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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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GAO Recommends Improvements to DOE’s Fraud Risk Management Controls; DOE Fires Back

*By Justin M. Ganderson and Peter B. Hutt II**

The authors of this article offer an assessment of the U.S. Government Accountability Office’s recently released report, “Department of Energy: Use of Leading Practices Could Help Manage the Risk of Fraud and Other Improper Payments.”

The U.S. Government Accountability Office (“GAO”) recently released a report titled “Department of Energy: Use of Leading Practices Could Help Manage the Risk of Fraud and Other Improper Payments” (the “Report”).¹ As the title suggests, GAO assessed the Department of Energy’s (“DOE”) internal controls to manage “the risk of fraud and improper payments.” GAO found that DOE had not employed certain “leading practices” to combat fraud—like creating a “dedicated entity to lead fraud risk management activities” and using “specific control activities, such as data analytics”—and offered six recommendations for improvement. Although DOE disagreed with certain findings in the Report, the agency represented that it either had implemented or was in the process of implementing the majority of GAO’s recommendations. This article provides an assessment of the Report and discusses the Report’s potential impact.

THE GAO REVIEW

In response to a 2014 request² from Senator Claire McCaskill (D-Missouri), GAO conducted a review of “DOE’s processes, programs, and practices for managing its risk of fraud.” In its review, GAO examined:

- (1) “DOE’s approach to managing its risk of fraud and other improper payments and challenges, if any, that may limit the effectiveness of

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¹ Report No. GAO-17-235 *available at* <https://www.gao.gov/assets/690/683826.pdf>.

² Letter from Senator C. McCaskill (Nov. 20, 2014) *available at* <http://www.hsgac.senate.gov/download/chariman-mccaskill-requests-gao-review-of-fraud-risk-management-at-the-department-of-energy>.

this approach”;

- (2) “the extent to which DOE’s approach incorporates leading practices, such as the use of data analytics”; and
- (3) “the application of data analytics in identifying potential indicators of fraud or other improper payments associated with selected DOE contracts.”

GAO’s Report was made public on May 1, 2017.

GAO’S RECOMMENDATIONS AND FINDINGS

Based on its assessment that DOE has “not used leading practices in its approach to managing its risk of fraud and other improper payments,” GAO recommended that DOE take six actions to improve its internal controls:

- (1) implement a “DOE-wide invoice review policy”;
- (2) form a “dedicated entity within DOE to design and oversee fraud risk management activities”;
- (3) carry out “fraud risk assessments that are tailored to each program” and develop a “fraud risk profile”;
- (4) develop an “antifraud strategy” focused on “addressing . . . prioritized fraud risks”;
- (5) implement “specific” fraud prevention and detection “control activities” like “fraud awareness training and data analytics”; and
- (6) “require contractors to maintain sufficiently detailed transaction-level cost data that are reconcilable with amounts charged to the government.”

GAO also noted that “[b]y not implementing leading practices, DOE is missing an opportunity to organize and focus its resources in a way that would allow it to mitigate the likelihood and impact of fraud.”

The recommendations and findings in the Report harken back to a July 2015 GAO guide³ intended to “help federal program managers combat fraud and ensure integrity in government agencies and programs.” In that guide, GAO “identified leading practices for managing fraud risks and organized them into a conceptual framework called the Fraud Risk Framework.” Examples of “leading practices” included the “use of data analytics to prevent and detect fraud.” Additionally, pursuant to the Fraud Reduction and Data Analytics Act

³ A Framework for Managing Fraud Risks in Federal Programs, GAO Report No. GAO-15-593SP (July 2015) *available at* <http://www.gao.gov/assets/680/671664.pdf>.

of 2015, passed in July 2016,⁴ the Director of the Office of Management and Budget (“OMB”) was tasked with (a) “establish[ing] guidelines for agencies to establish” fraud controls that incorporate the leading practices identified in the GAO guide and (b) convening a working group related to this effort.

DOE'S RESPONSE

DOE agreed “in principle” with GAO’s first five recommendations, and noted that it either had implemented or was in the process of implementing these recommendations.⁵ However, with respect to the second recommendation—that DOE form a dedicated entity to design and oversee fraud risk management activities—DOE indicated that it “will have to consider the costs/benefits and need for a separate organization before implementing a dedicated entity.”

DOE did not agree with GAO’s sixth recommendation—that DOE require contractors to maintain more detailed cost data. Notwithstanding, DOE indicated that it was willing to “discuss the merits of government-wide guidance for applying data-analytics to contract cost” with the OMB working group. DOE noted, however, that if the OMB working group “determines there is a need for contractors to retain and provide additional data to support data-analytical procedures, any proposed new requirement should be discussed with the FAR Council, the OMB Office of Federal Procurement Policy, and, potentially, the OMB Officer of Intergovernmental and Regulatory Affairs.” DOE also cautioned that “[a]ny new requirement necessitating significant changes to contractors’ financial systems could impose significant costs on those contractors, and increased costs would have to be considered when proposing such new requirements.”

Finally, DOE “expressed concern with the accuracy and characterization” of certain statements made in the Report. Among other things, DOE indicated that it already had in place a “robust” OMB Circular A-123⁶ compliant internal control program (including use of data analytics) and utilized “established invoice review procedures.” Furthermore, DOE noted that its Office of the Inspector General (“OIG”) employs “multiple audit oversight activities with respect to DOE management and operating contracts.”

⁴ Pub. Law No. 114-186, 130 Stat. 546 (2016) *available at* <https://www.congress.gov/114/plaws/publ186/PLAW-114publ186.pdf>.

⁵ DOE’s written response was appended to the Report.

⁶ Management’s Responsibility for Enterprise Risk Management and Control, OMB Circular No. A-123 (July 15, 2016) *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-17.pdf>.

QUESTIONS AND ANSWERS

Costly Changes to Cost Data Requirements?

As DOE noted, any new requirements imposed on contractors to maintain more detailed cost data would inevitably lead to increases in contractor costs—and the DOE itself would ultimately bear a large share of the burden of these cost increases under its cost reimbursement contracts. The GAO Report did not address this expense, the impact of the change on the DOE or other agencies, or the complexity and difficulty of imposing such cost data requirements across the entire DOE contractor base. We do not expect DOE to change its disagreement with this GAO recommendation and implement such cost data requirements unless otherwise mandated.

What About the DOE OIG?

GAO determined that DOE has “not created a structure with a dedicated antifraud entity to lead fraud risk management activities,” and concluded that “[w]ithout a dedicated entity within DOE to design and oversee fraud risk management activities, DOE is missing an opportunity to create a structure that is more conducive to fraud risk management.” Although the Report acknowledged that DOE’s Office of the Chief Risk Officer “may include fraud risk management” responsibilities, GAO did not appear to consider the capability of the DOE OIG to serve/lead this function and the interplay between a new dedicated antifraud entity and the DOE OIG. One of the stated purposes of the DOE OIG is to “[w]ork with the Department, prosecutors and others to hold recipients and overseers of Department funds accountable for actions that result in fraud, waste, and/or abuse,”⁷ and the OIG routinely works with the Department of Justice on False Claims Act investigations and qui tam matters. Although the report offers criticism of the DOE OIG, it does not make clear why a separate entity would be necessary and why the OIG could not serve this role. Creating a potential separate fraud-fighting/risk management entity in parallel to the OIG would not only be inefficient, but could lead to jurisdictional confusion, and appears unlikely to result in better fraud enforcement and prevention.

Was the GAO Report Premature?

GAO noted that “DOE officials told us that they plan to meet the requirements of the Fraud Reduction and Data Analytics Act of 2015 but

⁷ U.S. Department of Energy, Office of the Inspector General, Combined FY 2016 Annual Performance Report and FYs 2017 and 2018 Annual Performance Plan *available at* <https://energy.gov/sites/prod/files/2016/11/f34/Final%20Annual%20Performance%20and%20Plan.pdf>.

should not be expected to implement private industry leading practices *prior* to the issuance of OMB guidance.”⁸ Thus, this GAO review arguably is somewhat premature—especially if the DOE will be implementing new processes after OMB guidance is issued. Nevertheless, GAO responded to DOE’s representation by finding that DOE was “missing an opportunity to better position itself to meet the requirements of the Fraud Reduction and Data Analytics Act of 2015 and to organize and focus its resources in a way that would allow the department to mitigate the likelihood and impact of fraud.”

Ultimate Impact?

Even if the Report’s recommendations are not adopted by the DOE, the Report will likely have some impact. When the Report was released publicly, Senator McCaskill sent a critical letter⁹ to Secretary Rick Perry requesting that DOE “provide a detailed response” and explain how it would address the GAO’s findings and recommendations. DOE is unlikely to ignore the suggestion that its fraud controls are inadequate, and its response to Senator McCaskill’s letter may provide insight into future changes in its fraud-fighting controls and processes.

⁸ Emphasis added.

⁹ Letter from Senator C. McCaskill (May 1, 2017) *available at* <https://www.hsgac.senate.gov/download/mccaskill-letter-to-perry-re-gao-report>.