Grassroots Outreach.” CMS used this contract to award TO 2 and TO 3.

APPENDIX E: EXAMPLES OF A SUBCONTRACTOR INDIVIDUAL PERFORMING INHERENTLY GOVERNMENTAL FUNCTIONS ON STRATEGIC COMMUNICATIONS SERVICES CONTRACTS

Date of Email	OIG-Identified Examples of a Subcontractor Individual Performing Inherently Governmental Functions	Email Description
8/28/2017	<p>“Brian Smith” made a managerial decision that clearance of tweets would be obtained from three people: two persons from the Office of the Administrator and himself. “Brian Smith” also recommended sending out Spanish versions of tweets when approval was given.</p>	<p>Through email communications beginning August 28, 2017, the CMS Senior Advisor to the Director of the Strategic Marketing Group sent an email to “Brian Smith” regarding protocols of CMS retweets, stating that tweets should be approved by CMS senior leadership as well as “Brian Smith.” “Brian Smith” emailed: “If they could run the retweets by myself, [CMS Deputy Administrator and Deputy Chief of Staff], and [CMS Special Assistant to the Administrator] that’d be great. New content should go to the whole list you propose.”</p> <p>“Brian Smith” also stated: “I would recommend that when we get approval to send tweets, we should send out Spanish versions as well.”</p> <p>In a separate email, the CMS Director of the Strategic Marketing Group wrote to a CMS employee: “I’m trying to figure out if it is legal for a contractor to direct federal personnel,” and in response, the CMS Senior Advisor to the Director stated: “I have been wondering the same thing.” When we subsequently asked the CMS Director of the Strategic Marketing Group about the email, he stated that he had an “emotional reaction” and looking back did not believe “Brian Smith” was directing him.</p>
6/29/2018	<p>“Brian Smith” was identified by the CMS Deputy Administrator and Deputy Chief of Staff, in an email to Office of Communications staff, as someone for the Office of Communications staff to work with and who “can clear social and media responses” while she was out of the office.</p>	<p>In an email dated June 29, 2018, the CMS Deputy Administrator and Deputy Chief of Staff stated in an email to Office of Communications staff that she would be out of the office until July 10 and requested that Office of Communications’ staff work with the CMS Principal Deputy Administrator for Policy and Operations and “Brian Smith” until she returned and stated that both individuals “can clear social and media responses.”</p>

Date of Email	OIG-Identified Examples of a Subcontractor Individual Performing Inherently Governmental Functions	Email Description
7/6/2018	<p>“Brian Smith” made a management decision on the length of time for and interview of the CMS Administrator and advised CMS employees on who should attend. “Brian Smith” also instructed two CMS employees to work on preparations, such as scheduling and talking points and drafting responses to a reporter’s questions.</p>	<p>Through email communications beginning on July 6, 2018, a journalist contacted CMS’s Acting Director and Deputy Director of the Media Relations Group with a request to interview the CMS Administrator. CMS’s Acting Director and Deputy Director of the Media Relations Group then forwarded the request to “Brian Smith” for consideration by the CMS Administrator. “Brian Smith” informed a CMS employee that “the Administrator is interested in doing this interview Wednesday.” “Brian Smith” also added various CMS employees to the email to help “find the time for the interview and time for a prep” and with preparing “the talking points.” In a later email, “Brian Smith” made a management decision on the length of time for the interview, advised CMS employees on who should attend, and instructed these same CMS employees to draft responses to the reporter’s questions.</p>

APPENDIX F: DEPARTMENT OF HEALTH AND HUMAN SERVICES COMMENTS



THE DEPUTY SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

Christi A. Grimm
Principal Deputy Inspector General
Office of Inspector General
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Ms. Grimm:

The Department of Health and Human Services (HHS) thanks the Office of Inspector General (OIG) for the opportunity to respond to the OIG report entitled, *CMS Did Not Administer and Manage Strategic Communications Services Contracts in Accordance with Federal Requirements* (A-12-19-20003). As the audit report notes, HHS oversaw \$27 billion in contracts in Fiscal Year 2019, \$7 billion of which relates to the Centers for Medicare & Medicaid Services (CMS). The importance of oversight and integrity in the contracting process has only increased with the increased amount of contracting activity required to respond to the COVID-19 pandemic.

Three recommendations were directed by the audit report to HHS. HHS agrees that these forward-looking actions should strengthen the Department's contracting system at this critical time, and will work to implement these recommendations in an effective and efficient manner. Six additional recommendations, including recommendations related to the findings of the audit report, were directed to CMS. HHS defers to CMS in responding with particularity to these items, but will fulfill all legal obligations identified as arising from this report, and which attach to the Department as a whole.

The following are HHS's specific responses to each of OIG's recommendations for HHS:

Recommendation 1: *Determine whether any HHS contractors or subcontractors are performing inherently governmental functions and whether any active CMS service contracts or task orders are being administered as personal services contracts, and take action to correct their administration.*

Response: HHS concurs with this recommendation.



THE DEPUTY SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

HHS will commit to review its contracts for services in order to identify areas at risk of contracting for inherently governmental functions and for entering into personal services contracts that might require exercise of statutory exceptions under FAR § 37.104(b). HHS also may consider an examination of the current regulations and policies with regard to inherently governmental functions and personal services contracts. As the report indicates (note 20), the government has sought over several years a clearer and more consistent set of standards for distinguishing impermissible performance of inherently governmental functions from the permissible functions closely associated with governmental functions. Similarly, as the report discusses, there is currently no single determinative way to distinguish personal services contracts under the FAR. This requires a multifactorial inquiry which results in a totality of the circumstances test that may be difficult to apply, and thereby direct those procuring contractual services to make use of the authorities to employ consultants and experts under § 503 of Public Law 102-394. Such an assessment interacts with “the inherent tension” the IG acknowledges (note 47) between the limits on supervision in FAR § 37.104, and the obligations to appropriately monitor and oversee contract performance under FAR §§ 16601(c)(1), 7.503(d), and 37.114(b). These complexities should benefit from clarification and streamlining, and HHS looks forward to positive engagement with the Office of Inspector General in this effort.

HHS’ s review of existing service contracts for inherently governmental functions and personal services will be applicable to service contracts through all divisions, including but not limited to CMS. HHS also looks forward to positive engagement with the Office of Inspector General in developing the most efficient and effective way to conduct this review in the context of our current pandemic response focus. If, after this review, specific service contracts (or task orders under such contracts) are identified as raising concerns relating to this recommendation, HHS will direct any necessary correction of the administration of these contracts to bring them into compliance with the FAR and other applicable guidance.

Recommendation 2: *Work with CMS’s Office of the Administrator, in consultation with the HHS Office of Grants and Acquisition Policy and Accountability and the HHS Office of General Counsel, to improve contract management and ensure compliance with the FAR.*

Response: HHS concurs with this recommendation.

As discussed in the response to the previous recommendation, HHS will review its contract management processes and policies with particular reference to personal



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services contracts and inherently governmental functions. Various staff divisions of the Department, including but not limited to the Assistant Secretary of Administration, the Office of General Counsel, and the Division of Acquisition within the Assistant Secretary of Financial Resources, will be consulted. All operating and staff divisions with substantial contractual responsibilities, including but not limited to CMS, will be included in developing and implementing these reforms.

Recommendation 3: *Provide training to political appointees and senior leaders related to proper contract administration.*

Response: HHS concurs with this recommendation.

HHS recognizes the importance of its policy personnel understanding the rules of proper contract administration. Going forward, HHS intends to require a separate training session on the contracting process and the rules that govern it as part of our overall ethics training for all political appointees. Training material will also be made available to other senior leaders. Where feasible, existing training material will be adapted and enhanced to accelerate the timing of the initial training cycle.


Eric D. Hargan, Deputy Secretary

6/2/2020
Date

APPENDIX G: CENTERS FOR MEDICARE & MEDICAID SERVICES COMMENTS



DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

Administrator

Washington, DC 20201

DATE: June 3, 2020

TO: Christi A. Grimm
Principal Deputy Inspector General
Office of Inspector General

FROM: Seema Verma
Administrator
Centers for Medicare & Medicaid Services

A handwritten signature in blue ink, reading "Seema Verma", is placed to the right of the "FROM:" field.

SUBJECT: Office of Inspector General (OIG) Draft Report: CMS Did Not Administer And Manage Strategic Communications Services Contracts in Accordance with Federal Requirements (A-12-19-20003)

I appreciate the opportunity to review this draft report from the Department of Health and Human Services (HHS) Office of the Inspector General. The Centers for Medicare & Medicaid Services (CMS) has deep concerns with the OIG's findings, and we believe the report's conclusions are based on unsubstantiated assumptions and incomplete analyses. Additionally, the report relies on mischaracterizations of contractor tasks and duties as well as misinterpretations of the Federal Acquisition Regulation (FAR) and its requirements. Taken together, the full record of relevant facts and a careful review of the applicable federal contracting guidelines show that I and other officials at CMS acted appropriately and in good faith both in awarding and administering the contracted strategic communications work examined during this audit.

As described more fully below, the report incorrectly claims that some of CMS's strategic communications contracts included work that was inherently governmental or personal services. Of note, personal services under the FAR refers to a contract that by its express terms or as administered makes the contractor personnel appear to be, in effect, government employees, not to be mistaken with personal work such as errands or use of contractors for one's private business, which was not a finding. Making these conclusions is only possible using an incomplete record of evidence and a misunderstanding of federal contracting requirements.

First, the report's definitive assertion that a subcontractor employee engaged in inherently governmental work is based on insufficient evidence. The OIG's conclusions are based on a few hand-picked e-mail records, which the OIG did not even attempt to substantiate by interviewing all of the subcontractor employees in question, and it is therefore disingenuous to say that these individual contractors were engaged in "directing" career agency officials when all that is shown is typical collaboration among team members. Final decisions regarding communications were made by myself, and the normal exchange of information between CMS staff and a subcontractor employee does not rise to the level of inherently governmental functions being performed. This included allegations regarding the subcontractor employee's authority to clear social media or make other substantive decisions regarding the communications work being done at CMS. All decisions about final language were ultimately made by me, and the subcontractor employee's role was to support the CMS communications staff in translating policy and

effectively communicating with key audiences, among other strategic communications planning and activities.

CMS contractor employees never had ultimate “direction or control” of any government employees; instead, they were part of a collaborative effort to effectively communicate policy announcements, develop and propose recommendations for messaging, and craft cross-cutting agency communications strategies. These are precisely the kind of activities that the FAR envisions are not inherently governmental and could be appropriate to acquire from the private sector. The final decisions about using any of the proposed messaging or executing on any of the recommended strategies were made solely by me and others in agency leadership. Finally, the OIG makes an unsubstantiated claim that a subcontractor employee’s previous relationship with agency leadership serves as the “primary cause” for this finding and in doing so also mischaracterizes the relationship between the parties involved. The OIG offers no tangible support for this statement, and presents a matter of subjective opinion as if it were fact.

Second, the report’s allegation that the strategic communications contracts were managed in such a way that they became personal services contracts does not withstand scrutiny. The FAR defines a personal services contract as one that by its express terms or as administered makes the contractor personnel appear to be, in effect, government employees. An employer-employee relationship occurs when contractor personnel are subject to relatively continuous supervision and control of a Government employee. OIG noted that CMS prepared required documentation for the awarding of strategic communications services contracts in accordance with the FAR. CMS documented that these contracts were not personal services contracts in the awarding of the contracts and although contractor employees worked in close collaboration with the entire acquisition team, CMS did not subject them to “relatively continuous supervision and control.” Instead, CMS gave feedback on specific deliverables or services related to the contract, with the right to reject the finished product or results, which are the precise types of orders that the FAR describes as acceptable in section 37.104(c)(1). Giving feedback and requesting changes on work products related to contract deliverables does not constitute “supervision.”

As described in more detail below, the OIG’s analysis of elements that are used as a guide in assessing whether contracts are personal services is insufficient. The OIG asserts that its review of the descriptive elements included in the FAR, when taken in the aggregate, show that these task orders were administered as personal services. However, this fails to mention that the FAR also says that each contract arrangement “must be judged in light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?” As we have demonstrated to the OIG and described fully below, this did not occur.

The report’s final three findings, that: 1) CMS did not comply with the FAR in managing contract deliverables and approving the use of a subcontractor, 2) CMS Contracting Officer’s Representatives did not maintain complete working files, and 3) CMS paid some questionable costs, which are based on the lack of a business letterhead and signature on **one** document, partially incomplete contracting deliverables folders, and the timing of CMS consent for a contractor to use a subcontractor, are just more examples of the OIG’s far-reaching attempt to portray the indication of mismanagement where none existed. While CMS will continue to

ensure that our professional acquisition community are reminded of the contracting requirements that the OIG raises on these issues, characterizing these minor clerical errors as serious findings of noncompliance with the FAR is a stretch.

Finally, the OIG's incomplete analysis is only compounded by their choice in timing for releasing such a report. As the entire country is dealing with a national public health emergency, CMS staff should be solely focused on responding to an unprecedented global pandemic, but instead had to spend precious time responding to the numerous mischaracterizations and technical inaccuracies in the OIG's findings and conclusions.

As described in detail below, the OIG's major findings in this report are based on incomplete evidence and insufficient analysis. While I appreciate that the OIG acknowledges that the acquisition of these services were appropriate, I wholly disagree that the management and execution of the contracts ever gave rise to serious concerns.

DETAILED CMS RESPONSE TO OIG REPORT A-12-19-20003 FINDINGS

Background on CMS Strategic Communications Work

CMS serves more than 140 million beneficiaries across the United States through the Medicare, Medicaid, and Insurance Affordability programs and sets the quality and safety requirements for almost the entire American healthcare delivery system, therefore impacting every American that seeks healthcare in one way or another. CMS's \$1.3 trillion budget is almost 20 percent of the federal budget and the agency's actions directly affect millions of people in addition to program beneficiaries and influence America's health overall. To guide CMS's efforts, in 2017, CMS first established four goals to improve the healthcare system, with one overarching goal: to Put Patients First. To accomplish these goals, CMS established 16 strategic initiatives.

Given the importance of CMS's work and the impact on so many Americans, the agency sought to communicate with not only the beneficiaries it serves, but also with the more than one million healthcare providers and stakeholders that interact with CMS. The agency sought to gain input from a diversity of stakeholders and to and hear from those on the front lines of our healthcare system every day. This was a novel approach and the agency worked to develop a new strategy to ensure we were providing information while also gaining feedback and input from around the country. In addition, the agency sought to provide more real-time communications to stakeholders, and increase outreach to national as well as state and local media.

CMS's Office of Communications was charged with determining how to best develop and execute a strategic communications plan for the agency's new goals and strategic initiatives to proactively communicate and gain feedback from a broad range of stakeholders. The CMS Office of Communications supports the agency in communications activities across a wide variety of functions including marketing and outreach, media relations, strategic communications, partner relations, creative services, print materials, website operations, and call center operations. The work of the office in these areas was largely focused on beneficiary outreach, and communications around enrollment in beneficiary programs and program plans. Therefore, it was determined that the office was in need of specialized expertise to quickly develop and execute the new strategic communications strategy.

In alignment with the FAR 1.102-2(d), to ensure the efficient use of public resources, CMS has leveraged contractor resources for decades to effectively communicate with the public. As one of the largest contracting offices within HHS, CMS administers thousands of contracts with obligations totaling nearly \$7 billion annually. As such, CMS's contracting team has extensive experience in dealing with the FAR and ensuring CMS's compliance with all appropriate requirements. As part of the procurement, award, and monitoring of contracts, CMS routinely reviews contracts to ensure compliance with FAR requirements.

CMS utilized existing contracts to bring on public relations contractors with specialized expertise for this targeted work. Contractors are traditionally used, as in this case, to meet niche, specific agency needs by working with communications teams with specialized expertise in varying communications areas, such as speechwriting, national media relations, and event support. For example, CMS has had indefinite delivery/indefinite quantity (IDIQ) contracts in place since

2000 that provide contractor assistance for planning, developing, producing and delivering consumer-based communication programs, strategies, and materials to support national multimedia and education campaigns and grassroots outreach. This contract vehicle is available and used to execute more specific tasks needed by CMS as they arise given the evolving nature of communications work.

In addition to using contractor support for specialized communications needs, CMS continues to evolve and strengthen its in-house workforce to address longer term strategic communications work and to meet the changing nature of how the world communicates. The CMS Office of Communications has a diverse set of responsibilities that include conveying information about policy changes, educating CMS's beneficiaries and other stakeholders about our programs, and providing daily customer support for two of the highest volume services in the federal government. Historically, few resources from CMS's Office of Communications have been dedicated to the public relations arm of the office, making it difficult to meet the ever increasing demand of the modern world for strategic real time communications.

CMS made a number of staffing changes since 2017 to meet the growing needs of the Office of Communications, including filling key leadership positions in the office: an appointed Director and the addition of a second Deputy Director. The addition of the second Deputy Director allowed CMS to reallocate and align responsibilities of current. In addition, CMS hired new staff across the various communications groups, including in the Media Relations Group to add capacity for strategy and proactive press; in the Integrated Communications Management Staff to add a team dedicated to sustained and strategic communications and cross-cutting priority projects; in the social media team to expand CMS's social media presence; and the addition of a speechwriter to support the Administrator. These are positions that support the continual and growing needs of the agency to focus on sustained and strategic communications to the public.

The experience gained by utilizing these strategic communications contractors in 2017 and 2018 has helped CMS to build the capacity and capability to enable CMS to quickly and efficiently reach all Americans with information about the work of CMS, which has proven invaluable during the current COVID-19 pandemic crisis. Due to these foundational activities, CMS has been better positioned to communicate the agency's efforts to provide healthcare providers with critically needed flexibilities to deliver care.

OIG Finding that "CMS prepared the required documentation for awarding contracts for strategic communications services in accordance with the FAR."

CMS Response: As OIG noted, CMS followed the FAR requirements for the awarding of task orders relating to strategic communications. For example, OIG found that CMS developed the required acquisition plans and solicitation documents, and concluded the services procured were within the scope of the contract. CMS assessed and documented that the task orders were not considered inherently governmental nor personal services in nature prior to award.

OIG Finding that "CMS Allowed a Subcontractor Individual To Perform Inherently Governmental Functions on the Strategic Communications Services Contracts"

CMS Response: As allowed by the FAR, the primary contractor awarded on the task orders reviewed by the OIG was permitted to subcontract work and hire specialized consultants to ensure it had the right team to address the full scope of the work. As part of subcontracting work for these task orders, OIG claimed that CMS allowed a subcontractor employee to perform inherently governmental functions. CMS disagrees, as the OIG's assessment is based on insufficient and incomplete information and does not take into account the full context of these provisions in reaching their conclusion.

CMS appreciates the OIG's recognition of the ambiguity and complexities surrounding the topic of inherently governmental functions. The FAR leaves much to interpretation and federal agencies have historically struggled in clearly defining what falls under this type of work. In its 1991 report¹, the Government Accountability Office (GAO) acknowledged the longstanding challenges and ambiguity associated with determining work that is appropriate for Government performance versus that which should be contracted out to the private sector. In fact, Chapter 2 of the report opens with, "The concept of 'governmental functions' is difficult to define and is, therefore, subject to varying interpretations." Since the release of the GAO's report, the one principle that is clear, as articulated through the Office of Management and Budget (OMB) Circular A-76 under the definition of an inherently governmental function, is that inherently governmental functions normally fall into two categories: 1) the act of governing and 2) monetary transactions and entitlements. The FAR provides examples of the types of services that are inherently governmental versus those that are generally not. Among those not considered inherently governmental include drafting "strategy options to be used by agency personnel in developing policy" and "providing information regarding agency policies or regulations," such as "conducting community relations campaigns." This body of work is consistent with the type of work the contractors in question performed on a routine basis for CMS.

Consistent with the above, the CMS contractors did **not** determine agency policy nor bind the United States to take or not take some action, and the OIG did not provide any evidence that would demonstrate the contractors had any final decision making authority. In addition, OMB guidance specifically provides clarity on the point that, in regards to policy and regulatory development, while the determination of the content and application of policies and regulations is considered an inherently governmental function, support for policy development, such as drafting policy documents and regulations, performing analyses, feasibility studies, and strategy options, can be completed by contractor staff. The services CMS acquired, such as drafting communications messaging and strategy options, are specifically listed as services that are not considered inherently governmental and therefore, were permissible to be contracted out. This is a point the OIG failed to take into account in their findings.

Despite the long-standing ambiguity surrounding the topic of inherently governmental functions, the OIG conclusively asserts, and supports this assertion with a total of four emails, that a subcontractor performed these functions through his "direction and control of Federal employees." CMS disagrees with this assertion. While the FAR 7.503 lists "direction and control of Federal employees" as an example of an inherently governmental function, OIG incorrectly

¹ Government Accountability Office (1991) *GOVERNMENT CONTRACTORS: Are Service Contractors Performing Inherently Governmental Functions?* (Publication No. GGD-92-11) Retrieved from <https://www.gao.gov/assets/160/151334.pdf>

characterizes the gathering of information for or providing advice, opinions, recommendations, or ideas as such. The handful of emails the OIG uses as examples to come to this determination clearly present a subcontractor employee gathering and relaying information he discussed with CMS officials about communications needs, along with his recommendations for communication tactics and message framing. These do not constitute performing inherently governmental functions. Based on a review of a subset of CMS emails, OIG also claims that a subcontractor employee was making managerial decisions, going so far as to claim that an email showing a subcontractor employee confirming whether an interview was for 30 minutes is considered a managerial decision. Final decisions regarding communications are ultimately made by the CMS Administrator, and CMS does not consider this type of normal exchange of information to be a managerial decision, nor rise to the level of inherently governmental functions being performed. This included allegations regarding the subcontractor employee's authority to clear social media or make other substantive decisions regarding the communications work being done at CMS. In addition, there is no regulation or guidance that states that contractor support for communications tactics, such as speech writing and social media, are inherently governmental functions under the FAR or OMB guidance. The subcontractor employee's role was to support the CMS communications staff in translating policy and effectively communicating with key audiences, among other strategic communications planning and activities. Lastly, the subcontractor employee never participated in routine managerial tasks such as participating in hiring decisions or evaluations of employees, or approval of time cards.

OIG noted that creating an environment in which Federal employees and contractors work closely together to achieve similar goals is appropriate when effectively managed. CMS, through its interactions with contractor and subcontractor employees, was operating consistent with the FAR Guiding Principles at 1.102 to work together as an acquisition team, which consists of not only all participants in Government acquisition, but also the customers they serve and the contractors who provide services. The FAR encourages open communication and grants permission to acquisition team participants to "work together as a team" and to be "empowered to make decisions within their area of responsibility." The FAR states that the role of each member of the acquisition team is to "exercise personal initiative and sound business judgement in providing the best value product or service to meet the customer's needs." By acting in line with FAR requirements in the administration of these task orders, CMS minimized administrative burden and operating costs to fulfill public policy objectives with efficient use of agency resources. Further, although the contractor provided services to CMS, which included recommendations and options for CMS consideration, these were not services that compromised CMS decision making authority or affected the act of governing its programs as indicated by the FAR.

As part of these task orders, CMS charged the contractor with drafting and providing input on a variety of media materials, including press releases and speeches. The expertise of the contractor supported CMS's mission and efforts to reach the large number of beneficiaries and other stakeholders CMS serves in an easy to understand manner. Interactions with the contractors involved the normal back-and-forth needed to refine messaging on CMS programs, with CMS Office of Communications and CMS policy experts working with the contractor as needed on various topic areas. CMS always had the ultimate decision making authority on those messages. Recognizing that email records do not always show the full scope of conversations and decision

making, multiple CMS staff communicated to OIG in interviews during the course of this audit that CMS staff, including those in the Office of the Administrator and Office of Communications, worked together as a team with contractor individuals, while CMS staff always maintained the ultimate decision making authority during the management of the task orders.

OIG Finding that “CMS Administered Strategic Communications Services Contracts as Personal Services Contracts”

CMS Response: As defined by the FAR, a personal services contract is one that by its express terms or as administered makes the contractor personnel appear to be, in effect, government employees. It is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel, which occurs when as a result of the contract terms or as administered, the contractor personnel are subject to relatively continuous supervision and control of a Government employee. OIG claimed that CMS administered the contracts as personal services contracts, a type of contract OIG notes CMS has authority to use for experts and consultants. CMS disagrees with OIG’s finding, as the OIG’s assessment does not take into account the full context of the FAR provisions in reaching their conclusion.

With regards to personal services, FAR section 37.104 precludes agencies from contracting for personal services unless specifically authorized by statute to do so. By the OIG’s own admission, CMS had the statutory authority to contract for personal services. However, during the awarding process CMS deemed the services to be non-personal in nature, and followed FAR procedures in doing so. Although the OIG acknowledged that CMS prepared required documentation for the awarding of strategic communications services contracts in accordance with the FAR, the OIG asserted that the manner in which the contract was administered rendered the services as personal in nature. CMS disagrees with this assertion. CMS documented that these contracts were not personal service in nature in the awarding of the contracts and although contractor employees worked in close coordination with the entire Federal acquisition team, CMS did not subject them to relatively continuous supervision and control, a benchmark in determining whether a contract is personal. CMS staff did not act as a supervisor to contractor personnel, nor did they approve timecards, leave, or other employment related requests. Rather, CMS gave feedback on specific articles or services related to the contract, with the right to reject the finished product or results. FAR 37.104(c)(1) explicitly states that these types of orders are not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee. Giving feedback and requesting changes on work products related to contract deliverables does not constitute “supervision.”

OIG claimed that contract terms required “relatively continuous supervision” by CMS. However, the OIG mischaracterized the requirements at FAR 16.601(b)(1) for Government personnel to provide “appropriate Government surveillance of contractor performance” as “relatively continuous supervision.” OIG also claimed that government personnel who are not the contracting officer or contracting officer’s representative (COR) may exert inappropriate control over contractor personnel through day-to-day interactions. However, CMS staff interacting directly with contractors to provide input and feedback on deliverables as the customer of the products is not equivalent to the responsibilities of the contracting officer or the COR in overseeing contractor work and performance. Both the customer and the COR exercised actions

appropriate to their respective roles. The customer, including staff in the Office of Communications and CMS leadership, provided input on content and closely interacted with the contractor regarding deliverables requested as stipulated in the contract terms. Whereas the contracting officer and COR assisted with technical monitoring and contract administration. The COR worked in concert with Office of Communications' management to monitor the contracts through the review of invoices and activity reports.

The FAR defines six descriptive elements that should be used as a guide in assessing whether or not a proposed contract is personal in nature. In its report, OIG reviews these descriptive elements and made determinations on whether each element was "met," which is not a term the FAR uses when setting forth the elements. OIG found that five of the six descriptive elements were "met" in the contracts reviewed; however, the OIG's assertion that the FAR descriptive elements "met," when taken in the aggregate, constitute that the task orders were administered as personal services contracts is a mischaracterization of the FAR language. As mentioned earlier, the FAR refers to these descriptive elements as a "guide" but also says, "Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?" The OIG simply considered whether an element was "met" or "not met" in lieu of considering the elements as a guide, or in determining the scope at which each of the elements was "met," in assessing whether or not the contracts were personal in nature.

With respect to OIG's findings on the specific elements reviewed, CMS notes the following clarifications:

Contract Services Were Performed Onsite at Federal Offices (Finding for Element 1):

Only two out of approximately 25 contract/subcontract staff, which is less than 10 percent of the contractors, worked onsite at CMS offices. The staff were not given offices at CMS and did not have CMS email addresses. CMS staff did not approve timecards, leave, or other employment related requests, nor evaluate individual performance. These individuals worked onsite to more efficiently facilitate meeting the needs of the customer as is done by contractors across the Federal government. OIG did not consider this full context to make a determination that the element was "met."

Principal Tools and Equipment Were Not Furnished by CMS (Finding for Element 2):

As OIG noted, contractor personnel used their own equipment. The contractor was charged with many communications tactics, including social media duties. CMS staff provided direction to the contractor on his role in posting social media and the Administrator, not the contractor, approved all postings. OIG determined this element was "not met."

Contract Services Were Directly Applied to CMS Mission (Finding for Element 3):

As OIG mentioned, and in line with practices at other Federal agencies, CMS carries out its responsibilities through internal activities and through grants and contracts that support numerous healthcare-related programs and assist in carrying out CMS's basic mission. Contractors supported CMS in strategies to communicate with the public and align CMS's communication across the agency. Contractors were not making policy decisions nor making

decisions about the implementation of CMS programs. OIG did not consider this full context to make a determination that the element was “met.”

Comparable Services Were Performed Within the Office of Communications (Finding for Element 4):

CMS staff had distinct roles and expertise in comparison to contractors. Contractors were hired to address new cross-cutting communication efforts, including national media relations and event support, whereas CMS communications staff typically had a specific program area focus and supported beneficiary communications. Contractor tasks addressed identifying new media outlets, new forms of social media and commentary, and unique skills of contractor communications experts to expand communications to the general public. In addition, many of the descriptions highlighted by OIG of groups in the CMS Office of Communications encompass the work of both CMS staff and contractors that support those groups, so directly comparing the two is not accurate. This comparison also does not clearly identify the varying scope of work. For example, under event planning, CMS staff typically manage and coordinate staffing for key local conferences throughout the year, but that does not equate to implementing a nation-wide listening tour that contractor staff supported. OIG did not consider this full context to make a determination that the element was “met.”

Need for the Type of Service Provided Can Reasonably Be Expected To Last Beyond 1 Year (Finding for Element 5):

The task orders funded over the course of two and a half years varied in the work requested during that time. For example, initial work focused on a large-scale listening tour across the United States that led to the development of strategies to communicate better on future policy. In addition, the FAR expressly allows for and recognizes that Federal agencies may need to establish contracts spanning several years to fulfill recurring needs. A contract lasting over one year does not necessarily indicate it is a personal services contract. For example, CMS routinely funds contractors yearly to support communication around Medicare Open Enrollment and other large outreach campaigns. OIG did not consider this full context to make a determination that the element was “met.”

The Inherent Nature of Strategic Communications Services Required Close Government Direction or Supervision (Finding for Element 6):

In this case, CMS did not exercise relatively continuous supervision and control. For example, CMS staff did not act as a supervisor to contractor personnel, nor did they approve timecards, leave, or other employment related requests. In addition, CMS was not responsible for evaluating contractor personnel, only reviewing the contractor’s work products and overall performance as a whole through the annual contractor performance assessment reporting process. The contractor was responsible for determining the work of contractor and subcontractor employees and how they would appropriately address the needs of the contract. In addition, in some instances, OIG mischaracterized the content of emails. For example, in one instance, OIG considered a subcontractor employee simply being included on an email as indicative of the CMS Administrator directly assigning tasks. In the full email thread, the referenced subcontractor employee does not respond to the email, rather the CMS Deputy Administrator and Chief of Staff was the individual responding to the request.

The CMS Office of Communications staff and contractor staff worked closely with the Office of the Administrator to ensure any strategic messaging intended for the public was accurate and reflected agency leadership's policy goals. As the primary customer for this work, the Office of the Administrator at times directly provided the contractor feedback on deliverables to align and refine public communication and outreach messaging. This was appropriate because the Office of the Administrator makes all final decisions regarding communications about CMS policy and agency efforts. Providing this feedback on content does not equate to providing direction or supervision of contractor personnel to protect the Government's interest, retain control of the function involved, or retain full personal responsibility for the function supported, and complied with the FAR Guiding Principles at 1.102 to work together as an acquisition team. The OIG report implies that no one outside of the contracting officer or COR are allowed to communicate with the contractor, which would be inconsistent with the FAR Guiding Principles at 1.102 to work together as an acquisition team and would result in a highly inefficient, ineffective, and bureaucratic way of utilizing contracts. OIG did not consider this full context to make a determination that the element was "met."

The OIG acknowledges that the acquisition for these types of services on their face and in accordance with the respective contract terms and conditions, did not violate legal or regulatory requirements. Rather, the OIG cites that the issues emerged after contract award by the manner in which the contracts were being administered. While CMS does not agree that a subcontractor employee performed inherently governmental services, nor that CMS administered the task orders as personal services, CMS will continue our current annual training on contracts and acquisitions to reinforce these widely recognized ambiguous topics. CMS already provides training to its employees about the importance of administering contracts in a way that prevents them from becoming inherently governmental and personal services contracting, and will bolster its future training to reinforce these principles and ensure that the continued administration of contracts remain in line with the FAR.

OIG Findings that "CMS Did Not Comply With the Federal Acquisition Regulation in Managing Contract Deliverables and in Approving the Use of a Subcontractor," and "CMS Contracting Officer's Representatives Did Not Maintain Complete Working Files for All Three Contracts"

CMS Response: The CMS Office of Acquisition and Grants Management is responsible for ensuring each contract follows the FAR and provides guidance to program staff on the oversight and management of contract work. In accordance with the FAR, CMS designated a COR to assist with technical monitoring and contract administration of these task orders. The COR works as part of an acquisition team per the FAR guiding principles to communicate effectively and efficiently to the public about CMS programs and policies. Some of the COR's duties included technical guidance and monitoring of contractor performance, invoice review and approval, site visits, and serving as a liaison with other acquisition team members.

Deliverables for these contracts were broadly laid out in the contract statement of work; however, due to the evolving nature of communications work with rapid turnaround times and the high number of draft documents, items laid out in the statement of work were largely used as a guide of the scope and magnitude of work. As is common for a time and material type contract and as permitted by the FAR, much of the work acquired was for a specified level of effort of

personnel, rather than a specific end-product. These task orders required a quick turnaround to ensure CMS information got to stakeholders at various events and through a range of media outlets.

The OIG asserts that CMS did not properly maintain contract files. CMS is committed to complete transparency and collectively retained official records associated with the performance of this work. CMS is gathering documents and correspondence to store in one place to ensure record keeping aligns with HHS and CMS contracting requirements, in addition to the already followed record retention policies, prior to close out of these contracts.

For one task order, the OIG asserts that CMS did not follow FAR requirements (44.201 and 44.202) to provide the prime contractor with consent to subcontract. CMS disagrees with this assertion and followed FAR requirements associated with the issuance and definitization of change orders (43.204). CMS and the contractor acted properly whereby issuing a unilateral change order to allow the contractor to begin work immediately (43.201); then the action was definitized at a later date when requirements for subcontractor consent were evaluated (44.202) and all costs and proposed approaches were negotiated and approved (43.204).

OIG Finding that "CMS Paid Some Questionable Costs"

CMS Response: As part of the contractor oversight process, the COR carefully reviewed invoices submitted by the contractor to ensure appropriate contractor billing. The contractor is responsible for overseeing the work of any subcontractors and consultants and approving their spending and hours reported. For these task orders, CMS closely monitored monthly expenditures and the status of work through the review of invoice documentation submitted by the contractor and regular meetings held with the contractor to discuss deliverables needed and track progress of work.

OIG opined that in one instance, documentation was questionable due to a lack of business letterhead and signature of parties on the written agreement and invoice. However, CMS obtained documentation including the contractor's certified invoice. In addition, both the agreement and cancellation included a header with the business name, address and title of the company, in addition to details of the rates of the agreement. In reviewing the invoice, the COR and technical leads requested additional back-up documentation to verify the rates. The additional documentation was provided to CMS by the contractor. Based off of historical costs for this type of work conducted at CMS in the past, the CMS Office of Communications determined that the overall costs were reasonable.

During the referenced time period where a subcontractor worked on two separate strategic communications tasks, staff responsible for each task order collaborated and carefully reviewed the invoices submitted to ensure billed services were distinct. While the contractors were ultimately responsible for time-keeping and verifying any subcontractor staff labor costs, CMS also reviewed the contractor staff time to determine whether it was reasonable based on the volume of work and the participation in meetings. Based on their audit review, OIG did not cite any instances where duplicate payments were made.

On occasion, issues in billing may occur, such as the instance when the contractor billed to the wrong task order at the intersection of the two periods of performance, at which point CMS works with its Office of Financial Management to correct the issues, and, if applicable, recover any overpayments from the contractor. The payments in question by the OIG represent less than one percent of total payments to the contractor. CMS has recouped funds for issues already brought to CMS's attention.

OIG's recommendations to CMS and CMS's responses are below.

OIG Recommendation

We recommend that CMS provide training to program staff and contracting personnel, such as the contracting officers and CORs, on FAR requirements (1) specifying that contracts must not be used for the performance of inherently governmental functions and (2) related to written consent for the use of subcontractors.

CMS Response

CMS does not agree that a subcontractor employee performed inherently governmental services, nor that subcontractor consent was inappropriately administered. CMS will continue our current annual training on contracts and acquisitions to reinforce these widely recognized ambiguous topics and ensure that the continued administration of contracts remain in line with the FAR. Despite disagreeing with OIG's findings, CMS will bolster the COR appointment memorandum to more explicitly address the relevant FAR provisions.

OIG Recommendation

We recommend that CMS ensure that contracting personnel, such as the contracting officer, review contracts before they are awarded to determine whether they include language that could lead to those contracts being administered as personal services contracts.

CMS Response

CMS already reviews contracts and will continue to ensure contracting officers do so. Prior to award, CMS assessed and documented that the contracts were not personal services in nature. CMS will continue to strengthen its existing training to reinforce the principles identified in the report.

OIG Recommendation

We recommend that CMS ensure that for all future contracts (1) CMS receives and accepts deliverables in accordance with the SOW, (2) CORs maintain working contract files, and (3) CORs document all changes made to the SOW.

CMS Response

CMS concurs with this recommendation. CMS is bolstering the COR appointment memorandum to more explicitly address the FAR provisions reviewed by OIG.

OIG Recommendation

We recommend that CMS review contractor costs incurred under TO 1 and TO 2 during the overlap of performance periods to determine whether duplicate payments were made and take appropriate action, as necessary.

CMS Response

Based on their audit review, OIG did not cite any instances where duplicate payments were made. During the time period when strategic communications tasks overlapped, staff responsible for each task order collaborated and carefully reviewed the invoices submitted to ensure billed services were distinct. While the contractor was responsible for time-keeping and verifying any contractor staff labor costs, CMS also reviewed the contractor staff time to determine whether it was reasonable based on the volume of work and the participation in meetings. CMS will review any duplicate payments identified by the OIG for the contractor costs incurred under TO 1 and TO 2 during the overlap in period of performance to verify the accuracy of payments, and take appropriate action, as necessary, if any issues are found.

OIG Recommendation

We recommend that CMS expand the “COR Invoice Approval Operating Guidance” to include a description of acceptable documentation to support contractor payments.

CMS Response

As part of the contractor oversight process, the COR carefully reviewed invoices submitted by the contractor to ensure appropriate contractor billing. The contractor is responsible for overseeing the work of any subcontractors and consultants, and approving their spending and hours reported. For these task orders, CMS closely monitored monthly expenditures and status of work through the review of invoice documentation submitted by the contractor and meetings held with the contractor to discuss deliverables needed and track progress of work. CMS will expand the “COR Invoice Approval Operating Guidance” to include a description of acceptable documentation to support contractor payments.

OIG Recommendation

We recommend that CMS review contractor invoices identified in this report that contained questionable costs, determine the allowability of those costs, and take appropriate action to recoup any improperly paid amounts.

CMS Response

As part of the contractor oversight process, the COR carefully reviewed invoices submitted by the contractor to ensure appropriate contractor billing. The contractor is responsible for overseeing the work of any subcontractors and consultants, and approving their spending and hours reported. For these task orders, CMS closely monitored monthly expenditures and status of work through the review of invoice documentation submitted by the contractor and meetings held with the contractor to discuss deliverables needed and track progress of work. The payments in question by OIG are minor clerical mistakes and represent less than one percent of total payments to the contractor. On occasion when errors in billing occur CMS works with its Office of Financial Management to correct issues, and if applicable recoup any overpayments from the contractor. CMS has recouped funds for issues already brought to CMS’s attention.