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The Special Counsel

July 22, 2003

The President
The White House
Washington, DC 20500

Re: OSC File No. DI-02-1423, et al.

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report provided to this office pursuant to 5 U.S.C. § 1213(c) and (d) by the Honorable Reginald J. Brown, Assistant Secretary of the Army (Manpower and Reserve Affairs). The report sets forth the findings and conclusions of the Assistant Secretary upon investigation of disclosures of information allegedly evidencing violations of law, rule or regulation by officials at the Department of the Army, Joint Readiness Training Center and Fort Polk, Louisiana (Fort Polk), during the commercial activities cost comparison and procurement for Whole Base Operations and Support Services (BASOPS) recently conducted at Fort Polk.

The relevant information was provided to the Office of Special Counsel by Robert E. Love, President of Local R5-168 N.A.G.E. and a former employee of Fort Polk, and several employees of Fort Polk (whistleblowers). Mr. Love and another whistleblower, Vernon Scroggins, an Electrical Equipment Repairer at Fort Polk, each submitted comments on the agency report to this office pursuant to 5 U.S.C. § 1213(e)(1), which I am also transmitting. Mr. Love and Mr. Scroggins consented to the release of their names.

The allegations of the whistleblowers were transmitted to the Secretary of the Army for investigation on November 25, 2002. The Secretary of the Army delegated to Assistant Secretary Brown his authority to review and sign the agency report. The agency report was submitted to this office on April 8, 2003.

I have carefully examined the original disclosures and reviewed the agency's response. Pursuant to 5 U.S.C. § 1213(e)(2), I have determined that the findings in the agency report -- which, in part, substantiate the whistleblowers' allegations -- appear reasonable and contain all of the information required by statute.

The Whistleblowers' Disclosures

The whistleblowers alleged that officials at Fort Polk failed to safeguard "procurement sensitive" information during the course of the base-wide commercial activities cost comparison and procurement conducted pursuant to Office of Management and Budget (OMB) Circular A-76, "Performance of Commercial Activities" (Circular A-76).¹ The whistleblowers alleged that the Most Efficient Organization (MEO), which essentially serves as the government's bid proposal, was publicly disseminated to potential private-sector contractors in advance of the submission of their final bids, providing the contractors an unfair advantage in the cost comparison and procurement. The whistleblowers also alleged that the agency violated Circular A-76, as well as provisions of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 1.101 *et seq.* (2001), by failing to safeguard this procurement sensitive information.

Specifically, the whistleblowers alleged that during the procurement process, a Fort Polk employee from the Public Works Directorate released MEO information for several Fort Polk directorates during a training workshop on December 10 through 13, 2001. Government employees and private-sector contractors attended the workshop, which was sponsored by the Army Corps of Engineers and the Army Assistant Chief of Staff for Installation Management (ACSIM). The MEO information was presented on several slides. Copies of these slides and an additional slide with MEO information were also posted on the ACSIM website until January 16, 2002. At the time this information was released, final bids had not been submitted.

In a March 5, 2002, letter to Mr. Love and a March 8, 2002, article in the agency newspaper, the Guardian, Brigadier General Jason K. Kamiya, Commanding General, explained that when Fort Polk management and the contracting officer learned of the release of the MEO information, the contracting officer directed the A-76 Source Selection Evaluation Board (SSEB) to carefully review all final revisions of the contract proposals to detect any indication that contractors had modified their proposals based on the released MEO information. The SSEB determined that none of the proposals had been modified in such a manner. General Kamiya stated that, while "most regrettable," the release of the MEO information did not have any apparent impact on the competitive process. He further explained that a "more detailed" investigation into the conduct of the employee who released the MEO information was under way to determine whether disciplinary action was appropriate. On May 10, 2002, the agency announced that a private contractor, AECOM Government Services, Inc., was conditionally awarded the BASOPS contract at Fort Polk.

¹ In 1998, Fort Polk began the commercial activities cost comparison pursuant to Circular A-76, in preparation for a conversion of BASOPS from in-house to contract services.

While Fort Polk management had reviewed the matter and concluded that the release of MEO information had no apparent impact on the procurement process, it was not clear what steps management took to adequately investigate the matter and reach its conclusion. There was no indication whether the release of the MEO information was deliberate or accidental, or whether any of the contractors competing in the BASOPS procurement attended the training workshop, accessed the MEO information on the Internet, or obtained the information from another source. Further, it was unclear whether the agency adhered to procedural requirements of the FAR and other applicable laws, rules or regulations regarding potential violations or irregularities in the procurement process. Therefore, the former Special Counsel, Elaine Kaplan, referred the matter to the Secretary of the Army for an investigation and report under § 1213(c).

The Department of the Army Investigation and Report

This matter was initially referred by the Assistant Secretary to the Army Office of the General Counsel (OGC). The OGC forwarded the matter to Headquarters Forces Command (FORSCOM), Office of the Staff Judge Advocate, where Colonel Bruce Topletz was appointed Investigating Officer. Col. Topletz's investigation of the whistleblowers' allegations entailed an independent review of the investigations and reviews previously conducted by the Fort Polk Army Garrison Command, the Contracting Officer for the BASOPS A-76 cost comparison and procurement (Contracting Officer), the Army Forces Command Administrative Appeals Board (Appeals Board), and the Army Audit Agency (Army Audit).

During the course of the review, it was determined that a second release of procurement sensitive information occurred on May 1, 2002. This second release involved an unauthorized disclosure of a comparative analysis of the government's Technical Performance Plan (TPP) and the Best Value Proposal (BVP) to an agency official involved in the development of the TPP. The agency investigated this release in a manner similar to the investigation of the first release, with an investigation under Army Regulation (AR) 15-6, by the Contracting Officer, and reviews by the Appeals Board and Army Audit. Accordingly, Col. Topletz conducted an independent review of these investigations and reviews.

The agency report consists of two Reports of Investigation (ROIs) reviewing the investigations and findings for the two releases. In addition, the agency submitted extensive documentation detailing the steps taken in the investigations, the evidence collected, the communications among the individuals responsible for directing and carrying out the investigations, and the findings and conclusions made by the Deputy Director, Fort Polk Army Garrison Command, the Contracting Officer, the AR 15-6 Investigating Officer, the Appeals Board, and Army Audit.

First Release of Information

ROI Number 1 addresses the first release of information, which was the subject of OSC's transmittal to the Secretary of the Army for investigation. The ROI explains that Mr. Jim V. Kelley, a Supervisory General Engineer of the Directorate of Public Works (DPW) at Fort Polk, released procurement sensitive information pertaining to the DPW MEO during a December 11, 2001, workshop. The ROI further explains that the released information, presented on slides at the workshop, included in hand-outs, and posted on the ACSIM website until January 16, 2002, contained "a broad chart of a potential DPW organizational structure." An additional slide, not presented at the workshop but included in the hand-outs and posted on the website, contained civilian and military personnel numbers, but did not identify which figures represented the MEO or the Residual Organization (REO).

The ROI confirms that the release of MEO information by Mr. Kelley was an unauthorized disclosure of source selection (procurement sensitive) information in violation of 41 U.S.C § 423, FAR § 3.104, and Department of Defense Joint Ethics Regulation, DoD 5500.7-R. However, the investigation does not substantiate the whistleblowers' allegation that the release of the information provided the private contractors with an unfair advantage. As reflected in the ROI, the agency determined through its investigation and reviews that the evidence did not show that the release of information adversely affected the integrity of the procurement process, or provide a basis for setting aside the award to the BVP Contractor.

Specifically, ROI Number 1 reviews the "two separate routes of inquiry" taken by the agency regarding the release of MEO information. One inquiry was conducted by Mr. Ted L. Hammerschmidt, Deputy Director, Public Works, Fort Polk Army Garrison Command. Beginning in early January 2002, Mr. Hammerschmidt interviewed Mr. Kelley and other witnesses, analyzed the released information, and supervised the removal of the information from the website. In addition, he coordinated with the Contracting Officer and analyzed the impact of the release of information on the A-76 cost comparison and procurement.

The ROI and supporting documentation reflects that Mr. Hammerschmidt determined there was no record of the attendees of the December 11, 2001, workshop session where Mr. Kelley released the MEO information. He learned that at least two of the approximate twenty attendees were non-government personnel, but was unable to ascertain their identities. Mr. Hammerschmidt was able to identify and interview two government employees who attended the session: Mr. Edmond Davis, an ACSIM representative, and Col. Michael Pratt, Director, Public Works at Fort Hood, Texas. Both of these individuals explained that Mr. Kelley's presentation consisted of general information and did not disclose information that could be used to the advantage of a private contractor submitting a proposal for the Fort Polk cost comparison and procurement. Col. Pratt explained that he was particularly sensitive to procurement integrity issues, and nothing presented by Mr. Kelley raised a concern for him.

In addition, Mr. Hammerschmidt interviewed and obtained a written statement from Mr. Kelley regarding the circumstances surrounding the release of MEO information. He also examined the slides presented by Mr. Kelley at the session and posted on the ACSIM website, and compared the slide information with the actual MEO for the DPW. As reflected in his memorandum summarizing his findings, he determined that the information on the slides, which did not include cost information, was not an accurate representation of the MEO organization within the DPW. He further explained that the DPW is only a minority percentage of the whole base study. He also concluded that he had no information to suggest that Mr. Kelley intentionally released the information to provide a competitive advantage to any contractors involved in the procurement process. He noted that the evidence suggested that none of the contractors had changed their proposals in a manner that reflected they had accessed the released information. In light of the information gathered, he concluded that the release had "no substantive impact on the competitive process."

A separate inquiry was conducted concurrently by Ms. Charlene R. Allison, Contracting Officer for the A-76 cost comparison and procurement process at Fort Polk. The ROI explains that Ms. Allison examined whether the release of information adversely affected or compromised the integrity of the cost comparison and procurement. After consulting with legal counsel and the chair of the Source Selection Advisory Committee (SSAC), she initially determined that it did not appear that the released information had been accessed or used by the contractors who submitted Final Revised Proposals (FRPs).

In addition, Ms. Allison consulted with the Chair of the SSEB. Together, they informed the two SSEB evaluators responsible for reviewing the DPW function of the FRPs regarding the release, and instructed them to report any indication of radical changes in the contractors' approach, methodology and/or staffing that might raise suspicion of access to the released information. As reflected in the ROI and supporting documentation, the SSEB evaluators did not detect any indication in any of the FRPs that the contractors had modified their proposals based on the released MEO information. Ms. Allison advised the SSAC of her determination that there was no impact on the procurement process as a result of the release of information, and that the process could proceed to award.

ROI Number 1 summarizes the employee and union appeals to the Appeals Board regarding the Army's initial decision to award the contract. The appeals raised, among several issues, the release of the MEO information. The Appeals Board denied the appeals, determining that the release was unauthorized, but appellants did not present evidence establishing that the released information was used by the competing offerors or that it harmed the procurement process.

The ROI also outlines Army Audit's review of the Appeals Board decision, which was initiated in response to a request by U.S. Representative Jim McCrery. Army Audit, after

conducting an independent investigation of the allegations, concurred with the Appeals Board's determination that the unauthorized release of information did not adversely affect the procurement process. The ROI explains that the bases for Army Audit's determination was that the released MEO information pertained only to the DPW, which represented about 28% of the full-time equivalent positions within the entire (base-wide) MEO, the numbers presented were not identified as MEO or REO positions, and there was no evidence that any of the competing offerors used the information to modify their proposals.

The ROI states that Col. Topletz, following his independent review, concurred with the findings of the Deputy Director of Public Works, the Contracting Officer, the Appeals Board and Army Audit.

Second Release of Information

ROI Number 2 addresses the second release of procurement sensitive information that occurred on May 1, 2002, prior to the conclusion of the procurement process. The ROI explains that the release occurred when Mr. Richard Wisdom, Fort Polk Director of Contracting, forwarded an e-mail message to Dr. Ronald Tomas, Deputy to the Garrison Commander, Fort Polk Army Garrison Command. An attachment to the e-mail contained a briefing to the Source Selection Authority regarding a comparative analysis of the government's TPP and the BVP Contractor's proposal. Dr. Tomas was the Chair of the Management Support Team (MST), which was responsible for developing and revising the TPP. As such, he was not authorized to review the technical analysis or the BVP Contractor's proposal. On May 2, 2002, Dr. Tomas recused himself from the MST.

The ROI confirms that this release of procurement sensitive information violated 41 U.S.C. § 423, FAR § 3.104, and Department of Defense Joint Ethics Regulation, DoD 5500.7-R. However, again, the agency determined through its investigation and reviews that the release of information did not adversely affect the integrity of the procurement process. Importantly, the ROI points out that this second release of information would have provided an unfair advantage to the government, rather than a private contractor.

The ROI explains that upon notification of the release of information, Col. Robin Swann was appointed the AR 15-6 Investigating Officer responsible for conducting an investigation into the May 1, 2002, release. In addition, Ms. Allison, the Contracting Officer, promptly conducted an investigation to determine the effect of the release on the cost comparison and procurement prior to the awarding of the contract. Further, the Appeals Board and Army Audit conducted reviews of this release at the same time they reviewed the first release.

The ROI reflects that the investigations by Col. Swann and the Contracting Officer revealed no evidence that the release of information provided an unfair advantage to any offeror, was intentionally released for that purpose, or adversely affected the integrity of the

procurement process. As reflected in the supporting documentation, no changes to the BVP Contractor's proposal were involved after the release occurred, and there was no evidence that the government modified its proposal based on the released information.

As with the first release, the Appeals Board determined that the release was unauthorized, but did not adversely affect the procurement process. After conducting an independent review of the matter, Army Audit concurred with the Appeals Board's decision, finding that the release occurred only days before the SSAC's final decision, and that there was no evidence that the government used the information to modify its proposal. Again, the ROI states that Col. Topletz, following his independent review, concurred with the findings of the Investigating Officer, the Contracting Officer, the Appeals Board and Army Audit.

Disciplinary Action Taken

Both ROIs include a description of the disciplinary action taken in response to the investigations conducted by the agency. These actions include:

1. A 12-day suspension without pay was proposed for Mr. Kelley. Mr. Kelley retired from his position prior to the imposition of the suspension.
2. Dr. Tomas was given a 14-day suspension without pay, which he has served.
3. Removal was proposed for Mr. Wisdom. He retired pending completion of the removal action.

The Whistleblowers' Comments

As noted, Mr. Love and Mr. Scroggins submitted comments on the agency report. In his comments, Mr. Love asserts that the agency's investigation was not meaningful, because it failed to determine whether the release of information did, in fact, affect the procurement process. Mr. Love states that there is no way to determine from reviewing the contractors' final proposals whether a contractor in some way relied on the released information. He further explains that, based on the investigation conducted, there is no way to determine how widespread the distribution of the MEO information was or what effect it had on the private sector bids. Mr. Love contends that the agency failed to protect the integrity of the procurement process, despite the various levels of review conducted. He states that "[i]f the procedures used suffer significant breaches such as were found to be present here then there can be no faith in the results."

Mr. Scroggins alleges in his comments that the MEO information was intentionally disclosed at the workshop and on the website in a coordinated effort to assist AECOM

Government Services in winning the Fort Polk contract. In support of this allegation, he provides several documents that he contends establish a connection between Mr. Kelley and Mr. Robert Shirron, the Fort Polk Project Manager for AECOM. He alleges that AECOM obtained, and benefited from, MEO information received from Mr. Kelley. He further alleges that other personnel took part in the "conspiracy" to misuse their military positions and disclose procurement sensitive information to benefit AECOM.

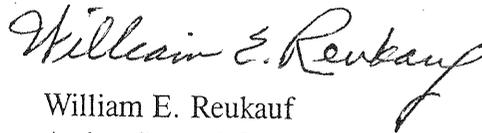
In addition, Mr. Scroggins believes that in light of the agency's admission that the releases violated 41 U.S.C. § 423 and FAR § 3.104, the agency was clearly required under those provisions to cancel the A-76 procurement process when the unauthorized release was discovered.² He further outlines what he believes are "holes and inconsistencies" in the agency's investigations and reports, which he alleges evidence a cover-up by the agency. Among the issues raised, he asserts that there was a conflict of interest in having Mr. Hammerschmidt, the Deputy Director of the DPW, investigate the actions of Mr. Kelley, a DPW Engineer. He also contends that the agency conducted merely an "inquiry" for the first release by Mr. Kelley, but conducted a full AR 15-6 investigation for the second release, and that the agency had no intent of ever stopping the procurement process, despite the clear violations of law.

Conclusion

Based on the representations made in the report and as stated above, I have determined, pursuant to section 1213(e)(2), that the findings in the agency's report appear to be reasonable and contain all of the information required by statute.

As required by section 1213(e)(3), I have sent a copy of the report and the comments of Mr. Love and Mr. Scroggins to the Chairmen of the Senate and House Committees on Armed Services. We have also filed copies of the report and comments in our public file and closed the matter.

Respectfully,



William E. Reukauf
Acting Special Counsel

Enclosure

² Our review of 41 U.S.C. § 423 and FAR § 3.104-7 reveals that neither provision contains a requirement of automatic cancellation of the procurement.