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OFFICE OF THE GENERAL COUNSEL  
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JUL 22 2013

Ms. Catherine A. McMullen  
Chief, Disclosure Unit  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

Re: Third Supplemental Army Submission--  
Whistleblower Investigation—Intelligence and  
Security Command (INSCOM), Fort Belvoir,  
Virginia (Office of Special Counsel File Number  
DI-11-2122)

Dear Ms. McMullen,

The following information is provided in response to your most recent request of June 11, 2013 for an update on the Department of the Army actions taken after the submission of its Army narrative report dated December 16, 2011. In particular, you were interested in the Army's determination with respect to the alleged potential Antideficiency Act (ADA) violations that were addressed in its December 16, 2011 report and any disciplinary actions that were taken as a result of the Army's investigation into the referred Office of Special Counsel (OSC) allegations.

As you may recall, on May 26, 2011, the Office of Special Counsel forwarded allegations to the Secretary of the Army that there existed the likelihood that INSCOM personnel had engaged in conduct that may constitute violations of law, rule, or regulation, gross mismanagement, and a gross waste of funds. Pursuant to that referral, the Secretary of the Army forwarded those allegations to the Deputy Chief of Staff, G-2, Lieutenant General (LTG) Richard P. Zahner to investigate the matter. LTG Zahner appointed as the Investigating Officer (IO), Ms. Lynn Schnurr, a member of the Defense Intelligence Senior Executive Service (DISES), to conduct an investigation pursuant to Army Regulation (AR) 15-6 into the allegations that INSCOM contracting activities had committed waste, fraud and abuse and violations of the Anti-Deficiency Act (ADA). Ms. Schnurr's very detailed report was concluded in November 2011 and made specific findings and recommendations. It formed the basis for the Army's narrative report submission to OSC.

On December 1, 2011, LTG Zahner, as the AR 15-6 Approving and Approval Official, informed INSCOM that he had approved Ms. Schnurr's AR 15-6 report and accepted all of her findings and recommendations. He forwarded to the Commanding General, INSCOM, a copy of the AR 15-6 Report of Investigation and a memorandum dated December 1, 2011 directing her to implement the IO's recommendations. LTG Zahner directed that the INSCOM Commander to take several immediate actions, including submitting a "flash report" to the Assistant Secretary of the Army (Financial Management & Comptroller) (ASA FM&C) regarding possible ADA violations.

The initiation of a “flash report” triggered an investigation by INSCOM into the potential violation of the Antideficiency Act that was to be conducted in accordance with the DoD Financial Management Regulation (FMR) and the applicable Defense Finance and Accounting Service regulation (DFAS-IN 37-1).

A flash report concerning potential ADA violations was provided to the ASA FM&C on January 6, 2012. ASA FM&C acknowledged the report and provided additional guidance and direction. Mr. Jeffrey Willey, another DISES, was subsequently appointed to conduct a preliminary inquiry to determine if any ADA violation(s) had occurred. Mr. Willey’s inquiry, concluded in July 2012, determined that no ADA violations had occurred. ASA FM&C ultimately agreed with the INSCOM investigation and determination that no ADA violation had occurred, closed the case, and in its correspondence dated October 16, 2012, informed the INSCOM Commander to this effect.

I will provide a brief summary of the ADA process that is followed within Department of the Defense (DoD) and was applicable to the instant Army actions regarding the allegations of potential ADA violations. For purposes of this supplemental report, I am enclosing the ADA Preliminary Investigation report and the Executive Summary which were prepared by Mr. Willey, both dated July 17, 2012, as well as the ASA FM&C’s closure memorandum, dated October 16, 2012.

Further, independent of the ADA process, the AR 15-6 report provided the basis for considering whether any disciplinary action was warranted against any INSCOM officials based on the underlying conduct. The results of this inquiry will be presented below as well.

## **DISCUSSION OF ADA RELATED MATTERS**

### **BACKGROUND**

LTG Zahner directed that the INSCOM Commander to take several immediate actions, including submitting a “flash report” to the ASA FM&C regarding possible ADA violations which triggered an investigation into the potential violation of the ADA that would be conducted in accordance with the DoD Financial Management Regulation (FMR) and the applicable Defense Finance and Accounting Service regulation (DFAS-IN 37-1). The following steps reflect the rigor with which alleged potential ADA violations are investigated by DoD activities. Also, given the ultimate result of the Army’s preliminary investigation (a finding of no ADA violation), not all of the steps that comprise the DoD ADA process for investigation into potential ADA violations will be described below since there was no need to include a description of all of the process steps when a finding of no ADA violation occurs. (Note, for ease of reference, the complete DoD ADA Process was more fully summarized in the Army’s narrative report and only the relevant portions to our current status update are provided in this supplemental report).

Within the Department of Defense, the investigation of a potential ADA violation is conducted pursuant to DoD Financial Management Regulations (DOD FMR), Volume 14,

principally Chapters 2, 3, 4, 5 and 7.<sup>1</sup> Depending on the complexity of the facts and circumstances of the subject investigation, this process often takes 6 – 12 months or more to complete. What follows is a description of the process that is used to determine if an ADA violation did in fact occur and the corrective actions that follow from such a finding. Based on LTG Zahner’s referral of the AR 15-6 ROI to the Commanding General, INSCOM, with direction to initiate a “flash report,” the DoD ADA process was invoked and the following sequence of steps did in fact occur. They are described generally below:

Generally, an ADA violation may occur from various circumstances. Inadequate supervisory involvement and oversight along with a lack of appropriate training are common throughout most DoD ADA violations. Therefore, supervisors of DoD personnel who have responsibility for control and use of DoD funds must ensure that their personnel receive proper oversight, support, and training to prevent violations. If a suspected or potential ADA violation is discovered, then a preliminary ADA review must be initiated.

Normally, when an individual learns of or detects a potential ADA violation, that individual must inform the senior resource manager of the command or activity concerned. The resource manager immediately will notify the commander responsible for the allowance/allotment involved in the alleged violation.

**Flash Report.** In order to report the suspected violation, the commander will prepare a flash report in accordance with Defense Finance and Accounting Service-Indianapolis (DFAS-IN) Regulation 37-1, paragraph 040204, and send it through the chain of command to the Assistant Secretary of the Army (Financial Management and Comptroller (ASA (FM&C))) by priority message within 15 business days of the date of discovery. The flash report will include the following information:

- a. Accounting classification of funds involved.
- b. Name and location of the activity where the alleged violation occurred.
- c. Name and location of the activity issuing the fund authorization.
- d. Amount of fund authorization or limitation that was allegedly exceeded.
- e. Amount and nature of the alleged violation.
- f. Date the alleged violation occurred and date discovered.
- g. Means of discovery.
- h. Name, organization, phone numbers, and email address of the investigator(s) that will conduct the preliminary review.

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<sup>1</sup> Procedures for selection of an investigating officer for a formal Investigation are covered in DoD FMR, Volume 14, Chapter 4. Reports are prepared according to the DoD FMR, Volume 14, Chapters 3 (Preliminary Reviews of Potential Violations) and 7 (Antideficiency Act Report).

**Preliminary Investigation.** If the Deputy Assistant Secretary of the Army (Financial Operations) (DASA (FO)) directs it, the commander must appoint an investigating officer, a legal representative, and a subject matter expert to a team that will conduct the *preliminary investigation*. The commander will conduct and complete a preliminary review within 90 days after the discovery of the potential violation. The purpose of the preliminary review is to gather facts and ultimately factually establish whether a reportable Antideficiency violation did or did not occur. In the instant case, this review will include a substantive analysis of the findings and conclusions of the AR 15-6 ROI, including the stated violations and apparent violations of laws, rules, and regulations that relate to funding but not the contracting. Additionally, that ADA preliminary investigation effort may result in the identification of additional violations of funding laws or regulations. Also, the review effort will include research into the applicable business transactions and accounting records to determine the amount and cause of the potential statutory violation. A preliminary review shall focus on the potential violation of the ADA and shall not focus on identification of the individual(s) responsible or the corrective actions. These aspects will be developed during the formal investigation, if a formal investigation is warranted.

The preliminary investigator or the review team lead shall be an individual with no vested interest in the outcome of the review. The preliminary investigator or the review team lead shall also be capable of conducting a complete, impartial, and unbiased review. A commander of a major command, a superior to a commander of a major command who is in the chain-of-command, or equivalent in an organization other than a Military Department, shall appoint a trained and qualified individual to serve as an investigator or a review team lead. To help assure independence and impartiality during the review, an investigator or review team lead shall be selected from an organization external to the installation-level organization being reviewed. DoD Components are required to document that the investigators and/or review team leads are free of personal, external, and organizational impairments and retain the document(s) in the ADA case file.

The Commander documents the results in a report of preliminary review and sends it through the chain of command to the ASA (FM&C), ATTN: SAFM-FO in accordance with the guidance provided for in DoD FMR, Volume 14, Chapter 3, on preliminary reviews.

**Formal Investigation.** The ASA (FM&C) and the Office of the General Counsel (OGC) review the preliminary investigation report. If the result of this review is that there is no violation, then the preliminary report completes the actions regarding the potential violation. On the other hand, if the determination is that there is a potential violation, then DASA (FO) will direct a *formal investigation*.

## **ARMY'S ADA PRELIMINARY INVESTIGATION AND AFTERMATH**

On February 8, 2012, the INSCOM Chief of Staff appointed an Investigator to conduct a Preliminary Investigation (PI) into allegations that violations of the ADA which may have occurred and were the subject of the Army's AR 15-6 Investigation transmitted by LTG Zahner to the INSCOM Commander. The AR 15-6 Investigating Officer concluded that three instances of potential ADA violations had occurred. They were:

**a. Automated Time and Attendance (ATA) Module** - An alleged Purpose Statute (31 USC 1301(a)) violation associated with the (ATA) subscription relative to software development. Allegedly O&M funds were used when Research, Development, Test and Evaluation (RDTE) funding was more appropriate.

**b. Salary Management Module (SMM)** - An alleged violation of the Bona Fide Needs rule (31 USC 1502(a)) because HQs INSCOM obligated an annual appropriation (O&M) for needs that did not exist at the time of obligation.

**c. Program and Resource Management (P&RM) Services** – Allegedly a Bona Fide Needs rule violation (31 USC 1502(a)) based on the 27 August 2010 award of P&RM Task Order D-0011-0001 requirement did not exist in FY10.

The PI Investigator conducted a thorough, methodical, and comprehensive review into the merits associated with each of these alleged ADA violations, including reviewing the AR 15-6 report and its supporting documentation, the guidance in the Financial Management Regulation, and course materials from DoD and Army fiscal law and financial management training courses. He concluded that there were no ADA violations with respect to each of the three issues outlined above. The enclosed reports detail the evidence and analysis that led in these conclusions.

### **Corrective Actions Taken by INSCOM As a Result of the OSC Referred Allegations**

The PI Investigator noted the following corrective actions had been taken by INSCOM to address systemic matters even though he found that no ADA violations had occurred, and, thus, no action needed to be taken to correct an ADA violation. He acknowledged that INSCOM has taken a number of measures to improve the capabilities of its acquisition processes and especially how it intends to oversee service contracts. Further, he observed that the implementation of the below processes will help to ensure that proper oversight of service contracts will occur in the future.

(1) Published Training Requirements Policy #19, amended 21 December 2011 that mandates specific acquisition training for specific acquisition functions, ie CORs.

(2) INSCOM Acquisition Center conducts training monthly that is geared to improving the knowledge and performance of individuals assigned to requiring activities who are involved in the acquisition process, i.e., senior leaders and CORs

(3) INSCOM Commander memorandum, SUBJECT: Contracting Officer's Representatives (COR) Access to Contracting Officers dated 7 March 2012 informs commanders, Staff heads/Deputies and Supervisors that CORs must be provided the necessary resources to perform their designated functions. Moreover, CORs must have unfettered access to the contracting officer in order to keep the contracting officer informed of all significant contracting matters.

(4) Requiring Activities must nominate CORs for all service related contracts and provide all required completed training documents to the contracting officer for review. Contracting officers will not award contracts without properly trained CORs appointed.

## **ADDITIONAL CORRECTIVE ACTIONS TAKEN BY INSCOM**

Senior INSCOM personnel have carefully reviewed LTG Zahner's directives and the investigative officer report concerning the whistleblower complaint that employees of INSCOM violated laws, rules and/or regulations and engaged in conduct that amounted to gross mismanagement, or abuse of authority with respect to the administration and oversight of three government contracts. Although no ADA was found to have occurred, a thorough review of all findings and reports led to the following corrective actions:

a. Negotiations were completed with Silverback 7 on 11 April 2012 and a total of \$1.16M was recouped on behalf of the US Government and forwarded to DFAS in Rome, NY. A change in the requirements for that capability made it necessary to re-compete the effort after the first option year. The government also took the opportunity to change from a Firm Fixed Price contract to Cost Plus Fixed Fee contract to provide the government with additional contractual flexibility. A new competitive contract was awarded on 15 March 2013.

b. A demand letter was issued to AVUE on 12 December 2012. Negotiations were also initiated with AVUE. INSCOM legal counsel and the Principal Assistant Responsible for Contracting (PARC) office have advised not to pursue further negotiations. Since they believed that the cost to seek any legal redress would greatly exceed the expected benefits and the probability of a successful resolution was assessed as low.

c. INSCOM bolstered its the Contract Acquisition Review Board (CARB) and the Procurement Management Program by reinforcing a disciplined process, increased emphasis on compliant behavior, promoting and reinforcing training, deliberately measuring and evaluating progress and strengthening communication between the INSCOM PARC and INSCOM major subordinate commands and Directors.

(1) INSCOM published a revised CARB policy that was made effective on March 30, 2012, which conforms with Army policy and eliminated any gap in oversight for contract actions greater than \$100,000 but less than \$500,000.

(2) INSCOM stood up a Command Services Organization (CSO) chartered to manage the CARB requirements process and to closely monitor the submission of required documentation.

(3) INSCOM has increased its staff and operational capability of its Directorate of Contracting (DOC) by hiring a significant number of experienced contracting professionals while simultaneously reducing the number of support contractors to a minimal level. Additionally, the PARC Office has increased its oversight capability by hiring senior contracting professionals to

include a GG-15<sup>2</sup> Alternate PARC and two GG-14 Procurement Analysts. Additional hiring actions for both contracting operations and PARC oversight are ongoing.

(4) INSCOM has also improved training standards for contracting officer representatives (COR) by establishing required COR certifications as well as monitoring and enforcing training standards. In doing so the Command's overall ability to discern "what right looks like" at the COR trip-wire level is vastly improved.

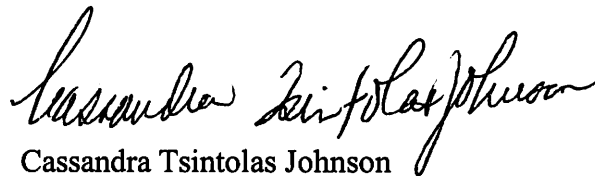
### **DISCIPLINARY ACTIONS TAKEN BY INSCOM**

The INSCOM Deputy Commanding General issued official Letters of Reprimand to two GS-15 senior staff managers who had oversight of the contracts. These letters of Reprimand were placed in placed in their official personnel file for one year. Additionally, a letter of counseling was also issued to the Contracts Officer (KO).

In summary, the multiple investigations of the subject contracting actions led to thoughtful review of how INSCOM conducts such contracting actions. INSCOM believes that enhanced management practices have significantly increased the quality of its contracting actions.

If you have any questions about these matters, please feel free to contact me at 703-614-3500.

Sincerely,



Cassandra Tsintolas Johnson

Enclosures

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<sup>2</sup> The Secretary of Defense has independent pay setting authority under the Title 10 statutory scheme for Department of Defense Intelligence employees, specifically, 10 United States Code 1601. According to the Office of Personnel Management, "The Guide to Data Standards", the pay plan used for these Title 10 employees is "GG" which means "grades similar to 'GS'" ("General Schedule"). Hence, Intelligence employees in the Department of Defense are designated as being "GG" employees.