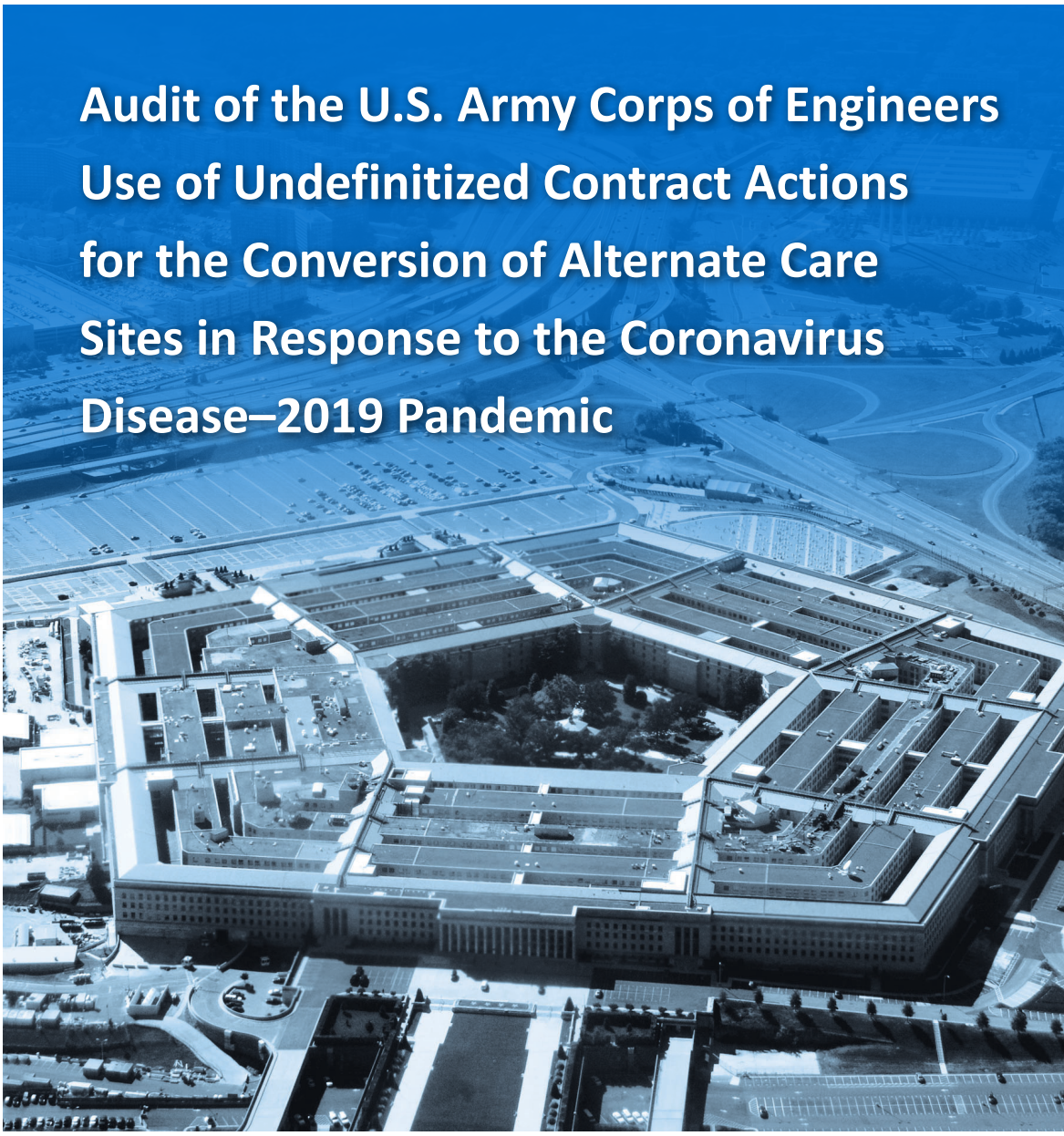
Report No. DODIG-2021-074

# INSPECTOR GENERAL

*U.S. Department of Defense*

APRIL 7, 2021

# Audit of the U.S. Army Corps of Engineers Use of Undefinitized Contract Actions for the Conversion of Alternate Care Sites in Response to the Coronavirus Disease–2019 Pandemic



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INSPECTOR GENERAL
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DEPARTMENT OF DEFENSE

# Results in Brief

*Audit of the U.S. Army Corps of Engineers Use of Undefinitized Contract Actions for the Conversion of Alternate Care Sites in Response to the Coronavirus Disease-2019 Pandemic*

**April 7, 2021**

## Objective

The objective of this audit was to determine whether U.S Army Corps of Engineers (USACE) officials properly managed undefinitized contract actions (UCAs) for Alternative Care Sites (ACS) constructed in response to the coronavirus disease–2019 (COVID-19) pandemic by definitizing actions within required time limits, conducting analyses of fair and reasonable price determinations, and ensuring profit was adjusted for costs incurred.

## Background

ACS are facilities temporarily converted for healthcare use during a public health emergency. ACS are intended to reduce unnecessary burden on hospitals and other healthcare facilities, help infected patients maintain isolation, and allow patients to be monitored, minimally treated, and quickly moved to other facilities if their condition worsens.

UCAs are agreements that allow a contractor to begin work and incur costs before the Government and the contractor have reached a final agreement on contract terms, specifications, or price.

USACE contracting officers awarded 30 UCAs with a not-to-exceed amount of $483,881,673 to convert facilities into ACS to address the rapid rise of COVID-19 cases in the U.S. because of concerns that hospitals would quickly become overwhelmed. In order to start

### Background (cont'd)

ACS conversion as quickly as possible, USACE officials awarded UCAs to shorten the amount of time required to complete ACS conversion by beginning immediately and subsequently negotiating contract costs.

## Finding

USACE contracting officers were not operating in a normal contracting environment because of the urgent nature of COVID-19 pandemic response; therefore, USACE contracting officers exercised the flexibility permitted under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and awarded 30 UCAs funded up to 100 percent of the not-to-exceed amount to start the conversion of facilities to ACS as quickly as possible. USACE contracting officers shortened the amount of time required to complete ACS conversion by awarding the contract actions as UCAs because contractors could begin conversion immediately and subsequently negotiate contract costs. However, USACE contracting officers only definitized 2 UCAs, valued at $9,524,754, of the 30 total UCAs within the definitization schedules included in the contract actions. For the other 28 UCAs, with a not-to-exceed amount of $474,356,919 at the time of award, USACE contracting officers definitized the award from 1 to 26 days after the definitization dates they established in the contract actions. According to USACE officials, the delays in definitization were out of USACE contracting officials' control and occurred because:

- contractors experienced delays in obtaining supplies for 3 contract actions;
- Government officials from the Federal Emergency Management Agency and officials at the state and local levels changed the requirements for 4 contract actions;
- contractors encountered unexpected site conditions for 1 contract action; and
- USACE officials required contractors to complete multiple revisions to proposals and conducted numerous negotiation sessions to align contractors' proposals to Government estimates for 12 contract actions.

# Results in Brief

*Audit of the U.S. Army Corps of Engineers Use of Undefinitized Contract Actions for the Conversion of Alternate Care Sites in Response to the Coronavirus Disease-2019 Pandemic*

### *Finding (cont'd)*

USACE officials did not provide a reason for, or document in the contract file, delays in definitization for the other 8 UCAs.

Additionally, USACE contracting officers determined the price was fair and reasonable for the 30 contracts awarded; however, contracting officers did not follow DoD acquisition regulations related to adjusting the potential contractor profit to reflect the definitization status of the award. For the 30 UCAs issued, USACE contracting officers only considered the ACS completion status for 2 UCAs when determining profit. USACE contracting officers did not document their reasons for not considering completion status in the contract files for the remaining 28 UCAs. The Chief of the USACE Acquisition Support Division stated that this occurred because of the urgent environment contracting officers were operating within.

As a result, USACE officials may have paid more than necessary for ACS conversion by not complying with Defense Federal Acquisition Regulation Supplement requirements. By the time USACE contracting officers definitized the contract actions, the period of performance was almost complete and contractors had most likely completed significant portions of the conversion and incurred the majority of costs. The cost risk to the Government is highest during this undefinitized period, and the cost risk increased even more because contracting officers could obligate 100 percent of the not-to-exceed amount at award as allowed under the flexibilities of the CARES Act. Until awards are definitized, the Government is responsible for any allowable costs the contractor incurs for the contract action up to the not-to-exceed price, giving the contractor little incentive to operate efficiently and greatly increasing the cost risk to the Government. According to USACE officials, USACE and its stakeholders understood that the short periods of performance would increase contractor costs; however, because of the life, health, and safety risks associated with any delays, the parties assumed some cost risks, worked to mitigate these risks during the construction phase, and considered these impacts during negotiations.

## Recommendations

We recommend that the USACE Director of Contracting:

- Complete an after-action review following the completion of the COVID-2019 mission to identify best practices and areas of improvement when issuing UCAs, including establishing attainable definitization schedules and definitizing contract actions within those schedules, in order to reduce the risk of complications occurring during future emergency situations.
- Issue guidance requiring contracting officers to document the reason definitization schedules were not met in the contracting files.
- Issue a memorandum directing contracting officers to differentiate the profit associated with UCAs dependent on contractors' decreased cost risks involved in completing work in an undefinitized status and the incentive to definitize contracts based on Defense Federal Acquisition Regulation Supplement guidance.

## Management Comments and Our Response

The USACE Director of Contracting agreed with the recommendations. The Director stated that USACE officials would prepare an after-action review to identify best practices and areas of improvement when issuing UCAs. The Director also agreed to issue guidance requiring contracting officers to document the reason if definitization schedules are not met.

## *Comments (cont'd)*

Lastly, the Director agreed to issue a memorandum alerting USACE contracting officers of the updated DD Form 1547, "Record of Weighted Guidelines," and the need to differentiate cost-type risks associated with costs incurred up to the UCA qualifying proposal and those incurred after the qualifying proposal. Comments from the Director addressed the recommendations; therefore, the recommendations are resolved but will remain open until we verify the corrective actions have been implemented.

Please see the Recommendations Table on the next page for the status of the recommendations.

## *Recommendations Table*

| Management | Recommendations Unresolved | Recommendations Resolved | Recommendations Closed |
|---|---|---|---|
| U.S. Army Corps of Engineers Director of Contracting | None | 1.a., 1.b., 1.c | None |

**Note:** The following categories are used to describe agency management's comments to individual recommendations.

- **Unresolved** – Management has not agreed to implement the recommendation or has not proposed actions that will address the recommendation.
- **Resolved** – Management agreed to implement the recommendation or has proposed actions that will address the underlying finding that generated the recommendation.
- **Closed** – OIG verified that the agreed upon corrective actions were implemented.

**INSPECTOR GENERAL**
**DEPARTMENT OF DEFENSE**
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500

April 7, 2021

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND SUSTAINMENT
COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS
AUDITOR GENERAL, DEPARTMENT OF THE ARMY

SUBJECT: Audit of the U.S. Army Corps of Engineers' Use of Undefinitized Contract Actions for the Conversion of Alternative Care Sites in Response to the Coronavirus Disease–2019 Pandemic (Report No. DODIG-2021-074)

This final report provides the results of the DoD Office of Inspector General's audit. We previously provided copies of the draft report and requested written comments on the recommendations. We considered management's comments on the draft report when preparing the final report. These comments are included in the report.

The U.S. Army Corps of Engineers Director of Contracting agreed to address all of the recommendations presented in the report; therefore, we consider the recommendations resolved and open. As described in the Recommendations, Management Comments, and Our Response section of this report, we will close the recommendations when you provide us documentation showing that all agreed-upon actions to implement the recommendations are completed. Therefore, please provide us within 90 days your response concerning specific actions in process or completed on the recommendations. Send your response to either followup@dodig.mil if unclassified or rfunet@dodig.smil.mil if classified SECRET.

If you have any questions, please contact me at [redacted]

Theresa S. Hull
Assistant Inspector General for Audit
Acquisition, Contracting, and Sustainment

# Contents

# Introduction

## Objective

The objective of this audit was to determine whether U.S. Army Corps of Engineers (USACE) officials properly managed undefinitized contract actions (UCAs) for Alternative Care Sites (ACS) constructed in response to the coronavirus disease–2019 (COVID-19) pandemic by definitizing actions within the required time limits, conducting analyses of fair and reasonable price determinations, and ensuring profit was adjusted for costs incurred. See Appendix A for scope and methodology and prior coverage.

## Background

COVID-19 is an infectious disease that can cause a wide spectrum of symptoms. On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic, and on March 13, 2020, the President declared the COVID-19 pandemic a national emergency.[1] Under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) enacted on March 27, 2020, the DoD received $10.5 billion to prevent, prepare for, and respond to COVID-19, domestically and internationally.[2]

### *CARES Act*

The President signed the CARES Act on March 27, 2020, in response to the COVID-19 pandemic. The CARES Act provides provisions allowing the head of an agency to waive section 2326(b) of title 10, United States Code (U.S.C.), if the head of the agency determines the waiver is necessary because of the COVID-19 national emergency and sets limits on the amount of money a contracting officer can obligate to a contract before it is definitized. On April 1, 2020, the head of the USACE contracting activity waived the obligation limits, allowing contracting officers to obligate 100 percent of the not-to-exceed amount when awarding the contracts. A UCA is critically necessary in order for USACE to ensure timely ACS delivery in response to the COVID-19 pandemic.

### *The USACE Role in COVID-19 Response*

The DoD provides disaster relief for situations like COVID-19 through Defense Support of Civil Authorities operations. DoD resources may be committed to these operations when requested by another Federal agency and approved by the Secretary of Defense or when directed by the President. Through a unified

[1] A pandemic is a global outbreak of a disease that occurs when a new virus emerges to infect people and can spread between people sustainably.

[2] Public Law 116-136, "The Coronavirus Aid, Relief, and Economic Security Act," March 27, 2020.

national response to the COVID-19 emergency, USACE deployed hundreds of people to provide technical engineering expertise and promote capacity development in the U.S. and abroad. Under the National Response Framework, USACE is assigned as the primary agency for Emergency Support Function Number 3, Public Works and Engineering. USACE assists the Department of Homeland Security through the Federal Emergency Management Agency (FEMA) by coordinating Federal public works and engineering-related support, as well as providing technical assistance, engineering expertise, and construction management to prevent, prepare for, respond to, and recover from domestic incidents.

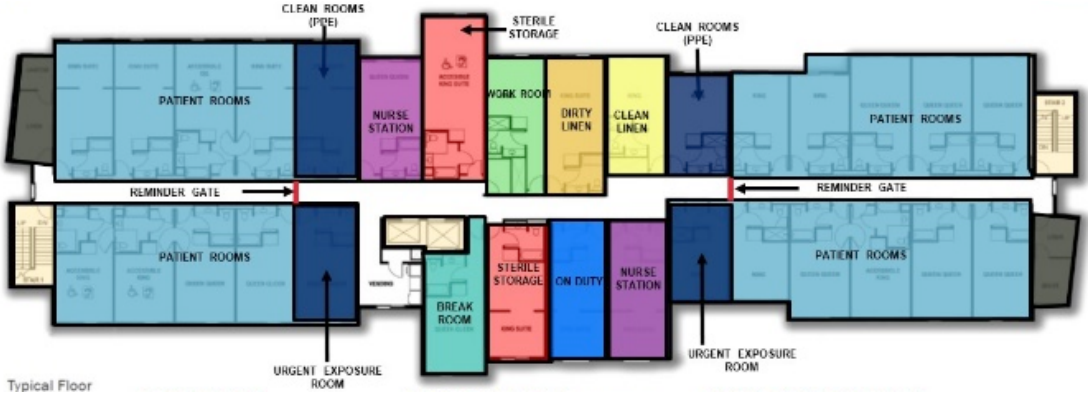
FEMA officials assigned USACE with the task of converting facilities to ACS through mission assignments; FEMA officials at the regional level initiated the development of specific sites to ACS under a Direct Federal Assistance mission; and FEMA provided a mission assignment to USACE officials for conversion of the facilities for medical purposes. FEMA assigned the construction mission to a USACE district and USACE district officials employed emergency contracting authorities using large or small businesses in the region that were capable of quickly performing the work.

## *Alternative Care Sites*

ACS are facilities temporarily converted for healthcare use during a public health emergency. ACS are intended to reduce unnecessary burden on hospitals and other healthcare facilities, help infected patients maintain isolation, and allow patients to be monitored, minimally treated, and quickly moved to other facilities if their condition worsens.

USACE officials published "ACS Implementation Support Materials," March 22, 2020, which described two general ACS configurations that may be adapted to a wide variety of situations. The first is conversion of facilities with individual rooms, such as hotels, dorms, or barracks. Figure 1 shows an example of how a facility with individual rooms might be converted into an ACS.

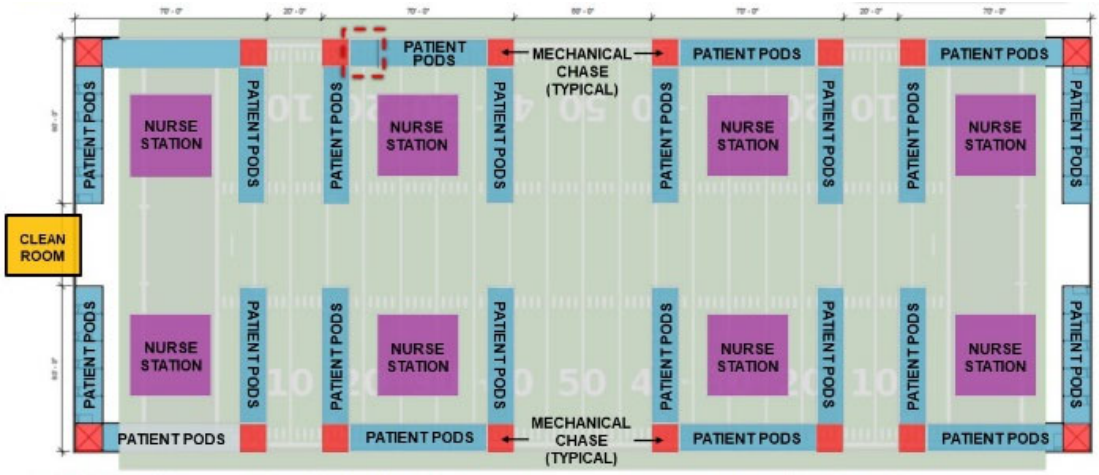
*Figure 1. ACS Configuration With Individual Rooms*




Source: USACE "ACS Implementation Support Materials," March 22, 2020.

The second conversion is for open spaces such as football stadiums or convention centers where individual pods provide a barrier around each patient. Figure 2 shows how an open space might be converted into an ACS.

*Figure 2. ACS Configuration of an Open Space*




Source: USACE "ACS Implementation Support Materials," March 22, 2020.

According to "ACS Implementation Support Materials," the USACE district commander and senior staff may meet with State Emergency Management offices or governors to identify a state's expectations regarding state medical requirements and USACE's role and responsibilities for the mission. It is the states' responsibility to identify and obtain sites to be used for ACS; however, states may ask USACE to support their site assessments. USACE officials stated that the requirements to convert ACS dramatically and frequently shifted, changing several times a day and even within the hour. Every site was customized and each design was adapted accordingly to address the variety of different requirements such as state and local regulations, medical requirements, varying infection rates, and site conditions.

## *Urgency and Criticality of Requirements*

According to USACE officials, in March 2020, Federal officials believed that hospitals would imminently be over-capacity and that ACS construction work was critical to save many thousands of lives. Although USACE is experienced with responding to disasters and urgent requirements, pandemic-related requirements were unprecedented. USACE and its stakeholders understood that the short periods of performance would increase contractor costs; however, because of the life, health, and safety risks associated with any delays, the parties assumed some cost risks, worked to mitigate these risks during the construction phase, and considered these impacts during negotiations.

### *Undefinitized Contract Actions*

In order to start the conversion of facilities to ACS as quickly as possible, USACE officials awarded UCAs to shorten the amount of time required to complete ACS conversions by beginning work immediately and subsequently negotiating contract costs.

UCAs are actions that allow a contractor to begin work and incur costs before the Government and the contractor have reached a final agreement on contract terms, specifications, or price. Proper use of UCAs by contracting officers during emergencies allows for a more timely response. Once a UCA is awarded, the contractor immediately begins working and during the undefinitized period, the Government is required to reimburse all of the contractor's allowable costs up to the not-to-exceed price. As a result, during the undefinitized period the UCA is essentially a cost-reimbursable contract. When the contractor and Government contracting officials agree on contract terms, specifications, price, and profit, the UCA should be definitized.

The CARES Act waives Section 2326(b)(3) of U.S.C. title 10 for COVID-19 related contracts, allowing flexibilities in the normal award procedures of UCAs such as making a larger percentage of the funds available (more than 50 percent of the total cost) to the contractor before definitization of the award.[3] While these flexibilities allow for contractors to start work on the conversion of ACS quickly, contractor personnel have less incentive to monitor cost, thereby increasing cost risk to the Government.

Another key factor in UCAs is the number of days allotted to definitize a contract action. USACE officials include a definitization clause in each UCA. The definitization clause includes specifics for definitizing the contract action, including providing a schedule detailing the number of days the contracting officer and the contractor have to finish negotiating terms, specifications, price, and profit for the contract action.

## USACE UCAs Awarded for the Conversion of ACS

We downloaded a list of ACS conversion locations from the USACE website and determined that USACE officials converted 38 locations to ACS in response to COVID-19. We used the 38 locations for our universe. USACE contracting officers awarded 36 contract actions for the 38 locations. As of October 16, 2020, USACE contracting officers from 17 different USACE districts awarded 36 contract

[3] The CARES Act is an economic stimulus bill signed into law on March 27, 2020. The Act provides various types of relief to businesses and individuals. The Act also waived various regulations and restrictions to ease the impact of the COVID-19 pandemic.

actions to convert facilities to ACS in response to the COVID-19 pandemic. Of the 36 contract actions, USACE contracting officers awarded 30 as UCAs. For the other six, USACE contracting officers terminated one contract for convenience and awarded five contracts that were not considered UCAs; therefore, these contracts were removed from our scope. In total, we reviewed 30 UCAs with a not-to-exceed amount of $483,881,673 at the time of award.[4] See Appendix B for more information on the 30 UCAs we reviewed.

## Review of Internal Controls

DoD Instruction 5010.40 requires DoD organizations to implement a comprehensive system of internal controls that provides reasonable assurance that programs are operating as intended, and to evaluate the effectiveness of the controls.[5] We identified internal control deficiencies related to USACE contracting officers definitizing UCAs after the date specified in the contract actions and USACE officials' determination of contractor profits for UCAs. We will provide a copy of the final report to the senior official responsible for internal controls in USACE.

[4] This amount represents the not-to-exceed amount listed in the initial contract actions.

[5] DoD Instruction 5010.40, "Managers' Internal Control Program Procedures," May 30, 2013.

# Finding

## USACE Contracting Officials Issued UCAs to Quickly Convert ACS During COVID-19 Pandemic Response

USACE contracting officers were not operating in a normal contracting environment because of the urgent nature of the COVID-19 pandemic response; therefore, USACE contracting officers exercised the flexibility permitted under the CARES Act and awarded 30 UCAs funded up to 100 percent of the not-to-exceed amount to start the conversion of facilities to ACS as quickly as possible. USACE contracting officers shortened the amount of time required to complete ACS conversion by awarding the contract actions as UCAs because contractors could begin conversion immediately and then subsequently negotiate contract costs. However, USACE contracting officers only definitized 2 UCAs, valued at $9,524,754, of the 30 total UCAs within the definitization schedules included in the contract actions. For the other 28 UCAs, with a not-to-exceed amount of $474,356,919 at the time of award, USACE contracting officers definitized the award from 1 to 26 days after the definitization dates they established in the contract actions. According to USACE officials, the delays in definitization were out of USACE contracting officials' control and occurred because:

- contractors experienced delays in obtaining supplies for 3 contract actions;
- Government officials from FEMA and officials at the state and local levels changed the requirements for 4 contract actions;
- contractors encountered unexpected site conditions for 1 contract action; and
- USACE officials required contractors to complete multiple revisions to proposals and conducted numerous negotiation sessions to align contractors' proposals to Government estimates for 12 contract actions.

USACE officials did not provide a reason for, or document in the contract file, delays in definitization for the other 8 UCAs.

Additionally, USACE contracting officers determined the price was fair and reasonable for the 30 contract actions awarded; however, contracting officers did not follow DoD acquisition regulations related to adjusting the potential contractor profit to reflect the definitization status of the award.[6] For the 30 UCAs issued, USACE contracting officers only considered the ACS completion status for 2 UCAs.

[6] DoD Federal Acquisition Regulation Supplement 217.7404-6, "Allowable Profit," notes that when the final price of a UCA is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity will ensure the profit allowed reflects any reduced cost risk to the contractor for costs incurred during contract performance before negotiating the final price.

USACE contracting officers did not document their reasons for not considering the completion status in the contract files for the remaining 28 UCAs. The Chief of the USACE Acquisition Support Division stated that this occurred because of the urgent environment contracting officers were operating within.

As a result, USACE officials may have paid more than necessary for ACS conversion by not complying with Defense Federal Acquisition Regulation Supplement (DFARS) requirements regarding profit and the cost risk to the Government.[7] By the time USACE contracting officers definitized the contracts, the period of performance was almost complete and contractors had most likely completed significant portions of the conversion and incurred the majority of costs. The cost risk to the Government is highest during this undefinitized period and the risk was increased even more because contracting officers could obligate 100 percent of the not-to-exceed amount at award as allowed under the flexibilities of the CARES Act. Until awards are definitized, the Government is responsible for any allowable costs the contractor incurs for the contract action, up to the not-to-exceed price, giving the contractor little incentive to operate efficiently and greatly increasing the cost risk to the Government. According to USACE officials, USACE and its stakeholders understood that the short periods of performance would increase contractor costs; however, because of the life, health, and safety risks associated with any delays, the parties assumed some cost risks, worked to mitigate these risks during the construction phase, and considered these impacts during negotiations.

## Contracting Officers Did Not Definitize Contract Actions in a Timely Manner

USACE contracting officers did not definitize 28 of the 30 UCAs issued for the conversion of ACS within the timeframes contained in the contract actions, potentially increasing costs. In addition, by the time USACE contracting officers definitized the contract actions, the periods of performance identified in the UCAs were almost complete.[8]

USACE contracting officers awarded the 30 UCAs for the conversion of facilities to ACS to reduce the burden on hospitals and established medical facilities in response to the COVID-19 pandemic. Because of the urgent nature of pandemic response, USACE contracting personnel were not operating in a normal contracting environment. In order to start conversion of facilities to ACS as quickly as possible, they awarded UCAs to shorten the amount of time required to complete ACS

[7] DFARS 217.7404-6, "Allowable Profit."

[8] The period of performance is the time during which the contractor may incur new obligations to carry out the work authorized under the contract.

conversion by beginning conversion immediately and subsequently negotiating contract costs. As a result, USACE officials risked paying more than if the contract actions were definitized at the time of the award because, during the undefinitized period, the UCA is essentially a cost-reimbursable contract action.

USACE officials explained that they provide substantial support to emergency response, but the ACS mission was like no other mission USACE had ever been asked to perform in modern history. According to USACE officials, although USACE diligently pursued the best possible price for taxpayers by considering what was fair and reasonable under the schedule, the threat to public health, and the health risks undertaken by contractors and USACE employees on the ground, the calculation did not fall within normal parameters. In prioritizing these three critical project elements of cost, schedule, and quality, USACE made the element of schedule the top priority with the realization that impacts to cost and quality would be inevitable.

Of the 30 UCAs, USACE contracting officers definitized two contract actions, valued at $9,524,754, within the schedules included in the contract actions. USACE contracting officials at USACE District-Philadelphia definitized the contract action for the Paramus, New Jersey, ACS within the scheduled timeframe despite undergoing multiple negotiation rounds with the contractor.[9] In addition, USACE District-Tulsa definitized on time another UCA that covered two ACS locations: the Oklahoma State University Medical Center at Tulsa, and the Integris Baptist Portland Campus, in Oklahoma City.[10]

For the other 28 UCAs, valued at $474,356,919, USACE contracting officers definitized the award from 1 to 26 days late because:

- contractors experienced delays in obtaining supplies;
- Government officials from FEMA and officials at the state and local levels changed the requirements;
- contractors encountered unexpected site conditions; and
- USACE officials required contractors to complete multiple revisions to proposals and conducted numerous negotiation sessions to align contractors' proposals to Government estimates.

In some cases, USACE officials did not provide a reason for delays in definitization in the contract file. Although many of these delays were unavoidable and were not caused by either contractors or USACE officials, these delays resulted in an extended period where the Government had greater cost risks because the contract actions were undefinitized.

[9] Contract W912BU-20-C-0020.

[10] Contract W912BV-20-C-0008.

## *Delays in Definitizing UCAs Increased Cost Risks to the Government*

USACE contracting officials did not definitize 28 of the 30 UCAs in the time specified in the UCA (generally about 10 days), resulting in an increased cost risk to the Government. USACE contracting officers included a definitization schedule in the base contract actions specifying within how many days after award the contract action needed to be definitized. USACE contracting officers' delays in definitization ranged from 1 to 26 days past the deadline stated in the contract actions. As a result, USACE contracting officers definitized UCAs the same day, or shortly before, the periods of performance for ACS conversions were completed, increasing the cost risk to the Government.

USACE officials stated that the current UCA requirements are not designed to accommodate timeframes as short as those needed at the beginning of the pandemic. Although USACE officials stated that UCAs were the best tool available, the UCA rules did not address completing negotiations for large-scale complex construction in just days or weeks, all while the dynamics of requirements and supply availability were changing daily. Table 1 shows the number of UCAs delayed beyond the scheduled definitization dates.

*Table 1. Delayed Definitization of UCAs*

| Days Delayed Range | Number of UCAs in the Days Delayed Range |
|---|---|
| 1 – 10 | 20 |
| 11 – 15 | 6 |
| 16 – 20 | 1 |
| 26 | 1 |

Source: The DoD OIG.

For example, a USACE District-Detroit contracting officer awarded a UCA on April 5, 2020, to retrofit the Suburban Collection Showplace in Novi, Michigan, into an ACS to serve ambulatory, vented, and non-vented COVID-19 patients.[11] In the contract action, the contracting officer provided that the UCA would be definitized within 6 days of award. However, the contracting officer did not definitize the UCA until April 20, 2020, 15 days after award, when the contractor had already incurred $12 million of the not-to-exceed maximum of $13 million. Furthermore, the USACE contracting officer did not definitize the contract action until the last day of the period of performance listed in the UCA. The USACE contracting officer did not provide a reason in the contract file for the delay in definitization. See Appendix B for a list of the contracts we reviewed and the number of days to definitize each UCA.

[11] Contract W911XK-20-C-0004.

## *Definitizing UCAs Shortly Before the End of the Period of Performance Increased Risks to the Government*

USACE contracting officers definitized UCAs the same day, or shortly before, the periods of performance for ACS conversion were completed, increasing the cost risk to the Government. In addition, USACE contracting officers could fund 100 percent of the not-to-exceed amount for the UCAs at the time of award. According to USACE officials, they funded 15 of the 30 actions at 100 percent of the not-to-exceed amounts at the time of award. The Government reimburses allowable, allocable, and reasonable costs up to the not-to-exceed amount until they definitize the contract action, leaving little incentive for the contractor to control costs, and resulting in increased cost risk to the Government. Because USACE contracting officers definitized the contract actions near the end of the period of performance, the contractor had most likely already incurred the majority of costs during the undefinitized period when cost risk to the Government was at its highest.

The CARES Act allowed flexibilities in the normal award procedures for UCAs, such as making a larger percentage of the funds available to the contractor before definitization of the award. Under normal circumstances, the UCA amount is stated in terms of a not-to-exceed amount, and the not-to-exceed price is the estimated amount necessary to cover the contractor's requirement for funds before definitization. Unless otherwise authorized, the Government cannot obligate more than 50 percent of the not-to-exceed price before definitization. By limiting the percentage the contracting officer can obligate, the Government's cost risk is reduced because the Government will reimburse allowable, allocable, and reasonable costs up to the not-to-exceed amount until definitized. Although the flexibilities in the CARES Act allowed contractors to start conversion of ACS quickly, contractor personnel had less incentive to monitor cost, thereby increasing risk to the Government. According to USACE officials, because of the life, health, and safety risks associated with delays, the parties assumed some cost risks, worked to mitigate these risks during the construction phase, and considered these impacts during negotiations.

At the time USACE contracting officers definitized 21 of the 30 contract actions, contractors were within the last 5 days or less of the period of performance of the contract actions or the period of performance had already ended; implying that contractors had already completed most of the ACS conversion and incurred most of the costs by the time the contracting officers definitized the actions. Generally, contractors agreed in the contracting actions to periods of performance of less than 30 days. USACE officials definitized 9 contract actions with 6 to 15 days remaining in the period of performance, resulting in the contractor bearing more of the cost

risk for the contract. See Appendix B for the length of period of performance for each contract action. Table 2 shows the range of days in which USACE contracting officers definitized the UCA before the period of performance ended.

*Table 2. Days Definitization Occurred Before the End of the Period of Performance*

| Days Left in the Period of Performance When the Contract was Definitized | Number of UCAs |
|---|---|
| 0 | 4 |
| 1 – 5 | 17 |
| 6 – 10 | 6 |
| 11 – 15 | 3 |

Source: The DoD OIG.

The period of performance is the time during which the contractor may incur new obligations to carry out the work authorized under the contract action. For most of the contract actions, contractors were finished with significant portions of the period of performance before definitization, increasing the Government's cost risk; therefore, the more days remaining in the period of performance when the contract action was definitized, the lower cost risk was for the Government.

## *Contracting Officers Appropriately Justified Delays in Definitization in Some Contract Files*

Although USACE contracting officers did not definitize UCAs within the established timeframes, the contracting officers appropriately assessed the reasons for delay for some of the UCAs in the contract files. Specifically, USACE contracting officers documented that they experienced delays during the definitization process related to supply shortages, changes in contract requirements and scope initiated by Federal and state emergency management officials, unexpected site conditions at the facilities being converted, multiple revisions to proposals, numerous negotiation sessions, or a combination of these factors. See Appendix C for further details on UCA definitization delays for each contract action reviewed.

### *USACE Contracting Officers Experienced Conversion and Definitization Delays Related to Supply Shortages*

According to documentation in the contract files, USACE contracting officers did not meet definitization schedules for 3 of 30 UCAs because contractors did not submit proposals for supplies or subcontractors' costs were not readily available during the pandemic. Contractors experienced difficulties related to traveling during the pandemic, the availability of supplies resulting from competing ACS conversion and supply chain disruptions, and state or local ordinances affecting their ability to work efficiently.

For example, USACE New York District contracting officers, responsible for converting the Westchester Community Center into an ACS in White Plains, New York, added 6 calendar days to the period of performance so the contractor could procure and install oxygen tanks.[12] USACE officials noted that although the contractor did not formally request an extension, they stated on multiple occasions that they needed additional time to procure and install oxygen tanks. USACE contracting officials and the contractor extended the period of performance as a result of the supply shortage and did not definitize the contract action until 25 days after award. As a result, the Government carried additional cost risk during the period before definitization and the contractor was unable to complete the ACS until 25 days after the start of the conversion of the ACS. The contractor's period of performance for the conversion of the Westchester Community Center was 28 days; therefore, only 3 days remained on the contract after definitization.

## *USACE Contracting Officers Experienced Definitization Delays Resulting From Changing ACS Requirements*

According to documentation in the contract files, USACE contracting officers did not meet the definitization schedules for 4 of 30 UCAs because emergency management officials revised the scope of the conversion to meet pandemic response requirements. Emergency management officials, contractors, and local government leaders proposed items needed for the ACS such as upgrades to heating, ventilation, and air conditioning systems or improvements to flooring that were later revised. During negotiations with USACE officials and contractors, officials better defined the needs of the local community and function of the individual ACS; therefore, items were either added or removed from the scope of work.

For example, the USACE contracting officer did not definitize the UCA for the ACS conversion in Detroit, Michigan, until 10 days after award, a delay of 4 days, because the contractor needed additional time to revise their proposal based on changes to the contract action.[13] After contracting officials awarded the UCA, emergency management officials requesting the ACS added storage spaces, break rooms, and areas for medical staff to change their personnel protective equipment to the initial requirements. As a result of these revisions, the contractor needed to revise their original planning regarding the supplies and skillsets needed to perform the required work. The contracting officer definitized the contract action on April 10, 2020, and the period of performance for the contract ended on April 12, 2020.

[12] Contract W912DS-20-C-0010.
[13] Contract W911XK-20-C-0001.

## *USACE Contracting Officers Experienced Definitization Delays Related to Unexpected Site Conditions*

USACE personnel and contractors encountered unexpected site conditions for one UCA contract which delayed definitization of the contract action. Although USACE engineers provided technical assistance to determine which sites should be converted to ACS, emergency management officials identified the sites for potential conversion. After officials identified the ACS site in Albuquerque, New Mexico, and started the conversion, the contractor identified outdated existing plumbing, mechanical, and electrical systems that were insufficient to support the additional requirements of the ACS, resulting in delays to both performance and definitization.[14] The contractor completed some of these repairs before negotiations occurred and included these costs in the proposal; however, the independent Government cost estimate (IGE) used as the Government's price objective did not reflect the additional work required. The USACE contracting officer confirmed the need for the repairs through discussions with USACE field personnel; however, the contracting officer did not negotiate the award in accordance with the definitization schedule. After a 5-day delay from the originally scheduled definitization date, the contractor and contracting officer definitized the award at the original not-to-exceed value of the UCA. The USACE contracting officer definitized the contract on day 12 of the contractor's 14-day period of performance.

## *Multiple Negotiation Sessions Caused Definitization Delays*

According to documentation in the contract files, USACE contracting officers needed multiple negotiation sessions to definitize the pricing for 12 of the 30 UCAs. The contracting officers experienced delays in finalizing negotiations because of scope changes, unexpected site conditions, and scarcity of supplies and subcontractors, in addition to delays related to contractors or Government officials being unable to align the scope of the work performed to the proposals and Government estimates. USACE officials and contractors operated in a pandemic environment with numerous changes and challenges that needed resolution through continued negotiations.

According to USACE, its officials experienced issues with contractors obtaining proposals, IGEs that needed the completed design information before they could be finalized, and contractors that needed to consult with their counsel and corporate leadership before agreeing to the final contract terms. USACE officials stated that under normal circumstances, the additional time these tasks take would be

[14] Contract W912PP-20-C-0007.

insignificant; however, because USACE officials attempted to complete large scale design and construction from limited information in a matter of days, these minor and reasonable delays caused increases in the short definitization schedules.

For example, the contracting officer responsible for the ACS conversion in the U.S. Virgin Islands documented four different rounds of negotiations required to definitize the contract action.[15] The contracting officer conducted negotiations on April 26, 2020; April 28, 2020; and two sessions on April 29. 2020, before definitizing the contract action on May 3, 2020, a delay of 2 days from the UCA schedule. The contracting officer explained that multiple negotiation sessions were required to match designs to billed costs, allow the contractor to provide additional documentation to support personnel costs proposed, and to confirm details from USACE field personnel regarding services completed by the contractor after the contracting officer issued the UCA. Although the contracting officer appropriately used this extra time to ensure the Government paid a fair and reasonable price for the ACS conversion, the delay increased the cost risks to the Government by operating in an undefinitized environment. The contractor's period of performance ended on May 8, 2020; therefore, the contractor was performing under an undefinitized contract action for 16 of the 21 days of the contract.

## *USACE Officials Explained Contracting Delays for 20 UCAs Despite Operating During a Pandemic*

Although contracting officials definitized 28 of the 30 UCAs later than originally scheduled, contracting personnel explained in the contract files that delays for 20 of the UCAs occurred because of situations outside the control of the contracting officers or contractors. Furthermore, because of the urgent nature of pandemic response, USACE contracting personnel were not operating in a normal contracting environment. USACE officials explained that contracting officers and contractors worked diligently and collaboratively to definitize contracts in a timely manner but at times were thwarted by factors outside their control because of the extraordinary conditions under which they were working, including contractor personnel contracting COVID-19 and requirements changes up to the day of definitization.

The USACE Director of Contracting should complete an after-action review following the completion of the COVID-19 mission to identify best practices and areas of improvement when issuing UCAs, including establishing attainable definitization schedules and definitizing contract actions within those schedules, to reduce the risk of these complications occurring during future emergency situations.

[15] Contract W912HN-20-C-3003.

### *USACE Contracting Officers Did Not Always Document the Reasons for Delayed Definitization*

USACE contracting officers did not document the reasons for delays in definitization for 8 of 28 UCAs that had delayed definitization. USACE contracting officers included a definitization schedule in the base contracts specifying how many days after award the UCA should be definitized. For 20 of the 28 contract actions, USACE contracting officers described in the price negotiation memorandum why the contract action was not definitized within the schedule. The USACE Acquisition Support Division Chief stated that the reasons for the delayed definitization should have been documented in the price negotiation memorandum for each UCA that did not meet the definitization schedule. However, for eight of the contract actions, USACE contracting officers did not provide a reason in the price negotiation memorandum. By not documenting the reasons for delays, contracting officers risk not having evidence if the delay results in potential contractor non-compliance or contract disputes in the future.

To mitigate these risks, the USACE Director of Contracting should issue guidance requiring contracting officers to document the reasons definitization schedules were not met in the contract files.

## Contracting Officers Determined UCA Prices Were Fair and Reasonable

USACE contracting officers determined that prices were fair and reasonable for the 30 UCAs they awarded. Contracting officers completed price and cost analyses on each ACS contract action to determine fair and reasonable contract pricing. Federal Acquisition Regulation 15.404-1(b)(2)(v) states that the Government may use various price analysis techniques and procedures to ensure a fair and reasonable price. An example of such techniques includes comparison of proposed prices with the IGE.

For example, for the West Allis, Wisconsin, UCA, USACE contracting personnel completed a comprehensive analysis of the contractor's proposal dated April 14, 2020. USACE officials conducted negotiation meetings with the contractor April 15-16, 2020, to discuss labor hour discrepancies, scope issues, cost analysis questions, and subsequent price negotiations. Contracting personnel conducted the first round of negotiations with the contractor on April 15, 2020. The negotiations primarily addressed the Government's cost analysis questions and clarification of scope issues related to the conversion of the ACS. As a result, the contractor submitted a revised proposal with minor changes. The contractor ultimately increased the price of the proposal because several items needed a

cost increase and needed to reflect Wisconsin's required payment of sales tax. The final round of negotiations started on April 16, 2020, and focused on labor concerns that the contractor had not addressed in the latest proposal. As a result, USACE officials believed a slight reduction in the price of the new proposal would be reasonable. Following the meeting, the contractor submitted its final proposal on April 16, 2020, and USACE accepted the price. The contracting officer included the IGE in the price negotiation memorandum. The contractor's final proposal was slightly less than the IGE. Based on the proposal analysis completed and comparison to the IGE, the contractor's final proposal was considered fair and reasonable to both the contractor and USACE officials.

## Contracting Officers Did Not Always Consider Profit When Definitizing UCAs

USACE contracting officers did not consider profit, as required by DFARS, when definitizing 28 of 30 UCAs for ACS conversions. USACE officials provided a price negotiation memorandum that did not contain information that met DFARS requirements for 27 contract actions, and the officials did not provide a price negotiation memorandum for 1 contract action. When the UCA was definitized, the contracting officer and contractors negotiated the final contract type and price including profit or fee. When calculating the negotiating position on UCA profits or fees, DFARS requires contracting officers to assess the relative risk accepted by the contractor versus the Government.[16] The amount of profit or fees available to the contractor is usually determined using a structured calculation that is a function of several different factors, such as the complexity of the work, resources required to perform, independent efforts by the contractor to bring about improved performance, and contract type.

USACE contracting officers reduced cost risks to the contractors with no benefit to the Government by not assessing the extent to which the ACS were converted and not determining how much of the period of performance had lapsed before definitization. In addition, USACE contracting officers potentially incentivized contractors to delay definitization schedules to avoid contract costs risks, without a corresponding decrease to profit. Additionally, USACE contracting officers used CARES Act authority to fully fund 15 of the 30 contract actions before definitization, resulting in some facilities' conversion nearing completion while in an undefinitized status. Although the Government primarily incurred the cost risks for the 30 ACS conversions because contract definitization generally occurred when the contract period of performance was almost complete, contracting officers only considered this status on 2 of the 30 UCA definitization negotiations.

[16] DFARS 217.7404-6, "Allowable Profit."

USACE contracting officers did not follow DFARS requirements to consider the amount of work completed in an undefinitized status when negotiating profits. USACE contracting officers were ultimately not required to determine a different profit percentage considering the work completed in an undefinitized status, but contracting officers should consider definitization status and document that consideration in the contract files. In many cases, contracting officers were justified negotiating higher profits given the urgent nature of the conversions and shortages of labor, supplies, and shipping agents for the items required. However, USACE contracting officers should document considerations of the work completed before definitization, as required by DFARS, as part of the negotiations.

## *Contracting Officers Should Consider Risk When Determining Profit*

USACE contracting officers did not document in the contract files their consideration of risk when determining profit for 28 of 30 UCAs. The USACE Acquisition Support Division Chief stated that USACE did not issue guidance to contracting officers regarding considering risk when determining profit; however, in hindsight, additional guidance would have been beneficial. Contracting officers should consider any reduced risk on the portion performed before definitization and any reduced risk on the remaining portion that will be performed after definitization. Contracting officers should document in the contracting files how the shift in risk associated with the undefinitized period was accounted for in determining the profit or fee calculated for negotiations.

## *USACE Officials Did Not Document DFARS Requirements Regarding Profit Considerations During the Period Contract Actions Were Undefinitized*

For 28 of the 30 UCAs, USACE contracting personnel documented how the profit was negotiated for each of the UCAs; however, contracting personnel did not document the increased risk to the Government when the award was undefinitized as part of the negotiations. Instead, contracting officers relied on weighted guidelines, accepted proposed profits when they were in line with Government estimates, and allowed for a higher profit related to the urgent and compelling nature of the work, with no considerations for the definitization status. Although these steps were taken to ensure that a fair and reasonable price was obtained for the ACS, contracting officers did not take action to ensure the DFARS requirement that contractors' reduced cost risks were reflected in the profit.

Generally, USACE contracting officials did not document their consideration of the contractor's reduced cost risk when determining profit for the UCA definitization. The USACE Acquisition Support Division Chief stated that USACE should have

issued guidance to contracting personnel regarding calculating profit for the ACS UCAs, and the lack of guidance was an oversight on USACE's part. For example, when USACE Albuquerque District officials were negotiating the contract action for the Gallup, New Mexico, ACS, the contractor proposed a profit rate on the contract.[17] USACE officials accepted the contractor's proposed rate because they considered the rate fair and reasonable; however, no additional consideration was given to the additional risk the Government was assuming while the contract action remained undefinitized. For this ACS, USACE contracting officers included a 7-day definitization schedule in the contract. Following a 5-day delay, USACE contracting officials definitized the contract action after 12 of the 14 days in the period of performance had elapsed.

USACE contracting officials stated that USACE personnel negotiated profits that were reasonable under normal conditions, that considering the completion status of the projects would have had marginal effects on the profits negotiated, and that the weighted guidelines do not reflect the extreme conditions experienced during the conversions. We agree that USACE personnel completed steps to ensure that negotiated profits were fair and reasonable for all 30 UCAs. USACE contracting personnel have the authority to adjust profit as necessary to reflect the risks to both the contractor and the Government. We did not identify issues with the actions taken by USACE personnel to determine UCA pricing; however, USACE contracting personnel did not provide documentation to address DFARS 217.7404-6. Although USACE personnel could have ultimately determined a similar profit had they followed DFARS 217.7404-6, USACE personnel did not include evidence that they fulfilled the requirement to consider risk in the contract files.

## *USACE Officials Considered Profit When Definitizing Two UCAs*

In contrast, USACE District Sacramento and USACE District Portland officials considered profit when definitizing the Porterville, California, ACS and the Eugene, Oregon, ACS.[18] For the Porterville ACS, according to the price negotiation memorandum, USACE officials provided the contractor the Government's alternate structured approach calculations under USACE Acquisition Instruction Desk Guide section 5115.404-73-1 and requested the contractor use it to recalculate their profit. USACE officials recalculated the amount of profit at a reduced rate because of the increased risk the Government assumed while negotiating the definitized contract. The contractor provided a counter proposal stating they had assumed additional risk converting an ACS during a pandemic and the short period of performance. After additional negotiation, USACE officials and the contractor agreed on a profit rate. The USACE contracting officer definitized the contract action on day 12 of the 13-day performance period.

[17] Contract W912PP-20-C-0008.

[18] Contract W91238-20-F-0058 and Contract W9127N-20-C-0012.

For the Eugene ACS, USACE officials provided the contractor with alternative calculations for profit which provided the contractor with a lower percentage of profit. However, the contractor rejected the USACE-calculated profit percentage. After a few more rounds of negotiation, USACE officials and the contractor could not agree on a profit percentage. Ultimately, USACE officials decided on a profit percentage based on the determination that a majority of the work was completed by that point, and no additional profit would be allowed. The USACE contracting officer definitized the contract action on day 24 of the 28-day performance period.

### *USACE Officials Did Not Follow DFARS Guidance for Determining Profit*

USACE contracting officers may have agreed to higher profits than warranted by not following DFARS guidance on 28 of the 30 UCAs issued for ACS. Although the contractors completed the conversions in an urgent manner that warranted adjustments to profits, the Government also incurred many of the cost risks by operating in the undefinitized environment. USACE contracting officials followed DFARS guidance to consider the contractor's reduced cost risks in the negotiations in 2 of the 30 UCAs. However, while USACE officials agreed to potentially higher profit margins than were warranted given the increased cost risk to the Government, contracting officers determined that contract prices were fair and reasonable given the urgent nature of the requirements.

The USACE Director of Contracting should issue a memorandum directing contracting officers to differentiate the profit associated with UCAs dependent on the contractor's decreased cost risks involved in completing work in an undefinitized status and the incentive to definitize contracts based on DFARS guidance.

## Conclusion

USACE officials and contracting personnel are in a unique, ever-changing situation with the COVID-19 pandemic. During the conversion of ACS facilities, USACE contracting personnel experienced delays in definitizing UCAs within the scheduled timeframes, resulting in the period of performance being almost complete at the time of definitization. However, officials generally justified the reasons for delays in the contract files. Additionally, contracting officials determined that they obtained a fair and reasonable price on all 30 UCAs. Conversely, USACE contracting officials did not implement DFARS guidance to consider the portion of the work completed in an undefinitized status as part of the profit negotiation. Although USACE officials were operating in a pandemic environment, officials needed to provide incentive to contractors to control costs and limit Government risk by adjusting profit for the length of the undefinitized portion of the contract action. Otherwise, contractors had little incentive not to delay definitization and complete

as much work as possible without bearing significant cost risk. According to USACE officials, USACE and its stakeholders understood that the short periods of performances would increase contractor costs; however, because of the life, health, and safety risks associated with any delays, the parties assumed some cost risks, worked to mitigate these risks during the construction phase, and considered these impacts during negotiations.

## Recommendations, Management Comments, and Our Response

### *Recommendation 1*

**We recommend that the U.S. Army Corps of Engineers Director of Contracting:**

**a. Complete an after-action review following the completion of the coronavirus disease–2019 mission to identify best practices and areas of improvement when issuing undefinitized contract actions, including establishing attainable definitization schedules and definitizing contract actions within those schedules, to reduce the risk of complications occurring during future emergency situations.**

### *USACE Director of Contracting Comments*

The USACE Director of Contracting agreed with the recommendation and stated that by June 1, 2021, USACE would prepare an after-action review to identify best practices and areas for improvement when issuing UCAs. Specifically, the after-action review will include establishing attainable definitization schedules and definitizing contract actions within those schedules, to reduce the risk of complications occurring during future emergency situations.

### *Our Response*

Comments from the Director addressed all specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once we verify that USACE has completed the after-action review identifying best practices and areas of improvement when issuing UCAs.

**b. Issue guidance requiring contracting officers to document the reason definitization schedules were not met in the contracting files.**

### *USACE Director of Contracting Comments*

The USACE Director of Contracting agreed with the recommendation and stated that by March 31, 2021, USACE officials would issue guidance requiring contracting officers to document the reason why definitization schedules are not met in the contract files.

## *Our Response*

Comments from the Director addressed all specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once we verify that USACE officials have issued guidance requiring contracting officers to document the reason why definitization schedules are not met.

**c. Issue a memorandum directing contracting officers to differentiate the profit associated with undefinitized contract actions dependent on the contractor's decreased cost risks involved in completing work in an undefinitized status, and the incentive to definitize contracts based on Defense Federal Acquisition Regulation Supplement guidance.**

## *USACE Director of Contracting Comments*

The USACE Director of Contracting agreed with the recommendation and stated that by March 31, 2021, the Director would issue a memorandum alerting USACE contracting officers of the updated DD Form 1547, "Record of Weighted Guidelines," when calculating profit under the weighted guidelines and the need to differentiate cost-type risks associated with costs incurred up to the UCA qualifying proposal and those incurred after the qualifying proposal per DFARS 215.404-71-3 and 217.7404-6. The Director explained that revisions to DD Form 1547 were effective in late April 2020, once USACE had already began the ACS performance and definitization process. She further explained that based on the critical nature of the work already addressed in the report, the actual profit rates assigned were not unreasonable.

## *Our Response*

Comments from the Director addressed all specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once we verify that USACE has issued a memorandum alerting USACE contracting officers of the updated DD Form 1547 and the need to differentiate cost-type risks associated with costs incurred up to the UCA qualifying proposal and those incurred after the qualifying proposal.

# Appendix A

## Scope and Methodology

We conducted this performance audit from June 2020 through February 2021 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.

The announced objective of this audit was to determine whether USACE officials established quality assurance controls for the ACS converted in response to the COVID-19 pandemic. We limited the objective of this report to whether USACE officials properly managed UCAs for ACS converted in response to the COVID-19 pandemic by definitizing actions within the required time limits, conducting analyses of fair and reasonable price determinations, and ensuring profit was adjusted for cost incurred. We plan to discuss the quality assurance and closeout processes in a separate report.

## Universe Information

We downloaded a list of ACS conversion locations from the USACE website on April 29, 2020. Based on the data provided on the USACE website, we determined that USACE officials converted 38 locations to ACS. We used the 38 locations for our universe. We determined that the contract action to convert one ACS was not awarded by a USACE contracting officer and it was removed from the universe, leaving 37 ACS. USACE contracting officers awarded the conversion for 2 of the remaining 37 ACS locations from the same contract action, bringing the total number of USACE awarded contract actions to 36 for the 38 locations.

USACE contracting officers from 17 different USACE districts awarded the 36 contract actions for $503,508,285 to convert ACS in response to the COVID-19 pandemic. USACE contracting officers awarded the contract actions from March 25, 2020, through May 24, 2020. Of the 36 contract actions, USACE contracting officers awarded 30 as UCAs. For the other six, USACE contracting officers terminated one contract for convenience and awarded five contracts that were not considered UCAs; therefore, these contracts were removed from

our scope. See Table 3 for a list of the contract actions excluded from the universe. In total, we reviewed 30 UCAs with a not-to-exceed amount of $483,881,673 at the time of award. See Appendix B for more information on the 30 UCAs we reviewed.

*Table 3. Contracts Excluded From Universe*

| Contract Number | Award Date | USACE District | ACS Location | Award Amount | Reason Excluded |
|---|---|---|---|---|---|
| W911KB-20-C-0012 | April 9, 2020 | Alaska | Anchorage, Alaska | $1,263,776 | Not a UCA |
| W912DR-20-C-0019 | April 10, 2020 | Baltimore | Hagerstown, Maryland | $2,500,000 | Terminated for Convenience |
| W9128F-20-D-0006 | April 5, 2020 | Omaha | Colorado Convention Center, Denver, Colorado | $5,073,865 | Not a UCA |
| W9128F-20-D-0008 | April 8, 2020 | Omaha | The Ranch Events Complex, Loveland, Colorado | $5,038,488 | Not a UCA |
| W9128F-19-D-0035 | May 5, 2020 | Omaha | Kalispell Regional Medical Center, Kalispell, Montana | $2,643,703 | Not a UCA |
| W9128F-20-D-0003 | April 11, 2020 | Omaha | St. Luke's Hospital, Phoenix, Arizona | $3,106,780 | Not a UCA |

Source: The DoD OIG.

## Review of Documentation and Interviews

We obtained and reviewed contracts and documentation issued by USACE personnel for the conversion of ACS in response to the COVID-19 pandemic. We selected the universe of contract actions to review using ACS conversion information on the USACE website. The documents we reviewed for each contract action included the base contract and modifications, the price negotiation memorandum, and the program objective memorandum.

We reviewed the base contract to determine if the contract action was a UCA. If it was a UCA, we identified the number of days the contracting officer had to definitize the contract action as outlined in the definitization schedule. Additionally, we reviewed the definitization modification to determine if the UCA was definitized within the time allowed in the base contract action. We reviewed the price negotiation memorandum and the program objective memorandum to determine the reason for delayed definitization, whether USACE officials performed a fair and reasonable price determination, and to ensure profit was adjusted for cost incurred.

We met with USACE officials involved in the award of ACS conversion contract actions including personnel from contracting, acquisition, general counsel, procurement, and construction.

We also reviewed the following criteria and guidance.

- CARES Act
- 10 U.S.C § 2326 (2010)
- Federal Acquisition Regulation (FAR) Subpart 1.6, "Career Development, Contracting Authority, and Responsibilities"
- FAR Subpart 4.8, "Government Contract Files"
- FAR Subpart 15.404-1, "Proposal Analysis Techniques"
- FAR Subpart 16.603, "Letter Contracts"
- FAR Part 37, "Service Contracting"
- DFARS Part 217, "Special Contracting Methods," Subpart 217.74, "Undefinitized Contract Actions"
- DFARS Subpart 217.7404-3, "Definitization Schedule"
- DFARS Subpart 217.7404-6, "Allowable Profit"
- USACE "ACS Implementation Support Materials," March 22, 2020

In addition, the audit team reviewed "Determination and Findings Class Waiver from the 10 U.S.C. § 2326(b) and DFARS 217.7404-4 Limitations on Obligations for all USACE Alternate Care Facilities (ACFs) Contracts in Response to the Novel Coronavirus Disease (COVID-19) Outbreak," signed April 1, 2020. The waiver allowed USACE to obligate 100 percent of the not-to-exceed amount when awarding UCAs to deliver ACS in a timely manner in response to the COVID-19 pandemic.

## Use of Computer-Processed Data

We did not use computer-processed data to perform this audit.

## Prior Coverage

During the last 5 years, the Government Accountability Office (GAO), the DoD Office of Inspector General (DoD OIG), and the Army Audit Agency issued four reports discussing UCAs and COVID-19.

Unrestricted GAO reports can be accessed at http://www.gao.gov. Unrestricted DoD OIG reports can be accessed at www.dodig.mil/reports. Unrestricted Army Audit Agency reports can be accessed from .mil and gao.gov domains at http://www.army.mil/aaa.

## GAO

Report No. GAO-15-496R, "Defense Contracting: Observations on Air Force Use of Undefinitized Contract Actions," May 2015

The Air Force obligated $14 billion on non-Foreign Military Sales UCAs from FYs 2010 through 2014. For the 10 reviewed UCAs the reason cited the most by Air Force contracting officials was to meet urgent needs. The findings showed that the Air Force did not meet definitization timeframes for the actions reviewed, and may have under-reported UCAs in the DoD's semiannual report to Congress. Air Force officials stated their UCAs did not meet standard time frames so their best practice was to exclude undefinitized long-lead contracts from UCA semiannual reports to Congress. During the review, the Deputy Assistant Director of the Air Force for Contracting issued a memorandum in April 2015 to all Air Force contracting commands reiterating that all UCAs, including those for long-lead items, are to be reported to the Office of Defense Procurement and Acquisition Policy for inclusion in the DoD's semiannual reports to Congress.

## DoD OIG

Report No. DODIG-2020-085, "Special Report on Best Practices and Lessons Learned for DoD Contracting Officials in the Pandemic Environment," June 2, 2020

The Report recognizes that DoD officials and contracting personnel are in a unique, ever-changing situation; however, the best practices, tips, issues identified, and lessons learned from past reports identified here can assist DoD officials in avoiding fraudulent activity and provide better contractor oversight. To avoid congressional and public scrutiny, DoD officials should ensure their response to COVID-19 relief funding is deliberate and accurate. DoD officials should use past experiences from disaster recovery while applying best practices in COVID-19 pandemic response.

Report No. DODIG-2020-084, "Audit of Military Department Management of Undefinitized Contract Actions," May 11, 2020

Defense Pricing and Contracting, under the Office of the Under Secretary of Defense for Acquisition and Sustainment, is responsible for pricing, contracting, and procurement policy for the DoD, including updates to DFARS and its procedures, guidance, and information. Some contracting officers did not fully comply with requirements for adjusting profit or definitizing UCAs. The report findings showed that contracting officers did not report accurate or complete information in the Federal Procurement Data System Next-Generation for 402 contract actions, valued at $12.8 billion, or to Defense

Pricing and Contracting for 17 UCAs, valued at $2.1 billion, because the Military Departments did not have controls in place to reconcile the Procurement Data System Next-Generation data to the UCA information they reported semiannually to Defense Pricing and Contracting and Congress. Specifically, contracting officers did not adjust the profit rate for contract risk to reflect costs already incurred on the UCAs at definitization when they determined profit for 12 UCAs, valued at $523.9 million, because the DFARS did not provide clear guidance on how contracting officers should adjust the profit rate for contract risk for costs already incurred on the UCA. The report recommended that the Defense Pricing and Contracting Principal Director update the DFARS to clarify that when considering the reduced cost risks associated with allowable incurred costs on a UCA, it is appropriate to apply separate and differing contract risk factors for allowable incurred costs and estimated costs to complete, in accordance with the requirements in 10 U.S.C §2326, "Undefinitized Contractual Actions: Restrictions," when completing the contract risk sections of DD Form 1547, "Record of Weighted Guidelines."

## *Army*

Report No. A-2016-0128-IEE, "U.S. Army Corps of Engineers Hurricane Sandy Recovery Program: Internal Controls (Contract Award Process)," August 18, 2016

In late October 2012, Hurricane Sandy devastated portions of the Caribbean, mid-Atlantic, and northeastern United States. The hurricane caused estimated damages of $20 billion and losses including business interruptions surpassing $50 billion. Hurricane Sandy prompted President Obama to sign the Disaster Relief Appropriations Act, which provided $50.5 billion in aid for Hurricane Sandy disaster victims and their communities. USACE generally had internal controls to manage the program's contract award process. The Army found valid and supported requirements for most of the 32 contract actions (valued at $376 million) selected for review with the controls in place to ensure contractors were registered and eligible, that contracting officers used appropriate solicitation and bidding, and that contractors were qualified for awarded contracts. However, the Army found that two contract actions included work that did not appear to meet the requirements of the Disaster Relief Appropriations Act. These conditions primarily occurred because USACE personnel did not properly consider requirements for program funds, USACE's existing policy was not consistent with guidance and requirements, and USACE personnel did not comply with requirements to use paperless contract files.

# Appendix B

## ACS UCAs Reviewed

Table 4 shows UCAs discussed in this report along with location, award, and definitization information.

*Table 4. UCAs Discussed in This Report*

| Contract Number | Award Date | USACE District | ACS Location | Not-To-Exceed Amount at Award | Final Definitized Amount | Days to Definitize in Contract | Actual Days to Definitize | Days in Period of Performance* |
|---|---|---|---|---|---|---|---|---|
| W911XK-20-C-0001 | March 31, 2020 | Detroit | Detroit, Michigan | $9,550,000 | $9,452,813 | 6 | 10 | 12 |
| W912P9-20-C-0009 | April 8, 2020 | Saint Louis | Quality Inn, Florissant, Missouri | 1,000,000 | 924,627 | 3 | 4 | 4 |
| W912QR-20-C-0018 | April 7, 2020 | Louisville | Wisconsin Fair Grounds Expo Center | 10,000,000 | 14,887,818 | 9 | 10 | 11 |
| W912PP-20-C-0007 | April 3, 2020 | Albuquerque | Albuquerque, New Mexico | 3,100,000 | 3,600,000 | 7 | 12 | 14 |
| W912PP-20-C-0008 | April 5, 2020 | Albuquerque | Gallup, New Mexico | 3,278,880 | 2,621,899 | 7 | 12 | 14 |
| W912EP-20-C-0003 | April 6, 2020 | Jacksonville | Miami Beach, Florida | 22,500,000 | 25,925,692 | 5 | 14 | 14 |
| W911XK-20-C-0004 | April 5, 2020 | Detroit | Suburban Collection Showplace, Michigan | 11,000,000 | 11,999,747 | 6 | 15 | 15 |
| W91238-20-F-0058 | April 2, 2020 | Sacramento | Porterville, California | 875,622 | 2,095,987 | 9 | 12 | 13 |
| W912DS-20-C-0010 | March 26, 2020 | New York | Westchester Community Center, New York, New York | 30,000,000 | 42,950,000 | 10 | 25 | 28 |
| W912DR-20-C-0018 | April 8, 2020 | Baltimore | United Medical Center, Maryland | 115,000 | 275,000 | 10 | 12 | 15 |
| W912BU-20-C-0020 | April 8, 2020 | Philadelphia | Paramus, New Jersey | 4,624,754 | 3,927,544 | 10 | 10 | 14 |
| W912P9-20-C-0003 | March 29, 2020 | Chicago | Metro South Medical Center, Blue Island, Illinois | 7,000,000 | 14,300,000 | 10 | 11 | 26 |
| W912P6-20-C-0005 | March 29, 2020 | Chicago | Sherman Hospital, Elgin, Illinois | 20,000,000 | 18,339,524 | 10 | 14 | 26 |
| W912P6-20-C-0002 | March 28, 2020 | Chicago | McCormick Place, Chicago, Illinois | 26,000,000 | 64,999,597 | 10 | 15 | 27 |

*Table 4. UCAs Discussed in This Report (cont'd)*

| Contract Number | Award Date | USACE District | ACS Location | Not-To-Exceed Amount at Award | Final Definitized Amount | Days to Definitize in Contract | Actual Days to Definitize | Days in Period of Performance* |
|---|---|---|---|---|---|---|---|---|
| W912P6-20-C-0004 | April 4, 2020 | Chicago | Westlake Hospital, Melrose Park, Illinois | 18,000,000 | 16,391,366 | 10 | 18 | 20 |
| W912DS-20-C-0008 | March 28, 2020 | New York | SUNY Stony Brook Alternate Care Facilities, New York, New York | 65,000,000 | 155,500,000 | 10 | 24 | 26 |
| W912DS-20-C-0009 | March 29, 2020 | New York | Westbury, New York | 116,500,000 | 118,504,737 | 10 | 24 | 29 |
| W912BU-20-C-0021 | April 13, 2020 | Philadelphia | St. Francis Medical Center, New Jersey | 2,960,000 | 1,533,333 | 10 | 12 | 15 |
| W912PP-20-C-0011 | April 17, 2020 | Albuquerque | Atsa Biyaazh High School, Shiprock Associated Schools Inc., New Mexico | 1,683,638 | 1,574,502 | 7 | 8 | 14 |
| W912DS-20-C-0007 | March 25, 2020 | New York | Jacob K. Javits Convention Center, New York, New York | 30,500,000 | 11,364,953 | 8 | 34 | 31 |
| W912PP-20-C-0012 | April 17, 2020 | Albuquerque | Chinle Community Center, Chinle, Apache County, Arizona | 2,016,062 | 1,916,807 | 7 | 8 | 14 |
| W912BU-20-C-0017 | April 7, 2020 | Philadelphia | East Orange Hospital, New Jersey | 9,733,325 | 10,279,098 | 10 | 11 | 14 |
| W912DR-20-C-0021 | April 16, 2020 | Baltimore | DC Convention Center, Washington, District of Columbia | 37,200,000 | 31,624,786 | 10 | 13 | 22 |
| W912HN-20-C-3003 | April 17, 2020 | Savannah | RTI Facility Barracks, St.Croix, U.S. Virgin Islands | 4,000,000 | 6,380,251 | 14 | 16 | 21 |
| W912BV-20-C-0008 | April 26, 2020 | Tulsa | Oklahoma State University (OSU) Medical Center Tulsa/ Integris Baptist Portland Campus, Oklahoma | 4,900,000 | 8,300,000 | 10 | 9 | 14 |
| W9127N-20-C-0012 | April 17, 2020 | Portland | Eugene River Avenue ACF, Lane County, Oregon | 730,000 | 2,600,000 | 10 | 24 | 28 |
| W912QR-20-C-0017 | April 30, 2020 | Louisville | Lotter Building, Milwaukee House of Corrections, Wisconsin | 12,000,000 | 4,455,897 | 10 | 22 | 23 |

*Table 4. UCAs Discussed in This Report (cont'd)*

| Contract Number | Award Date | USACE District | ACS Location | Not-To-Exceed Amount at Award | Final Definitized Amount | Days to Definitize in Contract | Actual Days to Definitize | Days in Period of Performance* |
|---|---|---|---|---|---|---|---|---|
| W912P5-20-C-0005 | May 1, 2020 | Nashville | Nashville General Hospital, Nashville, Tennessee | 4,500,000 | 7,217,218 | 10 | 21 | 28 |
| W912BV-20-C-0006 | May 24, 2020 | Tulsa | Memorial Hospital Texas County, Guymon, Oklahoma | 380,000 | 1,375,000 | 8 | 10 | 12 |
| W912EQ-20-C-0004 | April 6, 2020 | Memphis | The Gateway Center Site, Memphis, Tennessee | 24,734,392 | 51,326,283 | 10 | 30 | 39 |
| **Total** | | | | **$483,881,673** | **$646,644,480** | | | |

Source: The DoD OIG.

*The period of performance for some contracts was extended after initial award.

# Appendix C

## Delays in Definitization

Table 5 lists reasons for UCA definitization delays by contract action.

*Table 5. Reasons for UCA Definitization by Contract Action*

| Contract Number | Reason For Delays | | | | |
|---|---|---|---|---|---|
| | Delay Obtaining Supplies | State and Local Officials Changed Requirements | Unexpected Site Conditions | Multiple Revisions to Proposals | No Reason Given |
| W911XK-20-C-0001 | ✓ | | | | |
| W912P9-20-C-0009 | | | | ✓ | |
| W912QR-20-C-0018 | | | | ✓ | |
| W912PP-20-C-0007 | | | ✓ | | |
| W912PP-20-C-0008 | | | | | ✓ |
| W912EP-20-C-0003 | | | | ✓ | |
| W911XK-20-C-0004 | | | | | ✓ |
| W91238-20-F-0058 | | | | | ✓ |
| W912DS-20-C-0010 | ✓ | | | | |
| W912DR-20-C-0018 | | | | ✓ | |
| W912P6-20-C-0003 | | ✓ | | | |
| W112P6-20-C-0005 | | ✓ | | | |
| W912P6-20-C-0002 | | | | ✓ | |
| W112P6-20-C-0004 | | | | ✓ | |
| W912DS-20-C-0008 | | ✓ | | | |
| W912DS-20-C-0009 | | | | ✓ | |
| W912BU-20-C-0021 | | | | | ✓ |
| W912PP-20-C-0011 | | | | | ✓ |
| W912DS-20-C-0007 | ✓ | | | | |
| W912PP-20-C-0012 | | | | | ✓ |
| W912BU-20-C-0017 | | | | | ✓ |
| W912DR-20-C-0021 | | | | | ✓ |
| W912HN-20-C-3003 | | | | ✓ | |
| W9127N-20-C-0012 | | | | ✓ | |
| W912QR-20-C-0017 | | | | ✓ | |
| W912P5-20-C-0005 | | | | ✓ | |

*Table 5. Reasons for UCA Definitization by Contract Action (cont'd)*

| Contract Number | Reason For Delays | | | | |
|---|---|---|---|---|---|
| | Delay Obtaining Supplies | State and Local Officials Changed Requirements | Unexpected Site Conditions | Multiple Revisions to Proposals | No Reason Given |
| W912BV-20-C-0006 | | ✓ | | | |
| W912EQ-20-C-0004 | | | | ✓ | |
| **Total** | **3** | **4** | **1** | **12** | **8** |

Source: The DoD OIG.

# Management Comments

## USACE Director of Contracting

REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CECT

Mar 8, 2021

MEMORANDUM FOR [redacted] Program Director for Audit, Department of Defense Office of Inspector General (DoDIG), 4800 Mark Center Drive, Alexandria, VA 22350-1500

Subject: Response for the DoDIG Draft Report "Audit of the Use of Undefinitized Contract Actions for the Conversion of Alternative Care Sites in Response to the Coronavirus Disease – 2019", (Project code D2020-D000AV-0144-000) dated February 5, 2021.

**Objective Title**: DoDIG Audit of the Use of Undefinitized Contract Actions for the Conversion of Alternative Care Sites in Response to the Coronavirus Disease - 2019

**Objective:** The objective of this audit was to determine whether U.S. Army Corps of Engineers (USACE) officials properly managed undefinitized contract actions (UCAs) for Alternative Care Sites (ACS) constructed in response to the coronavirus disease–2019 (COVID-19) pandemic by definitizing actions within the required time limits, conducting analyses of fair and reasonable price determinations, and ensuring profit was adjusted for costs incurred.

**Recommendation 1.** We recommend that the U.S. Army Corps of Engineers Director of Contracting:

a) Complete an after-action review following the completion of the coronavirus disease–2019 mission to identify best practices and areas of improvement when issuing undefinitized contract actions, including establishing attainable definitization schedules and definitizing contract actions within those schedules, to reduce the risk of complications occurring during future emergency situations.

**Action Taken or planned:** USACE concurs with recommendation. USACE will prepare an after-action review to identify best practices and areas of improvement when issuing undefinitized contract actions, including establishing attainable definitization schedules and definitizing contract actions within those schedules, to reduce the risk of complications occurring during future emergency situations. Action to be completed by June 1, 2021.

# USACE Director of Contracting (cont'd)



b) Issue guidance requiring contracting officers to document the reason definitization schedules were not met in the contracting files.

**Action Taken or planned:** USACE Concurs with recommendation. USACE will issue guidance requiring contracting officers to document the reason if definitization schedules are not met in the contracting files. Action to be completed by March 31, 2021.

c) Issue a memorandum directing contracting officers to differentiate the profit associated with undefinitized contract actions dependent on the contractor's decreased cost risks involved in completing work in an undefinitized status, and the incentive to definitize contracts based on Defense Federal Acquisition Regulation Supplement guidance.

**Action Taken or planned:** USACE concurs with comment. USACE contracting officers negotiated profits between 3.15% and 12%. On May 11, 2020 the Inspector General of the U.S. Department of Defense published Report No. DODIG-2020-084 titled "Audit of Military Department Management of Undefinitized Contract Actions". Within the audit findings was the following:

"DFARS does not provide clear guidance on how contracting officers should adjust profit for costs already incurred on the UCA. Defense Procurement, Acquisition Policy, and Strategic Sourcing, Memorandum, "Management Oversight of Undefinitized Contract Actions," August 29, 2008 https://www.acq.osd.mil/dpap/policy/policyvault/2008-0083-DPAP.pdf encourages contracting officers to apply a profit rate for contract risk associated with a cost-reimbursement contract type to the cost already incurred on the UCA before definitization. However, DFARS does not include this information. When determining the profit rate for contract risk, DFARS does not provide an explanation of the expected designated range that contracting officers should be choosing from or that they could choose from two different designated ranges as indicated by the DPC memorandum. In addition, the DFARS states that contracting officers can apply a profit rate for contract risk as low as zero if a substantial portion of the UCA's cost was incurred before definitization. Only one fixed-price profit rate for contract risk goes as low as zero percent. The DPC Principal Director should update the DFARS to clarify that when considering the reduced cost risks associated with allowable incurred costs on a UCA, it is appropriate to apply separate and differing contract risk factors for allowable incurred costs and estimated costs to complete, in accordance with the requirements in 10 U.S.C. § 2326, when completing the contract risk sections of DD Form 1547, "Record of Weighted Guidelines." It should be noted that the DD Form 1547 was not revised until late April 2020, well into USACE's performance and definitization of ACS.

## USACE Director of Contracting (cont'd)



Based on the critical nature of the work already addressed in the report one could easily assign a value of 7% (5% is normal value) for the performance risk under DFAR 215.404-71-2. Assuming 50% of the costs were incurred at time of qualifying proposal and assigning a 0% cost type risk (as suggested) and a 6% cost type risk for a FFP without financing (5% is normal value)* under DFARS 215.404-71-3, the average cost type risk would be 3% for a total profit objective of 10% (7.5% using the normal value). This 7.5% to 10% profit (normal versus upper limit of designated range) is only an objective so an actual profit rate of 3.15% to 12% was not unreasonable.

USACE Director of Contracting will issue a memorandum alerting USACE contracting officers of the updated DD Form 1547 when calculating profit under the weighted guidelines and the need to differentiate (and document in the price negotiation memorandum) cost type risks associated with costs incurred up to the UCA qualifying proposal and those incurred after the qualifying proposal per Defense Federal Acquisition Regulation Supplement 215.404-71-3 and 217.7404-6 which meets the intent of the recommendation. Action to be completed by March 31, 2021.

If you have any questions or concerns, please contact me at [redacted]

Respectively,

STIGLICH.JILL.E.[redacted] Digitally signed by STIGLICH.JILL.E.[redacted] Date: 2021.03.08 10:46:45 -05'00'

Jill E. Stiglich
Directorate of Contracting

# Acronyms and Abbreviations

| | |
|---|---|
| **ACS** | Alternative Care Sites |
| **CARES Act** | Coronavirus Aid, Relief, and Economic Security Act |
| **COVID-19** | Coronavirus Disease–2019 |
| **DFARS** | Defense Federal Acquisition Regulation Supplement |
| **FAR** | Federal Acquisition Regulation |
| **FEMA** | Federal Emergency Management Agency |
| **IGE** | Independent Government Cost Estimate |
| **UCA** | Undefinitized Contract Action |
| **USACE** | U.S. Army Corps of Engineers |


INSPECTOR GENERAL
INTEGRITY
EFFICIENCY
DEPARTMENT OF DEFENSE

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### U.S. Department of Defense

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