United States General Accounting Office

GAO

Report to the Chairman, Committee on Finance, U.S. Senate

July 2003

CMS CONTRACTING

Issues Concerning Administrator's Decision to Exclude Subcontractor

GAO-03-842

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GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-03-842, a report to the Chairman, Committee on Finance, U.S. Senate

Why GAO Did This Study

In September 2002, the Centers for Medicare & Medicaid Services (CMS) awarded the RAND Corporation, with the University of Wisconsin's Center for Health Systems Research & Analysis as a subcontractor, a task order to study inconsistency in the nursing home survey process. Allegations were made that CMS directed RAND not to retain the Center as a subcontractor in retaliation for technical concerns that the Center's Director had raised about another CMS initiative. GAO was asked to examine these allegations. Specifically, GAO was asked to examine CMS's selection of RAND for this task order, the basis for CMS's decision to exclude the Center as a subcontractor, and whether the Center's exclusion extended to other CMS contracts.

What GAO Recommends

GAO recommends that the Secretary of Health and Human Services take appropriate action to remedy this situation. Such a remedy could include permitting RAND to subcontract with the Center as RAND had proposed or reopening the competition for the award of this task order. Also, the Secretary should have CMS procurement decisions affecting the Center since September 2002 reviewed to ensure they were supported by a reasonable basis. HHS and CMS concurred with our recommendations, although CMS disagreed with our conclusion that the Administrator's action was improper.

www.gao.gov/cgi-bin/getrpt?GAO-03-842.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Kathryn G. Allen at (202) 512-7118.

What GAO Found

CMS followed a competitive process in awarding the nursing home survey inconsistency research task order to RAND, with the Center as its subcontractor. RAND's proposal outlined a plan in which the Center would perform approximately half of the work, in terms of cost, in the first year and about 80 percent over a 3-year period, if the government exercised its options to extend the task order for 2 additional years. Based on four criteria, including an evaluation of personnel and experience and past performance, CMS awarded the task order to RAND on September 27, 2002.

At virtually the same time as the award, the Administrator intervened to exclude the Center from the RAND task order. The Administrator provided several reasons to support his exclusion of the Center, including his conclusion that the Center had performed poorly on a number of ongoing CMS task orders, especially those related to nursing home survey and certification. He understood that contract provisions provided him the legal authority to direct RAND not to use the Center as a subcontractor. GAO reviewed each of the reasons provided by the Administrator and concluded that, in light of the evidence, the Administrator did not have a reasonable basis to direct RAND not to subcontract with the Center. For example, GAO's review of the evidence did not support the Administrator's assertion of poor past performance by the Center; in fact, its strong past performance was a key factor in the decision to award the task order to RAND.

Instead, the Administrator's decision to exclude the Center from the RAND task order appears to have been retaliation for the Center Director's involvement in another CMS nursing home initiative. Because of technical concerns voiced about this separate initiative, the Administrator perceived the Center's Director to be obstructing CMS's implementation of the initiative in November 2002. Regardless of the merit of the Administrator's view of the Center's Director and concerns about his involvement in the other initiative, the Administrator was not authorized to effectively change the substance of the proposal on which the award to RAND had been based. Therefore, in GAO's view, the Administrator's action was improper and undermined the integrity of CMS's procurement process.

Communications between the Administrator and the Center suggested that the Administrator's decision to exclude the Center was limited to the RAND task order. However, senior CMS staff understood the Administrator's instructions to exclude the Center to extend to other contracting opportunities and thus attempted to limit the involvement of the Center in other CMS contracts.

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Abbreviations

CAHPS	Consumer Assessment of Health Plans
CICA	Competition in Contracting Act of 1984
CMS	Centers for Medicare & Medicaid Services
FAR	Federal Acquisition Regulation
HCFA	Health Care Financing Administration
HHS	Department of Health and Human Services
NQF	National Quality Forum
QI	quality indicator
RFP	request for proposals
RTI	Research Triangle Institute

GAO
Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

July 8, 2003

The Honorable Charles E. Grassley
Chairman
Committee on Finance
United States Senate

Dear Mr. Chairman:

Since 1997, considerable attention has been focused on the need to improve the quality of care in the nation's 17,000 nursing homes. In a series of reports and testimonies prepared at your request as the Chairman of the Senate Special Committee on Aging, we found significant weaknesses in federal and state survey and oversight activities designed to detect and correct quality problems in nursing homes. Several others have also reported on these problems, including the Institute of Medicine and the Office of Inspector General of the Department of Health and Human Services (HHS). In 1998, the President announced a series of initiatives intended to address many of the weaknesses we identified. These initiatives covered several areas, including the strengthening of states' periodic surveys of nursing homes and improving federal monitoring of state survey activities. Also in 1998, the Health Care Financing Administration (HCFA) launched a Web site—"Nursing Home Compare"—that has progressively expanded the availability of public information on nursing homes and the quality of care provided.[1] In April 2002, the agency began a pilot project to augment the information provided on this Web site to include quality indicators (QI) that allow consumers to make comparisons across nursing homes. This project was expanded nationwide on November 12, 2002.

As part of its work to improve the nursing home survey process, in September 2002, the Centers for Medicare & Medicaid Services (CMS) awarded the RAND Corporation a task order to study the inconsistency in nursing home survey results across states, based on a proposal that included the University of Wisconsin's Center for Health Systems

[1]In June 2001, the agency's name was changed from the Health Care Financing Administration (HCFA) to the Centers for Medicare & Medicaid Services (CMS). In this report, we continue to refer to HCFA where our findings apply to the organizational structure and operations associated with that name.

Research & Analysis as a subcontractor.[2,3] However, CMS also instructed RAND not to subcontract with the Center. Allegations were brought to you that CMS had inappropriately directed RAND not to retain the Center as a subcontractor in retaliation for technical concerns that the Center's Director, who was proposed by RAND to be the co-principal investigator for the task order, made about CMS's April 2002 nursing home QI initiative. As a result, you asked us to examine these allegations. We agreed to examine (1) CMS's selection of RAND for this task order, (2) the basis for CMS's decision to exclude the Center as a subcontractor, and (3) whether the exclusion of the Center extended to other CMS contracts. To do this, we reviewed relevant contract files and other key documents. We interviewed CMS staff, including the Administrator and one of his Special Assistants, the Director and other staff of the Acquisition and Grants Group, the Project Officer assigned to this task order, and the Director of the Quality Measures and Health Assessment Group. We also interviewed RAND contracting and program staff, and University of Wisconsin and Center staff, including attorneys, contracting personnel, and the Center's Director. We conducted our work from January 2003 through June 2003 in accordance with generally accepted government auditing standards.

Results in Brief

CMS followed a competitive process in selecting RAND, with the Center as its subcontractor, for the task order to study inconsistencies in the nursing home survey process. However, in our view, the Administrator improperly intervened to exclude the Center from the task order, thus undermining the integrity of the procurement process at CMS. The Center was integral to the RAND proposal, with RAND indicating that the Center would perform approximately half of the work, in terms of cost, in the first year and about 80 percent—valued at about $1.6 million—over a 3-year period, if CMS exercised its options to extend the task order for 2 additional years. Further, the Center's expertise in the nursing home survey area was a key factor in CMS's decision to select RAND's proposal over those submitted by two others. However, at virtually the same time that CMS awarded this task order, the CMS Administrator intervened without a

[2]This task order was issued under a CMS contract for Medicare Research and Demonstrations.

[3]The Center is the University of Wisconsin component that had been designated to perform work under the University's proposed subcontract with RAND and that carries out health care research under the University's contracts with CMS. Therefore, we refer to the Center rather than the University as the contracting entity throughout the report.

reasonable basis to exclude the Center as RAND's subcontractor. The Administrator's decision to exclude the Center appears to have been retaliation for the Center Director's expressed technical concerns about CMS's project to include nursing home QIs on the "Nursing Home Compare" Web site. The Director's comments did not affect the QIs CMS used or the timing of the national rollout. However, the Administrator characterized the Center Director's comments as obstructing the consensus-building process for the QI initiative. Senior CMS staff understood the Administrator's instructions to exclude the Center to extend beyond the RAND task order and thus attempted to limit the involvement of the Center in other CMS contracts.

In order to maintain the integrity of CMS's procurement process, we are recommending that the Secretary of Health and Human Services take appropriate action to remedy the situation. Appropriate remedies could include permitting RAND to subcontract with the Center as RAND had proposed or reopening the competition for the award of the nursing home survey research task order. In addition, we are recommending that the Secretary have CMS procurement decisions affecting the Center since September 2002 reviewed to ensure that they were supported by a reasonable basis. HHS and CMS concurred with our recommendations, although CMS disagreed with our conclusion that the Administrator's action was improper.

Background

To facilitate the procurement of services quickly while obtaining the advantage of competition, the Federal Acquisition Streamlining Act of 1994 authorized agencies to award task order contracts to multiple sources.[4] Task order contracts, which are also referred to as "indefinite delivery/indefinite quantity contracts," "umbrella contracts," or "master contracts," typically cover a range of services, without specifying a fixed statement of work and deliverables. Instead, orders are issued for the performance of specific tasks during the period of the contract. Agencies using task order contracts are required to provide contractors with "a fair opportunity to be considered" in the award of the individual task orders issued to meet agency needs. The Federal Acquisition Regulation (FAR) gives procurement officials broad latitude in administering the "fair consideration" process. The FAR requires them to consider price or cost

[4]Pub. L. No. 103-355, § 1054(a), 108 Stat. 3243, 3261-3265 (codified at 41 U.S.C. §§ 253h-253k (2000)).

as one factor in the selection process; it also suggests that other factors relevant to the award of a specific task order, such as past performance, quality of deliverables, and cost control, be taken into consideration.[5] CMS's Office of Research, Development, and Information is responsible for coordinating the agency's multiple-award task order contracts, which the agency refers to as "master contracts," while its Acquisition and Grants Group is responsible for awarding these contracts as well as subsequent task orders.

On February 24, 2000, HCFA issued a solicitation for master contracts in five specialty research areas related to Medicare and Medicaid.[6] Fourteen contractors, including RAND and the Center, were awarded master contracts in the specialty area of "Medicare Research and Demonstrations." The master contracts provided that contractors would be awarded at least $25,000 over the term of the contract, including options. The master contracts also provided that task orders would be awarded following a competitive process limited to the 14 contractors.

On July 12, 2002, CMS sent a request for proposals (RFP) to the 14 contractors for a task order to study the inconsistency across states in the nursing home survey process. Under contract with CMS, states are required to conduct periodic surveys of nursing homes that participate in Medicare and Medicaid to determine whether care and services meet the assessed needs of the residents and whether homes are in compliance with federal quality requirements, such as those regarding the prevention of avoidable pressure sores, weight loss, or accidents. Surveys must be conducted at each home on average every 12 months and no less than once every 15 months. During a nursing home survey, a state survey team that includes registered nurses spends several days at a home reviewing the quality of care provided to a sample of residents. Any deficiencies identified during routine surveys are classified according to the number of residents potentially or actually affected and their severity. Previous research has demonstrated considerable differences among states in terms of survey findings.

The Center, which is one of the 14 master contract holders, has worked with CMS and other entities to conduct research on a range of health care

[5]*See* 48 C.F.R. § 16.505(b) (2002).

[6]The solicitation referred to these contracts collectively as Research, Analysis, Demonstration, and Survey Design Task Order Contracts.

issues, particularly in the area of nursing homes and the regulatory survey process. Over the past 15 years, the Center has been a prime contractor or subcontractor on 20 individual agency projects whose value to the Center totals over $41 million.[7,8] Beginning in 1994, the Center assisted the agency in its efforts to (1) monitor the implementation of a revised long-term care survey process and (2) identify possible reasons for variations in survey findings among states.[9] The Center's survey work on this project was discussed in a July 1998 HCFA report to Congress and helped reveal a general problem of underidentification of regulatory deficiencies in nursing homes.[10]

The Center has a particularly extensive background in the development and use of QIs for nursing homes, which are essentially numeric warning signs of potential care problems, such as greater-than-expected instances of weight loss, dehydration, or pressure sores among a nursing home's residents. HCFA began contracting with the Center in 1988 to develop, test, and implement QIs as a way to improve the rigor of the survey process. As part of this effort, the Center developed a national automated system to provide to states and to HCFA assessment information on every nursing home resident in the United States.[11]

CMS recently undertook an effort to publicly report nursing home QIs on the agency's "Nursing Home Compare" Web site. This effort, which began in April 2002 with a pilot program in six states and was expanded

[7]Six of these projects valued at about $32.2 million are ongoing. Approximately $10.7 million of the $41 million is attributable to projects specifically related to the nursing home survey process.

[8]For Wisconsin's state fiscal year 2002, the Center's funding for CMS and other projects totaled approximately $13.8 million, and its total staff consisted of approximately 65 faculty, researchers, programmers, and support personnel.

[9]"Consultation in Analysis of Long-Term Care Survey Process," Contract No. 500-94-0075, from September 1994 through August 1998.

[10]HHS, HCFA, Report to Congress, *Study of Private Accreditation (Deeming) of Nursing Homes, Regulatory Incentives and Non-Regulatory Initiatives, and Effectiveness of the Survey and Certification System (*Washington, D.C.: July 1998).

[11]Effective July 1999, HCFA instructed states to begin using QIs derived from these data to review the care provided to a nursing home's residents before state surveyors actually visit the home to conduct a survey. Surveyors use the QIs to help select a preliminary sample of residents and preview information on the care provided to these residents prior to the on-site inspection. QIs are derived from data collected during nursing homes' assessments of residents, called the minimum data set.

nationwide on November 12, 2002, is intended to help consumers choose a nursing home. To develop and help select the QIs for this initiative, CMS contracted with two organizations with expertise in health care data and quality measurement—Abt Associates, Inc., and the National Quality Forum (NQF).[12] Abt identified a list of potential QIs—including some of those developed by the Center—as being suitable for public reporting, and NQF was tasked with reviewing Abt's work and making recommendations to CMS regarding the QIs for the pilot and national implementation. To accomplish this task, NQF established a 12-member steering committee, which included the Center's Director.[13]

The NQF Steering Committee differed with CMS on several aspects of the agency's QI initiative, including the risk-adjustment methodology, selection of QIs, and the time frame for publishing the data.[14] For example, NQF concluded that some of the QIs required further review and that CMS's QI initiative would have benefited from a postponement of 3 to 4 months. We also evaluated CMS's QI initiative, and on October 31, 2002, reported that its plan to publicly report QI data had considerable merit.[15] However, we also raised concerns about the agency's moving forward with its initiative without resolving a number of important open issues on the appropriateness of the QIs chosen for national reporting and the accuracy of the underlying data. For example, CMS planned to proceed with the national rollout without waiting for the advice it sought on the QIs from

[12]NQF is a nonprofit organization created to develop and implement a national strategy for health care quality measurement and reporting. NQF participants include government and private entities as well as entities from all sectors of the health care industry.

[13]The Steering Committee of 12 included health services researchers, geriatricians, state survey agency personnel, state Medicaid directors, health systems representatives, and others.

[14]Risk adjustment is important because it provides consumers with an "apples-to-apples" comparison of nursing homes by taking into consideration the characteristics of individual residents and adjusting QI scores accordingly. For example, a home with a disproportionate number of residents who are bedfast or who present a challenge for maintaining an adequate level of nutrition—factors that contribute to the development of pressure sores—may have a higher pressure sore score. Adjusting a home's QI score to fairly represent to what extent a home does—or does not—admit such residents is important for consumers who may wish to compare one home to another.

[15]See U.S. General Accounting Office, *Nursing Homes: Public Reporting of Quality Indicators Has Merit, but National Implementation Is Premature*, GAO-03-187 (Washington, D.C.: Oct. 31, 2002).

NQF.[16] In addition, we reported that CMS's planned November 2002 implementation did not allow sufficient time to ensure that the indicators it published were appropriate and useful to consumers. We recommended that the CMS Administrator delay the initiative to resolve outstanding issues and thoroughly evaluate the results of the six-state pilot. Such a delay, we concluded, would allow CMS to assess both how the information should be presented and how it could improve assistance to consumers. CMS implemented its QI initiative in November 2002 as planned but committed to continually improve the QIs and to work to resolve the issues discussed in our report.

CMS Selected RAND Following a Competitive Process but Excluded Proposed Subcontractor

CMS followed a competitive process in awarding a task order for nursing home survey inconsistency research work to RAND under the Medicare Research and Demonstrations master contract. RAND's proposal, which explicitly included the Center as a subcontractor, outlined a plan in which the Center would perform approximately half of the work, in terms of cost, in the first year and about 80 percent over a 3-year period, if the government exercised the options of extending the task order for 2 additional years. On the basis of four criteria—statement of the problem and technical approach, personnel and experience, management plan, and past performance—CMS awarded the task order to RAND on September 27, 2002. At virtually the same time, however, the CMS Administrator instructed agency staff to inform RAND that it could not subcontract with the Center. RAND continues to believe that the Center is the most qualified subcontractor available and as of June 23, 2003, had not conducted any substantive work under the CMS task order.

[16]Although the NQF Steering Committee had originally planned to complete its review of potential indicators using its consensus process by August 2002, in June 2002 CMS asked NQF to delay finalizing its recommendations until 2003.

CMS Followed a Competitive Process to Select the Proposal Submitted by RAND

CMS issued an RFP on July 12, 2002, to the 14 holders of Medicare Research and Demonstrations master contracts for a project to assess inconsistencies in the application of the nursing home survey process across states and to develop specific policy and programmatic options for improvement.[17] To improve survey consistency among states, the RFP listed four objectives for the task order: (1) distinguish variability in the survey measurement findings that is appropriate (that is, the result of real quality variations among nursing homes) from variability that is inappropriate (that is, the result of surveyor inconsistency), (2) identify the aspects of survey inconsistency that are cited by key stakeholders, (3) identify the most important causes of inconsistency, and (4) develop policy and programmatic options for improvement. The RFP specifically identified the need for a major fieldwork effort to collect primary data to compare state survey team decisions with those of an independent and expertly qualified research team.[18] Proposals were to be evaluated on the basis of four criteria, with a total possible score of 100. These criteria and their associated point totals were (1) statement of the problem and quality of technical approach (35 points), (2) personnel and experience (30 points), (3) management plan and facilities (10 points), and (4) past performance (25 points). The RFP specifically included subcontractors among those whose background, experience, and accomplishments would be reviewed as part of the evaluation process.

Three of the 14 eligible entities submitted proposals to CMS, including RAND with the Center as its subcontractor. RAND's proposal was prepared jointly with the Center and was premised on collaboration between RAND and the Center during the project. Center staff were to conduct the majority of the fieldwork, relying on their researchers' survey experience. RAND indicated that the Center would perform approximately 50 percent of the work in terms of cost during the first year. If CMS decided to exercise its options for years 2 and 3, RAND estimated the total

[17]"Improving the Consistency of the Nursing Home Survey Process," RFP No. CMS-02-017/JB, issued July 12, 2002. Nursing home deficiency rates and scope and severity determinations vary substantially among states. For example, according to the RFP, the percentage of nursing homes with no health deficiency citations in 2000 ranged from 2.3 percent in Arizona to 37.8 percent in Virginia. The RFP explained that although some of these differences might be accounted for by real quality-of-care differences among nursing homes, it also is extremely unlikely that average differences of this great a magnitude for entire states can be explained by real quality-of-care differences.

[18]The RFP repeatedly cited the previous survey work done by Center staff and attributed some improvements to the nursing home survey process to the Center's findings.

cost of its proposal at $2.0 million, of which the Center was expected to receive about $1.6 million. The tasks to be performed during the first year consisted largely of design preparation activities, with major fieldwork efforts and report writing occurring during the option years.

A review panel, composed of CMS staff with different areas of expertise and chaired by the Project Officer for this task order, was convened to evaluate the three submitted proposals based on the four criteria described above. To assign scores in the first three areas—statement of the problem and technical approach, personnel and experience, and management plan—panel members generally relied on information contained in the proposals. With respect to past performance, the RFP instructions required each offeror to submit a list of recent and related projects with CMS and other entities, and the Project Officer gathered past performance data on some of these projects by asking panel members and other individuals familiar with the offerors to complete a survey. The results of these surveys, as well as comments solicited from others who had worked with each of the offerors in the past, were shared and discussed by the panel, after which the individual panel members assigned a past performance score to each offeror. On the basis of its initial evaluation, the panel found each of the three submitted proposals to be acceptable.

The review panel chair then sent a series of questions to the three offerors to gain additional information about their proposals. The three entities responded to these questions, submitting their best and final offers. RAND's best and final offer proposed that the Center would perform more than 50 percent of the work during the first year, in terms of cost. The same panel again met to evaluate and score the best and final offers, and the RAND proposal received the highest number of points. The panel members specifically cited the Center's expertise in the area, particularly among its surveyors, as a reason for RAND's high score. CMS sent a letter to RAND on September 26, 2002, to notify the firm of its selection, and the CMS Contracting Officer signed the task order to RAND for $248,355 on September 27, 2002. The task order stated that "[c]onsent is hereby given" for a subcontract to the Center and expressly provided for the Center to receive $134,706.[19]

[19]The task order also incorporated RAND's technical proposal by reference.

CMS Administrator Intervened to Exclude Subcontractor

At virtually the same time that CMS awarded the task order to RAND, the CMS Administrator, who told us he had received advice that he had the legal authority to do so, directed staff from the Acquisition and Grants Group to inform RAND that it could not subcontract with the Center. Accordingly, on September 27, 2002, the same day that CMS awarded the task order to RAND, a CMS contract specialist left a voicemail message with RAND's Contract and Grant Administrator, with the following instructions:[20]

…[The] subcontract with University of Wisconsin…must be deleted at this time from your task order….I'm not sure exactly what the issues are but upper management has directed us not to award any…contracts or subcontracts with the University of Wisconsin until further notice.

An e-mail message dated September 26, 2002, from the Director of CMS's Acquisition and Grants Group to a Special Assistant to the Administrator demonstrates that CMS was contemplating this action before the award was made:

I just wanted to confirm our discussion last night….We are also going to award the Rand contract under which Wisconsin is a subcontractor. However, we can explore the possibility of requesting that Rand remove Wisconsin as a subcontractor after award.

The Center's Director, who learned of the agency's action from RAND on October 8, 2002, attempted to determine the status of the Center's role on the task order first through telephone calls to officials in CMS's Acquisition and Grants Group and then through e-mail communications with the Administrator. The Center's Director met with the Administrator and one of his Special Assistants on October 18, 2002. Although the Director and the Administrator both characterized the meeting as productive, on October 22, 2002, the Administrator sent an e-mail message to the Center's Director, reiterating his decision to direct RAND not to use the Center as a subcontractor. The University's Vice Chancellor for Research and Dean of the Graduate School sent a letter to the CMS Administrator on November 15, 2002, asking for the rationale for the

[20]A RAND official provided us with an electronic copy of the recorded voicemail message as well as a written transcription of the voicemail message that included the date and time it was received. We have corrected the transcription of this voicemail message and e-mail quotations throughout this report for spelling errors. Except where otherwise indicated by bracketed material or ellipses, they are verbatim.

agency's action.[21] On December 4, 2002, the University filed a bid protest with GAO's Procurement Law Group requesting that CMS be required to rescind its order to RAND barring the Center as a subcontractor.[22] However, GAO dismissed the bid protest on December 16, 2002, explaining that (1) it does not consider protests from subcontractors, and (2) the protest was not submitted within the appropriate time frame.[23] On December 18, 2002, CMS modified the RAND task order and formally withdrew its consent for the Center as a subcontractor. (Table 1 contains a summary of the dates on which these and other related events occurred.)

[21]As of June 20, 2003, CMS had not responded to this letter.

[22]Under the Competition in Contracting Act of 1984 (CICA), GAO considers protests of solicitations for contracts and awards or proposed awards of contracts by federal agencies. *See* 31 U.S.C. §§ 3551-3556. CICA and GAO's implementing regulations generally define the scope of GAO's bid protest jurisdiction. GAO's authority to hear bid protests is distinct from its authority to conduct audits, evaluations, and investigations of federal programs and activities.

[23]B-291751, Dec. 16, 2002.

Table 1: Chronology of Key Events in 2002 Relating to Award of Task Order to RAND with the Center as a Subcontractor

	Date	Action
July	July 12	CMS sends RFP to 14 contractors.
August	Aug. 8	Three offerors submit proposals in response to the RFP. RAND proposes to use the Center as a subcontractor.
	Aug. 20	CMS panel conducts initial review of proposals.
September	Sept. 6-10	CMS conducts discussions with three offerors and requests best and final offers.
	Sept. 17	CMS panel reviews best and final offers. Panel recommends RAND for award.
	Sept. 26	CMS sends letter to RAND stating that it had been selected for the task order. RAND signs the task order and sends it to CMS.
	Sept. 27	CMS signs the task order and instructs RAND not to subcontract with the Center.
	Sept. 30	At the request of CMS, RAND sends two e-mails to CMS indicating that RAND will not subcontract with the Center.
October	Oct. 7	CMS Project Officer, unaware of the decision regarding the Center, e-mails Center's Director reiterating that RAND has been awarded the task order.
	Oct. 10	Center's Director e-mails CMS Project Officer that RAND has been instructed by CMS not to subcontract with the Center.
	Oct. 14-17	CMS Administrator and Center's Director exchange e-mails regarding the basis for the Administrator's decision to exclude the Center from the RAND task order.
	Oct. 18	CMS Administrator and a Special Assistant meet with Center's Director to discuss CMS decision about the Center.
	Oct. 22	Center's Director e-mails CMS Administrator and a Special Assistant as a follow-up to meeting and asks about moving forward on project; CMS Administrator e-mails Center's Director that he is not changing his mind about the Center as a subcontractor.
	Oct. 23	Center's Director e-mails CMS Administrator to ask why he refuses to reverse his decision.
	Oct. 25	CMS Administrator e-mails Center's Director indicating no change in his decision.
November	Nov. 15	University sends a letter to CMS Administrator requesting clarification of his decision. CMS did not respond.
December	Dec. 4	University files bid protest with GAO.
	Dec. 16	GAO dismisses bid protest without addressing issues presented.
	Dec. 18	CMS signs a task order modification withdrawing its consent for the Center as a subcontractor and the Center's Director as the co-principal investigator.

Sources: HHS, RAND, and University of Wisconsin.

Task Order Work on Hold 8 Months After Award

Given the uncertainty surrounding the use of the Center as its subcontractor, RAND had not conducted any substantive work under the task order as of June 23, 2003, over 8 months after the task order was awarded. RAND officials told us that they had initially perceived that concerns about the Center's participation would be quickly resolved, with the Center reinstated as the subcontractor. As a result, RAND's response for several months was to request extensions from CMS on performing the work. On February 25, 2003, however, an official from CMS's Acquisition and Grants Group requested that RAND provide the agency with a course of action for performing the work without the Center. RAND provided

CMS with three options on March 14, 2003, all of which envisioned RAND performing as the prime contractor but potentially using another subcontractor. RAND's letter emphasized that it continued to believe that the Center was the most qualified subcontractor and that the options were only to be used if CMS continued to withhold its consent for the Center. On May 15, 2003, CMS asked RAND to delay its work under this task order until we had completed our investigation. However, on June 12, 2003, CMS's Acquisition and Grants Group sent a letter to RAND requesting the termination of the task order by mutual consent. On June 19, 2003, RAND responded that it agreed with the agency's earlier suggestion to wait for our report before taking further action.

Administrator's Decision to Exclude Center Was Improper

The Administrator informed us that a number of factors supported his exclusion of the Center from the RAND task order. First, he stated that the "subcontract consent" clause in the master contract authorized CMS to direct RAND not to use the Center as a subcontractor. A second factor the Administrator identified was the desire to award work to "new" contractors with "fresh" approaches and ideas in areas such as nursing home survey and certification. Third, the Administrator told us that he and his staff had assessed the Center's performance on a number of ongoing CMS task orders and determined that the Center had performed poorly on several of them, especially those related to nursing home survey and certification. Finally, the Administrator stated that during the development and implementation of the nursing home QI initiative, the Center's Director had worked against consensus and was unwilling to compromise, which generated significant problems for the agency. We have reviewed each of the reasons provided by the Administrator and conclude that, in light of the evidence, the Administrator did not have a reasonable basis to direct RAND not to subcontract with the Center.[24] Rather, the Administrator's decision appears to have been in retaliation for the Director's comments on CMS's QI initiative. As a result, we believe that the Administrator's action was improper.

[24]Contracting agencies are afforded broad discretion in their procurement decisions. *Maintenance Engineers v. United States*, 50 Fed. Cl. 399, 412 (2001); *Preferred Systems Solutions*, B-291750, Feb. 24, 2003, 2003 CPD P 56 at 4. Accordingly, when those decisions are challenged, they are generally reviewed only to ensure that they are consistent with the solicitation's stated terms and applicable procurement statutes and regulations, and that they have a reasonable basis. *Halter Marine v. United States*, 56 Fed. Cl. 144, 156-59 (2003); *TLT Construction Corporation v. United States*, 50 Fed. Cl. 212, 215 (2001); *Sams El Segundo, LLC*, B-291620.3, Feb. 25, 2003, 2003 CPD P 48 at 8.

Neither the Subcontract Consent Clause Nor CMS's Interest in New Contractors Provided a Reasonable Basis for the Administrator's Decision

Two of the reasons cited by the Administrator—the subcontract consent clause and a desire to obtain work from new contractors—do not provide reasonable bases for excluding the Center from the RAND task order. The Administrator's reliance on the subcontract consent clause is inappropriate because the task order award was largely based on the integral role of the Center in the work to be performed. Further, both the use of a task order competition limited to the 14 holders of master contracts and the RFP for this task order undermine the Administrator's second reason—an interest in working with new contractors.

Subcontract Consent Clause

The Administrator asserted that the subcontract consent clause contained in the master contract authorized him to disapprove RAND's use of the Center as a subcontractor under the task order. The subcontract consent clause requires the contracting officer to review requests for approval of subcontractors submitted by a prime contractor and advise the contractor of the agency's approval or disapproval in writing. While a subcontract consent clause generally provides an agency with broad authority to accept or reject proposed subcontractors, the Administrator's reliance on the clause in this context is inappropriate for a number of reasons.

As a preliminary matter, the subcontract consent clause cited by the Administrator is typically applicable after contract award, as a matter of contract administration, rather than at contract award.[25] Here, the Administrator's decision to exclude the Center as a subcontractor related to the award of the task order, rather than to CMS's administration of the task order. RAND had identified the Center as a subcontractor in the proposal it submitted to CMS, and the Administrator required RAND to remove the Center at essentially the same time as CMS awarded the task order to RAND.

More importantly, even if the subcontract consent clause was applicable, the Administrator's exercise of his authority under this clause was not reasonable. CMS selected RAND in large part because of the strengths of its proposed subcontractor, after reviewing the Center's past performance, the role it would have under the task order, and the time Center personnel would devote to the project. Moreover, the agency consented to the RAND

[25]The language of the clause (referring to requests by the "contractor," not offerors competing for a contract), as well as the FAR provision governing its use, support the view that its applicability is limited to post-award modifications or the approval of subcontractors that the agency had not otherwise agreed to prior to award. *See* 48 C.F.R. § 52.244-2.

subcontract with the Center in the task order itself, explicitly endorsing this element of the RAND proposal. If the Administrator acted properly in excluding the Center—which we do not believe is the case—the award to RAND would no longer be supported because it was largely based on RAND's subcontract with the Center.[26]

Agency's Interest in New Contractors

Given the terms of the solicitation, the Administrator's stated preference for CMS to work with new contractors with fresh approaches to the nursing home survey and certification area did not provide a reasonable basis for his decision to exclude the Center as a subcontractor. The solicitation did not state that being new to the area of nursing home quality review was a selection criterion. To the contrary, the competition for the nursing home research task order was limited to the 14 entities that were eligible to compete under the master contract.[27] In addition, much of the solicitation's discussion of the agency's need for work in this area was based on the Center's prior efforts, which were repeatedly referenced. If the Administrator believed there was a need to involve "new" researchers in the nursing home survey and certification work, he could have directed agency officials to amend the solicitation to reflect this criterion and request revised proposals.

Assertion of Center's Poor Past Performance Not Supported

The evidence also does not support the Administrator's statement that poor past performance by the Center justified his decision to exclude it from the RAND task order. As noted above, "past performance" and "personnel and experience" accounted for 25 and 30 percent, respectively, of the evaluation score, and officials from CMS's Acquisition and Grants Group told us that information about the past performance of a contractor or subcontractor—either positive or negative—would be in the contract file. Our review of the file for this task order, however, shows no record of poor past performance by the Center. The scores that the RAND proposal received for both of these criteria were high, and the contract file included several examples of the Center's strong past performance and unique

[26]It is well established that the selection of a proposal for award of a federal contract must be based on the proposal as it was submitted by the offeror and evaluated against the selection criteria in the solicitation. *Cf.* 41 U.S.C. § 253b(a); *Bionetics Corp.*, B-221308, Dec. 24, 1985, 85-2 CPD P 715 (pertaining to competitive procedures under CICA).

[27]CMS was not required to satisfy its research needs by awarding a task order under the master contract. A provision in the master contract suggests that an entity other than one of the 14 master contract holders could have met CMS's need for nursing home survey research through a separate contract.

qualifications. CMS acquisition and grants and program staff we interviewed also were not aware of any documentation suggesting poor performance by the Center. The selection panel assessed the Center's past performance as very satisfactory and pointed to the central role of its staff in the proposed fieldwork as a key factor in the decision to award the task order to RAND. In response to one offeror's post-award request for information about weaknesses in its proposal, CMS officials identified the absence of staff with extensive survey experience, like that of the Center.

Our review of other sources of performance information also yielded a high level of praise for the Center's prior work. For example, as part of the agency's review of proposals for its 2000 master contract, CMS requested evaluations from managers in CMS and other entities on projects that were either ongoing or completed within the past 3 years. CMS staff collected 18 such past performance evaluations for the Center on a mix of CMS and non-CMS projects.[28] For these evaluations, reviewers rated the Center in six categories, including performance. The majority of evaluations completed for the Center were positive. While a few of the reviewers gave the Center lower scores in some categories than in others, all but one indicated on the evaluation that they would contract with the Center again. The remaining reviewer gave an "unsure" response.

In addition, the Administrator's assessment of the Center's performance on ongoing projects as a prime contractor or a subcontractor is not persuasive and therefore does not support his assertion that the Center's past performance was poor. This assessment, which was documented in an e-mail message dated February 4, 2003, from a Special Assistant to the Administrator to senior CMS contracting and other officials—over 4 months after the decision was made to exclude the Center as a subcontractor—contains an unsupported statement that most of the work managed by the Center "did not produce favorable results." For the six task orders cited in this assessment, the vast majority of the funds—about 83 percent—were directed to two task orders in which the Administrator determined that the Center performed well.[29] With respect to the remaining

[28]The 2000 master contract solicitation instructed offerors to provide a list of contracts and subcontracts completed during the past 3 years and ongoing contracts and subcontracts similar in nature to the scope of the solicitation.

[29]These two projects involved examinations of the (1) Implementation of Medicare Consumer Assessment of Health Plans (CAHPS) Disenrollment Survey and (2) National Implementation of Medicare CAHPS/Fee-for-Service Survey.

four projects, the assessment characterizes the Center's performance as poor but does not provide specific examples of poor performance. For example, in reference to the Center's work on two survey and certification task orders, the assessment states that "this program/process [survey and certification] has been very problematic for CMS…. [I]t continues to be an area that generates great concern…. This doesn't mean that all of the problems are the responsibility of this contractor - but CMS would certainly benefit from a fresh approach - old ideas from this contractor and others are not working." The assessment does not go on to specify examples of the Center's poor performance on the projects and does not explain why the Center, which is one of several contractors to have performed work in the area, would be responsible for weaknesses in the nursing home survey and certification process.[30] The assessment also does not explain why the other contractors involved in the nursing home survey process were not excluded from survey-related task orders on a similar basis.

The Administrator's negative view of the Center's work on these four task orders identified in the summary assessment document also is not consistent with the master contract performance evaluations completed by CMS project managers, who a CMS official said are in the best position to comment on the performance of a contractor. For example, with respect to the two survey and certification projects referred to above, the respective CMS project officers gave high marks to the Center in all applicable categories on the performance evaluations. While there are some negative statements, most of the other documents related to these four task orders are positive.

The Administrator's October 17, 2002, e-mail message to the Center's Director also contradicts his assertion that the Center's past performance was poor. In this e-mail message, the Administrator stated, in part:

> I am sure your work with us will continue…. If you do good work—as you apparently do—and deal with us fairly—you will get the same treatment from me.

[30]While the Center has performed work on several projects related to the survey and certification process, there are other contractors with similar levels of CMS contracting experience in this area.

Evidence Suggests that Administrator's Decision Was Retaliation for the Center Director's Comments on QI Initiative

The evidence suggests that the Administrator's decision to exclude the Center from the RAND task order was in retaliation for the Center Director's comments about CMS's nursing home QI initiative, including the Director's provision of technical information that we requested during our review of the effort. Although these comments did not affect the QIs CMS used or the timing of the national rollout, the Center's Director was perceived by the Administrator as obstructing the consensus-building process for the QI initiative by being unwilling to compromise. Having received advice that he had the legal authority to exclude the Center from the RAND task order and understanding (although erroneously) that the task order was valued at $30,000, the Administrator directed CMS staff to exclude the Center. Acknowledging that he was not familiar with the agency's contracting process, the Administrator told us he believed it was appropriate for him to intervene in this instance given the Center Director's position on the QI initiative. Regardless of the merit of the Administrator's view of the Center's Director and concerns about the Director's capacity to build consensus, the Administrator was not authorized to effectively change the proposal on which the award to RAND had been based. As explained earlier, the award to RAND was no longer supported once the Administrator excluded RAND's proposed subcontractor.

The Administrator's frustration with the Center's Director regarding the QI project is demonstrated in e-mail exchanges between the two. For example, in an e-mail message on October 16, 2002, referring to the QI initiative, the Administrator wrote:

…Your problem with the agency is me—and I have discussed that with the Secretary at some length. I am happy to talk to you—but if you want to continue to yank my chain—I will continue to disconnect you from this agency. And I am happy to discuss this in front of the Secretary, either of your Senators—or anyone you like. There is no entitlement to government contracts—especially when you try to sandbag the agency you contract with—and I have NO doubt they would all agree with me if I have to discuss it in more detail.

When asked by the Center's Director on October 17, 2002, why the Center was excluded from the RAND task order, the Administrator responded, in part:

I gave you every shot in the world to get your views in…. We have worked hard to build that consensus in the last year, and are not interested in having it erode before the November 12th publication…. You were part of a fair, thorough and unbiased process. I don't think it is too much to ask the participants in that process not to rip it apart when it is put in place. The RAND subcontract is a very very small part of your work. I am sure your

work with us will continue. But the government has no requirement to contract with anyone.

The timing of certain events relating to the Administrator's decision to exclude the Center from the RAND task order and the involvement of the Center's Director in commenting on the QI initiative further suggest that the Administrator's directive was retaliatory in nature. For example, on September 25, 2002—roughly 6 weeks before the national rollout and 2 days before the task order award—the Center's Director met with CMS's Project Director for the QI initiative, at which time the Center's Director provided a position paper that identified several technical issues that he believed the agency needed to address prior to the national implementation. Although the CMS official characterized the meeting as productive, she also told us that CMS and the Center's Director had a fundamental disagreement over certain technical aspects of the initiative, and she believed that the Center's Director would not be satisfied unless CMS changed course and included the QIs that the Center's Director supported in its public reporting program. On the same day as this meeting, September 25, 2002, this CMS official contacted a Special Assistant to the Administrator to brief him on the substance of the discussion. The same evening, the Special Assistant and the Director of CMS's Acquisition and Grants Group also discussed the status of the RAND contract and the possibility of excluding the Center, which occurred 2 days later on September 27, 2002.

Efforts to Exclude the Center Extended to Other Contracting Opportunities

Although communications between the Administrator and the Center suggested that the Administrator's decision to exclude the Center was limited to the RAND task order, other evidence we reviewed indicated that senior CMS officials intended to exclude the Center from other CMS contracting opportunities based on their understanding of the Administrator's direction. Most notably, internal CMS communications suggest that agency officials had essentially barred the Center from participating as a prime or subcontractor on other task orders. However, CMS's treatment of the Center under other task orders has varied since its exclusion from the RAND task order. While CMS denied a request submitted in December 2002 to provide additional funds to the Center as a subcontractor, the agency recently decided to exercise an option to extend another task order on which the Center is the prime contractor.

Staff Understood Instructions to Exclude the Center to Extend to Other CMS Contracting Opportunities

On January 30, 2003, CMS sent a letter to the Center advising it that the agency and the Center no longer had a contractual relationship because of the Center's insistence on certain changes to the master contract that CMS considered unacceptable.[31] As a result, the Center was no longer eligible to compete for task orders issued under the master contract. Center officials told us that they were surprised and confused by CMS's letter since they believed that their concerns regarding the master contract had been resolved. Therefore, the Center requested clarification in a February 7, 2003, letter to CMS. On April 30, 2003, CMS advised the Center that it continued to find the Center's proposed changes unacceptable, but offered to reinstate the Center's master contract under the original terms.

Regardless of the dispute concerning the master contract, a January 29, 2003, internal CMS e-mail message suggests that the Center would not have been considered for task order awards despite the existence of a contractual relationship with CMS. Describing the context in which the ongoing dispute between the Center and CMS had arisen, the Director of CMS's Acquisition and Grants Group wrote to a Special Assistant to the Administrator, in part:

> In September, we sent [the Center] a modification to extend its current [master] contract for Medicare research activities. We have no intention of awarding it work under the contract based upon [the Administrator's] instructions. But, we felt we had to exercise the option to extend the base contract for legal reasons.

Earlier e-mail and voicemail messages also suggest that, as a practical matter, the Center had been barred from serving as a prime contractor for task orders under the master contract as well as a subcontractor to other entities. For example, the Director of CMS's Acquisition and Grants Group e-mailed the following direction concerning the Center to some of his staff in November 2002:

> …The Administrator's Office has directed us not to make awards to [the Center]…. If [the Center] is the apparent successful offeror for any competed task order, do not make an award until we have had the chance to raise the matter with the Office of the Administrator….

[31]Negotiations over information disclosure provisions in the master contract had been ongoing since October 2000, during which time CMS had twice exercised options to extend the contract. CMS officials told us that negotiations after contract award are common and that the Center had been eligible to compete for task orders under the master contract notwithstanding the ongoing negotiations.

In the same e-mail message, the Director of CMS's Acquisition and Grants Group also directed a senior member of his staff to pursue acquisition strategies, including competing work under other master contracts and awarding task orders to small businesses, designed to limit the Center's participation in CMS procurements. A later internal e-mail message emphasized that the instructions regarding awards to the Center extended to subcontracts and funding transfers as well.

An intent to exclude the Center from CMS procurements could constitute an improper de facto debarment.[32] A de facto debarment occurs when an agency excludes a potential contractor from government contracting or subcontracting without following the procedures set forth in the FAR, which requires agencies to notify contractors of the reasons for proposed debarments and provide them with an opportunity to respond.[33] During the course of our review, we found no evidence that the agency had followed these procedures with respect to the Center.

CMS's Treatment of Center on Other Task Orders Varied

CMS's unfavorable treatment of the Center was apparent in another CMS task order under a separate master contract where the Center is one of four subcontractors to the Research Triangle Institute (RTI).[34] In this project, the Center and another subcontractor are charged with leading a multiphase project to test and implement the use of QIs in the long-term care survey process.[35] The Center's Director is the principal investigator on the Center's subcontract with RTI. In late December 2002, the Project Officer for this task order submitted a request to adjust subcontractor

[32]Debarment refers to the formal exclusion of a prospective contractor from government contracting. The FAR identifies various reasons for debarment. Among other things, a contractor may be debarred for a conviction of or civil judgment for fraud, violation of federal or state antitrust statutes related to the submission of offers, or commission of other offenses indicating a lack of business integrity that seriously and directly affects the contractor's present responsibility. *See* 48 C.F.R. § 9.406-2.

[33]*See* 48 C.F.R. § 9.406-3; *Quality Trust, Inc.*, B-289445, Feb. 14, 2002, 2002 CPD P 41 at 4 (noting that a necessary element of a de facto debarment is that an agency intends not to do business with the firm in the future).

[34]Contract No. 500-96-0010, Task Order 3, "Evaluating the Use of Quality Indicators in the Long Term Care Survey Process."

[35]The other subcontractor is the Division of Health Care Policy and Research within the University of Colorado's Health Sciences Center.

funding levels, including a relatively small addition for the Center.[36] This request was not approved by CMS's Acquisition and Grants Group, based on the staff's understanding of the Administrator's instructions regarding the Center. A CMS official confirmed that there were no additional reasons the request was not approved, and when the reference to the Center was deleted, the request, which included additional adjustments to other subcontractor funding levels, was approved.

On June 9, 2003, the Director of CMS's Acquisition and Grants Group told us that CMS had recently decided to exercise an option to extend a task order on which the Center is the prime contractor but which does not involve the Center's Director.[37] The extension through September 30, 2004, is valued at $3.3 million, with the overall task order valued at approximately $15.6 million. A task order modification for this extension was provided to the Center for signature on May 29, 2003. A CMS official told us that the agency would sign the modification once it receives a signed copy from the Center.

Conclusions

Consistent with the "fair consideration" requirements of the Federal Acquisition Streamlining Act of 1994 and the terms of the master contract, CMS conducted a competitive process for the award of a task order for nursing home survey work. Although the resulting award to RAND was based largely on the identity and past performance of its proposed subcontractor—the Center—the Administrator intervened in the procurement by directing RAND to exclude the Center from serving as a subcontractor. The Administrator's action was not supported by any reasonable basis, including a reasonable exercise of authority under the subcontract consent clause contained in the master contract. Rather, the action appears to have been taken in retaliation for the Center Director's technical concerns about another CMS initiative. The Administrator's action thus was improper and undermined the integrity of the procurement process at CMS. Moreover, the Administrator's exclusion of the Center was understood by senior CMS officials to extend to other CMS procurements in which the Center might play a role as a prime contractor or subcontractor.

[36]This request included the transfer of $20,000 from one of the other subcontractors to the Center. The Center's budget for the RTI task order is approximately $2.3 million.

[37]"Implementation of Medicare CAHPS Fee for Service," Contract No. 500-95-0061, Task Order 7. The task order was awarded to the Center in August 2000.

Recommendations for Executive Action

In order to maintain the integrity of CMS's procurement process, we recommend that the Secretary of Health and Human Services take appropriate action to remedy the Administrator's improper decision to exclude the Center from the RAND task order. Such a remedy could include permitting RAND to subcontract with the Center as RAND had proposed or reopening the competition for the award of the nursing home survey research task order. We further recommend that the Secretary have CMS procurement decisions affecting the Center since September 2002 reviewed to ensure that they were supported by a reasonable basis.

Agency Comments

We provided a draft of this report to the Secretary of Health and Human Services and the Administrator of CMS, as well as relevant excerpts to RAND and the University of Wisconsin. The Office of the Secretary provided oral comments and CMS provided written comments (reproduced in app. I). RAND and the University of Wisconsin provided technical comments, which we incorporated as appropriate.

In its written comments, CMS disagreed with our conclusion that the Administrator's decision to exclude the Center as a subcontractor from the RAND task order was improper and undermined the integrity of CMS's procurement process. CMS asserted that the Administrator had a reasonable basis to instruct RAND not to subcontract with the Center, reiterating the reasons described earlier in this report without providing any new information. For example, CMS restated the view that the Center's past performance on nursing home survey and certification initiatives was problematic. We did not find evidence to support this view. Rather, the evidence pointed to a record of strong performance in this area. Nonetheless, CMS concurred with our recommendation concerning the need to take action to remedy the situation with regard to the Center's exclusion from the RAND task order award. CMS commented that the Administrator acknowledged that the subcontractor work under the RAND task order may have been more significant than he had initially understood and stated that the issue may be best rectified by recompeting the work, with the clear expectation that the agency is looking for new ideas with a strong results orientation. According to the written comments, the Administrator has directed staff to rebid the work as quickly as possible. Any such solicitation must include the actual selection criteria that CMS intends to apply.

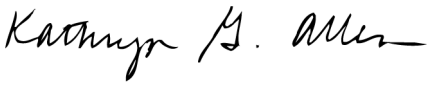
In oral comments, the Office of the Secretary concurred with our recommendation concerning the need to review CMS procurement decisions affecting the Center since September 2002. We were informed

that the Assistant Secretary for Administration and Management will perform an independent review of all CMS procurement activities involving the Center. In its comments, CMS emphasized that the Administrator did not intend for his decision concerning the Center on the RAND task order to extend to other work for CMS and that, upon learning of this possibility, the Administrator took immediate action instructing appropriate staff to "set the record straight." CMS said the Center is to be treated no better or worse than any other prospective contractor, with a completely level playing field for all contractors that want to offer new ideas to improve the nursing home survey and certification process.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after its issue date. At that time, we will send copies of this report to the Secretary of Health and Human Services, the Administrator of CMS, and appropriate congressional committees. We will also make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staff have any questions, please call Kathryn G. Allen at (202) 512-7118. Major contributors to this report include Susan Anthony, Helen T. Desaulniers, Laura Sutton Elsberg, and Behn M. Kelly.

Sincerely yours,



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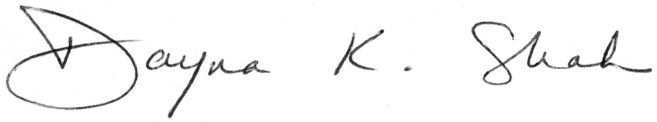

Dayna K. Shah
Associate General Counsel

Appendix I: Comments from the Centers for Medicare & Medicaid Services

DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services
Office of Strategic Operations and Regulatory Affairs

200 Independence Avenue SW
Washington, DC 20201

DATE: JUN 25 2003

TO: Kathryn G. Allen
General Accounting Office
Director, Health Care—Medicaid
And Private Health Insurance Issues

FROM: Jacquelyn Y. White
Director of Office of Strategic Operations and Regulatory Affairs

SUBJECT: General Accounting Office (GAO) Draft Report, *CMS CONTRACTING: Issues Concerning Administrator's Decision to Exclude Subcontractor* (GAO-03-842)

We appreciate the opportunity to review and offer comments on the above-referenced report. The Centers for Medicare & Medicaid Services (CMS) is the agency that purchases healthcare for 40 million Medicare beneficiaries, and partners with states to purchase healthcare for another 40 million people with Medicaid. As such, we take very seriously our charge to assure that we use every strategy available to us so that taxpayer dollars are used to finance continued improvements in the quality of healthcare.

The report deals with an issue very important to CMS and the American public – the Nursing Home Quality Initiative (NHQI) - and specifically about CMS's actions in dealing with a contractor who was part of an effort to improve the survey and certification process. We believe the quality measurement information we are sharing with the public and the provider community is reliable, valid, accurate, and useful. The CMS is committed to continually improving the quality measures and working to resolve the issues discussed in GAO's report *Nursing Homes: Public Reporting of Quality Indicators Has Merit, But National Implementation Is Premature*, (GAO-03-187). This contract, to study inconsistencies in nursing home survey results is also related to the agency's overall efforts to improve quality throughout the nursing home industry.

In the subject report GAO examined the actions taken by the CMS Administrator regarding a contract awarded to the RAND Corporation in September 2002, specifically as regards the subcontract to the University of Wisconsin's Center for Health Systems Research & Analysis (the Center). The GAO's goal was to determine if actions taken by the Administrator in denying this subcontract to the Center were appropriate. GAO concluded that, although the Administrator had the authority to take this action, the Administrator should also have a reasonable basis to direct RAND not to subcontract with the Center. The GAO believes that the Administrator's decision appears to have

been retaliation for the Center Director's involvement in another nursing home initiative. The GAO believes the Administrator's action was improper and undermined the integrity of CMS's procurement process.

The CMS disagrees and asserts that the Administrator did have a reasonable basis to instruct RAND not to subcontract with the Center. The Administrator was very direct with GAO in stating his concern regarding the inappropriate actions of the Center's Director regarding the nursing home quality initiative. The Administrator had good reason to believe that the Center's Director was obstructing and deterring the consensus building process for the NHQI by being unwilling to compromise and unwilling to work cooperatively with the broad group of stakeholders in addressing a delicate issue related to risk-adjustment. Although, the Administrator had good reason to be concerned about the contractor's performance under a different contract, other factors were considered by the Administrator, when he decided to restrict the Center from subcontracting with RAND for survey and certification work.

As GAO documents in the opening paragraphs of this report, the nursing home survey and certification process has been criticized for a number of years. The GAO as well as the Institute of Medicine, and the Office of the Inspector General of the Department of Health and Human Services, have reported on problems with this process. The Administrator was concerned with the constant criticism of the survey and certification process and, consequently, he was not satisfied with the work produced by the contractors that had been advising CMS on this issue. As this contract was being awarded to the RAND Corporation, the Administrator believed it was time to take a new approach. While the Center had performed reasonably well on some contracts in the past (not related to survey and certification), the Administrator decided that it was time for a change in this particular area. The Center, due to the body of work it had performed over the years had become part of the problem, not the solution.

The Federal Acquisition Regulations encourage agencies not only to consider past performance information submitted as part of a technical proposal, but to also consider relevant information from other sources. In this case, due to his past dealings with the survey and certification program, the Administrator would be an appropriate source from whom to obtain relevant information for purposes of evaluating the Center's experience in the area of survey and certification area. The Agency notes that considering relevant information from other sources, including high level officials, is appropriate.

The GAO asserts that the exclusion of the Center from this contract essentially changes the nature of RAND's proposal and may invalidate the award to RAND. The Administrator acknowledges that the subcontractor work under this contract award may have been more significant than he had initially understood. After a meeting with the GAO staff and consultation with CMS staff on this issue the Administrator agreed that this issue may be best rectified by recompeting the work, with the clear expectation that the agency is looking for new ideas – with a strong results orientation. Accordingly, the Administrator directed staff to rebid the work described above as quickly as possible. CMS believes the scope of work will be similar though not exactly the same as the

current task order due to changing CMS requirements and due to a clear focus on new ideas. All of this information was provided to GAO and their report should be modified to reflect these facts.

The GAO also contends that, due to the Administrator's actions, some CMS staff may have been left with the impression that the Center should be excluded from other contracting opportunities. This impression is totally false and the Administrator made clear to GAO that he never discussed this contractor with staff. He did not intend any impact on other work the contractor was doing for CMS. Upon learning of this possibility the Administrator took immediate action instructing appropriate staff to set the record straight. The Center is to be treated no better or worse than any other prospective contractor – with a completely level playing field for all contractors that want to offer new ideas to improve survey and certification. This fact was also explained to GAO and the report should be amended accordingly.

We appreciate the work completed by GAO. Their efforts helped us to identify potential problems that allowed the Administrator to take appropriate and immediate action. We respectfully request that the report be amended accordingly.

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