



The Library of Congress
Office of the Inspector General



Library-wide

*The Library Needs Better Data
And Guidance to More Effectively
Select Its Mix of Workforce*

Audit Report No. 2010-PA-105
March 2011

FOR PUBLIC RELEASE



UNITED STATES GOVERNMENT

LIBRARY OF CONGRESS

Memorandum

Office of the Inspector General

TO: James H. Billington
Librarian of Congress

March 7, 2011

FROM: Karl W. Schornagel
Inspector General

SUBJECT: *The Library Needs Better Data And Guidance to
More Effectively Select Its Mix of Workforce*
Audit Report No. 2010-PA-105

This transmits our final report summarizing the results of the Office of the Inspector General's audit of the Library's selection of its multi-sector workforce. The executive summary begins on page *i* and our complete findings and recommendations appear on pages 7 to 15.

Based on the written comments to the draft report, we consider all recommendations unresolved except for recommendation III. In accordance with LCR 2023-9, *Rights and Responsibilities of Library Employees to the Inspector General*, we request your response within 30 calendar days to the following:

- Recommendation I and II – a Corrective Action Plan in accordance with section 7.A, and
- Recommendation III - an action plan addressing implementation of the recommendations, including implementation dates, in accordance with section 6.A.

We appreciate the cooperation and courtesies extended to our staff during this review by Human Resource Services, the Office of Contracts and Grants Management, and the Office of Security and Emergency Preparedness.

cc: Chief of Staff
Chief, Support Operations

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▶▶ EXECUTIVE SUMMARY

Like other Federal agencies, the Library of Congress relies on a workforce that includes Federal employees and private sector contractors to carry out its mission. Its objectives in doing so are to maintain cost-effective operations, state-of-the-art operational practices, institutional knowledge, and organizational control.

This report provides the results of an audit we performed on the process the Library uses to determine whether contractor personnel or Federal government employees should perform needed services. Our objectives were to 1) identify and evaluate the specific procedures that the Library uses in making its personnel determination decisions, 2) evaluate the quality of data that the Library collects and maintains to analyze its total workforce needs, and 3) assess the impact of information regarding Library personnel who may be incorrectly classified as contractors.

We determined that:

- the Library does not have an agency-wide procedure for determining whether to perform a function with Federal employees or contractors,
- the quality of contractor data that the Library collects and maintains needs to be improved and should be part of its total workforce data used for human capital planning, and
- the Library may have unpaid Federal withholding tax liabilities related to work performed by misclassified contractors.

Further details on our audit's results are as follows.

The Library Needs a Structured Procedure for Determining Whether to Perform Functions with Federal Employees or Contractors—The Library does not have a structured assessment procedure to help its service units determine whether contractor personnel or Federal employees are best suited to perform various services. Executive branch agencies follow a structured process to make these determinations, but as a legislative branch agency, the Library is not required to

follow this guidance. Two cost comparisons we performed revealed that in two instances, the Library spent less on contractors than Federal employees. Absent a structured process, however, there is no assurance that the Library will choose the best value - based on cost and other relevant factors - in future cases. We recommend the Library establish a procedure that provides an organized method for implementing elements of best practice guidance in personnel-determination decision-making.

The Library Needs to Consider Contractors in its Human Capital Planning –The Library does not maintain collective data representing the total composition of its workforce – including contractors. As a result, a complete and accurate picture of the Library’s human capital status is unavailable. Without such information, it may not be possible for the Library to perform effective analyses regarding existing workforce challenges or to develop meaningful strategies to address its future personnel needs. We recommend that the Library collect and maintain data on the skills and labor categories of the Library’s contractor workforce.

The Library Needs to Determine if its Independent Contractors are Correctly Classified –The Library may have unpaid Federal withholding tax liabilities if any of its nonpersonal services contractors are performing work that qualifies them as an employee from an Internal Revenue Service (IRS) perspective. This possibility likely would not have arisen if the Library had a structured framework that incorporates IRS guidelines on factors for determining a worker’s employment classification. We recommend that the Office of Contracts and Grants Management promptly identify nonpersonal services contracts in which employer-employee relationships may have been established between the Library and the contractor personnel and, for such cases, determine 1) in consultation with the Office of the General Counsel (OGC) whether the contracts should be terminated, and 2) in consultation with the OGC whether the Library has any unpaid withholding tax liabilities related to contractor personnel determined to be “employees.”

Management concurred with our findings but did not address our recommendations. The full text of management’s response is included as appendix D.

▶▶ BACKGROUND

The Library of Congress uses a workforce that includes Federal employees and private sector contractors to accomplish its mission. This report provides the results of an audit we performed on the process the Library uses to determine whether contractor personnel or Federal government employees are best suited to perform needed services.

The Librarian's Authority

The Librarian of Congress has the authority to appoint employees,¹ establish personal services contracts with specially qualified personnel, experts, or consultants,² and enter into contracts for goods and services.³ Determinations regarding hiring of employees and procurement of services are exercised in conjunction with the Library's appropriations authority, strategic and budgetary planning, and procurement authority and procedures.

The Librarian's authority to appoint employees is subject to certain restrictions; in general, a person can be appointed to fill a vacant full-time equivalent (FTE)⁴ position if funding is available.

A Collaborative Personnel Determination Process

Before a Library service unit makes a decision on the kind of personnel to hire, it should first engage in an assessment process to ensure the decision is based on relevant considerations. Among other things, the service unit's assessment should take into consideration input provided by Human Resources Services (HRS) on the planning, recruitment, and management of human resources, the Office of Contracts and Grants Management (OCGM) on contract planning and contractor performance, and the Chief Financial Officer's Budget Office on funding availability and staffing level restrictions.

¹ 2 U.S.C. §§ 140, 142a, 166, 169 and 5 U.S.C. § 3104.

² 2 U.S.C. § 136c and 5 U.S.C. § 3109.

³ The Librarian of Congress has the authority to enter into contracts for goods and services as the head of a Federal agency.

⁴ An FTE or "full-time-equivalent" is a human resources measurement equal to one staff person working full-time for one year.

Personal and Nonpersonal Services Contractors

Personnel who perform Library work under personal service contracts established under Library of Congress Regulation (LCR) 2010-5, *Policies and Procedures Governing the Employment of Experts and Consultants on a Personal Services Basis*, are considered Library employees for certain statutory purposes including Federal income tax withholding, leave, premium pay, retirement, reemployment of annuitants, and limits on dual compensation. On the other hand, individuals who perform work under service contracts established under LCR 2110, *Procurement – Supplies and Services*, or under contracts with temporary help firms under LCR 2112, *Procurement – Temporary Help Services*, are employees of that firm. Similarly, individual contractors under nonpersonal service contracts established under LCR 2111, *Procurement – Nonpersonal Services from Individual Contractors*, are not considered employees of the Library. This type of worker is considered an independent contractor.

The Library has not adopted the Federal Acquisition Regulation (FAR) for obtaining services from individual nonpersonal services contractors.⁵ Accordingly, the Library is under no requirement to apply the FAR's formal competitive procedures in procurement of services from nonpersonal services contractors.

*Key Features of the Executive Branch's
Personnel Determination Process*

Key policy provisions of the Office of Management and Budget (OMB) Circular A-76 call for executive branch agencies to perform inherently governmental activities with government employees, and use competition to determine whether government employees or private sector personnel should perform commercial services. The circular states that “[a]n inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel.”⁶ It also states that

⁵ Library of Congress Regulation (LCR) 2111, *Procurement – Nonpersonal Services from Individual Contractors*.

⁶ OMB issued a public notice on March 31, 2010 that provides proposed policy for determining when work must be performed by, or reserved for, federal employees. Among other things, the proposal adopts the definition of the

“[a] commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement.”

Legislative branch agencies are under no obligation to implement Circular A-76, but we used this document for guidance as a best practice in government.

Changes in Federal Policy are Expected

Since the mid-1950s, the executive branch has encouraged Federal agencies to obtain commercially available services from the private sector when doing so is cost-effective. However, in March 2009, the President issued a memorandum on government contracting that, among other things, questioned whether agencies had become overreliant on contractors and had appropriately outsourced services. After noting in his memorandum that the line between inherently governmental functions and commercial activities had blurred, the President tasked OMB with issuing guidance in a number of areas, including when it is appropriate for the

government to outsource services and when it is not. OMB is expected to issue that guidance in the near future.

In July 2009, OMB provided initial guidance to executive branch agencies in Memorandum M-09-26, *Managing the Multi-Sector Workforce*,⁷ which, among other things, provides guidance on determining whether work must be performed only by Federal employees or may be performed either by Federal employees or private sector contractors. OMB specifically recommends that agencies conduct a cost-benefit

analysis if both the Federal sector and the private sector are

Table 1: OMB Memorandum M-09-26 Guidance	
Work Function	Workforce Sector
Inherently governmental	only with Federal employees.
Critical, but not inherently governmental	only with Federal employees to the extent required by the agency to maintain control of its mission and operations (or if required by law, executive order, or international agreement); and by either Federal employees or private sector contractors once the agency has sufficient internal capability to control its mission and operations.
Essential, but not inherently governmental	by either Federal employees or contractors.

term “inherently governmental function” that is stated in the Federal Activities Inventory Reform (FAIR) Act of 1998.

⁷ OMB M-09-26 required agencies to (1) adopt a framework for planning and managing the multi-sector workforce that is built on strong strategic planning; (2) conduct a pilot human capital analysis of at least one program, project, or activity, where the agency has concerns about the extent of reliance on contractors; and (3) when considering in-sourcing, use guidelines that facilitate consistent and sound application of statutory requirements.

being considered to perform a function. OMB's initial guidance is summarized in Table 1.

Legislative branch agencies, including the Library, are under no obligation to implement the initial guidance in Memorandum M-09-26.

►► OBJECTIVES, SCOPE, AND METHODOLOGY

We conducted this performance audit to assess the Library's process to determine whether contractor personnel or Federal government employees should perform needed services. Our objectives were to 1) identify and evaluate the specific procedures the Library uses in deciding whether to perform functions with Federal employees or contractors, 2) evaluate the quality of data that the Library collects and maintains to analyze its total workforce needs and whether a cost-comparison between Federal employees and contractors would reveal potential savings, and 3) assess the impact of information brought to our attention about some contractors who may be more properly classified as employees.

To identify and obtain an understanding of the procedures the Library uses to determine the kind of personnel needed to perform commercial services, we interviewed the management and staff of the OCGM, HRS, the Budget Office, and various service units. We also surveyed all six service unit heads to identify the guidance that they received for making their personnel determinations.

In order to evaluate the application of the Library's policy and procedures for seeking the services of nonpersonal services contractors (i.e., Library of Congress Regulation [LCR] 2111), we selected a non-statistical sample of the 15 highest paid nonpersonal services contractors for the first half of fiscal year 2010 for testing. We then collected and evaluated responses from a survey sent to the Contracting Officer Technical Representatives (COTRs) in charge of monitoring their performances.

To determine whether there was a cost-benefit for Federal employees performing commercial services versus contractors, we performed two cost analyses and found that contracting was more economical than performing the services internally.

We also contacted several Federal agencies to identify the procedures they use to determine the kind of personnel to perform needed services. Most of the agencies we contacted are part of the executive branch. Accordingly, they are subject to requirements established by the OMB.

We conducted this performance audit from March through August, 2010, in accordance with generally accepted government auditing standards and LCR 211-6, *Functions, Authority, and Responsibility of the Inspector General*. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

►► FINDINGS AND RECOMMENDATIONS

It has been the longstanding policy of executive branch agencies to rely on contractor personnel from the private sector for needed commercial services. But, before soliciting proposals from contractors to perform work, those agencies must first engage in assessment processes to ensure that their personnel decisions are based on required considerations.

Like executive branch agencies, the Library frequently has to determine whether contractor personnel or government employees are best suited to perform its commercial services. However, the Library does not have a structured assessment procedure for making personnel determinations. This is mainly because it is a legislative branch agency and is not subject to the personnel determination requirements applicable to executive branch agencies. As a result, Library service units may not consider important factors when making personnel decisions for needed services.

The following sections provide our full evaluation of the Library's current personnel determination processes and assessments of related issues.

I. The Library Needs a Structured Procedure to Determine Whether to Perform Functions with Employees or Contractors

The Library lacks a structured procedure similar to that used by executive branch agencies to determine the appropriate mix of contractors and Federal employees. Documenting the basis the Library uses to determine the type of personnel chosen to perform a needed service would help ensure that a uniform procedure is consistently used. Such a procedure should implement, as best practice, elements of criteria applicable to executive branch agencies that would provide the means to:

- identify activities which are inherently governmental, and
- analyze and compare contractor and government employee service performance costs to identify the service provider that represents the best value.

The procedure should also provide the means to evaluate other key factors including the restrictions on the Library’s authority to increase its government personnel levels, funding availability for and the urgency of a service need, and whether an employer-employee relationship would exist between the Library and the contractor.

The assessment procedures used by the Library’s service units frequently include the consideration of several meaningful factors (e.g., restrictions on the Library’s authority to increase its government personnel level, funding availability for and the urgency of a service need). However, we identified only three service units that considered cost in their assessment procedures. Along with the factors already identified, assessment of the inherently governmental nature of the function, and

Table 2: Cost Comparison Analysis		
Description	Copyright	Information Technology Services
	IT Helpdesk	IT Helpdesk
Period	12/27/08-1/26/10	12/27/08-1/22/10
Estimated Cost of Library Performance (FTE)		
Personnel Costs (Step 5) ⁸	\$ 695,430	\$ 745,684
Fringe (36.25% per OMB M-08-13) ⁹	252,093	270,310
Overhead Costs (12% of Personnel costs per A-76) ¹⁰	113,702	121,919
Total Cost of Agency Performance	1,061,226	1,137,913
Estimated Cost of Private Sector Performance		
Private Sector Price ¹¹	796,289	773,832
(Onsite Program Mgr. & Project Control Specialist) ¹²	(11,540)	
Contract Administrative Costs (per A-76) ¹³	42,427	42,427
Federal Income Tax Adjustment (per Compare A-76) ¹⁴	(3,742)	(3,637)
Total Adjusted Cost of Private Sector Performance	823,433	812,622
Cost Difference	(\$ 237,792)	(\$ 325,291)

⁸ OMB Circular No. A-76 (A-76) requires agencies to calculate civilian pay and wages for cost estimates using local pay salaries and wages at a rate of step 5 for General Schedule (GS) positions based on the grades necessary to meet the position requirements.

⁹ OMB Memorandum 08-13 Update to Civilian Position Full Fringe Benefit Cost Factor, Federal Pay Raise Assumptions, and Inflation Factors used in OMB Circular No. A-76, “Performance of Commercial Activities” requires agencies to add a 36.25% fringe benefit rate for each full-time civilian position in the agency cost estimate.

¹⁰ A-76 requires an overhead factor of 12% of pay when calculating public-private competition costs.

¹¹ Based on helpdesk invoices for services rendered from 12/27/08 to 1/22/10.

¹² Contractor costs were deducted since the total annual hours of these part-time supervisory positions were less than 123 hours which did not justify the hiring of a full-time equivalent position.

¹³ A-76 assigns the salary of half of a GS-12 FTE salary for contract administration costs associated with hiring contractors.

¹⁴ Rate determined using OMB’s costing software. Represents revenue for the government when a private sector provider pays income tax.

management priorities, cost should always be a factor in a best value determination.

Additionally, we performed a cost analysis on two Library service contracts and found that although the Library had not performed a cost comparison of their own, contracting was more economical than performing the services internally.

Table 2 shows two cost comparisons with a total difference of \$563,000 in savings to the benefit of the Library for hiring contractors instead of Federal employees. Conversely, similar decisions without proper analysis could result in the unnecessary expenditure of a like amount of funds.

However, since personnel determination requirements are not applicable to legislative branch agencies (see Appendix B) and the Library is not following a similar model as a best practice, it has no assurance that it is choosing the most cost-beneficial approach when filling a personnel need. Because its procedures are not formalized, there is no assurance that there is uniformity across the Library or that there is documentation supporting each determination including those where best value was chosen over lowest cost.

Recommendation

We recommend that the Library develop and implement a structured procedure that provides a uniform method for making personnel determinations. Such a procedure should:

- provide the means to identify activities which are inherently governmental, and
- identify the service provider that represents the best value.

Management Response

Management agreed to document the basis for individual decisions but did not commit to establishing a uniform method for making personnel determinations.

OIG Response

We agree that documenting individual decisions to hire an employee or contractor is important but the Library should first develop a uniform method for its selection decisions. The

intent of our recommendation goes primarily to developing a consistent, rational, and uniform methodology for making important business decisions. In the absence of such a structured methodology, the Library is at risk of not choosing the right workforce mix.

II. The Library Needs to Consider Contractors in its Human Capital Planning

Strategic workforce planning, also called human capital planning, focuses on developing long-term strategies for acquiring, developing, and retaining an organization's total workforce (including full- and part-time Federal staff and contractors) to meet the needs of the future.¹⁵

A key element in human capital planning is "gathering and analyzing certain types of service contracting data needed for making insourcing decisions. For example, information on the type of service contracts and the number of contractor-equivalent personnel... may be needed to review contracted-out services and make insourcing decisions."¹⁶

The Library's *Human Capital Management Plan for FY 2011-2016* states that "[w]hile workforce planning occurs in various organizational units in the Library, there is no methodical, systematic, Library-wide workforce planning system that provides

- present and future staffing profiles and projections
- gap analyses
- workforce strategies that prepare the Library to meet its anticipated challenges."

The results of our work are consistent with the conclusion of the Library's *Human Capital Management* plan. Specifically, we found that the Library does not maintain data representing the total composition of its contractor workforce. As a result, a complete and accurate picture of the Library's human capital is unavailable. Additionally, it may not be possible for the Library to perform effective analyses regarding existing workforce challenges (e.g., insourcing decisions, skill

¹⁵ GAO-04-39, Key Principles for Effective Strategic Workforce Planning, December 2003.

¹⁶ GAO-10-744T, Initial Agency Efforts to Balance the Government to Contractor Mix in the Multisector Workforce, May 20, 2010.

deficiencies, staffing gaps, etc.) or to develop meaningful strategies to address its future personnel needs. Table 3 illustrates the inverse relationship at the Library between the decrease in FTEs and the increase in contractual service program costs over the past five fiscal years.

Funding Source	FY 2005 Actual FTE	FY 2006 Actual FTE	FY 2007 Actual FTE	FY 2008 Actual FTE	FY 2009 Actual FTE
Appropriated	3,937	3,747	3,679	3,584	3,601
Non-Appropriated	187	170	167	148	135
Total FTEs	4,124	3,917	3,846	3,732	3,736
% increase (decrease)		(5.0%)	(1.8%)	(3.0%)	0.1%
Contractual Services	\$167,610,000	\$183,058,000	\$230,829,000	\$220,046,000	\$254,599,000
% increase (decrease)		9.2%	26.1%	(4.7%)	15.7%

Contractor Data

Data regarding the Library’s contractor workforce is separately collected and maintained by HRS, the Office of Security and Emergency Preparedness (OSEP), and OCGM. The offices collect the data for different purposes and maintain it in different systems. There is no single database that reflects the number of contractors working for the Library, the number on premises, and the functions being performed.

HRS maintains its contractor data in a staff directory. The directory showed that 497 contractors were in the Library’s workforce as of April 5, 2010. HRS compiles its data from input provided by the Library’s service units. The quality of HRS’ data depends on the service units providing current, complete, and accurate input to HRS for all additions and deletions to the directory.

OSEP maintains a database of contractor data from the identification badging system. The number of contractors included in the database totaled 1,143 contractors as of April 27, 2010. OSEP makes changes to the database in response to three events: 1) the issuance of an identification (ID) badge to a contractor, 2) the expiration of an ID badge according to a pre-established date, and 3) notification to OSEP by a service unit that a contractor’s association with the Library is terminating before the pre-established expiration date of the contractor’s ID badge. The OSEP data does not provide comprehensive

information on contractor workers because not all contractors are required to obtain ID badges and there is no assurance that a service unit will provide a current, complete, or accurate notification to OSEP when a contractor separates from the Library before his or her badge expires.

OCCGM maintains data on contracts with individuals in the Momentum Financial System (Momentum), the Library's automated financial management system. The number of individual contractors included in Momentum totaled 132 as of March 31, 2010. However, Momentum data on service contracts with companies under LCR 2110, or with contracts with temporary help firms under LCR 2112 only reflects the contract with the organization – not data on the contractor's individual employees.

LCR 212-1, *Functions and Organization of Human Resources Services* assigns to the Director of HRS the responsibility of assessing the Library's workforce characteristics and future workforce needs, based on the Library's mission and strategic plan.

The lack of a system or process to collect and maintain data representing the total composition of the Library's contractor workforce impairs the Library's ability to make insourcing decisions and identify skill gaps in Federal employees needed to accomplish its mission.

Recommendations

We recommend that HRS:

1. Establish a system to collect and maintain data representing the total composition of the Library's direct hire and contractor workforce, and
2. Establish controls to ensure that the data maintained in the system is current, complete, and accurate at all times.

Management Response

Management substantially agreed with our recommendations, however, it made no commitment on developing a process or system of collecting contractor data.

OIG Response

Lacking information about approximately one-fifth of its workforce represents a fundamental flaw in the Library's management process. Proper management requires full information of the Library's human resources, whether permanent staff or contractor.

III. The Library Needs to Determine if its Independent Contractors are Correctly Classified

Based on our assessment of data in a sample of nonpersonal services contractors, we believe that workers may be misclassified as contractors instead of employees. As a result, the Library may have unpaid Federal withholding tax liabilities to the Internal Revenue Service (IRS). We used relevant IRS criteria as well as LCR 2111, *Procurement - Nonpersonal Services from Individual Contractors* as guidance for our assessment.

In general, IRS criteria require an employer to classify a worker as an employee if the employer retains the right to direct and control the means and detail of the work involved. Guidance is available in IRS Revenue Ruling 87-41 (i.e., 20 Common-Law Rule factors) which may assist employers to determine whether a worker should be classified as an employee or an independent contractor. If a worker is classified as an employee, the IRS requires an employer to withhold Federal income, Social Security, and Medicare taxes from the worker's pay. The employer is also responsible for paying their portion of Social Security, Medicare taxes, and Federal unemployment tax. Appendix C lists each of the 20 Common-Law Rule factors.

LCR 2111 indicates that nonpersonal services contractors are "independent contractors" who provide their services to the Library without establishing an employer-employee relationship.

We judgmentally selected a non-statistical sample of the 15 highest paid nonpersonal services contractors for testing. Surveys were then sent to Contracting Officer Technical Representatives (COTRs) responsible for monitoring the contractor's performances. We received responses for 14 of the contractors selected.

The COTRs informed us that out of 14 of the Library's nonpersonal services contractors: 1) 10 had received instructions from a Library employee about when, where, and how contract work was to be performed in addition to specific directions on other contract performance matters; and 2) one of which had approved invoices for payment over a month after retiring from the Library as an employee.

In our assessment, 10 of the 14 nonpersonal services contractors might be considered employees based on IRS' and LCR 2111's criteria because the details of their work were directed by and were within the Library's control. They might also be considered employees based on LCR 2111 criteria because they were not providing their services independently and effectively had an employer-employee relationship with the Library. Finally, the nonpersonal services contractor who was approving invoice payments after retirement might be considered an employee because approving payments involves value judgments related to Federal funding that should only be made by a Library employee.

Although the content of LCR 2111 alone should have prevented the corresponding nonpersonal services contracts from being awarded, it appears that management did not pay attention to that regulation in the 10 cases. In our opinion, the uniform procedure that we recommended in Finding I would have provided the means to correctly assess the situations' work activities and appropriately determine that contractors should not perform those activities.

In addition, the IRS offers a service through which a worker's employment status is officially determined. The agency provides this service upon request and free of charge to a requestor. To obtain such an IRS determination, the Library should complete Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, and submit it to the IRS.

Recommendations

We recommend that the Library and Director of OCGM:

1. Create a policy that incorporates a framework modeling the applicable IRS Common-Law Rules test to assist in properly classifying workers as

- independent contractors or employees. Begin requiring service and support units to complete and submit documentation on the classification test to OCGM when requesting that a solicitation for a nonpersonal services contract be processed.
2. Promptly identify nonpersonal services contracts in which employer-employee relationships have been established between the Library and the contractors and determine in consultation with the OGC whether the contracts identified should be terminated.
 3. Consider filing Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding* with the IRS to officially determine the worker's status if further assistance is needed to determine proper worker classification.

Management Response

Management substantially agreed with our recommendations.

» CONCLUSION

The Library, as an institution, has not been involved in two important areas of workforce administration. First, it has not established an agency-wide procedure to guide service unit assessments of the type of personnel – Federal employee or contractor – to use to perform needed commercial services. Second, it has not maintained collective data representing the total composition of its contractor workforce, and the quality of contractor data that the Library collects and maintains needs to be improved and should be part of its total workforce data used for human capital planning. The results of these omissions may be detrimentally affecting the Library's present operations and its ability to effectively analyze its personnel needs.

This report provides starting points that the Library can use to begin addressing the above-described deficiencies. Once appropriate corrective actions are implemented, the Library will be conducting its workforce administration activities more strategically.

We urge the Library to take seriously our recommendations; in its response, the Library acknowledges the importance of our findings, yet declines to take concrete action to remedy the deficiencies we identified.

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▶▶ APPENDIX A: ACRONYMS USED IN THIS REPORT

BOC	Budget Object Code
COTR	Contracting Officer's Technical Representative
FAIR	Federal Activities Inventory Reform Act
FAR	Federal Acquisition Regulation
FTE	Full-Time Equivalent
HRS	Human Resources Services
IRS	Internal Revenue Service
LCR	Library of Congress Regulation
OCGM	Office of Contracts and Grants Management
OMB	Office of Management and Budget
OSEP	Office of Security and Emergency Preparedness
U.S.C.	United States Code

►► APPENDIX B: OTHER AGENCIES

Mixed Workforce Practices of Various Agencies				
Legislative Branch				
<i>Agency</i>	<i>Policies and Procedures</i>	<i>Able to Identify total # of contractors</i>	<i>Subject to OMB Circular A-76</i>	<i>Subject to OMB Memorandum 09-26</i>
Architect of the Capitol	N	N	N	N
Government Printing Office	N	N	N	N
Executive Branch				
<i>Agency</i>	<i>Policies and Procedures</i>	<i>Able to Identify total # of contractors</i>	<i>Subject to OMB Circular A-76</i>	<i>Subject to OMB Memorandum 09-26</i>
National Archives and Records Administration*	N	N	Y	Y
Nuclear Regulatory Commission*	N	N	Y	Y
Securities and Exchange Commission*	Y	N	Y	Y
Patent and Trademark Office**	Agency did not respond to request	Agency did not respond to request	Y	Y

We sought the data included in the above table to determine whether other agencies 1) had existing policies and procedures for determining the kind of personnel – direct hire or contractor – to use to perform needed commercial services, and 2) had the ability to identify the total number of contractors in their respective workforces. Four of the agencies that we contacted are subject to OMB Circular A-76 and OMB Memorandum M-09-26, and two are not.

* These are Independent Agencies and Government Corporations.

** Part of the Department of Commerce.

▶▶ APPENDIX C: IRS 20 COMMON-LAW RULE FACTORS

1. Instructions
2. Training
3. Integration
4. Services Rendered Personally
5. Hiring, Supervision, and Paying Assistants
6. Continuing Relationship
7. Set Hours of Work
8. Full Time Required
9. Doing Work on Employer's Premises
10. Order or Sequence Set
11. Oral or Written Reports
12. Payments by Hour, Week, Month
13. Payment of Business and/or Traveling Expenses
14. Furnishing of Tools and Materials
15. Significant Investment
16. Realization of Profit or Loss
17. Working for More Than One Firm at a Time
18. Making Service Available to General Public
19. Right to Discharge
20. Right to Terminate

Per IRS Revenue Ruling 87-41, “[a]s an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship.”

There is no particular number of factors that is required to determine whether a worker is an employee or an independent contractor. Factors are used to determine whether the employer has the right to direct and control the action of the worker.

▶▶ APPENDIX D: MANAGEMENT RESPONSE

UNITED STATES GOVERNMENT


Memorandum

Office of the Chief of Support Operations

Library of Congress

DATE: January 27, 2011

TO: Karl W. Schornagel
Inspector General

FROM: Lucy D. Suddeth 
Chief, Support Operations

SUBJECT: Draft Audit Report No. 2010-PA-105

Thank you for the opportunity to comment on Draft Audit Report No. 2010-PA-105, which pertains to the Library's selection of its multi-sector workforce.

In preparing this response, the Office of Support Operations (OSO) conferred with Library Officials representing the Office of the General Counsel (OGC), Human Resources Services (HRS), the Office of Contracts and Grants Management (OCGM) and the Office of Security and Emergency Preparedness (OSEP). Our comments relative to the report's findings and recommendations follow. We are also providing supplemental information that we believe will add accuracy and clarity in sections of the report that are not part of the formal recommendations (attached.)

I. The Library Needs a Structured Procedure for Making its Personnel Determination Decisions

OIG Recommendation

We recommend that the Library develop and implement a structured procedure that provides a uniform method for making personnel determinations. Such a procedure should:

- *provide the means to identify activities which are inherently governmental, and*
- *identify the service provider that represents the best value.*

OSO Response

OSO recommends that the heading be revised to "The Library Needs a Structured Procedure to Determine Whether to Perform Functions with Employees or Contractors." The phrase "*Personnel Determination Decisions*" connotes processes for

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selecting and retaining federal employees. The Library's processes for making merit-based selection determinations are actually quite extensive. A more specific description of the federal employee vs. contractor issue would be more helpful.

OSO agrees that in situations where decisions are made regarding the use of employees or contractors, the basis for the Library's determination should be documented in each instance, and that decisions regarding "best value" takes into account cost and other relevant factors.

OSO recommends that the statement "...activities which are inherently governmental," be revised to "...activities which are inherently governmental, critical or commercial..."

II. The Library Needs to Consider Contractors in its Human Capital Planning

OIG Recommendations

We recommend that HRS:

- 1. Establish a system to collect and maintain data representing the total composition of the Library's direct hire and contractor workforce, and*
- 2. Establish controls to ensure that the data maintained in the system is current, complete, and accurate at all times.*

OSO Response

OSO agrees that the Library should collect and maintain data on its federal employees and contractor workforce as it relates to its human capital planning; HRS is already collecting and maintaining this information on the Library's federal employees. A process to collect and maintain pertinent data on the contractor workforce would fall within the purview of the Library's contracting office and service units. As HRS is dependent on the service units for such information, it is not likely that HRS could independently provide assurance the data maintained is "current, complete and accurate at all times."

III. The Library Needs to Determine if its Independent Contractors are Correctly Classified

OIG Recommendations

We recommend that the Library and Director of OCGM:

- 1. Create a policy that incorporates a framework modeling the applicable IRS Common-Law Rules test to assist in properly classifying workers as independent*

contractors or employees. Begin requiring service and support units to complete and submit documentation on the classification test to OCGM when requesting that a solicitation for a nonpersonal services contract be processed.

- 2. Promptly identify nonpersonal services contracts in which employer-employee relationships have been established between the Library and the contractors and determine in consultation with the OGC whether the contracts identified should be terminated.*
- 3. Consider filing Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding with the IRS to officially determine the worker's status if further assistance is needed to determine proper worker classification.*

OSO Response

OSO agrees that the Library should create a process to assist in properly classifying workers as independent contractors or employees. It is likely that determinations regarding the classifications of independent contractors would be made in consultation with OGC, OCGM and the service units. Regarding Recommendation No. 3, if it became necessary to consult with the IRS to determine proper worker classification, it would be done by the OGC.

OSO agrees with Recommendation No. 2, and believes that this issue is more closely linked to misunderstanding of the proper scope of Government interaction with service contractors than to a process for deciding when to contract out.

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