

SPECIAL REPORT

**Issues Related to the Contract Between
The Division of Mental Retardation Services,
Clover Bottom Developmental Center, and
Action Rehabilitation Services, Inc.**

September 2004

**John G. Morgan
Comptroller of the Treasury**



**State of Tennessee
Comptroller of the Treasury**

**Department of Audit
Division of State Audit**

Arthur A. Hayes, Jr., CPA, JD, CFE
Director

Deborah V. Loveless, CPA, CGFM
Assistant Director

Joe Schussler, CPA, CGFM
Audit Manager

Amy Brack
Editor

John Malone
Inger Tyree, CFE
David Wright, CFE
Staff Auditors

Comptroller of the Treasury, Division of State Audit
1500 James K. Polk Building, Nashville, TN 37243-0264
615-401-7897

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STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
State Capitol
Nashville, Tennessee 37243-0260
(615) 741-2501

John G. Morgan
Comptroller

September 13, 2004

The Honorable Phil Bredesen, Governor
The Honorable John S. Wilder
Speaker of the Senate
The Honorable Jimmy Naifeh
Speaker of the House of Representatives
The Honorable Virginia Trotter Betts, Commissioner
Department of Mental Health and Developmental Disabilities
The Honorable David Goetz, Commissioner
Department of Finance and Administration
and
Members of the General Assembly
State Capitol
Nashville, Tennessee 37243

Ladies and Gentlemen:

Transmitted herewith is this office's report on issues related to the contract between the Division of Mental Retardation Services, Clover Bottom Developmental Center, and Action Rehabilitation Services, Inc.

Sincerely,

John G. Morgan
Comptroller of the Treasury

JGM/ab

ISSUES RELATED TO THE CONTRACT BETWEEN THE DIVISION OF MENTAL RETARDATION SERVICES, CLOVER BOTTOM DEVELOPMENTAL CENTER, AND ACTION REHABILITATION SERVICES, INC.

September 2004

**Department of Mental Health and Developmental Disabilities,
Department of Finance and Administration**

In November 1996, the State of Tennessee entered into a settlement agreement with the United States Government and People First of Tennessee, which represented a class of all persons who resided or would reside in the future at Clover Bottom Developmental Center (Clover Bottom) in Nashville, Greene Valley Developmental Center in Greeneville, or Nat T. Winston Developmental Center in Bolivar, which was closed in November 1998. The terms of the settlement included an agreement by the state to employ or retain the services of qualified physical therapists, occupational therapists, and certified physical therapy assistants/certified occupational therapist assistants to provide adequate and appropriate care and services to the class members. The state was under no obligation to retain the services of contractors to perform these services. In fact, Clover Bottom had an Assistive Technology (AT) Department which fabricated equipment and provided related therapy.

In December 1998, the state entered into a contract with Action Rehabilitation Services (ARS) to provide physical therapy services for persons who have resided or will reside at Clover Bottom. The original term of the contract was for the period January 1, 1999, to December 31, 2001, with a maximum liability of \$2,812,160. In October 2001, the contract was extended until December 31, 2003, and the overall liability was increased to \$5,120,960. Clover Bottom signed a six-month extension of the contract through June 2004. The contract between Clover Bottom and ARS ended as of June 30, 2004.

The contract with ARS expressly provided that the state was not to pay for “non-work hours”; that the state was not to be billed by ARS for the contractor merely having staff available to provide services; that the state was not obligated to use any services of ARS; and that, in addition to invoices, ARS was to maintain documentation supporting the charges to the state. All billings by ARS are expressly subject to audit for compliance with the contract terms.

In November 2002, this office began receiving complaints regarding ARS billing practices and the way ARS staff was running the AT Department at Clover Bottom.

Our review disclosed that ARS billed for hours ARS staff were “available” rather than for hours worked, did not maintain adequate documentation, billed for services not provided for in the contract, performed and billed for work that did not require the expertise of the skilled ARS staff, and billed for excessive numbers of appointments with therapists. Due to the time required to analyze records and to try to find documentation for hours billed, the auditors restricted their detailed review to the month of October 2002. For that month, ARS billed a total of \$87,608.80. However, documentation could only be found for billings totaling \$42,267.85, or 48% of the total billings.

A. Background

The Basis of Our Review

On November 25, 2002, the Comptroller's office received a complaint regarding the Assistive Technology (AT) Department run by Action Rehabilitation Services (ARS) at Clover Bottom Developmental Center. The complainant alleged that ARS was billing for services not billable under the contract terms (non-work hours) and was intentionally slowing down the production process of wheelchairs to extend the contract. Shortly after that, the Comptroller's office received information from other sources repeating the previous allegations and adding that the department was also manipulating the bidding process for purchasing wheelchairs. Upon receipt of these allegations, the Comptroller's office initiated this review.

The Justification for the Contract With Action Rehabilitation Services

In 1996, the Department of Mental Health and Developmental Disabilities had four mental health centers across the state: Arlington Developmental Center in Memphis, Clover Bottom Developmental Center in Nashville, Greene Valley Developmental Center in Greeneville, and Nat T. Winston Developmental Center in Bolivar. Each of those centers, including Clover Bottom, was created to provide to residents with developmental disabilities reasonable opportunities to grow and develop, exercise independence, and, insofar as possible, lead full and productive lives in a safe environment. Clover Bottom has provided Assistive Technology and therapeutic services to clients for many years, including but not limited to the fabrication of wheelchairs. The department was staffed solely with state employees prior to 1998. The federal government and People First, as a group representing residents, filed a lawsuit against Clover Bottom and the State of Tennessee alleging, among other things, that the center had failed to provide adequate therapeutic equipment services to its clients. In November of 1996, the state and the plaintiffs settled the case. The settlement provided that the center would, among other things, employ and retain the services of qualified physical therapists, occupational therapists, and certified physical therapy assistants/occupational therapy assistants to provide adequate and appropriate care and services to all citizens who need such care and services.

In order to comply with the terms of the settlement, the center issued a Request for Proposals (RFP) in 1998 for vendors to provide physical therapy services for the individuals who reside at Clover Bottom. The center received numerous bids and narrowed the search to the three most competitive bidders. The lowest responsive bid was submitted by Action Rehabilitation Services (ARS), a corporation with its principle office located in Greeneville, TN. There are apparently no former employees of Clover Bottom or the State of Tennessee employed by ARS or having an ownership interest in the company. At the time of the original contract, three of the developmental centers were operating. Nat T. Winston Developmental Center was closed on March 10, 1998.

According to management at Clover Bottom, when ARS began to render these contractual services, the original plan was to supplement the number of technical professional staff in the AT department in the center. At the time, it was not anticipated that ARS would actually supervise the operations in the departments. However, in 1999, supervisory duties within the AT department were shifted to Leta Kant, co-owner of ARS. Also, beginning in 2001, the number of state employees in the department started to decrease and the number of ARS employees started to increase.

B. Key Issue in the Review

During our review of the allegations, it became clear that the key issue in question was the daily activities of AT staff. As a result, the terms and requirements of the contracts and the documentation of AT staff's activities were critical.

Contract With Action Rehabilitation Services

Original Contract

Under the terms of the Clover Bottom Developmental Center contract, Action Rehabilitation Services (ARS) was required to provide physical therapy services and produce therapeutic equipment for individuals who reside at the center, or qualified individuals who have transitioned to the community from the center. The contract required ARS to use licensed physical therapists and technical equipment workers to provide these services. ARS provided these services at the Assistive Technology (AT) department on the campus of Clover Bottom in Nashville. While ARS was ultimately responsible for these services, and while the company primarily used its own staff, there were a few state employees in the AT department.

The original contract covered the period January 1, 1999, through December 31, 2001, and could be extended for two one-year periods. The contract stated that ARS would provide up to eight licensed physical therapists (for a maximum of 16,640 hours per year) and up to two therapeutic equipment technicians (for a maximum of 4,160 hours per year). The contract stated these were estimated maximum numbers of personnel and quantities of time to be used as needed. In addition, the contract stated that the state was not obligated to pay for any particular minimum number of personnel or quantity of time. The contract also stated that the contractor's personnel must have been able to provide approximately 40 hours of service per week. The contract expressly stated in two separate sections that there was to be no reimbursement for non-work hours. Payments to ARS were at the following hourly rates:

Table 1
Rates to Be Charged for ARS Staff

<u>Classification</u>	<u>Calendar Year</u>		
	<u>1999</u>	<u>2000</u>	<u>2001</u>
Licensed Physical Therapist	\$49	\$50	\$51
Therapeutic Equipment Technician	\$25	\$25	\$26

According to the contract, the contractor was required to submit invoices for completed work with supporting documentation. The contract required the invoices to include, at a minimum, the name and job title of each individual whose time was charged to the state, the number of hours (to the tenth of an hour) worked during the period, the hourly contract rate, the total compensation requested for that individual, and the total amount due to the contractor. The contract allowed travel reimbursement for actual cost of travel, meals, or lodging subject to the

maximum amounts and limitations in the state's Comprehensive Travel Regulations. Total travel reimbursement for the period of the contract was not to exceed \$6,000.

Contract Amendments

Amendment No. 1, signed in May 2000, did not extend the term of the contract but did increase the maximum number of licensed physical therapists from eight to nine (for a maximum number of 18,720 hours).

Amendment No. 2 signed in October 2001, extended the contract term to December 31, 2003, changed the number of therapists to be provided, and expanded the responsibilities of the contractor. Beginning January 1, 2002, ARS would provide up to seven licensed physical therapists, up to two supervisory licensed physical therapists, and up to two therapeutic equipment technicians. Additional contractual responsibilities included maintaining the assistive technology shop inventory and providing supervisory services through a staff person to serve as Director of Clinical Services. The supervisory licensed physical therapists were to be billed at the rate of \$54 per hour. Rates for the other two classifications did not change.

The original contract had a maximum liability of \$2,812,160. Amendment No. 1 increased the maximum liability to \$2,970,240, and Amendment No. 2 increased it to \$5,120,960. (For details regarding the maximum liability increases, see Table 2.)

Table 2
Contract Payment Limits, Calendar Years 1999-2003

<u>Fiscal Year</u>	<u>Original Contract</u>	<u>Amendment No. 1</u>	<u>Amendment No. 2</u>	<u>Revised Total</u>	<u>Actual Payments</u>
1999	\$459,680	-	-	\$459,680	\$337,049
2000	\$927,680	-	-	\$927,680	\$826,114
2001	\$946,400	\$105,040	-	\$1,051,440	\$826,635
2002	\$478,400	\$53,040	\$537,680	\$1,069,120	\$990,507
2003	-	-	\$1,075,360	\$1,075,360	\$906,312
2004	-	-	\$537,680	\$537,680	\$420,542
Total	<u>\$2,812,160</u>	<u>\$153,080</u>	<u>\$2,150,720</u>	<u>\$5,120,960</u>	<u>\$4,307,159</u>

Table 3

**Summary of the Positions in the AT Department
for the Period July 1998 Through June 2004**

	1998	1999	2000	2001	2002	2003	2004
State Employees:							
PTs and OTs	4	2	2	1	1	0	0
PTAs and OTAs	3	3	3	2	2	1	1
TEWs	4	4	4	5	5	4	4
Total State Employees:	11	9	9	8	8	5	5
Contract Employees:							
PTs and OTs *	1	1	1	4	4	5	5
PTAs and OTAs	0	0	0	0	0	0	0
TEWs	2	2	2	3	3	2	2
Total Contract Employees:	3	3	3	7	7	7	7

* In 1999, Leta Kant, co-owner of ARS, was named Director of AT and is included in the total number of positions.

Physical Therapist (PT), Occupational Therapist (OT), Physical Therapist Assistant (PTA), Occupational Therapist Assistant (OTA), Technical Equipment Worker (TEW)

C. Key Contract Requirements

With regard to possible waste or abuse of state funds, there were two primary issues involved in the administration of the contract:

1. ensuring that the state only paid for the technical services available through ARS
2. addressing the risk that ARS could bill for time not spent on delivering these specialized services

The importance of ensuring that the state only paid for the technical services available through ARS and the collateral risk that ARS could bill for time not spent on delivering these specialized services were clearly considered as the contract was being prepared. The justification for the contract was that the state did not have the special talent needed at the time of execution. If the services to be provided were simple, non-technical tasks, there were always state employees in the AT area and elsewhere in the center to do that work. Implicit in this contract, and all similar state contracts, is that the state does not pay for services that are not provided, regardless of the nature of the purported services.

Specific clauses in the contract and its amendments cite the need to control the risks of overbilling and place the burden on ARS to fully document its time. (See appendix.) The contract, by its terms, required the submission of invoices, along with other adequate supporting documentation.

D. Allegations

I. ARS billed for non-work hours.

Finding

ARS did bill for non-work hours. Undocumented payments for one month, October 2002, totaled \$45,340.95, or 52% of the total amount billed for the month (\$87,608.80). Of the total undocumented payment, \$8,923.20 was for the undocumented hours of therapeutic equipment technicians and \$36,417.75 was the undocumented amount billed for therapists. Without proper documentation, the contractor failed to meet its contractual responsibility to monitor the time of its personnel. ARS also billed for more undocumented hours than documented hours. ARS should not have submitted the charges in question in the first place without the proper supporting documentation.

For the reasons noted below, the auditors considered undocumented hours to be “non-work hours.”

The original contract referred twice to the fact that the contractor was not to bill for non-work hours. This statement was repeated once more in the second amendment to the contract. However, neither the original contract nor the subsequent amendments defined “non-work hours.” The contract and its amendments also expressly provided that ARS was to document the hours worked. Although the contract spelled out the details to be provided on the invoices submitted for hours billed by ARS, it did not define what other documentation ARS was required to maintain to support the charges but did provide that such documentation of work performed had to be acceptable to the state.

The two terms, “non-work hours” and “documentation” are interrelated.

The owners of ARS contend that the contract intended that ARS have staff available on a full-time basis and that ARS could bill accordingly, regardless of the actual hours of work staff performed. Due to this interpretation, ARS employees and management might not have been particularly diligent in creating and maintaining detailed documentation. However, the contract expressly and clearly prohibited payment for “non-work hours” and specifically required documentation of work performed as a condition of payment for contract services.

Contractors who fail to maintain adequate documentation are acting at the risk that their billings will be subsequently disallowed. Obviously, the relative difficulty of going back later and determining what hours were worked and what services were provided is directly proportional to the adequacy of the underlying documentation. That is why documentation is required in the first place. And as expressly stated in the contract, the billings of ARS are subject to audit at later dates and no billings are final until audited. If ARS could bill for just having staff available to work, there would be nothing to audit and the requirement for documentation beyond the invoices would be meaningless.

As noted below, there was substantial documentation for some of the hours billed. The system of documentation naturally and logically followed the flow of work. It was not documentation artificially created just to meet the billing needs of the state. For this reason, and based upon the stated position of ARS management that actual work performed was irrelevant to the invoicing

and payment process under the contract, we have considered all undocumented hours to be “non-work hours.”

There were basically two types of work performed by ARS employees:

- A. Physical Therapy
- B. Construction of Equipment

A. Physical Therapy Hours

Physical therapy consisted of appointments with individual clients who were in need of medical equipment, such as wheelchairs. The therapy was performed by physical therapists that were trained to counsel with clients about their needs and to prepare the orders detailing the way the equipment was to be constructed or modified to meet those needs. In performing these services, physical therapists met with the clients and discussed their needs. Depending on the particular needs of an individual client, several appointments might have been required before the final equipment is delivered. For example, it may be necessary for the client to return for subsequent fittings with the therapist to further modify the equipment after the initial work on the equipment was performed. Sometimes the client encountered other problems after the equipment was delivered which were not anticipated at the time of the original delivery, requiring subsequent modifications to the equipment.

Physical therapists attempted to document their hours through several different records, as noted below in the “methodology” section.

B. Construction of Equipment

Some of the therapeutic equipment workers (TEWs) in the AT department were employees of ARS. These technicians performed the actual physical modifications on the equipment.

Like therapists, the technicians were to submit invoices to state officials to bill for their time. Although the invoices were required to contain certain minimal information for purposes of initiating the bills for service, this information did not substitute for more detailed documentation. In fact, it would appear that even without the contract requirements, the individuals providing these health care services would have maintained, as a matter of professional practice, patient records of the progress of the case and the matters discussed during therapy sessions and while equipment was being prepared.

While substantial documentation existed for some reason of the hours billed by therapists, hours billed by therapeutic equipment workers lacked such documentation. Invoices were the only documentation of any of the time spent by therapeutic equipment workers to modify the equipment as requested by the therapist.

Under these circumstances, we questioned all of the hours of the technicians. Clearly, the technicians performed some work. However, it is difficult to see any reason to give ARS credit for time that technicians should have worked. Again, ARS management should have required such documentation. And even if it was not required by management, the staff actually performing the work on the equipment should have kept records of their work for and with the patients.

Methodology

To determine the contractor's compliance with the terms of the contract, we first obtained the invoices submitted by ARS to Clover Bottom for payment. As previously noted, the contract required additional documentation to support the invoices. Furthermore, additional documentation should have been prepared by ARS employees contemporaneously with the services, provided to Clover Bottom staff, and made part of the patient records. There were some additional records related to some therapy services, but the records were not maintained so that they could be associated with any particular invoice. There were no additional records regarding therapeutic equipment workers' hours. Hence, not only did ARS fail to comply with the terms of the contract, but as a result, we were not able to determine how many hours of the therapeutic equipment workers were appropriately billed.

The lack of adequate documentation is not surprising in light of the statements of ARS officials that they had billed the state for time when company employees were merely "available," whether or not they performed any contract services during their available hours. Under these circumstances, it appears that the failure to document more hours does not reflect carelessness on the part of ARS staff. Rather, ARS staff apparently only documented the contract work they actually performed.

The invoices contained the employees' names and the amount of time charged per employee for each day of the month. We developed a spreadsheet to account for how time was spent. If an employee charged eight hours for one day, we then reviewed the appointment log to see how many appointments were scheduled for that day. Then we looked in the patient files to verify that the appointments actually took place. According to the AT shop supervisor, a state employee, the patient files should contain an event log that records if an appointment occurred, how much time was spent on that appointment, the related time spent in the shop for the appointment, and the related time spent preparing the paperwork for the appointment and the shop work. Attached to the event log is the fitting form, which is a more detailed explanation of the appointment. If the appointment was not on the event log and/or there was no description of the results of the appointment, we considered the undocumented time non-work hours. If there was some documentation but none of the paperwork noted the actual time spent in the appointment, or the related shop work, we allotted time using 1.5 hours of estimated appointment time per therapist and 1.5 hours for paperwork to document the appointment. (The 1.5-hour estimation was given by ARS officials.)

- We asked Leta Kant, ARS co-owner and director of the AT department, for an explanation of the large discrepancy between hours billed and hours supported. She admitted that all billed hours might not be found in client schedules, patient files, event logs, or fitting forms because ARS's billings for therapists and technicians included time for other activities supposedly set forth in the contract and for being 'available' eight hours a day, five days a week.
- She took the position that the contract intended for her to merely have staff available. To her, specific hours worked did not matter, as long as the employees were present and available.

As noted above, monthly invoices from ARS to Clover Bottom listed individual ARS employees and the number of hours charged per day. However, these invoices did not include the necessary information such as specific duties performed, patients seen, or other information sufficient to justify the hours billed. Most of the documentation and forms we reviewed that related to therapist time were not sufficiently detailed with beginning and ending times, etc. For several of the files, we had to rely on estimates of the amount of time a therapist would spend with a patient. According to Ms. Kant, the time charged for an average appointment was two therapists for approximately an hour and a half each for a total of three billed hours.

Table 4
ARS Invoiced Hours for Physical Therapists, October 2002

<u>Physical Therapist</u>	<u>Hourly Rate</u>	<u>Invoiced Hours</u>	<u>Hours Documented</u>	<u>Hours Without Documentation</u>	<u>Invoice Amount</u>	<u>Documented Payment</u>	<u>Questioned Payment</u>
LK	\$54	173.3	46.25	127.05	\$9,358.20	\$2,497.50	\$6,860.70
RF	\$51	190.3	49.05	141.25	\$9,705.30	\$2,501.55	\$7,203.75
MH	\$51	181.6	48.00	133.60	\$9,261.10	\$2,448.00	\$6,813.60
MD	\$51	173.0	132.75	40.25	\$8,823.00	\$6,770.25	\$2,052.75
JM	\$51	175.1	142.25	32.85	\$8,903.10	\$7,254.75	\$1,675.35
BM	\$51	176.4	128.00	48.40	\$8,996.40	\$6,528.00	\$2,468.40
AP	\$51	159.9	78.50	81.40	\$8,154.90	\$4,003.50	\$4,151.40
JK	\$51	<u>123.5</u>	<u>21.70</u>	<u>101.50</u>	<u>\$6,298.50</u>	<u>\$1,106.70</u>	<u>\$5,191.80</u>
Total		<u>1,353.1</u>	<u>646.50</u>	<u>706.60</u>	<u>\$69,528.00</u>	<u>\$33,110.25</u>	<u>\$36,417.75</u>

II. ARS billed for work that was not provided for in the contract.

Finding

Based on the admissions of an ARS official, ARS did bill for work that was not provided for in the scope of services of the contract. However, the amount of time spent on these activities could not be independently established.

We received allegations that ARS improperly requested payment for services that were not provided for under the contractual scope of services. For example, there were allegations that ARS billed the state for time spent wrapping presents, cleaning windows, and building and refinishing furniture in Leta Kant’s office. In an interview, Ms. Kant acknowledged that ARS employees were engaged in building and painting furniture for her state office while being paid under the contract. However, she denied billing for time spent wrapping presents and cleaning windows. There was no documentation. The scope of services section of the contract does not include such activities; therefore, ARS should not have billed the state for them.

Ms. Kant responded that the contract mentions cleanliness of workspace and provision of an adequate work environment. However, the contract states that the state is under no obligation to request any work from ARS, so ARS should not have billed for staff time unless the employee was performing work specifically requested by the state.

III. ARS billed the state for physical therapists to perform production services that did not require their physical therapy expertise. As a result, the state paid, and ARS received, excessive amounts for these services.

Finding

ARS did bill the state for physical therapists to perform production services that did not require their physical therapy expertise. Due to the lack of adequate documentation, the total amount of excessive payments could not be determined.

According to Ms. Kant, co-owner of ARS, when there was not enough work for the therapists, ARS utilized its higher paid therapists, at the rate of \$51 an hour, to perform work that could have been performed by technical equipment workers, at the rate of \$26 an hour. We also observed these kinds of activities on several visits to the AT department at Clover Bottom.

IV. ARS billed for an excessive number of appointments between initial fitting and delivery of equipment.

Finding

It appears that ARS billed for an excessive number of appointments between initial fitting and delivery of equipment. However, we could not determine the extent of the excessive appointments.

We reviewed allegations that ARS had overbilled the state by charging for unnecessary appointments. Because of the way ARS fabricated the wheelchairs, AT staff may have seen patients several times for assessments and fittings before the delivery of their wheelchair. Auditors noted multiple appointments in the patient files reviewed. Of the event logs sampled, seven appointments was the average before an item was delivered. To judge the reasonableness of the number of appointments, we contacted a local clinic that performed similar services for similar patients. The essential difference between the operations of ARS and the clinic was the local clinic was constrained in the amount of fees it could recover for services. The clinic's primary source of funding was insurance, with clear limitations on payments. ARS, on the other hand, essentially had no limitations at all, allowing staff to be inefficient without the company's suffering financially.

The local clinic charges the patient's insurance company for appointments, and the insurance company purchases the wheelchair. According to a physical therapist at the local clinic, one therapist spends approximately an hour and a half on an assessment, and each therapist sees five to six patients daily for one-and-a-half-hour appointments. Based on typical insurance provisions, the clinic usually can only bill for one appointment before the delivery of a wheelchair. If there are more appointments necessary, the clinic usually must submit a written request to the insurance company specifying the reasons for the appointment. The insurance company may or may not cover additional appointments.

We attempted to locate other clinics or AT departments that perform the same services for similar patients in the State of Tennessee and were unable to do so. Per AT staff at Clover Bottom, the way the AT department fabricates wheelchairs from start to finish is unique, and there are no other businesses that perform the same services.

V. ARS intentionally slowed down the production process of wheelchairs to extend its contract with the state.

Finding

It appears that in some cases the AT department was taking too long to produce therapeutic equipment and equipment modifications. However, there was no evidence that the contractor intentionally slowed down the production process of wheelchairs to extend its contract with the state.

We reviewed allegations that ARS intentionally slowed down the production process of wheelchairs to extend its contract with the state. During the time of our review, the AT department at CBDC produced a wide variety of equipment, including customized wheelchair seating components, customized bathing equipment, customized dining chairs, and customized positioning equipment. According to an AT department official, a state employee, it took approximately eight months to produce an item of equipment from inception to delivery to the patient, although in emergency situations equipment could be produced in about three months. The official stated that because of the unique nature of each patient's medical condition, time was often required to fully identify and resolve patient needs.

A therapist at the local clinic stated that the clinic does not produce the wheelchairs in the same manner as the Clover Bottom clinic, although it did at one time. After performing a cost analysis, the local clinic found it was not cost-effective to fabricate every wheelchair in-house. The local clinic found that it could special-order the necessary equipment from vendors and have the vendors assemble the wheelchairs. The clinic staff performs the fitting and gives the specifications for the wheelchair to the vendors. A vendor representative is generally present at the fitting to become familiar with the patient needs. The vendor then orders all the necessary parts. The vendor assembles the chair on-site, lets the patient sit in the chair right after it is assembled, and makes any necessary adjustments. The patient comes back for a couple of visits and, if necessary, to adjust the chair. The time spent on fittings and checkups, and the cost of the wheelchair, are billed directly to the insurance company. A therapist stated that it takes the local clinic approximately two to four months to produce a wheelchair.

ARS produced wheelchairs in-house at the AT department. For each patient, ARS ordered the wheelchair, modified each item in the shop as necessary, created seating molds, and produced almost all of the other equipment in the shop at Clover Bottom. It took ARS approximately eight months to produce and deliver an item of equipment to a resident. It appears that the reasons for the lengthy time were the number of appointments for each individual and the fact that it takes longer to fabricate equipment in the shop than to order it. ARS did not bill the patient's insurance for any of the time or equipment. ARS billed the state for all time spent on each resident, regardless of the number of appointments needed. ARS scheduled the appointments, performed each evaluation, and bills the time to the state. All residents of Clover Bottom who utilized the AT department had their wheelchairs purchased by the state through the purchasing section of the AT department at Clover Bottom.

The Statewide Coordinator for Therapy and Nutritional Services, Division of Mental Retardation Services, stated that the department was pleased with the level of service provided by ARS and understood that factors outside their control might have delayed timely production of equipment. She agreed that, due to unique patient medical conditions, production time can be lengthy when staff takes the time required to best identify and resolve patient needs. When we disclosed our

findings to her, she did not question the length of time it took to produce patient equipment but noted that the department had not received any complaints from patients regarding the quality of service or the timeliness of equipment produced by the AT department.

We found that from January 2002 to July 2003, the AT department produced several different items of therapeutic equipment. Depending on individual needs, the AT department produced more of some items and fewer of others. (See Table 5.) Examples of equipment include knee pads, pillows, toilet chairs, activity chairs, gliders, and rocking chairs.

Table 5
Equipment Items Produced by ARS, January 2001 to July 2003

<u>Item</u>	<u>CY 2001</u>	<u>CY 2002</u>	<u>CY 2003 (as of July)</u>
Wheelchair	55	92	40
Modifications to Wheelchair*	29	27	12
Dining Chair	4	10	1
Kneeler †	3	10	4
Modifications to Kneelers	0	2	0
Quadruped on Forearms ‡	10	9	7
Bathing equipment	5	3	4
Sidelyer §	12	9	13
Modifications to Sidelyer	9	2	0
Bed Position/Incline	7	9	5
Other Miscellaneous Equipment	9	6	5

Source: Information provided by Assistive Technology Department staff as of August 2003. Auditors prepared spreadsheets based on shop record information. The information was maintained by patient. During the period in question, there were approximately 400 patients who used AT department services.

* Examples of wheelchair modifications include changing the chair's headrest, replacing the chair's footrest, and adding a lap tray to the wheelchair.

† Kneelers provide patients weight-bearing support and improve functional activity for patients who are unable to stand on their own.

‡ Quadruped on Forearms provides patients weight-bearing support on all four extremities and improves patient range of motion and head control.

§ A sidelyer is an alternate-positioning device for patients who require support to maintain a sidelying position.

Using shop records provided by AT staff, we found that the majority of equipment built by the AT department from January 2001 to July 2003 took eight months or less to produce. However, several items of equipment took more than a year to produce, and one item took at least 21 months. Relevant principle information contained in the shop records consisted of the type of equipment being produced, the patient's initial evaluation date, and the delivery date for the item. Other information maintained in the shop records included such information as the

patient's name, the name of the building where the patient resides in the event that the patient is located on the Clover Bottom campus, an annual update column for the clinic, an annual update column indicating when paperwork was received, a column indicating the date of a follow-up appointment if needed, and a general comments section. While the records indicated the initials of the client's therapist, they did not indicate the staff person performing the work on an item of equipment.

AT department staff attributed the lengthy time required to produce the equipment to deteriorating patient health resulting in missed fitting appointments; the lengthy time necessary to properly fit, modify, and produce an item; and the lengthy process of obtaining approval from insurance companies. Neither Clover Bottom nor ARS billed patient health insurance. According to an AT official, community patients who had private insurance companies selected the vendor to provide the basic equipment. The vendor billed the insurance company for the equipment. Any modifications were performed by AT and billed to the state, at no cost to the patient or the insurance company. For community patients without private insurance, and for patients located at Clover Bottom, the state did not receive any financial assistance from insurance companies. According to AT staff, community patients represented approximately 50% of its patient list, and the majority of community patients had private health insurance. While waiting, patients either did without the equipment, received a substitute item, or had their existing equipment modified to meet their needs while the AT department was constructing their equipment. In emergency situations, such as a patient having a broken leg or skin disorder, AT staff could produce temporary equipment in as little time as a few hours to a few days. These patients eventually received a substitute item of equipment or a modification of existing equipment. Table 6 identifies examples of equipment that took an excessive amount of time to produce.

As required by the settlement agreement, Clover Bottom receives an annual review by the Quality Review Panel (QRP). The panel consists of four experts in mental retardation, one nominated by each of the parties involved in the settlement agreement. The QRP hires consultants to help perform the review of Clover Bottom. Although the AT department is part of the QRP review, it is not a material segment, according to the chairperson of the QRP. The review panel looks at a small sample of patient files and considers such factors as service provided and timeliness of equipment produced. However, according to the chairman of the QRP, the panel has no criteria to assess timeliness. Neither the latest report dated October 7, 2002, nor the July 2003 review, which had not been published as of August 9, 2004, identified any problems with timeliness or delivery of therapeutic equipment. However, both the chair of the QRP and the consultant who conducted the review agreed that eight months to produce equipment is excessive. The consultant stated that an average of five to six months for the most complex pieces of equipment is more appropriate.

From January 2001 to July 2003, ARS produced 442 pieces of therapeutic equipment. Of these, 64 pieces (15%) took at least eight months to produce. Additionally, 18 of the 64 (28%) took more than a year. Table 6 identifies the 18 pieces that took the longest to produce.

Table 6

Examples of Excessive Delays in Equipment Delivery, January 2001 through July 2003

<u>Type of Equipment</u>	<u>Date Ordered</u>	<u>Date Delivered</u>	<u>Order to Delivery Time</u>
Sidelyer	3/26/2002	4/1/2003	13 months
Sidelyer	6/3/2002	Not yet finished	13 months as of 7/23/2003
Wheelchair	10/16/2001	Not yet finished	21 months as of 7/23/2003
Wheelchair	9/18/2001	4/24/2003	19 months
Wheelchair	10/16/2001	4/9/2003	18 months
Wheelchair	2/19/2002	Not yet finished	17 months as of 7/23/2003
Wheelchair	7/6/2001	12/16/2002	17 months
Wheelchair	3/4/2002	Not yet finished	16 months as of 7/23/2003
Wheelchair	3/19/2002	Not yet finished	16 months as of 7/23/2003
Wheelchair	2/21/2002	6/3/2003	16 months
Wheelchair	9/18/2001	11/19/2002	15 months
Wheelchair	6/9/2002	Not yet finished	13 months as of 7/23/2003
Wheelchair	7/3/2002	Not yet finished	12 months as of 7/23/2003
Wheelchair Modification	1/30/2002	Not yet finished	18 months as of 7/23/2003
Wheelchair Modification	2/8/2002	Not yet finished	17 months as of 7/23/2003
Wheelchair Modification	3/26/2002	Not yet finished	16 months as of 7/23/2003
Wheelchair Modification	8/9/2001	1/20/2003	16 months
Wheelchair Modification	3/29/2002	6/20/2003	15 months

Source: Information provided by Assistive Technology Department staff as of July 23, 2003. Auditors prepared spreadsheets based on shop record information.

VI. ARS used improper procurement procedures for wheelchairs and parts.

Finding

The allegations of improper procurement procedures for wheelchairs and parts appeared to be unfounded.

We also received allegations that ARS used improper procurement procedures for wheelchairs and parts. The state purchased therapeutic equipment for patients located at the Clover Bottom. The AT therapist performed an assessment, then gave an order for parts or a specifications sheet for a wheelchair to the store clerk in the shop. The clerk (who was a state employee supervised by the contractor) completed a request for bids for the item(s) requested and faxed the request to three or more vendors. When at least three bids had been received, the clerk prepared a purchase order. The purchase order was to be approved by Leta Kant, Director of the AT department and

co-owner of ARS; a state fiscal officer; and the superintendent of Clover Bottom, before being sent to the lowest bidder. Following approval, Clover Bottom made the purchase through normal purchasing procedures. We reviewed these procedures, and they appeared to be in compliance with the Department of General Services guidelines that detail the procedures an agency must use when purchasing materials, supplies, and equipment.

In the case of community-based patients who had private medical insurance, their insurance company purchased their equipment. ARS staff assessed their needs and then submitted equipment recommendations to the patients' insurance companies for approval. In accordance with the terms of the contract between ARS and Clover Bottom, the appointment times of the patient with ARS employees were billed to the state, not to the insurance company. Community patients who did not have private insurance had their equipment purchased by the state, following the same assessment, recommendation, and purchase process as for those patients located on the Clover Bottom campus.

The allegation was that ARS awarded one bidder more than 90% of all wheelchair bids and that ARS leaked information to this bidder about the current low bid. This bidder could then enter a bid price marginally lower (\$15 - \$20) than the lowest current bid and be awarded the sale. To determine if the allegation of improper procurement procedures by ARS had any basis, we reviewed all of the wheelchair bids that were awarded during fiscal year 2003, from July 1, 2002, through June 30, 2003. During this period, 27 wheelchair bids were awarded. Bidder A was awarded 15 of the 27 (56%). Of the 15 awards to bidder A, the company's bid was lower by an average of \$151, on an average bid of \$2,028. On only one occasion was bidder A the last to place a bid. In fact, 11 of the 15 times it was the lowest bidder, bidder A was the first to enter a bid. The remaining 12 wheelchair bids were awarded to two other companies, bidder B and bidder C. Bidder A received \$30,413 for the 15 wheelchair bids it was awarded, and bidder B received \$7,958 for the 7 wheelchair bids it was awarded. Bidder C received \$4,750 for the 5 wheelchairs it was awarded.

VII. Other Issues Related to Contractual Situations Such as the Ones Noted in this Report

A. Potential Conflicts of Interest

When an owner of a company providing personnel is appointed director of a state operation, there are numerous potential conflicts of interest. The risks to the state inherent in these conflicts of interest are significantly compounded when state management fails to monitor contractor activities. In such a situation, an owner may:

- be in a position to make decisions or influence decisions that have the direct effect of enriching the owner and others having financial interests in the company.
- initiate purchases and other expenditures that cost the state money and profit the private company.

- be influential in the process that reduces the number of state employees working in the department, thus allowing the owner to replace them with employees from the owner's private company.
- have the opportunity to bill the state for the maximum number of hours allowable under the contract for private employees, even when they were not working on projects that are within the scope of the contract.
- have the ability to avoid the preparation of adequate documentation (the audit trail) by permitting or encouraging employees to underdocument the work they performed, without consequences. The lack of documentation increases the risk that the state may be billed for time which was not worked at all, or at least was not performed for the benefit of the state.
- have the ability, in effect, to unilaterally ignore the terms of the contract in practice through control of the work including having staff perform private work during time that is billed to the state.
- affect the speed of work performed by the staff of the department, ultimately increasing the amount billed to the state for contract employees and extending the term of the contract.

B. Workplace Issues

Permitting an owner of a private company to have supervisory authority over the entire department of a state agency can create a work environment that is unnecessarily susceptible to poor morale and inefficiencies.

- Having contract and state employees doing much of the same work for extremely different pay can create a two-tier class of employees.
- Having an owner of the private company evaluating both state employees and employees of the company could create the impression that the owner might be inclined to evaluate the private employees more favorably.
- This possible favoritism is even more problematic in a situation in which the owner is influential in the decisions to replace state employees with employees from the company.
- The owner may also be in a position to exercise favoritism for company employees with regard to work assignments, work hours, work space and other incidents of employment.
- In light of the conflicted interests of a supervisor who owns the private company and the supervisor's control over the workplace, there is less incentive for employees, particularly state employees, to report problems with the contract to state officials. The degree of this reluctance is heightened by the extent to which employees perceive that the contractor has the ear of the responsible state

employees to whom they would otherwise complain. And the more the state officials withdraw from the operations in question, the greater that perception may be.

C. Legal and Internal Control Issues

1. State officials may view contracting for employees as an efficient way to “hire” management staff without increasing the size of the payroll of state government. However, the officials may actually be creating another level of bureaucracy, since the non-state supervisor should be subject to some oversight by state employees; the department should not contract out the supervision of the area and then fail to adequately monitor it.
2. By delegating the day-to-day operations to a non-state employee, the state officials who are ultimately responsible for the operations weaken their direct control over those operations.
3. Permitting a non-state employee to supervise state employees can have significant negative legal and internal-control consequences as well.
 - Since the supervisor is not a state employee, the authority of the supervisor to discipline state employees and to define their scope of work is unclear and susceptible to differing interpretations.
 - If the supervisor directs the state employee to engage in actions outside the scope of the employee’s clear authority, the state and the state employee may be liable for any unlawful consequences of those actions.
 - If the supervisor acts in an inappropriate manner with regard to state employees, the state could be held liable for those actions and also for possible negligence in placing a non-state employee in such a supervisory position without adequate oversight.
 - All of these issues are exacerbated when the non-state employee in the supervisory role is also in a position to profit from his or her position as an owner of a private company that is providing the services. In addition to the previously mentioned issues, there is even less incentive in such scenarios for the owner to acknowledge problems with the operations that he or she is running for the state. To do so would call into question the desirability of the contract from which they derive income.
4. As noted by the comparison of the manner in which ARS operated the department versus the way an organization that does not have the ability to charge freely for its services would have operated the department, the use of ARS was not cost-effective to the state.
 - The state did not engage in any meaningful review of the costs billed by ARS.

Recommendations

1. The department should review all of its contracts for services with outside parties that involve work performed on state property and/or supervision of state employees by contractors in light of the findings in this report and take appropriate, timely action to ensure that the abuses and problems noted in this report are not repeated.
 - The department should particularly examine contracts in which anyone with an ownership interest in the contracting company is involved in any way with the oversight of the contracted services. If such contracts exist, the department should evaluate whether the contracts are in the best interest of the state and whether the contracts should be replaced with direct delivery of the services by state employees. At a minimum, adequate mechanisms for state oversight of such contract activities should be clearly established. (Note below the status of this contract and the contract between ARS and Greene Valley Developmental Center.)
2. The department should promptly report any such contracts, or any such contracts the department has had in the past four years, to the Division of State Audit.
3. The department should review this report and seek recovery of the payments for undocumented work for which the state was billed and for any of the work for which the state was billed that was not within the scope of the contract. The department should immediately initiate steps to recover those amounts.
4. The department should review how this contract was initiated, approved, amended, reviewed, and monitored by state staff. The department should particularly review the actions of those individuals primarily responsible for the day-to-day operations of the contractor and should take steps to ensure that there were no inappropriate transactions or relationships between those officials and the company. The department should document why and how this contract was permitted to be mishandled in the ways it was and take appropriate personnel action as warranted. The department should also take any other legal action available to address the issues raised in this report.
5. The department should implement adequate internal controls to provide better oversight of its operations and contracts relative to the issues noted in this report.

Supplemental Note

The contract between the state and ARS at Clover Bottom Developmental Center ended December 31, 2003. Clover Bottom entered into a six-month contract with ARS, effective January 1, 2004, to June 30, 2004, to continue the services that ARS had been providing under the previous contract. This was necessary after Clover Bottom was unable to attract enough qualified employees to fill all the state positions established to obviate the need for a contract. The six-month contract provided for three contract employees: one Assistive Technology Director, one Physical Therapist, and one Therapeutic Equipment Worker. These contract

positions were in addition to four state employees who remained in the AT department during this time period. The additional six months allowed CBDC to work with the Department of Personnel to improve salary grades for the vacant positions to help attract prospective staff.

As of July 1, 2004, the contract between Clover Bottom and ARS ended. According to the superintendent at Clover Bottom, the AT department is in the process of being fully converted into a state-employee run facility, and all positions previously held by contract employees will be filled by state employees. The AT department will be staffed by two physical therapists (including the Director of the AT department) and three therapeutic equipment workers (TEWs). The two physical therapist positions need to be filled. Clover Bottom is currently looking to fill those positions with existing staff at the center. The TEW positions are in the process of being filled now, and management at Clover Bottom feel confident they will be able to fully staff the AT department, with state employees, in the near future.

ARS is currently contracting with Greene Valley Developmental Center to provide Assistive Technology Services, the same services it provided at Clover Bottom. The contract between Greene Valley and ARS began on July 1, 2003, and will end on June 30, 2008. This contract provides for one Director of Physical Therapy and Therapeutic Equipment, one Director of Assistive Technology, one licensed physical therapist, and two physical therapist assistants. The maximum liability is \$2,220,000 spread over the five-year term of the contract (\$444,000 per year).

As of September 1, 2004, ARS and officials of Greene Valley Developmental Center were involved in a dispute as to the future of the current contract at the facility.

Appendix

Contract Between the Division of Mental Retardation Services, Clover Bottom Developmental Center, and Action Rehabilitation Services, Inc. Summary of Specific Relevant Clauses in the Original Contract and All Subsequent Amendments

Original Contract

- Caption of the contract states that it is a contract for the provision of physical therapy services.
- § A.2.10 (p. #3) State is the sole judge of the Contractor's personnel performance. Contractor further agrees not to charge the State for any services performed which the State designates as being unacceptable.
- § A.4.15 (p. #5) Contractor will supervise staff.
- § A.7.1 (p. #9) Personnel must be able to provide 40 hours of service per week. There will be no reimbursement for non-work hours.
- § C.1 (p. #11) Unit rates shall constitute the entire compensation due the Contractor . . . regardless of the difficulty, hours worked, or materials or equipment required.
- Unit rates include, but are not limited to, all applicable taxes, fees, overhead, profit, and all other direct and indirect costs.
- § C.3 (p. #11) All hours worked will be reimbursed at regular hourly rates. There will be no reimbursement for non-work hours.
- § C.3 (p. #12) The Contractor shall submit invoices for completed work in form and substance acceptable to the State and with all of the necessary supporting documentation prior to any payment. Such invoices shall at a minimum, include the name of each individual, the individual's job title, the number of hours worked (to tenths) worked during the period, the hourly rate, the total compensation requested for the individual, and the total amount due the Contractor for the period invoiced.
- § C.5 (p. #12) The payment of an invoice by the state shall not prejudice the State's right to object to or question any invoice or matter in relation thereto. Such payment by the State shall neither be construed as acceptance of any part of the work or service provided nor as an approval of any of the amounts invoiced therein.
- § C.6 (p. #12) Contractor's invoice shall be subject to reduction for amounts included in any invoice or payment theretofore made which are determined by the State, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute proper remuneration for compensable services.
- § C.7 (p. #12) The State reserves the right to deduct from amounts which are or shall become due and payable to the Contractor . . . any amounts which are or shall become due and payable to the State of Tennessee by the Contractor.
- § D.8 (p. #14) The Contractor shall maintain documentation for all charges against the State under this Contract.
- § D.8 (p. #14) The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this contract, shall be maintained for a period of three (3) full years form the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the State, the Comptroller of the Treasury, or their duly appointed representatives.

- § D.9 (p. #14) The Contractor's activities conducted and records maintained pursuant to this Contract shall be subject to monitoring and evaluation by the State, the Comptroller of the Treasury, or their duly appointed representatives.
- § D.15 (p. #16) The Contractor shall comply with all applicable State and Federal laws and regulations in the performance of this Contract.
- § E.4 (p. #18) Upon termination for lack of funds availability the Contractor shall be entitled to compensation for all satisfactory and authorized (emphasis added here and following) services completed as of the effective termination date.
- § E.8 (p. #19) Contractor shall be solely responsible for monitoring the time of the personnel it provides, because Clover Bottom will not pay overtime.

Second Amended Contract

- § C.1 (p. #2) The payment rates constitute the entire compensation for the service . . . regardless of the difficulty, hours worked, or materials or equipment required. The payment rates include, but are not limited to, all applicable taxes, fees, overhead, profit, and all other direct and indirect costs incurred.
- § C.1 (p. #3) The Contractor is not entitled to be paid the Maximum Liability for any period under this Contract for any work not requested by the State. The Maximum Liability represents available funds for payment to the Contractor and does not guarantee payment of any such funds to the Contractor under this contract unless the State requests work and the Contractor performs such work. In which case the Contractor shall be paid in Accordance with the Payment Rates.
- § C.1 (p. #3) The state is under no obligation to request work from the Contractor in any specific dollar amounts or to request any work at all from the Contractor during any period of this contract.
- § C.3 (p. #3) The Contractor shall be compensated based upon the Payment Rates herein for units of service authorized by the State.
- § C.3 (p. #4) All hours worked shall be reimbursed at regular hourly rates. There shall be no reimbursement for non-work hours.
- § C.3 (p. #4) The Contractor shall not be compensated for travel time to the primary location of service provision.
- § C.3 (p. #4) Contractor shall submit monthly invoices for completed work in form and substance acceptable to the State with all the necessary supporting documentation prior to payment.
- § D.3.a (p. #5) Contractor shall be entitled to receive compensation for satisfactory authorized service completed as of the termination date, but in no event shall the State be liable to the Contractor for compensation for any service which has not been rendered.
- § A.5.1 (p. #6) The Contractor will be responsible for hiring and training new assistive technology employees.
- § A.5.6 (p. #6) Contractor will write and implement assistive technology policies and procedures.
- § A.5.8 (p. #7) The Contractor will communicate effectively with all assistive technology employees in order to coordinate the assistive technology schedule and to prioritize all work to be completed for fittings and deliveries.
- §§ A.6.1-6.5 (p. #7) Contractor responsible for supervising certain staff.

- § A.6.8 (p. #8) Contractor will be responsible for the timely preparation of all required documentation, special reports, etc.
- § A.6.9 (p. #8) Contractor will participate in the writing and implementation of new policies and procedures.
- § E.5 (p. #8) Contractor shall be responsible for the correct use, maintenance, and protection of all articles of nonexpendable, tangible, personal property furnished by the State for the Contractor's temporary use.