



June 1, 2010

TO: William P. McNally
Assistant Administrator for Procurement

Dudley R. Cannon
Director, Kennedy Space Center Procurement Office

FROM: Paul K. Martin /s/
Inspector General

SUBJECT: Final Memorandum on the Review of NASA's Payment of Task
Order 389 to United Launch Alliance (Report No. IG-10-010;
Assignment No. A-08-005-01)

The Office of Inspector General (OIG) reviewed NASA's September 24, 2009, payment of \$12,019 to United Launch Alliance (ULA) for costs associated with supporting an OIG audit of NASA's export control program. Our objective was to determine whether NASA's payment to ULA was appropriate under the contract. Although this review focused on one contract, the issue of NASA approving a payment for contractor costs associated with supporting the work of the OIG may have broader applicability across other NASA contracts.

Executive Summary

NASA should not have approved payment to ULA for costs associated with supporting the OIG audit because the contract with ULA requires it to support oversight activities (defined in the contract as insight, inspection, inspect, and test) at no additional cost to the contract price. Furthermore, the NASA contracting officer at Kennedy Space Center (KSC) authorized reimbursement to ULA even though the request did not comply with terms of the contract that required written agreement on task orders prior to the contractor performing any work. In this case, the contracting officer approved ULA's task order to support the OIG audit after the work was completed rather than before it was initiated.

We recommended that the Director, KSC Procurement Office, recover the amount paid to ULA through direct reimbursement or offset of a future payment. We also recommended that the Assistant Administrator for Procurement provide contracting officers training to familiarize them with the OIG's oversight function and with contract clauses that require NASA contractors to cooperate with oversight organizations during the performance of their contracts – including cooperation with audits conducted by the OIG and the

Government Accountability Office (GAO) – at no increase in the contract price. (See Enclosure 1 for details on the review scope and methodology.)

Management’s Response. In commenting on the draft of this memorandum (see Enclosure 2), NASA’s Assistant Administrator for Procurement did not concur with our recommendation to recover the \$12,019 paid to ULA, stating that he believed the support provided by ULA was “beyond the intent of the parties” (NASA and ULA) and the money paid was “fair and reasonable for the work performed.” Although the contracting officer had authority to enter into this task order, we believed the task order was unnecessary because existing contract clauses support such inspection and oversight at no additional cost to the Government. Furthermore, charging audit cooperation costs directly against the launch services contract, albeit with NASA’s approval, appears to be inconsistent with ULA’s accounting practices because “Audit services” is included in the General & Administrative (G&A) Expense Pool of ULA’s Cost Accounting Standards Disclosure Statement. Therefore, we believe the costs ULA incurred while cooperating with the OIG audit were simply part of the cost of doing business as a major Government contractor and that NASA erred in paying Task Order 389. However, given the modest dollar amount at issue in this case, we do not expect NASA to undertake Contract Disputes Act litigation to recover the monies paid. Rather, we would hope that NASA would request that ULA reclassify its audit cooperation in this case as an indirect cost. Since NASA and OIG have reached an impasse on this particular matter, we are closing the recommendation but urge NASA to recognize and reinforce the underlying, general principle that contractors have a duty to assist with OIG reviews of their NASA contracts without expecting additional reimbursement from NASA.

The Assistant Administrator partially concurred with our second recommendation to provide contracting officers training on the extent of contractors’ obligations to cooperate with government audit and oversight efforts. The Assistant Administrator stated that contracting officers receive training on a regular basis on the contractual process, and that this includes training on the “appropriate interpretation of contract clauses.” We suggest that as part of these sessions, contracting officers receive training about the operation of OIG, GAO, and other oversight organizations that function independent of the contract. We will close the recommendation following verification that contracting officers are receiving applicable training.

Background

From November 2007 through April 2009, the OIG conducted an audit of NASA’s oversight and monitoring of contractor transfers of critical technologies and technical information to foreign nationals and countries of concern. As part of the audit, we reviewed 13 contracts and visited 10 contractor locations, including the United Launch Alliance (ULA) facility located on Cape Canaveral Air Force Station, Florida, in September 2008. ULA supported the audit by arranging interviews with ULA personnel

responsible for managing its export control program and by providing relevant procedural and policy documentation.

On August 31, 2009, the OIG received a copy of a task order ULA submitted to NASA requesting reimbursement of \$12,019 for costs associated with supporting the OIG audit. Task Order 389 (Enclosure 3), dated August 12, 2009, was issued under Contract No. NAS10-00-001, which is NASA's firm-fixed-price contract with ULA for launch services. On September 24, 2009, NASA disbursed \$12,019 to ULA for this task order.

ULA Contract Provides for Government Insight and Inspections

NASA Contract No. NAS10-00-001 with ULA for launch services contains two clauses (Clauses 25 and 35) that require ULA to support Government insight and inspections at no additional cost in the contract price.

Section C, Clause 25, Government Insight and Approval, of the ULA contract states that

[t]he contractor shall provide NASA¹ an adequate level of insight into and/or approval of certain contractor tasks and milestones in order to ensure all reasonable steps have been taken that result in the highest probability of mission success.

Section C, Clause 25.3, defines Government insight as

gaining an understanding necessary to knowledgeably concur/non-concur with the contractor's actions through watchful observation, documentation, meeting attendance, reviews, tests and compliance evaluations.

Section C, Clause 25.5, further states that

[t]his insight shall be accommodated with no increase in contract price.

Section C, Clause 25.8 lists specific areas open to Government insight including "operations and procedure discipline" and "work practices and documentation." The contractor's export control procedures, which is a requirement based on contract Clause 30, Export Control and Foreign Nationals, are inherent to the services provided to NASA and, therefore, are covered by the "operations and procedure discipline" and "work practices and documentation" section of the contract clause.

The contractor also agreed to abide by Clause 35, Listing of Clauses Incorporated by Reference, which subjects the contractor's export control procedures (as inherent services) to Government inspection and testing at no increase in contract price.

¹ The Inspector General Act of 1978 (Public Law 95-452), as amended, authorizes access by NASA OIG to all NASA records, reports, audits, reviews, documents, papers, recommendations, or other materials, including contractor data and other information related to NASA contracts. Contractor data are also available to the OIG by administrative subpoena.

Specifically, Clause 35, which includes by reference Federal Acquisition Regulation (FAR) Section 52.246-4, states that

[t]he Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract.

The FAR section further states that

[i]f the Government performs inspections or tests on the premises of the contractor or a subcontractor, the contractor shall furnish, and shall require the subcontractor to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.

Contracting Officer Did Not Consider Relevant Contract Clauses in Approving ULA's Task Order

On October 15, 2009, we met with the Chief of Flight Projects, two contracting officer's technical representatives, the lead contracting officer, the contracting officer, and three members of the Office of Chief Counsel responsible for administering KSC's contract with ULA. At this meeting, we discussed the basis for NASA's payment of the ULA task order given that the contract included Clauses 25 and 35, which provide for Government insight and inspection at no additional cost in the contract price.

The Assistant Chief Counsel from KSC's Office of Chief Counsel stated that the expense of providing audit support were ULA's responsibility if the work performed in supporting the OIG audit was within the scope of the contract. However, he concluded that determining whether the audit support provided was within or outside the scope of the contract was a contracting issue and therefore he deferred to the contracting officials.

During our October 15, 2009, meeting, the contracting officer stated that she had sought advice from legal and other offices prior to approving payment and that she and the lead contracting officer concluded that Clauses 25 and 35 applied only to the launch services provided under contract and not to the overall administration of the contract. Consequently, she said she paid the contractor the costs it billed for supporting the OIG audit without considering the two contract clauses highlighted by the OIG. We disagree with NASA's decision to pay the contractor for supporting the OIG audit because Clauses 25 and 35 provide the Government the right to perform oversight of all contract activities, including overall administration of the contract, at no additional cost.

Contracting Officer Approval of ULA's Task Order Was Inappropriate

The contracting officer approved payment of the ULA task order even though neither NASA nor ULA followed the required ordering procedures for issuing a task order. In addition, the statement of work (SOW) ULA referenced to justify the work performed under the task order did not relate to the support provided to the OIG. Since the task

order was not issued prior to performance of the work as contractually required, and because the task order SOW did not describe the actual work performed, the contracting officer had insufficient justification to approve payment to ULA.

Contract Clauses 8, Scope of Work-Special Task Assignments (Studies and Analysis) [Contract Line Item Number] (CLIN 12), and 9, Ordering Procedure and Payment for Special Task Assignments (Studies and Analysis) (CLIN 12), require that the terms and conditions of a task order be agreed to in writing prior to the contractor performing any work on the order. However, ULA submitted this task order for payment almost a year after the work was completed. Had contractual procedures been followed, the contracting officer should have reviewed the appropriateness of issuing a task order and established the total price and number of direct labor hours allotted for the task prior to ULA performing any work to support the OIG audit. Given this failure to comply with the relevant contract terms, the contracting officer should not have approved the task order for payment.

In addition, ULA's task order incorrectly cited Paragraph 5.0, Special Task Assignments [Studies and Analysis, CLIN 12], and Attachment D1 of Contract No. NAS10-00-001 as justification for the work performed. Paragraph 5.0 states

[t]he Contractor shall be required to perform special studies and analyses, provide materials, or fabricate hardware in support of this contract. Each task will be initiated by written direction from the NASA Contracting Officer. At the Contracting Officer's discretion, these tasks generally include: advance planning and feasibility studies in support of future contemplated missions; analyses in support of change requirements to authorized missions; development, fabrication, and test of hardware/software to support planning studies or special tests; mission unique studies; material provision; and hardware fabrication in support of missions.

The contracting officer should not have approved the payment to ULA given that the task descriptions cited in the above paragraph relate to specific launch services activities rather than the type of support ULA provided to the OIG audit.

Recommendations, Management's Response, and Evaluation of Management's Response

Recommendation 1. We recommended that the Director, KSC Procurement Office, recover the \$12,019 inappropriately paid to ULA for Task Order 389 under Contract No. NAS10-00-001.

Management's Response. The Assistant Administrator for Procurement nonconcurred, stating that the money paid under the task order was for audit work that was beyond the intent of the parties and beyond the terms and conditions of the contract. The Assistant Administrator also stated that "the amount paid was fair and reasonable for the work performed."

Evaluation of Management's Response. We disagree with the Assistant Administrator and maintain that the contracting officer should not have approved the task order because clauses 25 and 35 of the contract clearly dictate that the contractor shall support inspection and oversight at no additional cost to the Government.

In addition, ULA's Cost Accounting Standards Disclosure Statement reveals numerous indirect cost categories, as defined by ULA, against which it would have been more logical to charge the audit cooperation effort, including the General & Administrative (G&A) Expense Pool. Major functions of the G&A Expense Pool include "General Counsel," "Office of Internal Governance," and "Central Business Operations." Major cost elements of the G&A Expense Pool include "Audit services" and "Legal fees." In light of these indirect cost categories, ULA's charging NASA for cooperating with the OIG audit against the launch services contract, albeit with NASA's approval, appears to be inconsistent with ULA's disclosed accounting practices.

Therefore, we believe the costs ULA incurred when cooperating with the OIG audit were simply part of the cost of doing business as a major Government contractor and that NASA erred in paying this task order. However, given the modest dollar amount at issue, we do not expect NASA to undertake Contract Disputes Act litigation to recover the monies paid. Rather, we would hope that NASA would request that ULA reclassify its audit cooperation in this case as an indirect cost. We believe that these costs are overhead, and as such, ULA should have accounted for them as indirect costs in accordance with the Cost Accounting Standards and ULA's Cost Accounting Standards Disclosure Statement.

We also note that we have not reviewed the technical evaluation performed on the task order. We requested but did not receive any cost detail to support the amounts charged and paid for the task order and therefore are unable to determine whether the costs were fair and reasonable.

Since the parties have reached an impasse on this particular matter, we are closing the recommendation but urge NASA to recognize and reinforce the underlying, general principle that contractors have a duty to assist with OIG reviews of their NASA contracts without expecting additional reimbursement from NASA.

Recommendation 2. We recommended that the Assistant Administrator for Procurement provide contracting officers training to familiarize them with contract clauses that require NASA contractors to assist in oversight of the performance of their contracts – including OIG and GAO audits – at no increase in the contract price.

Management's Response. The Assistant Administrator for Procurement partially concurred, stating that contracting officers "should, and do receive training on a regular basis on the contractual process" and that this training includes interpretation of contract clauses.

Evaluation of Management's Response. The Assistant Administrator's comments are responsive to the intent of the recommendation. However, we would expect that the provided training contain an appropriate presentation of the oversight functions carried out by the OIG, GAO, and other Government agencies. NASA contracting officials need to be aware of the statutory and oversight environments in which contractors operate. NASA needs to be vigilant in ensuring that costs incurred for compliance with regulatory and other oversight regimes are properly accounted for in accordance with the FAR and the Cost Accounting Standards so that NASA is not improperly billed for a contractor's routine compliance efforts. We will close the recommendation following verification that contracting officers are receiving applicable training.

We appreciate the courtesies extended during our review. If you have any questions or need additional information, please contact Raymond Tolomeo, Acting Space Operations Director, Office of Audits, at 202-358-7227, or G. Paul Johnson, Project Manager, Space Operations Directorate, Office of Audits, at 321-867-7552.

Enclosures

Scope and Methodology

We performed this review from September 2009 through February 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the review to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on the objectives. We believe that the evidence obtained during this review provides a reasonable basis for our findings and conclusions based on our objectives.

We performed this review at Kennedy Space Center. We reviewed the procedures, clauses, and task orders for Contract No. NAS10-00-001. In performing this review, we identified and reviewed the following applicable documentation:

- Contract Authorization Document dated August 12, 2009,
- Non-Launch Services Task Order 389, signed and dated by ULA representative on August 11, 2009 and the NASA contracting officer on August 12, 2009,
- Non-Launch Services Task Order 389 Statement of Work,
- NASA Expendable Launch Services Support Contract No. NAS10-00-001,
- Federal Acquisition Clauses included in Contract No. NAS10-00-001, and
- ULA's Cost Accounting Standard Disclosure Statement issued November 3, 2008 with an effective date of January 1, 2009.

We also interviewed the lead contracting officer, the contracting officer, responsible contracting officer technical representatives, and representatives from the KSC Office of Chief Counsel.

Computer-Processed Data. We did not use computer-processed data to perform this review.

Review of Internal Controls. We reviewed and evaluated internal controls associated with the payment of the task order and found deficiencies as described in the report. Implementation of the recommendations should improve the internal controls and prevent future recurrence.

Prior Coverage. During the last 5 years, there has been no coverage of this particular issue.

Management's Comments

National Aeronautics and
Space Administration
Headquarters
Washington, DC 20546-0001




May 11, 2010

Reply to Attn of:

TO: Assistant Inspector General for Auditing
FROM: Assistant Administrator for Procurement
SUBJECT: Response to Draft Memorandum on the Review of NASA's Payment of
Task Order 389 to United Launch Alliance (Assignment No. A-08-005-
01)

Enclosed is the response to the subject draft memorandum, dated February 23, 2010.
This response has been coordinated with the Office of General Counsel.

Please contact Sandra Morris from my staff if you have any questions. Sandra can be
reached at 358-0532.


William P. McNally

Enclosure

Enclosure

Recommendation 1: The Director, KSC Procurement Office, should recover the \$12,019 inappropriately paid to ULA for Task Order 389 under Contract No. NAS10-00-001.

Response: Non concur. After careful review of the contract requirements, we believe the money paid to ULA under Task Order 389 was for audit work that was beyond the intent of the parties and was beyond the terms and conditions of the contract. Further, we believe the amount paid was fair and reasonable for the work performed.


Recommendation 2: The Assistant Administrator for Procurement should provide contracting officers training to familiarize them with contract clauses that require NASA contractors to assist in oversight of the performance of their contracts – including OIG and GAO audits – at no increase in the contract price.

Response: Partially concur. Contracting Officers should, and do receive training on a regular basis on the contractual process. This training is not limited to, but does include determining the appropriate interpretation of contract clauses. We will continue to provide any and all training necessary for our contracting officers to perform all of their duties.

Task Order 389

CONTRACT AUTHORIZATION DOCUMENT (CAD)



		Date: 12 August 2009	Page 1 of 2
Program: NASA Launch Service (NLS)-Delta	Contract ID. NLS	Series No. 800	Revision No. New-098
Contract Number: NAS10-00-001			
Customer Name: NASA Kennedy Space Center			
Title: OIG Export Control Audit	Authorized by:  (Joe Del Moral)		

Enclosures: Statement of Work for Non-Launch Services Task Order 389-Export Control Audit

- 1.0 **References:** E'mail-from Jacqueline Brooks dated 12 August 2009
- 2.0 **Authority:** NAS10-00-001 Section C, Clause 9.0 Ordering Procedure and Payment for Special Task Assignments (Studies and Analyses) (CLIN 12)
- 3.0 **Purpose:** Provide support to NASA Office of Internal Governance (OIG) to facilitate audit of ULA Export Control
- 4.0 **Direction:** ULS shall perform the necessary task to comply with tasks described in the enclosure.
 - 4.1 The individuals identified below are responsible for performance of this task:
 - 4.2 **NLS-Program Manager** Scott Messer (303) 269-5307
NLS- Export Control Michelle Leifker
ULS- Estimating Kerri Seymour (303) 269 5420
ULS- Contract Specialist Joe Del Moral (303) 269-5410
ULS- Cost Management- Amy Kump (303) 269 5132
ULS Financial Manager Steve Furuto (303) 269 5511
- 5.0 **Work Directive:** Subsequent to issuance of this CAD, an Administrative WD will be issued to assign a CCN to capture the labor required to perform the required tasks.

BM-507 (Revision New 7 October 2008)
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NON-LAUNCH SERVICES TASK ORDER (Non-LSTO)
CLIN 12 - NASA LAUNCH SERVICES (NLS)

PAGE 1 OF 1

1. CONTRACT NO. NAS10-00-001	2. TASK ORDER NO. NLSB-389	3. AWARD/EFFECTIVE DATE See Block 17c.	4. MISSION	5. REQUISITION NO.
6. FOR INFORMATION CALL	a. NAME Jacqueline Brooks Contracting Officer	b. TELEPHONE NUMBER 321-867-7698	c. FACSIMILE NO. 321-867-4848	

7. ISSUED/ADMINISTERED BY
 John F. Kennedy Space Center, NASA
 Office of Procurement
 Mail Code: OP-LS/Jacqueline Brooks
 Kennedy Space Center, FL 32899

8. AUTHORITY UNDER CONTRACT NAS10-00-001 - This Non-LSTO is issued under CLIN 12, Special Task Assignments-Firm Fixed-Price Composite Labor Hours (page B-12.1 of the contract). Pursuant to Section C, Clause 8.0, Scope of Work - Special Task Assignments (Studies and Analyses) (CLIN 12) (page C-19), and Attachment D1, Statement of Work, Paragraph 5.0 Special Task Assignments (page D1-25).



9. CONTRACTOR United Launch Services, L.L.C. Attention: Mr. Joseph Del Moral 9100 East Mineral Circle Centennial, CO 80122 Ph: 303-269-5410	10. TASK ORDER TITLE/AUTHORIZATION & COMPLETION DATE Export Control Audit Date Authorized: See Block 17c Completion Due Date: August 14, 2009
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11. TASK ORDER NO.	12. TITLE/DESCRIPTION	13. AMOUNT
NLSB-389	SOW Title - same as Item 10 above	\$12,019.00

14.

15. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 2 COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF CONTRACT NAS10-00-001 AND AS SPECIFIED HEREIN.

Accepted as Written: In the performance of this Firm Fixed Price, completion basis, non-LSTO, 72.5 direct labor hours are utilized.

16a. SIGNATURE OF CONTRACTOR 		17a. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER) 	
16b. NAME AND TITLE OF SIGNER Joseph Del Moral Contracts Administration	16c. DATE SIGNED 08/11/09	17b. NAME OF CONTRACTING OFFICER Jacqueline Brooks	17c. DATE SIGNED 08/12/2009

**NON-LAUNCH SERVICES TASK ORDER NLSB-389
STATEMENT OF WORK
OFFICE OF INSPECTOR GENERAL (OIG) AUDIT**

Scope

The contractor shall provide the necessary support to facilitate the OIG to perform an audit to ensure Contractor is in compliance with all U.S. Export Control and Regulations including the International Traffic in Arms Regulations (ITAR), 22 CFR Parts 120-130, and the Export Administration Regulations (EAR), 15 CFR Parts 730-744 in the performance of the contract.

Task Description

The contractor shall:

1. Provide the necessary personnel assistance, and access to documents, policies and procedures and assistance to the OIG Auditors to satisfactorily perform an audit of policies, and procedures to ensure compliance with all EAR and ITAR requirements.

POP

September 15-19-2008

POC

Julie Eggert
Telephone: 321-867-3153