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June 2009

# ARMY CORPS OF ENGINEERS

## Recent Changes Have Reduced the Use of Continuing Contracts, but Management Processes Need to Be Improved





Highlights of GAO-09-552, a report to congressional committees

## Why GAO Did This Study

The U.S. Army Corps of Engineers (Corps) has had the authority to award multiyear contracts—continuing contracts—without having received appropriations to cover the full contract amount. In 2006, Congress limited the Corps' use of such contracts by prohibiting obligations made in advance of appropriations. In response, the Corps developed a new clause that stopped work once funding for a fiscal year was expended. GAO was mandated to examine (1) the accuracy of the Corps' fiscal years 2007 and 2008 quarterly reports to Congress about continuing contracts that included the new clause, (2) the extent to which the Corps' use of continuing contacts with the new clause may have affected its execution of the Civil Works program during this time, and (3) the extent to which the Corps followed legal procedures in implementing the new clause. To conduct this work, GAO reviewed Corps documents, such as its quarterly reports and bid protests, federal procurement laws, and interviewed officials.

## What GAO Recommends

GAO recommends that the Corps (1) establish adequate internal controls to track continuing contracts and (2) suspend its use of the new clause until it has been published in the *Federal Register*. The agency disagreed with the latter recommendation because it anticipates publication within 60 days. GAO continues to believe the recommendation is appropriate because use of the clause would be in violation of the OFPP Act.

[View GAO-09-552 or key components.](#)  
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June 2009

# ARMY CORPS OF ENGINEERS

## Recent Changes Have Reduced the Use of Continuing Contracts, but Management Processes Need to Be Improved

### What GAO Found

The Corps' quarterly reports to Congress for fiscal years 2007 and 2008 about continuing contracts with the new clause were inaccurate. According to the reports, the Corps awarded 21 new continuing contracts during fiscal years 2007 to 2008: 9 for construction and 12 for operations and maintenance, ranging in value from \$2.1 million to \$341.5 million, for a total value of about \$811 million. However, GAO found that some continuing contracts were double-counted, while others were missing from the reports. GAO also found other types of errors, such as a fully funded contract that was incorrectly included in the quarterly report as a continuing contract. These errors raise questions about the accuracy of the reports. GAO identified similar inaccuracies in the Corps' quarterly reports during its 2006 review and at that time recommended that the Corps develop a tracking system to monitor its use of these contracts. While the Corps believes its system of asking divisions to provide information on a quarterly basis is sufficient for tracking continuing contracts, GAO disagrees. Without a tracking system supported by sufficient internal controls to ensure accuracy, errors can persist in the information provided to Congress.

The Corps' use of the new clause has generally not affected the agency's ability to execute its Civil Works program. The Corps decreased its use of continuing contracts beginning around the time that the new clause was initiated. However, while acknowledging that the transition to the new clause created some initial difficulties that have since been overcome, Corp officials did not provide any examples of work being stopped on a project because funds were not available.

The Corps did not comply with a legal requirement in implementing the new clause, resulting in some districts' reluctance to use it. Section 22 of the Office of Federal Procurement Policy Act (OFPP Act) generally provides that no procurement regulation that has a significant effect beyond the internal operating procedures of the agency or a significant cost on contractors or offerors may take effect until 60 days after the procurement regulation is published for comment in the *Federal Register*. This requirement may be waived in urgent and compelling circumstances; however, the regulation must still be published in the *Federal Register* stating that it is temporary and providing for a public comment period of 30 days. Although the Corps has requested approval since 2006 from the Department of the Army and the Department of Defense, as it is required to, the clause has never been published and the Corps has continued to use it. GAO believes that the Corps' argument that its pursuit of publication satisfies the statute is unpersuasive. Moreover, GAO spoke with Corps officials from districts and divisions who expressed concern about using the clause prior to its publication. Specifically, they are concerned that using the clause could subject the Corps to legal challenges, such as bid protests, and that such potential challenges could delay projects and increase their costs.

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## **Abbreviations**

Corps	U.S. Army Corps of Engineers
DOD	Department of Defense
OFPP Act	Office of Federal Procurement Policy Act

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**United States Government Accountability Office  
Washington, DC 20548**

June 22, 2009

The Honorable Byron Dorgan  
Chairman  
The Honorable Robert Bennett  
Ranking Member  
Subcommittee on Energy and Water Development  
Committee on Appropriations  
United States Senate

The Honorable Peter J. Visclosky  
Chairman  
The Honorable Rodney P. Frelinghuysen  
Ranking Member  
Subcommittee on Energy and Water Development  
Committee on Appropriations  
House of Representatives

Congress provides the U.S. Army Corps of Engineers' (Corps) Civil Works program with funding each year to plan, construct, operate, and maintain a wide range of water resource projects.<sup>1</sup> Congress appropriated over \$5 billion for such projects in fiscal year 2007 and again in fiscal year 2008. The Corps relies on contractors to construct many of these projects, which often take more than 1 fiscal year to complete. Generally, federal agencies are required to obligate appropriations for the full cost of a contract at the time of award (i.e., they must fully fund the contract).<sup>2</sup> However, from 1922 to 2005, an Army policy allowed the Corps to enter into, and commit the federal government for the full amount of, contracts that spanned more than 1 fiscal year (called "continuing contracts"), even though the Corps may not have received appropriations to cover the full contract amount at the time the contracts were awarded.<sup>3</sup> More specifically, since

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<sup>1</sup>The Corps also has a military program that provides, among other things, engineering and construction services to other U.S. government agencies and foreign governments. This report discusses only the Civil Works program.

<sup>2</sup>The Antideficiency Act prohibits agencies from entering into contracts that exceed currently available appropriations or that obligate appropriations not yet made.

<sup>3</sup>The River and Harbor Act of 1922 gave the Corps the permanent authority it had sought to use continuing contracts to complete projects even when the agency did not have appropriations to cover the full contract amounts.

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1977, these continuing contracts contained a clause that allowed contractors to continue working even when appropriated funds were not available. In such cases, the Corps would be committed to pay the contractor, with interest, when funding became available—in effect, obligating Congress to fully fund a project even though sufficient funds had not been appropriated for it. During fiscal years 2003 through 2005, the Corps' routine practice was to use continuing contracts for most of the contracts it awarded, in part, because of the Corps' interpretation of a provision in the Water Resources Development Act of 1999 that required the Corps to use continuing contracts for certain projects if sufficient funding was not available to complete the project. As a result, as we reported in 2006, the Corps was frequently awarding continuing contracts for short-term, low-dollar-value contracts that could have been fully funded.<sup>4</sup> For example, we found in 2006 that 39 continuing contracts in fiscal years 2003 through 2005 had been awarded for work that lasted 6 months or less, and 34 continuing contracts had been awarded during this time that had a value of less than \$1 million.

In our 2006 report, we also reported that the Corps' quarterly reports to Congress on the agency's use of continuing contracts frequently contained inaccuracies and that the Corps lacked a system for tracking these contracts. As a result, we recommended that the Corps develop a tracking system to monitor the use of its continuing contracts. The Corps agreed with our recommendation and told us that it would, among other things, establish an automated tracking system and implement it in fiscal year 2007. Also, at the time of our review, the Energy and Water Development Appropriations Act of 2006 restricted the way the Corps could use continuing contracts by prohibiting it from awarding or modifying existing continuing contracts when doing so would commit an amount in excess of the amount provided to a project. To ensure compliance with this restriction, the Corps developed a new clause for continuing contracts that specifically requires contractors to stop work once they have expended the funding set aside for the fiscal year.

A joint explanatory statement accompanying the fiscal year 2008 Consolidated Appropriations Act directed us to review the continuing contracts that the Corps has awarded using the new clause. In response,

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<sup>4</sup>GAO, *Army Corps of Engineers: Improved Monitoring and Clear Guidance Would Contribute to More Effective Use of Continuing Contracts*, GAO-06-966 (Washington, D.C.: Sept. 8, 2006).

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this report examines (1) the accuracy of the information in the Corps' fiscal years 2007 and 2008 quarterly reports to Congress about continuing contracts that included the new clause, (2) the extent to which the Corps' use of continuing contracts with the new clause may have affected its execution of the Civil Works program during this time, and (3) the extent to which the Corps followed legal procedures in implementing the new clause.

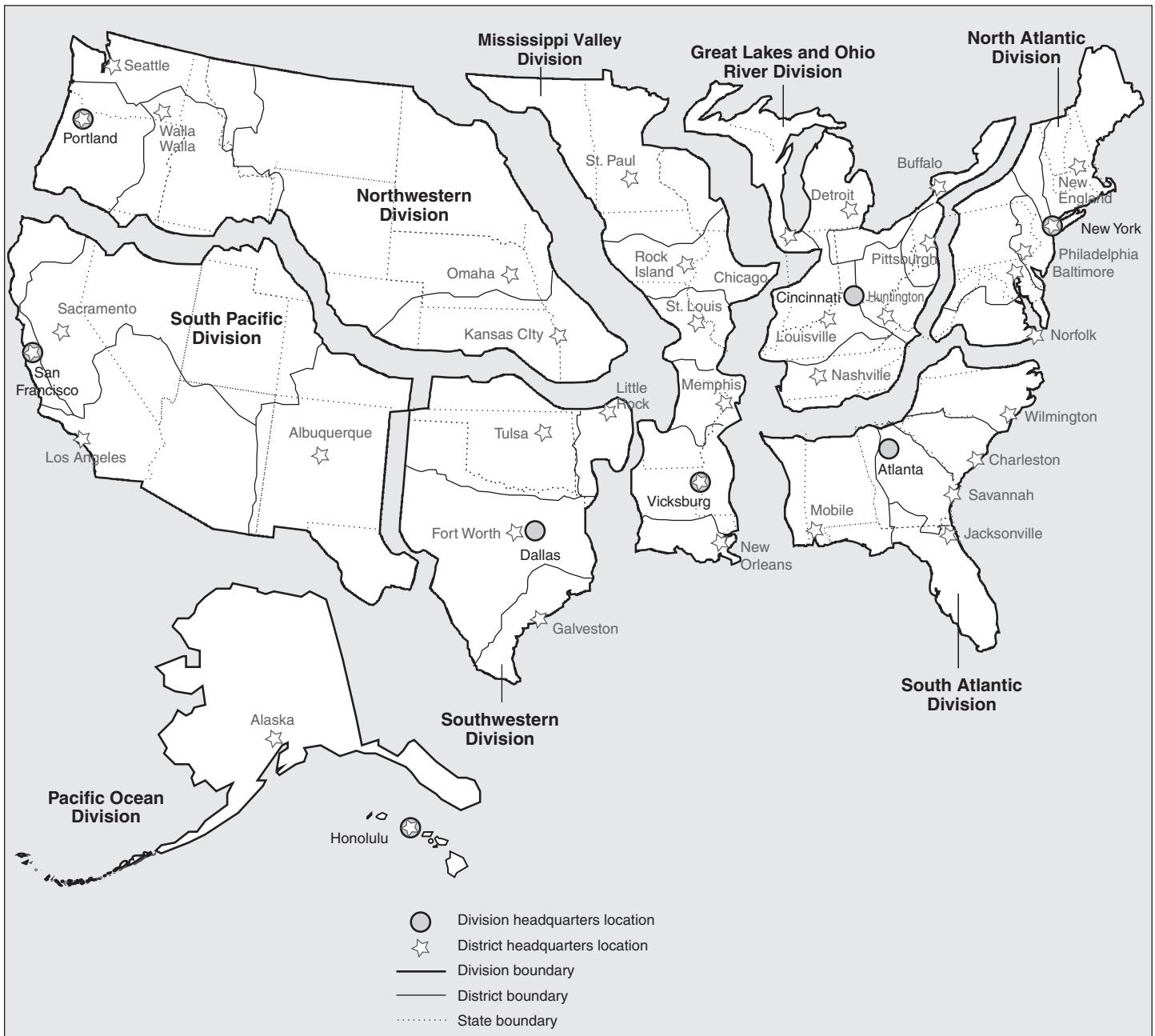
To determine the accuracy of the information the Corps reported to Congress, we reviewed the agency's quarterly reports to Congress for fiscal years 2007 and 2008. We compared the information on the number, type, and dollar value of continuing contracts in the reports with information from a Corps database and the results of interviews with officials from a nonprobability sample of 6 of the 38 districts and two of the eight divisions. To obtain information about the extent to which the Corps' use of continuing contracts that included the new clause may have affected its Civil Works program, we interviewed district and division officials at these same locations, as well as Corps headquarters officials. To assess the Corps' process for implementing the new continuing contracts clause, we reviewed federal procurement laws related to the Corps' issuance and use of the new continuing contract clause. In addition, we interviewed selected district and division officials to understand the process that the Corps used to develop and implement the new continuing contracts clause and obtain their views on the issue. We also contacted the Corps' Office of the Chief Counsel to obtain the Corps' legal position on the extent to which the Corps has met the requirements of federal procurement law, and reviewed its response and supporting documentation. Finally, we examined three bid protests, and the Corps' responses to these protests, concerning solicitations issued from fiscal years 2006 through 2008, that alleged, among other things, that the new clause was not published in the *Federal Register* as required by law. Appendix I contains a more detailed discussion of our scope and methodology. We conducted this performance audit from September 2008 to June 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

Under its Civil Works program, the Department of Defense's (DOD) U.S. Army Corps of Engineers plans, constructs, operates, and maintains a wide range of water resources projects. In addition to its headquarters in Washington, D.C., the Corps has eight regional divisions and 38 districts that carry out its domestic civil works responsibilities (see fig. 1).

**Figure 1: Locations of the Corps' Civil Works Divisions and Districts**



Source: GAO representation of U.S. Army Corps of Engineers data.

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Corps headquarters primarily develops policies and plans the future direction of the organization; divisions coordinate the districts' projects; and the districts plan and implement the projects, which are approved by the divisions and headquarters. Water resource projects are generally very large undertakings that often take more than a single fiscal year to complete. Moreover, the timing of these projects is often dictated by weather conditions or environmental concerns. For example, many dredging projects take place during the winter months because environmental concerns limit dredging operations during the spring and summer (March through September) to protect various species, such as threatened and endangered turtles.

Congress appropriates about \$5 billion annually to the Corps to carry out its Civil Works program. Federal agencies generally receive annual appropriations (also called fiscal year or 1-year appropriations) that are made for a specified fiscal year. These appropriations are available for obligation—legal commitment by the government for the payment of goods and services ordered or received—only for the bona fide needs of the fiscal year for which they were appropriated. If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, the funds cease to be available to the agency for new obligations. They are referred to as “expired” and, after 5 years, are returned to the U.S. Treasury. In contrast, the Corps receives “no-year” appropriations through the Energy and Water Development Appropriations Act—that is, there are no time limits on when the funds may be obligated or expended, and the funds remain available for their original purposes until expended. The majority of the Corps’ Civil Works appropriations are generally directed to two types of activities: (1) operations and maintenance and (2) construction.<sup>5</sup> Operations and maintenance activities include the preservation, operation, and maintenance of existing rivers and harbors. Construction activities include construction and major rehabilitation projects related to navigation, flood control, water supply, hydroelectric power, and environmental restoration.

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<sup>5</sup>The Corps typically receives contributed funds, particularly for construction projects, from nonfederal sponsors (state, tribal, county, and local agencies) that provide, among other things, financial contributions to complete the work.

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## The Corps' Quarterly Reports to Congress Contained Inaccurate Information on the Use of Continuing Contracts with the New Clause

The Corps' fiscal years 2007 and 2008 quarterly reports to Congress on continuing contracts awarded with the new clause contained inaccurate information. According to these reports, the Corps awarded 21 new continuing contracts during this time: 9 for construction and 12 for operations and maintenance, ranging in value from \$2.1 million to \$341.5 million, for a total of about \$811 million. However, we found that some continuing contracts were double-counted, while others were omitted from the reports. For example, two contracts were first reported to Congress as new continuing contracts at the end of fiscal year 2007. The Corps then reported the same two contracts in the first quarter of fiscal year 2008, marking them as "not reported" in the prior fiscal year. In addition, we identified two continuing contracts totaling approximately \$48 million that should have been included as new awards in the Corps' quarterly reports but were omitted. Corps officials confirmed that these were indeed new continuing contracts that should have been included in the reports. Both types of errors impacted the total number and value of the continuing contracts with the new clause that were reported to Congress as having been awarded during this 2-year period. We also identified other types of errors that did not affect the overall totals of new contracts or their value but, nevertheless, raise questions about the accuracy of the information that the Corps is providing to Congress. For example, when we asked Corps officials in one district to verify information about the continuing contracts they had awarded in fiscal years 2007 and 2008, they provided us with documentation that showed that one contract that had been incorrectly included in the Corps' quarterly report to Congress as a continuing contract was actually a fully funded contract. In addition, four new continuing contracts were not initially reported as new in the quarterly reports covering their award periods; instead, three were reported in a later quarterly report and one was reported earlier. Similarly, we found that two fully funded contracts were incorrectly included in the 2007 quarterly reports as existing continuing contracts.

The Corps' failure to accurately report to Congress the number of continuing contracts it awards is a problem that we previously identified in 2006, and at that time, we recommended that the Corps develop an appropriate tracking system for these contracts. Although the Corps concurred at the time, Corps officials told us that the agency had not developed a tracking system as we had recommended because it believed its system of asking divisions to provide information on a quarterly basis was sufficient for tracking the use of continuing contracts. These officials also told us that the agency had issued a 2007 guidance document that provided instructions to the districts for making submissions for the

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quarterly reports to Congress. In light of the inaccuracies we identified in the quarterly reports to Congress, we do not believe that the Corps quarterly data calls constitute a systematic tracking system for continuing contracts that we recommended in 2006; therefore, we believe that our 2006 recommendation has not yet been implemented by the agency. According to our *Standards for Internal Control in the Federal Government*, managers are to “complete, within established time frames, all actions that correct or otherwise resolve the matters brought to management’s attention.”<sup>6</sup> We believe that the Corps’ inaction on our recommendation has led to a lack of internal controls that has contributed to persistent errors on the part of the agency in reporting to Congress on its use of continuing contracts.

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## Overall, the Use of the New Continuing Contracts Clause Has Not Affected Execution of the Civil Works Program

As a result of the limits that Congress has placed on the Corps’ use of continuing contracts in recent years, the Corps has issued guidance and made several modifications to its policies that govern the Civil Works program. While these changes, taken together, have resulted in a decrease in the number of continuing contracts that the Corps has awarded, they have not significantly affected the agency’s ability to execute its Civil Works program. Specifically, the committee report accompanying the Corps’ fiscal year 2005 appropriations expressed concern about the Corps’ use of continuing contracts and noted that the purpose of continuing contracts was to enable the Corps, in awarding contracts for the components of large construction projects, to take advantage of economies of scale and efficiently manage these large components over several years. In enacting the Energy and Water Development Appropriations Act of 2006, Congress provided specific direction to the Corps regarding its use of continuing contracts. The law states, among other things, that with certain exceptions, none of the funds made available in the act may be used to award any continuing contract, or make modifications to any existing continuing contract, that commits an amount for a project in excess of the amount provided for the project.

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<sup>6</sup>The Federal Managers’ Financial Integrity Act of 1982 required that GAO issue standards for “internal control” in government. The result was GAO, *Standards for Internal Control in the Federal Government, GAO/AIMD-00-21.3.1* (Washington, D.C.: November 1999). The term internal control is synonymous with the term “management control” in OMB Circular A-123, which covers all aspects of an agency’s operations—programmatic, financial, and compliance.

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To help ensure that it met these new congressional requirements, the Corps issued guidance in fiscal year 2006 that, among other things,<sup>7</sup>

- directed that districts use fully funded contracts as their primary contracting option and that continuing contracts be used only as the contracting option of last resort;
- summarized new information that the districts are required to provide in their requests to use continuing contracts, including an explanation of why using a continuing contract is in the best interest of the government; and
- directed districts to take measures to ensure that contractor costs do not exceed the amount provided for projects.

Also, in response to these new congressional requirements, that same year, the Corps developed a new clause for continuing contracts that specifically required contractors to stop work once they had expended the funding set aside for the fiscal year. In addition, the Corps established certain criteria for the use of continuing contracts for operations and maintenance projects. The Assistant Secretary of the Army for Civil Works preapproved certain requests for operations and maintenance continuing contracts if the contracts met five conditions. In response, the Corps issued guidance to the divisions reiterating these conditions. These conditions included that (1) the contract was financed from the Corps' operations and maintenance account and (2) the work could not be broken down into smaller increments that could be fully funded within the current fiscal year.<sup>8</sup> The following fiscal year, the Corps also established certain criteria for continuing contracts for construction projects. Specifically, using continuing contracts for construction activities was to be considered only if the contract was for more than \$10 million and the work could not be completed in a single fiscal year. The Corps also required that requests for using continuing contracts, other than continuing contracts that had been preapproved, be approved at the Assistant Secretary level.

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<sup>7</sup>The Corps issued this guidance in its Engineering Circular 11-2-189.

<sup>8</sup>The other three conditions follow: (1) the contract met all requirements established by the Corps, including that it be the most cost-effective acquisition mechanism; (2) no funds could be reprogrammed to or from the project in fiscal year 2006; and (3) the lowest amount specified in either the President's budget, the House report or the Senate report for fiscal year 2007, or the conference report for fiscal year 2007, if available, included funding for the remaining portion of the contract, along with funding for any other operation and maintenance of the affected project.

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While the Corps quarterly reports to Congress cannot be fully relied on for accurate information on the number and value of continuing contracts awarded with the new clause, they do provide a reasonable sense of the overall direction of the use of such contracts. In 2006, we reported that the Corps, on average, awarded about 500 continuing contracts per year for fiscal years 2003 through 2005. The 2007 and 2008 quarterly reports to Congress indicate that the number of continuing contracts with the new clause has reduced considerably and may average only about 10 per year for fiscal years 2007 and 2008.

The decreased use of continuing contracts, and the use of the new clause, does not appear to have significantly affected the Corps' Civil Works program. While the Corps has not established metrics to evaluate the impacts of this change, district officials we spoke with told us that they believe that the new continuing contracts clause has had little, if any, impact on their ability to accomplish the Civil Works mission of the agency. For example, several Corps district officials we interviewed said that while there were some temporary difficulties in executing their projects when the new clause was first implemented, their ability to conduct their work has not been adversely affected. Specifically, these officials told us that the combined effect of the requirement to fully fund contracts and the lack of sufficient funds in 2007, when the new clause was first implemented, led them to award fewer contracts at that time, and some project starts were delayed until the following fiscal year. These officials did not provide any examples, however, of where work on a project was stopped because funds were not available. Since that time, however, they have adjusted to the changes and have resumed their normal level of contract activity.

Corps officials also told us that, in general, the recent changes, including the new clause, have had some positive effects on contract management, including the following:

- Contracts that are fully funded, as well as continuing contracts that use the new clause, provide officials more certainty in managing their funds. For example, the Corps no longer has to search for funds each year to meet the obligations created when contractors would work after the amount appropriated for a fiscal year was exhausted.
- Contract management has become easier for Corps officials, whether they fully fund contracts or use continuing contracts with the new clause, because fewer contract modifications are likely, and the contractor is restricted to the work specified in the contract.

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Notwithstanding these positive effects, some district officials also told us that having the flexibility to use continuing contracts as they were previously used, as opposed to fully funding contracts, would be useful for some large, longer-term projects, such as lock and dam projects, which require millions of dollars and multiple fiscal years to complete. According to these officials, if such projects are fully funded, large amounts of unexpended appropriations would be carried over for several fiscal years. For example, a 5-year, \$200 million contract that required only \$75 million in its first year would require carrying over the remaining \$125 million into subsequent fiscal years until the funds were expended. Since the \$125 million would already have been obligated to the contract at award, it would not be available to be used on other contracts. If such projects were funded using continuing contracts as they were previously used, the Corps would allocate the entire contract amount at the time of award, but would obligate only the amount of funds that would be needed to cover the first year of the contract. The remaining funds not needed during the first year would be available to be used on other contracts. As a result, these officials told us that the restrictions placed on the use of continuing contracts in recent years may have made execution of some projects somewhat less efficient and more costly, although they could not provide us any specific examples of this having occurred. Corps headquarters officials generally disagreed with this position. According to these officials, over time, the Corps could complete the same number of projects even if they were fully funded, as opposed to using continuing contracts as they were previously used.

Corp headquarters officials did tell us, however, that there is some value in having the ability to use continuing contracts as they were previously used for a few projects. Specifically, as previously used, continuing contracts obligated the Corps for the full amount of the contract at the date of the award. According to these officials, in practical terms, this means that the contractor does not have to wait for the Corps to provide the money in order to make large investments, such as ordering prefabricated materials and buying raw materials like steel. This flexibility on timing realized under the previous use of continuing contracts therefore provided contractors the ability to reap the benefits of economies of scale when purchasing materials in bulk.

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## The Corps Did Not Comply with a Legal Requirement in Implementing the New Continuing Contracts Clause

In implementing the new continuing contracts clause, the Corps did not comply with a legal requirement and, as a result, some districts are reluctant to use it when awarding contracts. Specifically, the Corps has been using the new continuing contracts clause prior to its publication in the *Federal Register* for public comment, in violation of section 22 of the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. § 418b.<sup>9</sup> This section of the act generally provides that no procurement regulation relating to the expenditure of appropriated funds that has a significant effect beyond the internal operating procedures of the agency or a significant cost or administrative impact on contractors or offerors may take effect until 60 days after the procurement regulation is published for public comment in the *Federal Register*. This requirement for advance comment may be waived if urgent and compelling circumstances make compliance impracticable; in such cases, a procurement regulation shall be effective on a temporary basis if a notice of the regulation is published in the *Federal Register* stating that it is temporary and providing for a public comment period of 30 days. After considering the comments received, the agency may issue the final procurement regulation. Courts have held that the failure to comply with section 22 renders the proposed procurement regulation without effect.<sup>10</sup>

In spring 2006, the Corps waived the requirement to obtain advance comments on the new clause based on urgent and compelling circumstances and sent a request for publication of the clause to the Department of the Army. The Corps is required to obtain approval from the Department of the Army and DOD prior to publication of a change that has a significant effect beyond the internal operating procedures of the agency, such as the new continuing contracts clause.<sup>11</sup> Over the intervening months and years, the Corps has submitted multiple iterations

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<sup>9</sup>The act established the Office of Federal Procurement Policy in the Office of Management and Budget in 1974 to play a central role in shaping the policies and practices federal agencies use to acquire the goods and services they need to carry out their responsibilities. Among other things, the act provides overall direction for governmentwide procurement policies, regulations, and procedures to promote economy, efficiency, and effectiveness in acquisition processes.

<sup>10</sup>*Munitions Carriers Conference, Inc. v. United States*, 932 F. Supp. 334, 341 (D.D.C. 1996), *rev'd on other grounds*, 147 Fed. Cl. 200 (2003) ("Because [the agency] did not comply with § 418b, either actually or constructively, the [procurement regulation] is without effect.").

<sup>11</sup>See Defense Federal Acquisition Regulation Supplement (DFARS) § 201.304; Army Federal Acquisition Regulation Supplement (AFARS) § 5101.301.

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of the request for publication to the Army. These requests have moved among the Army, DOD, and the Office of Management and Budget, but the Corps has not yet received confirmation of approval from DOD, and the clause has never been published in the *Federal Register*. The Corps' use of the new clause for more than 3 years prior to its having been published in the *Federal Register* for public comment does not meet the requirements of section 22 of the OFPP Act. The Corps' argument that its use of the new clause complies with the statute because it has been pursuing publication through the Army and DOD as required is, in our view, unpersuasive. The relevant provision states that new procurement regulations may only take effect if a *Federal Register* notice "is published," not while publication is being pursued. The Corps' interpretation also ignores the requirement for a minimum public comment period of 30 days after the notice is published—to date, no public comment period whatsoever has been provided.

Corps officials from the districts and divisions with whom we spoke expressed concern about the Corps' use of the new clause without its having been published in the *Federal Register*. According to these officials, because this legal requirement has not been met, they are concerned that using the new clause could subject the Corps to legal challenges such as bid protests.<sup>12</sup> Such potential legal challenges could prolong projects and increase their costs.

We identified three solicitations for continuing contracts with the new clause issued from fiscal years 2006 through 2008 that did result in bid protests. These protests alleged, among other things, that the Corps' use of the new continuing contracts clause prior to providing an opportunity for public notice and comment violated the OFPP Act. These protests were withdrawn when the Corps reissued the solicitations without the new clause, using instead such options as fully funding the contracts and restructuring the work required by the contracts. (See app. II for details about the three bid protests.) Some district officials where the solicitations that were protested originated said that they are concerned that such legal challenges could resurface in the future—jeopardizing other contracts that use the new clause and delaying the award of these contracts. Moreover, officials in one district that has not used the new

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<sup>12</sup>Bidders and offerors seeking federal government contracts who believe that contracts have been, or are about to be, awarded in violation of the laws and regulations that govern contracting with the federal government may file bid protests with the contracting agency, GAO, or the U.S. Court of Federal Claims.

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continuing contracts clause since it became available told us that the fact that the new clause has never been published for comment constituted their major reason for not using it.

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## Conclusions

Although Congress and GAO have raised a number of concerns in recent years about the Corps' use of continuing contracts, of particular note has been the agency's lack of accurate information on the number and value of contracts that it has awarded. In 2006, we specifically recommended that the Corps establish a system to track its use of continuing contracts, and while the agency agreed with this recommendation, it has failed to implement it. As a result, the process and guidance it relies on to provide quarterly information to Congress are ineffective and continue to generate information that is neither complete nor accurate.

Moreover, the Corps developed and implemented its new continuing contracts clause over 3 years ago, but its use of the clause does not comply with the publication requirements of the OFPP Act. The Corps' position that its use of the new continuing contracts clause while "pursuing publication" of the clause in the *Federal Register* satisfies the requirements of the act is unpersuasive. While we understand that the Corps has been seeking approval to publish the clause since 2006, and that it is unable to publish the clause without approval from the Army and DOD, the statute's publication requirement and its waiver provision clearly permit temporary use of such a clause only if it is actually published in the *Federal Register* for public comment. The Corps' use of the clause prior to publication does not comply with the statute's requirements and may leave the Corps susceptible to further legal challenges.

## Recommendations for Executive Action

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To ensure that the Corps provides accurate and reliable reports to Congress on its use of continuing contracts and complies with federal procurement law, we recommend that the Secretary of Defense direct the Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers to take the following three actions:

- Establish adequate internal controls to ensure accurate and complete information is collected and reported to Congress on the use of continuing contracts.
- Suspend the Corps' use of the new continuing contracts clause until it has been published in the *Federal Register*, in accordance with 41 U.S.C. § 418b.

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- Provide regular updates to Congress on the progress of these actions.
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## Agency Comments

We provided a draft of this report to the Department of Defense for official review and comment. The department concurred with two of our recommendations and did not concur with one. Specifically, the department concurred with our recommendations that the Corps establish adequate internal controls to ensure accurate and complete information is collected and reported to Congress on the use of continuing contracts; and provide regular updates to Congress. The department did not agree, however, with our recommendation that the Corps suspend use of the new continuing contracts clause until it has been published in the *Federal Register* in accordance with § 41 U.S.C. 418b. The department did not disagree with our conclusion that its use of the new clause prior to publication violates the law, and acknowledged that the unforeseen delay in publishing the clause is undesirable. The department also stated that it intends to publish the new clause in the *Federal Register* as expeditiously as possible and anticipates approval of the clause for publication within 60 days. While we agree with the department's efforts to expedite the publication of the new clause in the *Federal Register*, we continue to believe that suspending the use of the clause in the interim would be the appropriate course of action. This is because until the clause is published in the *Federal Register* for a minimum public comment period of 30 days, the department's use of the clause will violate section 22 of the OFPP Act.

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We are sending copies of this report to the appropriate congressional committees, the Secretary of Defense, and the Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers. In addition, this report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

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If you or your staffs have any questions regarding this report, please contact me at (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in appendix IV.

A handwritten signature in black ink, appearing to read "Anu K. Mittal".

Anu K. Mittal  
Director, Natural Resources and Environment

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# Appendix I: Scope and Methodology

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A joint explanatory statement accompanying the fiscal year 2008 Consolidated Appropriations Act directed us to review the continuing contracts that the U.S. Army Corps of Engineers (Corps) has awarded using a new clause. More specifically, from 1922 to 2005, the Corps had the authority to award multiyear contracts (called continuing contracts) without having received appropriations to cover the full contract amount. These continuing contracts allowed contractors to continue working on a project after funds provided for that project had been expended. In 2006, as part of its changes associated with continuing contracts, the Corps created two new clauses—a “special” clause and an “incrementally funded” clause that require contractors to stop work on a project once they have expended the funding set aside for the fiscal year. According to Corps counsel, however, the agency considers only contracts with the special clause to be continuing contracts because the incrementally funded clause does not involve a future funding obligation. For the purpose of this review, we have referred to the special clause as the “new clause.”

To determine the accuracy of the information the Corps reported to Congress in fiscal years 2007 and 2008, we compared information from the Corps’ quarterly reports on the number, type, and dollar value of continuing contracts that used the new clause with information obtained from a Corps database and results of interviews with Corps officials in selected divisions and districts.<sup>1</sup> We identified the continuing contracts that the Corps listed as new awards on the basis of the information the Corps presented in its summary letters to Congress, as well as the information contained in the quarterly reports themselves.<sup>2</sup> We then identified continuing contracts with the new clause that were awarded during the 2-year time frame but were missing from the Corps’ quarterly reports by querying the Corps’ Primavera database.<sup>3</sup> We did not assess the reliability of the Primavera database, but we verified information from that

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<sup>1</sup>The quarterly reports list new continuing contracts awarded during fiscal years 2007 and 2008, as well as contracts already under way (that is, continuing contracts awarded prior to fiscal year 2007).

<sup>2</sup>In fiscal year 2007, the Corps bolded newly awarded continuing contracts in the quarterly reports. In fiscal year 2008, the Corps changed its method for identifying new continuing contracts and added a “New” column in the quarterly report. The Corps placed an “X” in the “New” column to indicate that a contract was newly awarded in that quarter.

<sup>3</sup>Primavera is used by project managers to develop and manage project schedules and resource requirements. Primavera has an optional field to track continuing contracts that was added to the database in early 2007.

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database independently using both testimonial and documentary evidence provided by the Corps. In addition, we interviewed Corps officials in selected divisions and districts to corroborate the information on continuing contracts that we obtained from the quarterly reports and Primavera database. We selected a nonprobabilty sample of two of the eight divisions and 6 of the 38 districts that carry out the Corps' domestic civil works responsibilities. More specifically, we selected the one division that had used continuing contracts with the new clause the most and the other division that had used them the least. In addition, of the six districts, two had used continuing contracts with the new clause the most, two had used them the least, and the remaining two had been involved with bid protests associated with the new clause. We also ensured that those districts and divisions varied geographically and in program size. Specifically, we selected the Mississippi Valley and South Pacific Divisions, as well as the Los Angeles (South Pacific Division), Nashville (Great Lakes and Ohio River Division), Philadelphia and New York<sup>4</sup> (North Atlantic Division), Vicksburg (Mississippi Valley Division), and Walla Walla (Northwestern Division) districts. We obtained pertinent supporting documentation from the divisions and districts to support the testimonial information obtained during the interviews.

To obtain information about the extent to which the Corps' use of continuing contracts with the new clause may have affected its execution of the Civil Works program and the extent of the Corps' use of continuing contracts with the new clause, we interviewed Corps division and district officials at the locations identified above, as well as at Corps headquarters. In addition, we interviewed the Corps manager at headquarters responsible for the quarterly reports to obtain basic information for assessing the reliability of those data. Although there were inaccuracies, we found that the data were sufficiently reliable for the purposes of our report. During the interviews, we discussed, among other things, Corps guidance on continuing contracts, the process used to obtain approval to use continuing contracts, any impacts and challenges related to the Corps' use of continuing contracts, and monitoring the use of continuing contracts.

To assess the Corps' process for implementing the new continuing contracts clause, we reviewed relevant federal procurement laws related

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<sup>4</sup>The Philadelphia and New York districts dealt with bid protests related to their use of the new clause.

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to the Corps' issuance and use of the new continuing contract clause.<sup>5</sup> In addition, we interviewed selected district and division officials to obtain their views on the issue. We also interviewed selected district and division officials to understand the process that the Corps used to develop and implement the new continuing contracts clause and obtain their views on the issue. We also contacted the Corps' Office of the Chief Counsel to obtain the Corps' legal position on the extent to which the Corps has met the requirements of federal procurement law, and reviewed its response and supporting documentation. Finally, we examined three bid protests, and the Corps' responses to these protests, concerning solicitations issued from fiscal years 2006 through 2008, that alleged, among other things, that the new clause was not published in the *Federal Register* as required by law.

We conducted this performance audit from September 2008 to June 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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<sup>5</sup>The Corps created two new clauses—a special clause and an incrementally funded clause—but according to Corps counsel, the agency only considers contracts with the special clause to be continuing contracts. Corps counsel stated that the incrementally funded clause does not include a future funding obligation and is, therefore, not considered a continuing contract. For the purposes of this review, we are referring to the special clause when we mention the “new clause.”

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# Appendix II: Summary of Bid Protests Regarding the New Clause for Continuing Contracts

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From fiscal years 2006 to 2008, the U.S. Army Corps of Engineers (Corps) received bid protests for three of its solicitations for continuing contracts with the new clause. A bid protest may be filed when a bidder or other interested party has reason to believe that a contract has been or is about to be awarded improperly or illegally, or that the bidder or interested party has been unfairly denied a contract or an opportunity to compete for a contract. One firm protested three solicitations that would have awarded contracts with the new clause. In each case, the firm withdrew its protest after the Corps restructured the statement of work, issued an amendment to remove the new clause from the solicitation, and proceeded to award the contract as a contract with a different funding mechanism, such as a fully funded contract, rather than as a continuing contract.

Specifically, the firm filed initial protests with three districts that issued solicitations with the new clause—San Francisco, New York, and Philadelphia.<sup>1</sup> The firm alleged several bases for its protests; however, the overarching issue in the protests, which generally used the same language, was the Corps' inclusion of the new clause in the solicitations. The firm alleged the following:

- Inclusion of the new clause rendered the specifications defective because it made the project schedule and duration so vague and indefinite that potential bidders could not compete intelligently and on an equal basis. The firm argued that bidders would make different assumptions involving different contingencies and might not be bidding to perform the same scope of work and that, as a result, the Corps would be precluded from determining whether the lowest bid received represented the lowest cost to the government of performing the work required.
- The Corps' attempt to use the new clause violated 41 U.S.C. § 418b and Federal Acquisition Regulation Subparts 1.3 and 1.5, which require the clause to be published in the *Federal Register* for public comment.

When the Corps receives a bid protest, the respective division office responds on behalf of the district whose solicitation is being protested. Of the three districts that received bid protests, only the division for the San Francisco District formally denied the protest. The May 22, 2006, decision

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<sup>1</sup>A protest can be filed with the contracting agency, GAO, and the U.S. Court of Federal Claims.

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**Appendix II: Summary of Bid Protests  
Regarding the New Clause for Continuing  
Contracts**

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by the Assistant Chief Counsel/Division Counsel for the South Pacific Division, among other things,

- denied the allegation that the clause rendered the specifications defective and stated that any assumptions a contractor may choose to make with regard to schedule, funding streams, delays, and so forth would necessarily be reflected in the bid prices. As a result, the Corps argued, as long as the bid was not unbalanced and was otherwise the lowest price, it would also be the lowest cost to the government.
- asserted that the Corps used the new clause prior to publishing it in the *Federal Register* for public comment due to “urgent and compelling circumstances,” and explained that the Corps was in the process of submitting the clause to the *Federal Register* for public comment through its internal procedures.

After the Corps’ South Pacific Division denied the agency-level protest, the protester filed a protest with GAO on May 31, 2006. Subsequently, the Corps’ San Francisco District decided to remove the new clause from the solicitation, and the protester withdrew its protest on June 15, 2006.

Similarly, the protests filed with the New York and Philadelphia Districts resulted in the districts’ removing the new clause from the solicitations. The protester subsequently withdrew its protest in both cases. In all three protests, the Corps districts then used a different funding mechanism to complete the work. Table 1 describes the projects and shows relevant dates and estimated amounts.

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**Table 1: Description of Projects Subject to Bid Protests because of the New Clause**

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Project name	Type of work	Protest date	Protest withdrawn date	New contract mechanism
Oakland Harbor (San Francisco District)	Operations and maintenance	March 27, 2006	June 15, 2006	Fully funded contract
New York and New Jersey Harbor (New York District)	Operations and maintenance	April 14, 2006	May 17, 2006	Fully funded contract
Inland Waterway Delaware River to Chesapeake Bay (Philadelphia District)	Operations and maintenance	August 20, 2007	August 30, 2007	Incrementally funded contract

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Source: GAO analysis of Corps bid protests.

# Appendix III: Comments from the Department of Defense



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108

June 12, 2009

Ms. Anu Mittal  
Director, Natural Resources and Environment  
U.S. Government Accountability Office  
441 G Street, N.W.  
Washington, DC 20548

Dear Ms. Mittal:

This is the Department of Defense (DoD) response to the GAO Draft Report, GAO-09-552, "ARMY CORPS OF ENGINEERS: Recent Changes Have Reduced the Use of Continuing Contracts, but Management Processes Need to be Improved," dated May 15, 2009 (GAO Code 360999).

Thank you for the opportunity to review and comment on the draft report. Responses to the GAO recommendations are enclosed.

We concur with recommendations one and three. We non-concur with recommendation two whereby GAO recommends suspending the use of the new continuing contracts clause until it has been published in the Federal Register in accordance with 41 U.S.C. 418b. We do however agree that the interim continuing contracts clause should be published in the Federal Register. The Corps has been working with the Army and DoD since 2006 in an effort to publish the clause. We anticipate DoD's approval within 60 days.

Very truly yours,

Terrence C. Salt  
Acting Assistant Secretary of the Army  
(Civil Works)

Enclosure

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**Appendix III: Comments from the Department  
of Defense**

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GAO DRAFT REPORT – DATED MAY 15, 2009  
GAO CODE 360999/GAO-09-552

"ARMY CORPS OF ENGINEERS: RECENT CHANGES HAVE REDUCED THE USE OF  
CONTINUING CONTRACTS, BUT MANAGEMENT PROCESSES NEED TO BE IMPROVED"

DEPARTMENT OF DEFENSE COMMENTS  
TO THE RECOMMENDATIONS

**RECOMMENDATION 1:** The GAO recommends that the Secretary of Defense direct the Commanding General and the Chief of Engineers of the U.S. Army Corps of Engineers to establish adequate internal controls to ensure accurate and complete information is collected and reported to Congress on the use of continuing contracts.

**DOD RESPONSE:** Concur.

**RECOMMENDATION 2:** The GAO recommends that the Secretary of Defense direct the Commanding General and the Chief of Engineers of the U.S. Army Corps of Engineers to suspend the Corps' use of the new continuing contracts clause until it has been published in the Federal Register in accordance with 41 U.S.C. 418b. (p. 16/GAO Draft Report)

**DOD RESPONSE:** Non-concur. Notwithstanding our non-concurrence, DOD acknowledges the unforeseen delay in publishing the interim continuing contract clause is undesirable. We intend to publish the interim clause in the Federal Register as expeditiously as possible. We anticipate approval of the clause for publication within 60 days.

**RECOMMENDATION 3:** The GAO recommends that the Secretary of Defense direct the Commanding General and the Chief of Engineers of the U.S. Army Corps of Engineers to provide regular updates to Congress on the progress of these actions.

**DOD RESPONSE:** Concur.

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# Appendix IV: GAO Contact and Staff Acknowledgments

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## GAO Contact

Anu K. Mittal, (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov)

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## Staff Acknowledgments

In addition to the individual named above, Vondalee R. Hunt (Assistant Director), Tania L. Calhoun, Nancy L. Crothers, Diana C. Goody, Daniel J. Semick, and Delia P. Zee, made key contributions to this report. Also contributing to this report were Joel I. Grossman, Carol M. Henn, and William T. Woods.

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