



FIRST RESPONDER NETWORK AUTHORITY

FirstNet Must Strengthen Management of Financial Disclosures and Monitoring of Contracts

FINAL REPORT NO. OIG-15-013-A
DECEMBER 5, 2014

U.S. Department of Commerce
Office of Inspector General
Office of Audit and Evaluation

FOR PUBLIC RELEASE





December 5, 2014

MEMORANDUM FOR: Uzoma Onyieje
Board Secretary
First Responder Network Authority

Lawrence E. Strickling
Assistant Secretary for Communications and Information
National Telecommunications and Information Administration

Kelly R. Welsh
General Counsel

A handwritten signature in black ink, appearing to read "Andrew Katsaros". The signature is written in a cursive, flowing style.

FROM: Andrew Katsaros
Principal Assistant Inspector General for Audit and Evaluation

SUBJECT: *FirstNet Must Strengthen Management of Financial Disclosures and Monitoring of Contracts—Final Report No. OIG-15-013-A*

Attached is our final report on our review of First Responder Network Authority (FirstNet) ethics- and procurement-related matters in response to concerns raised by a FirstNet Board member in April 2013. Our objectives were to determine whether the Department

- had adequate processes in place to ensure that FirstNet Board members properly filed financial disclosures and identified potential conflicts of interest; and
- used the appropriate contract type, fairly awarded and appropriately administered FirstNet contracts, ensured services purchased under those contracts met industry standards, and were consistent with contract requirements.

We found that the Department's confidential and public disclosure monitoring procedures were inadequate (see finding I). Board members did not file timely public financial disclosure reports (see finding II). Also, the FirstNet Board operational procedures for monitoring potential conflicts of interest need improvement (see finding III). In addition, FirstNet contracting practices lacked transparent award competition, sufficient oversight of hiring, adequate monitoring, and procedures to prevent payment of erroneous costs (see finding IV).

The final report will be posted on OIG's website pursuant to section 8M of the Inspector General Act of 1978, as amended.

In accordance with Department Administrative Order 213-5, please provide us with your action plan within 60 days of the date of this memorandum. We appreciate the assistance and courtesies extended to us by FirstNet, NTIA, and the Department. If you have any questions about this report, please contact me at (202) 482-7859 or Susan Roy, Regional Inspector General for Audits, at (404) 730-2063.

Attachment

cc: Bruce H. Andrews, Deputy Secretary
Ellen Herbst, Chief Financial Officer and Assistant Secretary for Administration



Report In Brief

DECEMBER 5, 2014

Background

Signed into law on February 22, 2012, the Middle Class Tax Relief and Job Creation Act of 2012 established the First Responder Network Authority (FirstNet) as an independent authority within the National Telecommunications and Information Administration (NTIA). The Act authorized and allocated up to \$7 billion in funding to NTIA for the establishment of an interoperable Nationwide Public Safety Broadband Network (NPSBN). FirstNet's mission is to ensure its creation, deployment, and operation using a single, nationwide network design.

FirstNet is governed by a 15-member board consisting of the Attorney General of the United States, the Secretary of Homeland Security, the Director of the Office of Management and Budget, and 12 nonpermanent members from local, state and federal government, public safety, and the wireless industry. For roughly the first year and a half, the Board functioned as both board and management, eventually assembling a management team and transferring responsibilities to it. In addition, NTIA, the Commerce Office of General Counsel (OGC), the Census Bureau, and the National Institute of Standards and Technology (NIST) have supported FirstNet in its start-up efforts.

Why We Did This Review

Our overall objective was to review ethics- and procurement-related matters in response to concerns raised by a FirstNet Board member in April 2013. Specifically, we sought to determine whether the Department (a) had adequate processes in place to ensure that FirstNet Board members properly filed financial disclosures and identified potential conflicts of interest, and (b) used the appropriate contract type, fairly awarded and appropriately administered FirstNet contracts, ensured services purchased under those contracts met industry standards, and were consistent with contract requirements.

FIRST RESPONDER NETWORK AUTHORITY

FirstNet Must Strengthen Management of Financial Disclosures and Monitoring of Contracts

OIG-15-013-A

WHAT WE FOUND

The Department's confidential and public disclosure monitoring procedures were inadequate. OGC was unable to provide a record of all FirstNet confidential and public financial disclosure files, including due dates, as required by federal regulations. Nor had OGC created a schedule of Board members' start dates of service, due dates of disclosures, or a centralized point of record showing the training and counselling provided.

Board members did not file timely public financial disclosure reports. One Board member initially did not file a required public disclosure—and, when eventually doing so, did not disclose an interest in a conflicting company. Another Board member submitted the required public disclosure form 5 months late. Two others submitted inaccurate time-and-attendance records, in one case to avoid filing the required public financial disclosure. Finally, all four of these Board members continued to engage in decision making, even though they were not in compliance with the financial disclosure requirements.

The FirstNet Board operational procedures for monitoring potential conflicts of interest need improvement. The Department does not appear to have anticipated that Board members would take on duties sufficient to trigger the more detailed of the required financial reporting requirements. In addition, six months after the Board began regular meetings, senior NTIA and OGC officials were still debating how best to routinely monitor potential conflicts of interest.

FirstNet contracting practices lacked transparent award competition, sufficient oversight of hiring, adequate monitoring, and procedures to prevent payment of erroneous costs. Even though one contract was properly awarded and administered, two contracts were not, as a result of (a) one contract's sole-source procurement exceptions for other than full and open competition not appearing to meet FAR standards of support; (b) undue influence from a FirstNet official, which interfered with the contractor's ability to independently recruit and hire consultants; (c) adequate surveillance not being conducted over two contracts, resulting in approximately \$11 million in unsupported costs to the government; and (d) the contracting officer's representative approving duplicate and unsupported charges for one contract, as well as rates higher than that contract allowed.

In other matters, concerns remain with possible lack of competition and conflicts of interest while awarding FirstNet task orders under the Department's established blanket purchase agreements. We acknowledge that, subsequent to discussions with OIG, FirstNet took steps to address concerns over Board members' potential conflicts of interest and ethics issues.

WHAT WE RECOMMEND

We offer recommendations to

1. the Secretary, regarding financial disclosure noncompliance issues;
2. the General Counsel, regarding OGC internal controls pertaining to financial disclosure and conflict of interest at FirstNet;
3. the Chair of FirstNet, regarding the submission of initial disclosure and final public filer termination reports, as well as the routine updating of lists of entities presenting potential conflicts of interest; and
4. the Department's Senior Procurement Official, regarding contracting procedures, quality assurance, and administration.

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*COVER: Detail of fisheries pediment,
U.S. Department of Commerce headquarters,
by sculptor James Earle Fraser, 1934*

Introduction

Signed into law on February 22, 2012, the Middle Class Tax Relief and Job Creation Act of 2012 (the Act) established the First Responder Network Authority (FirstNet) as an independent authority within the National Telecommunication and Information Administration (NTIA). The Act authorized and allocated up to \$7 billion in funding to NTIA for the establishment of an interoperable Nationwide Public Safety Broadband Network (NPSBN). FirstNet's mission is to ensure its creation, deployment, and operation using a single, nationwide network design. The interoperable NPSBN is being built to address failures that occurred in the United States on September 11, 2001, in the wake of the terrorist attacks, in which first responders could not effectively communicate.

FirstNet is governed by a 15-member board consisting of the Attorney General of the United States, the Secretary of Homeland Security, the Director of the Office of Management and Budget, and 12 nonpermanent members from local, state and federal government, public safety, and the wireless industry. To recruit FirstNet Board members, NTIA conducted meetings and conversations with interested groups and individuals. Those efforts also included publication of a May 7, 2012, *Federal Register* recruitment announcement and a FirstNet Board *Recruitment Prospectus*, posted on the NTIA web site on May 22, 2012. NTIA recommended candidates to the Acting Secretary of Commerce, who announced the appointments in August, 2012. The Board's first meeting was in September 2012.

In establishing FirstNet, the Board needed to

- create working committees;
- decide on internal policies and procedures;
- obtain staff, either directly or through memorandums of understanding (MOUs) with other federal agencies;
- decide whether to hire contractors to support project management; and
- obtain any other assistance it required.

For roughly the first year and a half, the Board functioned as both board and management, eventually assembling a management team and transferring responsibilities to it.

In addition, NTIA, the Department of Commerce Office of General Counsel (OGC), the Census Bureau, and the National Institute of Standards and Technology (NIST) have supported FirstNet in its start-up efforts. FirstNet and OGC entered into an MOU under which OGC would provide legal services for federal procurement, assistance, and appropriations law, as well as for the provision of ethics program services. As part of NTIA's procurement service MOUs with the Census Bureau and NIST, the contracting offices at those bureaus entered into three contracts on behalf of NTIA to meet FirstNet's procurement needs to obtain project management and planning support, professional and intellectual support, and to develop network and business plans. The contracts were awarded between September 2012 and March

2013 with a value of approximately \$13 million.¹ In September 2013, the Department's Acquisition Division competitively awarded three blanket purchase agreements (BPAs) to three contractors selected from the General Services Administration (GSA) MOBIS program.² Task orders with an estimated value of \$67.2 million are expected to be awarded competitively to one or more of the three contractors to obtain professional technical support and subject matter expert support services.

During our review of FirstNet start-up activities, we noted the challenges of establishing a new organization. At FirstNet, some staff in key positions were not familiar with government requirements. Other staff were tasked with fulfilling the duties of positions as the roles and responsibilities for these positions were still being established. These circumstances created some confusion about who was responsible for certain tasks, thus some required activities were overlooked. Compounding this situation was the expected expediency of start-up operations. As a result, there arose a number of control issues, which we present in the findings of this report.

¹ Contract 1 was awarded to FunctionalIT for \$1.95 million on September 13, 2012, with a performance period ending on March 21, 2014. Contract 2 was awarded to Workforce Resources, Inc. (WRI) for \$3.98 million on November 15, 2012, and was terminated on March 17, 2013, after \$2.59 million was expended. Contract 3 was also awarded to WRI for \$8.4 million on March 18, 2013, with a performance period ending on December 17, 2013.

² The GSA Mission Oriented Business Integrated Services (MOBIS) program offers a full range of management and consulting services that can improve a federal agency's performance, and its endeavors, to meet its mission goals. MOBIS contractors possess the necessary expertise to facilitate streamlined federal government acquisitions.

Objectives, Findings, and Recommendations

Our overall objective was to review ethics- and procurement-related matters in response to concerns raised by a FirstNet Board member in April 2013. In October 2013, the FirstNet Chairman of the Board requested that the Inspector General take over phase 2 of the Special Review Committee's³ work, which would have focused on ethics concerns and FirstNet's procurement activities. Specifically, we sought to determine whether the Department

- had adequate processes in place to ensure that FirstNet Board members properly filed financial disclosures and identified potential conflicts of interest; and
- used the appropriate contract type, fairly awarded and appropriately administered FirstNet contracts, ensured services purchased under those contracts met industry standards, and were consistent with contract requirements.

We reviewed Departmental compliance with applicable laws, regulations, policies, and procedures. Details of our audit scope and methodology can be found in appendix A. In appendix B, we provide further background into the events that led to the Board member's concerns and OIG initiating this audit; appendix C provides contract criteria for exceptions permitting a process other than full and open competition, which pertain to FirstNet's initial procurement needs. Appendixes D and E summarize our review of the FirstNet Board members' confidential and public financial disclosure forms, respectively. Appendix F charts the potential monetary benefits we found from our review. Appendix G lists the FirstNet Board members, as well as the requirements that their membership must fulfill. Finally, appendix H contains FirstNet's response to our draft report.

We found that the Department's confidential and public disclosure monitoring procedures were inadequate (see finding I). Board members did not file timely public financial disclosure reports (see finding II). Also, the FirstNet Board operational procedures for monitoring potential conflicts of interest need improvement (see finding III). In addition, FirstNet contracting practices lacked transparent award competition, sufficient oversight of hiring, adequate monitoring, and procedures to prevent payment of erroneous costs (see finding IV).

³ The Special Review Committee was a temporary body established by the FirstNet Board of Directors to review potential legal and ethical matters raised by one of its members. The committee was asked to review and report on whether FirstNet was in compliance with (1) federal requirements for hiring and procurement, (2) federal requirements for avoiding conflicts of interest, and (3) the open meeting requirements of the Act.

I. The Department's Confidential and Public Financial Disclosure Monitoring Procedures Were Inadequate

The Ethics in Government Act of 1978 and federal regulations require certain executive branch employees, based on their duties and responsibilities, to file either confidential or public financial disclosure reports.⁴ The purpose of disclosure is to assist employees and their agencies in avoiding conflicts between official duties and private financial interests or affiliations. See table I, below, for a summary explanation of the two financial disclosure forms and their differences.

Table I: Summary of Executive Branch Financial Disclosure Requirements

	Confidential: OGE Form 450 (Not Available to Public)	Public: OGE Form 278 (Available to Public by Request)
Who?	Employees exercising discretion (e.g., in contracting, procurement, grants administration, or regulating or auditing nonfederal entities)	Certain senior officials who work more than 60 days in 1 year
What?	Requires the identification of certain assets, sources of income, positions and agreements with entities outside of the government, and gifts and travel reimbursements	Similar to confidential report, but also requires reporting of asset values and income amounts, within specified ranges
Why?	To identify and prevent conflicts of interest	

Source: Office of Government Ethics

Because of their status as special government employees (SGEs)⁵ and their level of compensation, FirstNet Board members are required to file these reports. According to OGC, prior to the first Board meeting, it provided guidance to FirstNet Board members, each of whom was required to submit the confidential financial disclosure form 450. OGC also informed us that it initially provided ethics briefings for Board members, with

⁴ The Ethics in Government Act (EIGA), 5 U.S.C. app. 4 §§ 101-111 (1978), 5 CFR § 2634.104(a), requires high-level federal officials to disclose publicly their personal financial interests. The Secretary is required to refer to the Attorney General the names of those individuals the Secretary “has reasonable cause to believe [have] willfully failed to file a public report or information required” in a public report. The Attorney General may bring a civil action in federal district court against such an individual. Administrative remedies, including reprimand, suspension, and removal, are also available. 5 CFR § 2634.701.

⁵ An SGE is an officer or employee who is retained, designated, appointed, or employed to perform temporary duties for not more than 130 days during any period of 365 consecutive days. 18 U.S.C. § 202. Under long-standing executive branch practice—and subject to certain exceptions—work for any part of a day counts as a full day of work, for purposes of the relevant day limits under the ethics laws and regulations, as well as determining whether an individual qualifies as a SGE. Congress created the SGE category in recognition of the need to apply appropriate conflict of interest restrictions to experts, consultants, and other advisers who serve the government on a temporary basis.

counselling for those whose employment or financial interests could have created a conflict of interest.

However, SGEs are also required to file the more detailed public financial disclosure form 278 within 30 days of assuming the position and/or annually if they meet (1) the compensation requirement, which Board members do, and (2) a 60-day annual work threshold requirement.⁶ If new SGEs are not expected to work more than 60 days, but end up actually doing so, they must file a public financial disclosure form 278 within 15 calendar days after the 60th day of duty.⁷

The Department did not anticipate that some FirstNet Board members would devote enough time to their Board duties to trigger the requirement for the public financial disclosure form.⁸ However, eight Board members did trigger the requirement in 2013. In the course of transitioning certain FirstNet Board members from the confidential financial disclosure system to the public filing system, with its more extensive reporting requirements, the Department's inconsistent administration resulted in the Board operating without adequate oversight of required financial disclosures.

The Designated Agency Ethics Official (DAEO), a senior OGC official, is charged with coordinating and managing the agency's ethics program consistent with applicable ethics laws and regulations. Relevant duties defined in the Code of Federal Regulations (CFR) include

- ensuring an effective system for the collection, filing, review and maintenance of financial disclosure reports;
- ensuring that all financial disclosure reports are properly maintained and effectively and consistently reviewed; and
- undertaking prompt and effective action to remedy the failure to file a financial disclosure report—as well as potential or actual conflicts of interest, or appearances thereof, which were disclosed.⁹

The CFR also contains specific requirements for using date stamps,¹⁰ establishing due dates¹¹ and extensions¹² for filers, and maintaining records of due dates and extensions.¹³ Finally, the

⁶ 5 U.S.C. app 4 § 101; 5 CFR §§ 2634.201; 2634.204.

⁷ 5 CFR § 2634.204.

⁸ See 5 CFR § 2634.204(a). These Board members did not necessarily work 60 days consecutively and reached the threshold at different dates.

⁹ See generally 5 CFR § 2638.203. See also Department Administrative Order 205-1, "Records Management," which sets forth the policies, responsibilities, and procedures for the creation, maintenance, use, and disposition of all records throughout the Department.

¹⁰ 5 CFR § 2634.605(a). In addition, the guidance published by the Office of Government Ethics emphasizes that "[t]he reviewer must ensure that reports are marked or stamped with the date of receipt by the agency." *Public Financial Disclosure: A Reviewer's Reference* (2nd ed.) at 2-1.

¹¹ 5 CFR §§ 2634.201(a), (b); 2634.903(a), (b).

¹² 5 CFR §§ 2634.201(f); 2634.903(d).

signature of the reviewing official on financial disclosure forms certifies that the forms are complete and that, on the basis of information contained in such forms, the filer is in compliance with applicable law or regulation.¹⁴

In response to OIG's document request, OGC returned records largely consisting of e-mails and attachments. The documents provided did not reflect an adequate record keeping system: they were in no apparent order and, in many cases, we were unable to determine relevance. We found that OGC was unable to provide a record of all FirstNet confidential and public financial disclosure files, including due dates, as required by federal regulations. Nor had OGC created a schedule of Board members' start dates of service, due dates of disclosures, or a centralized point of record showing the training and counselling provided.

In addition, OGC does not deploy a sufficient process for reviewing the forms. We found that two of nine Board members required to file public financial disclosure forms did so 5 months after the forms were due; two requested extensions after the deadline had passed; and two were granted extensions, even though they had not made the required request (see appendix E for further details).

Further, many of the confidential financial forms 450 were incomplete. Of 14 submitted confidential disclosure forms that we reviewed, OGC accepted 4 without a filer signature and did not date stamp 11 of the forms (see appendix D for further details). A lack of signature leaves open questions as to the integrity of the information provided on the form. And, without the date stamp, OGC cannot attest that the forms were received by the due date or that it had timely reviewed the forms.

Inconsistencies in record keeping and administration suggest a lack of active or centralized supervision and quality control, thereby creating gaps in oversight and increasing the risk of noncompliance with disclosure requirements among FirstNet Board members. This is especially critical, given Board member ties to the telecommunications industry.

Responsible officials at OGC and NTIA stated that FirstNet was unique, requiring them to adapt existing procedures and practices to a new entity. Nonetheless, neither OGC, which is responsible for FirstNet's ethics program, nor NTIA, within which FirstNet was established as an independent authority, had adequate financial disclosure procedures in place to ensure timely compliance by the FirstNet Board. In addition, OGC did not have any mechanism in place to verify and confirm that new employees received initial ethics training. Consequently, some Board members continued to act and to make decisions, even though they were not in compliance with financial disclosure requirements.

¹³ 5 CFR § 2634.704(c).

¹⁴ 5 CFR § 2634.605.

II. Board Members Did Not File Timely Public Financial Disclosure Reports

As noted earlier, OGC informed us that Board members had been trained and counselled on ethics and financial disclosure requirements, including federal prohibitions of Board members' participation in matters in which they have a financial interest.¹⁵ Board members filed their confidential form 450 disclosure reports prior to the first Board meeting. However, OGC is unable to provide us with sign-in sheets verifying attendance at Board training—or, as noted above, a single point of record for the Board training and counselling they provided. Our review found that the following issues¹⁶ had arisen:

- A. *Board member A initially did not file a required public disclosure—and, when eventually doing so, did not disclose an interest in a conflicting company.*

A review of e-mail correspondence suggests that Board member A initially did not file a public disclosure by recording work days to remain under the 60-day threshold during 2012. This Board member eventually filed the public disclosure form 278 but neglected to disclose a potentially conflicting company that had been included in the initial confidential, nonpublic filing from the previous year. Further, OGC had previously advised Board member A not to work in any substantive way on matters associated with the conflicting company. Nonetheless, OGC accepted the defective disclosure. Eight months passed before OGC required the Board member to disclose the conflicting company, in which Board member A reported holding substantial assets.¹⁷

- B. *Board member D submitted the required public disclosure form 5 months late.*

Board member D—whose public disclosure filing deadline of November 2013 provided for a 90-day extension even though the required request was not submitted—did not submit the form until April 2014. During this extended period of time, the Department failed to take corrective action against the Board member.

- C. *Board members C and F submitted inaccurate time-and-attendance records, in one case to avoid filing the required public financial disclosure.*

In these instances,

- I. Board member C submitted signed, certified timesheets showing 0 hours worked—that is, stating that no Board-related activities had been performed during several reporting periods, even though that was not the case.

¹⁵ The FirstNet bylaws reinforce these obligations: "FirstNet Board members shall comply with all applicable government ethics, financial disclosure and conflict of interest statutes and regulations." Sec. 3.18.

¹⁶ Board member labels correspond with the tables in appendixes D and E.

¹⁷ Assets are reported within dollar ranges on public disclosure form 278.

On May 2, 2013, NTIA, which was initially responsible for FirstNet timekeeping, notified Board member C that the 60-day trigger for filing a public disclosure form was approaching. In response to the notification, the Board member asked by e-mail whether 0-hour timesheets could be submitted to avoid filing the public financial disclosure. In the same e-mail exchange, the Board member acknowledged that FirstNet Board duties would continue. NTIA stated that compensation for FirstNet work was required by law, which does not allow for flexibility. On May 19, 2013, Board member C began submitting certified 0-hour timesheets, despite having been counseled not to. One NTIA official sent 3 follow-up e-mails to this Board member requesting corrected, accurate timesheets—and also notified a more senior NTIA official. The Board member continued to submit 0-hour timesheets until September 20, 2013.

Although the Board member eventually submitted revised time sheets and a public financial disclosure form, the form was received nearly 5 months past the filing deadline.

2. Board member F submitted inaccurate time-and-attendance records by submitting 0-hour timesheets for what appear to be reasons related to restrictions on outside compensation at this Board member's employer, according to an NTIA official. As of March 2014, this Board member had received compensation for only 1 day of FirstNet-related work and was continuing to submit incorrect time records.

The actions of these two Board members have caused the Department to be noncompliant with the law, which requires that Board members be compensated for duties performed.¹⁸ In addition, the inaccurate timesheets did not allow the Department to determine when or whether public financial disclosure was required.

Finally, all four of these Board members continued to engage in decision making, even though they were not in compliance with the financial disclosure requirements. Departmental officials could have elevated or called attention to these issues, in order to prevent or remedy these conditions. But, without a more effective ethics program in place for FirstNet, the Department has not created sufficient internal controls to ensure a sound process for the filing of Board members' financial disclosures.

III. FirstNet Board Operational Procedures for Monitoring Potential Conflicts of Interest Need Improvement

Conflict of interest statutes generally prohibit executive branch employees from participating in government matters that will affect the employee's own financial interests—or the financial interests of

¹⁸ 47 USC § 1424(g)(1).

- a spouse or minor child;
- a general partner;
- an organization in which the employee serves as an officer, director, trustee, general partner or employee; or
- a person or organization with whom the employee is negotiating or has an arrangement concerning prospective employment.¹⁹

The CFR restates the statutory prohibition, further defining disqualifying financial interests,²⁰ and provides a rationale, noting that the Ethics in Government Act requires disclosure in order to ensure confidence in the integrity of the federal government by demonstrating that government employees are able to carry out their duties without compromising the public trust.²¹

As noted above, the Department does not appear to have anticipated that Board members would take on duties sufficient to trigger the more detailed of the required financial reporting requirements.²² At the same time, the Board, of necessity, includes members with significant ties to the telecommunications industry. They are charged with making strategic decisions regarding FirstNet's operations. FirstNet, from the time of its creation, needed to be able to assure taxpayers that Board members are acting in the public interest.

Nonetheless, 6 months after the Board began regular meetings, senior NTIA and OGC officials were still debating by e-mail how best to routinely monitor potential conflicts of interest. NTIA proposed requiring Board members to recuse themselves from meeting agenda items and for distribution of conflict of interest guidance, at a minimum, once per year. In addition to recusal for conflicted Board members, OGC recommended affirmative certification, which would require Board members who had not recused themselves from a particular matter to sign a statement at each Board meeting certifying that they had no conflicts of interest with agenda items. Affirmative certification, combined with recusal, would have been consistent with procedures used for other government employees responsible for assessing contract bids. OGC also advocated distributing conflicts guidance at each meeting. An NTIA official, who has since left the federal government, stated that these procedures were overly intrusive.

The rationale for a more rigorous approach to ensuring the public's best interest is that it increases the likelihood that Board members are (a) conscientiously identifying actual or potential conflicts of interest to the Board, (b) avoiding working on matters covered by a disqualification, and (c) being held accountable if a problem results. This is especially

¹⁹ See, for example, 18 USC § 208.

²⁰ 5 CFR § 2635.402(a).

²¹ 5 CFR § 2634.104(a).

²² The recruitment prospectus, issued in May 2012, specifically stated that Board members were expected to work less than 60 days per year—the threshold for enhanced reporting.

important given that some Board members are inexperienced with pertinent government standards and, given their experience in the telecommunications industry, are at increased risk of conflicts. This system would also create a record showing that FirstNet took all steps it could to identify actual or potential conflicts and document which Board member participated in each decision.

The Board began meeting in September 2012. Disagreements among senior Department officials notwithstanding, Board meeting agendas and minutes are generally silent on the subject of recusals, suggesting a lack of awareness or attention to potential conflicts. Transcripts of Board meetings refer to one recusal, in December 2013. The Board chair noted the opportunity to abstain for those present, should they have a personal interest in anything under consideration, in a March 2014 meeting. This statement stands out because it is the only one of its kind in the available transcripts. The FirstNet Board held certain meetings in closed session, so we are unable to determine whether the subject of conflicts was discussed at those times.²³

IV. FirstNet Contracts Were Awarded Without Competition or Sufficient Oversight of Hiring—and Were Not Adequately Monitored

NTIA was tasked with helping FirstNet with its start-up efforts, including the procurement of professional staffing services. Because NTIA does not have a contracting office, it secured contracting assistance from other Departmental bureaus. Between September 2012 and March 2013, the contracting offices at the Census Bureau and NIST entered into three time-and-material (T&M) contracts on behalf of NTIA to meet FirstNet's procurement needs to obtain project management and planning support, professional and intellectual support, and to develop network and business plans. Table 2 (next page) summarizes the contracts and subsequent OIG concerns.

²³ NTIA developed a list of potentially conflicted entities; however, we were not able to determine what use was made of the list.

Table 2. Summary of Time-and-Materials (T&M) Contracts Awarded to Assist with FirstNet’s Procurement Needs

Contracting Bureau	Date	Contractor and Contract Value (millions)	Competition Requirements Met	FirstNet Board Member Directed Hiring	Adequate Surveillance	Erroneous Costs ^a Approved
Census Bureau (Contract 1)	09/13/12	FunctionallT (\$1.95)	Yes	No	Yes	No
NIST (Contract 2)	11/15/12	Workforce Resources, Inc. (\$3.98)	N/A	Yes	No	No
NIST (Contract 3)	03/18/13	Workforce Resources, Inc. (\$8.40)	No	Yes	No	Yes

Source: OIG analysis of documents provided by the Census Bureau, NIST, FunctionallT, and Workforce Resources, Inc.

^a Erroneous costs include invoiced claims for duplicate charges, unsupported time, and labor rate errors.

We found that the three contracts were awarded as T&M contracts; however—even though contract 1 was properly awarded and administered—contracts 2 and 3 were not, as a result of

- sole-source procurement for contract 3 not meeting FAR exceptions for full and open competition (see subfinding A);
- undue influence from a FirstNet official, which interfered with the contractor’s ability to independently recruit and hire consultants (see subfinding B);
- adequate surveillance not being conducted over contracts 2 and 3, resulting in approximately \$11 million in unsupported costs to the government (see subfinding C); and
- the contracting officer’s representative (COR) approving duplicate and unsupported charges for contract 3, as well as rates higher than that contract allowed (see subfinding D).

A. Sole-source procurement exceptions for other than full and open competition were not supported

The FAR requires government agencies to procure services by obtaining full and open competition through procedures such as soliciting sealed bids and requesting competitive proposals. There are exceptions to obtaining full and open competition when one of several circumstances exists (see appendix C for a complete list of exceptions): for example, when (1) there is an unusual and compelling urgency or (2) the procurement is authorized or required by a statute expressly authorizing or requiring an acquisition from a specified source or through another agency.

NIST awarded the third contract noncompetitively to Workforce Resources, Inc. (WRI) for \$8.40 million on March 18, 2013. According to NIST, it awarded contract 3

noncompetitively because it was a way to meet the Act's requirement to establish FirstNet as operational in what the agency perceived was an extremely limited time frame. Additionally, NIST stated in its *Justification for Other Than Full and Open Competition* (JOFOC) that the procurement was unusual, urgent, and compelling; that any interruption in services would set FirstNet back 6 months; and that the cost of the interruption would be significantly high, as FirstNet has mission essential milestone dates that have to be executed to meet criteria established under the Act, even though specific reasons were not provided supporting this statement.

However, our review of the contract in question showed that:

1. ***Specific procurement needs and limited time frames were not required by statute.*** Although NIST justified the noncompetitive award on the basis that it was the most expeditious way to achieve certain milestones within a very limited time frame to meet the requirements of the Act, we found that neither the Act nor the JOFOC identify specific guidelines FirstNet is required to meet.
2. ***Procurement needs did not meet criteria for unusual and compelling urgency.*** Without any limited time frames that FirstNet is required to meet, FirstNet did not adequately justify how its hiring of consultants under contract 3 to perform technical planning, business planning, market research, and outreach activities was an urgent matter that was unusual and compelling. Also, neither a business plan nor a network plan were completed or delivered to FirstNet during the 1-year performance period of the contract—bringing into question the urgency of need.

B. A FirstNet Board member directed inappropriate hiring actions

On two separate contracts, FirstNet Board member A inappropriately directed WRI hiring actions. First, during the pre-award phase of contract 2, the government inappropriately identified and recruited subject matter experts (SMEs). Specifically, FirstNet directed WRI via NIST's contracting office to include a total of 16 SMEs in its proposal. On November 6, 2012—9 days prior to contract award (i.e., November 15, 2012)—NIST e-mailed WRI, a spreadsheet containing the names of 14 SMEs. In addition, NIST also confirmed that 12 of the 16 SMEs included in the proposal were recommended directly by a FirstNet Board member, while the other 4 SMEs were transitioned in from the previous engagement with FunctionIT (contract 1). The actions taken by the government give the appearance that, in order to be awarded the contract, WRI was required to hire the SMEs recommended by the government.

At the time of award for contract 2 NIST was aware that, for the contract to qualify as a SBA 8(a) award, WRI was required to use at least 50 percent of their employees to fulfill contract requirements. WRI engaged the SMEs to work on the FirstNet contract with the expectation that the SMEs would become WRI employees. However, the 16 SMEs opted to remain as independent contractors rather than WRI employees. Because none of the SMEs opted to become WRI employees, WRI no longer qualified for an SBA 8(a) award. Subsequently, SBA was informed of the situation and the contract was terminated on March 17, 2013.

Further, contract 3 required WRI to recruit and present FirstNet with a minimum of three candidates for each identified consulting position. Similar to contract 2, FirstNet Board member A instructed WRI—directly and through NIST and NTIA contracting personnel—to hire preselected SMEs, who accounted for 34 of the 37 SMEs working on the contracted project.

Both contracts 2 and 3 were designated as nonpersonal services; however, in both cases, FirstNet directed the hiring of preselected SMEs. As control over hiring or firing decisions is one aspect of the traditional employer–employee relationship, the exercise of such control by federal employees over contractor personnel can create the appearance of personal service contracts, which federal agencies generally may not enter into without explicit authority.²⁴ Furthermore, NIST and NTIA contracting personnel should have implemented stronger controls to ensure an independent relationship with contractor personnel—by both allowing the contractor to independently conduct SME recruitment and not allowing FirstNet to direct hiring actions. Unduly close personal relationships with contractor personnel can create the appearance of favoritism and may call into question the integrity of the procurement process.

Additionally, regarding contract 3, FirstNet Board member A—who was also given certain operational responsibilities—inappropriately bound the government by tasking an SME with work before the individual was officially under contract with WRI. The SME proceeded with the work based upon the verbal authorization of FirstNet Board member A. Because WRI had not hired the SME and had no knowledge of Board member A's action, it did not have supervision or control of the SME. WRI did not become aware of the hiring action until the SME presented the contractor with an invoice, for the period March 18–April 17, 2013, that included 142 hours totaling \$16,756 charged in unauthorized time and \$692 in unauthorized travel costs (\$17,448 total that the government paid). Based on the Board member's direction on April 13, 2013, the COR authorized a start date for the SME effective April 15, 2013.

Commitments not authorized by law can have serious repercussions for the government—and can be the basis of legal disputes between the government and the contractor, which may result in personal liability for the individual who made the commitment. Additionally, the FAR limits ratification of unauthorized commitments

²⁴ FAR 37.101—Service Contracts General. A “nonpersonal services contract” is one under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the government and its employees. FAR 37.104—Personal Services Contracts. (a) A personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel. The government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

under agency procedures²⁵ that prescribe the responsible government employee to be appropriately disciplined.²⁶

The contracting officer (CO) ratified the unauthorized commitment on December 5, 2013. Board member A was not subjected to any disciplinary action—only required to attend a 1-day training course that the member initially postponed and eventually attended on June 5, 2014.

C. FirstNet did not conduct adequate surveillance of its WRI contracts

We found that FirstNet did not conduct adequate surveillance of its WRI contracts. FirstNet expended \$2.59 million on contract 2 for two tasks related to wireless communications: assistance with the development of a network plan and a business plan. FirstNet expended \$8.40 million on contract 3 for four tasks: wireless broadband technical planning, business planning, market research, and outreach efforts. (See table 3, next page, for these contracts' requirements.) These awards were structured as T&M contracts without deliverables (other than monthly status reports for contract 3) or specific work products.

The T&M contracts required a level of monitoring that FirstNet ultimately did not provide. The COR was required to review draft and final work products for “completeness, accuracy and appropriateness.” However, we were unable to verify that this monitoring actually occurred. The COR has represented allowing the SMEs to work directly with FirstNet and delegating the responsibility to review work products—because, according to the COR, the COR did not have the technical expertise needed to review the work products. However, the COR did not have the documentation to support this delegation, nor documentation showing that any delegated technical experts provided the required oversight. We also cannot conclude that—at the end of both contract periods—FirstNet received the few deliverables that were expressly required (i.e., monthly status reports). WRI acknowledged that NIST did not require it to provide monthly status reports of tasks performed, even though such reports were required in contract 3.

²⁵ FAR 1.602-3—Ratification of Unauthorized Commitments. C. (7) “The authority . . . may be exercised only when the ratification is in accordance with any other limitations prescribed under agency procedures.”

²⁶ Commerce Acquisition Manual (CAM) 1301.602—Ratification of Unauthorized Commitments. 2.3 Unauthorized commitments may be considered matters of serious misconduct and may be subject to appropriate disciplinary actions.

Table 3. Summary of Contract Requirements and Work Products

Contract	Contract Requirements	Deliverables	Contract Amount Expended (Millions)
Contract 2	<ol style="list-style-type: none"> 1. Assistance with development of network plan 2. Assistance with development of business plan 	None	\$2.59
Contract 3	Wireless broadband <ol style="list-style-type: none"> 1. technical planning 2. business planning 3. market research 4. outreach 	Monthly status reports containing <ol style="list-style-type: none"> 1. summary of accomplishments 2. overall status of all tasks 3. relevant programmatic and financial information 	\$ 8.40
Total			\$10.99

Source: OIG analysis of documentary evidence obtained from NIST, NTIA, and WRI

During OIG's exit conference with FirstNet management about the results of our audit work, they stated that they had received a number of documents that they considered to be responsive to the contract requirements. As follow-up, management provided for our review approximately 20 work product documents, which SMEs and FirstNet staff appear to have created.²⁷ According to WRI, it had never seen these documents, which it believes the SMEs provided to the FirstNet Board and staff members. WRI also told us that the work of each SME was directed by the Board member responsible for that area of the project. Based on our review of the documents and related correspondence, we noted that FirstNet staff and management often obtained the documents directly from the SMEs working on the contract. At times they would update or modify these documents.

This direct interaction between FirstNet Board members and WRI consultants—without the involvement of WRI or the COR—suggests that FirstNet management may have had relatively continuous control over WRI consultants. Such control contributes to the appearance of a personal services contract, which—as mentioned in the previous

²⁷ The COR and the CO do not consider these documents as formal deliverables but rather as work products. The work products consisted of documents such as FirstNet's company start-up plan presentation and proposed FY 2014 operating plan presentation.

subfinancing—federal agencies generally may not enter into without explicit authority. The FAR characterizes a *personal services contract* as one in which an employer–employee relationship is created between the government and contractor personnel when contractor personnel are subject to relatively continuous supervision and control by a government officer or employee.²⁸

The FAR²⁹ and the Commerce Acquisition Manual (CAM) state that T&M contracts do not provide a positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate government oversight, also known as contract surveillance or quality assurance of contractor performance, is required to provide reasonable assurance that (a) efficient methods and effective cost controls are used throughout the life of the contract and (b) the contractor is performing in accordance with the statement of work. In addition to the COR’s oversight duties specified in the contract, one way to ensure quality assurance is to develop a quality assurance surveillance plan (QASP).³⁰

The FAR³¹ states (a) that these plans should specify all work requiring surveillance, including the method of surveillance, and (b) that quality assurance records should be maintained as part of the contract file. The CAM³² also states that, for T&M contracts, the contract file shall contain, at a minimum, the surveillance plan outlining how the government will monitor, control, and mitigate the impact of any adverse performance. Monitoring of contractor’s performance is typically performed by a COR.

We found that, even though the COR conducted an effective review of most invoices and timesheets submitted, the COR and CO did not follow FAR and CAM criteria when generally administering FirstNet’s T&M contract actions with WRI. Specifically, a surveillance plan was not developed and there are no other formal contract surveillance documents available. This occurred because the CO believed a formal surveillance plan was not needed for contracts 2 and 3, prompting the COR to follow the more limited inspection and acceptance criteria outlined in the contracts. Also, neither the contracting officer at NIST nor the COR considered the 20 work product documents subsequently provided to us as deliverables as defined under the contracts; the work products were also not recognized by WRI. As a result, the documents could

²⁸ FAR 37.104—(a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract. (b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. § 3109) to do so.

²⁹ FAR 16.601

³⁰ U.S. Department of Commerce Office of Inspector General, November 08, 2013. *The Department’s Awarding and Administering of Time-and-Materials and Labor-Hours Contracts Needs Improvement*, OIG-14-001-A. Washington, DC: DOC OIG, 7.

³¹ FAR 46.401(a) and 4.803(b)(15)

³² CAM 1316.1 5.3

not be considered as support for meeting the requirements for contracts 2 and 3, and we identify unsupported³³ costs of almost \$11 million (see appendix F).

Although a COR was assigned to monitor the contractor's performance, we found an inadequate level of oversight. For contracts 2 and 3, FirstNet paid nearly \$11 million to its contractor without adequate surveillance documentation of contractor performance, which we therefore identify as unsupported costs. Without adequate documentation of contractor performance, there is no record of whether work performed under the contract met acceptance criteria or quality standards. Contractors performing T&M contracts are paid for the hours applied to the task, regardless of the outcome. The decision to award a T&M contract placed a significant burden on FirstNet to ensure it was receiving fair value. Thus, without surveillance documentation, the Department does not have reasonable assurance that it received fair value. Further, because no deliverables were stipulated for contract 2 and only status reports for contract 3, these contracts required very little of the contractor to comply with the terms of the agreements.

D. The COR approved payments for erroneous costs

We reviewed 96 percent of the \$10.99 million paid to WRI and noted that the contractor consistently submitted incorrect invoices, which the COR appropriately rejected. However, for contract 3, the COR did not identify all invoice errors. Of the 19 WRI labor invoices paid, 3 invoices included duplicate charges previously paid and 1 of those also included unsupported labor charges. There were 2 additional invoices from WRI that included time that was unsupported; 4 included rates that were higher than the contract allowed. As a result, for contract 3, the COR erroneously approved approximately \$28,000 in improper payments and questioned costs. See table 4, next page, for a summary of the erroneous invoice charges.

³³ Section 5(f)(2) of the Inspector General Act of 1978, as amended, defines *unsupported cost* as questioned by an OIG finding that, at the time of the audit, such cost is not supported by adequate documentation.

Table 4. Summary of Erroneous Invoice Charges

Invoice	Duplicate Charges	Unsupported Time	Rate Error	Questioned Costs
593-rev-1	X	X		\$ 8,555
504-rev-2	X			5,664
493-rev-3		X		4,142
635			X	2,366
632-rev-1		X	X	2,266
457-rev-1	X			2,172
669			X	1,660
611-rev-1			X	930
Total				\$27,755

Source: OIG analysis of documentary evidence obtained from NIST, NTIA, and WRI

In approving these expenses, the COR did not follow federal regulations requiring government contracting personnel to reject services not conforming to contract requirements.

Other Matters

Concerns Remain with Possible Lack of Competition and Conflicts of Interest While Awarding FirstNet Task Orders Under the Department's Established Blanket Purchase Agreements (BPAs)³⁴

The Census Bureau and NIST did not have sufficient contracting staff to support FirstNet procurement needs. As a result, the Department's Office of Acquisition Management (OAM) assumed the contracting support responsibilities and, in September 2013, established three BPAs, awarded to three companies with a total estimated value of \$67.2 million for 2 years of service. Although we found that OAM's awarding process, while establishing the BPA awards, (a) followed acquisition regulations, and (b) addressed the fair and open competition issues that WRI contract 3 had encountered, concerns remain with awarding task orders against the BPAs.

FirstNet asked that 30 incumbent SMEs from the WRI contract 3 be transitioned into the new BPAs. Even though OAM expressed the belief that this request was not unusual for a follow-on procurement, they raised a concern that the Department may appear to foster a

³⁴ *Use of Commercial Independent Risk Analysis Services Blanket Purchase Agreements (BPA)*, Memorandum for the Heads of Departments and Agencies, February 4, 2008. Office of Management and Budget, Executive Office of the President. "The General Services Administration (GSA), under the direction of OMB, has created a Government-wide vehicle for acquisition...The use of a BPA will reduce administrative costs to the Government by acquiring commercial items and services from GSA Multiple Award Schedule contracts...The BPAs do not obligate funds and the Government is obligated only to the extent that authorized task orders are issued under the BPA. There is no limit on the dollar value of task order purchases made under the BPA, and the period of performance...generally will not exceed five years."

noncompetitive environment because they were aware of the significant role the incumbent SMEs were having on FirstNet startup activities. As a result, OAM applied a tailored strategy to help assure long-term competitiveness by (1) awarding three BPAs, in which the vendors compete among themselves for the task orders to be awarded, and (2) limiting the past performance factor to the experience of the prime contractor, instead of incumbent SME previous work on contracts.

Additionally, during the course of our work, we found that—even though OGC was aware of a list of companies developed by NTIA that posed a potential conflict of interest for FirstNet Board members—such a list was never provided to OAM. As such, possible lack of full and open competition when awarding future FirstNet task orders associated with the BPAs—and contracting personnel not receiving information concerning potential conflicts of interest prior to awarding the task orders—remain a concern.

Subsequent to Discussions with OIG, FirstNet Took Steps to Address Concerns Over Board Members' Potential Conflicts of Interest and Ethics Issues

Finally, during the course of this audit, FirstNet's chief counsel briefed us on recent FirstNet efforts to develop and implement compliance procedures, including the hiring of an experienced compliance specialist. We recognize the challenges associated with forming a new entity—and find that the structure for ensuring coordination with the Department, as well as compliance with ethics, financial disclosure and conflicts of interest statutes, is still developing. We cannot make an assessment of its adequacy at this time.

Recommendations

We recommend that the

1. Secretary

Determine whether any of the financial disclosure noncompliance issues identified in our audit require additional administrative action.

2. General Counsel

Conduct a review of OGC internal controls pertaining to financial disclosure and conflict of interest at FirstNet, pursuant to the DAEO's responsibilities described in the CFR.³⁵

3. Chair of FirstNet

- (a) Send a memorandum to all FirstNet Board members and staff to remind them of their obligations under the Ethics in Government Act and corresponding regulations,

³⁵ The review should determine centralized supervisory responsibilities, resources, controls, and procedures sufficient to meet the intent of the Ethics in Government Act and corresponding regulations.

- including the submission of initial disclosure and final public filer termination reports, as well as the implementation of recusal procedures, as appropriate.
- (b) Provide the appropriate staff at the Office of General Counsel (OGC) routinely updated lists of entities representing potential conflicts of interest with FirstNet Board members and staff.
4. Department's Senior Procurement Official
- (a) Provide guidance to NIST contracting staff on correct procedures for (1) selecting contract types, (2) hiring consultants, (3) ensuring receipt of deliverables, and (4) outreach, training, and oversight effort to prevent occurrences of unauthorized commitments, according to appropriate federal regulations and contractual requirements.
 - (b) Provide sufficient resources and guidance to the Contracting Officer Representative (COR) assigned to FirstNet in order that the COR be able to perform adequate contract quality assurance activities.
 - (c) Provide guidance to FirstNet management to ensure that the COR designated for contracts has the appropriate technical expertise to administer the contract.
 - (d) Develop and implement policies and procedures to prevent FirstNet officials from managing contractor personnel as personal service contractors.
 - (e) Identify any active FirstNet contracts or task orders currently being administered as personal services contracts and take action to correct their administration.

Summary of Agency Response and OIG Comments

In responding to our draft report, the Department acknowledges OIG's findings and concurs with the recommendations. Also, the Department provides additional details relating to its management of financial disclosures and procurement activities—and notes where it took issue with OIG findings.

Overall, our findings confirm many of the ethics and procurement issues noted in the original complaint leading to our audit (see appendix B for background). Below, we comment on certain issues the Department raised within its response.

Financial disclosure findings

First, the Department's response asserts that it takes seriously the requirements of filing financial disclosure reports. However, it does not fully acknowledge the importance of internal controls that guide administration of the Ethics in Government Act. (See finding I for additional details on this criterion.)

The Department's response also describes the work OGC undertook to brief and counsel FirstNet Board members on ethics issues. Our audit report acknowledges the challenges inherent in creating a new entity—and notes that OGC informed us of the work it did to brief and counsel Board members prior to their first meeting. However, OGC was unable to produce adequate, ordered, and relevant documentation to verify that this work had taken place.

The response further delineates the effectiveness of OGC's identification of and counselling on potential conflicts of interest for the FirstNet Board. The Department attributes the exceptions that our report notes to the scale of the Department's financial disclosure programs and provides details on the particular attention that it had given to disclosures related to FirstNet Board members. Despite this level of attention, OGC was unable to provide documentation of its standard practices.

In addition, while the Department's response asserts that an ethics official would have access to the necessary information for a conflicts analysis, facts with respect to FirstNet indicate otherwise. For example, an ethics official took 8 months to correct one Board member's failure to disclose a significant financial interest in a conflicting entity. Separately, available documents show no systematic attention to potential conflicts of interest on the FirstNet Board—and we could not determine whether potential conflicts of interest were comprehensively addressed when Board meetings were held in closed session.

Procurement findings

The Department's response asserts that FirstNet relied on an unusual and compelling urgency exception to full and open competition rules in conducting its contracting activities. However,

as stated in finding IV. A, FirstNet failed to support its position within the sole source justification. In particular, FirstNet's written justification relied upon purported milestones that might be missed if there was a gap in consultant services; however we were unable to identify any such required milestones in the Act.

In addition, the Department's response asserts that our report does not identify an impermissible use of subcontractors and consultants; however, its response concerning the use of consultants is incomplete. As the Department acknowledges in its response, the Act requires FirstNet to select consultants, at a minimum, in "a fair, transparent, and objective manner."³⁶ Awarding contracts for WRI to identify and recruit consulting candidates, but then directing WRI to hire preselected individuals, does not seem to satisfy this standard. Also, the Department finds it permissible to direct a contractor to hire specific consultants prior to award; however, prior to award, there is no contractor. The consultants employed by WRI were independent contractors reporting directly to FirstNet Board members and employees.

With respect to contract monitoring, in its response the Department notes that it incorporated FAR 52.246-6 into both WRI contracts. Not mentioned in the Department's response are how it addressed provisions of FAR 4.8, related to quality assurance records in contract files, or CAM 1316.1, requiring contracting officers to ensure contract files contain documentation to support the decision to use time-and-material or labor-hour contracts—as well as a surveillance plan outlining how the government will monitor, control, and mitigate the impact of adverse contract performance. This CAM section further requires that surveillance plans provide reasonable assurance that efficient methods and effective cost controls are utilized; outline the roles and responsibilities of surveillance personnel; and demonstrate the skills and capacity of personnel to perform adequate reviews before payment is made. Further, the Department's sample COR appointment memorandum, CAM 1301.670, Appendix H, instructs CORs to document actions taken and decisions made, as well as maintain adequate records to sufficiently describe the performance of their duties during the life of a contract, including records of COR inspections and records of conversations with the contractor.

Documentation in contract files should be sufficient to constitute a complete history of the transaction for the purposes of providing a complete background as a basis for informed decisions at each step in the acquisition process, supporting all actions taken; providing information for reviews and investigations, and furnishing essential facts in the event of litigation or Congressional inquiry. Without appropriate surveillance documentation, FirstNet cannot provide reasonable assurance that it received fair value for the submitted work products with a cost of \$11 million.

The Department also responds that duplicate charges and unsupported time resulted in \$16,413 in overpayments. Although \$16,413 in duplicate charges and unsupported time have been recovered, the remaining \$11,342 noted in our report was incorrectly approved.

Finally, the Department's response points out that FirstNet's early lack of a full management team and support staff posed challenges in terms of the administration of the contracts. We

³⁶ See Pub. L. No. 112-96 § 6205(b)(1).

acknowledge these administrative challenges—but still assert that the findings in this report represent more serious systemic issues.

Appendix A: Objectives, Scope, and Methodology

The objectives of our audit were to assess whether the Department

- had adequate processes in place to ensure that FirstNet Board members properly filed financial disclosures and identified potential conflicts of interest and
- used the appropriate contract type, fairly awarded and appropriately administered FirstNet contracts, ensured services purchased under those contracts met industry standards, and were consistent with contract requirements.

To accomplish our audit objectives, we

- interviewed NIST, NTIA, and Census contracting officials, NTIA and FirstNet managers, OGC officials, and Workforce Resources, Inc., officials;
- reviewed timekeeping records to determine whether FirstNet Board members met the public financial disclosure requirements;
- reviewed confidential and public financial disclosure forms submitted by FirstNet Board members to determine whether all federal requirements were met;
- reviewed OGC documentation to determine whether ethics and financial disclosure processes were adequate;
- reviewed performance monitoring documentation to include contractor-generated monthly status reports, government-generated contractor performance reports, and contractor invoices and payments to evaluate the government's monitoring of contractor performance;
- determined what types of services were purchased under the selected contracts and purchase agreements; and
- assessed whether
 - the services purchased met contract requirements;
 - the Contracting Officer's Representative (COR) reviewed time and attendance documents, contractor invoices, and other necessary supporting documentation to ensure costs were allowable, reasonable, and allocable;
 - CORs monitored and tracked contract labor rates and ceiling amounts to ensure contract costs billed by the contractor did not exceed the negotiated contract amount; and
 - the Department had adequate processes in place to ensure that FirstNet Board members properly filed financial disclosures and identified potential conflicts of interest.

We reviewed the following laws, regulations, policies and documents:

- The Middle Class Tax Relief and Job Creation Act of 2012
- 5 CFR §§ 2634, 2635, and 2638
- The Ethics in Government Act of 1978
- *Public Financial Disclosure: A Reviewer's Reference*, second edition
- 5 USC § 3109, 18 USC § 208, and 41 USC § 253
- FAR subparts 6.3, 8.4, 12, 19, and 37
- The *Commerce Acquisition Manual* 1301, 1306, and 1316
- Memorandum from Civilian Agency Acquisition Council on Direct 8(a) Contracting
- SBA Government Contracting 101, PART I—Small Business Contracting Programs, A Guide for Small Business
- Workforce Resources, Inc., contracts SBI335-13-CN-0002 and SB 1335-13-CN-0020
- FunctionalIT contract GS-10F-0027S

We reviewed internal controls significant within the context of the audit objectives by interviewing officials at the Census Bureau, NIST, NTIA, and OGC, examining relevant policies and procedures, and reviewing documentation for evidence of internal controls. To satisfy our audit objectives, we did not rely on computer-processed data. Instead, we reviewed documentation submitted by contracting personnel at NIST, the Census Bureau, and NTIA, as well as contractor staff at Workforce Resources, Inc.; therefore, we did not test the reliability of information technology systems.

We performed our work in accordance with generally accepted government auditing standards. These standards require that we plan and perform our audit to obtain sufficient, appropriate evidence that provides 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.

We conducted our review from November 2013 through July 2014 under the authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13. We performed our work at the Department of Commerce headquarters in Washington, DC; NIST offices in Gaithersburg, Maryland; and the OIG regional offices in Atlanta and Denver.

Appendix B: Complaint Background

At the April 23, 2013 FirstNet Board of Directors meeting, a Board member presented a resolution raising various concerns, including (1) openness and transparency in decision making by the FirstNet Board, (2) Board members access to records, (3) the development of a plan for FirstNet's national public safety broadband network, and (4) issues related to ethics and procurement. In addition, the Board member met with the Inspector General in July 2013 to discuss his concerns.

In May 2013, the FirstNet Board established a Special Review Committee to examine the first three of these issues. In the public version of its report,³⁷ the Committee concluded that (1) the FirstNet Board has engaged in open and transparent decision making, (2) FirstNet did not withhold information from Board members, and (3) FirstNet is still developing its network plan with full consultation and outreach.

In October 2013, the Board chairman, based on conversations with the Inspector General, asked the Office of Inspector General to take over the inquiry into ethics and procurement.

³⁷ See FirstNet Special Review Committee, September 20, 2013. *Report on Openness and Transparency, Access to Information and Network Planning* [online]. www.ntia.doc.gov/other-publication/2013/firstnet-special-review-committee-report. The Special Review Committee notes that the public report does not include privileged communications and attorney work product, which are neither subject to disclosure nor available to the public—but are included in the Legal Counsel Report to the First Responder Network Authority (FirstNet) Board of Directors Special Review Committee, August 2013.

Appendix C: Contract Criteria

The following list provides background information to criteria concerning exceptions permitting a process other than full and open competition. The exceptions criteria are referred to in subfinding A within finding III of the report.

Circumstances permitting other than full and open competition (FAR 6.302):

- A. *Only one responsible source and no other supplies or services will satisfy agency requirements.* When the supplies or services required by the agency are available from only one responsible source, or—for the Department of Defense, NASA, and the Coast Guard—from only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements, full and open competition need not be provided for.
- B. *Unusual and compelling urgency.* When the agency's need for the supplies or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals, full and open competition need not be provided for.
- C. *Industrial mobilization; engineering, developmental, or research capability; or expert services.* Full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order to (a) maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization; (b) establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center; or (c) acquire the services of an expert or neutral person for any current or anticipated litigation or dispute.
- D. *International agreement.* Full and open competition need not be provided for when precluded by the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the acquisition of the supplies or services for such government.
- E. *Authorized or required by statute.* Full and open competition need not be provided for when (a) a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source; or (b) the agency's need is for a brand name commercial item for authorized resale.
- F. *National security.* Full and open competition need not be provided for when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.
- G. *Public interest.* Full and open competition need not be provided for when the agency head determines that it is not in the public interest in the particular acquisition concerned.

Appendix D: OIG-Reviewed Confidential Disclosure Filings

FirstNet Board, Inconsistencies in Confidential Disclosure Filings (Form 450), Post-OGC Review Period		
FirstNet Board Member	Agency Acceptance Without Filer Signature	No Date Stamp
A		X
B	X	X
C		X
D		X
E	X	
F	X	X
G	N/A	N/A
H		X
I		X
J	X	X
K		X
M		X

Source: OIG analysis of filer submissions to OGC
 Board members were randomly assigned letters. Analysis is of nonpermanent Board members and, in some cases, consolidates multiple filings. Board member L submitted Form 278 only.

Appendix E: OIG-Reviewed Public Financial Disclosure Filings

FirstNet Board, Inconsistent Administration of Public Financial Disclosure Submissions (Form 278), Post-OGC Review Period			
Board Member	Extensions		Form Timely Received by Department
	Request	Granted	
A	Yes	Yes	Yes
B	N/A	N/A	N/A
C	No	No	No
D	No	Yes ^a	No
E	Yes	Yes	Yes
F	N/A	N/A	N/A
G	N/A	N/A	N/A
H	Requested after submission deadline	Yes ^a	No
I	No	Yes ^a	No
J	Requested after submission deadline	Yes ^a	No
K	No	No	No
L	N/A	N/A	N/A
M	N/A	N/A	N/A

Source: OIG analysis of filer submissions to OGC

^a Extension granted, but contrary to federal regulations. Board members were subject to differing filing requirements, including deadlines, based on length or type of service. N/A means public disclosure requirement is not triggered, already fulfilled, or unknown. Analysis is of nonpermanent Board members in calendar year 2013. Since the Board's inception, one Board member completed his appointment and did not seek another term.

Appendix F: Potential Monetary Benefits

	Unsupported Costs
Finding IV, subfinding C	\$11,000,000 ^a

^a Includes \$27,755 of unsupported costs from finding IV, subfinding D

Appendix G: FirstNet Board

Board Member	Occupation	Term Expiration
Susan Swenson, Chair	Telecommunications/technology executive	August 2016
Samuel “Sam” Ginn (former Chair)	Telecommunications executive (retired)	August 2014
Barry Boniface	Private equity investor and telecommunications executive	August 2016
Tim Bryan	CEO, National Rural Telecommunications Cooperative	August 2015
Shaun Donovan	Director, Office of Management and Budget	<i>Ex-officio</i>
Charles “Chuck” Dowd	Assistant Chief, New York City Police Department	August 2014
F. Craig Farrill	Wireless telecommunications executive	August 2015
Paul Fitzgerald	Sheriff, Story County, Iowa	August 2014
Eric Holder	Attorney General of the United States	<i>Ex-officio</i>
Jeffrey Johnson	Fire Chief (retired); former Chair, State Interoperability Council, State of Oregon; CEO, Western Fire Chiefs Association	August 2016
Jeh Johnson	Secretary, Department of Homeland Security	<i>Ex-officio</i>
William Keever	Telecommunications executive (retired)	August 2013
Kevin McGinnis	Chief/CEO, North East Mobile Health Services	August 2016
Ed Reynolds	Telecommunications executive (retired)	August 2014
Teri Takai	Government information technology expert; former CIO, States of Michigan and California	August 2016
Wellington Webb	Founder, Webb Group International; former Mayor, Denver, CO	August 2015

Source: FirstNet

As of the completion of OIG field work, William Keever had completed his initial appointment and did not seek another term. Subsequent to the completion of OIG field work, Samuel Ginn vacated his position 2 months prior to the end of his term and F. Craig Farrill resigned.

The FirstNet authorizing legislation established a Board, to consist of the Secretary of Homeland Security, the Attorney General of the United States, and the Director of the Office of Management and Budget as permanent members.³⁸ In addition, the Secretary of Commerce appoints 12 individuals as follows:

- to include no fewer than 3 individuals to represent the collective interests of the states, localities, tribes, and territories;

³⁸ 47 USC § 1424(b)(1).

- to ensure geographic and regional representation of the United States in such appointments;
- to ensure rural and urban representation; and
- to include no fewer than 3 individuals who have served as public safety professionals.³⁹

Each of the 12 Board members appointed by the Secretary should possess at least one of the following areas of expertise:

- *public safety*: knowledge and experience in the use of federal, state, local, or tribal public safety or emergency response
- *technical*: technical fluency regarding broadband communications, including public safety communications
- *network*: knowledge and experience with building, deploying, and operating commercial telecommunications networks
- *financial*: knowledge and experience with financing and funding telecommunications networks⁴⁰

Further, the 12 Board members appointed by the Secretary must include at least one individual with technical expertise, one with network expertise, and one with financial expertise.⁴¹

³⁹ 47 USC § 1424(b)(2)(A).

⁴⁰ 47 USC § 1424(b)(2)(B)(i).

⁴¹ 47 USC § 1424(b)(2)(B)(ii).

Appendix H: Agency Response




UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

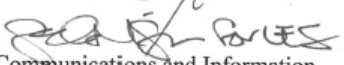
November 18, 2014


MEMORANDUM FOR: Todd J. Zinser, Inspector General
Department of Commerce

Andrew Katsaros
Principal Assistant Inspector General for Audit and Evaluation

Ann C. Eilers
Acting Assistant Inspector General for Administration

FROM: TJ Kennedy, Acting General Manager
First Responder Network Authority 

Lawrence E. Strickling 
Assistant Secretary for Communications and Information
National Telecommunications and Information Administration

Kelly R. Welsh, General Counsel 
Department of Commerce

SUBJECT: Comments on Draft Report Entitled, "*Audit of FirstNet Ethics and Procurement-Related Matters: To Mitigate Compliance Risk, the Department Must Strengthen Internal Controls and Provide Adequate Guidance*"

Thank you for sharing your draft of the above-captioned audit report, and in response the Department of Commerce submits these comments.

As explained in our attached response, the Department concurs with the recommendations in the draft report. The Department has taken and will take a number of steps to respond to these helpful recommendations.

Our attached response provides additional context regarding the Department's extensive ethics activities surrounding the FirstNet Board and the valuable work product FirstNet received under its early contracts. The work product discussed in the response has been critical to the rapid establishment of the organization.

We appreciate this opportunity to comment on the draft report.

Attachment

cc: Bruce H. Andrews, Deputy Secretary
Ellen Herbst, Chief Financial Officer and Assistant Secretary for Administration
Barry Berkowitz, Senior Procurement Executive and Director of Acquisition
Management, Office of Acquisition Management, Department of Commerce

SUMMARY

The First Responder Network Authority (“FirstNet”) is a start-up Federal entity with a critical mission: to provide a dedicated, reliable nationwide wireless network with advanced data communications capabilities to the public safety community. The goal is to plan, build, and operate the type of network that the public safety community lacked on September 11, 2001. Recognizing that this ambitious project would require both public-sector and private-sector expertise, Congress established a unique governance structure for FirstNet and mandated that the FirstNet Board include both public-sector and private-sector members.¹ In addition, Congress set an aggressive plan for the completion of the network.

During FirstNet’s early days, its 15-member Board set to work on creating an organizational structure, researching the feasibility of various technical and business options, and developing a strategy to get FirstNet off the ground. The fact that private-sector experts were willing to serve in these important roles has been crucial to FirstNet’s mission, but also created a need to consider carefully potential conflicts of interest. As described below, the Department of Commerce (“Department”) took myriad steps to ensure that the FirstNet Board members had appropriately identified and addressed potential conflicts of interest. In addition, the Department took a number of steps to ensure that FirstNet’s first contracts were awarded appropriately and resulted in work product that advanced FirstNet’s mission.

As discussed below, the Department appreciates the effort reflected in the draft audit report (“Report”) produced by the Office of Inspector General (“OIG”). The Report, which focuses on ethics and contracting issues arising from FirstNet’s early operations, makes a number of recommendations, and the Department concurs with those recommendations. With respect to both ethics and contracting, however, it is important that the record reflect the Department’s full efforts. Thus, to complete and clarify the record, the Department emphasizes the following:

First, the Department has a robust ethics program that went beyond Federal requirements by working closely with FirstNet Board members to counsel them regarding their employment and financial interests even before they entered Government service. Although administrative requirements may not have been fulfilled in several instances with respect to certain disclosure reports, as far as we are aware, Board members made the material disclosures necessary to identify and address potential conflicts.

Second, the Report does not identify any violations of conflict of interest laws or circumstances that actually affected FirstNet decision-making. As noted above, the Board members—with deep private-sector experience in the telecommunications industry—were also likely to have interests in the telecommunications industry that could raise potential conflicts. These Board members sought legal and ethics advice, and they sacrificed in a number of ways, including financially, to serve FirstNet’s public safety goals. While certain Board members did appear to late-file certain public disclosure reports, this should be considered in the context of the other significant efforts that were dedicated to identifying and addressing potential conflicts.

¹ Congress established FirstNet in February 2012 as an independent authority within the National Telecommunications and Information Administration (“NTIA”), which is part of the Department of Commerce.

Third, the early FirstNet contracts resulted in valuable work product that has been critical to the rapid establishment of the organization. FirstNet sought and received first-rate feasibility research, technical analysis, strategic planning, and outreach services from highly specialized consultants, whose work product has laid the groundwork for executing FirstNet's mission.

Fourth, contrary to the suggestions in the Report, FirstNet used sole-source contracting under an appropriate statutory exception. In addition, there is no general prohibition on directing a contractor to engage with specific subcontractors or consultants, either as a condition of award or during contract performance. It is not unusual for a contractor to consult with the Government's program officials to identify potential resources to provide highly specialized services.

To be clear, this response acknowledges that administrative errors were made along the way, and the Department takes those mistakes seriously. The Department has taken and will take steps to address errors such as date stamps and signatures missing from several confidential disclosure reports and approximately \$16,000 in overpayments to contractors, which were contrary to standard Department procedures and practices.² These issues occurred during the earliest stages of FirstNet's existence, and they will not affect the significant procurements and other program activities that are now under way.

Today, FirstNet is entering the next phase of its development, which will include significant and complex procurements necessary to deploy the network. The maturing organization now has over 80 employees, including an experienced management team and dedicated legal counsel. FirstNet is focused on enhancing its compliance and risk assessment programs to help ensure that it will meet its future operational challenges as it grows.

Since FirstNet's inception, the Department, NTIA, and FirstNet have strived to stand up and operate this start-up organization in a compliant and first-rate manner. We appreciate the opportunity to comment on the Report, and we offer the following observations regarding these matters for consideration.

I. The Department's Ethics Program Effectively Identifies and Counsels FirstNet Board Members on Potential Conflicts of Interest.

Executive Branch agencies operate two programs to identify and help employees avoid conflicts of interest: a financial disclosure report program and an ethics training program. The former provides for the collection and review by an ethics official of financial disclosure reports from designated employees. At the Department, human resources offices identify employees who meet the filing requirements and notify them to file the appropriate report with the Ethics Law and Program Division in the Department's Office of the General Counsel ("OGC"). OGC ethics officials review the report to help ensure it has the requested information, and they use the information to advise the filer about potential conflicts of interests based on the employee's specific duties. The reviewer counsels the filer on options for addressing potential limitations, including divestiture and disqualification. Agencies, including the Department, also provide

² The Department has recovered these overpayments.

ethics training for all new employees and for filers of financial disclosure reports annually thereafter.

The goals of ethics programs are to help employees understand the conflict of interest laws and *their* responsibility to comply with these rules.³ Federal regulations require certain employees to file Confidential Financial Disclosure Reports (OGE Form 450s) within 30 days after appointment.⁴ These forms “assist an agency in administering its ethics program and counseling its employees.”⁵ Once the form is submitted, an ethics official reviews it within 60 days of filing. In addition, employees receive ethics training no later than 90 days after appointment. Accordingly, the Department’s ethics program is designed to assist employees with filing complete, accurate, and timely financial disclosure reports so OGC ethics officials can properly advise them on the potential conflicts of interest they might encounter and what actions would need to be taken to address them.

From the beginning of FirstNet, Department officials recognized the unique challenges it presented. Congress provided for the appointment of FirstNet Board members from the stakeholder community, including groups with professional expertise and experience in telecommunications, finance, and public safety. Given this legislative mandate, Board members were likely to have financial and employment interests that could potentially pose a conflict under ethics rules.⁶ Both OGC and NTIA made it a priority to proactively address potential conflicts. Before the FirstNet Board was operational, OGC and NTIA instituted robust procedures, many of which exceeded regulatory requirements, to help avoid conflicts.

For example, OGC and NTIA assisted FirstNet Board members in providing confidential financial disclosure reports to OGC ethics officials *before* appointment, which is not a Federal requirement. This procedure allowed ethics officials to begin counseling FirstNet Board members at the earliest opportunity. Board members then worked closely with OGC to make divestitures as warranted and to limit their non-Federal activities to narrow the scope of disqualifications in some cases. Among others, the Department adapted the following procedures for the original FirstNet Board to help ensure that ethics obligations were understood and potential conflicts were identified and addressed:

- (1) OGC and NTIA collect draft confidential financial disclosure reports and information on each prospective Board member’s financial and employment interests before appointment.
- (2) Ethics officials obtain more detailed information on the value of holdings and on non-Federal employment arrangements in order to counsel Board members on potential divestiture or disqualification.

³ See 5 C.F.R. §§ 2634.901(a), 2638.701.

⁴ See 5 C.F.R. § 2634.903(b). Filing extensions are available to new filers.

⁵ 5 C.F.R. § 2634.901(a).

⁶ FirstNet Board members serve as part-time special Government employees, which means they are subject to the same conflict of interest statute and ethics regulations as full-time employees.

- (3) Throughout the appointment process and thereafter, Board members are counseled individually on conflicts rules in light of the Board member's specific investments and non-Federal activities.
- (4) After appointment, OGC ethics officials provide additional briefings on applicable ethics laws and disqualification requirements to Board members.
- (5) OGC ethics officials develop and distribute specialized ethics training materials to Board members that summarize applicable ethics rules and highlight provisions of particular relevance to Board members.
- (6) NTIA and FirstNet develop and update a list of companies likely to have matters pending before FirstNet in the future to help Board members identify investments that might trigger a disqualification. OGC ethics officials use this list to review financial disclosure reports and counsel Board members.
- (7) OGC ethics officials review the agendas of FirstNet Board meetings to identify and counsel NTIA and FirstNet officials on issues from which individual Board members might need to recuse themselves.
- (8) On an ongoing basis, OGC, NTIA, and FirstNet officials review and consider ways to improve procedures.
- (9) FirstNet Board members have access to and receive individual guidance and counseling from ethics officials on a variety of ethics issues, including conflicts.

To our knowledge, these procedures were effective. As these procedures show, OGC ethics officials guided FirstNet Board members through the ethics process, starting before appointment—from accepting draft reports, obtaining extra information, customizing training materials, and providing multiple counseling sessions. These procedures and the expenditure of additional human resources were appropriate in light of the fact that FirstNet Board members serve on a part-time basis while remaining active in the private sector.

II. The Report Does Not Identify Violations of Ethics Laws or an Effect on FirstNet Decision-Making.

The Report does not identify undisclosed potential conflicts of interest by FirstNet Board members, actual conflict of interest violations, or circumstances that affected FirstNet decision-making or its mission.⁷

To be sure, the Department made some administrative errors. The Report has identified some problems with regard to the collection and review of several disclosure reports. The

⁷ We understand that OIG is conducting other reviews with respect to FirstNet, and the Department has not been privy to all of the facts known to OIG. The Department stands ready to discuss and respond to information OIG wishes to share.

Department takes the administrative requirements of filing disclosure reports seriously.⁸ However, any organization that administers programs involving thousands of individuals filing reports will make mistakes. The Report identifies administrative errors related to missing date stamps and signatures on certain confidential disclosure reports. These errors occurred because mistakes were made in following standard practices. However, due in part to OGC's proactive counseling of FirstNet Board members described above, these mistakes did not affect the review of the reports to identify potential conflicts of interest or the guidance provided to Board members on disqualification requirements and other options for avoiding such conflicts.

The Report also notes some other errors with the calculation of days Board members worked and when they became subject to a public financial disclosure system. These issues have been corrected. Additionally, the Report notes that some Board members' Public Financial Disclosure Reports (OGE Form 278s) were submitted after the due dates. However, OGC already had provided guidance to those members based on the confidential financial disclosure reports they had filed previously.⁹ Both the public and confidential reports require the disclosure of assets.¹⁰ Thus, whether looking at a public or confidential report, an ethics official would have access to the necessary information for a conflicts analysis and, therefore, would provide such advice regardless of the type of report.

Moreover, the filing of these subsequent OGE Form 278 reports by some Board members was required in the same year that they filed a confidential report only because they served more than 60 days in a calendar year. This unusual and unanticipated situation may have played a role in the delinquency of some reports, but the delay did not appear to impact Board members' ability to comply with the conflict of interest rules. The Report raises concerns with Board members continuing to serve while "not in compliance" with financial disclosure requirements. But there is no requirement that employees discontinue performing their Government duties if they miss a disclosure report deadline.¹¹ Filing extensions are routinely granted in the Department and throughout the Government.¹²

The original FirstNet Board members went to great lengths, including making sacrifices of time away from full-time jobs and of financial investments through divestiture, to provide their insight and expertise to a start-up Federal entity with a crucial mission. The interplay of the

⁸ OGC utilizes an electronic document management system for the ethics program. This system uses metadata for storage and retrieval of documents including advisory opinions, guidance, and financial disclosure report data for over 10,400 filers at the Department. OGC's ethics program filing system is effective and complies with applicable recordkeeping laws.

⁹ For example, the Report notes the initial absence of a reference to a Board member's non-Federal employer on an OGE Form 278. This temporary omission did not affect OGC's identification of potential conflicts of interest. That Board member's previously filed OGE Form 450 disclosed this interest and the form documents that an ethics official advised the Board member not to participate in matters that would affect the particular outside employment interest. In addition, the existence of the non-Federal employment was public knowledge.

¹⁰ The public report requires an indication of the value range of an asset, which the confidential report does not.

¹¹ It is not uncommon for Federal employees to file late reports. The sanction for a delinquent public financial disclosure report is the assessment of a \$200 late filing fee for reports that are more than 30 days overdue, to be assessed after the report is filed. See Ethics in Government Act, § 104, 5 C.F.R. App. 4. Employees are held to the same standard with regard to complying with ethics requirements regardless of when a report is received.

¹² Initial requests for extensions may be made verbally or in writing. See 5 C.F.R. §§ 2634.201(f), 2634.903(b).

confidential and public financial disclosure systems for part-time employees is far from intuitive. Late-filed OGE Form 278s by Board members with limited Government experience and greater than anticipated workloads should be viewed within this broader context.

All FirstNet Board members filed timely OGE Form 450s upon or prior to appointment, and they received appropriate counseling on the application of the Federal conflicts of interest laws to their service. Although there were some administrative mistakes that will be addressed, and several public disclosure reports were filed late, the Department fulfilled the goals of the ethics program by helping Board members understand their responsibility to comply with ethics rules.¹³

III. The Early Contracts Were Valuable for FirstNet's Mission and Were Awarded and Performed in Accordance with Applicable Laws and Regulations.

FirstNet conducted its contracting activities in accordance with Federal procurement laws and regulations, which are designed to help ensure a fair and transparent process.

OIG's Report focuses on two early FirstNet contracts awarded to Workforce Resources, Inc. in November 2012 and March 2013 ("WRI1" and "WRI2," respectively). The work performed under these contracts provided FirstNet with a valuable strategic foundation that it continues to leverage today. Among other things, FirstNet received specialized expertise and analysis regarding technical and business strategy, market research, and state, local, territorial, and tribal outreach. The contractor provided extensive technical research and critical analyses within a short period of time to help FirstNet get off the ground. FirstNet also received enormous amounts of data and information for planning purposes. These initial efforts resulted in valuable inputs for FirstNet's start-up and operational plans and its program roadmap approved by the Board in March 2014.

For example, the WRI consultants worked on developing FirstNet's preliminary network architecture, which incorporated technical work from core network, radio access network, LTE standards, and device teams. This work informed and was largely responsible for FirstNet's twelve Requests for Information in 2013, which sought feedback from industry on matters including network partnering, radio access network, core network, devices, and mobile applications capabilities. Today, with some refinement, this work product continues to serve FirstNet's technical team as it crafts the next steps in FirstNet's strategic roadmap.

In addition, the WRI consultants provided business planning and strategy development, including (i) an initial pricing and revenue model, (ii) evaluation of partnering strategies, (iii) time to market analysis, (iv) evaluation of potential market size, (v) summary of financial scenarios, (vi) assumptions on capital and operating expenses, (vii) analysis on spectrum sharing, and (viii) a proposed organizational plan for FirstNet. These financial modeling data were used to run and analyze deployment scenarios, including detailed network capital and operating costs.

¹³ The Report notes that there are few documents addressing recusals in the early materials. The initial activities of the FirstNet Board primarily involved organizational set-up of FirstNet. Internal FirstNet matters that do not involve private-sector companies generally would not have a direct and predictable effect on such companies, and thus they would not require recusal under 18 U.S.C. § 208(a). Each Board member received individual counseling on recusal.

WRI consultants also supported FirstNet's outreach efforts to regional, state, local, and industry stakeholders.

This information has been shared with OIG, as has the relevance of the work product to FirstNet's planning and mission. The Report raises concerns with contract surveillance, the way work product was presented to FirstNet, and documentation related to these processes, which are discussed below. It is important to also note, however, that the actual work product shows FirstNet received substantial value for the funding. The initial work performed by the WRI contractors was instrumental for FirstNet's rapid early development.

A. FirstNet Monitored Performance of the Early Contracts.

The Report questions the adequacy of FirstNet's monitoring and oversight of the WRI contracts. These were time-and-materials ("T&M") type contracts with combined not-to-exceed amounts totaling approximately \$11 million. Under a T&M contract, the Government pays the contractor an hourly rate for all labor performed that meets the qualifications of a labor category specified in the contract, up to the contract ceiling. Payment is not dependent on the delivery of work product or completion of a particular task. In light of the difficulty of predicting what precisely FirstNet would require during its start-up phase, this type of contract provided the organization with needed flexibility to receive assistance with its start-up efforts without specifying deliverables at the procurement stage. FirstNet conducted surveillance of these contracts to help ensure the contractor's performance met the contracts' requirements and provided value.

Federal Acquisition Regulation ("FAR") Part 46, Quality Assurance, provides for (1) contracts to include inspection and other quality requirements necessary to protect the Government's interest; and (2) quality assurance to be conducted before acceptance by or under the direction of Government personnel.¹⁴ In addition, FAR Part 42 provides that the "Government will maintain surveillance of contractor performance as necessary to protect its interests."¹⁵ The FAR recognizes that the type of quality requirements needed depends on the particular acquisition. Both WRI1 and WRI2 incorporated FAR 52.246-6, Inspection – Time-and-Material and Labor Hour, which FAR 46.306 prescribes for T&M type contracts. *See* WRI1, § E.1; WRI2, § E.2. The clause requires the contractor to maintain an inspection system covering the services under the contract and gives the Government the right to inspect all services performed under the contract. In addition, both contracts notified WRI that the Contracting Officer Representative ("COR") would review its work product for acceptance and had the authority to delegate that responsibility to other Government employees with appropriate expertise. *See* WRI1, § F.2; WRI2, § E.1.

FirstNet monitored WRI's performance consistent with the terms of the contracts. Among other things, the COR used FirstNet officials with expertise and knowledge of the work being performed to conduct this surveillance. Using the authority provided for under the contracts, the COR delegated certain review responsibilities to these officials. For instance, FirstNet had a FirstNet Board member with technical and planning expertise serve in this role for WRI1. As

¹⁴ *See* FAR 46.102.

¹⁵ *See* FAR 42.

the start-up entity built out its organizational structure with assigned roles, FirstNet used several officials for different categories of work under WRI2, such as technical planning, business planning, outreach, and market research to verify the time-and-activity reports submitted each month. In addition, WRI designated certain program managers to serve as key personnel, including a Program Manager and Client Manager under WRI1. These WRI subcontractors were the primary contacts for the FirstNet officials who reviewed work product, and they worked with the other WRI consultants and managed the presentation of the work product on behalf of WRI. It is not the Government's responsibility to manage information flow between a contractor and its subcontractors. Throughout this process, the COR was in contact with FirstNet officials on various aspects of the contracts, including monthly documentation of time and materials and any performance issues.¹⁶

To be sure, these early FirstNet contracts posed challenges for the Department from a contract surveillance standpoint, in part because FirstNet was a fledgling organization without a full management team or support staff in place at that time, in part due to the complexity of its needs, and in part due to the flexible nature of T&M contracts. In that regard, the Department appreciates the Report's emphasis on the increased importance of Government surveillance with respect to T&M contracts.¹⁷ For example, T&M contracts often use a formal, documented surveillance plan.¹⁸ The Department will review its administration of these types of contracts going forward to help ensure that appropriate contract quality requirements are implemented and documented properly. Despite these challenges and the need for better documentation, as described above, the Department's contract oversight practices for these early FirstNet contracts helped ensure that FirstNet received value proportionate to the funding.

B. The Department Appropriately Relied on an Unusual and Compelling Urgency Exception to Full and Open Competition Rules.

In addition, the Report questions whether the award of WRI2 complied with certain competition requirements. As described below, FirstNet properly awarded WRI2 as a sole-source contract under a statutory exception to full and open competition.

With respect to WRI2, FirstNet followed the FAR, which satisfies its statutory requirements for retaining consultants.¹⁹ The FAR provides a statement of guiding principles for the Federal Acquisition System, which includes conducting business "with integrity, fairness,

¹⁶ The Report also questions whether FirstNet received the monthly status reports specified by WRI2 to include a summary of accomplishments, overall status of tasks, and relevant programmatic and financial information as specified by the COR. Under WRI2, the contractor combined timesheets with the supporting task information for each individual consultant. The contractor then submitted a single, extensive invoice containing time-and-activity reports to the COR each month which summarized the data. FirstNet received the material status information required under the contract through these detailed monthly invoices, in addition to the work product itself.

¹⁷ See FAR Subpart 37.5; CAM 1316.1; FAR 16.601(c)(1); DAO 208-10.

¹⁸ See CAM 1316.1.

¹⁹ See Section 6205(b) of The Middle Class Tax Relief and Job Creation Act of 2012, providing for the selection of consultants or experts in a "fair, transparent, and objective manner." Section 6206(b)(1)(B) of the Act provides a separate "open, transparent, and competitive" standard with respect to requests for proposals. FirstNet is currently seeking public comment on the appropriate interpretation of these standards, including the comparison of the "fair and objective" standard versus the "open and competitive" standard.

and openness.” FAR 1.102(b)(3). The Competition in Contracting Act (“CICA”), 41 U.S.C. § 3301 *et seq.*, further provides, with certain limited exceptions, that contracting officers promote and provide for full and open competition in soliciting offers and awarding Government contracts. CICA permits an exception to competitive procedures when “the executive agency’s need for the property or services is of such an unusual and compelling urgency that the Federal Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals.” 41 U.S.C. § 3304(a)(2). FAR 6.302-2, which implements section 3304(a)(2), further provides that contracts awarded using this authority be supported by a written justification.

The NIST Contracting Officer awarded WRI2 in March 2013, based on a written justification for other than full and open competition (“JOFOC”) citing the “unusual and compelling urgency” exception. The JOFOC explained that FirstNet’s need for expert consultation services was urgent and that an interruption in service would be “detrimental to the FirstNet program.” The JOFOC explained that WRI had the “requisite knowledge and expertise to continue services at the required levels,” and that its existing subcontracts with subject matter experts critical to FirstNet’s mission in the areas of wireless telecommunications and start-up activities would permit work to continue uninterrupted. The JOFOC further explained that any gap in services would “set the program back six months” and that the cost “would be significantly high as the FirstNet program has mission essential milestone dates that have to be executed on time to meet the implementation criteria established” under the Act.

An agency awarding a sole-source contract must provide “a coherent and reasonable explanation of its exercise of discretion.”²⁰ The reasonableness of the agency’s decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the JOFOC.²¹ An agency need not cite to a statutorily mandated deadline or acquisition in order to articulate a sufficient basis for an exception to full and open competition. Under the circumstances, the WRI2 contract was awarded appropriately because the JOFOC provided a coherent and reasonable explanation of FirstNet’s exercise of discretion to continue critical start-up work uninterrupted and to avoid a detrimental programmatic delay.

C. The Report Does Not Identify an Impermissible Use of Subcontractors and Consultants.

The Report also raises concerns regarding the identification of subject matter experts to WRI. However, there is no general prohibition on directing a contractor to engage with specific subcontractors or consultants, either as a condition of award or during contract performance. For example, an agency may require contractors to use directed-source subcontractors where necessary to satisfy the needs of the agency.²² Where the Government requires highly

²⁰ *Cherokee Nation Technologies, LLC v. United States*, 116 Fed. Cl. 636, 640 (2014) (citing *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1085-86 (Fed. Cir. 2001)).

²¹ See *Camden Shipping Corp.*, B-406171, B-406323, 2012 CPD ¶ 76.

²² See *Valentec Systems, Inc.*, B-270880, 96-1 CPD ¶ 231.

specialized services, it is not unusual for a contractor to consult with the Government's program officials to identify potential resources to provide those services.²³

The Report also questions whether the WRI contracts were administered as personal services contracts. The policy underlying the general prohibition against personal services contracting is, in part, to preserve the use of competitive appointment procurements required by the civil service laws. Pursuant to FAR 37.104, a personal services contract is "characterized by the employer-employee relationship it creates between the Government and the contractor's personnel," when, "as a result of the contract's terms or the manner of its administration during performance, contractor personnel are subject to relatively continuous supervision and control of a Government office or employee."

Although FirstNet's early lack of a full management team and support staff posed challenges in terms of the administration of the contracts, WRI1 and WRI2 were not personal services contracts. WRI's subcontractors and consultants generally worked independently while providing temporary services specific to FirstNet's start-up phase; they were not supervised in a manner that would create an employer-employee relationship.

D. The Department Acknowledges and Has Recovered \$16,413 in Overpayments.

The Report questions \$27,755 in costs from the invoices listed below due to invoice errors. The Department acknowledges that duplicate charges and unsupported time resulted in \$16,413 in overpayments, which have been recovered.

Invoice	Costs	Response
593-rev-1	\$8,555	The Department has recovered \$8,555 in unsupported time and duplicate charges.
504-rev-2	\$5,665	The Department has recovered \$5,665 in duplicate charges.
493-rev-3	\$4,142	WRI provided the services and was paid the agreed-upon rates.
635	\$2,366	WRI provided the services and was paid the agreed-upon rates.
632-rev-1	\$2,266	The Department has recovered \$21 in unsupported time. With respect to the remainder, WRI provided the services and was paid the agreed-upon rates.
457	\$2,172	The Department has recovered \$2,172 in duplicate charges.
669	\$1,660	WRI provided the services and was paid the agreed-upon rates.
611-rev-1	\$930	WRI provided the services and was paid the agreed-upon rates.
Total	\$27,755	\$16,413

IV. The Current Blanket Purchase Agreements Provide for Robust Competition and Properly Consider Organizational Conflicts of Interest.

Today, FirstNet's Blanket Purchase Agreements ("BPAs") provide competition at three levels in the contracting process: the BPA award stage, the BPA order stage, and the BPA

²³ In fact, WRI2 contemplated significant involvement by FirstNet in the selection of subject matter experts with highly specialized skills sets needed to support FirstNet's mission.

subcontractor and consultant identification stage. In the summer of 2013, on behalf of FirstNet, Commerce Acquisition Solutions (“CAS”) issued a competitive solicitation requesting quotations from service-disabled, veteran-owned small businesses with GSA Mission Oriented Business Integrated Services (“MOBIS”) contracts to establish multiple BPAs for professional support services. To balance the benefits of a carryover workforce with a desire to maximize competition, CAS crafted an acquisition strategy that emphasized the prime contractor under the past performance evaluation factor to help ensure that the offerors could not rely solely on the relevant experience of previous contractors’ subcontractors and consultants.

In September 2013, the CAS Bureau Procurement Official and Contracting Officer (“CO”) awarded three two-year BPAs to three businesses against their GSA MOBIS contracts. The BPA Statement of Work requires the contractors to “provide professional services using highly-skilled wireless and public safety trusted advisors and contractors” in five areas: (1) Technical Professional Services; (2) Business Professional Services; (3) User Advocacy Services; (4) User Operations Services; and (5) Information Technology Services.

Each of the three BPAs set forth labor categories and a fixed hourly rate for each. The BPAs did not obligate any funds; they notified the contractors that the government estimated that each of them would be awarded \$11.2 million annually if FirstNet issued an equal amount of orders to each. In accordance with FAR 8.405-3(c)(2)(ii), which requires the agency to provide each BPA holder a fair opportunity to compete for each order over \$3,000, the BPAs further notified the contractors that subsequent orders would be competed among them and the amount of task orders awarded to each may vary greatly. Section C set forth competitive procedures for any order above \$3,000 that “FirstNet anticipates will create a more competitive environment and fair opportunity.” To help ensure robust competition among qualified subcontractors and consultants at the BPA order stage, the CO notified the BPA holders that they would be required to propose highly qualified alternates whenever they proposed subcontractors and consultants who had worked on previous FirstNet contracts.

FirstNet also appropriately considers organizational conflicts of interest in the administration of the BPAs. The BPAs take a comprehensive approach to addressing organizational conflicts of interest that may exist as a result of the contractors’ or their subcontractors’ previous work and those that may arise as a result of the contractors’ or their subcontractors’ work under the BPA. To address the previous work, the BPAs include Commerce Acquisition Regulation (“CAR”) 1352.209-74, Organizational Conflict of Interest (“OCI”), the purpose of which is to help ensure that the contractor and its subcontractors are not biased as a result of any financial, contractual, organizational, or other interests, which relate to the work under the contract and do not obtain an unfair competitive advantage over other parties by virtue of their performance of the contract. The OCI clause places the onus on the contractor and its subcontractors to represent at the time of contract award that there are no facts that would give rise to an OCI and that they have disclosed all relevant information regarding any actual or potential OCI. Throughout the life of the contract, the contractor must immediately disclose any potential or actual OCIs or the existence of any facts that may raise doubt regarding the contractor’s impartiality because of the appearance or existence of bias or an unfair competitive advantage. The contractor must further describe the actions it has taken or proposes to take in order to avoid, neutralize, or mitigate any resulting conflict of interest.

To address future work, the BPAs explicitly informed the contractors they would be prohibited by a conflict of interest from participating in future FirstNet acquisitions for the “installation, implementation, and/or operations and maintenance of the FirstNet network.” Further, the BPAs included CAR 1352.209-71, Limitation on Future Contracting, which places restrictions and provides definitions to “prevent conflict roles, which may bias the contractor’s judgment or objectivity, or to preclude the contractor from obtaining an unfair competition advantage in concurrent or future acquisitions.” The clause required that its restrictions be included in all of the contractors’ subcontracts, teaming arrangements, and other agreements. Accordingly, FirstNet’s BPAs affirm open competition principles and include strong controls to help address potential conflicts of interest posed by contractors.

COMMENTS ON DRAFT RECOMMENDATIONS

1. With Regard to the Draft Recommendation for the Secretary:

We concur with this recommendation. We are not aware of facts warranting additional administrative action.

2. With Regard to the Draft Recommendation for the General Counsel:

We concur with this recommendation. OGC regularly conducts such internal reviews.

3. With Regard to the Draft Recommendations for the Chair of FirstNet:

(a) Memorandum to FirstNet Board Members and Staff

We concur with this recommendation. FirstNet has implemented a process similar to that recommended.

(b) Lists of Entities Representing Potential Conflicts of Interest

We concur with this recommendation. OGC and FirstNet initiated this procedure and will continue to use it.

4. With Regard to the Draft Recommendations for the Department’s Senior Procurement Official:

The Department concurs with each of the recommendations as described below. In accordance with Department Organizational Order 20-26, there are Department-wide acquisition management strategic plans, policies, regulations, procedures, and guidance to help ensure that the Department’s procurement offices are effectively and efficiently managing the procurement process. Pursuant to Department Administrative Order 208-2, Bureau Procurement Officials are responsible for carrying out the day-to-day functions of managing the contracting activity.

(a) **Recommended Guidance to NIST**

1. Selecting Contract Types

We concur with this recommendation. CAM 1316.1, *Selecting Contract Types*, provides policy and guidance for the selection of contract types. It focuses on the effective use and management of contracts using “high-risk contracting authorities” such as noncompetitive contracts, single-offer contracts, cost-reimbursement contracts, T&M contracts, labor-hour contracts, incentive contracts, and indefinite-delivery contracts. It applies to all acquisitions within the Department and was updated in July 2014.

2. Hiring Consultants

We concur with this recommendation. DAO 208-10, *Management of Contract Services*, prescribes the policy and responsibilities for management of services contracts, including advisory and assistance contracts. Its purpose is to help ensure that (1) adequate procedures are in place to monitor contracting services; (2) services being performed are not inherently governmental; (3) services are essential to the Department’s mission; and (4) appropriate procurement policies emphasizing competition are observed. NIST has implemented further guidance in Standard Operating Procedure NIST-02-12, *Inherently Governmental Functions*, and NIST Form 1082, *Certification of Proposed Acquisition for Services*.

3. Ensuring Receipt of Deliverables

We concur with this recommendation. Section 5 of CAM 1316.1, *Selecting Contract Types*, focuses on T&M and labor-hour contracts. It advises contracting officers to ensure requirements are well defined with a clear vision of the desired end product with measurable milestones and deliverables, to designate an appropriately certified COR prior to award and ensure the COR has the expertise to review invoices, and to ensure the acquisition team is well trained in the use of T&M contracts. Similarly, DAO 208-10, *Management of Contract Services*, emphasizes the need to craft a statement of work that is sufficiently definitive, specifying a contract deliverable or requiring progress reporting on contractor performance.

4. Ratification of Unauthorized Commitments

We concur with this recommendation. CAM 1301.602, *Ratification of Unauthorized Commitments*, sets forth requirements to implement measures to avoid unauthorized procurement actions and prescribe the ratification process. Pursuant to Section 1.5, the Senior Procurement Executive is responsible for establishment of policy supporting the avoidance of unauthorized commitments and the Bureau Procurement Officials are responsible for implementation of preventive measures. It applies to all operating units within the Department and was updated in July 2014.

(b) Recommended Resources and Guidance to COR Assigned to FirstNet

We concur with this recommendation. CAM 1301.670, Contracting Officer Representative Certification Program, provides the framework to establish procedures for implementation of the Federal Acquisition Certification ("FAC") program for CORs. The FAC-COR certification program applies to all individuals with delegated COR responsibilities for Department contracts and was updated in January 2012. The program's training requirements address contract quality assurance activities. Additionally, CAM 1316.1, Selecting Contract Types, includes policies for quality assurance plans for T&M and other high-risk contract types.

(c) Recommended Guidance to FirstNet Management

We concur with this recommendation. CAM 1301.670, Contracting Officer Representative Certification Program, addresses the requirement for CORs to possess the appropriate level of technical expertise. Section 3.1 requires program officials to nominate COR candidates who are technically competent in the field related to the specific acquisition.

(d) Recommended Guidance Regarding Personal Services Contracts

We concur with this recommendation. DAO 208-10, Management of Contract Services, prescribes the policy and responsibilities for management of services contracts, including advisory and assistance contracts. OAM is working on further guidance regarding the administration of contracts to help ensure they are not treated as personal services contracts.

(e) Request for Information Regarding Active FirstNet Contracts

We concur with this recommendation. We are not aware of active FirstNet contracts or task orders that are being administered as personal services contracts.