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INTEROFFICE MEMORANDUM

MEMORANDUM INTERIEUR

OFFICE OF INTERNAL OVERSIGHT SERVICES - BUREAU DES SERVICES DE CONTRÔLE INTERNE
INTERNAL AUDIT DIVISION - DIVISION DE L'AUDIT INTERNE

TO: Ms. Patricia O'Brien, Under-Secretary-General

DATE: 26 July 2011

A: Office of Legal Affairs

REFERENCE: IAD: 11- 00506

FROM: Fatoumata Ndiaye, Director

DE: Internal Audit Division, OIOS

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SUBJECT: **Assignment No. AH2010/521/01 – Audit of the process for resolving procurement-related**
OBJET: **disputes referred to the Office of Legal Affairs**

While generally adequate and effective, the internal control system for resolving procurement-related disputes would be enhanced by formally documenting procedures

1. I am pleased to present the report on the above-mentioned audit which was conducted in accordance with the International Standards for the Professional Practice of Internal Auditing.
2. The matters presented in bold text in the report are opportunities for improvement. While implementation of opportunities for improvement is left to the discretion of OLA management, OIOS will follow up on them, as appropriate, during subsequent, relevant oversight activities.
3. We wish to express our appreciation to the Management and staff of OLA for the assistance and cooperation extended to the auditors during this assignment.

cc: Ms. Antigoni Axenidou, Deputy Director, General Legal Division, OLA
Mr. Jay Pozenel, Principal Legal Officer, General Legal Division, OLA
Mr. Swatantra Goolsarran, Executive Secretary, UN Board of Auditors
Mr. Rohan Wijeratne, Board of Auditors
Ms. Susanne Frueh, Executive Secretary, Joint Inspection Unit
Mr. Zachary Ikiara, Chief Policy and Oversight Coordination Unit, DM
Mr. Byung-Kun Min, Special Assistant to the USG-OIOS
Mr. Gurpur Kumar, Deputy Director, Internal Audit Division, OIOS
Ms. Amy Wong, Programme Officer, Internal Audit Division, OIOS

EXECUTIVE SUMMARY

Audit of the process for resolving procurement-related disputes referred to the Office of Legal Affairs

The Office of Internal Oversight Services conducted an audit of the process for resolving procurement-related disputes referred to the Office of Legal Affairs (OLA). The overall objective of the audit was to assess whether the internal controls established for the dispute-resolution process were adequate and effective. The audit was conducted in accordance with the International Standards for the Professional Practice of Internal Auditing.

The General Legal Division (GLD) in OLA is mandated, among other functions, to provide legal advice on procurement-related claims and disputes involving the operational activities of the Organization. During the period covered by the audit (2009 and 2010), GLD resolved nine disputes referred to it by the Procurement Division, totaling \$105 million. These disputes were settled for \$31 million. The audit concluded that while GLD's internal control system for resolving procurement-related disputes was generally adequate and effective, it would be enhanced by:

- Formally documenting procedures to serve as a reference guide to staff members in doing their work;
- Facilitating the retrieval of documents from the case management record-keeping systems;
- Developing additional performance indicators to more fully measure the effectiveness of GLD's role in the dispute-resolution process;
- Communicating the respective roles and responsibilities of GLD and its clients in the process for resolving procurement-related disputes to ensure a common understanding of GLD's services and better manage expectations; and
- Introducing a formal mechanism to obtain client feedback.

I. INTRODUCTION

1. The Office of Internal Oversight Services (OIOS) conducted an audit of the process for resolving procurement-related disputes referred to the Office of Legal Affairs (OLA).
2. OLA was established on 13 February 1946 by General Assembly resolution 13(I). OLA is the central legal service of the Organization and provides legal advice to the Secretary-General, Secretariat departments and offices and United Nations organs in the field of private and public law. OLA's General Legal Division (GLD) provides, inter alia, legal advice on procurement, the drafting and negotiation of contracts and other commercial matters, as well as claims and disputes involving operational activities of the Organization, its organs and voluntary programmes and funds. The Division is headed by a D-2 Director and has a total of 48 posts, of which 11 were vacant at the time of the audit.
3. Due to the privileges and immunities granted to the Organization by the UN Charter and the Convention on Privileges and Immunities of the United Nations, in particular the immunity from the legal process, UN contracts provide for disputes between the UN and contractors to be resolved by amicable means (i.e. conciliation in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Conciliation rules). In the absence of an amicable settlement, disputes may be resolved in accordance with the UNCITRAL Arbitration rules.
4. When a procurement-related dispute arises that has not been resolved by the requisitioner and/or the Procurement Division (PD), the UN Procurement Manual directs that legal advice be sought from OLA. During the audit, GLD provided OIOS with a list of 19 procurement-related disputes handled by OLA between January 2009 and September 2010. These disputes included eight claims against the Organization totaling \$95 million, which were resolved for \$30 million and three claims against UN vendors for \$16 million, which were resolved for \$5 million. Of the eight disputes unresolved at September 2010, five were claims against the Organization totaling \$5 million and three were claims against UN vendors totaling \$1 million.
5. Comments made by the Office of Legal Affairs are shown in *italics*.

II. AUDIT OBJECTIVE

6. The main objective of the audit was to assess the adequacy and effectiveness of internal controls in the process for resolving procurement-related disputes referred to OLA.

III. AUDIT SCOPE AND METHODOLOGY

7. The audit scope included all procurement-related disputes referred to GLD by PD and resolved during 2009 and 2010. IAD selected a sample of four disputes, focusing on disputes where the claim exceeded \$10 million, outside counsel had been engaged or the claim was related to an aviation contract. The total amount claimed in these four disputes equaled \$100 million, representing 95 per cent of the total amount claimed against the United Nations in the audit period.
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IV. AUDIT RESULTS

A. Internal controls in the process of resolving procurement-related disputes referred to OLA

Procedures need to be formally documented

8. On receipt of a request for advice on a procurement-related dispute from its clients, GLD's records management staff log the dispute, then GLD's D-level staff members assign the dispute to a GLD Legal Officer. The Legal Officer coordinates with the respective client(s) to gather all relevant information and review whether any similar disputes have arisen in the past, before formulating legal advice. The legal advice is reviewed and authorized by a GLD D-level staff member, before being communicated to the client(s).

9. GLD has procedures in place; however these have not been documented to serve as a structured reference guide to staff members in doing their work. Documented procedures increase the likelihood that GLD's processes will be performed in a consistent manner to achieve its objectives. They also serve as a basis for making improvements to processes and demonstrate that an effective internal control system is in place to regulate activities.

Adequate controls are in place to manage the work of outside counsel

10. GLD hires outside counsel to assist in procurement-related disputes resulting in arbitration. The GLD legal team assigned to the dispute manages the contract by tasking the outside counsel, maintaining a log of work performed by the firm and certifying invoices received. To control the hours charged by outside counsel, the amount payable under the contract may be capped. Outside counsel was engaged for only one of the nine disputes resolved during the audit period. OIOS reviewed the management of contract no. PD/C0043/09 and were satisfied contract management controls were generally in place.

Case management record-keeping could be improved

11. In accordance with Secretary-General Bulletin ST/SGB/2007/5 on record-keeping and the management of UN archives, UN departments are required to develop procedures to identify and manage their vital records. GLD staff members document information relevant to the provision of legal advice in paper files, documents on shared electronic drives and more recently by using the Prodagio case management software. However, the standard of record-keeping could be improved to make it easier to locate and retrieve specific documents supporting the procurement-related disputes resolution process. During the audit, OLA and OIOS staff encountered difficulties in retrieving documentation on the referral of disputes to OLA, which OLA explained was due to conversion from a paper-based legal records management system to an electronic case management system, the Prodagio software system. Document retrieval is of even more importance considering it could take more than three years to resolve a dispute; with staff mobility and turnover, an improved case management system is essential to ensure the efficient operation of the Division.

Additional performance measures are required to measure the effectiveness of GLD’s role in the dispute-resolution process

12. GLD has adopted as the only target of the effectiveness of its role in the dispute resolution process, “the total amount of the Organization’s legal liability reduced by 65 per cent compared with the total amount of claims brought against the Organization”. The measure is reflected in the proposed programme budgets for the 2008-2009 and 2010-2011 biennia (A/62/6 Sect.8 and A/64/6 Sect.8 respectively). The table below reflects the reduction of legal liability for all eight procurement-related disputes raised by a UN vendor and referred to GLD by PD, and resolved in 2009 and 2010:

Table 1: Percentage reduction in legal liability for procurement-related disputes resolved in 2009 and 2010

Contract	Vendor claim	Settlement of vendor claim	Reduction of legal liability (\$)	Reduction of legal liability (%)
1	\$3,691,185	\$186,629	\$3,504,556	95
2	\$61,200,000	\$25,419,539	\$35,780,461	58
3	\$25,000,000	\$100	\$24,999,900	100
4	\$3,814,362	\$3,814,362	\$0	0
5	\$9,540	\$9,540	\$0	0
6	\$378,115	\$378,115	\$0	0
7	\$624,228	\$411,033	\$213,195	34
8	\$227,006	\$0	\$227,006	100
TOTAL	\$94,944,436	\$30,219,318	\$64,725,118	68%

13. Although the total amount of the Organization’s legal liability reduced by more than 65 per cent compared with the total amount of claims brought against the Organization, it was not directly evident whether the reductions were attributable to GLD’s legal advice or the contractor’s desire to settle the matter in favour of a timely resolution of the claim or other factors. Also, cases that do not result in a reduction of the claim do not necessarily imply inadequate performance by GLD.

A formal mechanism to obtain client feedback should be introduced

14. Client feedback provides valuable information on the satisfaction of the services provided to clients and a means of identifying and addressing potential areas of improvement. However, GLD does not have a formal mechanism in place to obtain client feedback from PD or other clients, on the procurement-related legal advice provided.

15. The Office of Legal Affairs, General Legal Division (GLD) should enhance the internal control system for resolving procurement-related disputes by documenting its procedures to guide staff members, improving record-keeping of documents to facilitate retrieval, developing additional performance indicators to measure the effectiveness of GLD’s role in the process and implementing a formal mechanism to obtain feedback from clients.

16. *OLA explained that GLD continues to seek to improve policies and procedures to provide guidance to staff, both in GLD and in other offices to which OLA provides legal support and service, to improve the consistency of legal practices and inform staff of the*

rationale for such practices. For example, GLD promulgates model legal documents, together with appropriate explanations regarding the use of such documents in protecting the Organization's legal interests. GLD will prepare and disseminate guidance on the procedures and practices best intended to protect the Organization's legal interests with respect to resolving procurement-related disputes. GLD intends to issue this guidance by the end of 2012 following consultations with the Office of Central Support Services (OCSS), including PD, and with the Controller's Office in the Office of Programme Planning Budget and Accounts (OPPBA), and the Legal Liaison Officers of the UN and its Funds and Programmes.

17. *OLA commented that records and archives are the lifeblood of its legal services and support without which OLA would not be in a position to provide the comprehensive and consistent legal advice, services and support that its client offices expect and that are necessary to protect the legal interests of the Organization. OLA has throughout its history maintained a comprehensive archives and record-keeping system, which form the crucial repository of the legal practice of United Nations operations and activities. During the audit, OLA was in the process of converting from a paper-based legal records management system to an electronic case management system, the Prodagio software system. OLA intends to commission additional upgrades for implementation by no later than 31 December 2011 to improve and refine the implementation of the Prodagio system and will continue to work on an ongoing basis with the Office of Information and Communications Technology and Archives and Records Management Section to ensure that OLA's robust archiving practices remain consistent with standards and technology implemented in the Secretariat.*

18. *OLA further stated that it strongly considers that its current performance measure is an objective and effective measurement of the value that its legal services provide to the Organization, which has been accepted by OPPBA as well as the Committee on Programme Coordination as an appropriate performance measure for results-based budgeting purposes. OLA has no plans to alter that performance measure. OLA however accepts that it should seek to identify and utilize additional performance indicators concerning the way it handles claims and disputes arising out of the Organization's procurement activities, including for self-evaluation and client-feedback purposes. In this regard, OLA will consult with Legal Advisers of the UN system organizations and, if necessary, the Inspection and Evaluation Division of OIOS.*

Communication of GLD's role in the disputes resolution process could be improved

19. Although the Secretary-General's Bulletin ST/SGB/2008/13 outlines OLA's and GLD's generic responsibilities, GLD has not communicated to its clients the precise nature of services that it provides, respective responsibilities of the client and GLD in the dispute resolution process and agreed milestones for various activities, etc. A protocol outlining these matters would promote a common understanding of GLD's services, manage client expectations and provide benchmarks against which GLD's services could be measured.

20. The Office of Legal Affairs, General Legal Division (GLD) should communicate the respective roles and responsibilities of clients and GLD in the process for resolving procurement-related disputes.

21. *OLA stated that it has begun consultations with OCSS and OPPBA on the respective roles of the offices in the resolution of disputes, controversies and claims arising out of procurement matters. In addition, OLA will consult with the Legal Liaison Officers of the Funds and Programmes and other subsidiary organs of the United Nations. GLD will submit guidance on such roles and responsibilities for review and consultation during the next meeting of the Legal Liaison Officers in May 2012*

B. GLD measures in reducing the risk of procurement-related disputes

More can be done to mitigate the risk of disputes arising on procurement-related contracts

22. Although not a primary function, GLD has implemented measures, some in collaboration with PD, to mitigate the risk of disputes arising on contracts. These include developing model contracts and general conditions of contract, providing (as needed) legal advice to procurement officers prior to finalizing contracts, and participating in the annual conference of chief procurement officers from peacekeeping missions.

23. In submitting its request for the approval of settlements, GLD provides a detailed analysis of the claim including any actions that may have weakened the UN's position in negotiating the claim. These analyses may provide valuable lessons to procurement officers and contract managers in the conduct of their work; however, more can be done to share this information. Replying to a survey administered by OIOS, respondents indicated that online-tools such as the PD Intranet could be utilized to share case studies that provide insights on disputes that have arisen and the resolution process.

24. The Office of Legal Affairs, General Legal Division, in collaboration with the Procurement Division, should develop mechanisms to periodically identify and communicate in an appropriate format, lessons that can be learned from resolved procurement-related disputes relevant to staff members.

25. *OLA stated that it will work with PD and Legal Liaison Officers of the Funds and Programmes and other subsidiary organs of the United Nations in order to conduct lessons-learned round-table discussions on a periodic basis. GLD intends to include such discussions regularly as part of annual meetings of the Legal Liaison Officers, beginning with the next meeting in May 2012, at which PD and its counterparts from the Funds and Programmes and other subsidiary organs of the UN will be invited to participate for that agenda item. In addition, GLD will seek to enhance the distribution of the outcomes of such round-table discussions via the UN's Intranet and/or Extranet.*

CONTACT INFORMATION:

DIRECTOR:

Fatoumata Ndiaye: Tel: +1.212.963.5648, Fax: +1.212.963.3388,
e-mail: ndiaye@un.org

DEPUTY DIRECTOR:

Gurpur Kumar: Tel: +1.212.963.5920, Fax: +1.212.963.3388,
e-mail: kumar@un.org