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**Analysis of Disclosures, Agency Investigation and Report, Whistleblower Comments, and
Comments of the Special Counsel**

OSC File No. DI-03-0750

Summary

Christy Watts, former Contracting Division Chief, Department of the Army, U.S. Army Corps of Engineers (USACE), Great Lakes and Ohio River Division, Louisville District (the District) disclosed to the Office of Special Counsel (OSC) multiple violations of federal contracting laws, rules, and regulations in connection with several Louisville District contracts.

The USACE Office of Chief Counsel investigated Ms. Watts's allegations and substantiated them in part. The Office of Chief Counsel found that several of these allegations had been previously investigated by Internal Review (IR) or the Department of Defense (DOD) Office of Inspector General (OIG), and, when warranted, USACE had already taken appropriate corrective action.

The Whistleblower's Disclosures

Ms. Watts is the former Contracting Division Chief at USACE's Great Lakes and Ohio River Division, Louisville District. She has over 18 years of experience in the field of federal contracting. During her 12 years with USACE, Ms. Watts served as Contracting Division Chief in its South Atlantic Division, Charleston District, from March 1992 to June 1998; its Pacific Ocean Division, Alaska District, from June 1998 to June 2001; and its Ohio River Division, Louisville District, from June 2001 to May 2004.

Ms. Watts alleged that, in the normal course of performing her Contracting Division Chief duties, she reviewed contract files and discovered administrative anomalies (e.g., the absence of required documents) and other indicia of the District's violation of federal contracting laws, rules, and regulations. She 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), the Chief Financial Officers Act of 1990 (CFOA) (31 U.S.C. § 901 *et seq.*), the Competition in Contracting Act (CICA) (10 U.S.C. § 2304), and the Brooks Act (40 U.S.C. § 541 *et seq.*). On three separate occasions between June 2001 and January 2003, Ms. Watts brought her concerns to Colonel Robert A. Rowlette, Louisville District Commander. However, Ms. Watts stated that Col. Rowlette did not take any action.

In OSC's letter referring Ms. Watts's allegations to the Secretary of the Army, OSC enumerated 11 specific allegations for investigation. These allegations are described in the following section, along with the findings of the agency investigation.

Department of the Army's Investigation and Report

1. Ms. Watts alleged that 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 \$12.5 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 is required by FAR 15.206. Furthermore, 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 15.305A(a)(1), or to conduct a meaningful cost realism analysis, as required by FAR 15.404-1(d), prior to awarding that contract.

The agency report concludes that the District did not violate either FAR 15.206 or FAR 15.404-1 (d) in connection with Contract No. DACW27-03-R-003. The report explains that FAR 15.206 requires the government to amend a solicitation when there is a change in requirements, terms or conditions either before or after receipt of proposals. In the instant situation, however, a contract had already been awarded at the time the funds were reprogrammed from \$15 million to \$12.5 million; therefore, FAR 15.206 did not apply because there was no longer a solicitation in place to be amended. The report further advises that another reason FAR 15.206 did not apply is that the reprogramming of funds did not alter the requirements, terms or conditions of Contract No. DACW27-03-R-003. The investigators also found that the proposals were properly evaluated in accordance with the source selection criteria in the solicitation and the "cost realism" criteria set forth in FAR 15.404-1 (d), and that the post-award reprogramming of funds did not have any impact upon this process.

2. Ms. Watts alleged that District contracting officers delegated Administrative Contracting Officer (ACO) authority on Contract No. DACA27-01-D-0002, a *service* contract. According to Ms. Watts, the delegation of ACO authority on that contract violated EFARS 1.602-1-100, which restricts the delegation of ACO authority to *construction* contracts.

According to the agency report, Ms. Watts previously raised this issue with Col. Rowlette, in September 2002. At Col. Rowlette's request, Internal Review investigated the matter and issued a report on September 8, 2003, entitled IR 03-16 *Service Contracts versus Construction Contracts*. Internal Review concluded that District contracting officers did not violate EFARS 1.602-1-100 because they did not actually delegate ACO authority on Contract No. DACA27-01-D-0002.

However, as part of the investigation, Internal Review also evaluated other service contracts and found that ACO authority had been improperly delegated on another service contract, DACA27-98-D-0001. In response, Internal Review recommended that the agency re-issue guidance from the Office of the Chief of Contracting to contracting personnel regarding the proper authority for modifications on service contracts. Internal Review also recommended that contracting officers review contract records every 12 months to ensure compliance with the terms of the contract. A follow-up investigation in April 2004 confirmed that the Contracting Division was implementing the recommendations.

3. Ms. Watts alleged that the District issued 90 impermissible unilateral contract modifications totaling approximately \$25 million on Contract No. 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.

The report states that, for Contract No. DACA27-99-C-0050, the contractor encountered problems during performance, so it became necessary for the District to quickly issue 118 contract modifications to redesign the work. Although FAR 43.102(b) does express a preference for pricing before execution, it also recognizes that this is not always possible nor practical. The report advises that it was not possible to negotiate a final price for all of the modifications issued under Contract No. DACA27-99-C-0050 because the agency would have incurred significant costs for disruption and delay. Thus, the report concludes that the District's decision to issue unilateral notices to proceed with "not to exceed price" clauses was necessary and proper under the circumstances and that it was in accordance with EFARS 17.7503(b).

4. Ms. Watts alleged that, on Contract No. 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 the solicitation was publicly released. Ms. Watts alleged that this omission violated FAR 15.303(b)(2), DFARS 215.303(b)(2), and AFARS 5115-303(b)(2)(b).

After Ms. Watts reported this matter to Col. Rowlette on August 16, 2002, the DOD OIG investigated the allegation. The DOD OIG substantiated Ms. Watts's allegation, finding that neither the Source Selection Authority nor the legal office approved the source selection plans before the solicitation was issued. However, the DOD OIG found that the Source Selection Authority for this contract was actually Ms. Watts herself, and, therefore, she had the ultimate responsibility for approving the source selection plan. Consequently, when Ms. Watts originally raised this issue, her supervisor at the time, Lt. Col. Richard Fagan, referred the matter back to her to correct the problem.

5. Ms. Watts alleged that the District issued construction solicitations containing sole source items on Contract No. DACA27-02-B-1001 without following any of the required sole source procedures set forth in FAR 6.3.

The report states that the DOD OIG previously investigated this allegation. The DOD OIG substantiated the allegation, finding that the contract did contain sole source items for which a sole source justification had not yet been approved. The DOD OIG also found that the District Contracting Division discovered the problem and subsequently corrected it by issuing an amendment to the solicitation to delete the sole source items from the contract.

6. Ms. Watts alleged that the District intentionally over-obligated several task orders on Contract No. DACA27-97-D-0015 -- specifically Task Orders 01, 10, 11, and 4005 for the Savanna Army Depot Activity project, 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" 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 the District issued them without first negotiating their scope and without intending that the work be completed at that time.

The investigation found that all funds on the task orders in question were Base Realignment and Closure funds, which are non-expiring funds that are available until expended. Thus, it is unlikely that the District "banked" or "parked" these funds to prevent expiration, as they never expire. The report also concludes that the task orders did not violate FAR Part 43. The report explains that Contract No. DACA27-97-D-0015 was a cost-reimbursable contract, instead of a fixed-price contract, thus, FAR 16.3 applies instead of FAR Part 43. The investigation found that the contract met the requirements of FAR 16.3.

7. Ms. Watts alleged that, without exercising applicable options, the District issued new task orders on Contract No. 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 also alleged that the District modified other task orders after their period of performance had expired. She asserted that the District's actions violated procedures set forth in FAR 36, which implements the Brooks Act, the federal statute governing A/E contracts.

The report states that Contract No. DACA27-00-D-0002 was not an A/E contract, but instead was a design-build indefinite delivery/indefinite quantity construction contract. Therefore, the District did not violate FAR Part 36 or the Brooks Act, as neither one applied to this contract. However, the investigation did find other problems with the contract. Specifically, the investigators found that the District did not formally exercise the option on the contract, the District awarded task orders outside the term of the base contract, and, based on available information, it appears that the District most likely did not properly address competition concerns under the CICA. The report states that, in April 2004, the District took corrective action to prevent similar problems from arising in the future by implementing an electronic system for tracking options.

8. Ms. Watts alleged that the District awarded Contract No. DACA27-00-D-0004 without price competition in violation of CICA and the FAR's guiding principles found in FAR 1.102(b). Specifically, she alleged that the District treated the 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.

According to the agency report, the contracting officer properly determined that the scope of work for Contract No. DACA27-00-D-0004 was for A/E services. The report explains that most of the work covered by the contract included tasks that fall within the definition of A/E services set forth at 40 U.S.C. § 1102(2)(c) and FAR § 36.601-4(a)(3). Thus, the agency concluded that it was proper for the contracting officer to award the contract under the Brooks Act, without price competition.

9. Ms. Watts alleged that Project Manager Gary Chisolm violated DFARS 245 on Contract No. DACW27-97-D-0015 when he transferred a \$2,000,000 municipal well house and water supply wells to a local sponsor without authority to do so. She further asserted that the District did not assign personnel to monitor government-furnished or contractor-acquired property on Contract No. DACW27-97-D-0015, as required by FAR 45.5.

According to the agency report, Ms. Watts previously raised this issue with District Command in August 2002. In response, Internal Review conducted an audit to review the District's procedures for monitoring government-furnished property, and it issued a report, IR -3-22, *Government Furnished Property*, on July 23, 2003. Internal Review found that the well house and the water supply wells never belonged to the federal government, but had always remained the property of the Township of Kinross. Thus, Internal Review did not find any evidence that government property had been improperly transferred. Internal Review found that the District satisfied mandatory reporting requirements on government property, but recommended that it start using DD Form 1662, "DOD Property in the Custody of Contractors," to track government-furnished property.

10. Ms. Watts alleged that Contract No. DACW27-02-C-0005, a design/build contract, violated Engineering Regulation 1180-1-9, ¶ 8c(1)(d), which provides that design/build contracts for civil works must be 100% funded at the time of the award. Ms. Watts alleged that the contract file contains documents indicating that contract was funded incrementally, not fully, at the time of its award.

The investigation confirmed that Contract No. DACW27-02-C-0005 was not fully funded at the time of award, in violation of ER 1180-1-9, ¶ 8c(1)(d). Nevertheless, the report states that this regulation contradicts the Continuing Contracts Clause, EFARS 52.232-5001, which was properly included in Contract No. DACW27-02-C-0005. The Continuing Contracts Clause notes that the Rivers and Harbors Act of 1922, 33 U.S.C. 621, allows for the use of continuing contracts to fund civil works projects incrementally. The report concludes that the EFARS, which is statutorily derived, has greater authority than the Engineering Regulations, which are internal agency regulations and guidance. Thus, the report concludes that the District acted within its authority when it funded this contract incrementally.

11. Ms. Watts alleged that the District does not have written contracts for utility services, in violation of FAR 41.201(b), 41.202, and 41.205. She also alleged 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.

According to the agency report, Ms. Watts raised this matter with Col. Rowlette. In response, Col. Rowlette assembled a team to examine the issue. The team found that the District's utility acquisitions and procedures were in compliance with the FAR and DFARS. The report explains that FAR Part 41 only requires that an agency enter into a bilateral contract for utility services when the amount of the contract is greater than the simplified acquisition threshold of \$100,000. Here, the contracts in question were for lesser amounts. In addition, DFARS 241.101 and 241.205 authorize the use of month-to-month utility services when it is in the government's best interest. The team also found that the local and long distance telephone services and wireless communication services were all covered by contract, except in those instances when the value of the service was less than the micro-purchase threshold of \$2500. For those services falling under the micro-purchase threshold, the District used government credit cards to pay the monthly balance, as authorized by the FAR.

The Whistleblower's Comments

Ms. Watts commented on the agency report. She stated that, because her allegations involved complex procurement issues, she does not believe the investigators adequately understood the relevant concepts. Ms. Watts asserted that "a true procurement professional, outside the Corps of Engineers," would have substantiated all of her allegations. Ms. Watts offered three recommendations to address what she perceives to be USACE's habitual contracting problems. First, she recommended that USACE undergo "a serious and thorough review of [its] current contracting practices by true contracting professionals outside the Corps of Engineers." She next suggested that USACE merge its contracting offices with those of the Army Contracting Command and that it establish a contracting review process independent from USACE leadership. Lastly, Ms. Watts recommended that USACE remove contracting officers from "the undue influence" of USACE commanders.

Conclusion

Based on the representations made in the agency report and Ms. Watts's comments, I have determined that the agency report contains all of the information required by statute and the findings appear to be reasonable.