30-Day Review of Spending by U.S. Customs and Border Protection under the American Recovery and Reinvestment Act for Construction of Land Ports of Entry

October 23, 2009

Homeland Security

Executive Summary

When Congress enacted its economic stimulus legislation, it appropriated a sum of money far in excess of what the legacy organizations of the Department of Homeland Security had ever received for upgrades to the United States land ports of entry along the northern border. The facilities at those ports of entry have a long history of little or no investment in maintenance and improvements. By the time Congress enacted the American Recovery and Reinvestment Act of 2009 ("Recovery Act"), key officials in the Congress and the Executive Branch shared a mutual understanding that the current state of the facilities at those ports of entry were outdated in a manner that hindered the mission of the officers staffing those ports. We reviewed the plans for spending tax dollars on these facilities. We have concluded that the U.S. Customs and Border Protection component of the Department has followed the intent of Congress and has followed sound methodologies in implementing the spending instructions of the Recovery Act. We did not find any inappropriate interference (political or otherwise) in the merit-based decisions made with respect to upgrading these facilities.

Congress does not lightly appropriate hundreds of millions of dollars for a particular purpose. When Congress appropriated more than $400 million to the Department for construction at the ports of entry owned by U.S. Customs and Border Protection (CBP), it did so after receiving briefings, cost estimates, and explanations of the current conditions at the United States facilities at issue. A recent Congressional report stated that "[t]he Committees on Appropriations are alarmed at the condition of the Nation's ports of entry." Several years ago, Congressional reports urged CBP to provide planning and prioritization for construction at port of entry facilities. Since that time, CBP has followed established planning and prioritization protocols. And CBP has had continuing communications with senior officials in the Department, the Office of Management and Budget, and Congress on this issue for at least several years pre-dating the enactment of the Recovery Act. Congress had transparent access to CBP's plans for the use of appropriated funds for port of entry facilities, and Congress ultimately decided to provide those funds.

The northern border facilities currently scheduled for new construction are in poor shape. These facilities (one more than seventy years old) have received very little in the way of investment over the decades, and the United States built them with a different set of national interests in mind than exists today. At some of these facilities, plans for detaining any dangerous individual who might pass through include handcuffing him to a bench located in the vestibule of the facility. This may have sufficed at some point in our history, but this clearly does not provide the tools needed when we instruct CBP Officers to stand as the front guard against terrorist threats. Facilities at the entry to our Nation cannot be built solely to process our peaceful neighbors. As history has vividly shown, those determined to kill within our borders seek to pass through our ports of entry. If the United States Government decides to maintain a port of entry at a particular location along its border, it will incur some minimum cost to enable the missions it sets out for those standing post at that port of entry.

This does not mean, of course, that gold-plated fixtures should adorn any new construction projects. Our review has convinced us that CBP has followed merit-based processes that avoid lavish spending on the new facilities. CBP construction planning officials consulted with senior field managers for facility requirements and the prioritization of construction among facilities. CBP also consulted with architectural and engineering experts in developing prototype designs. The costs of these facilities are significant, in part, because of changes to infrastructure (e.g., roadways) at the sites. The designs call for significant changes, but they are not lavish.

We note, however, that further cost reductions may be realized by a reconsideration of certain aspects of design prototypes as they apply to particular facility sites. For example, the prototypes call for physical training rooms in each new port facility. Based on our site visits, it appears that not every facility would need such space, especially where CBP Officers are routinely rotated among several different ports of entry during the course of a month. During the course of our review, we discovered that the Department has not issued sufficient guidance on a recognized principle known as "value engineering." We recommend that the Department develop this guidance and that CBP apply "value engineering" practices in future planning and design of construction projects.

Some statutory restrictions have affected how CBP has approached its spending at the facilities. For example, the Recovery Act requires $420 million to be spent at CBP-owned land ports of entry. Many of the Nation's port of entry facilities, however, are owned by the General Services Administration (GSA), not CBP. (Congress separately appropriated funds for use at the GSA facilities.) Therefore, CBP shifted its plans to match the spending to the facilities designated by Congress. This has resulted in more spending in the near term for northern border ports—as compared to southern border ports—than CBP had proposed in its prioritization plans prior to enactment of the Recovery Act. Another impact of the statute relates to procurement mechanisms. CBP decided to approach the procurement of construction contracts in ways that expedited construction in keeping with the stated Congressional goals contained in the Recovery Act. Those expedited procedures—although lawful—reduced the number of contractors that might otherwise have bid on the construction projects. We find no fault in this choice; the decision to pursue the procurements in this fashion more closely aligned with the stated directives of the Recovery Act than other options.

We make two additional recommendations. The first relates to projections CBP initially made to Congress regarding the number of facilities that could be constructed with the $420 million appropriated. CBP is experiencing lower costs than initially projected. We therefore recommend that CBP continue to invest in additional port of entry facilities with the remaining Recovery Act funds.

Second, we recommend that the Department conduct periodic studies to determine whether any ports of entry should be closed. The Secretary of Homeland Security currently has authority to close permanently ports of entry. None have been closed for at least several decades. Although permanent closure of a port of entry involves a number of complex considerations, some of the facilities that currently exist are separated by only several miles and have low traffic volumes. We believe that further and periodic study is therefore warranted.

Based on our 30-day review, we believe that CBP acted prudently in response to the large appropriation specified for CBP-owned port of entry facilities.

FACTS

I. Current Status

The Recovery Act appropriated $420 million dollars for the Department of Homeland Security (DHS) that must be obligated and expended within a defined period. This funding must be expended on the Land Ports of Entry (LPOE) owned by CBP. The Recovery Act directed that funds be expended by specific dates to ensure a quick infusion of spending into the U.S. economy.

Some criticism, however, was lodged concerning the spending at the northern border ports of entry. To ensure accountability, Secretary Napolitano ordered a 30-day review of all of CBP's LPOE construction decisions using Recovery Act funds. No new CBP contracts have been let for CBP LPOE construction projects during the pendency of the review.

CBP, through its servicing agencies, has already awarded 17 contracts for design-build construction services[1] on CBP-owned port facilities and, as of October 9, 2009, obligated $214,583,690 of the original $420,000,000.[2] Based on the Secretary's mandate to hold the award of new LPOE construction contracts for thirty days, CBP stayed additional design-build construction projects. This mandate has affected seven confirmed projects (six small-business program competitions being conducted by CBP procurement operations and one GSA Federal Supply Schedule competition also being conducted by CBP procurement operations). Additionally, CBP contemplates pursuing additional design-build construction projects to be funded through the Recovery Act due to the currently projected costs for the 17 design-build contracts that have already been awarded.

II. Review Committee

The review team includes senior officials from the Department of Homeland Security, the Transportation Security Administration, the Department of State, and the Executive Office of the President. These officials have expertise in real estate contracting, construction project planning, procurement, and grants management, as well as in relevant legal areas, including fiscal law, civil law, criminal law, and administrative law.

The review process included interviewing more than 45 people selected for their expertise. The interviewees were officials from the Department's headquarters, including from the Chief Financial Office and the Under Secretary for Management; CBP, including the Finance and Field Operations offices; the GSA; the Army Corp of Engineers (USACE); and the Department of State, Bureau of Overseas Buildings Operations; and the Office of Management and Budget. We spoke with the most senior officials at CBP, as well as CBP Officers who work on a daily basis at the LPOE facilities. These interviews assisted the reviewers in understanding the full scope of CBP's planning and award processes, from its determination that certain construction projects were appropriate candidates to receive Recovery Act funds, to its cost estimates and contract vehicles.

[1] A design-build contract holds the contractor responsible for both design and construction of the facility.

[2] LPOE Modernization Contract and Task Order Award Spreadsheet.

Additionally, the review process included examining CBP documents explaining its plans for modernization and capital improvement of LPOE. CBP's construction contracts and award/selection documentation for LPOE, as well as CBP's non-construction support contracts for the LPOE, were reviewed.[3]

Finally, the review process included three site visits to the LPOE at Whitetail, Montana, Morses Line, Vermont, and Pinnacle Road, Vermont. The sites were selected to allow the reviewers to see a full range of LPOE needs along the Nation's northern border.

III. Background

CBP Officers at land borders are tasked with the dual goals of facilitating legitimate trade and travel while at the same time interdicting persons and goods whose entry into our county would be detrimental. CBP enforces what are now literally hundreds of statutory and regulatory prohibitions related to activity at the Nation's borders. CBP Officers stop prohibited goods, narcotics, and the profits of crime from entering United States, as well as protect us from threats of terrorism.[4] The LPOE facilities are integral to achieving these goals. At these facilities, CBP Officers must identify and verify the admissibility of persons seeking to gain entry to the United States. This includes checking identity and citizenship documents, checking vehicle license plate numbers, verifying vehicle registration information, and running a variety of database checks. Officers must also obtain a variety of information from the travelers depending on the circumstances, including information about their residences, the length of time they were outside the United States, the purpose for traveling, and items acquired outside the United States. Once the traveler has been admitted to the United States through one of the LPOE facilities, the traveler is free to travel throughout the country, without further scrutiny.

In addition to verifying admissibility, CBP Officers must conduct physical inspections of vehicles and items that travelers are attempting to bring into the United States. Over and above preventing contraband and weapons from entering, CBP Officers are charged with protecting the economy and agricultural industries from harmful animal and plant diseases, pests, and contaminants by enforcing United States agricultural laws and regulations.

Frequently, physical inspections prove demanding for CBP Officers. Vehicles inspections, for example, may call upon officers to use advanced, non-intrusive inspection technology and personal radiation detectors to inspect the cargo load of a truck. They may also call upon officers to use more labor-intensive manual methods, ranging from visual examinations of all parts of the vehicle and its contents to removing the vehicle's fuel tank or other mechanical components.[5]

CBP Officers require adequate LPOE facilities to carry out these tasks. The facilities house computer equipment and electronic search and imaging technology; provide space needed for identification processing and any necessary inspection of travelers; enable officers to conduct

[3] The scope of this review did not consider planned spending of Recovery Act funds on a project management and reporting system.

[4] *See generally* U.S. Customs and Border Protection Directive, Primary Processing of Travelers and Vehicles Seeking Entry to the United States at Land Ports of Entry (May 14, 2008).

[5] *See generally United States v. Flores-Montano*, 541 U.S. 149 (2004) (discussing land border search of vehicle gas tank).

efficient and effective searches of vehicles and their contents; and act as holding areas for detained persons. The facilities shelter officers during and in between shifts and, in some instances, especially along the northern border where the weather may be severe, serve as relief quarters for officers.

IV. Site Reviews of Northern Border Land Ports of Entry

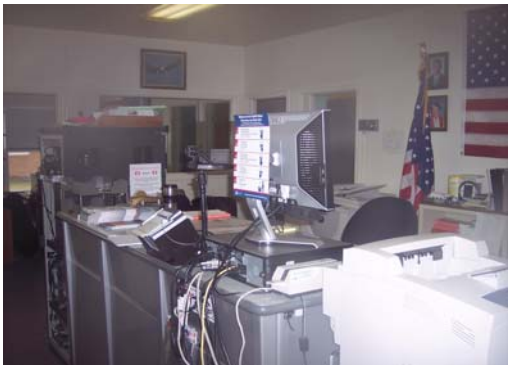
In addition to the documentation review and interviews, the review team visited three ports of entry scheduled for new construction. While at these facilities, we spoke with CBP Officers stationed at the facilities to hear first-hand how the facilities operated on a day-to-day basis. The time constraints of our review did not allow for visits to all of the ports of entry scheduled for construction, but the general condition of the facilities we did visit revealed similarities that we believe likely exist at many of the other ports of entry.

We found woefully out-of-date facilities during these visits. It was immediately apparent that the conditions at these facilities hinder the duties that CBP Officers are required to perform. The facilities are dilapidated and far more run-down than, for example, a state rest stop we encountered along the way to one of the United States port facilities we reviewed. Our physical review of these three ports of entry added context and emphasis to the description that many CBP officials gave us concerning the antiquated conditions of ports along the northern United States border.

(a) LPOE at Whitetail, Montana

We visited the port of entry near Whitetail, Montana, on October 1, 2009. The port is located several yards to the west of Route 511, a road running between the United States and Canada. The border is several hundred feet to the north, marked by a thin metal gate with a stop sign on it. Five officers operate the port in shifts of two. The port has low traffic volume, averaging perhaps five vehicles per day. The traffic increases seasonally; in hay season, for example, multiple trucks per day carrying agricultural equipment can be expected to cross the border.

Whitetail LPOE exterior



Whitetail LPOE interior

International border (southwest view)

Constructed in 1964, the main building is the size of a small gas station. It has a first floor and an unfinished basement. The building is distressed: the outside paint is peeling; light shines through cracks in the side door; the basement floods; there appears to be mold and may be asbestos in the building; the water is not potable; tile in the bathroom has been scraped away in places, revealing a plywood subfloor; officers stranded at the port due to inclement weather (a routine event) sleep on the floor and eat stored rations until they are rescued; and the wiring and electrical system are outdated.

Restroom floor

Wellhead near road

Peeling exterior paint

There are also evident security issues. The lines of sight are poor, both within the building and along the road viewed from the building. There is virtually no separation inside the building between the officers and the traveling public. The building has no holding facilities; accordingly, when CBP detains someone, one officer monitors the person and the other officer conducts the

other business of the port, including inspections. Vehicle inspections are performed outdoors regardless of the weather conditions; in fact, the building's canopy is so low that virtually all truck inspections must take place at the side of the road. The lighting and camera equipment are poor; [redacted]

There are two small residential units associated with the port. We did not inspect the interiors of these units, but we were told that they are now occupied by officers who staff the port. These officers, however, intend to move away from the units in the near term.

LPOE and residential units (viewed from north and south, respectively)

(b) LPOE at Morses Line, Vermont

The CBP facility at Morses Line, Vermont was built in 1934 just inside the United States on the highway entering from Canada. We conducted the site visit on October 15, 2009. As the picture below illustrates, the inspection facility looks similar to a roadside gas station, which is accessible only by leaving the highway and entering its separate driveway.

Approach to Morses Line LPOE

The Morses Line facility is in a state of disrepair. The building contains one large first floor room that performs all the support functions for the CBP Officers. Its remaining space is taken up by an out-of-date kitchen, two upstairs rooms that were officer residences many years ago, and a closed-in porch only useable during the limited period of warm weather. The roof leaks and the facility lack a source of potable water.

Further, the building has only a small foyer with a counter for the public. Individual inspection and processing, accordingly, must occur at the computer on the public side of the counter. We estimate the total size of this room, including the space on the officers' side of the counter, to be no more than 15 by 5 feet. The only detention space is a bench, equipped with handcuffs, located in this small public space and immediately adjacent to the front door of the facility.

Detention bench

We learned anecdotally that CBP detains an average of three or four individuals each week at the Morses Line facility, although the space is so limited that at least one attempt to detain a family ended when most family members successfully fled back to Canada on foot.

The port lacks a booth allowing drive-through processing of entering vehicles. Cars must stop in the driveway and wait for a CBP Officer to come out of the building and walk around the car to the driver's window. Trucks cannot be expected to make the turn onto the driveway and must be inspected on the highway. Officers must be constantly attentive to vehicles coming down the highway that miss the facility or simply ignore it, a situation that requires the officers to waive down the vehicle on the highway or have it pursued.

Because the port does not include an indoor vehicle inspection area, all vehicle secondary inspections occur outside regardless of the weather. Moreover, the small parcel of land, just one third of an acre, does not have separate, designated parking for vehicles that CBP inspects.

(c) LPOE at Pinnacle Road, Vermont

We conducted a site visit to the Pinnacle Road port of entry on October 15, 2009. It is one of three LPOE in the area of Richford, Vermont, which is the nearest town. The port facility was constructed in 1971 and is located roughly 600 feet south of the international border. CBP conducts traveler and vehicle inspections and processing, focused primarily on non-commercial vehicles and permit-only commercial vehicles. A considerable number of farm vehicles also transit the crossing.

Pinnacle Road LPOE

The facility is now 38 years old and has significant deficiencies. It shows multiple signs of disrepair, from wiring to heating/insulation to foundation and general construction weaknesses. There is no potable water for the staff and, owing to local resident concerns, there is no gate to impede southbound traffic. Nor is there roadway illumination.

Buckling floor

Rusted water fountain with contamination sign

The facility lies midway down a steep hill on a narrow, two-lane roadway (with no shoulder) that descends from Canada and then abruptly turns sharply downhill, with traffic rapidly disappearing from view around a hill just south of the site. There is very little approach-time warning for officers, the presence of incoming traffic being signaled by a pressure-plate-triggered chime to alert them. The approach to the facility requires a southbound driver to veer sharply to the right to enter the port. Inspections of stopped vehicles are to be conducted beneath a drive-through canopy at the front of the facility. Owing to the limited height of the canopy, however, and to the sharpness of the turn off of the roadway into the facility, large vehicles, including buses, must be stopped and inspected on the main roadway to the east of the canopy. Staff is required to cross the by-pass lanes, step out from beneath the canopy, and stand on the main roadway (which can include northbound traffic) to converse with drivers or conduct vehicle inspections. Moreover, because not all vehicular traffic is required to enter the by-pass into the facility, vehicles, either through negligence or choice, may simply drive past the port with no impediment, and then be quickly out of sight down the southbound curved and descending roadway. While there is an alarm horn which can be sounded to alert the driver to the presence of the station, the horn must be manually activated. [redacted]

The sightlines are also a problem. Not only are there brush and scrub trees within feet of the facility blocking northbound vision for officers within the facility, a stand of trees at the top of the hill immediately adjacent to the Canadian port inhibits vision. Finally, there are large posted signs

announcing the impending U.S port to southbound drivers, but those signs, placed adjacent to the roadway, further obscure the ability of officers to see approaching traffic.

Facility inadequacies extend to the absence of a locker area for body armor, weapons, or bulky winter gear. Additional deficiencies attend the processing of violators. There is no holding or detention facility for either the further processing of violators or for their detention. There is no separate processing, holding, or detention space. Violators must be handcuffed in the main entrance/office area, within feet of staff conducting sensitive port operations. Such violators require full-time staff monitoring, which often requires closure of the entire port to further traffic until the violator can be removed by appropriate law enforcement personnel from the City of Richford. The officers at the port estimate that detentions may take place several times a week. In the event of multiple violators, the officers could be overwhelmed and unable to respond.

V. Legal Requirements

The legal requirements for spending Recovery Act funds directly impacted CBP's LPOE modernization project selection process. Congress set forth five purposes of the Recovery Act (P.L. 111-5). They are as follows:

> (1) To preserve and create jobs and promote economic recovery.
> (2) To assist those most impacted by the recession.
> (3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.
> (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.
> (5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

For these purposes, Congress appropriated $420 million in the Recovery Act for construction of LPOE owned by CBP. The Recovery Act thus provides as follows:

> For an additional amount for "Construction", $420,000,000 solely for planning, management, design, alteration, and construction of U.S. Customs and Border Protection owned land border ports of entry: Provided, That no later than 45 days after the date of enactment of this Act, the Secretary of Homeland Security shall submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for expenditure of these funds.

P.L. 111-5, 2009 H.R. 1, 123 Stat. 115, 162 (Feb. 17, 2009).[6] Up to five percent ($21 million) of these funds may be used to enhance management and oversight of construction.[7]

[6] Overall, the Recovery Act allocated $720 million for LPOE modernization. CBP receives $420 million of the funds for the 43 LPOE it owns, while GSA, which owns or leases 119 LPOE, receives the balance of the construction money.

[7] H. Rept. 111-016.

In addition to delineating Recovery Act construction funds through CBP ownership, Congress required the Secretary to provide Congress with an expenditure plan within 45 days of enactment of the Recovery Act. *Id*.

To facilitate the prompt infusion of funds into the economy, the Act provides:

> In using funds made available in this Act for infrastructure investment, recipients shall give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of the enactment of this Act.

Id., § 1602.

The Act further specifies that the allocated funds should be obligated by September 30, 2010.[8]

DHS has no discretion to decide not to obligate and expend funds appropriated by Congress. Under the Impoundment Control Act of 1974, the Executive Branch must obligate funds appropriated by Congress unless the President proposes a rescission.[9] If the President proposes such a rescission, the House of Representatives and Senate have 45 days to approve it, otherwise the funds still must be made available for obligation.[10]

In sum, the Recovery Act expressly singles out CBP-owned LPOE for $420 million in construction spending, requiring DHS to obligate the money within two years. The overall purposes of the Recovery Act are to spur economic activity through investment in technology and infrastructure that provide long-term benefits.

VI. Five-Year Plan for LPOE Modernization

In 2005, Congress asked CBP to develop and implement a master construction planning process that included a strategy to prioritize projects, a prioritized list of projects, and an implementation schedule. In particular, U.S. Senate Appropriations Committee Report 108-086 requested CBP to develop a nationwide strategy to prioritize and address infrastructure needs, and Conference Report 108-280 requested CBP to submit a construction master plan to committees by June 10, 2005.[11]

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[8] *See* 123 Stat. at 302 ("All funds appropriated in this Act shall remain available for obligation until September 30, 2010, unless expressly provided otherwise in this Act.").

[9] P. L. 93-344, 2 U.S.C. §§ 601-608.

[10] As a general rule, appropriations acts include transfer or reprogramming authority that allows the agency to move funding. The Recovery Act is an exception to the general rule, however: it provides DHS with no transfer or reprogramming authority. *Cf.* Section 503 of the Fiscal Year 2009 DHS Appropriation Act (P.L. 110-329) (permitting transfer and reprogramming of funds with Congressional notification).

[11] The DHS Appropriations Act of FY 2009 (P.L. 110-329) requires as follows:

> That for fiscal year 2010 and thereafter, the annual budget submission of U.S. Customs and Border Protection for 'Construction' shall, in consultation with the General Services Administration, include a detailed 5-year plan for all Federal land border port of entry projects with a yearly update of total projected future funding needs.

To meet these Congressional requests, CBP reviewed and sought to implement the program planning methodology used by GSA for United States courthouses.[12] GSA had been utilizing a long-range facilities planning process for courthouses, which had a scoring and prioritization system and a five-year facilities investment plan. Following this methodology, CBP established a five-year investment strategy for LPOE. The five-year plan is reviewed annually,[13] and CBP and GSA evaluate their LPOE modernization needs jointly under the plan.

The process for establishing a capital investment plan has five steps. First, CBP conducts a Strategic Resource Assessment (SRA) for each LPOE by collecting data on 60 predetermined need-based factors. Each data point falls into one of four categories: Missions and Operations; Security and Life-Safety; Space and Site Deficiencies; and Personnel and Workload Growth. This step provides a uniform picture of LPOE needs across the country.

Second, a combined score for each facility is calculated using the SRAs and by assigning the four categories relative weights.[14] This step results in a rank order of facilities by priority of need. It is not, however, a final prioritization or investment strategy.

Third, a "sensitivity" analysis is applied to the rank-ordered priority list. This step takes into account objective factors that would not otherwise be captured in the earlier steps. This might include, for example, the physical viability of the facility as a result of flood damage. It may also include factors related to expected changes in traffic volume, which may be caused, for example, by the anticipated closing of a nearby manufacturing facility. This step allows CBP to identify and account for additional constraints that might alter the initial priority ranking.

Fourth, a "feasibility" or "risk" analysis is performed to determine the likelihood of completing the project within a given timeframe. This evaluation includes consideration of environmental conditions, cultural and historical requirements, and land-acquisition issues. It also includes consideration of the likelihood of having continued funding available to execute the project.

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[12] *See* LPOE Modernization: Promoting Security, Travel, and Trade at 6 (discussing CBP LPOE modernization strategy based on U.S. Court's program planning methodology). Created in 1939, the Administrative Office of the United States Courts (AO) serves the federal Judiciary in carrying out its constitutional mission to provide equal justice under law. The AO does not have independent authority to acquire or lease facilities. The AO is reliant upon GSA for its facilities (courthouse needs). In approximately 1988, GSA started to develop a long-range facility planning process for the AO Courthouses. In approximately 1993, the GSA Administrator called for a review and overhaul of the AO Courthouse program. As part of this overhaul, a Blue Ribbon Panel of outside experts (architects, engineers, planning experts) was established. The Panel came up with about 20 recommendations including the establishment of an "Implementation Plan," and a five-year facility plan. AO at the behest of Congress also adopted a prioritization and scoring system.

[13] LPOE Modernization: Promoting Security, Travel, and Trade at 8.

[14] The relative weights of the categories are as follows: Missions and Operations (35%); Security and Life-Safety (25%); Space and Site Deficiencies (25%); and Personnel and Workload Growth (15%). The weighting process is set forth in greater detail in the document *Office of Field Operations, LPOE Prioritization Methodology* (Nov. 2006).

Finally, CBP creates a prioritization plan for modernizing LPOE, which serves as the basis for a capital investment plan. CBP and GSA update their LPOE capital investment plan annually. The prioritization of LPOE set forth in the memorandum *Land Port of Entry Modernization: Promoting Security, Travel and Trade* (October 2008) is the most recent pre-Recovery Act iteration of this process and reflects a five-year plan for modernizing LPOE.[15]

VII. LPOE Ownership

The United States has 163 LPOE. Of these 163, the GSA owns 96.5 and leases 22.5 (collectively, "GSA LPOE").[16] The National Park Service owns one. CBP owns the remaining 43 ("CBP LPOE"). Of the 43 CBP LPOE, 39 are located along our Nation's northern border.

In contrast to the GSA LPOE, which tend to be larger and located on the southern border (such as the LPOE at Laredo, Texas, and Nogales, Arizona), the CBP LPOE are relatively low-volume entry points. The volume of vehicles passing through CBP LPOE ranged from 791 privately owned vehicles at Whitlash, Montana in fiscal year 2008 to 149,428 at Falcon Dam, Texas during that period. Seven of the 42 highway-accessible CBP LPOE averaged less than ten privately-owned vehicles per day while 30 of 42 averaged less than 100 privately owned vehicles per day.

As mentioned, the infrastructure is aging. Most of the CBP LPOE were designed and built in the 1960s and 1970s to support pre-DHS component agencies, including the U.S. Customs Service, the U.S. Department of Agriculture, and the Immigration and Naturalization Service. On average, the CBP LPOE are more than four decades old; one was built in the 1930s.[17]

Under rules for the Federal Building Fund (out of which GSA typically funds its LPOE projects), the projected useful life of new office building construction is 30 years, and 20 years for repairs and alterations.[18] The number of years before regenerating a facility through replacement or major renovation at a given level of investment varies for federal agencies from 40 years for the U.S. Coast Guard to 67 years for the Department of Defense.[19] The "useful life" of a building assumes scheduled maintenance. CBP LPOE have not been maintained in this manner.

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[15] *See* U.S. Customs and Border Protection, Capital Improvement Plan: Land Ports of Entry Modernization Program (June 10, 2005) (providing methodology for developing a capital improvement plan for LPOE).

[16] The "0.5" figure represents a facility that is partially owned and partially leased.

[17] The dates on which the individual LPOE were designated as ports are set forth in regulation. *See* 19 C.F.R. § 101.3 (listing dates of creation for "Customs Ports of Entry and Service Ports"). At 75 years old and constructed in 1934, the inspection facility at Morses Line, Vermont, is the oldest CBP owned LPOE. All but two of the CBP owned land ports of entry considered for reconstruction under Recovery Act have passed their 30-year life expectancy and 20 are 40 or more years old. The LPOE at Sherwood, North Dakota, built in 1981, has only two years remaining on its projected life expectancy. Easton, Maine is a trailer installed in 2001 that needs to be replaced with a functioning building.

[18] LPOE Modernization: Promoting Security, Travel, and Trade at 10.

[19] *See* FY10-14 Program Review, Program Review Board Decision Brief, Land Port of Entry Modernization (June 28, 2008), at 14 (Powerpoint presentation).

VIII. CBP's Pre-Recovery Act Financial Projections for LPOE Recapitalization

In 2008, CBP quantified its total LPOE modernization needs (including GSA LPOE) to be over $6 billion. Between 2003 and 2008, Congress provided $939 million in appropriations to meet this need. In FY 2009**,** Congress provided $10 million for CBP LPOE and $74 million for GSA LPOE. At this level of funding, CBP projected that it would take 42 years to meet its LPOE capital needs, assuming no new needs or cost increases during that time. The Department's involvement with LPOE modernization issues significantly predates the Recovery Act. As indicated, the CBP LPOE have been chronically underfunded prior to the Recovery Act. CBP and the Department have recognized this and have been attempting to address the issue for the last several years.

IX. Transparency in CBP Planning

In late October and early November of 2008, in anticipation of a request from Congress for technical assistance, the Department sent a formal tasking to its operating components, including CBP, to identify their infrastructure priorities and funding requirements for inclusion in an economic stimulus bill. On October 31, 2008, CBP responded with a list that included $150 million to address needs at both GSA and CBP LPOE. In November 4, 2008, CBP provided an updated submission, which included two five-year options for LPOE modernizations. The first option that the Department submitted assumed $1.36 billion in appropriations in the first year and $600 million in each of the next four years. The second option provided $600 million each year for five years. Both of these options delineated funding for individual LPOE in CBP's priority order: only GSA LPOE were listed for inclusion in the first year of funding, because the GSA LPOE fell higher on CBP's priority list. On November 13, 2008, the Department submitted a preliminary list of potential projects for both options.

On November 19, 2008, the Senate Appropriations Committee passed the "Reid-Byrd Economic Stimulus Package" (S. 3689),[20] which included $100 million for CBP and $210 million for GSA LPOE. This was a significant increase over the level identified as technical assistance by DHS for CBP LPOE and less than identified for GSA LPOE. Congress did not act further on this legislative proposal prior to its adjournment for the year. In January, the Agency Review Team ("ART"), which was the new Administration's transition team, requested a more comprehensive package identifying infrastructure projects that could be obligated within two years. This review was also in anticipation of renewed action by the new Congress on a stimulus bill. On approximately December 15, 2008, the Department transmitted a revised list of potential projects to the ART. There were no changes made to the priority list established by CBP and the Department. This list was then forwarded to the Senate Appropriations Committee and the House Appropriations Committee on December 22, 2008.

On January 15, 2009, the House of Representatives announced its proposed $825 billion version of the Economic Stimulus Bill, which included $1 billion for GSA LPOE and $150 million for CBP LPOE. The Recovery Act was formally introduced in the House on January 26, 2009, as H.R. 1. On January 27, 2009, the Senate announced its proposed Recovery Act legislative proposal, which included $1.2 billion for GSA LPOE and $800 million for CBP LPOE. The House passed its version of the Recovery Act (H.R. 1), on January 28, 2009. On February 5,

[20] Unless specifically noted, the "House of Representatives" and "Senate Appropriations Committee" refers respectively to the House and Senate Appropriations subcommittees on Homeland Security.

the Department drafted internal views letters, indicating support for the Senate's announced version with funding levels at $1.2 billion for GSA LPOE and $800 million for CBP LPOE. On February 6, as technical assistance to Congress, the Department provided analysis of the House and Senate LPOE funding levels, which included anticipated job creation impacts and obligation schedules, but did not include the Department's preference on funding levels. In response to this submission, the House Appropriations Committee requested that the Department provide a breakout of LPOE funding between GSA and CBP, which the Department forwarded two days later on February 8.

The Senate formally introduced its version of the Recovery Act (S. 336) on February 7, 2009, and passed it on February 10, 2009.

The House and Senate began the conference process to reconcile their two bills. On February 12, 2009, the House and Senate conferees completed their negotiations on the Recovery Act and filed their conference report. The $787 billion bill included $300 million for GSA LPOE and $420 million for CBP LPOE with no discretion for the Department to transfer or reprogram either sum. The bill also requested that the Secretary submit an expenditure plan detailing the proposed expenditure of the $420 million for CBP LPOE. Both the House and the Senate passed the Recovery Act on February 13, 2009, and the President signed the Recovery Act into law on February 17, 2009 (P.L. 111-5). The Department transmitted the requested expenditure plan regarding the CBP owned LPOE to the House Appropriations Committee and the Senate Appropriations Committee on April 3, 2009. This was prepared by CBP and cleared through the Department and OMB prior to transmittal to the House and Senate Appropriations Committees. No substantive changes were made during the clearing process.

X. CBP's Plan to Spend Recovery Act Construction Dollars

As noted, the Recovery Act provides $420 million for the planning, management, design, alteration, and construction of CBP LPOE. CBP planned to use $374 million of this appropriation for reconstructing existing CBP LPOE, mostly along the northern border. CBP planned to spend the balance of the money on service contracts in support of the reconstruction and immediate life safety repairs to existing facilities ($25 million), and for the acquisition of a project management and reporting software system ($21 million). Project expenditures for the reconstruction, which will cost $399 million altogether ($374 million plus $25 million), included site acquisition and associated services, design services, construction, environmental planning and compliance services, historical and cultural preservation planning and compliance services, government and contract personnel, and project and construction management support services.

With modifications made necessary by the Recovery Act's ownership and timing requirements, CBP used the same process to prioritize spending Recovery Act construction money that it used to create its aforementioned five-year spending plans for LPOE modernization. In addition to the Recovery Act's ownership distinction, which separated the GSA LPOE and CBP LPOE modernization priorities, CBP incorporated the Recovery Act time constraints as a prerequisite that could impact the feasibility of implementing construction at its 43 LPOE. This allowed CBP to identify the most "shovel ready" projects for the purposes of the Recovery Act.

Based on initial cost projections, CBP selected 23 of its 43 LPOE for modernization using the Recovery Act construction funds.[21] With the exceptions of the LPOE at Antelope Wells, New Mexico, and Los Ebanos Ferry, Texas, the initial 23 CBP LPOE sites receiving Recovery Act construction funds are all located along the northern border. For these 23 LPOE, the modernization projects involve the complete replacement and expansion of the existing facilities. The present average size of the facilities is 2,500 square feet, with some as small as 300 square feet. The replaced facilities will range in size from approximately 8,880 to 15,430 gross square feet (including unfinished storage space). CBP has also determined that some of its port facilities will be repaired (and not replaced).

CBP also initially selected ten "back-up" sites as alternate projects.[22] The alternate-site list serves two functions. First, it identifies facilities that could be modernized if for any reason it becomes clear that CBP's initially targeted projects cannot not be executed under the Recovery Act's constraints. Second, the alternate-site list identifies additional modernization projects that CBP could undertake should its initially targeted projects come in under budget, thus permitting CBP to replace additional facilities.[23]

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[21] *See* U.S. Customs and Border Protection Expenditure Plans, American Recovery and Reinvestment Act, Report to Congress (April 3, 2009) at 10 (listing 23 LPOE reconstruction project sites). LPOE modernization project, for Maida, North Dakota, was added subsequently. CBP currently believes that it will have sufficient funds to modernize 29 or more LPOE using Recovery Act construction funds. In addition to the port at Maida, this includes the LPOE at Amistad Dam, Texas; Sarles, North Dakota; Easton, Maine; Bridgewater, Maine; and Pinecreek, Minnesota.

Listed by State, the 23 CBP LPOE projects initially selected by CBP are as follows. The year in which the facility was built is indicated in parentheses.

Maine (1):	Hamlin (1972)
Montana (5):	Del Bonita (1962) ; Morgan (1963) ; Scobey (1978); Whitetail (1964); Wild Horse (1964)
New Hampshire (1):	Pittsburg (1960)
New Mexico (1):	Antelope Wells (1971)
New York (2):	Cannons Corner (1974); Churubusco (1968)
North Dakota (9):	Antler (1961); Carbury (1963); Hansboro (1963); Neche (1965); Noonan (1975); Sherwood (1981); Walhalla (1962); Westhope (1974)
Texas (1):	Los Ebanos Ferry (1979)
Vermont (2):	Morses Line (1934); Pinnacle Road (1971)
Washington (2):	Boundary (1978); Frontier (1956)

[22] Listed by State, the ten CBP LPOE "back-ups" are as follows. The year in which the facility was built is indicated in parentheses.

Maine(3):	Bridgewater (1976); Easton (2001); Forest City (1965)
Minnesota (1):	Pinecreek (1958)
Montana (1):	Whitlash (1974)
North Dakota (2):	Hannah (1961); Maida (1961); Sarles (1961)
Texas (1):	Amistad Dam (1969)
Washington (1):	Nighthawk (1962)

[23] Port Modernization PMO, American Recovery and Reinvestment Act (ARRA) Project Selection.

XI. Modular Port Prototypes

CBP uses standardized designs for replacement LPOE. Using standard designs is a well-established industry practice, particularly when rapid delivery of multiple facilities is required. The small port prototype design used by CBP was created in 2002.[24] It was updated in 2006 and further revised in early 2009 in preparation for the Recovery Act modernization initiative.[25] Prototype designs are used by CBP and GSA to decrease the time needed for design and construction of a port facility. The small port prototype includes seven elements:

1. Inspection booths for primary screening of travelers and vehicles.
2. Lane systems to protect officers and booths, as well as to allow officers to scan incoming traffic with modern inspection technologies.
3. Canopy systems to provide shelter and to protect electrical wiring.
4. Interior processing centers for screening individuals.
5. Secure holding areas for detainees.
6. Secondary buildings for detailed vehicle inspections.
7. Secondary buildings to provide weather protection and security for non-intrusive inspection technology.

Although based on prototypes, CBP's designs for the modernization projects in issue are modified for site-specific variables. All, however, will include the following: a two-story main building; inspection canopies and booths; inbound and outbound lanes that support modern inspection technologies; site improvements including perimeter fencing, lighting, gates, and other security measures; parking areas for visitors, referrals, and employees; and support structures including an enclosed secondary inspection garage and a government vehicle garage. They will include officer residences as required.[26]

XII. Cost Estimates

The costs associated with new construction of the land port of entry facilities are substantial as compared to the costs of merely replicating the facilities already on site. Some of the larger costs relate to roadway demolition and construction, electrical and security systems, additional land acquisition, and environmental remediation. The new facilities will also have new elements

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[24] *See Port Modernization PMO – Small Port Prototype*. The majority of LPOE modernization projects at issue involve so-called "micro" ports. Micro ports are a subset of small ports, staffed by as few as two officers. "The Micro Port is designated as a Small Port with low traffic volume. It is the most basic design. The 2-4 Person Model is the standard Small Port design." U.S. Customs and Border Protection Design Standard for U.S. Land Port of Entry, sec. 9.1, at 9-1. It appears that to date, no agency has built a micro port. GSA has built small port facilities for CBP LPOE. These include the LPOE at Willow Creek, Montana; Roseau, Minnesota; Lancaster, Minnesota; Opheim, Montana; and Northgate and Fortuna, North Dakota.

[25] In March 2009, CBP reviewed its small port requirements through two planning workshops. Experts in operations, architecture, and engineering reviewed the minimum operational requirements and identified ways to improve the prototypes to support CBP's mission. CBP has told us that the improvements to the most recent updates of the prototype designs were not consequential in terms of cost; for example, adding a window to the door of the holding room so that the officers could see the room's interior.

[26] *See* U.S. Customs and Border Protection Design Standard for U.S. Land Port of Entry, §§ 4.1-4.1.2, at 13-15 (Sept. 2009) (setting forth facility requirements for micro and other small ports).

currently lacking at the facilities slated for replacement. These include detention rooms, interview rooms, and secondary inspection garages.

(a) Initial Planning Estimates

CBP derived its initial cost estimates for the 45-day spend plan it sent to Congress from the actual replacement costs of seven small-port projects from 2003 and 2004. The average construction cost for these seven projects was $5 million. CBP escalated this figure by 20% per year based on GSA project trends, covered increases in operational and security measures, and increased material and labor costs. Calculating from 2003-2008, CBP arrived at a base estimate of $12,441,600.

Once this base figure was determined, CBP added additional costs to some locations based on site-specific needs, such as the need for additional buildings, land acquisition, materials remediation, higher-than-average site-work costs due to terrain, site layout, and environmental mitigation issues. In addition to construction costs, the estimates included project elements such as voice and data technology, moving services, and program management support. The total cost of replacing the 23 LPOE facilities, including all hard costs (land, construction, furniture/fixtures, and security) and soft costs (project management, consultant fees) ranged from a low of $13,869,565 in Antler, North Dakota, to a high of $24,669,565 in Frontier, Washington.

(b) Independent Government Estimates (IGEs)

Subsequent to establishing individual project budgets and prior to release of the solicitations for the design-build procurements, independent government estimates (IGEs) were prepared for each project.[27] CBP prepared the IGEs for each solicitation package and the IGEs were validated by the USACE and GSA prior to the release of the solicitations. These estimates were developed by performing a detailed material-takeoff[28] and applying RS Means[29] cost data and federally mandated local Davis-Bacon wage rates.[30] Cost estimates were escalated by 3% to account for

[27] The Independent Government Estimate (IGE) is a government estimate of the costs a contractor will incur in the performance of a contract. These costs include direct costs, such as labor, supplies, equipment, or transportation and indirect costs, such as labor, material, general and administrative (G&A) expenses, and profit. An IGE is typically prepared by the organization that established the acquisition requirement and is required for all sizable procurement actions. Significant variation between the cost of a contractor proposal and the IGE requires analysis. Where variation exists, the government can identify and correct IGE inaccuracies or use the IGE to negotiate a lower contractor cost.

[28] Material Takeoff or Quantity Takeoff is an activity performed by general contractors, subcontractors, cost estimators, and quantity surveyors as part of the construction process. It involves counting the number of items associated with a particular construction project, determining the associated materials and labor costs, and formulating a bid or estimate as part of the procurement process.

[29] RS Means, a product line of Reed Construction Data, provides up-to-date cost information that assists owners, developers, architects, engineers, and contractors provide accurate cost estimates and projections for both new building construction and renovation projects. It is the federal government standard for construction cost data and is widely used by the industry as a whole.

[30] The Davis-Bacon Act of 1931, 40 U.S.C. §§ 276a to 276a-5, requires paying prevailing wages on public works projects. All federal government construction contracts, and most contracts for federally assisted construction over $2,000, must include provisions for paying workers on-site no less than the local prevailing wages and benefits paid on similar projects.

construction starting in 2010. The IGEs afforded a much more accurate projection of actual costs than the initial planning estimates.

(c) Task Order Amounts

As more fully discussed below, the 17 task orders that have been awarded to date were awarded by GSA and USACE functioning as servicing agencies for CBP by means of Economy Act Inter-Agency Agreements. Both GSA and USACE conducted task order fair opportunity competitions against pre-existing Indefinite Delivery Indefinite Quantity (IDIQ) contracts.[31] Through the competitive process, the IGEs were further validated as the task order award amounts were comparable or below the IGEs.[32]

XIII. Additional LPOE Projects

CBP's first project estimates appropriately planned for all costs which could be incurred in completing the initial 23 projects. Those estimates were also based on conservative predictions of what contractors might charge in 2009 to design and build these facilities. After CBP completed its April 2009 spend plan, but before it awarded any particular contracts, CBP further refined and reduced its estimates based on more specific project information. The actual task orders have been awarded at less than CBP originally projected. The combined effect of avoiding possible construction expenses and the competitive process has allowed CBP, even with appropriate contingency reserves for the 17 projects already awarded, to complete the initial 23 projects for substantially less than the originally projected costs in the April 2009 spend plan. As a consequence, CBP predicts that it will fund up to six projects from its back-up list. In the event that those additional projects also can be accomplished for less than projected, CBP may be able to replace all 33 of the CBP LPOEs appropriate for replacement.[33]

XIV. LPOE Acquisitions Strategy

CBP undertook the execution and delivery of multiple projects using its own procurement capabilities, as well as through leveraging several existing servicing providers,[34] namely the Public Buildings Service of GSA and USACE.

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[31] An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values. (FAR 16.504). IDIQ contracts provide for the issuance of orders for the performance of tasks during the period of the contract.

[32] *See* IGE Contract Award Table (Oct. 19, 2009).

[33] Some of CBPs LPOE have already been replaced, other wise received significant investment or are otherwise not appropriate for replacement for this time.

[34] The Economy Act, 31 U.S.C. §§ 1535, 1536, authorizes agencies to enter into mutual agreements to obtain supplies or services by inter-agency acquisition and for the acquiring agency to reimburse the servicing agency for the services. The Federal Acquisition Regulations, Part 17.5, prescribes policies and procedures applicable to interagency acquisitions under the Economy Act.

With respect to the design-build construction contracts, CBP's acquisition strategy was two-fold: (1) assisted acquisitions by way of Intra-Agency Agreements with two government agencies as service providers – GSA and USACE; and, (2) direct acquisition by the CBP procurement office.

Both GSA and USACE had existing, previously-competed, multiple award design-build contracts in place against which task orders for the specific projects could be competed from among the IDIQ contractor holders. As discussed more fully below, the "fair opportunity" competition requirements and task order procedures are different and generally not as complex as those associated with the award of a negotiated contract. The ability for CBP to utilize pre-existing contracts created by other agencies provided an opportunity to save time, manpower and procurement costs. In addition, an IDIQ task order competition,[35] as opposed to a competitive negotiated procurement, generally offers more flexibility and the ability to utilize more streamlined processes. Accordingly, task order competitions under pre-existing IDIQ contracts can generally be accomplished faster and more efficiently than a negotiated procurement.[36]

XV. Competition Requirements

The Competition in Contracting Act (10 U.S.C. § 2304 and 41 U.S.C. § 253) requires that contracts be entered into after "full and open competition through the use of competitive procedures" unless certain circumstances exist that would permit agencies to use noncompetitive procedures. As more fully explained below, GSA and USACE utilized pre-existing competitively awarded IDIQ contracts. Both GSA and the USACE had pre-existing IDIQ contracts for design-build construction and repair and alteration services that were competitively awarded by means of full and open competition and fully compliant with the statutory requirements.

(a) Fair Opportunity to Compete

Issuance of task orders under IDIQ contracts is not subject to renewed open competition requirements,[37] but agencies are required to provide contractors "a fair opportunity" to compete for orders in excess of $3,000 under multiple-award IDIQ contracts.[38] The requirement to afford "fair opportunity" does not require the same formal evaluation process used to make the initial IDIQ contract award. Instead, it allows for the expeditious placement of orders against the

[35] FAR 16.505(b)(ii) provides, in pertinent part: "The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. In addition, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order and the order does not exceed $5 million. The competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process. . . . (B) Formal evaluation plans or scoring of quotes or offers are not required."

[36] *See* FAR Part 15, Contracting by Negotiation. Typically a Part 15 acquisition requires an agency to, prepare formal evaluations plans; score quotes or offers; post notice of contract actions; and hold discussions and negotiations with each awardee.

[37] The competition requirements are considered to be met with the full and open competition conducted when the IDIQ contract was awarded.

[38] *See* 41 U.S.C. § 253j(c).

existing contract and limits competition to those vendors within the pool of IDIQ contract holders. Fair opportunity requires that agencies describe the order placement and selection criteria in the initial solicitation so that awardees have notice of the procedures, and all IDIQ awardees will be provided with the opportunity to be considered for the placement of each order, unless one of the exceptions to fair opportunity are present.[39] When conducting task order competitions, agencies must not use any method that would not result in fair consideration of all awardees. It appears that GSA and USACE were fully compliant with these competition requirements.

XVI. Acquisition Strategy Considerations

As previously noted, CBP considered a multi-pronged acquisition strategy when considering how best to accomplish its LPOE procurements in accordance with the objectives of the Recovery Act. CBP decided to utilize servicing agency partners and its own in-house acquisition expertise. CBP looked to GSA and USACE because they had existing IDIQ contracts for design-build, environmental remediation and mitigation and repair and/or alteration projects that were available immediately and could accommodate the aggressive timelines imposed by the Recovery Act, specifically issuing contract vehicles for over half of the identified LPOE by the 4th Quarter fiscal year 2009. In considering how to distribute the 23 projects initially planned, CBP considered the capacity of the servicing agencies as well as its in-house resources. As part of the Acquisition Review Board process, the Under Secretary for Management (USM) and other Board members met with CBP to discuss balancing the goals of infusing money into the economy, expediency of awards, meeting operational requirements, maximizing competition and ensuring small business participation. Given that the servicing agencies would utilize existing IDIQ contracts, the Board directed CBP to select projects that could be competed as new contract awards directed at the small business community. Based on these parameters, CBP assigned ten of the initial 23 procurements to USACE, seven to GSA, and kept six for its in-house procurement office.

XVII. CBP Procurements

Several of the LPOE projects designated by the CBP procurement office for direct acquisition were targeted for small business. These include: Boundary, Washington; Cannons Corner, New York; Del Bonita, Montana; Hamlin, Maine; Los Ebanos, Texas; and, Morses Line, Vermont. For these projects, in accordance with procurement policy, CBP aggressively pursued potential contracting opportunities with small and disadvantaged businesses. In an effort to reach as many small businesses as possible, CBP took the following steps: conducted market research looking for small businesses targeted for the region; issued a Sources Sought Synopsis[40] to verify the data

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[39] Four exceptions to fair opportunity exist: (1) The need for services is so urgent that giving a fair opportunity would result in unacceptable delays; (2) Only one contractor is capable of providing the services required at the level of quality required, because the services are unique or highly specialized; (3) The order should be issued on a sole-source basis in the interest of economy and efficiency as a logical follow-on to an order already issued, where all awardees had been given a fair opportunity to compete for the original order; or (4) It is necessary to place an order to satisfy a minimum guarantee (FAR 6.505(b)(2)).

[40] A Sources Sought Synopsis is a tool used to enhance market research. Agencies can publish general requirements on FedBizOpps (http://www.fbo.gov), the official web site listing of all federal government contracting opportunities and awards over $25,000. Federal agencies are required by law to post their contracting opportunities over $25,000) and request that potential vendors respond. Agencies can then assess contractor level of interests in a particular opportunity.

collected, and to find more small business companies that might not have been registered and would be interested; held a small business forum in Montana; held webinars; and, coordinated with the Small Business offices of Washington, Maine, and New York. In accordance with law and policy, a portion of the design-build construction sites were competed as small business and small disadvantaged business acquisitions under Part 19 of the FAR.[41]

CBP is following the design-build construction contract process outlined in FAR 36.3.[42] As described in FAR 36.3, the process involves two phases wherein the culmination of Phase 1 will be the contracting officer selection of the most highly qualified offerors who will be invited to submit Phase 2 proposals. Pursuant to this process, two separate solicitations (one for each phase) will be released with corresponding publication of pre-solicitation notices prior to release of the solicitations. At the end of Phase 2, a single award will be made based upon an integrated assessment of the Phase 2 evaluation factors described below. Selection of that offeror whose proposal provides the best solution to the Government's requirements will be made by the Source Selection Official.

Currently, the CBP procurements are in Phase 1 and no awards have been made during the pendency of this review. Competition has been significant on all six projects with multiple offerors proposing on all projects ranging from five proposals received in response to the Boundary, Washington solicitation to 18 proposals received in response to the Del Bonita solicitation.

XVIII. USACE Task Order Competitions

The USACE utilized on of its pre-existing Multiple Award Task Order Contract [43] to award task orders for design-build construction services for ten LPOEs: Antelope Wells, New Mexico; Cardbury, North Dakota; Hansboro, North Dakota; Neche, North Dakota; Pinnacle Road, Vermont; Pittsburg, New Hampshire; Sherwood, North Dakota; Walhalla, North Dakota; Westhope, North Dakota; and Whitetail, Montana.

[41] It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance (FAR 19.201).

[42] Design-build as described in FAR Part 36 is a performance based, fast-tracked, and best-value approach to meeting the construction-related needs of the LPOE Modernization Program. The government specifies the outcomes desired and the design-build contractors are responsible for designing and constructing a solution that satisfies the objectives and delivers the required outcomes.

[43] A Multiple Award Task Order Contract is a large scale construction IDIQ contract awarded to multiple vendors to provide services to federal government customers nationwide. The IDIQ contracts were awarded by USCAE using full and open competition procedures. Multiple vendors proposed (13 vendors) and five IDIQ contracts were awarded to the following entities: MCC/Catamount LLC (Joint Venture), Innovative Tech Solutions (ITSI)**,** Overland Corp, J.D. Abrams, and RK Johnson.

(a) USACE Task Order Process

The Request for Proposals (RFP) issued by USACE was largely generated by CBP with some USACE-specific elements. Each RFP contained technical specifications that were built upon an existing LPOE design guide that was generated by CBP in consultation with GSA. USACE used its own agency government cost estimators to validate the CBP pricing and cost estimates for each RFP package. The IGE was very detailed and included an estimate for each project with cost broken out by work activity – labor, steel, lumber, and so forth.

The RFP issued by USACE included three non-price criteria: technical approach, small business utilization, and past performance.[44] The non-price criteria were significantly more important than price and the award was to be based on the best value to the Government.

(b) Competition and Selection

Competition was open to all five IDIQ contractors and the task order RFP was sent to all five contract holders for each of the ten projects in accordance with the fair opportunity requirements of FAR Part 16. Pre-solicitation site visits were conducted at eight out of the ten sites with pre-proposal visits conducted at the other two locations (Pinnacle Road and Pittsburg). Two vendors submitted proposals for Pinnacle Road and Pittsburg. Four vendors submitted proposals for each of the remaining eight sites.

USACE established a Source Selection Evaluation Board (the entity responsible for evaluating the proposals in accordance with the RFP) that was comprised of six voting members including a USACE Chair. For the technical approach criteria, the Board utilized a non-voting design expert. The same Board participated in the evaluation for all ten projects.

The Board indicated that most projects resulted in offeror ratings in a similar cluster thereby allowing selection of the low reasonable price from the vendors receiving similar technical ratings and that award decisions did not require a cost-technical trade-off because they did not select a high-priced, technically superior proposal. Out of the five IDIQ contract holders, two contractors, MCC/Catamount LLC and Innovative Tech Solutions, Inc., received task order awards. USACE did not receive any bid protests from potential offerors relative to the task order awards.

XIX. GSA Task Order Competitions

CBP initially identified seven LPOE projects for GSA to support: Antler, North Dakota; Churubusco, New York; Frontier, Washington; Morgan, Montana; Noonan, North Dakota; Scobey, Montana; and Wildhorse, Montana.

GSA, like USACE, had pre-existing IDIQ contracts under which it could conduct task order competitions for the LPOE construction projects. In the fall of 2008, GSA awarded multiple IDIQ Contracts for nationwide construction and repair/alterations with design-build capabilities to support GSA and DHS general construction program requirements. These contracts were designed so that construction alterations and repairs to government buildings and space could be

[44] In negotiated acquisitions, 10 U.S.C. § 2305(a)(2) and 41 U.S.C. § 253a, a contracting agency must list all factors and subfactors that it reasonably expects to consider in evaluating proposals and the relative importance of each factor.

accomplished as needed on a prompt and timely basis. GSA awarded three IDIQ contracts to the following entities: MCC Construction (November 5, 2008); Innovative Technical Solutions, Inc. (November 5, 2008); and Tetra Tech EC, Inc. (November 18, 2008). Each contract has a one-year base period, with four one-year options.

In the fall of 2008, GSA also awarded so called "8(a) small business"[45] IDIQ contracts for construction and repair/alterations with design-build capabilities to support DHS construction program requirements specifically for projects in the States of Washington, Idaho, and Alaska. GSA awarded IDIQ contracts to the following small businesses: Diversified Maintenance Solutions; and, Randolph Construction Services, Inc. Each contract has a one-year base period with four one-year options.

(a) The Request for Proposals

Each RFP contained technical specifications that were built upon an existing LPOE design guide that was generated by CBP in consultation with GSA. GSA relied upon the technical expertise of construction experts to assist in preparing the technical package and internal government cost estimates. The RFP identified the following evaluation criteria (in descending order of importance):

- Design Incorporation Approach
- Past Performance and Experience of the Team
- Management Approach
- Project Schedule Plan
- Subcontracting Plan.

The RFP also established that task order awards were to be made to the responsible contractor whose offer was the most advantageous to the Government, based on identified technical factors and cost considerations.

(b) Competition and Selection

For each separate project, the GSA Source Selection Evaluation Board[46] evaluated each proposal against the evaluation criteria and chose the highest ranked technical proposal after comparing the proposals and cost estimates. Of the five possible contractors (three non-small business and two small business), three received awards (including one small business). All task orders were awarded on a firm-fixed price basis.[47] The task orders were all awarded without protest.

[45] Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and let subcontracts for performing those contracts to firms eligible for program participation. The SBA's subcontractors are referred to as "8(a) contractors." FAR 19.800(a).

[46] The Board was comprised of three voting members (two from GSA and one from CBP), and seven non-voting technical advisors (one from CBP, three construction contractor experts, and three acquisition support contractors).

[47] A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control

ANALYSIS

CBP's overall plan to use Recovery Act funds for construction of its own LPOE was based on a set of practical, thoughtful, and thorough criteria that allow CBP to meet the goals of the Recovery Act while simultaneously addressing CBP's pressing recapitalization needs. CBP's plan permits CBP to maximize its operational capabilities, efficiencies, and integration; accommodate increasing capacity demands associated with CBP's expanded mission focus, personnel growth, increased space requirements for property assets, and changing inspection, detection, and communications technologies; mitigate and correct deficiencies within existing real property inventory and structures; replace temporary or substandard structures with permanent solutions; and sustain real property inventory through proactive maintenance. All of these are reasonable and worthy goals.

Our only concern—a minor one—lies with the scope of the particular facility designs that CBP is using. Some small portion of the designs may include non-essential capital costs. Our review, based on the significant construction project experience of the review committee, however, revealed to us only minor design elements that may be reduced for cost savings. Nevertheless, if excesses were to be identified and removed from the designs, greater returns on investment could be realized for the taxpayer by shifting cost savings to additional modernization projects.

I. Project Selection

The available evidence strongly suggests that CBP's project modernization priorities were the result of CBP's pre-existing project selection process, applied to take into account the two additional Recovery Act requirements of ownership and timeliness (that is, the so-called "shovel-ready" requirement). We found no evidence that CBP's modernization list or its "backup" list of LPOE were based upon extraneous criteria or an inappropriate decision-making methodology.

CBP's project selection process was based on a modernization procedure that CBP has used successfully for more than half a decade, augmented to take into account the Recovery Act requirements of port ownership and shovel readiness. Although questions have been raised about the particular modernization projects that CBP chose to undertake with the Recovery Act funds, the aforementioned Recovery Act requirements and conditions explained above adequately justify CBP's priorities.

As one might expect, we found shifts over time in CBP's prioritization of its LPOE modernization projects. Three CBP reports concerning LPOE modernization are instructive in this regard. In 2008, prior to the Recovery Act, CBP prepared a five-year spending plan. The plan reflects a $600 million request for LPOE modernization funds to be spent over a five-year period on both CBP and GSA facilities. Although no funds for CBP LPOE are planned for the first year in this plan (the capital funds for the first year are for GSA LPOE exclusively), subsequent years' plans for CBP LPOE include 15 projects (excluding GSA projects).[48]

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costs and perform effectively, and it imposes a minimum administrative burden upon the contracting parties (FAR 16.202-1).

[48] U.S. Customs and Border Protection, Land Port of Entry Modernization: Promoting Security, Travel and Trade (Oct. 2008). To be clear, the five-year plan in question includes only the 15 listed CBP LPOE. CBP submitted a five-year spending plan to Congress in August 2009, but because Congress had already provided $420 million in construction funds for CBP-owned facilities in the ARRA, the 2009 spending priorities include only GSA LPOE.

As a useful point of comparison, CBP submitted a project priority list to Congress on April 3, 2009, pursuant to the 45-day expenditure plan required by the Recovery Act for construction funds.[49] And, as a third point of comparison, CBP created an updated expenditure plan on August 17, 2009.[50] The LPOE priorities list therein is identical to the list from the April Recovery Act expenditure plan, save for the addition of the LPOE at Maida, North Dakota, as an anticipated 24th modernization project. The August Recovery Act plan explains that "Maida, ND reflects the first backup project to be added to the Expenditure Plan as a result of savings generated through current project awards."[51]

There are numerous similarities between these three priority lists. For example, the 2008 Spend Plan and the 2009 Recovery Act reports list the same top five LPOE modernization projects, namely, Antelope Wells, Frontier, Scobey, Boundary, and Los Ebanos. Moreover, the relative ranking of the projects is the same; thus, for example, in all the lists, the LPOE at Los Ebanos appears before Morses Line, which appears before Cannons Corner, and so forth.

There are also differences. The modernization projects at Sarles, Forest City, and Hannah, for example, all appear on the 2008 spend-plan list, but do not appear on the 2009 Recovery Act lists. Similarly, regarding the top 15 priorities on each list, 11 LPOE that are absent from the 2008 Spend Plan are included on the 2009 Recovery Act lists. Six other projects outside the top 15 priorities (Carbury, Westhope, Morgan, Whitetail, Sherwood, and Maida in the August 17, 2009 report) appear on the 2009 Recovery Act report lists, but do not appear on the 2008 Spend Plan list.

These differences are understandable in view of the Recovery Act. As an initial matter, the increase in construction funding for CBP's LPOE provided by the Recovery Act made it possible for CBP to expand considerably the CBP ports slated for recapitalization. The 2008 spend plan included only 15 LPOE projects; the Recovery Act lists include an additional eight. Additional modernization projects were added using the same process CBP had originally used to arrive at the 2008 spend plan, albeit augmented to meet the Recovery Act's ownership and shove-readiness requirements.

As noted, three LPOE modernization projects prioritized in the 2008 spend plan do not appear on the 2009 priorities lists. The explanation for this appears to be the Recovery Act "shovel readiness" requirement; in other words, it appears that CBP did not believe it could appropriately obligate the funds for these sites within the time periods allowed by the Recovery Act. Modernizing the LPOE at Sarles, North Dakota, and Forest City, Maine, first required negotiating with the states over the rights of way for the ports.[52] There were wet-land issues and cultural

[49] U.S. Customs and Border Protection Expenditure Plans, American Recovery and Reinvestment Act (ARRA), Report to Congress (April 3, 2009), at 10.

[50] U.S. Customs and Border Protection Expenditure Plans, American Recovery and Reinvestment Act (ARRA), Report to Congress (Aug. 17, 2009). This updated plan has not yet been submitted to Congress.

[51] U.S. Customs and Border Protection Expenditure Plans, American Recovery and Reinvestment Act (ARRA), Report to Congress (Aug. 17, 2009), at 10.

[52] *See* Working Draft Version 2, CBP Owned LPOE Prioritization Spread Sheet (March 13, 2009), at 2-3.

\concerns associated with the projects.[53] By a similar token, modernizing the LPOE at Hannah, North Dakota, first required negotiating with the state about the extent of the easement for the road at the port.[54] According to CBP, it then had limited confidence that it could conclude the negotiations timely.[55] We find this to be a reasonable explanation for the differences in the project plan lists.

The rankings of modernization projects on the "backup" lists generated additional questions. It appears, for example, that CBP initially determined that the LPOE at Maida should be ranked 32 out of 43, based on the potentially inhibiting fact that modernization of the port required acquisition of commercial property adjacent to the site.[56] The August 17, 2009, Recovery Act report, however, raises Maida up to the 24th priority and slates it to receive Recovery Act construction funds. Questions might be raised as to why the funds for the Maida project did not simply move down to the next highest priority on the backup list, rather than advancing the Maida project up the list, effectively jumping over seven other CBP LPOE backup projects.

The explanation for the Maida project's movement appears to be that although the port facility is in great need of reconstruction, CBP placed it low on the priority list for Recovery Act construction spending because CBP believes that it was unlikely that the project would meet the Recovery Act time constraints. This was due to the need to acquire land surrounding the facility, and on which there was at least one commercial enterprise. Upon further inquiry, however, CBP discovered that the risk presented by the land-acquisition issue was less than CBP originally anticipated and, in fact, the funds at issue could be obligated within the Recovery Act timeframes. By that point, however, CBP had already submitted to Congress the April 3, 2009 spend plan required by the Recovery Act. The Maida project was not on the priority list in that spend plan. Consequently, CBP did not feel that it was in a position to add Maida to the list later, potentially forcing other port projects off the list. CBP thus moved the Maida project up, making it the first backup project that could receive overflow funding if CBP were able to reach additional construction projects (which now appears likely to happen). Given all of these circumstances, we conclude that CBP's prioritization of the Maida project is reasonable.

II. Procurement Issues

Based upon our review of the acquisition strategy employed by CBP and our review of the procurements conducted by CBP, GSA and USACE, the servicing partners all adhered to the full and open competition requirements of the Competition in Contracting Act when awarding the underlying IDIQ contracts and the fair opportunity competition requirements when awarding task orders under the IDIQ contracts. In addition, the set aside small business acquisition strategy employed by the CBP procurement office, as well as, the emphasis on small business participation in the procurements conducted by GSA and CBP, is in keeping with government policy to

[53] *See* Working Draft Version 2, CBP Owned LPOE Prioritization Spread Sheet (March 13, 2009), at 2-3.

[54] *See* Working Draft Version 2, CBP Owned LPOE Prioritization Spread Sheet (March 13, 2009), at 3.

[55] *See generally* Port Modernization PMO, American Recovery and Reinvestment Act (ARRA) Project Selection at 3, Table 1. CBP currently anticipates that it will complete the necessary steps to provide Recovery Act construction funding for the port at Sarles, North Dakota.

[56] *Compare* Working Draft Version 2, CBP Owned LPOE Prioritization Spread Sheet (March 13, 2009) (ranking Maida LPOE as 32nd priority), *with* Working Draft Version 9, ARRA Project List (August 10, 2009) (ranking Maida LPOE as 24th priority).

promote contracting opportunities for small and disadvantaged businesses. Competition for both the GSA small business procurements and the task orders awarded by GSA and USACE has been robust and all 17 task orders awarded by GSA and USACE were awarded without protest.

We do note, however, that the need to expeditiously carry out the new construction under the Recovery Act has resulted in less competition for these projects than might have otherwise occurred. In particular, use of IDIQ contracts, rather than entirely new competition for the projects, has meant that many contractors that might have otherwise competed for these projects were not able to do so. Given the different timeframes for these different procurement approaches (as described above), CBP had little choice but to follow the approach now underway. CBP's acquisition strategy was not, however, limited to the use of IDIQ contracts. CBP's acquisition strategy included direct acquisitions targeted at small business concerns. We have no basis for determining that the mix of IDIQ contracts and non-IDIQ contracts does not strike the right balance given the Recovery Act and other procurement related laws.

III. Cost Estimates

CBP's cost estimating procedures reflect standard industry and government practices. Working from a known, but aged, set of actual costs for previous construction projects, CBP escalated the amounts to reasonably reflect the dramatic increase in construction costs in recent years (which moderated only partially during the current economic recession). More accurate methods exist for establishing project budgets, but the technique CBP employed was a sufficient alternative given the absence of time for standard project planning. CBP also leveraged the extensive cost estimating expertise of the Army Corp and GSA and prepared government-mandated IGEs for each project.

IV. Design Specifications

As indicated, the Recovery Act set tight time parameters. It required the Secretary of Homeland Security to submit a plan to Congress within 45 days for the expenditure of the $420 million in construction projects. It further required the Department to obligate the funds by September 30, 2010. Faced with these constraints, it is not surprising that CBP turned to its existing prototype designs to deliver multiple LPOE facilities across the United States that met CBP's needs and building code requirements.

CBP reasonably matched its staffing and throughput needs at individual LPOE to the planned port design. Thus, the majority of the LPOE in issue, which have (and are anticipated to continue to have) relatively low traffic volumes and are typically staffed by two officers per shift, are assigned micro-port designs appropriate to the staffing and other needs of these LPOE.[57] We believe that this represents a reasonable and prudent approach to allocating construction resources promptly.[58]

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[57] Five of the 24 LPOE on the 2009 priority list used more than two officers per shift at peak times: Frontier, Washington (five officers); Boundary, Washington (three officers); Los Ebanos, Texas (3 officers); Walhalla, North Dakota (3 officers); and Neche, North Dakota (three officers). *See* Working Draft Version two, CBP Owned LPOE Prioritization Spread Sheet (March 13, 2009), at 1.

[58] *See* CBP Owned LPOE Workload (Oct. 14, 2009) (Excel spreadsheet) (listing throughput volumes at CBP LPOE from 2005 to August 2009).

Our concerns rest in a related area: facilities design. CBP has provided us with prototype design schematics and example design schematics for two LPOE, both of which happen to be in Montana: Noonan and Morgan. The site-design schematics appear to us to be reasonable. In the facilities schematics, however, we note that the proposed facilities have a variety of features in common. Each proposed facility includes a first and second floor; three restrooms (one for the public and two for officers, including a second floor restroom); two firearm storage facilities; a separate physical-fitness room for the officers; and some square footage to be unused growth space. These features do not appear lavish or clearly excessive. It is possible, however, that more refined analysis could show some of these elements to be above the absolute minimum requirements for CBP to accomplish its mission.

V. Value Engineering

Although CBP has provided explanations for each of the design elements, some may exceed the minimum necessary for CBP to accomplish its missions. In reviewing CBP's planning procedures, it became clear that CBP did not conduct distinct analyses that are referred to in the construction industry as "value engineering" analyses. In hindsight, however, it is understandable that CBP did not take a more formal approach to value engineering because of the time pressures associated with Recovery Act projects and because it is not clear that the Department (or any other authority) requires value engineering prior to awarding construction contracts. Importantly, however, although it is required to do so, the Department has not yet issued sufficient guidance on the use of value engineering practices.

Value engineering is a principle that the construction industry has used in planning for many years. Value engineering is a set of disciplined procedures designed to seek out optimum value for both initial and long-term investment. More specifically, value engineering is an organized effort that analyzes elements of a project for the purpose of determining whether their inclusion and arrangement enable the essential functions at the lowest total cost over the life of the project. Relying upon analysis performed by experienced, multi-disciplinary teams, value and economy are improved through the study of alternate design concepts, materials, and methods without compromising the functional objectives of the project.

Value engineering can be applied at any point in a project. Project managers can conduct the analysis during planning, design, or construction phases. The earlier planners apply this analysis, the higher the return on the time and effort invested.

Several authorities require agencies to follow value engineering practices. Prior to other mandates, the Federal Acquisition Regulations required federal agencies to incorporate value engineering principles in their procurement activities. In 1993, OMB issued a circular requiring agencies to develop value engineering practices and guidelines more generally.[59] And in 1996, Congress enacted the Office of Federal Procurement Policy Act, requiring agencies to maintain cost-effective value engineering procedures and processes.[60] In short, the Department is required

[59] The Office of Management and Budget (OMB) Circular A-131 http://www.whitehouse.gov/omb/circulars/a131/a131.html, issued in May 1993, required all Federal agencies to use value engineering and report on value engineering practices on an annual basis. The circular also directs agencies to adhere to the policies set forth in FAR Parts 48 and 52.

[60] P. L. 93-400, § 36, 41 U.S.C. § 432.

to use value engineering as a management tool and to develop guidelines for the application of value engineering techniques. Although the Department's acquisition-specific manual has minimal procedures related to oversight of contractors performing value engineering,[61] the Department has not promulgated guidelines that instruct project managers across the Department on the use of value engineering as a management tool: no specific guidance existed for CBP as it went through its planning and design activities.

CBP has engaged in some planning activities that appear to resemble value engineering. During the planning phase, CBP employed teams of subject matter experts from multiple disciplines to develop and refine the requirements package for each of the technical packages incorporated into the project requests for proposals. CBP and its servicing agency partners, GSA and USACE, met to review the design packages. In addition, the selected design-build contractors will continue this process by engaging with designated design review teams throughout the design process to further refine the facility designs before receiving notice-to-proceed for construction. With respect to the LPOE task orders already awarded by GSA and USACE, the required value engineering contract clause (*see* FAR 52.248-3) is contained in the base IDIQ contracts. (The IDIQ contract clauses apply to all task orders issued under the IDIQ contracts.) Pursuant to this clause, the contractor is encouraged to develop, prepare, and submit value engineering change proposals voluntarily. Other than inclusion of this clause, the statements of work included in the task order do not make specific reference to value engineering.[62]

It appears that the principles of value engineering could have been more aggressively applied and documented for the LPOE program at the design and planning phases. Our review of value engineering guidelines issued by other departments leads us to believe that additional value engineering procedures and documentation would have been required—and may have resulted in lower-cost designs—if CBP had been operating under similar guidelines. For example, the prototypes call for physical training rooms in each new port facility. At least some of these facilities are located in close proximity to one another and are staffed with CBP Officers that routinely rotate assignments among facilities. It is unclear whether value engineering analysis would justify these rooms at every facility.

But as noted above, the Department has not yet issued guidelines comparable to those of other departments on value engineering. We recommend that the Secretary direct the Under Secretary for Management to develop the required guidelines and place the emphasis on value engineering required by the OMB circular and the Office of Federal Procurement Policy Act.

VI. Closure of Ports of Entry

We asked a number of individuals whether CBP or the Department had ever conducted a study of whether to close particular ports of entry. We could not find any evidence of a comprehensive

[61] The DHS Homeland Security Acquisition Manual, Chapter 3048, sets forth some acquisition-related procedures relative to value engineering.

[62] In addition, each project technical package specifies that the winning vender must incorporate LEED certification into their design concept to maximize life-cycle return for the resulting facility by enhancing energy efficiency and conservation measures. The LEED green building rating system—developed and administered by the U.S. Green Building Council, a Washington D.C.-based, nonprofit coalition of building industry leaders—is designed to promote design and construction practices that increase profitability while reducing the negative environmental impacts of buildings and improving occupant health and well-being.

study considering this option. None of the officials with whom we spoke could recall a port facility ever being closed permanently during their time at CBP or its legacy agencies.

A number of facilities allowing individuals into the United States lie within less than 25 miles of each other. Closure of one or more port facilities would, of course, bring cost savings related to immediate construction costs. We realize, however, that considerations involved in closing a port facility are considerably more complicated than the straight dollar savings associated with foregone construction. Closure of port facilities would likely inconvenience local residents, and it may adversely impact the flow of commerce into the United States. But where port facilities are less than, for example, 20 miles apart, those adverse impacts may not outweigh the continuing costs to the taxpayers of maintaining a particular port facility. Other considerations, such as international relations with Canada regarding particular ports of entry, may also complicate the analysis.

Although our 30-day review could not provide adequate consideration as to whether any ports should be closed, the Department may decide to conduct a study of this issue. Currently, the Secretary of Homeland Security has authority to close ports of entry[63] after required Congressional notifications.[64]

[63] This authority has been transferred to the Secretary of Homeland Security from the Secretary of Treasury. *See* 6 U.S.C. § 203(1). Historically, this authority was assigned to the President of the United States by statute. *See* 19 U.S.C. § 2. The President delegated that authority to the Secretary of Treasury, *see* Exec. Order 10,289 (Sept. 17, 1951), before the Homeland Security Act transferred the authority to the Secretary of Homeland Security.

[64] *See* 19 U.S.C. § 2075(g)(2)(D) (requiring notification at least 180 days prior to taking any action that would eliminate a port of entry).

RECOMMENDATIONS

- CBP should be allowed to proceed with its current plans for construction for LPOE facilities.

- CBP should continue to invest in additional port of entry facilities as it experiences lower-than-expected costs due to current market forces for labor and materials.

- The Department should develop guidelines and practices regarding value engineering. Although the Department and CBP should follow value engineering practices in the future—and a gap currently exists in this regard—we cannot say that following such an analysis for the CBP construction prototypes and specific design plans would have certainly resulted in different or lower cost designs.

- The Department should conduct periodic studies to determine whether any ports of entry should be closed. The Secretary of Homeland Security currently has authority to close permanently ports of entry. (CBP is required by statute to provide Congressional notification before such closures take effect.) Based on our interviews, no ports have been permanently closed for at least the past three decades. Although permanent closure of a port of entry involves a number of complex considerations (international relations and impacts on local residents to name just two), some of the facilities that currently exist are separated by only several miles and have low traffic volumes.