



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
111 ARMY PENTAGON  
WASHINGTON, DC 20310-0111



JUN 09 2005

REPLY TO  
ATTENTION OF

The Honorable Scott J. Bloch  
The Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

Re: OSC File No. DI-03-0750, U.S. Army Corps of  
Engineers (USACE), Great Lakes and Ohio River Division,  
Louisville District

Dear Mr. Bloch:

In accordance with Title 5, United States Code (USC), Sections 1213(c) and (d), the enclosed report (Tab E, Attachments 1-6, 9-41) is submitted in response to your referral of information in the above referenced case.

As the Agency head, the Secretary of the Army has delegated to me his authority to review, sign and submit to you the report required by Title 5, United States Code (USC), Sections 1213(b), (c) and (d). (Tab A).

### INFORMATION THAT INITIATED THE SUBJECT INVESTIGATION

By letter dated February 8, 2005 (Tab B), the Office of the Special Counsel (OSC) referred to the Secretary of the Army its conclusion that allegations filed by Ms. Christy Watts, the former GS-14 Contracting Division Chief, US Army Corps of Engineers (USACE), Great Lakes and Ohio River Division, Louisville District (the District), revealed eleven circumstances in which the District violated federal contracting laws, rules, and regulations in connection with numerous federal contracts. Ms. Watts alleged that the District's contracting personnel routinely disregarded applicable federal contracting laws, rules and regulations, including the Federal Acquisition Regulation (FAR), Engineering FAR Supplement (EFARS), Department of Defense FAR Supplement (DFARS), Competition in Contracting Act (CICA) (Title 10 USC, Section 2304), and the Brooks Act (Title 40 USC, Section 541, *et. seq.*). According to Ms. Watts, she brought these concerns to the attention of Colonel Robert A. Rowlette, Louisville District Commander and Engineer, who allegedly took no action. Specifically, Ms. Watts alleged:

1. In violation of FAR 15.206, the District failed to amend its solicitation prior to awarding Contract Number DACW27-03-R-003—a \$500 million cost-reimbursement construction contract—after learning that fiscal year funding levels had been significantly

reduced from \$15 million to \$2.5 million. According to Ms. Watts, the District reasonably should have known that the change in funding would increase the time it would take to complete the project and, in turn, increase USACE's costs significantly. Nevertheless, the District did not request revised proposals or provide offerors with the opportunity to submit them, as Ms. Watts argued was required by FAR 15.206. Further, in light of the funding reduction, Ms. Watts alleged that it was impossible for the District to have accurately evaluated competitive proposals, as required by FAR 15.404-1(d), prior to awarding that contract.

2. District contracting officers delegated Administrative Contracting Officer (ACO) authority on Contract Number DACA27-01-D-2002, a *service* contract. According to Ms. Watts, the delegation of ACO authority on that contract violated EFARS 1.602-1-100, which limits the delegation of ACO authority to *construction* contracts.

3. Ninety (90) impermissible unilateral contract modifications totaling approximately \$25 million were issued on Contract Number DACA27-99-C-0050 (the Central Energy Plant Fort Campbell project). According to Ms. Watts, the agency was required by FAR 43.102(b) to negotiate or finalize those contract modifications before the contractor performed the work. However, the contract file showed that those modifications were neither negotiated nor finalized until over 12 months later.

4. On Contract Number DACW27-02-R-0004, neither the District's Source Selection Authority nor its Office of Counsel approved the source selection strategy or acquisition plan before public release of the solicitation. Ms. Watts alleged that such omission violated FAR 15.303(b)(2), DFARS 215.303(b)(2), and AFARS 5115-303(b)(2)(b). She bases her assertions on the lack of documentation of such approval in the contract file.

5. The District issued construction solicitations containing sole source items on Contract Number DACA27-02-B-1001 without following any of the required sole source procedures set forth in FAR 6.3, which governed that contract. Ms. Watts based her allegation on the lack of documentation supporting the use of a sole source in the contract file.

6. The Total Environmental Restoration Contract Number DACA27-97-D-0015 was intentionally over-obligated on several task orders—specifically Task Orders 01, 10, 11 and 4005 for the Savanna Army Depot Activity, which exceeded \$3,000,000—in order to reserve expiring funds for customers. Ms. Watts alleged that those actions, which are commonly referred to as “parking” or “banking” of funds, constitute an impermissible movement of funds because they are sham transactions. She further asserted that the task orders violated FAR Part 43, which governs contract modifications, because they were made without first negotiating their scope and without the intent that the work would be completed at that time. Ms. Watts provided relevant documents pertaining to those task orders to the OSC. The OSC included them as Enclosure #1 to its referral letter.

7. Without exercising applicable options, the District issued new task orders on Contract Number DACA27-00-D-0002, an Architectural/Engineering (A/E) contract, that exceeded the value of the contract and that were outside the scope of the contract. Ms. Watts asserted that the contract file did not contain documents reflecting the executed options.

Ms. Watts also alleged that, based on her review of documents in the contract file, the District modified task orders that were already in place after the task order's period of performance had expired. She asserts that the District's actions violated required procedures for A/E contracts set forth in FAR 36, which implements the Brooks Act, the federal statute governing A/E contracts.

8. The District awarded Contract Number DACA27-00-D-004 without price competition in violation of CICA and the FAR's guiding principles found in FAR 1.102(b). Specifically, Ms. Watts alleged the District treated that contract as if it were an A/E contract—in which price quotations need not be considered during the selection process—when in fact, the primary scope of that contract was other than A/E services.

9. The District violated DFAR 245 on Contract Number DACW27-97-D-0015 when Project Manager Gary Chisholm transferred a \$2,000,000 municipal well house and water supply wells to a local sponsor without authority to do so. Ms. Watts provided relevant documents on this allegation to the OSC. The OSC forwarded these documents in its referral letter as Enclosure #2.

Ms. Watts further asserted that the District did not have authorized personnel monitoring government furnished or contractor acquired property on Contract Number DACW27-97-D-0015, as required by FAR 45.5.

10. Ms. Watts alleged that Contract Number DACW27-02-C-0005, a design/build contract, violated EFARS 1180-1-9 ¶ 8c(1)(d), which requires that design/build contracts for civil works be 100% funded at the time of the award. Ms. Watts alleges that the contract file contains documents indicating that contract was funded incrementally, not fully, at the time of its award.

11. The District does not have written contracts for utility services, in violation of FAR 41.201(b), 41.202 and 41.205. Ms. Watts also alleged that the District does not have written contracts for local or long distance telephone service or wireless communication services such as cellular telephones, pagers, and personal data assistants, as required by FAR 37.101 and FAR 39.1 for information technology services. Given her role as the District Contracting Division Chief, Ms. Watts asserted that she would have known if written contracts existed.

## CONDUCT OF THE INVESTIGATION

On February 15 2005, the Army Office of the General Counsel (OGC) forwarded the OSC request for investigation to the USACE Office of Chief Counsel for appropriate action. (Tab C). After initiating an inquiry into the allegations, the USACE Office of the Chief Counsel forwarded its report to the Office of the Army General Counsel for review and further processing on March 30, 2005. On April 7, 2005, an extension of the suspense for the submission of the report to OSC was requested to permit the Department of the Army to review the draft report prepared by the USACE, ensure that all allegations were addressed in a thorough and complete manner, and prepare and forward the report to the OSC in satisfaction of the 5 USC §1213 requirement (Tab D). Ms. Catherine McMullen, Chief, Disclosure Unit, OSC, granted the request for extension. On June 7, 2005, USACE submitted a revised report to OGC based on questions and comments from the OGC. (Tab E).

## GENERAL BACKGROUND ON ALLEGATIONS

Ms. Watts made eleven allegations that procurement irregularities, and fraud, waste, and abuse permeated the contracting processes in the Louisville District. Ms. Watts had previously filed several of these allegations in other for a, pursuant to which they were investigated by the processes prescribed. (See Attachment 5).

There have been numerous internal and external audits of the Louisville District's contracting procedures primarily initiated as a result of allegations of wrongdoing or illegality or fraud, waste and abuse by Ms. Watts (Attachment 1) since she became the Chief of Contracting Division in June 2001. Specifically, as result of Ms. Watts September 17, 2002 interview with Internal Review (IR), IR conducted audits regarding the issuing of Administrative Contracting Officer (ACO) authority on Service Contracts (see discussion on allegation No. 2), and the transfer of Government property which included procedures for monitoring government acquired property (see discussion on allegation No. 9). Most of these reviews were conducted at the direction of the current Commander of the Louisville District, Colonel Robert A. Rowlette, Jr., or the previous Commander, retired Colonel Robert E. Slockbower. Both Commanders consistently ordered reviews of issues that Ms. Watts brought to their attention. This included an Army Regulation (AR) 15-6, Procedures for Investigating Officers and Boards of Officers, review on the Government Purchase Card Program dated June 26, 2002 (Attachment 2) with an Internal Review follow-up audit IR 04-03 dated August 6, 2004 (Attachment 3) and a Department of Defense, Office of the Inspector General (DoD IG) audit *Acquisition Purchase Card Use and Contracting Actions at the U.S. Army Corps of Engineers, Louisville District (D-2004-104)*, dated July 27, 2004 (Attachment 4) and four additional internal audits. A list of the investigations relevant to this report and their subjects is included. (Attachment 5). None of these audits, reviews, or investigations found any evidence of fraud, waste, or abuse, or financial losses to the Government. The primary finding/recommendation of the DoD IG Report on Purchase Card Use related to "separation of functions," which involved changing a computer program (the Corps of Engineers Financial Management System) to separate credit card approving/ordering

System) to separate credit card approving/ordering officials, a change that has been made. The results of these audits have been incorporated into this report.

As background, the Louisville District of the USACE performs military, environmental and civil works missions in the states of Tennessee, Kentucky, Illinois, Indiana, Ohio and Michigan, as well as a nationwide mission for the U.S. Army Reserves and the U.S. Air Force Reserves. In executing these missions, the Louisville District awards contracts with annual values totaling between \$400 million and several billion dollars. All types of contracts are used in performance of this mission from hundreds of micro-purchases (below \$2,500) using Government VISA cards to numerous large Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts. The Louisville District executes several thousand contract actions annually.

Given the great number of allegations raised by Ms. Watts to OSC, the summary below provides a quick overview of and explanatory remarks on each allegation, with a view to facilitating an understanding of this report.

Allegation 1: Solicitation DACW27-03-R-03 was required to be amended by FAR 15.206 to indicate a potential reduction in funds available the first year of the contract.  
Response 2: Allegation 1 was not addressed by any previous audits, however, the source selection was reviewed by District Counsel and the Contracting Officer/Source Selection Authority and found to be proper.

Allegation 2: Administrative Contracting Officer (ACO) authority was delegated on service contracts in violation of EFARS 1.602-1-100.  
Response 2: Internal Review determined that ACO authority had been properly exercised or delegated on service contracts and corrective action was taken by issuing immediate guidance on the subject and initiating annual reviews for compliance. The DoD IG audit confirmed these findings.

Allegation 3: Impermissible contract modifications were made under Contract DACA27-99-C-0050 in violation of FAR 43.102(b).  
Response 3: FAR Part 43 and DFARS Part 217 recognize that un-priced modifications are allowable and under certain circumstances in the best interest of the Government. A review by IR and DoD IG concluded that the modifications were properly reviewed and executed.

Allegation 4: With regard to Contract DACW27-02-R-0004, neither the District Source Selection Authority nor District Counsel approved the source selection plan that was issued in violation of FAR 15.303(b)(2), DFARS 215.303(b)(2) and AFARS 5115-303(b)(2)(b).  
Response 4: Although the DoD IG substantiated this allegation, it concluded that there was no consequence on the procurement or need for corrective action, and indicated that the ultimate responsibility for this matter rested with District Chief, Contracting Division, Ms. Watts.

Allegation 5: Solicitation DACA27-02-B-1001 was issued containing sole source items not justified in accordance with FAR 6.3.

Response 5: DoD IG investigated this allegation and found it to be unsubstantiated.

Allegation 6: Task orders on DACA27-97-D-0015 were intentionally over-obligated to reserve expiring funds and were not finalized in accordance with FAR Part 43.

Response 6: The funds associated with these actions were non-expiring and un-finalized actions and are permissible under FAR Part 43 and DFARS Part 217. DoD IG found no deficiencies or irregularities on this issue.

Allegation 7: On Contract DACA27-00-D-0002, for Architect/Engineer (A/E) services, new task orders were issued and existing task orders modified after the period of performance expired that were out of scope and exceeded the value of the contract. Also, these actions violated FAR Part 36, which implements the Brooks Act.

Response 7: This contract was misidentified as an A/E contract and was in fact an ID/IQ construction contract. Therefore, there was no violation of the Brooks Act. The complete records for this contract are unavailable due to ongoing Army Criminal Investigation Command and Defense Criminal Investigative Service investigations (in assistance to the Department of Justice) of the contractor. However, based on available records, it appears task orders were improperly issued and that competition concerns under the Competition in Contracting Act (CICA) were not addressed. An electronic system designed to track options was put into place in April 2004 to prevent future occurrences.

Allegation 8: Contract DACA27-00-D-0004, an A/E services contract, was awarded without price competition in violation of CICA and FAR 1.102(b) because the primary scope of the services was other than A/E. (Note, that the contract number that OSC referred as the subject of Allegation 8 dealt with contract number DACA27-00-D-004; however, the correct contract number is DACA27-00-D-0004).

Response 8: The Contracting Officer determined that the scope of work qualified as A/E services and acquired this contract pursuant to the Brooks Act under FAR Part 36 and in accordance with CICA. DoD IG did not concur with the scope determination but concluded that CICA was satisfied. However, it is our opinion that the scope determination would meet the standard of review established by the Government Accountability Office (GAO) and that the acquisition was proper.

Allegation 9: Government property was improperly transferred to a local sponsor.

Response 9: IR and DoD IG reviewed this allegation and determined it was unsubstantiated.

Allegation 10: Contract DACW27-02-C-0005, a design/build contract, was improperly used on a civil works project that was incrementally funded in violation of EFARS 1180-1-9 which requires 100% funding at time of award.

Response 10: The correct reference is to Engineer Regulation (ER) 1180-1-9. This internal guidance (that is outside of the FAR procurement regulatory scheme but issued by the USACE engineers and contracting communities as policy guidance) applies to

fully-funded contracts, not civil works construction contracts. The approved clause for civil works projects that can be executed using continuing contracts, such as this project, is the clause published at EFARS 52.232-5001, "Continuing Contracts," which mandates use of the clause in contracts for civil works water projects specifically adopted by Congress in authorizing legislation. Section 206(b) of the Water Resources Development Act of 1999 (WRDA 1999) (codified at 33 U.S.C. 2331) also mandates use of continuing contracts. The Corps acknowledges that it did not fully fund the contract at time of award in violation of ER 1180-1-9, but, because of the language contained in 33 U.S.C. 2331 and the EFARS, which is derived from statutory language, it has acted within its authority in incrementally funding this design-build contract.

Allegation 11: The District does not have written utility contracts, which is in violation of FAR 41.201(b), 41.202 and 41.205. Additionally it does not have written contracts for telephone service or wireless communications services as required by FAR 37.202 and FAR 39.1.

Response 11: Acquisitions of these services are in accordance with FAR Part 13 and DFARS Part 241.

## **GENERAL AUTHORITIES RELEVANT TO ADDRESSING ALLEGATIONS**

The authorities cited by Ms. Watts are based in the Federal Acquisition Regulations (FAR) System that is defined in FAR 1.101, Purpose:

The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

Specifically, in this case, the authorities referenced are:

- a. The Federal Acquisition Regulations (FAR), Chapter 1 of Title 48, CFR. The FAR is prepared, issued, and maintained, and the FAR System is prescribed jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities;
- b. The Defense Acquisition Regulations Supplements (DFARS) issued and maintained by the Department of Defense;
- c. The Army Federal Acquisition Regulations Supplement (AFARS) issued and maintained by the Department of Army; and
- d. The Engineer Federal Acquisition Regulations Supplement (EFARS) issued and maintained by the U.S. Army Corps of Engineers.

## MS. WATTS'S DUTIES, RESPONSIBILITIES AND CONDUCT AS CHIEF OF CONTRACTING DIVISION, LOUISVILLE DISTRICT, USACE

Ms. Watts served as the Chief of the Contracting Division from June 3, 2001 to May 6, 2004. Paraphrasing from the attached Position Description (Attachment 6), she was the supervisor responsible for acquiring all necessary commodities in support of the Louisville District's mission; was the principal procurement official and primary contracting officer to contract for supplies and services via any authorized contracting method exercising full breadth of authority; and exercised delegated authority to appoint Ordering Officers, Administrative Contracting Officers, Contracting Officer Representatives, and similar positions in the contracting process. It is noted that the circumstances on which allegations 1, 3, 4, 5, 10 and 11 are based, occurred while Ms. Watts was the Chief of the Contracting Division and were activities under her control and responsibility.

### SUMMARY OF EVIDENCE OBTAINED FROM THE INVESTIGATION AND AGENCY DISCUSSION

There are eleven allegations raised by Ms. Watts in the whistleblower complaint referred from the Office of Special Counsel. Below are the results of the investigation of each of these allegations. The specific allegation is stated in bold and is followed by a description of the evidence obtained either in the course of the present investigation or in the context of a previous review or investigation.

**1. In violation of FAR 15.206, the District failed to amend its solicitation prior to awarding Contract Number DACW27-03-R-003 – a \$500 million cost-reimbursement construction contract – after learning that fiscal year funding levels had been significantly reduced from \$15 million to \$2.5 million. According to Ms. Watts, the District reasonably should have known that the change in funding would increase the time it would take to complete the project and, in turn, increase USACE's costs significantly. Nevertheless, the district did not request revised proposals or provide offerors with the opportunity to submit them, as Ms. Watts argues is required by FAR 15.206. Further, in light of the funding reduction, Ms. Watts alleges that it was impossible for the District to have accurately evaluated competitive proposals, as required by FAR 15.404-1(d), prior to awarding that contract.**

First, there must be an understanding of the Corps of Engineers civil works funding process related to major civil works projects that are expected to be designed and constructed over several years. These civil works projects are authorized by Congress in the Water Resources Development Act(s) (Public Law 106-53, and subsequent statutes passed by Congress periodically) and are incrementally funded. This and 33 U.S.C. 621 allow the Corps, by using the Continuing Contract Clause (EFARS 52.232-5001), to award a contract to obligate the full cost in advance of appropriations and only seek appropriations each year to cover contract payments that will be made in that year. It is

expected that additional funds will be reserved from future appropriations by Congress and, in this case, by the non-federal project sponsor, the Inland Waterways Trust Fund. The Continuing Contracts Clause contemplates possible interruptions in performance of projects arising out of funding shortages and provides a remedy to the parties for damages/delays associated therewith.

This method allows Congress to appropriate only the funds that are necessary each year for these major civil works projects, minimizing the impact on the budget cycle in any given fiscal year. It also allows these appropriations to be utilized to their utmost efficiency by providing a method to move the funds between projects so that progress can continue on those exceeding their planned execution and not letting the funds sit idle on projects that are not executing as expected.

Specific to this allegation, the Water Resources Development Act of 1988 (WRDA 1988), Section 3(a)(6) authorized the Olmsted Lock and Dam project at a total first cost of \$775,000,000, with the costs of construction of the project to be paid as follows: one-half from amounts appropriated from the general fund of the Treasury and one-half from amounts appropriated from the Inland Waterways Trust Fund.

Contract DACW27-03-R-0003 is an incrementally funded \$564 million cost reimbursement contract for the Construction of the Olmsted Dam, Olmsted, Illinois. It resulted from Solicitation DACW27-03-R-0003.

Solicitation DACW27-03-R-0003 was issued on May 5, 2003, seeking proposals on the cost reimbursement contract. (Attachment 9). Two proposals were received by the closing date of October 1, 2003. The Source Selection Evaluation Board (SSEB) determined that neither of the offerors' proposals was technically acceptable. After establishing the competitive range, discussions were opened on October 21, 2003. A letter was sent on November 25, 2003, closing discussions and requesting final proposals. (Attachment 10). The letter also stated that the government would not be able to meet the expenditure curves submitted in their original proposals, that the Government anticipated only \$15-\$20 million would be available in FY-2004, that a maximum of \$80 million would be available in any fiscal year thereafter, and that the offerors should base their final offer on this maximum funding per year. Final proposals were received on December 9, 2003, and a \$564 million contract was awarded to the Washington Group/Alberici Constructors JV in January 2004. (Attachment 11).

FAR 15.206 requires that the Government amend a solicitation, "when it changes its requirements or terms or conditions" either before or after receipt of proposals. However, in this instance, the \$15 million in question was available at the time of award and reprogramming of \$12.5 million occurred after award of the contract (Attachment 12). Therefore, there was no longer a solicitation that could be amended making FAR Part 15.206 inapplicable to this situation. This management decision was made to avoid the payment of substantial amounts of interest on other contracts, where the contractor had already earned funds. Additionally, the reprogramming had little or no impact on the Olmsted contract because that contract had just been awarded and work was in the planning stages, which takes several months on a large contract of this sort and generates

low earnings. The reprogramming of funds for the purpose of efficient execution of appropriations did not alter the requirements, terms or conditions of the Olmsted contract, nor did it violate the law because (a) continuing contracts are authorized on Corps of Engineers Civil Works projects adopted by Congress; and (b) reprogramming is permitted within lump-sum appropriations.

Since the reprogramming occurred after award, it had no impact on the evaluation process and the two proposals were evaluated in accordance with the "cost realism" criteria set forth in FAR 15.404-1(d) and the source selection criteria in the solicitation, which focused on experience, past performance, proposed plans for managing the work, and field and home office overhead rates. An examination of the evaluation factors indicates that these factors, that included total estimated cost, are not the type that would change based on a decision to reprogram \$12.5 million in funds temporarily to another contract. (Attachment 13). Had the reprogramming not taken place, the Government would have incurred significant interest costs on other contracts and had excess funds remaining on this contract at the end of the fiscal year.

Therefore, since the change in funding is not a change to the requirements, terms or conditions of the contract, no amendment was required and FAR 15.206 is not applicable and cannot have been violated. Similarly since the reprogramming action occurred after award, the cost realism evaluation was not impacted and FAR 15.404-1(d) was not violated.

**2. District contracting officers delegated Administrative Contracting Officer (ACO) authority on Contract Number DACA27-01-D-2002, a *service* contract. According to Ms. Watts, the delegation of ACO authority on that contract violated EFARS 1.602-1-100, which limits the delegation of ACO authority to *construction* contracts.**

Ms. Watts, then the Chief of Contracting, raised this issue of improper designation of ACO authority on service Contracts with the Commander, Louisville District, in response to the Commander's "Request for FY03 Audit Suggestions." (Attachment 14). The Chief of Contracting requested Internal Review (IR) perform a review of this issue on September 27, 2002. (Attachment 15). As a result, this internal review was included in the FY 2003 audit plan. On September 8, 2003, IR issued a report IR 03-16 *Service Contracts versus Construction Contracts*. (Attachment 16).

EFARS 1.602-1-100 expressly provides for delegation of ACO authority on construction contracts, with certain limits. In accordance with EFARS 1.602-1-100, the District issues warrants to qualified individuals in the construction offices and then appoints them as ACOs on specific construction contracts. Examples of these documents are attached. (Attachments 17 and 18). However, since the only ACO authority for service contracts that can be delegated under this section is the ability to execute unilateral administrative modifications under FAR 43.103(b)(1), this is not routinely done.

With regard to the contract identified in the allegation, it is our conclusion that the reference is to DACA27-27-01-D-0002, not 2002 as stated in the OSC allegation, since this is the contract previously identified by Ms. Watts to IR for internal review. IR determined that no ACO authority, proper or improper, was delegated on that service contract. So, there was no violation of EFARS 1.602-1-100. However the review did find that there were 6 change orders made erroneously by personnel acting outside the limits of their warrant and without delegation.

IR reviewed other service contracts and found one, DACA27-98-D-0001, where ACO authority was improperly delegated. IR did not find any other delegations or unauthorized changes in its review of other Service contracts.

As a result of this review, IR suggested two command actions: 1) re-issuing guidance from the Office of the Chief of Contracting to contract personnel regarding the proper authority for modification on service contracts, and 2) initiating reviews by Contracting Officers of Contracting Officer records and Ordering Officer Records every 12 months to ensure compliance with the terms of the contract and generate a written record of the review for placement in the contract file

The District supported this action based on the limits of the authorities delegated under the warrants. On April 28, 2004, IR issued a report IR 04-14, *Follow-Up Service Contracts vs. Construction Contracts*. (Attachment 19). It found that the Contracting Division (CT) was following the recommendation to send out the guidance and that on April 14, 2004, CT had selected an Agency Procurement Coordinator to handle the suggested reviews.

On July 27, 2004, the DoD IG issued its report, which among other issues reviewed these same allegations regarding improper delegation of ACO authority on service contracts. (See Attachment 4, p. 26). It confirmed the findings in IR Report 03-16.

As a result of these reviews and the corrective action taken, no further action is warranted on this issue.

**3. Ninety (90) impermissible unilateral contract modifications totaling approximately \$25 million made on Contract Number DACA27-99-C-0050 (the Central Energy Plant Fort Campbell project). According to Ms. Watts, the agency was required by FAR 43.102(b) to negotiate or finalize those contract modifications before the contractor performed the work. However, the contract file showed that those modifications were neither negotiated nor finalized until over 12 months later.**

On September 22, 1999, Contract DACA27-99-C-0050, Central Energy Plant Upgrade, Ft. Campbell, Kentucky, was awarded as a firm fixed price contract to the Foley Company in the amount of \$16,480,300.00. (Attachment 20). This was a contract for renovation of an existing energy plant and an underground heating and cooling distribution system for a military barracks complex. Numerous design and construction

problems were encountered during performance and it was necessary to redesign work and order changes as quickly as possible to limit impact and delay costs. As a result, there was a need to issue 118 modifications on this contract (totaling approximately \$14,000,000), many of which were un-priced changed orders. (Attachment 21). An example of one of these un-priced modifications and its justification is attached. (Attachment 22).

FAR 43.102 requires pricing before execution “if this can be done without adversely affecting the interest of the Government” [emphasis added] but recognizes that this is not always possible and goes on to say “if a significant cost increase could result from a contract modification and time does not permit negotiation of a price, at least a maximum price shall be negotiated **unless impractical.**” [emphasis added]. The presence of these qualifiers in the FAR language implicitly recognizes that there are times when un-priced unilateral modifications can be issued.

FAR 43.204(a) specifically recognizes that “[w]hen change orders are not forward priced, they require two documents: the change order and a supplemental agreement reflecting the resulting equitable adjustment in the contract terms.” DFARS 217.7403 promulgates DoD policy that undefinitized contract actions can be used when the negotiation of a definitive contract action is not possible in time to meet the Government's requirements and it is in the Government's interest that the contractor be given a binding commitment so that contract performance can begin immediately.

The purpose and goal of these FAR requirements is to ensure that the work is clearly identified by the parties, properly performed, and that claims and disputes are avoided. Advance pricing and negotiation of modifications accomplishes these results. However, there are occasions, such as under the subject contract, when a negotiated final price is not possible because significant costs would be incurred for disruption and delay. As was the case on this contract, unilateral notices to proceed with a “not to exceed price” are necessary and proper. The modifications reflect that the notices to proceed were rendered in accordance with EFARS 17.7503(b), which now refers to FAR 43.102.

Both IR (in IR 03-16) and the DoD IG reviewed this allegation by Ms. Watts. The DoD IG Report (Attachment 4, p. 26) found that 33 contract modification documents did not have the contractor's signature although they were meant to be bilateral. The DOD IG stated that the modifications would be effective if signed by the Contracting Officer and the contractor performed in accordance with the bilateral modification indicating intent to be bound. The DOD IG did not find any documentation that would indicate the contractor failed to perform under the contract.

IR suggested a command action to address the issue of outstanding unsigned modifications. It suggested requiring reviews of Contracting Officer records and Ordering Officer Records every 12 months to ensure compliance with the terms of the contract and to generate a written record of the review for placement in the contract file.

On April 28, 2004, IR issued a report IR 04-14, *Follow-Up Service Contracts vs. Construction Contracts*. (Attachment 19). That report found that on April 14, 2004, that CT had selected an Agency Procurement Coordinator (APC) whose duties included conducting the suggested reviews and noted that a follow-up review would be conducted after the APC had been in the position long enough to have an opportunity to perform the review. The follow-up review by IR has not yet been conducted.

In sum, the modifications were in accordance with the FAR, DFARS, AFARS and EFARS. However, it was not possible to conform to FAR 43.102(b)'s stated **preference** for bilateral modifications in the present circumstances and doing so likely would have added significant costs for delay and impact during construction. In addition, Louisville District implemented IR's recommendations and appointed an APC.

Given this finding and actions taken, the District will await the results of the follow-up IR review before determining whether any further action is warranted on this allegation.

**4. On Contract Number DACW27-02-R-0004, neither the District's Source Selection Authority nor its Office of Counsel approved the source selection strategy or acquisition plan before publicly releasing the solicitation. Ms. Watts alleges that such omission violated FAR 15.303(b)(2), DFARS 215.303(b)(2), and AFARS 5115-303(b)(2)(b). She bases her allegations on the contract file's lack of documentation of such approval.**

This issue was first raised with Coonel Rowlette on August 16, 2002, when Ms. Christy Watts, Chief of Contracting, submitted to him a list of her concerns about contracting problems (Attachment 23).

DoD IG reviewed and substantiated this allegation. DoD IG noted that the Source Selection Authority (SSA) did not approve the source selection plans as required by FAR 15.3 until 3 months after Solicitation DACW27-02-R-0004 was issued on March 21, 2002. It should also be noted that not only did the SSA not approve the source selection plans as required before the solicitation, but also the legal office similarly did not review the plan until after the solicitation. (Attachment 23 a). The Source Selection Plan identified the SSA as Chief of the District Contracting Division, Ms. Watts. The DoD IG Report stated in its finding that:

[t]he SSA (the Chief of the District Contracting Division) has ultimate responsibility for approving the source selection plan before it is issued. Not approving the source selection plan was a technical oversight by the SSA, but it had no consequence in terms of the validity of the procurement. In the review of the contract files, we were unable to find any bid protest ever filed over a procedural oversight. However, the SSA should be familiar with the specific requirements of the FAR . . . and other selected members to ensure

that a source selection plan is prepared and approved prior to issuance of the solicitation. (Attachment 4, p. 27)

Given that Ms. Watts was the Chief of the District Contracting Division and the SSA, it ultimately was her responsibility to secure all required reviews and approvals (i.e., from the SSA and the legal office) before issuing the solicitation. When Ms. Watts originally raised the issue, her supervisor at the time, Lieutenant Colonel Richard Fagan, referred the matter back to Ms. Watts directing her to correct the problem. (Attachment 24).

The SSA is required to ensure that a source selection plan is prepared and approved prior to issuance of the solicitation. This did not occur in this instance. Since this was a matter of internal enforcement of proper contracting procedure on an individual procurement, the DoD IG report made no recommendation for change to agency or District policy.

Given this finding, no further review or action is warranted on this allegation.

**5. The District issued construction solicitations containing sole source items on Contract Number DACA27-02-B-1001 without following any of the required sole source procedures set forth in FAR 6.3, which governed that contract. She bases her allegation on the contract file's lack of documentation supporting the use of a sole source.**

The DoD IG investigated and substantiated this allegation. It reported:

[A] construction solicitation (DACA27-02-B-1001) was issued containing sole source items prior to that item(s) being synopsisized and a justification and approval approved. [(Attachment 25)] However, before the contract was awarded, District Contracting Division personnel discovered the sole source items included in the solicitation and took corrective action by issuing an amendment to the solicitation to delete the sole source items. [(Attachment 26)] The District Contracting Division issued Amendment No. 5 on September 4, 2002.

(Attachment 4, p. 27)

Given this finding, no further review or action is warranted on this allegation.

**6. The Total Environmental Restoration Contract Number DACA27-97-D-0015 was intentionally over-obligated on several task orders – specifically Task Orders 01, 10, 11 and 4005 for the Savanna Army Depot Activity, which exceeded \$3,000,000 – in order to reserve expiring funds for customers. Ms. Watts alleges that those actions, which are commonly referred to as “parking” or “banking” of funds, constitute an impermissible movement of funds because they are sham transactions. She further asserts that the task orders violated FAR Part 43, which governs contract**

**modifications, because they were made without first negotiating their scope and without the intent that the work would be completed at that time. (In its referral letter, the OSC forwarded the documents it received from Ms. Watts on this allegation, as Enclosure #1).**

The crux of Ms. Watts' allegation is that the District "parked" or "banked" expiring funds on a contract under a Task Order to illegally assist a customer in preventing the loss of these expiring funds.

All funds on the Task Orders in question are Base Realignment and Closure or "BRAC" funds that are non-expiring environmental restoration funds and are available until expended. This can be discerned from the fund citations that all contain an "x" to indicate a No Year appropriation, indicating they are available for obligation indefinitely. For example, the fund citations on page 3 of Task Order 1, Modification 000110 (also referred to as mod 10), that was included in Enclosure 1 to the allegation; all start with "97 NA X ....." Given that the funds at issue never would expire, it is illogical to argue that these monies were inappropriately obligated to save them against expiration. Therefore, money was not obligated on these task orders to reserve expiring funds. (Attachment 27).

Ms. Watts also mistakenly alleges that these Task Orders violate FAR Part 43. The contract in question is a cost reimbursable contract to which FAR 16.3 applies. Compliance with FAR 16.3, which was met on these Task Orders, assures compliance with FAR Part 43, to the extent FAR Part 43 applies to a Task Order.

A cost-reimbursement contract is used when uncertainties about performance do not allow a fixed price contract to be used (FAR 16.301-2); when the contractor has an adequate cost accounting system in place and the Government has enough oversight to ensure efficiency and cost reasonableness (FAR 16.301-3(a)); and when the total cost can be estimated for the purpose of obligating funds and to establish a "not to exceed" ceiling for the contractor. (FAR 16.301-01).

The Task Orders at issue identified a general scope of work and obligated funds based on a "cost to complete" estimate but no notice to proceed was given. As more information became available, individual modifications were negotiated identifying specific scopes of work related to particular facets of the cleanup efforts for which an estimated cost or a "not to exceed" cost could be negotiated.

The DoD IG reviewed the Total Environmental Restoration Contract including "solicitations, price negotiations memorandums, Government cost estimates, source selection plans, contract modifications, PR&Cs, task orders, ACO and ordering officer delegation of authority letters, and Individual Contracting Action Reports." They also interviewed contracting officers and procurement officials who were involved in the contract awards that were reviewed. (Attachment 4, page 16, and Appendix A). Because this contract was reviewed by the DoD IG and no further issues were raised in the report

regarding the TERC's administration, we can assume that there were no deficiencies or irregularities.

Therefore, there was no motivation for "parking" or "banking" of funds since they did not expire and the individual task orders met the requirements of FAR.

Given this finding, no further review or action is warranted on this allegation.

**7. Without exercising applicable options, the District issued new task orders on Contract Number DACA27-00-D-0002, an Architectural/Engineering (A/E) contract, that exceeded the value of the contract and that were outside the scope of the contract. She asserted that the contract file did not contain documents reflecting the executed options.**

**She also alleges that, based on her review of documents in the contract file, the District modified task orders that were already in place after the task order's period of performance had expired. She asserts that the District's actions violated required procedures for A/E contracts set forth in FAR 36, which implements the Brooks Act, the federal statute governing A/E contracts.**

Contract No. DACA27-00-D-0002 was not an A/E contract, but a design-build indefinite delivery/indefinite quantity (ID/IQ) construction contract awarded to Landmark Construction under the 8a Small Business program. (Attachment 28). The contractor defaulted and came under a nationwide investigation by Army Criminal Investigation Command and the Defense Criminal Investigative Service (that is working with the Department of Justice) for issues of fraud relating to its status as an 8a Small Business on numerous contracts nationwide. Most records related to this contract were turned over to investigators of these agencies and are unavailable to the District at this time for examination. (Attachment 29).

Since this is not an A/E contract as this allegation mistakenly concludes, there cannot possibly be a violation of FAR Part 36 or the Brooks Act, the federal statute governing A/E contracts.

The Corps has ascertained, based on the best available information, that the base period on the contract expired on June 30, 2001, that the option was not formally exercised and that there were Task Orders awarded outside the term of the base contract. It does not appear that the competition concerns under the Competition in Contracting Act (CICA), 41 United States Code 251 and 10 United States Code 2304, were properly addressed in this instance but it would be necessary to review the official procurement files after they are released by the criminal investigators before these facts could be definitively verified.

The instant controversy occurred just after Ms. Watts became the Chief of Contracting Division. However, this same type of issue arose again two years later in April 2002 on another contract while Ms. Watts still held the position as the Chief of the

Contracting Division. The District Counsel noted that this was a non-conformity under the District's Project Management Business Process and that there should be a system in place to ensure that options are exercised properly because of potential legal complications that may result. (Attachment 30). In January 2004, the Contracting Division initiated efforts to establish an electronic system to track options. This was after Ms. Watts was no longer in the position of Chief of Contracting Division. The system was put into service in April 2004.

The implementation of the electronic tracking system has resolved the non-conformity in the District's Management Business Process.

**8. The District awarded Contract Number DACA27-00-D-004 without price competition in violation of CICA and the FAR's guiding principles found in FAR 1.102(b). Specifically, she alleges the district treated that contract as if it were an A/E contract – where price quotations need not be considered during the selection process – when in fact, the primary scope of that contract was other than A/E services.**

The scope of work for the contract in question (note that the correct contract number is DAC27-00-D-0004, rather than DAC27-00-D-004 referenced in the OSC's referral letter) was determined by the Contracting Officer to be for A/E services and was awarded under the Brooks Act which is a competitive procedure under (FAR 6.102(d)(1)) and is consistent with the requirements of CICA.

The contract synopsis published in the Commerce Business Daily stated that this was a contract for Architect and Engineering Services in Support of Project Management for the Great Lakes and Ohio River Division's civil work's military, environmental, and other various project within the Louisville District Mission Boundaries, (Attachment 31). The selection criteria required proposing firms to submit resumes and qualifications for various personnel including engineers and scientists. (Attachment 32). Finally, during the negotiations for pricing the contractor submitted a schedule of pay rates for proposed staff that included engineers and architects. (Attachment 33).

The major scope of the work required by this contract included preparation and maintenance of project management plans and the development and maintenance of schedules for planning, construction and operation, and management of projects. It also included the collection and analysis of project information, cost estimating, and the production and maintenance of business processes as they relate to project management. All of these tasks fall under the definition of Architectural and Engineering Services as defined in 40 USC §1102 (2)(c), which states, "The term "architectural and engineering services" includes —

other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations,

comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

Almost identical language is used to define Architectural and Engineering services in FAR 36.601-4(a)(3).

The broad definition in the statute and regulation expands the contracting officer's discretion to determine which "related" or "incidental" services may be performed logically or justifiably by an A/E firm.

The statutory language quoted above (then 40 USC 541) was added to the statute in 1989, in response to what Congress felt was a narrowing of the scope of the Brooks Act by previous GAO definitions of A/E Services. In defining A/E services under the newly amended language the GAO advised that agencies should determine the applicability of the Brooks Act to other specific services not associated with a specific A/E project on cases by case basis. The GAO further advised that it would only review contracting officer determinations made on this issue under an abuse of discretion or bad faith standard. Forest Service, Department of Agriculture--Request for Advance Decision, B-233987, 89-2 CPD ¶ 47

The DoD IG Report, (Attachment 4, pp.13 and 28), stated the opinion that the contract, because it procured project management services, should not have been procured under the Brooks Act but did recognize that the procurement under the Brooks Act is considered a competitive acquisition and in compliance with CICA (FAR 6.102(d)(1)).

The District asserts that its use of the Brooks Act to procure construction management services is proper and supported by the above quoted language, of the amended Brooks Act, which broadens its definition of Architectural and Engineering Services. This position is supported by the GAO's interpretation of the new statutory definition in Forest Service, *supra*, wherein the Comptroller General opined:

[t]he revised definition now makes it clear that "incidental services" means types of services which are incidental to (part of) A-E services, and not, as we previously have held, incidental to an A-E project. The test to be applied in making this determination, then, is not whether the service is incidental to a traditional A-E project; rather, it is first, whether the service is the type which is incidental to professional services of an architectural or engineering nature, and if so, whether the service is one which members of the architectural and engineering profession may logically or justifiably perform.

Therefore, the contracting officer did not violate statute or regulations because he did not abuse his discretion or act in bad faith when determining that these services should be procured under the Brooks Act.

Given this finding, no further review or action is warranted on this allegation.

**9. The District violated DFAR 245 on Contract Number DACW27-97-D-0015 when Project Manager Gary Chisholm transferred a \$2,000,000 municipal well house and water supply wells to a local sponsor without authority to do so. (The OSC's referral letter included Enclosure #2 which contains documents provided to OSC by Ms. Watts pertaining to this allegation). Ms. Watts further asserts that the District did not have authorized personnel monitoring government furnished or contractor acquired property on Contract Number DACW27-97-D-0015, as required by FAR 45.5.**

Ms. Watts raised this issue in her August 16, 2002, memorandum to District Command. In response Colonel Rowlette instructed IR to conduct an audit to review District procedures regarding the monitoring of Government furnished property. On July 23, 2003, CELRL-IR issued IR 03-22, *Government Furnished Property*, and it specifically addresses this allegation. (Attachment 34).

The property in question, the well house and water supply wells, was never owned by the Department of Defense, but was always the property of the Township of Kinross. The Kinross Township well house and wells were on component of a DoD Formerly Used defense Sites (FUDS) remediation project. Because the project required improvements to the owner's property, the Project Manager, Mr. Gary Chisholm, became confused about how to handle returning the project to the control of Kinross Township and in May 2001, executed a Department of Defense Form 1354, Transfer and Acceptance of Military Real Property, which he thought transferred this property to the Township. Upon review, it was determined that this well house and wells was in fact Township property that had been under Corps control while they conducted a project solely for FUDS purposes; Mr. Chisholm was attempting to return control of the facility to the Township. (Attachment 35). The October 26, 2001, letter with attachments from the government's contractor, Montgomery-Watson-Harza, is the contractor's acknowledgement that responsibility for the facility had been returned to the Township.

Therefore, there was no improper transfer of Government property. There was a recommendation that a letter be sent to Kinross Township informing them that the FUDS project was complete, effectively accomplishing what Mr. Chisholm attempted to do with the DD 1354. (Attachment 36). IR 04-12, *Government Furnished Property*, April 28, 2004, was conducted as a follow-up to IR 03-22, and confirmed that the letter was sent on March 4, 2004. (Attachment 37).

The IR 03-22 also reviewed the District's procedures regarding monitoring of Government property. The report found that similar to other Districts, Louisville had

assigned this function to its Logistic Management Division. The report found that the District was fulfilling its mandatory reporting requirements on Government property for DoD by utilizing Contractor's submissions documenting their inventories of items purchased by the Contractors. (See FAR 45.500 et seq). In accordance with the recommendation of the IR review, Contracting Division now provides the Logistics Management Division with DD Form 1662, "DoD Property in the Custody of Contractors," that is submitted by contractors, thus allowing LM to track government furnished property. (Attachment 38).

The DoD IG report reviewed and unsubstantiated these allegations reaching the same conclusions as the internal audits. (DoD IG Report, Attachment 4, Page 27).

**10. Contract Number DACW27-02-C-0005, a design/build contract, violated EFARS 1180-1-9 ¶ 8c(1)(d), which requires that design/build contracts for civil works be 100% funded at the time of the award. Ms. Watts alleges that the contract file contains documents indicating that contract was funded incrementally, not fully at the time of its award.**

It should be stated that there is no EFARS (Engineer FAR Supplement) 1180-1-9. Rather, we believe that this allegation refers to Engineer Regulation 1180-1-9 or ER 1180-1-9, available at <http://www.usace.army.mil/inet/usace-docs/eng-regs/er1180-1-9/toc.htm>. This distinction is important because the EFARS are procurement regulations promulgated under the authority of FAR 1.3, which is in turn promulgated under the authority of the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400), as amended by Pub. L. 96-83. Engineer Regulations are not derived from statutory authority, but are internal agency regulations and guidance.

This contract for the Miter Gate Storage Facility is a part of the overall Olmsted Lock and Dam Project (WRDA 1988, Section 3(a)(6)) that is incrementally funded. (Attachment 39). Since this is a water resource project specifically adopted by Congress, EFARS 32.705-100(a) requires use of the approved Continuing Contracts Clause at EFARS 52.232-5001 in all contracts for all specifically authorized civil works projects that will be executed using continuing contracts. That clause notes that the use of continuing contracts is directly authorized by the Rivers and Harbors Act of 1922, as codified in 33 USC 621 for this effort. In addition, Section 206(b) of WRDA 1999, codified at 33 U.S.C. 2331, also mandates of use continuing contracts in this type of situation. (Attachment 40).

ER 1180-1-9 8c(1) identifies five requirements for civil works design build projects with the fourth one being that "full funding is available for the design-build contract at the time the contract is awarded."

Full funding as contemplated by the ER was not in place when this contract was awarded. The Contracting Officer included the Continuing Contracts Clause as required by EFARS 32.705-100. Based on this authority the contract was incrementally funded.

The DoD IG investigated this allegation and found that the required Continuing Contracts Clause (EFARS 52.232-5001) conflicts with ER 1180-1-9 8c(1)(c), (Attachment 4, p. 28), but that the District was in compliance with the EFARS regulations regarding Continuing Contracts. (Attachment 4, p.13). The District concurs that the ER guidance is not consistent with the authority granted by Congress and implemented by EFARS to use incremental funding on authorized civil works projects. In fact, it simply does not recognize the clear authority of the Corps to execute civil works contracts without fully funding them (*i.e.*, by using continuing contracts). The DoD IG found that the District was in compliance with the EFARS regulations regarding continuing contracts. (Attachment 4, p.13). Therefore, Corps acknowledges that while it did not fully fund the contract at time of award in violation of ER 1180-1-9, because of the greater authority accorded to the statutorily derived EFARS (as well as 33 U.S.C. 2331) and recognizing the intent of the ER, the Corps acted within its authority in incrementally funding this design-build contract. The District is making efforts to have USACE review the internal COE issued ER policy for consistency with the Corps' Congressionally-authorized funding process that is based on statute and the EFARS. (See Attachment 40a, regarding discussion on Finding B, specifically Finding B.2. on page 3).

Though the Corps was in compliance under the requirements in place at that time for the subject contract, there are currently several legislative proposals from the House, Senate and the Administration's budget that may change this area of the law.

**11. The District does not have written contracts for utility services, in violation of FAR 41.201(b), 41.202 and 41.205. She also alleges that it does not have written contracts for local or long distance telephone service or wireless communication services such as cellular telephones, pagers, and personal data assistants, as required by FAR 37.101 and FAR 39.1 for information technology services. As the District Contracting Division Chief, Ms. Watts asserts that she would have known if written contracts existed.**

Regarding Utility Services:

Ms. Watts raised the concern to Colonel Rowlette, the District Commander, in January-February 2002, that a lack of written utility contracts was a potential violation of FAR Part 41. In February 2002, Colonel Rowlette assembled a team to determine the proper acquisition procedures in accordance with FAR and ensure that the District was in compliance.

The District acquires utilities for approximately a thousand locations across a five state area under four different sets of circumstances. The first is for its office space in the Federal Building, which is leased from GSA with utilities included. The second is for its Construction Division (CD) field offices on military installations where the installation deals with the utility provider. The third is approximately sixty Operations Division (OP) field offices related to our civil works functions. The fourth is the approximately nine hundred locations (e.g. recruiting stations, etc.) requiring utility service that are presently being leased by the Real Estate Division (RE) for military customers.

There was no concern with the acquisition of utilities associated with the District offices, with CD offices on military installations, or where the utilities are acquired under area wide service contracts administered by GSA.

The concern was related to the acquisition of utilities at the Operations Division field offices and the Real Estate Division locations leased for military customers where utility services were being purchased month to month. The annual expenditure at each location for utility purchases falls under the simplified acquisition threshold (SAT) of one hundred thousand dollars and in most cases under the micro-purchase threshold of two thousand five hundred dollars. Many of these facilities are in locations where there is only one regulated provider; in others there are multiple providers so competition needs to be considered.

Guidance for utility acquisition is contained in FAR Part 41. Part 41 supersedes earlier guidance contained in FAR Part 8.3 and in particular for the Army, it supersedes Armed Services Procurement Regulations, Supp. No. 5. The corresponding supplemental guidance to Part 41 is contained in DFARS Part 241.

An earlier version of FAR 8.3, which eventually became FAR Part 41, specifically noted at FAR 8.302 that it only applied to acquisition of utility services costing \$10,000 or more. Additionally, at FAR 8.304-5, Agency Acquisition, stated that it did not apply to DoD and that DoD was to proceed in accordance with Agency procedures. This section also noted that one of the requirements for a bilateral written contract was that the annual cost of service exceeds the small purchase limitation in Part 13. This section is mentioned only to note a connection between bilateral contract requirements and the small purchase limit, which is now the simplified acquisition threshold (SAT) defined at FAR 2.101 as \$100,000.

Under FAR 41.103, the DOD is a delegated agency meaning that it has authority from GSA to contract for utility services for periods not exceeding ten years.

FAR 41.201(a), "Policy," notes that it is the policy of the Federal Government that agencies obtain required utility services from sources of supply which are most advantageous to the Government in terms of economy, efficiency, reliability, or service. Subparagraph (b) notes that acquisitions above the simplified acquisition threshold require a bilateral written contract. This implies that acquisitions at or below the SAT do not require a bilateral written contract.

Also, under DFARS, the Corps may use a month-to-month utility services contract when it is in the Government's best interest. (DFARS 241.101 and 241.205)

Therefore, acquisitions of utility services at or below the simplified acquisition threshold do not require a bilateral written contract. These services can be acquired under FAR Part 13 under simplified acquisition procedures; some even fall under the micro-

purchase threshold, both defined at FAR 2.101 In addition, DFARS 241 recognizes an indefinite term month-to-month utility contract.

Based on this analysis, the District team, which consisted of members from Internal Review, Office of Counsel and Contracting Division, concluded that previous acquisitions that did not have a bilateral contract were not in violation of regulations. The team determined that following minimum procedures to annually survey the market to determine if there was more than one provider and to obtain the best price and having an authorized individual ordering the utilities met the requirements. This was determined to be protective of the Government's interest.

The utility acquisitions and procedures are in conformance with FAR and DFARS regulations. Given these findings, no further review or action is warranted on this allegation.

Regarding local or long distance telephone service or wireless communication services such as cellular telephones, pagers, and personal data assistants:

Attached is a spreadsheet for the local and long distance telephone service and a spreadsheet for the wireless communication services. (Attachment 41). These show that contracts are in place for these services except when the value of the service falls below the \$2,500 threshold and qualifies as a micro purchase on the Government VISA card. In those cases, the service is identified with an account number and the bill is paid monthly by credit card. The only account that is not reflected on the spreadsheets is long distance service from MCI that is provided by FTS2001 through a GSA contract.

Given these findings, no further review or action is warranted on this allegation.

### **LISTING OF VIOLATIONS OF LAW AND CORRECTIVE ACTIONS TAKEN OR PLANNED**

A summary of the alleged violations and any corrective actions that have been found as necessary are noted below.

Allegation 1: This allegation is not substantiated. Ms. Watts alleged that Louisville District failed to amend the solicitation No. DACW27-03-R003, following a reduction of available funding. Ms. Watts alleges this was a violation of FAR 15.206. The available funds were reduced following award of the contract; therefore, modification of the solicitation was impossible. Additionally, even in the event that the reduction in funds occurred before award, this reduction did not alter the requirements or terms and conditions of the contract as contemplated by FAR 15.206. In addition, since the reprogramming action occurred after award, FAR 15.404-1(d) was not violated. This allegation was not made known to the District until it was raised by the OSC complaint. Because no violation was found, no further review or corrective action needs to be taken.

Allegation 2: This allegation was not substantiated. Ms. Watts alleged that ACO authority was improperly issued on contract No. DACA27-01-D-2002, a service contract. Ms. Watts alleged that delegation of ACO authority on a service contract is a violation of EFARS 1.602-1-100. IR conducted a review of this issue and found that no ACO authority was issued on this contract. However, IR did find one instance of an improper delegation on another service contract and six instances where change orders were made by personnel that exceeded their authority. IR made two recommended command actions (Attachment 16, pp. 5-6). IR performed a Follow up review and concluded that these command actions were undertaken (Attachment 19, pp 2-3). The DoD IG audited this issue and confirmed the findings made by IR. Following these reviews, the District is now in compliance with FAR 1.602-1-100.

Allegation 3: This allegation is not substantiated. Ms. Watts alleged that the District violated FAR 43.102(b) by not negotiating or finalizing contract modifications before the contractor performed the work on Contract No. DACA27-99-C-0050. Review by the District determined that there was no violation of this regulation. In addition, the DoD IG found that there was no evidence that the contractor failed to perform on these modifications.

Allegation 4: This allegation was substantiated. Ms. Watts alleged that the District violated FAR 15.303(b)(2), DFARS 215.303(b)(2) and AFARS 5115 303(b)(2) when it failed to include the Source Selection Authority and Office of Counsel approval before releasing a solicitation or Contract No. DACW27-02-R-0004. This issue was recognized as a failure to follow clear guidance and this failure was attributed to the Chief of Contracting, Ms. Watts. As the regulations and guidance were clear on this matter, no corrective policy was implemented. Ms. Watts was instructed to conduct the source selection process according to regulations.

Allegation 5: This allegation is unsubstantiated. Ms. Watts alleged that the District violated FAR Subpart 6.3 by not following proper sole source procedures. This allegation was reviewed by the DoD-IG and was found to have no basis. Therefore no further action was undertaken.

Allegation 6: This allegation is unsubstantiated. Ms. Watts alleged that the District illegally "parked" money on a Total Environmental Restoration Contract to in order to save expiring funds in violation of the Anti-Deficiency Act, 31 USC 1341. In addition Ms. Watts also alleged a violation of FAR Part 43, which requires pre-negotiation of modifications. No violation of statute was found because money appropriated for this contract was non-expiring funds, there was no "parking" of money in violation of the statute. No violation of regulation was found because the TERC is a cost-reimbursable contract to which Part 43 does not apply.

Allegation 7: This allegation is partially substantiated. Ms. Watts alleges that the District violated Brooks Act 40 USC 1104 by modifying Contract No. DACA27-00D-0002 and exceeded its scope. In addition, contract options were executed after expiration of the option period. The contract in question was not subject to the Brooks Act;

therefore, there was no violation of 40 USC 1104. Accordingly, this confusion on the part of Ms. Watts undermines her allegation that the modification exceeded scope or the value of the contract. It is however, believed that options were executed after their expiration. The District has since instituted an electronic system to monitor all contracts and give notice on expiring option periods.

Allegation 8: This allegation was unsubstantiated. Ms. Watts alleged that the District violated FAR 1.102(b) by utilizing an Architect/ Engineering contracting method (the Brooks Act) to procure services in violation of the Competition of Contract Act on Contract No. DACA27-00-D-0004. (Note, the correct reference to the subject contract is DACA27-00-D-0004, not DACA27-00-D-004 as referenced in the OSC referral letter). The Contracting Officer determined that the scope of work for the contract was for A/E services. Upon review, the District determined that the procurement of construction management services was appropriate under the Brooks Act. In addition, as noted by the DoD IG, procurement under the Brooks Act is a competitive procedure (*see* FAR 6.102(d)(1)) and is consistent with the requirements of CICA.

Allegation 9: This allegation is not substantiated. Ms. Watts has alleged that on Contract No. DACW27-97-D-0015, the District improperly transferred property to a municipality without proper authority. In addition, Ms. Watts alleges a violation of FAR Subpart 45.5 stating that the District did not have proper management of government property. In the first instance it was determined that the property in question was not owned by the Government and therefore was not improperly transferred. In the second instance, the District was in compliance with its monitoring of Government property, but in response to Ms. Watts's concerns and IR recommendations, the District set up a system of coordination for monitoring government property between Contracting and Logistics (Attachment 38).

Allegation 10: This allegation is partially substantiated. Ms. Watt alleges that the District violated ER 1180-1-9 ¶ 8c (1) (d) which requires all design/build contracts for civil works projects be fully funded at time of award. The Corps acknowledges that it did not fully fund the contract at time of award in violation of ER 1180-1-9 but because of the greater authority accorded to the statutorily derived EFARS, the Corps has acted within its authority in incrementally funding this design-build contract. The internally issued COE ER guidance is in conflict with the EFARS and the law. This conflict is being addressed at Headquarters USACE level. (Attachment 42, p. 7).

Allegation 11: This allegation is unsubstantiated. Ms. Watts alleges that the District is in violation of FAR 41.201(b), 41.202, and 41.205 by not having written contracts for utility services. In addition, she alleges that the District has no contract for wireless communications or long distance service as required by Far 37.101 and FAR part 39.1. The District has in place signed letters authorizing utility purchases in accordance with FAR part 41 and DFARS part 241. In addition, the District has a contract in place for wireless communications and long distance service in compliance with regulations.

## CONCLUSION

I have reviewed the report, as has the Army OGC. That review indicates that the investigation was conducted by the USACE and its subordinate activities in a thorough, fair and impartial fashion. I believe that the Department of the Army has appropriately addressed the myriad of issues that comprised the allegations in the subject OSC request for investigation. The Department takes very seriously its responsibilities in addressing matters brought to its attention by the OSC in a timely, thorough and deliberative manner.

Based upon the results of the present investigation and the past reviews and investigations, the eleven allegations raised by Ms. Watts are considered resolved by the Department of the Army. Allegation Nos. 1, 2, 3, 5, 6, 8, 9, and 11 were found to be unsubstantiated.

Allegation 4, failure to obtain Source Selection Authority and Office of Counsel approval of a solicitation before advertisement (as required by the EFARS), were substantiated, but was identified as an isolated occurrence and therefore, considered de minimis in nature.

Allegation 7 (exercising contract options timely) was partially substantiated but the matter has been resolved through the use of an electronic monitoring system. Though a problem of potential significance the facts did not disclose that this was widespread or that the actions undermined the competitive process, therefore, it is also considered de minimis in nature.

Allegation 10 identified a conflict between the internally issued COE ER policy guidance (issued by the USACE contracting and engineering communities) with the EFARS and the law. The Headquarters (USACE) is addressing the conflict. Nevertheless, the action in question was authorized. Design-build civil works contracts of this nature are uncommon, so this is considered a minor infraction of a regulation on an infrequent procurement.

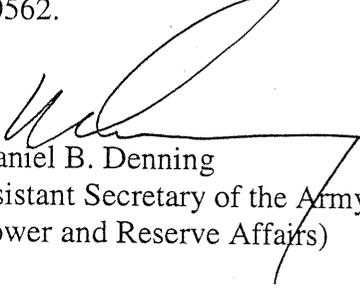
As a final comment, it should be recognized that the Louisville District awards contracts with annual values totaling between \$400 million and several billion dollars. These awards consist literally of thousands of contract actions. In the few instances where Ms. Watts' allegations have any foundation, the District has moved diligently to correct the identified problems.

The Army recognizes that irregularities in procurement can occur, and actively seeks to identify and correct problems. With respect to the Louisville District procurement program, for many years it has had an ongoing internal review program that requires Division Chiefs to identify any issues, including procurement matters that require investigation or audit. Ms. Watts made use of this program and the District responded by conducting reviews and taking corrective action regarding contracting procedures. Ms. Watts' insistence on representing that the District's contracting functions are irregular and non-compliant is grossly overstated when compared against the scale of

the District's mission, and the reality of the District's continuing efforts to correct problems when identified. Because the foregoing allegations fail to show that the District did not address problems when identified, Ms. Watts' allegations have failed to show systemic failure to comply with proper procedures and regulations.

There is no criminal violation inquiry referral to the Attorney General pursuant to 5 USC 1213(d)(5)(d).

Therefore, on the basis of this Report, the Army does not plan to take any further action regarding this matter other than those actions noted above. This letter and enclosures are submitted in satisfaction of my responsibilities under 5 USC 1213(c) and (d). Please direct any questions you have concerning the conduct of this investigation to Ms. Cassandra Tsintolas Johnson, at 703-695-0562.



Daniel B. Denning  
Acting Assistant Secretary of the Army  
(Manpower and Reserve Affairs)

Enclosures



S E C R E T A R Y O F T H E A R M Y  
W A S H I N G T O N



29 JAN 2005

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (MANPOWER  
AND RESERVE AFFAIRS)

SUBJECT: Delegation of Authority Under Title 5, Sections 1213 (c) and (d)

In accordance with Title 10, United States Code, section 3013(f), I hereby delegate to you certain authority conferred upon me as agency head under Title 5, United States Code, section 1213. Specifically you are authorized to review, sign and submit written reports of investigations of information and related matters transmitted to the Department of the Army by The Special Counsel, in accordance with Title 5, United States Code, sections 1213(c) and (d). The authority delegated herein may not be further subdelegated.

This delegation shall remain in effect for three years from the date of the execution, unless earlier rescinded in writing by me.



Francis J. Harvey

CF:  
Acting General Counsel