



# Audit of the Executive Office for Immigration Review's Electronic Case Management System Awards



23-003

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**NOVEMBER 2022**

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# EXECUTIVE SUMMARY

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### Objectives

The Department of Justice (DOJ) Office of the Inspector General (OIG) audited an Executive Office for Immigration Review (EOIR) and Justice Management Division (JMD) procurement awarded to NTT DATA Federal Services, Inc. (NTT DATA) to support EOIR's new electronic case management system (ECMS). The OIG's objectives were to assess: (1) JMD's and EOIR's planning and procurement procedures, administration, and oversight; (2) NTT DATA's compliance with the award terms and conditions, applicable laws, and regulations; and (3) NTT DATA's performance on the award.

### Results in Brief

We found that JMD's and EOIR's contracting files did not demonstrate that the acquisition planning team applied well-established techniques to facilitate monitoring and overseeing the contractors' performance in compliance with the Federal Acquisition Regulation (FAR), DOJ and EOIR policies, or the award terms and conditions. For example, JMD's and EOIR's inconsistent application of award terms and internal policies led to the contractor billing overtime without the required pre-approval and receiving advance payments for work not yet performed. Also, the pricing analysis that JMD used to determine the award ceiling did not consider the work required for all ECMS project phases. As a result, the software development team is ill-positioned to adapt to planned and unplanned work, time, and budgeting constraints, which jeopardizes the immigration courts' ability to meet their goals of improving case scheduling, increasing adjudication efficiency, and reducing the active pending case backlog.

Many of these deficiencies reflect concerns the OIG highlighted in DOJ-wide management advisory memoranda concerning: (1) [contract administration](#) and (2) [compliance with laws and regulations that protect the whistleblower rights of those who support federal contracts](#).

### Audit Results

From 2001 to 2016, EOIR spent over \$80 million to modernize its eWorld Adjudication System (eWorld), which is comprised of various databases and applications, including the Case Access System for EOIR (CASE). EOIR intended for eWorld to integrate and automate its paper-based case management system and capture the complete lifecycle of information EOIR manages. In 2017, EOIR sought to replace CASE with a next generation ECMS to achieve a paperless case management system for immigration adjudication, appeals, and administrative hearings through its EOIR Courts and Appeals System (ECAS) initiative.

Leveraging one of the General Services Administration's government-wide contracts, in September 2020 EOIR (via JMD's Procurement Services Staff) competitively awarded NTT DATA a 5-year Blanket Purchase Agreement (15JPSS20A00000412 or the 2020 BPA) with a \$35-million ceiling. Under the 2020 BPA, NTT DATA agreed to design, configure, implement, and support the new ECMS using its primary subcontractor's commercial-off-the-shelf product. As of January 2022, JMD has issued five orders (known as calls), totaling \$27.8 million (79 percent of the BPA ceiling).

### Acquisition Planning Techniques

We found that JMD's and EOIR's acquisition planning documents lacked multiple components the FAR and its DOJ supplement require, including: (1) the statement of need; (2) the acquisition team participants; (3) consideration of performance-based acquisition methods; (4) a Quality Assurance Surveillance Plan; (5) a written assessment of closely associated with and inherently governmental functions; and (6) a complete pricing analysis. We believe that an adequate oversight framework developed pre-award would have likely addressed some of the issues we found in EOIR's and JMD's post-award administration and oversight.

## **BPA Pricing Analysis and Performance Milestones**

We found that EOIR, NTT DATA, and its subcontractor have encountered numerous challenges, which have added at least 14 months to the overall ECMS project timeline. We believe that these delays relate to acquisition planning tenets that JMD and EOIR either did not sufficiently document or complete. For instance, JMD based the total cost of the award on NTT DATA's proposed costs for one of three ECMS project phases. As a result, 79 percent of the budget has been allocated with two phases left that depend on the preceding phases, which will require more time and work to complete than initially planned.

### **Subcontracts**

We found that JMD and EOIR did not require NTT DATA to identify, in its proposal, the division of labor and costs attributed to it and its subcontractor. We believe this hindered JMD and EOIR contracting officials' ability to analyze and track the 2020 BPA calls and contributed to JMD and EOIR contracting officials not knowing that NTT DATA used a second subcontractor on the award, which was not identified in its proposal. This is problematic because NTT DATA's use of another subcontractor could impact the quality of deliverables.

### **Government and Contract Personnel Oversight Roles**

We found that an EOIR official without contracting authority for the 2020 BPA regularly bypassed properly designated contracting officials to instruct the contractors' project managers and other personnel on software configurations and milestone prioritization. This puts the government at risk of costly miscommunications and legal disputes. We believe that this occurred partly because the JMD contracting officer (CO) and EOIR government personnel who closely interact with the contract workers did not receive timely training on the government-contractor protocol that JMD adopted in response to the OIG's July 2020 Management Advisory Memorandum (MAM) regarding the administration and oversight of contracts.

We also determined that EOIR used contract workers obtained through a separate JMD contract with a staffing company. The contract workers review and

approve work products for the 2020 BPA, which we believe is closely associated with, or is in practice, an inherently governmental function.

### **Performance Evaluation and Reporting**

JMD contracting officials incorrectly registered the BPA calls in the Contract Performance Assessment Reporting System, resulting in the system's automations not prompting them to complete and submit the first contractor performance evaluation until 4 months after the due date.

### **Billing and Payments**

We tested the 21 invoices that EOIR approved and paid for the 5 active BPA calls and found: (1) 8 Time and Materials invoices with over \$18,000 in overtime charges that did not receive required EOIR pre-approval, and (2) a Firm-Fixed Price invoice paid using a payment schedule that is inconsistent with EOIR practices and BPA terms, which resulted in EOIR effectively advancing NTT DATA 9 months' worth of payments before the contractor had rendered all agreed-to services.

### **Whistleblower Rights and Protections**

We found that the 2020 BPA and its calls did not include the mandatory FAR 52.203-17 clause on contract workers' whistleblower rights and protections. JMD contracting officials also did not provide required information documents to NTT DATA for dissemination to its contract workers (including subcontractors) that would have ensured the workers' awareness of their rights and responsibilities while working on a federal award. After our inquiries, JMD modified the BPA to include the required clause, provided the appropriate whistleblower information to NTT DATA, and received confirmation that the information had been disseminated to all contract workers. JMD awarded the 2020 BPA prior to issuing prescriptive guidance in March 2021 in response to a February 2021 OIG MAM.

### **Recommendations**

Our report contains 13 recommendations to help improve JMD's and EOIR's planning, administration, and oversight of complex Information Technology (IT) procurements.

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# Introduction

The Executive Office for Immigration Review (EOIR) adjudicates immigration cases, including immigration court proceedings, appellate reviews, and administrative hearings. In 2001, EOIR began deploying its eWorld Adjudication System (eWorld), which is comprised of various databases and applications, including its legacy case management system—the Case Access System for EOIR (CASE). EOIR intended for eWorld to integrate and automate its paper-based tracking systems and capture the complete lifecycle of information that EOIR manages.<sup>1</sup>

Through the eWorld initiative, EOIR entered into multiple support contracts and agreements that correlate with shifts in budget and administration strategy over the course of more than 20 years. While the Justice Management Division's Procurement Services Staff (JMD PSS or JMD) has served as the Contracting Office for many of these awards, the EOIR Office of Information Technology (OIT) is responsible for overseeing the information technology (IT) infrastructure across EOIR, including automation and data processing. From 2001 to 2016, JMD PSS coordinated with EOIR OIT to plan, solicit, and award an estimated total of \$80 million in procurements to support eWorld software design, systems implementation, and IT applications. If not administered properly, services provided through eWorld contracts and agreements risk contributing to, perpetuating, or even causing tangible immigration court operational deficiencies.

Nevertheless, EOIR's contractor-supported eWorld initiative has raised multiple concerns since its inception in 2001. Specifically, the U.S. Government Accountability Office (GAO) and EOIR reported that:

- In August 2006, while EOIR increased the number of immigration judges, the number of new immigration cases filed outpaced cases completed. GAO also identified irregularities in EOIR's evaluation of immigration court performance in that it: (1) was not able to demonstrate the accuracy of case completion goals and (2) did not apply a consistent methodology to clearly identify the cases that were counted towards such goals. EOIR cited its case management system functionality as a reason for the performance data inconsistencies.<sup>2</sup>
- In March 2017, an EOIR official submitted a hotline complaint to OIG that alleged, among other issues, EOIR contracting officials did not follow best practices for evaluating legacy systems prior to awarding an EOIR Courts and Appeals System (ECAS) support contract.
- In June 2017, EOIR was not able to implement its e-Filing system on time and may have disposed of records documenting reasons for not meeting eWorld goals.<sup>3</sup>

Amidst these concerns, EOIR continued its IT modernization efforts, using a 2016 Operational and Maintenance (O&M) contract (DJJ16PSSE2683) that JMD had awarded to NTT DATA Federal Services, Inc. (NTT

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<sup>1</sup> For further information on the eWorld applications and databases, see Appendix 2.

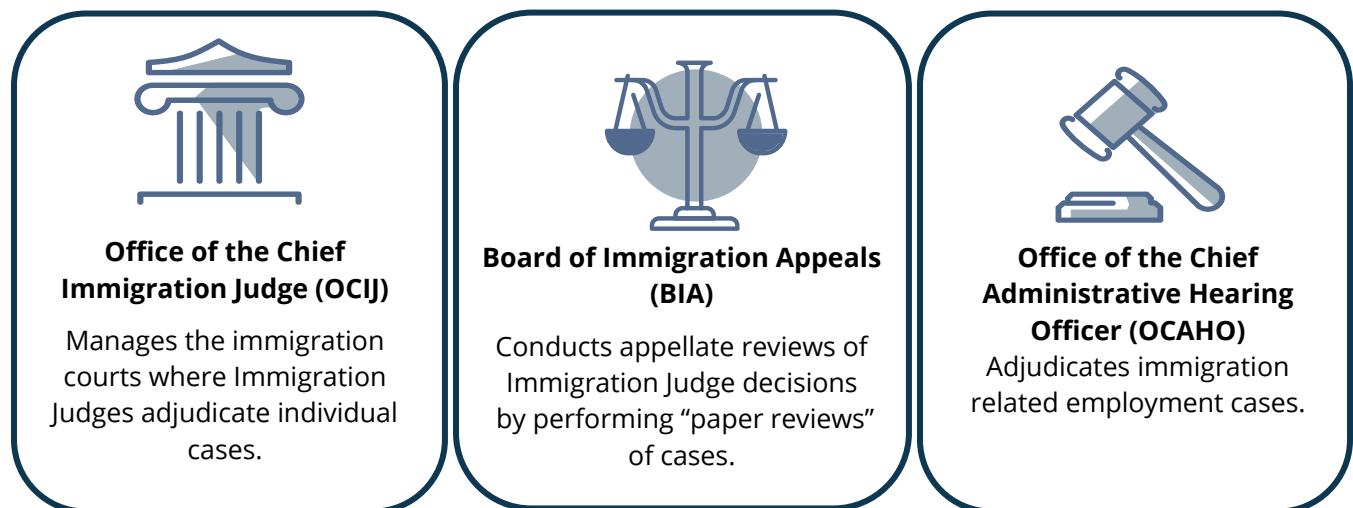
<sup>2</sup> U.S. Government Accountability Office, *Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement*, GAO-06-771 (August 2006), [www.gao.gov/assets/gao-06-771.pdf](http://www.gao.gov/assets/gao-06-771.pdf) (accessed May 25, 2021), 11-14, 20-29.

<sup>3</sup> U.S. Government Accountability Office, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438 (June 2017), [www.gao.gov/assets/gao-17-438.pdf](http://www.gao.gov/assets/gao-17-438.pdf) (accessed May 25, 2021), 43-51.

DATA) subsidiary Keane Federal Systems, Inc. to sustain some of the legacy eWorld systems until a new electronic case management system (ECMS) could be implemented to replace CASE.<sup>4</sup> In July 2018, EOIR began to use the O&M contract to support the ECAS pilot program. Through ECAS, EOIR intended to fully automate and make interoperable the business processes of its three adjudicatory components, detailed in Figure 1.<sup>5</sup>

**Figure 1**

**EOIR Adjudicatory Components and Roles**



Source: EOIR

As plans materialized for the next-generation ECMS, EOIR determined that, to be effective, such a system needs to process case information and securely make it accessible to appropriate external and internal immigration case stakeholders. ECAS stakeholders include the U.S. Department of Homeland Security (DHS), respondent attorneys and representatives, and EOIR immigration and appellate judges and staff.<sup>6</sup> As shown in Figure 2, these entities use different systems and tools to prepare, submit, and receive court information.

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<sup>4</sup> JMD awarded the 2016 O&M contract with a 5-year performance period, \$35 million total value, and Time and Materials calls. As of May 2022, JMD had modified the contract at least 14 times for within-scope supplemental agreements and the extensions required to process the new solicitation, increasing the total value to \$95 million. JMD renewed the O&M contract in July 2021, and a previous bidder protested this renewal. As a result, EOIR had to extend the O&M contract for up to 6 months while JMD prepared and processed a solicitation in lieu of the renewal.

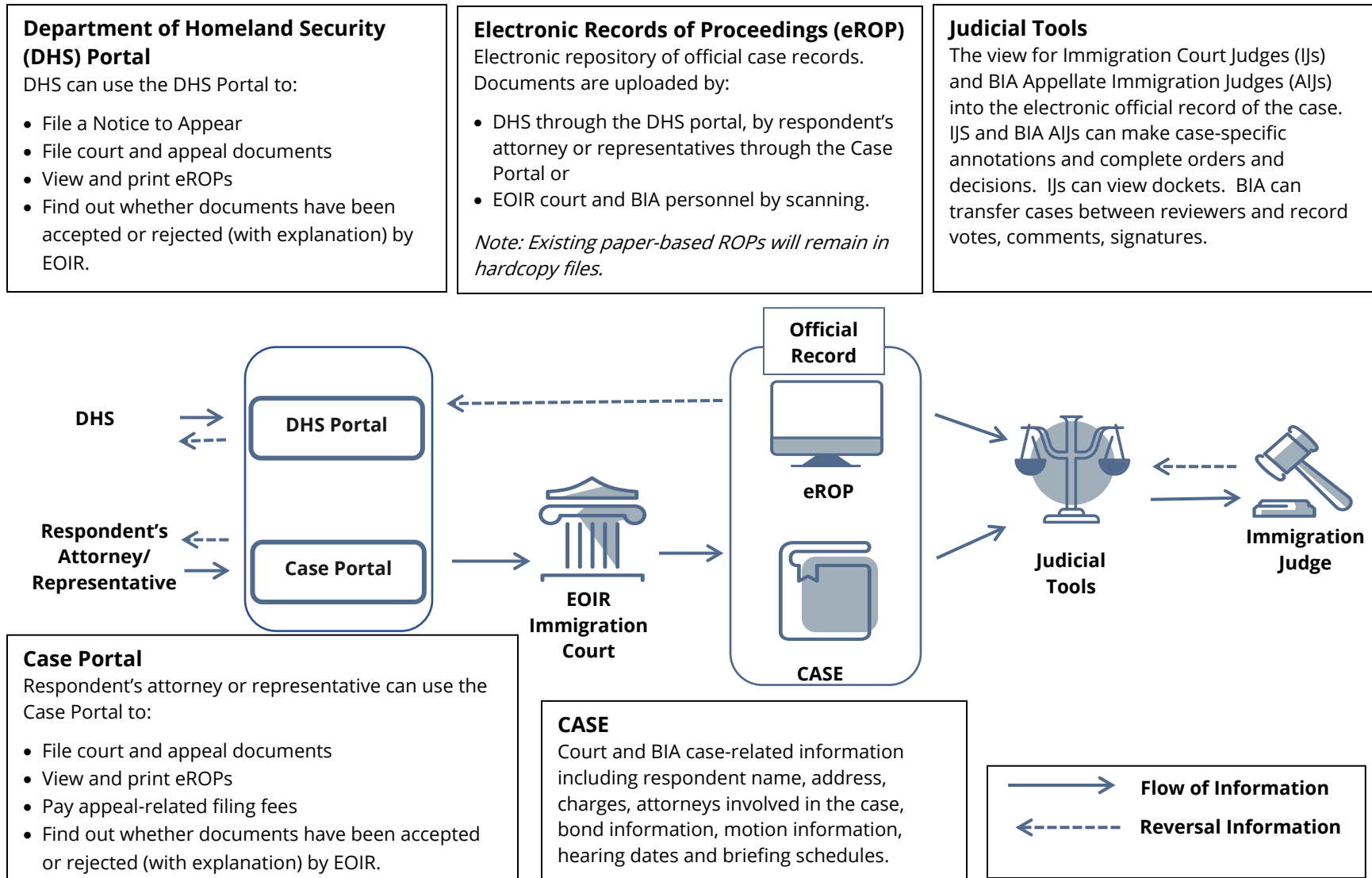
A Time and Materials contract provides for acquiring products or services based on: (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) actual cost for materials.

<sup>5</sup> In addition to the three adjudicatory components outlined, EOIR has other offices that use ECAS to a lesser extent, including the Office of the Director, Office of the General Counsel, Office of Administration, OIT, and Office of Policy.

<sup>6</sup> A respondent is a foreign-born individual who the DHS has charged with violating immigration law. The respondent is the party against whom a petition is filed, especially one on appeal.

**Figure 2**

**Immigration Court Case Information Exchange via ECAS**



Source: Office of the Inspector General (OIG) Analysis and EOIR



To achieve the desired ECAS functionality, in September 2020, JMD PSS leveraged the General Services Administration’s (GSA) government-wide IT Professional Services Federal Supply Schedule to competitively award NTT DATA a 5-year Blanket Purchase Agreement (BPA 15JPSS20A00000412 or the 2020 BPA) with a \$35-million ceiling to design, configure, implement, and support the new ECMS, using subcontractor Thomson Reuters Court Management Solutions’ (Thomson Reuters) C-Track commercial-off-the-shelf software.<sup>7</sup> Calls issued under the BPA may include Firm-Fixed Price; Labor Hours, including Time and Materials; or Cost-Reimbursable contract line-item numbers.<sup>8</sup> As shown in Table 1, as of January 2022, EOIR issued five calls under the 2020 BPA.

**Table 1**

**2020 BPA Calls Awarded to NTT DATA  
as of January 2022**

<b>BPA Calls</b>	<b>Contract Line-Item Numbers Type</b>	<b>Performance Period</b>	<b>Total Call Value</b>	<b>Obligated Amount</b>	<b>Percentage Obligated</b>
<b>15JPSS20F00001022</b>	Firm-Fixed Price/ Labor Hours	09/29/2020 – 09/28/2021	\$801,139	\$319,392	40
<b>15JPSS21F00000286</b>	Time and Materials Firm-Fixed Price	01/04/2021 – 03/08/2021 03/09/2021 – 01/31/2023	8,578,477	6,288,488	73
<b>15JPSS21F00000287</b>	Time and Materials	03/09/2021 – 01/31/2023	5,998,554	2,019,167	34
<b>15JPSS21F00000288</b>	Time and Materials	03/09/2021 – 01/31/2023	6,603,784	2,192,345	33
<b>15JPSS21F00000337</b>	Firm-Fixed Price	04/13/2021 – 04/12/2023	5,829,280	5,829,280	100
<b>Total</b>			<b>\$27,811,234</b>	<b>\$16,648,672</b>	

Source: BPA documents and OIG Analysis

<sup>7</sup> A Federal Supply Schedule, also known as a GSA Schedule or Multiple Award Schedule, is a long-term government-wide contract with companies that provide commercial products and services at fair and reasonable prices.

Commercial-off-the-shelf consists of ready-made hardware and software IT products that are available for purchase by the public.

<sup>8</sup> A BPA is a simplified method of filling anticipated repetitive needs for products or services by establishing charge accounts with qualified vendors so that an agency may place an order (known as a call) against the agreement to request a service or product. Single-award BPAs, such as the 2020 BPA, involve the government awarding one vendor the BPA and all subsequent calls because the expected work is so integrally related that only a single source can reasonably perform the work.

A Firm-Fixed Price contract provides a price that is not subject to any adjustment based on the contractor’s cost experience in performing the contract.

A Labor-Hour contract is a variation of the Time and Materials contract, differing only in that the contractor does not supply the materials.

Since the 2016 O&M contract and the 2020 BPA run concurrently, the new solicitation will affect scheduled maintenance and upgrade timelines for the CASE and e-Filing legacy systems as well as development work for eROP and Judicial Tools.<sup>9</sup>

## Office of the Inspector General Audit Approach

The objectives of this audit, which considered JMD's and EOIR's performance with regard to the 2020 BPA, were to assess: (1) JMD's and EOIR's planning and procurement procedures, administration, and oversight; (2) NTT DATA's compliance with the BPA terms and conditions, as well as applicable laws and regulations; and (3) NTT DATA's performance on the BPA, including financial management, monitoring, reporting, and progress toward meeting the BPA goals and objectives. To accomplish these objectives, we:

- Interviewed and consulted JMD and EOIR personnel responsible for the acquisition lifecycle (i.e., planning, award, administration, and oversight), as well as personnel responsible for security and IT considerations for the BPA, legacy case management applications, and databases to understand their experiences, roles, and responsibilities.
- Reviewed various documents to understand the history of eWorld (particularly CASE and ECAS), including support for key decisions regarding prior configurations and system development.
- Interviewed contract workers from prime contractor NTT DATA and subcontractor Thomson Reuters who provided data migration, integration, configuration services under the 2020 BPA. Also interviewed contract workers furnished by a staffing company that oversaw end-user outreach.
- Reviewed BPA deliverables as stated in the Statement of Work.
- Examined support for 2020 BPA contractor billing and government payment of costs.

We evaluated the aforementioned information and considered whether the processes practiced by JMD and EOIR complied with the laws, regulations, internal policies, and applicable contractual requirements.

Several of the concerns identified in this audit underscored those outlined in our July 2020 and February 2021 Management Advisory Memoranda, which identified Department-wide concerns regarding management and oversight of service contracts.<sup>10</sup> Appendix 1 contains further details on our audit objectives, scope, and methodology.

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<sup>9</sup> For further information on eROP and Judicial Tools, see Figure 2.

<sup>10</sup> DOJ OIG, [Management Advisory Memorandum Concerning the Department of Justice's Administration and Oversight of Contracts](https://www.oig.justice.gov/reports/management-advisory-memorandum-concerning-department-justices-administration-and-oversight), Audit Report 20-082 (July 2020), [www.oig.justice.gov/reports/management-advisory-memorandum-concerning-department-justices-administration-and-oversight](https://www.oig.justice.gov/reports/management-advisory-memorandum-concerning-department-justices-administration-and-oversight). DOJ OIG, [Management Advisory: Notification of Concerns Regarding the Department of Justice's Compliance with Laws, Regulations, and Policies Regarding Whistleblower Rights and Protections for Contract Workers Supporting Department of Justice Programs](https://www.oig.justice.gov/reports/management-advisory-notification-concerns-regarding-department-justices-compliance-laws), Audit Report 21-038 (February 2021), [www.oig.justice.gov/reports/management-advisory-notification-concerns-regarding-department-justices-compliance-laws](https://www.oig.justice.gov/reports/management-advisory-notification-concerns-regarding-department-justices-compliance-laws).

## Audit Results

To modernize its court and appellate case management systems, beginning in 2001, the Executive Office for Immigration Review (EOIR) (via the Justice Management Division's Procurement Services Staff- JMD PSS or JMD) entered into multiple contracts and agreements with a cadre of information technology (IT) contractors. The most recent procurement agreement was with prime contractor NTT DATA Federal Services, Inc. (NTT DATA) and its primary subcontractor, Thomson Reuters Court Management Solutions (Thomson Reuters). Through implementation of Thomson Reuters' commercial-off-the-shelf electronic case management product (known as C-Track) EOIR sought to eliminate paper filings, automate case processing, retain all records and documents in electronic form, and reduce maintenance costs under a 2020 Blanket Purchase Agreement (BPA).

However, we determined that JMD's and EOIR's pre-award decisions, including failure to apply and misapplication of well-established government acquisition planning techniques, contributed to some of the post-award operational deficiencies that EOIR's over 60 immigration courts have experienced to date and will likely continue to experience if JMD and EOIR do not make improvements. Specifically, we found that during:

- the 2020 BPA pre-award phase: (1) JMD did not have guidelines to help its contracting officials establish realistic acquisition timelines; (2) JMD and EOIR did not fully consider or use performance-based acquisition; (3) EOIR did not develop measurable performance standards; (4) JMD and EOIR did not include key elements in their pricing analysis; and (5) JMD and EOIR did not require prospective contractors to submit a subcontract plan that would have helped the government to understand the specifics on the work performed by the prime contractor and its subcontractors.
- the 2020 BPA post-award phase: (1) EOIR's ECMS milestones have been delayed several times, which caused the go-live date to be extended by more than a year; (2) JMD and EOIR did not prepare and submit contractor performance evaluations as required by the Federal Acquisition Regulation (FAR); (3) EOIR did not perform an adequate review of the invoices for the Time and Materials BPA calls, which resulted in EOIR paying overtime costs without the required requests and pre-approval; and (4) JMD contracting officials did not include the mandatory FAR Subpart 52.203-17 clause in the BPA, which establishes guidance to ensure contract workers are informed of their whistleblower rights and protections.

An underlying challenge that we noted related partly to JMD's and EOIR's ongoing reconciliation of the traditional "waterfall" software development approach to the modern iterative "agile" approach. Because the agile approach allows teams to develop software code as they obtain real-time user feedback and address issues sooner (e.g., changes in laws, regulations, policies, and leadership priorities), it is widely accepted as the preferred method for management of federal IT projects. However, federal budgeting, procurement, and oversight structures more closely align with the waterfall approach because they seek certainty through definitive timelines and deliverables. This does not mean that the Federal Acquisition Regulation (FAR) and other pillars of government contracting do not apply to or cannot benefit agile projects, such as the C-Track work procured under the 2020 BPA. Figure 3 depicts the agile development

process that EOIR used to track the contractors' progress and performance on the 2020 BPA.<sup>11</sup> While the process depicted aligns with the common baseline application of agile, in practice, EOIR's implementation of the agile approach has decreased EOIR's visibility in multiple areas that led to the previously outlined post-award deficiencies.

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<sup>11</sup> Agile is a software development approach in which the product is designed incrementally and is continuously evaluated for functionality, quality, and customer satisfaction. In contrast, the traditional waterfall approach breaks down project activities into linear sequential phases, where each phase depends on the deliverables of the previous phase. This agile framework, referred to as "scrum," organizes teams using defined roles, such as "product owner" and "scrum master."

Figure 3

### EOIR's Agile Development Process

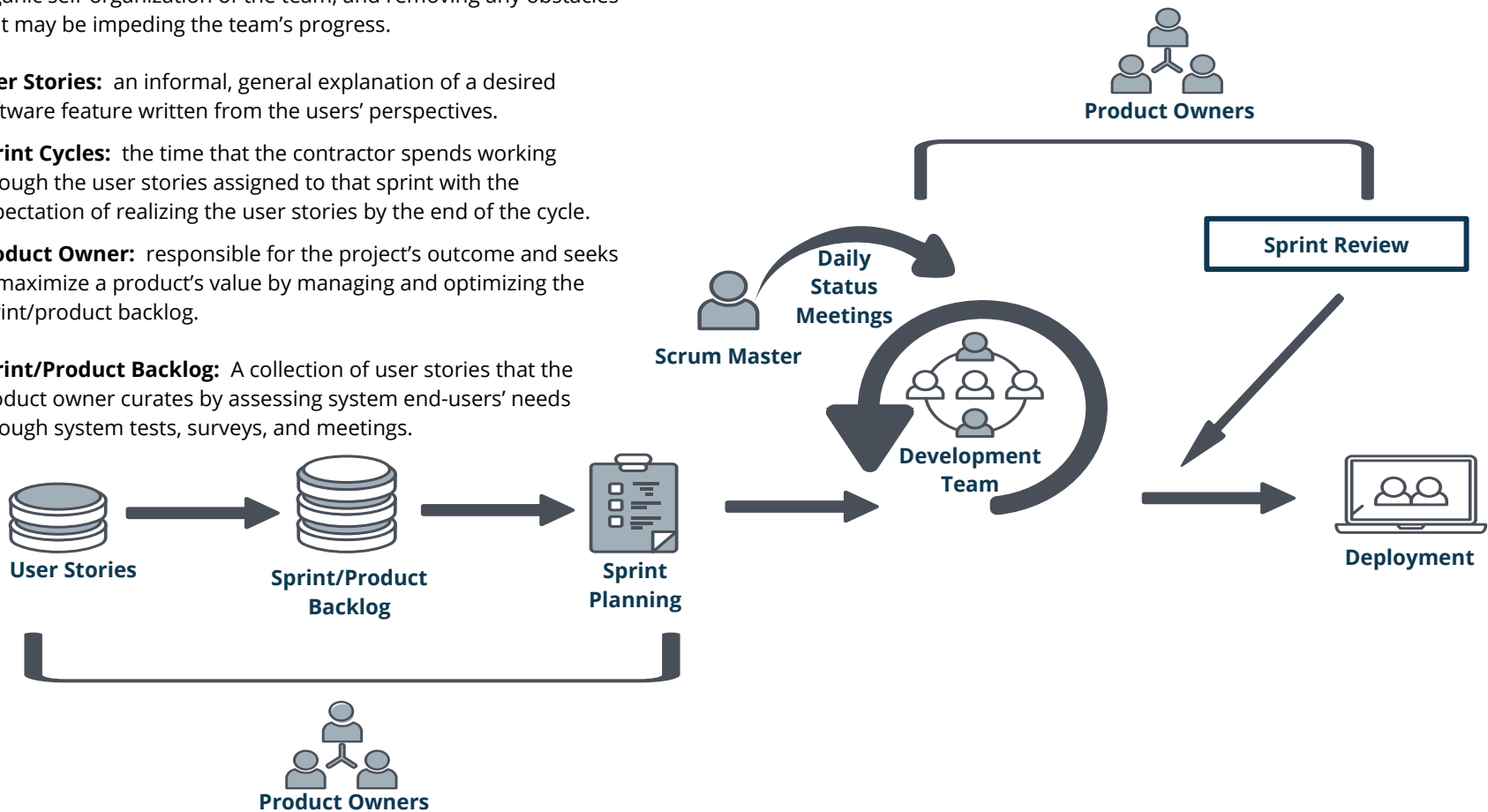
**Scrum Master:** manages the agile process and the team (i.e., product owners and development team) by administering the Scrum ceremonies (i.e., daily status meetings, and an end of sprint review that require reviewing the work performed to identify lessons learned and best practices), facilitating the organic self-organization of the team, and removing any obstacles that may be impeding the team's progress.

**User Stories:** an informal, general explanation of a desired software feature written from the users' perspectives.

**Sprint Cycles:** the time that the contractor spends working through the user stories assigned to that sprint with the expectation of realizing the user stories by the end of the cycle.

**Product Owner:** responsible for the project's outcome and seeks to maximize a product's value by managing and optimizing the sprint/product backlog.

**Sprint/Product Backlog:** A collection of user stories that the product owner curates by assessing system end-users' needs through system tests, surveys, and meetings.



Source: OIG Analysis of EOIR's Agile process

## Acquisition Planning Techniques

To ensure that a federal agency meets its needs in the most effective, economical, and timely manner, the FAR advises that an agency undertake acquisition planning as soon as it identifies its procurement need (preferably well in advance of the fiscal year in which contract award or order placement is necessary). Moreover, Justice Acquisition Regulation (JAR) Subpart 2807.105 requires that the Heads of Contracting Activities prescribe the format and content of acquisition planning documents commensurate with the complexity and dollar-value of the acquisition. The acquisition planning team should consist of those responsible for significant aspects of the acquisition, such as contracting, small business, fiscal, legal, and technical functions.<sup>12</sup> We determined that many key acquisition planning documents for the 2020 BPA either were not completed or lacked sufficient support, such as a: (1) written acquisition plan, (2) written assessment of inherently governmental functions (and those closely associated with such functions), (3) measurable performance standards, (4) price fairness and reasonableness determination, (5) performance-based acquisition, and (6) subcontract's level of work and cost.

## BPA Acquisition Planning Requires Documented Evidence

Although JMD PSS and EOIR applied milestones to guide the 2020 BPA acquisition planning process, the contract file lacked the support and sufficient detail necessary to demonstrate compliance with acquisition planning requirements. Table 2 lists the considerations the FAR requires contracting officials to document during acquisition planning, identifies whether JMD PSS and EOIR completed the written consideration and, if so, whether the written consideration contained sufficient detail to meet the requirement.

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<sup>12</sup> Certain acquisitions require more explicit documentation and support than what is shown in Table 2. To facilitate the acquisition planning team's collaboration, as well as to guide and memorialize the decision-making process, high-risk contracts (generally, those other than Firm-Fixed Price) require a written cost reimbursement plan. For IT acquisitions, FAR Subpart 39.102(c) indicates that appropriate techniques should be applied to manage and mitigate risk. Such techniques include, but are not limited to, prudent project management, use of modular contracting, thorough acquisition planning tied to budget planning by the program, finance and contracting offices, continuous collection and evaluation of risk-based assessment data, prototyping prior to implementation, post implementation reviews to determine actual project cost, benefits and returns, and focusing on risks and returns using quantifiable measures.

**Table 2**

**Written Considerations for Acquisition Planning**

Required Written Considerations	Criteria	2020 BPA	
		Completed	Sufficient Detail
Written Acquisition Plan	FAR Subparts 7.103(e) and 7.105	Yes	No
Written Assessment of Inherently Governmental Functions (and those closely associated with such functions)	FAR Subparts 2.101 and 7.503(e)	No	-
Quality Assurance Surveillance Plan Prepared in Conjunction with the Statement of Work or Performance Work Statement	FAR Subparts 46.401 and 16.601(c)(1)	No	-
Estimate of Fair Market Price (i.e., Independent Government Cost Estimate)	FAR Subparts 8.4, and 15.4	Yes	No
Implementing Performance-Based Acquisition Methods	FAR Subpart 7.105 and FAR Part 37	No	-

Source: OIG Analysis, FAR, JMD, and EOIR

We determined that the 2020 BPA's written acquisition plan did not include the following required elements: (1) the statement of need; (2) the acquisition team participants; (3) consideration of performance-based acquisition methods; or (4) a Quality Assurance Surveillance Plan.<sup>13</sup> In addition, JMD PSS did not have guidelines to help its contracting officials establish realistic acquisition timelines. While JMD PSS had acquisition plan templates for various procurement types, it did not have policies or guidelines on how it and program offices (such as EOIR OIT) should apply lead times (i.e., the amount of time required to complete the actions leading to contract award) in acquisition planning. Nevertheless, JMD PSS and EOIR updated the milestones to account for the time to receive approval to solicit publicly the ECMS without small business preferences. These adjustments contributed to the acquisition process for the 2020 BPA taking over a year (398 calendar days) to complete.

JMD PSS and EOIR acquisition planning procedures do not need to just comply with regulations. Adequate oversight of the BPA's acquisition planning framework, as prescribed by the FAR and JAR, would have helped align the BPA to better support ECMS functions, thereby preempting some of the post-award concerns identified in subsequent sections of this audit report. In working with EOIR on future iterations of the 2020 BPA and other procurements, JMD PSS would benefit from applying the best practices for Procurement Administrative Lead Times as outlined in the Office of Management and Budget's (OMB) January 2021

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<sup>13</sup> A Quality Assurance Surveillance Plan is used by government personnel to assess contractor performance. This document incorporates contract requirements to ensure that each performance objective is linked to a post-award method of inspection (i.e., what is going to be inspected, the inspection process, and who will do the inspecting).

memorandum.<sup>14</sup> This guidance explains how the federal acquisition team can drive continual process improvement by monitoring acquisition milestone data and evaluating a contract's overall effectiveness and value in terms of the cost and quality of contractor performance. We recommend that JMD PSS provide guidance to acquisition planning team members, including EOIR OIT and contracting officials, on how to apply the best practices outlined in OMB's January 2021 memorandum on Procurement Administrative Lead Times for all procurement vehicles. Such guidance should incorporate an oversight framework by which JMD PSS and EOIR contracting officials adopt practices that will help them to monitor and reduce the time between the initial contract action solicitation and award dates.

### **Acquisition Planning Needs to Assess for Inherently Governmental Functions (And Those Closely Associated with Such Functions)**

The FAR requires government contracting officials to use acquisition planning documents to ensure that contractors do not perform inherently governmental functions.<sup>15</sup> Specifically, FAR Subpart 7.503(e) states that an agency head (or designee) must include a written assessment regarding how the agency will hold itself accountable and control the contractor's discretionary authority and decision-making ability.

DOJ requires that components: (1) reserve certain work for DOJ employees and (2) take special care to maintain sufficient oversight of contract workers used to support government operations. In April 2019, DOJ issued a policy requiring that program officials affirmatively determine whether contemplated contracted tasks or duties may approach an inherently governmental function.<sup>16</sup> This policy requires that, before issuing a solicitation, the Contracting Officer (CO) state in the contract file whether the: (1) contracted function is closely associated with an inherently governmental function; (2) contractor's performance of the function is appropriate and the most cost-effective source of support for the agency; and (3) contracting agency will oversee contractor performance to mitigate conflicts and the provision of unauthorized personal services.<sup>17</sup> Also, DOJ components should review, on a regular basis, the functions performed by contractors to avoid an overreliance on contractors that could expose the Department to an unacceptable level of risk. We found that JMD PSS did not follow the FAR and DOJ policies in assessing whether the 2020 BPA included inherently governmental functions (and those closely associated with such functions). JMD PSS also told us that it had not performed any such assessment after awarding the 2020 BPA.

Failure to consider inherently governmental functions (and those closely associated with such functions)

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<sup>14</sup> While the memorandum became effective after JMD and EOIR awarded the 2020 BPA, we believe that JMD needs to consider these guidelines during acquisition planning for future iterations of the ECMS contracts and agreements. See OMB [Memorandum on Reducing Procurement Administrative Lead Time Using Modern Business Practices](#) (January 2021).

<sup>15</sup> FAR Subpart 2.101, *Definitions*, defines inherently governmental functions as activities that require exercising discretion in applying Government authority or making value judgments in making decisions for the Government. FAR Subpart 7.503(a) expressly prohibits the government from contracting for inherently governmental functions.

<sup>16</sup> DOJ Instruction 1301.02.01, *Acquisition Policy Oversight Inherently Governmental and Critical Functions* (April 19, 2019).

<sup>17</sup> FAR Subpart 2.101, *Definitions* and FAR Subpart 37.104, *Personal Services Contracts*, defines a personal services contract as one that, by its express terms or as administered, makes the contract personnel appear to be, in effect, Government employees and involves the relative continuous supervision and control of contract personnel by a Government employee.



increases the risk that contractors will perform tasks more appropriate for government employees. For example, EOIR (via JMD PSS) entered a separate contract with a staffing company (not NTT DATA or its subcontractors) for product owners to assist in the project management of the software development lifecycle for C-Track under the 2020 BPA. However, JMD did not assess whether the services to be provided constituted inherently governmental functions (and those closely associated with such functions), which resulted in JMD and EOIR using the product owners as the primary method of tracking the work performed by NTT DATA to ensure that it meets the BPA requirements, which we believe is likely inappropriate because the product owners are performing tasks that are very similar to work that should be performed by government employees (i.e., approving sprint user stories of another contract worker) due to the autonomy and empowerment innate in the role as discussed throughout the rest of this section.

To guide federal agencies on addressing common pitfalls in implementing modern software development practices, the General Services Administration (GSA) issued the De-risking Government Technology Federal Agency Field Guide in September 2020. In this document, GSA advises that product owners, as the key persons on software projects, must be government employees due to the autonomy and empowerment innate to the role. Table 3 lists the duties that GSA identified as reasons that product ownership is best suited for government employees. We compared these descriptions to the tasks performed by the 2020 BPA’s contracted product owners and found that they had assumed all the duties.

**Table 3**

**GSA Government Product Ownership Duties Compared to Contracted Product Owners’ Involvement in the 2020 BPA**

<b>GSA-Defined Product Owner Duties Best Suited for Government Employees</b>	<b>Currently Performed by Contracted Product Owner (Yes/No)?</b>	<b>How is the Contracted Product Owner Involved?</b>
(1) Works with all involved to envision the direction of the product.	Yes	Interpret OIT and stakeholders' needs to conceptualize the vision that becomes the user stories.
(2) Iteratively prioritize and define the work for the product team.	Yes	Manage the sprint/product backlog and establish the priorities for each sprint cycle.
(3) Measure progress against clear performance indicators by accepting the user stories at the end of the sprints.	Yes	Accept the user stories after each sprint cycle based on performance indicators developed by the product owners.
(4) Communicate with stakeholders and cross-functional teams that build the product.	Yes	Meet with OIT and stakeholders to communicate the sprint cycles and sprint/product backlog progress.

Source: OIG Analysis, FAR, GSA, and EOIR

Moreover, by not completing the required pre-award assessment JMD PSS and EOIR missed an opportunity to detect whether the contract positions (including product owners) that they were creating appeared to be inherently governmental functions (or closely associated with such functions) and ultimately avoid using the positions that they determined to be so. Further, had JMD PSS and EOIR completed the pre-award

assessment, they would have had a monitoring framework that included internal controls to: (1) limit the autonomy (by not assigning the duties listed in Table 3) of the product owner position to make it potentially suitable for contract workers and (2) ensure that the manner that the government administers and oversees the product owners does not convert the position to an inherently governmental function.

As a result of our discussions with JMD PSS contracting officials regarding closely associated and inherently governmental functions, they provided the assigned JMD CO and EOIR Contracting Officer's Representative (COR) the September 2021 Department-wide template, which was created to help contracting officials determine the appropriate use of contract workers for acquired services in compliance with the April 2019 Department-wide policy.<sup>18</sup> While the template instructs the Designated Requirements Official (i.e., the COR) to complete the assessment and submit it to the CO for approval, the template does not include instructions on when the contracting officials should perform the assessment on new and existing contracts.

In addition to our concerns about contracting officials not assessing services during pre-award phases, we are concerned that contracting officials will not reassess contracts that have been modified after award to refine contract labor categories or to expand the scope of duties. Enhanced guidance on assessing inherently governmental functions would benefit JMD PSS and EOIR acquisition planning and facilitate EOIR efforts to properly oversee contract workers performing services closely related to such functions. Therefore, we recommend that JMD PSS complete the written assessment for inherently governmental functions (and closely associated functions) for the 2020 BPA and the related contracts (e.g., the contract for product owners and future related procurements) and update its template to include instructions on when contracting officials should perform the assessment. Such updates should address considerations during pre-award and appropriate reassessment after award.

### **EOIR Needs to Develop Measurable Performance Standards to Achieve ECMS Goals**

JMD PSS and EOIR issued each 2020 BPA call using a combination of Firm-Fixed Price and Time and Materials cost structures. Time and Materials contracts base payments on a specified price per labor hour and FAR Subpart 16.601(c)(1) states that services procured under Time and Materials contracts must be managed carefully (via a quality assurance framework) to control costs and to ensure that the procured services conform to contract requirements. A Quality Assurance Surveillance Plan prepared with the Statement of Work specifies all activity requiring surveillance (i.e., monitoring and evaluation) and the method of surveillance.<sup>19</sup>

For the 2020 BPA, NTT DATA and Thomson Reuters developed the Statement of Work during the post-award "Discovery Phase," which we describe later in the [More Sufficient Milestones Will Help Ensure Achievement of the ECMS Goals](#) section. The 2020 BPA's Statement of Work includes multiple factors that indicate that an acquisition of the size and complexity of the ECMS would have benefited from additional quality assurance and surveillance considerations to align BPA goals with ECMS project management goals. Specifically: (1) the C-Track commercial off-the-shelf product requires customizations to meet the over 60 immigration

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<sup>18</sup> Inherently Governmental Functions Determination, V.1, dated September 15, 2021.

<sup>19</sup> FAR Subpart 46.4, *Government Contract Quality Assurance*.

courts' needs and (2) the legacy system (i.e., CASE) and C-Track will need to run parallel to ensure that immigration court operations continue uninterrupted.

### **JMD's and EOIR's Application of Agile Development Framework Did Not Supplant the Need for a Quality Assurance Surveillance Plan**

EOIR relied on agile methodology records maintained by NTT DATA to track the progress and performance of the contractors' work. As depicted in Figure 3, EOIR applies a 3-week sprint cycle to work on the defined user stories agreed to by the contracted product owners and NTT DATA's development team. During each sprint cycle, the teams have a sprint planning meeting to develop the goals and acceptance criteria of each user story and to determine if they need to carry forward user stories from the sprint backlog to the next sprint cycle. Also, the teams have daily scrum meetings to discuss: (1) the work completed the day before, (2) what will be accomplished during the day, and (3) obstacles that need to be addressed. Once the sprint cycle is completed, the teams have a sprint review meeting to determine how many user stories were completed, and to update the sprint backlog.

Despite the 2020 BPA's use of this agile methodology, the acquisition planning team did not develop a Quality Assurance Surveillance Plan to ensure its goals and needs aligned with the contractors' plans. As a result, EOIR never integrated the agile process into a monitoring framework that aligned acquisition planning documents to ECMS implementation steps as required by the FAR. We discussed the decision to forgo a Government-developed Quality Assurance Surveillance Plan with EOIR officials and as a result they told us that they plan to develop a Quality Assurance Surveillance Plan for the calls issued under the 2020 BPA as of January 2022 (listed in Table 1) for ECMS configuration and implementation services.

Had JMD PSS and EOIR designed and implemented a Quality Assurance Surveillance Plan or equivalent that included a monitoring framework, they could have detected or prevented the instances of unauthorized government and contract personnel improperly guiding and directing contract workers that we discuss in the [\*JMD PSS's and EOIR Must Ensure Proper Delegation to Government Personnel with Oversight Roles\*](#) section of the audit report. Therefore, for the 2020 BPA, we recommend that EOIR finalize, share with NTT DATA, and implement the Quality Assurance Surveillance Plan it is developing for the 2020 BPA. Considering JMD PSS's shared acquisition planning roles with multiple DOJ components on multi-year procurements like the 2020 BPA, we further recommend that JMD PSS evaluate and update its policies and procedures to ensure that its contracting officials create timely Quality Assurance Surveillance Plans and ensure that delegated personnel follow such plans in conjunction with the Statements of Work or Performance Work Statements for contracts that meet the FAR requirements.

### **JMD PSS's and EOIR Must Ensure Proper Delegation to Government Personnel with Oversight Roles**

The FAR gives COs the authority to designate COR and authorize in writing such individuals to perform certain technical or administrative contract functions.<sup>20</sup> Memorializing COR responsibilities and limitations on authority is critical to maintaining an effective oversight environment that minimizes the risk of costly results for the government, such as unauthorized commitments, personal services contracts, and out of scope changes, all of which can potentially lead to cost overruns and legal disputes.

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<sup>20</sup> FAR Subpart 1.602-2(d), *Responsibilities*.

We identified instances when an EOIR OIT official, without appropriate authority in relation to the 2020 BPA, regularly bypassed properly designated EOIR contracting officials and communicated instructions to the contractors' project managers and other personnel. As the official responsible for managing the ECAS program, which includes the legacy ECMS (i.e., CASE) that C-Track will replace, this individual was supposed to advise the contracting officials on how the ongoing C-Track work would affect the interim ECAS functionality NTT DATA supported under the O&M contract. However, EOIR's C-Track decision log contained entries that documented that instead of advising the authorized contracting officials, this EOIR OIT official was the final decision maker on how the contractors would translate a functionality that they had not anticipated incorporating in the new system. When we discussed 2020 BPA oversight with the EOIR contracting official, we found that the EOIR OIT official was their supervisor. We further determined that the EOIR OIT official had been a designated COR for EOIR's IT procurements that preceded the O&M contract and the 2020 BPA. The EOIR OIT official acknowledged having no authority to provide technical direction to the 2020 BPA contractors.

In April 2021, in response to the OIG's July 2020 [\*Management Advisory Memorandum Concerning the DOJ's Administration and Oversight of Contracts\*](#), JMD adopted a department-wide training on government-contractor protocol. The training includes guidance on how to maintain an appropriate government-contractor relationship in accordance with the applicable regulations.<sup>21</sup> The EOIR personnel who continuously communicate with the 2020 BPA contract workers without having received this training risk inappropriate interactions. For instance, we believe that this lack of training, as well as the EOIR OIT official's familiarity and proximity to the 2020 BPA, led to the official performing duties that appear inappropriate and better suited for a properly designated EOIR contracting official, as discussed above. Although JMD required only acquisition workforce members to take the training, because there is a close interaction between other government personnel and the 2020 BPA contract workers, we believe that JMD and EOIR should consider expanding the training requirement. We determined that the previously mentioned EOIR OIT official, JMD CO-, and other government personnel who closely interact with contract workers had either not completed the training or completed it after our inquiry.

Similarly, we believe that the contracted product owners' oversight of NTT DATA's and Thomson Reuters' work that we discussed previously in the [\*Acquisition Planning Needs to Assess for Inherently Governmental Functions \(and those closely associated with such functions\)\*](#) section of the audit report, does not comport with the FAR's requirements and guidelines on contracting authority as some of the duties outlined in Table 3 seem more appropriate for a government CO or COR.

EOIR's use of improperly designated personnel to guide and direct the contract workers risks compromising the 2020 BPA oversight framework by filtering decisions and technical direction through improper channels to the contractors completing the work. EOIR has an OIT government official who the CO did not delegate authority to and a third-party staffing company that is intimately involved in the 2020 BPA performance process, which increases the risk of improper contract efforts to be performed. Therefore, we recommend that EOIR provide the April 2021 Department-wide government-contractor protocol training to its contracting officials and personnel who closely interact with contract workers to ensure that only government personnel with properly designated authority (e.g., CO, COR, Alternate COR) coordinate with

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<sup>21</sup> Acquisition Policy Notice 21-04 New Mandatory Training for Acquisition Workforce Members Government- Contractor Relationships (March 2021).

contractors' project managers on instructions to contract workers.

### **JMD PSS's Analysis Needs to Consider All Relevant Available Information and Key Factors to Determine Price Fairness and Reasonableness**

COs must determine a fair and reasonable price for all contracts, including subcontracts.<sup>22</sup> This means that COs must determine the price point for a good or service that is fair to the government and contractor based on agreed-upon conditions, quality, and timeliness of contract performance. Although the pricing information that JMD PSS contracting officials used complied with the FAR's minimum price analysis requirements, we believe that the information was insufficient because it did not encapsulate relevant, available information and key factors regarding NTT DATA and Thomson Reuters' proposed prices for the ECMS project. The result is that JMD PSS and EOIR potentially underestimated the full cost of C-Track at \$35 million.

Specifically, JMD PSS established a preliminary award ceiling of \$30 million and included a \$5 million "buffer" in the final BPA to account for EOIR's \$33 million Independent Government Cost Estimate and to lessen the likelihood that the funding ceiling would need to undergo a review to increase the ceiling after the BPA was awarded. However, JMD contracting officials based their price analysis and final determination on the contractors' proposed prices for only a portion of the executed 2020 BPA. The price analysis was based only on the: (1) first call, known as the Discovery Phase, which JMD PSS established to allow the contractor to develop a post-award project plan detailing the tasks that the contractor would perform toward full system implementation under future calls; and (2) salaries of key personnel. The price analysis did not consider the price of the rest of the project lifecycle (i.e., design, configure, implement, and support as outlined in the Statement of Work). In other words, JMD PSS's pricing calculations addressed less than 10 percent of EOIR's requirements for the ECMS that JMD PSS used to solicit the BPA. The missing portions of the project lifecycle include costs associated with key factors, such as software licensing, maintenance, and labor for system configuration and implementation, that drive the full cost of complex IT projects like C-Track.

Moreover, because NTT DATA's strategy for meeting EOIR's ECMS needs via the 2020 BPA hinged on Thomson Reuters' C-Track software, licensing, configuration and maintenance services, JMD PSS should have considered the subcontract costs in its price analysis in accordance with FAR Subpart 15.404-3, which requires contracting officials to include subcontract work that is significant to the contract objectives. As discussed later in the [\*Pre-Award Strategic Alliance Has Evolved into a Post-Award Prime/Subcontractor Relationship\*](#) section of this report, Thomson Reuters' contributions account for 52 percent of the total value of the issued BPA calls (i.e., 41 percent of the total BPA value).

By limiting their price analysis to the work performed under the initial 2020 BPA call, JMD PSS determined fairness and reasonableness only for the initial stages of the project and missed an opportunity to strengthen its projections for the total cost of the ECMS project. Although FAR Subpart 8.405-3 permits the government to establish BPAs to streamline purchases of repetitive service needs, which have consistent and predictable costs by their nature, the IT tasks and associated costs procured under each 2020 BPA call will vary. Therefore, it is inappropriate to apply the initial call price to subsequent calls that may include work that neither the government nor contractors anticipated after reviewing the project backlog or receiving user feedback. Also, had JMD PSS estimated that the total cost of the BPA and its options

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<sup>22</sup> FAR Subpart 15.404-3, *Subcontract Pricing Considerations*.

exceeded \$100 million, the head of the agency would have been required to provide additional written assurances before awarding the 2020 BPA exclusively to NTT DATA rather than to multiple contractors.<sup>23</sup>

We discussed the 2020 BPA's pricing with the current JMD contracting official who could not provide further details regarding the decisions made because the previous CO had left JMD without documenting them in the contract file. We believe that JMD PSS's lack of policies and procedures to guide its contracting officials on how to perform an adequate price analysis and document the rationale in accordance with the FAR's contract file content requirements impairs the government's ability to preserve a complete history of the BPA.<sup>24</sup> Because the BPA price was not evaluated considering all ECMS project requirements, EOIR risks project cost overruns, which may require an increase in contract funding and adjustments to the timeline for deployment to the immigration courts.

As of January 2022, EOIR has allocated NTT DATA and Thomson Reuters a total of \$27.8 million (i.e., 79 percent of the total BPA ceiling) with two project phases left that depend on the already delayed preceding phases, which will require more time and funding than initially planned as some work will carryforward to future calls. JMD PSS and EOIR also expect to issue additional calls for training and maintenance after C-Track is implemented. We further discuss the project schedule in the [More Sufficient Milestones Will Help Ensure Achievement of the ECMS Goals](#) section of this report.

A more realistic evaluation of the overall total price of the ECMS project would have alleviated some of these concerns by considering potential overrun or changes in award scope that could potentially increase funding in later project stages. Therefore, we recommend that JMD PSS work with EOIR to perform a price analysis prior to the beginning of each of the remaining project phases to provide a more accurate cumulative total project costs and estimates for the full implementation, maintenance, and training cost of C-Track. Also, given the potential for contract personnel attrition and other organizational changes, we recommend that JMD PSS update its policies and procedures to include guidelines for succession planning to demonstrate that the historical knowledge of BPA actions are preserved in a manner that facilitates effective, continuous administration and oversight in the event of responsible contracting officials' separation from the agency.

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<sup>23</sup> FAR Subpart 8.405-3(a) prohibits the government from entering into a single-award BPA with an estimated value exceeding \$100 million (including any options) unless the head of the agency determines in writing that: (1) the calls expected under the BPA are so integrally related that only a single source can reasonably perform the work; (2) the BPA provides only for: (a) Firm-Fixed-Price calls for products with unit prices established in the BPA or (b) services with prices established in the BPA for specific tasks to be performed; (3) only one source is qualified and capable of performing the work at a reasonable price to the Government; or (4) it is necessary in the public interest to award the BPA to a single source for exceptional circumstances. This is in addition to applicable limited source justifications at FAR Subpart 8.405-6.

<sup>24</sup> FAR Subpart 4.8, *Government Contract Files*, requires the head of each agency to establish files containing the records of all contract actions that constitute a complete history of the transaction for the purpose of: (1) providing a complete background as a basis for informed decisions at each step in the acquisition process; (2) supporting actions taken; (3) providing information for reviews and investigations; and (4) furnishing essential facts in the event of litigation or congressional inquiries.

## Performance-Based Acquisition Should Be Fully Considered or Implemented

Contracting agencies must consider using Performance-Based Acquisition methods while planning service contracts or orders to help orient such procurements toward mission results and foster innovation in contractor performance. Service contract acquisition plans must also describe the strategies for implementing Performance-Based Acquisition or offer a rationale for not using those methods.<sup>25</sup> The FAR requires that performance-based service contracts include specific requirements and techniques that align with the desired performance outcome. However, as detailed in Table 4, we noted multiple deficiencies with JMD PSS and EOIR's 2020 BPA planning documents regarding Performance-Based Acquisition.

**Table 4**

### Performance-Based Acquisition Requirements

Performance Based Criterion	Mandatory	Discretionary	Included in 2020 BPA File (including the Acquisition Plan) (Yes/No)?
Rationale for <b>not</b> using Performance-Based Acquisition.	FAR Subpart 7.105	–	No
A performance work statement.	FAR Subpart 37.601(b)(1)	–	No
Measurable performance standards (i.e., in terms of quality, timeliness, quantity, etc.) and the method of assessing contractor performance against performance standards.	FAR Subpart 37.601(b)(2)	–	No
Performance incentives (where appropriate).		FAR Subpart 37.601(b)(3)	No

Source: FAR Subpart 37.6, *Performance Based Acquisition* and OIG Analysis of EOIR Compliance

FAR Subpart 2.101 defines a Performance Work Statement as a Statement of Work for performance-based acquisitions that describes the required results in clear, specific, and objective terms with measurable outcomes. However, a Performance Work Statement describes the results to be achieved, rather than detailing how the work is to be accomplished; whereas a Statement of Work shall include a description of work to be performed; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements (e.g., security clearances, travel, special knowledge).

The 2020 BPA's Statement of Work did not include specifics regarding how the contractor will achieve the project milestones nor measurable performance standards. Neither JMD PSS nor EOIR could explain why the acquisition planning team had not considered Performance-Based Acquisition and developed a Quality

<sup>25</sup> FAR Subpart 7.105, *Contents of Written Acquisition Plans*.

Assurance Surveillance Plan or any documents to support how contracting officials planned to monitor the contractors' progress toward achieving the BPA objectives.

Even if JMD PSS and EOIR did not believe that Performance-Based Acquisition was appropriate for the 2020 BPA, under the FAR, they were required to document the rationale to support this conclusion. Without considering and documenting their rationale for not applying PBA to the 2020 BPA, EOIR and JMD PSS missed another opportunity to align EOIR's goals with the contractor's Statement of Work to mitigate the concerns discussed in the [EOIR Needs to Develop Measurable Performance Standards to Achieve ECMS Goals](#) and [More Sufficient Milestones Will Help Ensure Achievement of the ECMS Goals](#) sections of this report. Therefore, we recommend that JMD PSS implement policies and procedures to ensure that acquisition planning teams consider Performance-Based Acquisition strategies or document a rationale for not using those methods in its acquisition plans.

### **Pre-Award Strategic Alliance Has Evolved into a Post-Award Prime/Subcontractor Relationship**

While JMD PSS received nine distinct proposals to design and implement EOIR's ECMS via the 2020 BPA, four of the nine contractors (including NTT DATA and Thomson Reuters) remained eligible to receive the BPA after satisfying the requirements for one of three phases of a technical evaluation, which included tests of the contractors': (1) experience recency and relevancy, (2) technical approach and pricing, and (3) product demonstrations.<sup>26</sup> NTT DATA had an established relationship with DOJ through a previous and concurrent agreement (i.e., the O&M contract), while Thomson Reuters had a viable commercial off-the-shelf product, C-Track. JMD PSS and EOIR contracting officials stated that for the second phase of the technical evaluation, NTT DATA and Thomson Reuters entered a strategic alliance (or teaming arrangement) to increase their chances of winning the BPA.<sup>27</sup> The contractors' alliance progressed through the technical evaluation, during which time NTT DATA presented the C-Track software as the solution that would meet the requirements for EOIR's new ECMS with only minimal modifications. The JMD CO further explained that the relationship between the software provider (Thomson Reuters) and its "collaborator" (NTT DATA) had evolved to resemble a prime contractor/subcontractor relationship, which would have benefitted from a subcontract plan. A subcontract plan, which they did not have, would have enabled the government to fully understand the contractors' relationship, including their division of labor.

NTT DATA representatives signed the 2020 BPA as a prime contractor and became the conduit between Thomson Reuters and EOIR OIT. Additionally:

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<sup>26</sup> For further details on the 2020 BPA technical evaluation process, see Appendix 3.

<sup>27</sup> FAR Subpart 9.601 defines a teaming arrangement as an arrangement in which: (1) two or more companies form a partnership or joint venture to act as a potential prime contractor; or (2) a potential contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program. FAR Subpart 9.603 further states that the Government will recognize the integrity and validity of such arrangements; *provided*, they are identified and company relationships are fully disclosed in an offer; or, for arrangements entered into after submission of an offer, before the arrangement becomes effective.

FAR Subpart 9.604 clarifies that this subpart does not authorize contractor teaming arrangements in violation of antitrust statutes or limit the Government's rights to: (1) require consent to subcontracts in accordance with

*Continued*



- EOIR OIT, NTT DATA, and Thomson Reuters personnel told us that because Thomson Reuters' C-Track license is proprietary, Thomson Reuters personnel perform all the configuration, modification, integration, and troubleshooting for EOIR's three end-user groups. Even though Thomson Reuters is responsible for these three areas, EOIR OIT must go through NTT DATA to obtain support from Thomson Reuters. While the communication flow comports with the FAR's restrictions on contracting authority with respect to contractual privity, this does not appear efficient from a cost or operational standpoint, considering that the subcontractor is and will continue to be an essential part of the system configuration process.
- The subcontractor's contributions to the ECMS are further obscured by the fact that JMD PSS issued all BPA calls involving Thomson Reuters as Firm-Fixed Price since this cost structure does not require contractors to submit itemized billable hours.

JMD PSS and EOIR did not require NTT DATA to identify in its proposal the total cost of the work that it and each subcontractor planned to perform, which would facilitate compliance with government-wide directives effectuated by the FAR.<sup>28</sup> Neither JMD PSS nor EOIR questioned the contractors' evolving relationship until we asked about the lack of transparency in the cost proposals that NTT DATA submitted, which make costs attributed to NTT DATA versus Thomson Reuters indistinguishable. For future BPAs and contracts, the acquisition planning team should re-evaluate the prudence of similar teaming arrangements.

Additionally, we identified a related issue regarding another subcontractor in the [EOIR Needs a Consistent Review and Approval Process for Contractor Payments](#) section of this audit report. Through the review of the invoices and supporting documents that NTT DATA submitted, we determined that NTT DATA had arrangements with at least four other subcontractors (not including Thomson Reuters) that it could call upon to support its 2020 BPA work. An examination of NTT DATA's invoices and supporting documents demonstrated that NTT DATA had used yet another subcontractor on the Time and Materials BPA call (Call No. 15JPSS21F00000288).

Despite having approved and paid the aforementioned call, EOIR and JMD contracting officials told us that they did not know that NTT DATA had a second subcontractor (other than Thomson Reuters) that contributed to the 2020 BPA as NTT DATA had not disclosed this information in its invoices or any other submitted information. EOIR is aware that this other subcontractor also provides IT-related support to NTT DATA on the concurrent O&M contract. This increases the risk of cost misallocation if EOIR is unaware of the subcontract workers who are assigned to each BPA. NTT DATA's 2020 BPA proposal established that it

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FAR Subpart 44.2; (2) determine, on the basis of the stated contractor team arrangement, the responsibility of the prime contractor; (3) provide to the prime contractor data rights owned or controlled by the Government; (4) pursue its policies on competitive contracting, subcontracting, and component breakout after initial production or at any other time; and (5) hold the prime contractor fully responsible for contract performance, regardless of any team arrangement between the prime contractor and its subcontractors.

<sup>28</sup> For example, FAR Subpart 22.8, *Equal Employment Opportunity* derives from Executive Order 11246 (effective July 2014), which requires COs to perform a pre-award review to determine whether the U.S. Department of Labor's Office of Federal Contract Compliance Programs has verified that prospective contractors and subcontractors slated to receive contracts estimated to be at least \$10 million (including all options) have not violated this directive within the past 2 years. If a noncompliance has occurred, the government cannot award the contract action to the contractor or subcontractor.

planned to use subcontractors but did not specify how much of the work would be completed by Thomson Reuters and additional subcontractors, which we believe should have been disclosed to, or detected by, the contracting officials performing surveillance.

The cost associated with the second subcontractor that NTT DATA used for the 2020 BPA call was not a readily identifiable portion of the 2020 BPA call value. NTT DATA used an O&M subcontractor to furnish personnel for the 2020 BPA's required labor categories as needed. The lack of pre-award visibility on subcontractor work performed effectively hindered the CO's ability to analyze and continuously track contractor performance on the 2020 BPA calls for compliance with the FAR. While the FAR does not require the previously mentioned subcontract plan, NTT DATA's use of additional subcontractors that neither JMD nor EOIR were aware of indicates that the government would benefit from additional oversight to prevent, identify, and address performance risk.<sup>29</sup> Therefore, we recommend that JMD PSS work with EOIR to consider including FAR Subpart 52.244-2 in the 2020 BPA to require the prime contractor to request consent prior to subcontracting work, thus allowing JMD and EOIR to document the work being subcontracted and monitor potential concerns.

The amount of subcontract labor needed could change as NTT DATA's sprint/product backlogs increase due to the delays depicted in Figure 4 and staffing needs that continue to increase with each project phase. Therefore, we recommend that JMD PSS work with EOIR to request additional information from NTT DATA to facilitate greater transparency on the 2020 BPA calls for enhanced contract monitoring purposes. Related monitoring procedures should include: (a) maintenance of evidence demonstrating continuous monitoring of the labor distribution of all BPA calls with subcontractors and (b) Time and Materials invoices that detail which labor categories and subcontractors support each call to ensure that the government can readily identify and evaluate subcontract effort.

## **BPA Performance**

### **More Sufficient Milestones Will Help Ensure Achievement of ECMS Goals**

The first BPA call issued in September 2020 included a "Discovery Phase" to give NTT DATA and Thomson Reuters a year to develop a Statement of Work that would describe a Minimum Viable Product version of C-Track that would meet the minimum basic requirements of EOIR's three primary end-user groups (i.e., Office of the Chief Immigration Judge, Board of Immigration Appeals, and Office of the Chief Administration Hearing Officer). Since the Discovery Phase, the ECMS project timeline has been continuously delayed due to foreseeable challenges in significant parts of the configuration process as seen in Figure 4. As a result, JMD, EOIR, NTT DATA, and Thomson Reuters have added more time to address these challenges, which will delay the final ECMS deployment by more than a year. As shown in Table 5, the Minimum Viable Product Statement of Work included a project and milestone plan, displaying the estimated date and sprint numbers for each task to be accomplished.

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<sup>29</sup> FAR Subpart 42.302, *Contract Administration Functions*, states that contracting officials should perform surveillance and evaluate for adequacy of contractor work on management systems that relate to subcontractors.

**Table 5**

**ECMS Project Milestones— MVP Phase**

<b>Milestones</b>	<b>Estimated Completion Date and Sprint Number</b>	<b>Actual Completion Date and Sprint Number</b>
Configured Environment	April 2021/ #5	August 2021/ #9
Partially Migrated Data - v0.1.0 Release	July 2021/ #9	TBD
Complete Data Migration & Integrations - v0.20 Release	December 2021/ #16	TBD
User Acceptance Testing Release - v0.3.0	April 2022/ #21	TBD
Bug Fixes and User Acceptance Testing Acceptance	July 2022/ #27	TBD
Authority to Operate	August 2022/ #28	TBD
Go-Live	September 2022/ #28	TBD

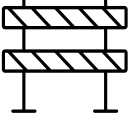
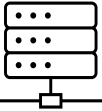


Source: NTT DATA

The first ECMS milestone included the product testing environment configuration scheduled for Sprint 5 in April 2021; however, NTT DATA and Thomson Reuters did not finish until August 2021 (4 months late). NTT DATA's and Thomson Reuters' contract workers told us that during the configuration, they discovered that the unmodified version of C-Track did not allow users to view the court proceedings schedule (e.g., hearings, trials, applications, etc.) as the legacy system had, so if the proceeding venue changed, users who were using the new ECMS would not see it.

The next milestone (i.e., a partial data migration from the legacy system to new ECMS) was also delayed by 7 months, as it was scheduled for completion by the end of February 2022. According to EOIR officials, this milestone requires extensive coordination among the various NTT DATA and Thomson Reuters teams that support the O&M contract and the 2020 BPA. As shown in Figure 4, EOIR OIT, NTT DATA, and Thomson Reuters have encountered several other challenges adding months to the overall ECMS project timeline.

**Figure 4**

**ECMS Project Challenges**

	<b>Application Programming Interface<sup>a</sup></b>	<b>Deployment in Increments vs. "Big Bang" Approach<sup>b</sup></b>	<b>Proceedings Functionality</b>
 <b>Challenge</b>	The C-Track software suite does not map to all of EOIR's mission-critical legacy software applications and databases.	Incremental software deployment will require EOIR to maintain both systems (i.e., C-Track and CASE) until C-Track is fully implemented.	C-Track lacks CASE's "proceedings" function. The similar "dockets" function does not fully map to CASE.
 <b>Sprint/Product Backlog Impact</b>	During the System Configuration Phase, NTT DATA and Thomson Reuters identified more legacy applications and databases that must map to C-Track than were planned for in the Discovery Phase.	EOIR opted for a "Big Bang" approach rather than increments, which will require greater coordination because an issue with one part undermines the whole system.	EOIR must understand how the data resides in the new system (i.e., C-Track) to ensure that stakeholders continue to receive complete, accurate, and timely reporting on immigration court cases.
 <b>Approach</b>	NTT DATA and Thomson Reuters software developers plan to create more Application Programming Interfaces.	NTT DATA and Thomson Reuters plan to allot more time for upfront system testing, training, and integration.	NTT DATA and Thomson Reuters await EOIR's decision on how to proceed.
 <b>Timeline Impact</b>	Estimated 3-month schedule delay.	Estimated 6-month schedule delay.	Additional schedule delays likely.

Notes:

<sup>a</sup> An Application Programming Interface is a set of defined rules that explain how computers or applications communicate with one another. Application Programming Interfaces sit between an application and the web server, acting as an intermediary layer that processes data transfer between systems.

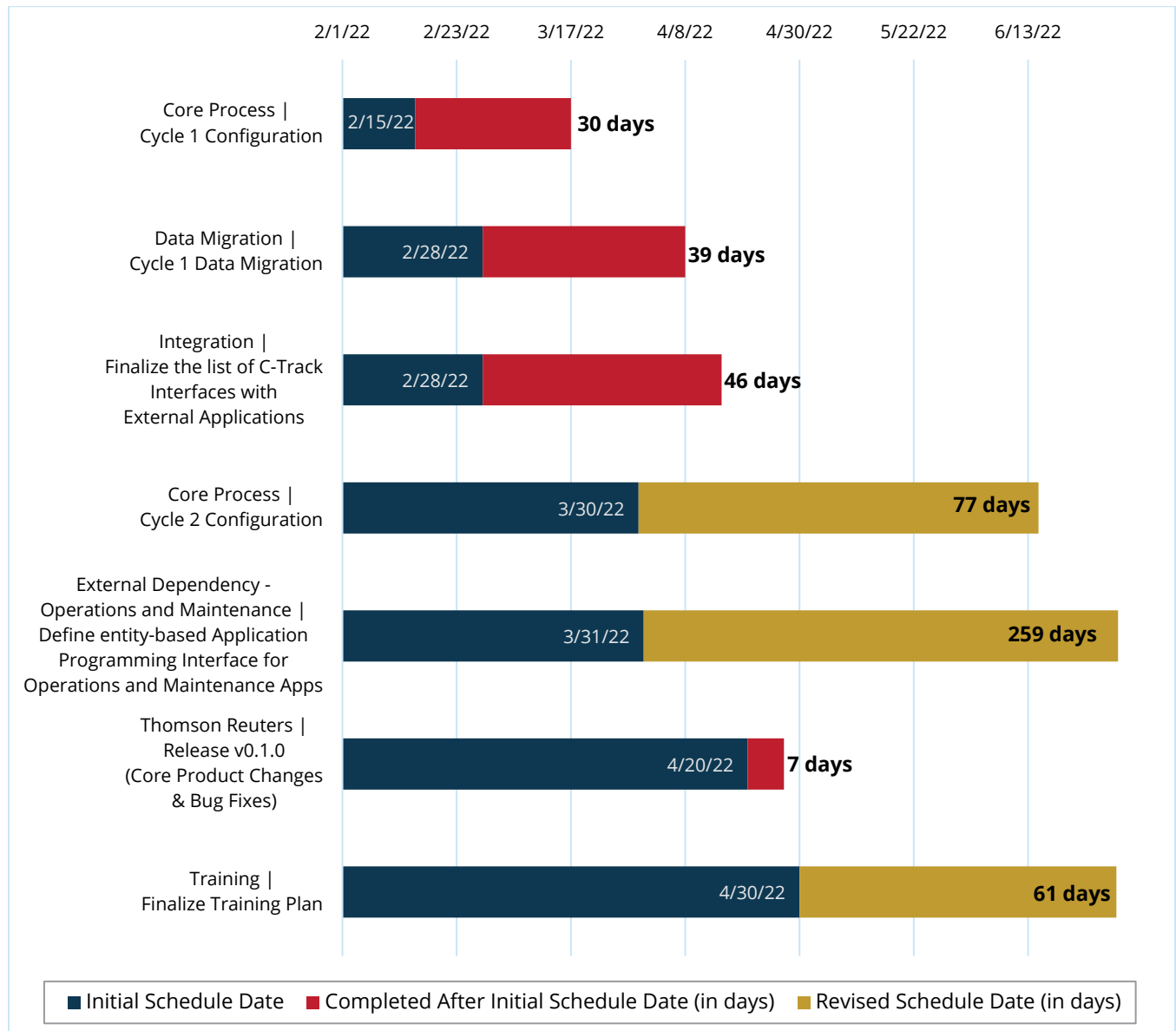
<sup>b</sup> "Big Bang" is a non-incremental software deployment strategy that entails defining and developing a solution, testing the build, and applying the changes all at once. This approach means that the entire solution goes live throughout the organization at once while syncing data from the old system with no overlap for parallel testing.

Source: EOIR, NTT DATA and OIG Analysis

As a result of the previously mentioned project delays, NTT DATA presented to EOIR the “re-baselined” schedule of revised milestones shown in Figure 5. Upon approval, EOIR’s contracting officials (i.e., COR and Alternate COR) will work with JMD’s CO to make any necessary modifications to the BPA call orders.

**Figure 5**

**ECMS Project Revised Milestone Plan for Tasks from February to June 2022**



Source: EOIR and OIG Analysis

EOIR has not demonstrated that it has adequately considered the effect that the delays will have on the overall timeline and budget for the 2020 BPA, as well as future calls and interdependent projects to continue ECAS implementation. Failure to meet the milestones shown in Figure 5, will impact the over 20 milestones

scheduled through June 2024 when the system is set to go live. Further, we believe that these delays will impact the immigration courts' ability to: (1) improve case scheduling, (2) increase adjudication efficiency, and (3) reduce the active pending case backlog. Based on the OIG's recent audits of enterprise management contracts, we know that IT modernization projects that fail to achieve interoperability can have costly monetary impacts and security risks.<sup>30</sup> Furthermore, a recent OIG review identified difficulties in EOIR's ability to implement modernization efforts for ECAS.<sup>31</sup> Since the ECMS acquisition planning team did not develop a Quality Assurance Surveillance Plan or consider the tenets of Performance-Based Acquisition in conjunction with the contractor-developed Statement of Work, we recommend that EOIR, in the continued development of its Quality Assurance Surveillance Plan, incorporate milestones aligned with the performance metrics to (a) assist EOIR with monitoring NTT DATA's and Thomson Reuters' progress toward meeting the ECMS goals and (b) readily identify and mitigate situations that can impact the timeliness and scope of work performed under the 2020 BPA.

### JMD PSS Has Not Met Performance Reporting Requirements for the 2020 BPA

FAR Subpart 42.15 requires agencies to monitor contractor performance and complete performance evaluations in the Contractor Performance Assessment Reporting System on an annual basis. The reports provide relevant information for future procurement source selection purposes on a contractor's past performance. The Contractor Performance Assessment Reporting System Guide establishes that COs (or their designees) should complete performance evaluations for each BPA call that meets the Simplified Acquisition Threshold (i.e., anything above \$250,000 except if FAR Subpart 13.5 exemptions applied).

Considering these criteria, we noted that the performance period for BPA Call 15JPSS20F00001022 required JMD PSS to complete and submit a performance evaluation no later than January 2022. However, JMD PSS did not complete the performance evaluation until May 2022. The current JMD CO explained that the previous CO had incorrectly registered the BPA calls in the Contractor Performance Assessment Reporting System, which caused the system not to provide notifications of the overdue status of the evaluation for BPA Call 15JPSS20F00001022 performance evaluation.<sup>32</sup> JMD confirmed that they have properly registered all subsequent calls in the Contractor Performance Assessment Reporting System to ensure timely evaluation

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<sup>30</sup> U.S. Department of Justice Office of the Inspector General, [Audit of the Drug Enforcement Administration's Laboratory Information Management System Support Contracts](#), Audit Report 21-079 (June 2021), [www.oig.justice.gov/reports/audit-drug-enforcement-administrations-laboratory-information-management-system-support](http://www.oig.justice.gov/reports/audit-drug-enforcement-administrations-laboratory-information-management-system-support).

DOJ OIG, [Audit of the Federal Bureau of Investigation's Biometric Algorithm Purchase Order Awarded to Idemia National Security Solutions, LLC](#) Audit Report 22-045 (February, 2022), [www.oig.justice.gov/reports/audit-federal-bureau-investigations-biometric-algorithm-purchase-order-awarded-idemia](http://www.oig.justice.gov/reports/audit-federal-bureau-investigations-biometric-algorithm-purchase-order-awarded-idemia).

<sup>31</sup> U.S. Department of Justice Office of the Inspector General, [Limited-Scope Review of the Executive Office for Immigration Review's Response to the Coronavirus Disease 2019 Pandemic](#) Evaluation and Inspections Report 21-063 (April 2021), [www.oig.justice.gov/reports/limited-scope-review-executive-office-immigration-reviews-response-coronavirus-disease-2019](http://www.oig.justice.gov/reports/limited-scope-review-executive-office-immigration-reviews-response-coronavirus-disease-2019), 14-16.

<sup>32</sup> We have previously reported on instances when DOJ contracting officials stated that they did not receive Contractor Performance Assessment Reporting System automated messages. DOJ OIG, [Management Advisory Memorandum Concerning the Department of Justice's Administration and Oversight of Contracts](#). We believe that it is imperative that DOJ contracting offices understand that delays in receiving these system prompts do not obviate the need to adhere to the proactive controls in existing FAR and standing DOJ policies requiring timely and accurate contractor performance reports.

and submission. JMD PSS and EOIR plan to complete annual performance evaluations for the other four 2020 BPA calls, the first of which is due in July 2022.





The registration process for the Contractor Performance Assessment Reporting System portal and reliance on the automated system messages to generate reminders should not be the only method used by contracting officials to ensure that they adhere to the FAR Subpart 42.15 requirements for contractor performance evaluations. The JMD CO stated that the only guidance available to JMD PSS personnel is on the Contractor Performance Assessment Reporting System website because JMD has not issued any policies and procedures to assist contracting officials with properly registering contract information in that system to ensure that they submit contractor performance evaluations on time. Therefore, we recommend that JMD PSS provide its contracting officials with training and guidance that ensures their understanding of how to adequately enter contract information into the Contractor Performance Assessment Reporting System and design and implement policies and procedures that ensure acquisition personnel adhere to the schedule for mandatory completion of contractor performance evaluations via the Contractor Performance Assessment Reporting System for contract vehicles that meet the requirement.

### **EOIR Needs a Consistent Review and Approval Process for Contractor Payments**

EOIR (via JMD PSS) has issued multiple calls of Firm-Fixed Price and Time and Materials cost structure under the 2020 BPA. Due to the inherent risks to the government associated with each cost structure outlined in Figure 6, the FAR and 2020 BPA require contractors to maintain support for costs billed to the government and contracting officials must verify those costs. EOIR did not always adhere to these requirements, which resulted in the government approving and paying the contractors for overtime incurred without the required pre-approval, using only limited support provided by the contractor. This lack of visibility into the contractors' billing increases the likelihood that EOIR will approve and pay hours that the contract workers charge to the incorrect BPA calls or BPA.

**Figure 6**

**Government Risk by Cost Structure**

<b>Time and Materials</b>	<b>Firm-Fixed Price</b>
<b>Characteristics</b> <ul style="list-style-type: none"><li>• Direct labor hours at specified fixed rates, and material at cost.</li><li>• Requires a price ceiling which contractor may not exceed except at own risk.</li><li>• Labor-Hour (variant) may provide for payment of labor hours only.</li></ul>	<b>Characteristics</b> <ul style="list-style-type: none"><li>• Requires delivery of a product or services at a specified price, fixed at the time of contract award and not subject to any adjustment.</li><li>• Encourages contractor efficiency and economy.</li></ul>
<b>Constraints</b> <ul style="list-style-type: none"><li>• Heavy burden on technical personnel to perform surveillance to preclude inefficiency or waste.</li><li>• No positive profit incentive for contractor to control costs.</li><li>• Determination that no other contract type will serve.</li></ul>	<b>Constraints</b> <ul style="list-style-type: none"><li>• Lacks flexibility in pricing and performance.</li><li>• Difficult to make changes in the requirement after award.</li></ul>
<b>Risk Factors</b> <p>Increased Risk to the Government </p> <p>Reduced Risk to Contractors </p>	<b>Risk Factors</b> <p>Reduced Risk to the Government </p> <p>Increased Risk to Contractors </p>

Source: OIG and FAR

The 2020 BPA references FAR Subpart 52.232-7, which requires NTT DATA to: (1) substantiate costs claimed under Time and Materials and Labor Hours contracts (including BPA calls) and (2) adhere to invoicing and payment requirements, such as providing copies of the contract workers' time records showing actual labor hours worked by individual. In addition, EOIR personnel stated that OIT requires the contract workers to complete timesheets via an internal timekeeping system, which the COR uses to review and approve contractor invoices for payment.

We judgmentally selected 21 invoices, totaling \$7 million that NTT DATA submitted for work performed under the 2020 BPA's five active calls. Of the 21 invoices submitted, 16 included contract workers' hours charged to the Time and Materials portions of the calls. We found that EOIR approved and paid multiple



invoices for the Time and Materials calls that included over 130 hours in overtime charges (totaling over \$18,000) without the COR pre-approval that EOIR policy and the BPA terms require.

A contributing factor to the improper overtime charges paid without the appropriate approval is the reports submitted by NTT DATA to support its incurred Time and Materials invoices. The report NTT DATA provided only summarized the contract workers' total hours worked per billing cycle and did not include itemized details (e.g., leave or holidays) for the hours charged each day, which is critical to determining whether an invoice should be approved. When we asked whether the EOIR COR used additional information to verify the contractors' invoices, the EOIR COR stated that there is no further support and that not until recently did the NTT DATA contract workers start to enter their hours worked into EOIR's timekeeping system because NTT DATA had previously raised concerns that the timekeeping system vendor could gain a competitive advantage by seeing the hourly rates that had won NTT DATA the 2020 BPA. Our review of EOIR's timekeeping system determined that contract workers charged all hours to one job code per sprint cycle and the system does not distinguish between the work performed across the multiple 2020 BPA calls. This lack of transparency combined with EOIR's acceptance of NTT DATA's summarized invoice information increases the likelihood that the government will approve and pay invoices containing unreasonable, unallowable, and non-allocable costs.<sup>33</sup>

We also requested the timesheets for each contract worker who charged time to the Time and Materials BPA calls to determine whether the hours reconciled to the summary reports provided to EOIR for invoice approval and payment. This reconciliation, as discussed above, identified the discrepancies in hours that were charged and paid without proper approval. EOIR officials told us that they had multiple discussions with NTT DATA about their informal overtime requests, which relied on verbal exchanges and instant messaging chats that sometimes occurred after the contract workers charged the overtime hours. Nonetheless, EOIR approved and paid the invoices without confirming if the contract workers ultimately

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<sup>33</sup> FAR Subpart 31.201-2, *Determining Allowability*, states that a cost is allowable only when the cost complies with all the following requirements: (1) reasonableness, (2) allocability, (3) cost accounting standards, if applicable, otherwise generally accepted accounting principles and practices appropriate to the circumstances, (4) contract terms, and (5) any limitations set forth in FAR Subpart 31.201-2.

FAR Subpart 31.201-3, *Determining Reasonableness*, states that a cost is reasonable if, in its nature and amount, it does not exceed what a prudent person would have incurred in the conduct of competitive business. Contracting officials must examine the reasonableness of specific costs with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If contracting officials' initial review of the facts results in a challenge of a specific cost, the burden of proof is on the contractor to establish that such cost is reasonable.

FAR Subpart 31.201-4, *Determining Allocability*, defines an allocable cost as a cost that is assignable or chargeable to one or more cost objectives based on relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it: (1) is incurred specifically for the contract; (2) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (3) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

worked the hours. The documents that the COR used to verify the invoices did not contain sufficient detail to see that the hours charged included overtime.<sup>34</sup>

We also tested the three Firm-Fixed Price calls issued under the 2020 BPA and determined that each lacked consistent support for the amount that EOIR paid throughout the performance period. The calls demonstrate that EOIR did not use a consistent payment schedule or rationale for how it would reimburse the contractors. Specifically, EOIR paid one of the Firm-Fixed Price calls without following the BPA terms or EOIR's unwritten methodology for calculating a reasonable Firm-Fixed Price monthly payment. The EOIR COR further stated that they determine the reasonableness of the contractor's monthly invoices by dividing the total call value by the performance period length. Our tests of the selected invoices for BPA call 15JPSS20F00001022 determined that EOIR did not apply this described payment methodology. Instead, the COR applied the delivery date from the Statement of Work rather than the BPA terms to calculate payment amounts. Table 6 illustrates the difference between how the COR calculated the approved payment (i.e., using the deliverable date in the Statement of Work) and the way the BPA terms required the progress payment to be incurred. The COR's calculation resulted in EOIR essentially advancing NTT DATA 9 months of payment, for 3 months (90 days) at \$79,848 per month, before it rendered all agreed-upon services.

**Table 6**

**Invoice Progress Payment Calculation for 2020 BPA Call 15JPSS20F00001022**

	<b>Time Used to Calculate Invoice Progress Payment</b>	<b>Used to Calculate the Amount the Contractor Billed Payment (Yes/No)?</b>	<b>Used to Calculate the Amount the Government Paid (Yes/No)?</b>	<b>Total Firm-Fixed Price Contract Line Item Number Funding</b>	<b>Monthly Invoice Progress Payment</b>
<b>Statement of Work Deliverable Due Date</b>	90 days	Yes	Yes	\$ 319,392	\$ 106,464
<b>BPA Terms</b>	365 days	No	No	\$ 319,392	\$ 26,616
<b>Monthly Amount the Government Advanced</b>					<b>\$ 79,848</b>

Source: OIG Analysis, JMD and EOIR

<sup>34</sup> EOIR further explained that the overtime billing continued after these discussions, and it continued approving and paying it despite their inability to consistently track and document the informal requests. After our inquiries regarding the payment process, EOIR contracting officials sent a request to the JMD CO to issue an email stating that any future overtime that is worked and subsequently billed without a written request to and pre-approval from the COR or Alternate COR will be considered unallowable.

JMD contracting officials confirmed that the payment dates specified in the BPA terms should have correlated with the Statement of Work. For this Firm-Fixed Price call, applying the incorrect payment schedule could prove detrimental to the ECMS project schedule, considering that the BPA terms provide the contractor with 365 days (as opposed to 90 days stipulated in the Statement of Work to complete the work. By setting payment dates with the Statement of Work, the EOIR essentially advanced the contractor 9 months of payments before it rendered all agreed-to services. EOIR is in the process of closing this Firm-Fixed Price call and plans to update the Statement of Work to align with the BPA payment schedules.

Our testing and observations reveal concerns that could lead to contractors exhausting BPA funds without delivering an acceptable ECMS product:

- As Time and Materials cost structures have limited incentive for labor efficiency, the government must monitor contractor performance to ensure the contract work is being performed in a cost-efficient manner.<sup>35</sup>
- Continuous overtime without proper government oversight, including required pre-approval from the contracting officials, could increase the risk that the BPA will require additional funding to complete the project goals.
- The Time and Materials summary reports used by EOIR to approve the contractor invoices lack controls, such as contract worker attestations for labor hours charged and adjusted during the BPA call performance period.
- Disbursements made under Firm-Fixed Price calls without a formalized process for calculating payments to ensure that billing cycles and formulas in all documents are consistent with BPA terms could result in significant payments without services completed.

EOIR's informal practices for reviewing, approving, and paying the contractor-submitted invoices lack internal controls necessary to ensure that the hours charged by NTT DATA and its subcontractors received approval as stipulated in the BPA's terms and EOIR policies. JMD and EOIR did not meet the government's obligation to ensure the reasonableness of the contractors' billed costs considering that EOIR continued paying the overtime hours that contract workers improperly billed. Therefore, we recommend that EOIR evaluate and update its policies and procedures to ensure that billings and payments for service contracts comply with the FAR, EOIR internal policies, and BPA terms, ensuring that: (a) contracting officials review appropriate supporting information to determine whether the contractors' billed amounts reflect reasonable, allocable, and allowable costs; and (b) contracting officials consistently communicate with the CO to ensure that contract workers comply with BPA terms and internal procedures on charges that may result in cost overruns.

## **Contract Workers' Whistleblower Rights and Protections**

JMD and EOIR did not adhere to all applicable laws, regulations, and Department-wide policies designed to

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<sup>35</sup> FAR Subpart 16.601(c)(1) *Time and Materials Contracts*, application and government surveillance.

ensure that contract workers who service federal contracts are aware of their whistleblower rights and protections, which is even more concerning given that JMD has implemented supplemental policies and processes designed to remedy similar issues that the OIG previously identified in a February 2021 Management Advisory Memorandum (MAM).<sup>36</sup>

Procurement Guidance Document 16-05, *Implementation of Requirement of Notification to Contractors of Employee Whistleblower Rights*, which effectuated the requirements of 41 U.S.C. § 4712 and FAR Subpart 3.908-9 (effective August 2016) is among the Department-wide policies addressed in the MAM. Applicable to the 2020 BPA, which JMD awarded in September 2020, Procurement Guidance Document 16-05 required COs to insert FAR clause 52.203-17 into all new contracts. Additionally, for all new and existing contracts, the guidance required COs: (1) provide contractors with a “Whistleblower Information for DOJ Contractors, Subcontractors, and Grantees” document (Whistleblower Information Document); (2) direct the contractors and subcontractors to distribute the Whistleblower Information document to their employees; and (3) direct the contractor to provide an affirmative response notifying the DOJ of their successful distribution of the Whistleblower Information document to its employees, which should be added to the contract file. For existing contracts, COs should perform all previously mentioned procedures and incorporate FAR clause 52.203-17 in all contracts over the Simplified Acquisition Threshold.

However, we found that JMD contracting officials did not include the mandatory FAR Subpart 52.203-17 clause on contract worker whistleblower rights and protections in the 2020 BPA or its five calls issued to date as required by 41 U.S.C. § 4712, the FAR, and Procurement Guidance Document 16-05. The contracting officials also did not provide NTT DATA the Whistleblower Information Document to distribute to its employees or subcontractor. This adds to our previous concerns because it exposes continuing vulnerabilities in the Department’s whistleblower framework, namely Department contracting officials’

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<sup>36</sup> The OIG issued Management Advisory Memorandum: Notification of Concerns Regarding the Department of Justice’s Compliance with Laws, Regulations, and Policies Regarding Whistleblower Rights and Protections for Contract Workers Supporting Department of Justice Programs, Audit Report 21-038 (February 2021), [www.oig.justice.gov/sites/default/files/reports/21-038.pdf](http://www.oig.justice.gov/sites/default/files/reports/21-038.pdf), which highlighted gaps in the Department’s adherence to laws, regulations, and internal policies regarding whistleblower rights and protections for DOJ contract workers as defined in 41 U.S.C. § 4712 and FAR Subpart 3.908-9, effectuated by DOJ Procurement Guidance Document 16-05, *Implementation of Requirement of Notification to Contractors of Employee Whistleblower Rights*, in August 2016.

Federal law (41 U.S.C. § 4712) prohibits a federal contractor from discharging, demoting, or otherwise discriminating against a contract worker as a reprisal for disclosing information that the worker reasonably believes is evidence of gross waste, gross mismanagement, abuse of authority, or a violation of law, rule, or regulation related to a contract. The statute also requires the head of each executive agency to ensure that its contractors inform their workers in writing of the rights and remedies under the statute. FAR Subpart 3.903, Whistleblower Protections for Contractor Employees, Policy, prohibits government contractors from retaliating against a contract worker for making a protected disclosure. The regulation also requires COs to insert FAR clause 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights in all solicitations and contracts that exceed the Simplified Acquisition Threshold.

FAR Subpart 2.101, Definitions, states that Simplified Acquisition Thresholds are not to exceed \$150,000 for acquisitions of supplies and services. The National Defense Authorization Act increased the Simplified Acquisition Threshold to \$250,000 for acquisitions of supplies and services on February 16, 2018.

failure to include the mandatory FAR clause in applicable procurement vehicles used for Simplified Acquisition Procedures that meet the FAR's exceptions for exceeding the Simplified Acquisition Threshold.<sup>37</sup>

The JMD CO informed us that the missing clause was an oversight on JMD's part, and that after our interview JMD modified the 2020 BPA to include the clause and sent the Whistleblower Information Document to NTT DATA for dissemination to the contract workers supporting the ECMS. The CO also required NTT DATA to provide written notification that it had provided the information to its workers and subcontractors. JMD provided the BPA modification and information to NTT DATA in July 2021. We followed up with the CO in September 2021 to verify that NTT DATA provided the written notification to JMD and found that the contractor had provided an email confirmation to the Acting CO after our request for an update.

In December 2021, the OIG closed the February 2021 MAM as a result of JMD implementing supplemental policies and deploying its Robotic Process Automation bot, which automated: (1) DOJ contracting officials' provision of the Whistleblower Information Document to contractors and (2) affirmative confirmation from contractors to the DOJ contracting officials that the contract workers have been notified of their whistleblower rights and protections. Considering that: (1) we identified non-compliances with the 2020 BPA after receiving JMD's proposed remedial actions toward closure of the February 2021 MAM and (2) JMD PSS plays a similar role in some of EOIR's other IT procurements, we believe that it is critical that JMD PSS and EOIR continue to coordinate on the evolving policies and procedures to ensure that contract workers supporting those other projects are informed of their whistleblower rights and protections. Therefore, we recommend that JMD PSS work with EOIR to develop policies and procedures that detail how their shared monitoring processes incorporate JMD's remedial actions (e.g., the newly deployed Robotic Process Automation bot) that resulted in the MAM closure.

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<sup>37</sup> FAR Part 13 details Simplified Acquisition Procedures, defined as steps to streamline the purchase of relatively simple supply and service requirements, characterized by a total value not exceeding the Simplified Acquisition Threshold.

In the OIG's audit of the Federal Bureau of Investigation's \$87.5 million biometric algorithm purchase order awarded to Idemia National Security Solutions, LLC, we found that the FBI contracting officials did not include the required FAR clause or disseminate the Whistleblower Information document to the contractor due to inattention to the Simplified Acquisition Threshold.

## Conclusion and Recommendations

Our review of JMD PSS's and EOIR's planning, administration, and oversight of the 2020 ECMS BPA awarded to NTT DATA identified various potential areas for improvement. We found that JMD and EOIR would benefit from fully leveraging acquisition planning techniques to facilitate adequate post-award administration and oversight by aligning procurement and agile project management goals for complex IT procurements. For instance, we found that JMD's and EOIR's contract files did not demonstrate that the acquisition planning team had adequately considered developing the acquisition plan, completing the assessment of inherently governmental functions (and those closely associated with such functions), a Quality Assurance Surveillance Plan, cost estimates, and Performance-Based Acquisition.

We also found that JMD inappropriately used NTT DATA's pricing for the first phase of the ECMS project to estimate the total cost of the work performed via the 2020 BPA. We further found that JMD and EOIR did not require NTT DATA to identify in its proposal the division of labor and costs attributed to it and its subcontractor. We believe this: (1) impaired the contracting officials' ability to analyze and to continuously monitor for NTT DATA's compliance with directives effectuated via the FAR and (2) contributed to NTT DATA using a second subcontractor without JMD and EOIR contracting officials' knowledge.

We also identified several areas of post-award non-compliance with the FAR, EOIR and DOJ policies, as well as the 2020 BPA terms and conditions, including instances when EOIR: (1) allowed an OIT official with no Contracting Officer-delegated authority to bypass contracting officials to instruct the contractors' project managers and other personnel; (2) submitted late contractor performance evaluations to Contractor Performance Assessment Reporting System; and (3) approved and paid invoices with over \$18,000 in overtime charges without the COR pre-approval that EOIR policy and the BPA terms require.

Lastly, we found that JMD contracting officials did not include the required FAR clause 52.203-17 in the 2020 BPA or its calls, which ensures contract workers are informed of their whistleblower rights and protections. As such, NTT DATA did not notify the contract workers of their whistleblower rights, which could have adversely affected contract workers' knowledge of their rights and responsibilities to disclose wrongdoings they may have observed while working on a federal award.

We recommend that EOIR:

1. Finalize, share with NTT DATA, and implement the Quality Assurance Surveillance Plan it is developing for the 2020 BPA and, in the continued development of its Quality Assurance Surveillance Plan, incorporate milestones aligned with the performance metrics to (a) assist EOIR with monitoring NTT DATA's and Thomson Reuters' progress toward meeting the ECMS goals and (b) readily identify and mitigate situations that can impact the timeliness and scope of work performed under the 2020 BPA.
2. Provide the April 2021 Department-wide government-contractor protocol training to its contracting officials and personnel who closely interact with contract workers to ensure that only government personnel with properly designated authority (e.g., CO, COR, Alternate COR) coordinate with contractors' project managers on instructions to contract workers.

3. Evaluate and update its policies and procedures to ensure that billings and payments for service contracts comply with the FAR, EOIR internal policies, and BPA terms, ensuring that: (a) contracting officials review appropriate supporting information to determine whether the contractors' billed amounts reflect reasonable, allocable, and allowable costs; and (b) contracting officials consistently communicate with the CO to ensure that contract workers comply with BPA terms and internal procedures on charges that may result in cost overruns.

We recommend that JMD PSS:

4. Provide guidance to acquisition planning team members, including EOIR OIT and contracting officials, on how to apply the best practices outlined in OMB's January 2021 memorandum on Procurement Administrative Lead Times for all procurement vehicles. Such guidance should incorporate an oversight framework by which JMD PSS and EOIR contracting officials adopt practices that will help them to monitor and reduce the time between the initial contract action solicitation and award dates.
5. Complete the written assessment for inherently governmental functions (and closely associated functions) for the 2020 BPA and the related contracts (e.g., the contract for product owners and future related procurements) and update its template to include instructions on when contracting officials should perform the assessment. Such updates should address considerations during pre-award and appropriate reassessment after award.
6. Evaluate and update its policies and procedures to ensure that its contracting officials create timely Quality Assurance Surveillance Plans and ensure that delegated personnel follow such plans in conjunction with the Statements of Work or Performance Work Statements for contracts that meet the FAR requirements.
7. Implement policies and procedures to ensure that acquisition planning teams consider Performance-Based Acquisition strategies or document a rationale for not using those methods in its acquisition plans.
8. Update its policies and procedures to include guidelines for succession planning to demonstrate the historical knowledge of BPA actions are preserved in a manner that facilitates effective, continuous administration and oversight in the event of responsible contracting officials' separation from the agency.
9. Provide its contracting officials with training and guidance that ensures their understanding of how to adequately enter contract information into the Contractor Performance Assessment Reporting System and design and implement policies and procedures that ensure acquisition personnel adhere to the schedule for mandatory completion of contractor performance evaluations via the Contractor Performance Assessment Reporting System for contract vehicles that meet the requirement.

We recommend that JMD PSS work with EOIR to:

10. Perform a price analysis prior to the beginning of each of the remaining project phases to provide a more accurate cumulative total project costs and estimates for the full implementation, maintenance, and training cost of C-Track.
11. Consider including FAR Subpart 52.244-2 in the 2020 BPA to require the prime contractor to request consent prior to subcontracting work, thus allowing JMD and EOIR to document the work being subcontracted and monitor potential concerns.
12. Request additional information from NTT DATA to facilitate greater transparency on the 2020 BPA calls for enhanced contract monitoring purposes. Related monitoring procedures should include: (a) maintenance of evidence demonstrating continuous monitoring of the labor distribution of all BPA calls with subcontractors and (b) Time and Materials invoices that detail which labor categories and subcontractors support each call to ensure that the government can readily identify and evaluate subcontract effort.
13. Develop policies and procedures that detail how their shared monitoring processes incorporate JMD's remedial actions (e.g., the newly deployed Robotic Process Automation bot) that resulted in the MAM closure.



# APPENDIX 1: Objectives, Scope, and Methodology

## Objectives

The objectives of this audit were to assess: (1) JMD's and EOIR's planning and procurement procedures, administration, and oversight; (2) NTT DATA's compliance with the Blanket Purchase Agreement (BPA) terms and conditions, applicable laws, and regulations; and (3) NTT DATA's performance on the BPA, including financial management, monitoring, reporting, and progress toward meeting the BPA goals and objectives.

## Scope and Methodology

The scope of our audit focused on the 5-year BPA 15JPSS20A00000412 (2020 BPA), awarded to NTT DATA by JMD Procurement Services Staff (PSS) and EOIR to design, configure, implement, and support EOIR's new electronic case management system, developed using primary subcontractor Thomson Reuters Court Management Solutions' C-Track commercial-off-the-shelf product. The BPA has a ceiling not to exceed \$35 million. From September 2020 through January 2022, EOIR has paid NTT DATA \$11.6 million via a combination of five Firm-Fixed Price and Time and Materials orders (known as calls) issued under the BPA.

To accomplish our objectives, we reviewed and analyzed assorted documents to understand: (1) EOIR's case management system acquisition history and strategy, including key decisions regarding legacy court tools, case management components, and prior configurations; (2) project progress and performance indicators; and (3) monitoring activities. In addition to the BPA and its calls, the documents examined included, but were not limited to the:

- Contractor Proposals,
- Independent Government Cost Estimate,
- Acquisition Plan,
- Source Selection Decision Memorandum,
- Price Analysis for Solicitation Memorandum,
- Statement of Work,
- System Architectural Decision Logs,
- Project Milestone Plans, and
- Invoices.

We also reviewed relevant Federal Acquisition Regulation (FAR), Justice Acquisition Regulation (JAR), Department-wide as well as EOIR policies governing acquisition processes, and IT-focused guidelines, such

as those published by the General Services Administration. As a result of the COVID-19 pandemic response, we performed our audit fieldwork exclusively in a remote manner.

## Interviews

We interviewed JMD's and EOIR's contracting officials responsible for the planning, procurement, administration, and oversight of the BPA awarded to NTT DATA, as demonstrated by their knowledge and maintenance of the aforementioned documents or related process ownership. These individuals included: JMD's: (1) Former Contracting Officer and (2) PSS Deputy Director. They also included EOIR's: (1) Contracting Officer's Representative (COR), (2) Alternate COR, (3) Acting Chief Information Officer, (4) Director of Software Development, (5) Office of the Chief Immigration Judge Chief Clerk, (6) Bureau of Immigration Appeals (BIA) Senior Program Manager, and (7) BIA Chief Clerk.

Additionally, we interviewed contract workers from prime contractor NTT DATA and its subcontractor Thomson Reuters that provided data migration, software integration, configuration, and support services, under the 2020 BPA. These individuals included: (1) a Program Manager, (2) an Architect & Technical Lead, (3) a Data Migration Track Lead, (4) a Business Analyst Lead, (5) an Infrastructure and Security Lead, (6) the Scrum Master, and (7) the Deputy Program Manager. Because JMD and EOIR had outsourced product ownership to a staffing company under a separate contract, we also interviewed the three product owners furnished by a third contractor.

## Acquisition Planning, Procurement, Administration, and Oversight

To assess the adequacy of JMD's and EOIR's acquisition planning, procurement, administration, and oversight of the 2020 BPA and its calls, we reviewed FAR, JAR, EOIR and DOJ policies, and Office of Management and Budget (OMB) memoranda that establish requirements and guidelines for the complete acquisition lifecycle. We also reviewed and analyzed related NTT DATA policies and procedures.

JMD and EOIR contracting and program officials provided insight on events surrounding the pre-award and administration of the BPA, as well as roles and responsibilities during the acquisition life cycle. We analyzed the Statements of Work associated with the contract to gain an understanding of the contract requirements and the electronic case management system (ECMS) design, configuration, implementation, and support during the performance period. We identified key written considerations for acquisition planning as defined in documents, such as the determination of written acquisition plan, and support for fair and reasonable pricing.

We designed procedures to gain an understanding of the nature and extent of the ECMS design, configuration, implementation, and support provided under the BPA. We reviewed BPA clauses, contracting officials' files, EOIR's mission statement, strategic planning documents, and program area descriptions.

## Performance

While we did not evaluate NTT DATA's performance in terms of the design, configuration, and implementation of C-Track; we assessed the contractor's performance based on compliance with the terms, conditions, deliverables, and other requirements detailed in the BPA and its Statement of Work. We then interviewed JMD, EOIR and NTT DATA personnel, and reviewed invoices, and other relevant

documents to determine if NTT DATA complied with the BPA requirements. We also judgmentally selected timesheets to reconcile direct costs to supporting documentation. Furthermore, we examined the government officials' supporting documents for the financial management, monitoring, reporting, and progress of the BPA under audit.

## Statement on Compliance with Generally Accepted Government Auditing Standards

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.

## Internal Controls

In this audit, we performed testing of internal controls significant within the context of our audit objectives. We did not evaluate the internal controls of JMD, EOIR, and NTT DATA to provide assurance on its internal control structure as a whole. JMD, EOIR, and NTT DATA management is responsible for the establishment and maintenance of internal controls in accordance with the FAR and OMB Circular A-123. Because we do not express an opinion on the JMD, EOIR, and NTT DATA's internal control structure as a whole, we offer this statement solely for the information and use of the JMD, EOIR, and NTT DATA.<sup>38</sup>

We assessed the design, implementation, and operating effectiveness of these internal controls and identified deficiencies that we believe could affect JMD's, EOIR's, and NTT DATA's ability to ensure compliance with laws and regulations. The internal control deficiencies we found are discussed in the *Audit Results* section of this report. However, because our review was limited to those internal control components and underlying principles that we found significant to the objectives of this audit, it may not have disclosed all internal control deficiencies that may have existed at the time of this audit.

## Compliance with Laws and Regulations

In this audit we also tested, as appropriate given our audit objectives and scope, selected transactions, records, procedures, and practices, to obtain reasonable assurance that JMD's, EOIR's, and NTT DATA's management complied with federal laws and regulations for which noncompliance, in our judgment, could have a material effect on the results of our audit. Our audit included examining, on a test basis, JMD's, EOIR's, and NTT DATA's compliance with the following laws and regulations that could have a material effect on the ECMS procured by JMD and EOIR:

- FAR Subpart 1.6, Career Development, Contracting Authority, and Responsibilities;
- FAR Subpart 2.101, Definitions;
- FAR Subpart 3.9, Whistleblower Protections for Contractor Employees;

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<sup>38</sup> This restriction is not intended to limit the distribution of this report, which is a matter of public record.

- FAR Subpart 4.8, Government Contract Files;
- FAR Part 7, Acquisition Planning;
- FAR Part 8, Required Sources of Supplies and Services;
- FAR Subpart 9.6, Contractor Team Arrangements;
- FAR Part 13, Simplified Acquisition Procedures;
- FAR Part 15, Contracting by Negotiation;
- FAR Part 16, Types of Contracts;
- FAR Subpart 22.8, Equal Employment Opportunity;
- FAR Part 31, Contract Cost Principles and Procedures;
- FAR Subpart 32.905, Payment Documentation and Process;
- FAR Part 37, Service Contracting;
- FAR Part 39, Acquisition of Information Technology;
- FAR Subpart 42.15, Contractor Performance Information;
- FAR Part 42.302, Contract Administration Functions;
- FAR Part 46, Quality Assurance;
- FAR Part 52, Solicitation Provisions and Contract Clauses;
- JAR Part 2807, Acquisition Planning; and
- Title 41 U.S.C. § 4712, Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information.

This testing included analyzing contract files and related documents, interviewing JMD, EOIR, and NTT DATA personnel, and reviewing invoices and supporting documentation. As noted in the *Audit Results* section of this report, we found that JMD, EOIR, and NTT DATA did not comply with federal regulations related to acquisition planning, contract administration and oversight, and whistleblower protections.

## **Sample-Based Testing**

To accomplish our audit objectives, we performed sample-based testing for personnel, labor category requirements, and invoices. We employed a judgmental sampling design to obtain broad exposure to numerous facets of the areas we reviewed. This non-statistical sample design did not allow projection of the test results to the universe from which the samples were selected.

## **Computer-Processed Data**

We obtained information from EOIR's and NTT DATA's timekeeping system. We did not test the reliability of those systems as a whole; therefore, we verified any findings identified involving information from those systems with documentation from other sources.

## APPENDIX 2: E-World Applications and Databases

Application or Database	Description	Replaced in ECMS Solution (C-Track)?	Integrates with ECMS Solution (C-Track)?	Commercial-of-the-Shelf?
<b>Case Access System for EOIR (CASE)</b>	<p>A Cold Fusion, web-based application that supports the Immigration Courts and the Board of Immigration Appeals (BIA) for tracking court cases and scheduling hearings. CASE is supported by a Standard Query Language server database (EOIR Database) and consists of five modules:</p> <ul style="list-style-type: none"> <li>(1) <b>Case Manager</b> - Allows users to add, verify, and/or modify case, representative, and appeal information for foreign-born individuals.</li> <li>(2) <b>Utilities</b> - Allows users to set Immigration Judge (IJ) agendas, process Federal Records Center (FRC) information, process deposits, process EOIR 33s, perform data maintenance and access the Certification utility.</li> <li>(3) <b>Administration</b> - Allows validated users to set roles and security access for users.</li> <li>(4) <b>Reports</b> - Allows users to generate reports based on criteria selected within the module.</li> <li>(5) <b>Other Programs</b> - The programs available on the Other Programs module include BarCode Batch Scanner Upload, Barcode Search, Streamlining Assignment, eDecisions, FileTrail Administration, Record of Proceedings (ROP) Barcode Printing, FRC Box Label Printing, eRegistration, and eTranscription.</li> </ul>	<b>Yes</b>		<b>No</b>
<b>FileTrail</b>	Generate Barcode to track location of paper ROP.	<b>No</b>	<b>Yes</b>	<b>Yes</b>
<b>Attorney Discipline</b>	Tracks complaints and discipline cases against representatives for foreign-born individuals.	<b>No</b>	<b>Yes</b>	<b>No</b>
<b>Digital Audio Recording (DAR)</b>	Provides multi-channel recording and playback of court hearings. DAR uses scheduling and hearing data from CASE to link a recording to a hearing. Users can also access a recording for play back from within CASE.	<b>No</b>	<b>Yes</b>	<b>Yes</b>
<b>eTranscription</b>	Provides electronic transcriptions - is a tool that is used to assign, capture, and track transcript requests for appeals.	<b>No</b>	<b>Yes</b>	<b>No</b>
<b>eROP</b>	Stores legal documents, able to accept and reject filed documents, and notify appropriate parties of filing. Link the relevant document to cases in CASE, and receives documents generated by the court management application and the Judicial Tools application.	<b>Yes</b>		<b>No</b>
<b>Electronic Contract Interpreter Ordering System (ECIOS)</b>	Allows court users to order contract interpreters and perform administrative tasks associated with these orders.	<b>No</b>	<b>Yes</b>	<b>No</b>

Application or Database	Description	Replaced in ECMS Solution (C-Track)?	Integrates with ECMS Solution (C-Track)?	Commercial-of-the-Shelf?
<b>Immigration Review Information Exchange System (IRIES)</b>	A web service used by various Department of Homeland Security (DHS) components. DHS can retrieve select information concerning a specific foreign-born individual's case by alien registration number.	No	Yes	No
<b>eNET Application Programming Interface (API)</b>	Provide Application Programming Interface to external users.	No	Yes	No
<b>EOIR Data Connector (EDC)</b>	Provides integrated EOIR services used by ECAS applications (i.e. - document sync, watermarking, etc.).	No	Yes	No
<b>Notice to Appeal (NTA) Pull (scheduled for decommission)</b>	When a court clerk is entering a case, the court management system will attempt to retrieve case information from a DHS web service. If the data is available, the NTA Pull will retrieve and pre-populate certain fields for the user, saving data entry time. Please note this application is scheduled to be decommissioned.	No	No	No
<b>Recognition and Accreditation (R&amp;A)</b>	Tracks Recognition and Accreditation status of attorneys and representatives.	No	Yes	No
<b>BIA eDecisions</b>	Stores written decisions from the BIA. It provides users at BIA and the US Courts a search function to retrieve these decisions by alien registration number.	No	Yes	No
<b>BIA Electronic En Banc</b>	A voting system where Administrators post descriptions of issues with related documentation. This will be subsumed by Judicial Tools.	No	No	No
<b>BIA Pro Bono Program</b>	An EOIR outreach program to link Pro Bono representation to immigrants without BIA representation.	No	Yes	No
<b>Judicial Tools (BIA &amp; OCIJ)</b>	Provides management of day-to-day court operations as well as providing immigration judges with multiple tools such as calendar management, PDF document annotation, and electronic signature capabilities.	No	Yes	No
<b>Freedom of Information Act (FOIA) Tracking System</b>	Includes the ability to monitor the requestor, scanned requests, records of proceeding, all letters and e-mails sent, and all actions taken on the request. This is a COTS product named FOIA Express.	No	No	Yes
<b>e-Filing- subsumed by Case portal, DHS portal, and Respondent Access</b>	A customized eInfo system that allows external parties to electronically submit case-related documents and review the status of uploaded files. Subsumed into Case Portal, DHS Portal, and Respondent Access.	Yes		No
<b>Case Information System (1-800)</b>	Provide toll free phone number for members of the public to call for the purpose of receiving information about cases before the immigration courts (i.e. - hearing dates & times, hearing location, etc.)	No	Yes	No

<b>Application or Database</b>	<b>Description</b>	<b>Replaced in ECMS Solution (C-Track)?</b>	<b>Integrates with ECMS Solution (C-Track)?</b>	<b>Commercial-of-the-Shelf?</b>
<b>EOIR Electronic Payment</b>	(New) Allow members of the public to pay fees associated with appeals and motions using Pay.gov.	<b>No</b>	<b>Yes</b>	<b>Yes</b>
<b>Automated Case Information System</b>	(New) Web version of 1-800 Case Information System; Provides members of the public the ability to view case information (such as hearing dates and locations) using their web browser.	<b>No</b>	<b>Yes</b>	<b>No</b>
<b>DHS Portal</b>	Allow DHS attorneys to electronically file documents, schedule a case, view case information, and view eROPs.	<b>Yes</b>		<b>No</b>
<b>Case Portal (replaced eInfo)</b>	Allows an attorney or accredited representative registered in eRegistration to view case information for respondents that they are representing. CMS will be addressing this functionality in a later phase of the project.	<b>Yes</b>		<b>No</b>
<b>eRegistration</b>	An existing application for registered attorney and accredited representative user accounts, which is expanded to additionally register DHS users. CMS will be addressing this functionality in a later phase of the project.	<b>Yes</b>		<b>No</b>
<b>Judicial Complaint system (New Ancillary application)</b>	Tracks and processes complaints against Judges.	<b>No</b>	<b>No</b>	<b>No</b>
<b>OGC Fraud Tracking (New Ancillary application)</b>	Tracks and processes fraud complaints reported to Office of General Counsel.	<b>No</b>	<b>Yes</b>	<b>No</b>
<b>Electronic Docket Display System (New Ancillary application)</b>	Displays calendar and docket information in court waiting room.	<b>No</b>	<b>Yes</b>	<b>Yes</b>
<b>eProcessing</b>	Encompasses the electronic submission, adjudication, communication, and all practices and procedures associated with the paperless processing of immigration requests or other documents submitted to the United States Citizenship and Immigration Services.	<b>Yes</b>		<b>No</b>
<b>Respondent Access</b>	(New) Allows respondents to electronically file EOIR-33 forms to immigration courts and Board of Immigration Appeals. This application also provides needed functionality in support of the MPP program.	<b>Yes</b>		<b>No</b>

Source: EOIR and Department of Homeland Security's Privacy Impact Assessment



## APPENDIX 3: 2020 BPA Pre-award Process

In May 2020, nine contractors submitted nine distinct proposals to design and implement EOIR’s ECMS via the 2020 BPA. The table below details the three-phase technical evaluation that JMD and EOIR contracting officials used to award the 2020 BPA competitively:

Phase	Requirements
1. <b>Recency and Relevancy</b>	<p>Contractors <b>must</b> submit a Statement of Corporate Experience with the following:</p> <ul style="list-style-type: none"> <li>• Proposed team structure (i.e., prime and subcontractors), including the rationale for team member selection. The team structure must include the proposed commercial off-the-shelf software contractor(s) and product(s).</li> <li>• Recency – A description of one to three ongoing or previously completed projects within the past 5 years on which the vendor implemented a commercial off-the-shelf based ECMS for a court.</li> <li>• Relevancy - Demonstrate experience integrating a solution that allows communication between different software environments (preferably the Azure Service Environment with Microsoft Dynamics CRM), and Microsoft Exchange.</li> </ul>
2. <b>Technical Approach and Pricing</b>	<p>Contractors <b>must</b> submit Technical and Price Proposals, including the following:</p> <ol style="list-style-type: none"> <li>1. Technical Proposal must be concise, complete, and demonstrate a thorough understanding of the requirements:               <ol style="list-style-type: none"> <li>a. Executive Summary – A concise narrative summary of the vendor’s technical proposal highlighting any key or unique features. If any portion of the work will be subcontracted, identify the subcontractor(s) or team member(s) and their respective role(s).</li> <li>b. Technical Approach - Emphasize any unique business relationships, tools, processes, procedures, and resources that the vendor will use to enhance the quality of the deliverables/services and their ability to meet tight schedules.</li> <li>c. Management Approach - Should include a staffing chart, recruitment program, and resumes of key and optional personnel.</li> </ol> </li> <li>2. Price Proposal must include authorized individuals, terms and conditions, assumptions, and pricing.</li> </ol>
4. <b>Demonstration Scenarios</b>	<p>Contractors <b>must</b> demonstrate their case management solution.</p>

Source: EOIR

# APPENDIX 4: Justice Management Division's Response to the Draft Audit Report

U.S. Department of Justice



Washington, D. C.

## MEMORANDUM

**TO:** Jason R. Malmstrom  
Assistant Inspector General for Audit  
Office of the Inspector General

**FROM:** Arthur E. Gary,  
Deputy Assistant Attorney General  
Justice Management Division

ARTHUR GARY  
Digitally signed by ARTHUR GARY  
Date: 2022.09.29  
14:47:11 -0400

David L. Neal  
Director  
Executive Office for Immigration Review

David L. Neal  
Digitally signed by David L. Neal  
Date: 2022.09.29  
13:45:17 -0400

**DATE:** September 30, 2022

**SUBJECT:** Response to Office of Inspector General Draft Audit Report, Audit of the Executive Office for Immigration Review's Electronic Case Management System Awards

The Department of Justice (DOJ or Department), Justice Management Division, Procurement Services Staff (JMD PSS) and the Executive Office for Immigration Review (EOIR) reviewed the Office of the Inspector General's (OIG's) Draft Audit Report – *Audit of the Executive Office for Immigration Review's Electronic Case Management System Awards* (Report). The Report identifies 13 recommendations related to the acquisition planning, procurement, and contract administration of the Department's task order to NTT Data, which provides for the development and implementation of an Electronic Case Management System (ECMS) for EOIR. EOIR provided a response to the OIG's recommendations directed solely to it on September 9, 2022. Below are JMD's and EOIR's responses to the remaining recommendations. EOIR and JMD concur with the OIG's recommendations.

**Recommendation #4 (JMD PSS):** The Report instructs JMD PSS to provide guidance to acquisition planning team members, including EOIR OIT and contracting officials, on how to apply the best practices outlined in OMB's January 2021 memorandum on Procurement Administrative Lead Times for all procurement vehicles. Such guidance should incorporate an oversight framework by which JMD PSS and EOIR contracting officials adopt practices that will help them to monitor and reduce the time between the initial contract action solicitation and award dates.

*JMD PSS concurs with this recommendation. As noted by the OIG in its report, the OMB memorandum cited was issued after the ECMS contract was awarded. Nevertheless, JMD PSS will make the memorandum available to its contracting officers and managers to assist in acquisition planning for future procurement actions. To ensure proper oversight in this area, contracting officers and managers will also be reminded of the requirement that PSS managers must review and*

Response to the OIG Audit  
of the ECMS Procurement

*approve pre-award files, which include the completed acquisition plan, before the solicitation is issued.*

**Recommendations #5 (JMD/PSS):** The Report recommends that PSS complete the written assessment for inherently governmental functions (and closely associated functions) for the 2020 BPA and related contracts (e.g., the contract for product owners and future related procurements), and update its template to include instructions on when contracting officials should perform the assessment. Such updates should address considerations during pre-award and appropriate reassessment after award.

*JMD concurs with this recommendation. It will conduct an inherently governmental/closely associated function analysis of the positions under the ECMS contract. Additionally, PSS contracting officers and their managers will be reminded that the acquisition planning format described under Federal Acquisition Regulation (FAR) 7.1 includes an element for analyzing inherently governmental functions in accordance with FAR 7.5 and DOJ 1301.02.01, Acquisition Policy Oversight Inherently Governmental and Critical Functions. As noted in our response to Recommendation #4 above, PSS managers are required to review and approve the pre-award file, which includes acquisition plans and a completed inherently governmental function analysis before the solicitation is issued. Further guidance will be issued to acquisition personnel on when such assessments shall be performed.*

**Recommendation #6 (JMD/PSS):** The Report recommends that JMD/PSS evaluate and update its policies and procedures to ensure that its contracting officials create timely Quality Assurance Surveillance Plans (QASPs) and ensure that delegated personnel follow such plans in conjunction with the Statements of Work or Performance Work Statements for contracts that meet the FAR requirements.

*JMD concurs with this recommendation. During their pre-solicitation review of contract files, PSS managers will ensure that QASPs and associated documents are completed and included in the pre-award file, as appropriate. As a further safeguard, during their review of the file before contract award, PSS managers will ensure that the QASP and associated documents are included in the contract, as appropriate.*

**Recommendation #7 (JMD/PSS):** The Report recommends that JMD/PSS implement policies and procedures to ensure that acquisition planning teams consider Performance-Based acquisition strategies or document a rationale for not using those methods in its acquisition plans.

*JMD concurs with this recommendation. Contracting Officers will be reminded that they must address the use of Performance Based acquisitions in their planning in accordance with FAR Part 7.*

**Recommendation #8 (JMD/PSS):** The Report recommends that JMD update its policies and procedures to include guidelines for succession planning to demonstrate the historical knowledge of Blanket Purchase Agreement (BPA) actions are preserved in a manner that facilitates effective, continuous administration and oversight in the event of responsible contracting officials' separation from the agency.

Response to the OIG Audit  
of the ECMS Procurement

*JMD concurs with this recommendation. The primary vehicle for historical procurement actions is the official contract file. PSS Contracting Officers will be reminded to complete and keep the contract award files up to date as they serve as the primary source of historical knowledge for contract actions.*

**Recommendation #9 (JMD/PSS):** The Report recommends that JMD provide its contracting officials with training and guidance that ensures their understanding of how to adequately enter contract information into the Contractor Performance Assessment Reporting System (CPARS) and design and implement policies and procedures that ensure acquisition personnel adhere to the schedule for mandatory completion of contractor performance evaluations via the CPARS for contract vehicles that meet the requirement.

*JMD concurs with this recommendation and will further train its contracting officers to appropriately enter contractor performance data in a timely manner into CPARS, in accordance with Section 10 and Appendix A of DOJ Instruction 1301.02.02, both of which provide instructions on CPARS reporting.*

**Recommendation #10 (EOIR & JMD/PSS):** The Reports recommends that EOIR and JMD conduct a price analysis prior to the beginning of each of the remaining ECMS project phases to provide a more accurate cumulative total project costs and estimates for the full implementation, maintenance, and training cost of C-Track.

*EOIR and JMD/PSS both concur with this recommendation. EOIR and JMD/PSS are conducting a comprehensive review of the project and associated costs, including life-cycle costs. The results of this review will determine the direction of the project, and the next steps that the Department will take to meet the project's goals.*

**Recommendation #11 (EOIR & JMD/PSS):** The Reports recommends that EOIR and JMD consider including FAR Subpart 52.244-2 in the 2020 BPA to require the prime contractor to request consent prior to subcontracting work, thus allowing JMD and EOIR to document the work being subcontracted and monitor potential pass-through concerns.

*EOIR and JMD/PSS both concur with this recommendation. The BPA has been modified to include FAR 52.244-2, Subcontracts, which includes consent to subcontracting provisions (see Attachment #1). Accordingly, we respectfully request that this recommendation be resolved and closed.*

**Recommendation #12 (EOIR & JMD/PSS):** The Report recommends that EOIR and JMD request additional information from NTT DATA to facilitate greater transparency on the 2020 BPA calls for enhanced contract monitoring purposes. Related monitoring procedures should include: (a) maintenance of evidence demonstrating continuous monitoring of the labor distribution of all BPA calls with subcontractors, and (b) Time and Materials invoices that detail which labor categories and subcontractors support each call to ensure that the Department can readily identify and evaluate subcontract effort.

*EOIR and JMD/PSS both concur with this recommendation. We agree that the BPA needs to be more transparent about the unit prices for the labor categories provided by the prime contractor and its subcontractors. In this regard, the Contracting Officer is restructuring the Contract Line*

Response to the OIG Audit  
of the ECMS Procurement

*Item format to include a detailed breakdown of the prime and subcontractors' labor categories associated with each task area. In addition, the contractor's future invoices will include supporting details on direct labor expended by task area and employee name. Both of these actions will aid the Department in identifying and evaluating the efforts of both the prime contractor and its subcontractors.*

**Recommendation #13 (EOIR & JMD/PSS):** The Report Recommends that EOIR and JMD develop policies and procedures that detail how their shared monitoring processes incorporate JMD's remedial actions (e.g., the newly deployed Robotic Process Automation bot) that resulted in the MAM closure.

*EOIR and JMD/PSS both concur with this recommendation. In October 2021, The Department issued Acquisition Policy Notice (APN) 2022-03 that implemented a Robotic Process Automation (RPA) bot which electronically monitors DOJ's awards and sends automated email responses to both the contractor and the Contracting Officer about the contractor's obligation to distribute the Whistleblower Distribution Information (OCT 2021) clause to their employees. The BPA award pre-dated the RPA process; however, JMD/PSS has already sought and received NTT DATA's certification that it has distributed the clause to its employees (Attachment #2). Accordingly, we respectfully request that this recommendation be resolved and closed.*

EOIR and JMD appreciates the opportunity to comment on the OIG's Draft Report. We also appreciate the time and effort of the OIG Audit Staff in its review of the ECMS BPA and its BPA calls. Should you have any questions regarding this topic, including our comments, please do not hesitate to contact Tracy Waters, Justice Management Division, Audit Liaison Group.

Attachments

Attachment #1: Modification Incorporating FAR 52.244-2, Subcontracts, into the BPA

Attachment #2: NTT Data's Certification of its Distribution of the Whistleblower Clause to its Employees

# APPENDIX 5: Executive Office for Immigration Review's Response to the Draft Audit Report



U.S. Department of Justice  
Executive Office for Immigration Review  
*Office of the Director*

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September 9, 2022

## MEMORANDUM

TO: Jason R. Malmstrom  
Assistant Inspector General for Audit  
Office of the Inspector General

FROM: David L. Neal  
Director

SUBJECT: Response to Office of Inspector General Draft Audit Report, The Executive  
Office for Immigration Review's Electronic Case Management System Awards

This memorandum is in response to your transmittal memorandum dated August 12, 2022, providing an official copy for review and comment of the Office of the Inspector General's (OIG) report entitled, "*Audit of the Executive Office for Immigration Review's Electronic Case Management System Awards.*"

The Executive Office for Immigration Review (EOIR) appreciates the opportunity to review and respond to your office's findings and recommendations prior to their issuance. We look forward to working with OIG to address concerns noted in the report and appreciate OIG's efforts throughout this review to comprehensively assess EOIR's procurement and performance oversight of the NTT DATA Federal Services, Inc award to support EOIR's Electronic Case Management System (ECMS).

OIG made a total of thirteen recommendations in its report. EOIR hereby submits its responses to the first three recommendations that were directed only at EOIR. Should you have any questions, please feel free to contact me.

**Recommendation 1** — Finalize, share with NTT DATA, and implement the Quality Assurance Surveillance Plan (QASP) it is developing for the 2020 BPA and, in the continued development of its Quality Assurance Surveillance Plan, incorporate milestones aligned with the performance metrics to (a) assist EOIR with monitoring NTT DATA's and Thomson Reuters' progress toward meeting the ECMS goals and (b) readily identify and mitigate situations that can impact the timeliness and scope of work performed under the 2020 BPA.

**Response:** EOIR concurs with this recommendation. EOIR completed its final QASP document

inputs on August 23, 2022. The Justice Management Division's Procurement Services Staff (JMD PSS) accepted the QASP and will include the QASP in the BPA. Once the QASP has been added to the BPA via contract modification, it will be used by the Contracting Officer's Representative (COR) and Alternate COR (ACOR) to assess and document contractor performance. The QASP will be considered a "living" document and will be reviewed as contract performance warrants.

*Recommendation 2* — Provide the April 2021 Department-wide government-contractor protocol training to its contracting officials and personnel who closely interact with contract workers to ensure that only government personnel with properly designated authority (e.g., CO, COR, Alternate COR) coordinate with contractors' project managers on instructions to contract workers.

Response: EOIR concurs with this recommendation. All 32 EOIR Office of Information Technology (OIT) government staff members involved in the procurement, administration, and oversight of the ECMS award and who closely interact with workers to ensure that only government personnel with properly designated authority coordinate with contractors' project managers on instructions to contract workers were required to attend Government-Contractor Protocol Training on April 20, 2022, and April 28, 2022, during OIT All-hands meetings. Based on the training attendance sheet, all OIT members attended the training sessions except for three staff members. Subsequently, the OIT management validated that these staff members completed the "USMS Government Contractor Protocol Training" via LearnDOJ within the last 12 months.

*Recommendation 3* — Evaluate and update its policies and procedures to ensure that billings and payments for service contracts comply with the FAR, EOIR internal policies, and BPA terms, ensuring that: (a) contracting officials review appropriate supporting information to determine whether the contractors' billed amounts reflect reasonable, allocable, and allowable costs; and (b) contracting officials consistently communicate with the CO to ensure that contract workers comply with BPA terms and internal procedures on charges that may result in cost overruns.

Response: EOIR concurs with this recommendation. To that end, EOIR has taken steps to ensure that the two objectives outlined in the recommendation above are met. On December 16, 2021, January 26, 2022, and February 4, 2022, the ECMS COR provided reminders regarding overtime adherence, which included the section of the FAR that mentions the overtime approval process, to the prime contract program manager. Overtime approval adherence requirements were met from November 2021 to now. Invoice-related guidance documentation created by EOIR's Office of Procurement Services (OPS) will continue to be used by EOIR/OIT CORs when reviewing contractor invoices. This documentation provides instructions in the form of a checklist and a workflow outline of the EOIR invoice processing procedures.

In conclusion, we appreciate the OIG's efforts to assist EOIR in determining best practices to develop a framework that strengthens EOIR's post-award administration and oversight. Should you or your staff require further information, please do not hesitate to contact us.

Sincerely,

David L.  
Neal

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David L. Neal  
Director

## APPENDIX 6: Office of the Inspector General Analysis and Summary of Action Necessary to Close the Report

The OIG provided a draft of this audit report to the Justice Management Division (JMD), Executive Office for Immigration Review (EOIR), and NTT DATA Federal Services, Inc. (NTT DATA). JMD's and EOIR's responses are incorporated in Appendices 4 and 5 of this final report. NTT DATA elected not to provide a written response to the final report. In response to our audit, JMD and EOIR concurred with all 13 of our recommendations. The following provides the summary of actions necessary to sustain the resolved status of and ultimately close this report.

### Recommendations for EOIR:

- 1. Finalize, share with NTT DATA, and implement the Quality Assurance Surveillance Plan it is developing for the 2020 BPA and, in the continued development of its Quality Assurance Surveillance Plan, incorporate milestones aligned with the performance metrics to (a) assist EOIR with monitoring NTT DATA's and Thomson Reuters' progress toward meeting the ECMS goals and (b) readily identify and mitigate situations that can impact the timeliness and scope of work performed under the 2020 BPA.**

Resolved. EOIR concurred with our recommendation. EOIR stated in its response that it has developed a Quality Assurance Surveillance Plan (QASP) as of August 23, 2022. JMD PSS accepted the QASP and agreed to incorporate it in an upcoming BPA modification. Once the modification is effectuated, the COR and Alternate COR will use it to assess and document contractor performance.

This recommendation can be closed when EOIR provides a copy of the BPA modification with accompanying QASP.

- 2. Provide the April 2021 Department-wide government-contractor protocol training to its contracting officials and personnel who closely interact with contract workers to ensure that only government personnel with properly designated authority (e.g., CO, COR, Alternate COR) coordinate with contractors' project managers on instructions to contract workers.**

Resolved. EOIR concurred with our recommendation. EOIR stated in its response that it required all 32 contracting officials and EOIR Office of Information Technology (OIT) personnel involved in the procurement, administration, and oversight of the ECMS award to attend internally developed Government-Contractor Protocol Trainings on April 20, 2022, and April 28, 2022, during an all-hands meeting. The EOIR OIT Management subsequently verified that all staff completed the training through the DOJ training platform (i.e., LearnDOJ).

This recommendation can be closed when EOIR provides evidence (e.g., training attendance sheet, certificates of completion, course materials with content on contracting authority for COs, COR, Alternate COR) to substantiate that all responsible contracting officials and OIT personnel involved in the procurement, administration, and oversight of the ECMS award have completed the government-contractor protocol trainings. EOIR should also demonstrate to the OIG that



new processes include coordination with contractors' project managers to facilitate contract workers' understanding of contracting authority and limitations.

- 3. Evaluate and update its policies and procedures to ensure that billings and payments for service contracts comply with the FAR, EOIR internal policies, and BPA terms, ensuring that: (a) contracting officials review appropriate supporting information to determine whether the contractors' billed amounts reflect reasonable, allocable, and allowable costs; and (b) contracting officials consistently communicate with the CO to ensure that contract workers comply with BPA terms and internal procedures on charges that may result in cost overruns.**

Resolved. EOIR concurred with our recommendation. EOIR stated in its response that it has taken steps to ensure that recommendation 3 is addressed. As we mention in our report, EOIR has reiterated established procedures to NTT DATA to ensure that contract workers properly request and charge overtime. EOIR stated that it has confirmed that prime contractor NTT DATA and its subcontractors have met the overtime approval requirements as of November 2021. However, based on our invoice review for the period covering November 2021, we still have concerns that EOIR does not receive sufficient support with the invoices to verify whether contract workers have charged reasonable, allocable, and allowable costs in accordance with the FAR, BPA terms, and internal EOIR policies and procedures.

EOIR further stated that it will ensure that the COR will apply EOIR's Office of Procurement Services' (OPS) existing invoice related guidance when reviewing the contractor invoices. The OPS guidance provides CORs with overarching guidelines to ensure the invoice is completed properly and that the charges within the invoice reconcile. Nonetheless, the guidance does not include methods to help CORs to verify that contractors have billed reasonable, allocable, and allowable costs that consider the inherent risks associated with a BPA that has Time and Materials calls.

This recommendation can be closed when EOIR provides its updated policies and procedures that ensure service contract billing and payments comply with the FAR, EOIR internal policies, and BPA terms to ensure that: (a) contracting officials receive and review appropriate supporting information to determine whether the contractors' billed amounts reflect reasonable, allocable, and allowable costs; and (b) contracting officials consistently communicate with the CO to ensure that contract workers comply with BPA terms and internal procedures on charges that may result in cost overruns.

#### **Recommendations for JMD PSS:**

- 4. Provide guidance to acquisition planning team members, including EOIR OIT and contracting officials, on how to apply the best practices outlined in OMB's January 2021 memorandum on Procurement Administrative Lead Times for all procurement vehicles. Such guidance should incorporate an oversight framework by which JMD PSS and EOIR contracting officials adopt practices that will help them to monitor and reduce the time between the initial contract action solicitation and award dates.**

Resolved. JMD PSS concurred with our recommendation. In its response, JMD PSS stated that it will make OMB's January 2021 memorandum available to its contracting officers and managers to assist in acquisition planning for future procurement actions. JMD PSS further stated that it also plans to remind contracting officers and managers of the requirement that PSS managers must review and approve pre-award files, which include the completed acquisition plan, before the solicitation is issued.

This recommendation can be closed when JMD PSS provides evidence of: (1) centralized access to the OMB memorandum for its contracting officers and managers to refer to throughout the acquisition lifecycle, (2) a memorialized source of the aforementioned managerial pre-award review and approval requirement (e.g., policy, directive, etc.), and (3) recent dissemination of the managerial pre-award review and approval requirement to process owners and approvers (e.g., an email, a memorandum, training materials, etc.).

- 5. Complete the written assessment for inherently governmental functions (and closely associated functions) for the 2020 BPA and the related contracts (e.g., the contract for product owners and future related procurements) and update its template to include instructions on when contracting officials should perform the assessment. Such updates should address considerations during pre-award and appropriate reassessment after award.**

Resolved. JMD PSS concurred with our recommendation. In its response, JMD PSS stated that it will complete an inherently governmental/closely associated function analysis of the ECMS award positions. JMD PSS also stated that it will remind the contracting officers and their managers that the acquisition planning format described in Federal Acquisition Regulation (FAR) Subpart 7.1 includes an element for analyzing inherently governmental functions in accordance with FAR Subpart 7.5 and DOJ 1301.02.01, *Acquisition Policy Oversight Inherently Governmental and Critical Functions*.

JMD PSS, in its response to recommendation #4 above, stated that before solicitation issuance it requires PSS managers to review and approve the pre-award contract file, which includes acquisition plans and a completed inherently governmental function analysis. Also, JMD PSS stated that it will issue further guidance to acquisition personnel on when they must perform such assessments.

This recommendation can be closed when JMD PSS provides evidence of a: (1) completed written assessment for inherently governmental/closely associated function for the 2020 BPA and (2) recent dissemination of the managerial pre-award review and approval requirement to process owners and approvers (e.g., an email, a memorandum, training materials, etc.).

- 6. Evaluate and update its policies and procedures to ensure that its contracting officials create timely Quality Assurance Surveillance Plans and ensure that delegated personnel follow such plans in conjunction with the Statements of Work or Performance Work Statements for contracts that meet the FAR requirements.**

Resolved. JMD PSS concurred with our recommendation. JMD PSS stated in its response that it will review the contract files during the pre-solicitation review, and PSS managers will ensure

that contracting officials complete and include QASPs and associated documents in the pre-award file, as appropriate.

This recommendation can be closed when JMD PSS provides evidence of a memorialized requirement for managers to perform a pre-solicitation review to ensure that contracting officials complete and include the QASPs and associated documents in the contract files (e.g., policy, directive, etc.).

**7. Implement policies and procedures to ensure that acquisition planning teams consider Performance-Based Acquisition strategies or document a rationale for not using those methods in its acquisition plans.**

Resolved. JMD PSS concurred with our recommendation. EOIR stated in its response that it will remind Contracting Officers that they must address the use of Performance Based Acquisitions in their planning in accordance with FAR Part 7.

This recommendation can be closed when JMD PSS provides: (1) evidence of a recent dissemination of the Performance-Based Acquisition requirement to contracting officers (e.g., an email, a memorandum, training materials, etc.) and (2) a policy or procedure that helps ensure the implementation of the requirement.

**8. Update its policies and procedures to include guidelines for succession planning to demonstrate the historical knowledge of BPA actions are preserved in a manner that facilitates effective, continuous administration and oversight in the event of responsible contracting officials' separation from the agency.**

Resolved. JMD PSS concurred with our recommendation. JMD PSS stated in its response that the primary vehicle for historical procurement actions is the official contract file. JMD PSS stated that it will remind Contracting Officers to complete and keep the contract files current as the primary source of historical knowledge for contract actions.

This recommendation can be closed when JMD PSS provides evidence of a recent dissemination (e.g., an email, a memo, training materials, etc.) reminding contracting officials of the importance of maintaining complete and current contract files to preserve and demonstrate the historical award knowledge if responsible contracting officials' separation from the agency.

**9. Provide its contracting officials with training and guidance that ensures their understanding of how to adequately enter contract information into the Contractor Performance Assessment Reporting System and design and implement policies and procedures that ensure acquisition personnel adhere to the schedule for mandatory completion of contractor performance evaluations via the Contractor Performance Assessment Reporting System for contract vehicles that meet the requirement.**

Resolved. JMD PSS concurred with our recommendation. In its response, JMD PSS stated that it will further train its contracting officers to appropriately enter contractor performance data in a timely manner into Contractor Performance Assessment Reporting System, in accordance with

Section 10 and Appendix A of DOJ Instruction 1301.02.02, both of which contain Contractor Performance Assessment Reporting System reporting instructions.

This recommendation can be closed when JMD PSS provides: (1) copies of Section 10 and Appendix A of DOJ Instruction 1301.02.02 and (2) evidence of the contracting officer training (e.g., course materials, attendance sheets, etc.).

**Recommendations for JMD PSS and EOIR:**

- 10. Perform a price analysis prior to the beginning of each of the remaining project phases to provide more accurate cumulative total project costs and estimates for the full implementation, maintenance, and training cost of C-Track.**

Resolved. JMD PSS and EOIR concurred with our recommendation. The DOJ components stated in their response that a comprehensive review of the ECMS project, its life-cycle and its associated costs is being performed. This review will determine the project next step and how the auditees will meet the project's goal.

This recommendation can be closed when the components provide a copy of the comprehensive review that demonstrates considerations toward developing a more accurate estimate of the total project cost, including the full implementation, maintenance, and training on the new system.

- 11. Consider including FAR Subpart 52.244-2 in the 2020 BPA to require the prime contractor to request consent prior to subcontracting work, thus allowing JMD and EOIR to document the work being subcontracted and monitor potential concerns.**

Closed. JMD PSS and EOIR concurred with our recommendation. The DOJ components stated in their response that they have modified the BPA to include FAR Subpart 52.244-2 to require the prime contractor to request consent prior to subcontracting work, thus allowing JMD and EOIR to document the work for potential concerns. JMD provided a copy of the modified BPA, which now includes the aforementioned FAR clause.

This recommendation is closed.

- 12. Request additional information from NTT DATA to facilitate greater transparency on the 2020 BPA calls for enhanced contract monitoring purposes. Related monitoring procedures should include: (a) maintenance of evidence demonstrating continuous monitoring of the labor distribution of all BPA calls with subcontractors and (b) Time and Materials invoices that detail which labor categories and subcontractors support each call to ensure that the government can readily identify and evaluate subcontract effort.**

Resolved. JMD PSS and EOIR concurred with our recommendation. The DOJ components stated in their response that they agree that the BPA needs to allow for more transparency into the unit prices charged by the prime contractor and subcontractors. The components further stated that the contracting officer is planning to restructure the contract line items in the BPA calls to breakdown the labor categories associated with the prime contractor and the subcontractors.

Additionally, the prime contractor's future invoices will include supporting detail for the direct labor by employee name.

This recommendation can be closed when the components provide: (1) a copy of the BPA call modifications that reflect the restructured contract line items, (2) details on how this helps the Department to distinguish between the work of the prime contractor and its subcontractors, and (3) an example of the new invoices submitted by the prime contractor that reflect direct labor by employee name and employer.

**13. Develop policies and procedures that detail how their shared monitoring processes incorporate JMD's remedial actions (e.g., the newly deployed Robotic Process Automation bot) that resulted in the MAM closure.**

Resolved. JMD PSS and EOIR concurred with our recommendation. The DOJ components stated in their response that the Department issued Acquisition Policy Notice (APN) 2022-03, which described the deployment of a Robotic Process Automation (RPA) bot that electronically monitors DOJ's awards and sends automated email responses to the contractor and the Contracting Officer about the contractor's obligation to distribute a Whistleblower Distribution Information clause to their employees. JMD and EOIR also stated that JMD has already sought and received NTT DATA's certification that it has distributed the clause to its employees.

Although JMD PSS modified the 2020 BPA to include the whistleblower protections FAR clause, which triggers the RPA bot, and received the prime contractor's certification after we identified the issue in July 2021, the components have not provided policies and procedures detailing how they will coordinate to ensure that contracting officials consistently implement the remedial actions taken in APN 2022-03 on open ECMS contract actions. Therefore, this recommendation can be closed when the auditees provide updated policies and procedures that detail how their shared monitoring processes (on awards such as those related to the ECMS project) incorporate the RPA bot.