



DEPARTMENT OF THE ARMY  
OFFICE OF THE GENERAL COUNSEL  
104 ARMY PENTAGON  
WASHINGTON DC 20310-0104

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.



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
UNITED STATES ARMY INTELLIGENCE & SECURITY COMMAND  
8825 BEULAH STREET  
FORT BELVOIR, VIRGINIA 22060-5246

IAPC

17 July 2012

MEMORANDUM THRU Deputy Commanding General, U.S. Army Intelligence & Security Command, Fort Belvoir, Virginia 22060-5246

FOR Assistant Secretary of the Army (Financial Management and Comptroller) (FM&C)

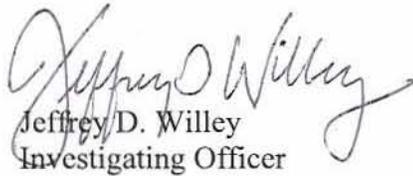
SUBJECT: Executive Summary of Investigation of Alleged Antideficiency Act (ADA) Violations

1. BLUF: There is insufficient evidence to substantiate any finding of ADA violations as identified in ADA violation case 12-03 (Intelligence and Security Command Allegations of Acquisition Improprieties).
2. Background: On 8 February 2012 I was appointed to conduct a preliminary investigation into allegations that violations of the Antideficiency Act may have occurred. These violations were identified in DAG2 Investigating Officer Report, SUBJECT: Whistleblower Investigation-Intelligence and Security Command. In this report, the Investigating Officer concluded that three instances of potential Antideficiency Act violations 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)) because the 27 August 2010 award of P&RM support Task Order D-0011-0001 requirement did not exist in FY10.
3. I have conducted a preliminary investigation into the merits associated with each of these alleged Antideficiency Act violations, reviewed the attachments and sworn statements contained in the DA G2 Investigating Officer's report, and I have read and reviewed guidance in the Financial Management Regulation and training courses. Based on my analysis, I have determined the following:

(a) ATA Time and Attendance Module. There was no violation of the Purpose Statute (31 USC 1301(a)) relative to the question of using O&M funding vice RDTE funding. There was no violation because it was necessary and proper for INSCOM management to determine that contracting for a Time and Attendance Module was necessary for the efficient running of the Command. Thus there was a proper purpose in the expenditure of funds for this purpose. INSCOM properly used O&M appropriations in accordance with applicable Congressional fiscal law statutes to fund the ATA Time and attendance requirement.

(b) Salary Management Module. There was no Bona Fide Needs rule violation (31 USC 1502 (a)) relative to the award of the SMM Module. The requirement existed at the time of obligation in FYs 2008, 2009 and 2010, therefore in accordance with applicable Congressional fiscal law statutes, no violation of fiscal law occurred.

(c) Program and Resource Management (P&RM) Services. There was no Bona Fide Needs rule violation (31 USC 1502) based on the 27 August 2010 award of the P&RM service contract. The requirement and bona fide need test was met at the time of obligation in FY 2010. Therefore, in accordance with applicable Congressional fiscal law statutes, no violation of fiscal law occurred.

  
Jeffrey D. Willey  
Investigating Officer



**DEPARTMENT OF THE ARMY**  
**OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY**  
**FINANCIAL MANAGEMENT AND COMPTROLLER**  
109 ARMY PENTAGON  
WASHINGTON DC 20310-0109

OCT 16 2012

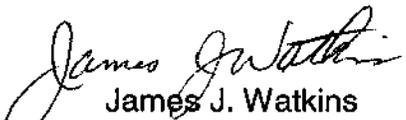
MEMORANDUM FOR Commander, Headquarters, United States Army Intelligence and Security Command, 8825 Beulah Street, Fort Belvoir, Virginia 22060-5246

SUBJECT: Potential Antideficiency Act (ADA) Violation Case 12-03 (Intelligence and Security Command Allegations of Acquisition Improprieties)

1. My office, in coordination with Army General Counsel completed its review of your investigation related to the whistleblower complaints pursuant to the acquisition of the Automated Time and Attendance (ATA) module, the Salary Management (SM) module and the procurement of Program and Resource Management (P&RM) services.

2. The ATA and SM modules appear to have been independent and properly funded with Operation and Maintenance, Army. Neither appears to have been significantly modified or reengineered. Moreover, the staffing levels on the P&RM contract were at the discretion of the vendor and outside of the control of the Government. We concur that there is no ADA violation. Based on the information we have reviewed, these cases may be closed.

3. My point of contact for this report is Mr. Michael Anglemyer who can be reached at (703) 614-7069, email: [michael.f.anglemyer.civ@mail.mil](mailto:michael.f.anglemyer.civ@mail.mil).

  
James J. Watkins  
Deputy Assistant Secretary of the Army  
(Financial Operations)



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
UNITED STATES ARMY INTELLIGENCE & SECURITY COMMAND  
8825 BEULAH STREET  
FORT BELVOIR, VIRGINIA 22060-5246

IAPC

17 July 2012

MEMORANDUM THRU Deputy Commanding General, US Army Intelligence and Security Command, 8825 Beulah St., Fort Belvoir, VA 22016-5246

FOR Assistant Secretary of the Army (Financial Management and Comptroller) (FM&C)

SUBJECT: Preliminary Review of Alleged Violations of the Antideficiency Act Made During 15-6 Investigation dated 15 November 2011

1. References:

- a. DA G2 Investigating Officer Report dated 15 November 2011, SUBJECT: Whistleblower Investigation-Intelligence and Security Command (HQS INSCOM), Fort Belvoir, Virginia (Office of Special Counsel File Number DI-11-2122)
- b. DA G2 Memorandum dated 1 December 2011, SUBJECT: Implementation of Recommendations from the AR 15-6 Whistleblower Investigation – Hqs INSCOM, Fort Belvoir, Virginia (Office of Special Counsel File Number DI-11-2122)
- c. INSCOM Memorandum dated 8 February 2012, SUBJECT: Appointment of Investigating Officer Pursuant to DoD Financial Management Regulation.
- d. DoD Financial Management Regulation Volume 14, Administrative Control of Funds and Antideficiency Act Violations
- e. JAG University 2012 Comptrollers Accreditation and Fiscal Law Course Class 06
- f. Enhanced Defense Financial Management Training Course, revised October 2006

2. On 8 February 2012 I was appointed by INSCOM Chief of Staff to conduct a preliminary investigation into allegations that violations of the Antideficiency Act may have occurred. These violations were identified in the referenced 15 November 2011 DAG2 Investigating Officer Report, SUBJECT: Whistleblower Investigation-Intelligence and Security Command. In this report, the Investigating Officer concluded that three instances of potential Antideficiency Act violations 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. (Enclosure 1).

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. (Enclosure 2).

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. ( Enclosure 3).

3. I have conducted a preliminary investigation into the merits associated with each of these potential Antideficiency Act allegations, and thoroughly reviewed the many attachments and sworn statements contained in the DA G2 Investigating Officer's report. Additionally, I have read and reviewed guidance provided in the referenced Financial Management Regulation and training courses. Based on my analysis, I have determined the following:

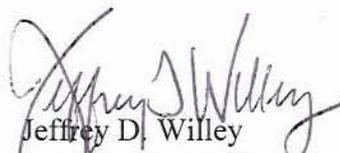
(a) ATA Time and Attendance Module. There was no violation of the Purpose Statute (31 USC 1301(a)) relative to the question of using O&M funding vice RDTE funding. There was no violation because it was necessary and proper for INSCOM management to determine that contracting for a Time and Attendance Module was necessary for the efficient running of the Command. Thus there was a proper purpose in the expenditure of O&M funds for this purpose. INSCOM properly used O&M appropriations in accordance with applicable Congressional fiscal law statutes to fund the ATA Time and Attendance requirement.

(b) Salary Management Module. There was no Bona Fide Needs rule violation (31 USC 1502 (a)) relative to the award of the SMM Module. The requirement existed at the time of obligation in FYs 2008, 2009 and 2010, therefore in accordance with applicable Congressional fiscal law statutes, no violation of fiscal law occurred.

(c) Program and Resource Management (P&RM) Services. There was no Bona Fide Needs rule violation (31 USC 1502(a)) based on the 27 August 2010 award of the P&RM service contract. The requirement and bona fide needs test was met at the time of obligation in FY 2010. Therefore, in accordance with applicable Congressional fiscal law statutes, no violation of fiscal law occurred.

4. The complete report for each of these alleged Antideficiency Act violations can be found at Enclosures 1-3.

Encls  
as

  
Jeffrey D. Willey  
Investigating Officer

**DEPARTMENT OF THE ARMY  
POTENTIAL ANTIDEFICIENCY ACT REPORT**

**US Army Intelligence and Security Command  
Case Number 12-03 (Allegations of Acquisition Improprieties)**

**Automated Time and Attendance (ATA) Module**

1. Appropriation Involved/Title. Fiscal Year 2008, 2009, 2010 Operation and Maintenance (2182020), (2192020), (2102020) appropriations.
2. Where Potential Violation Occurred. Potential violation occurred at US Army Intelligence and Security Command, Ft Belvoir, VA, 22060.
3. Name and Location of Activity Issuing the Fund Authorizations. US Army Intelligence and Security Command, Ft Belvoir, VA 22060.
4. Amount of Potential Violation. \$588,020.
5. Date Potential Violations Occurred. Potential violations occurred 18 September 2008, 10 September 2009 and 27 September 2010.
6. Type of Potential Violation. The Whistleblower Investigating Officer identified an alleged Purpose Statute (31 USC 1301(a)) violation associated with the (ATA) subscription relative to software development using O&M funds versus Research, Development, Test and Evaluation (RDTE) funding.
7. Effect of Violations on the Next Higher level of Funding. N/A.
8. Responsible individuals. N/A.
9. Signed Statements of Responsible Individuals. N/A.
10. Dates and Description of How Potential Violations Were Discovered. Allegations were raised in a Whistleblower complaint to the US Office of Special Counsel (OSC). OSC informed the Secretary of the Army on 26 May 2011 of the allegations and requested an investigation. Army G2 directed INSCOM on 1 December 2011 to forward three ADA Flash Reports to ASA (FM&C).
11. Causes and Circumstances Surrounding the Potential Violations.
  - a. The contract, awarded off of a GSA Schedule under INSCOM contract number W911W4-08-F-0104, was awarded on 18 September 2008 to Allied Technology Group,

Rockville, MD. The contractor was to provide Time and Attendance automation subscription service to the INSCOM G1.

b. INSCOM expected the Automated Time and Attendance (ATA) module, developed by AVUE Technologies Corporation, to provide flexible timesheet options for capturing and calculating salaried employee pay, create employee profile's, quickly approve timesheets, manage exceptions, labor and productivity costing, thus creating opportunities for better decision making. The module was required to support 100% rule automation and real-time rule processing with the ability to configure the application to meet customer specific requirements. Further, it should have provided full audit tracking and reporting capabilities and be able to accommodate an unlimited number of concurrent users, interfacing with human resources information system as well as INSCOM payroll system.

c. The contract contained a base year and four option years. Base year was priced at \$82,375. Option years were priced at \$228,454; \$277,191; \$329,462; and \$385,470 respectively. In September 2008 and September 2009, INSCOM executed the base year and 1<sup>st</sup> option year of contract W911W4-08-F-0104. Instead of exercising the third option year, the contracting officer wrote a new contract for the ATA services. This contract, awarded off the GSA Schedule under INSCOM contract number W911W4-10-F-0250, contained two option years and was awarded on 27 September 2010 to Allied Technology Group. Base year was priced at \$277,191 and option years were priced at \$329,462 and \$385,470 respectively. INSCOM executed the base year of this contract to continue the ATA services.

d. INSCOM paid \$310,829 for the ATA services provided under contract W911W4-08-F-0104 and \$277,191 for ATA services provided under contract W911W4-10-F-0250. Total amount paid for the ATA effort was \$588,020. The funds provided for this purpose were Operations and Maintenance, Army (O&M) funds.

e. To determine if the proper funding type was provided, several questions must be answered:

First, who is the purchase for? Congress appropriates funds for DOD in the annual DOD Appropriations Act (DODAA). Congress intends that DOD use their appropriated funds for the primary benefit of DOD. In this instance, INSCOM was the primary beneficiary of the purchase. Since INSCOM was the primary beneficiary, INSCOM may obligate appropriated funds for this purchase.

Second, the ATA acquisition must be classified as one of the following: expense items ("expenses"), investment items ("investments"), and/or construction. After reviewing the definitions associated with each of these groups, the ATA expenditure falls into the category of an "expense" item. Generally, expenses are "the costs of resources consumed in operating and maintaining [DOD]," such as services, supplies, and utilities. ***Expenses are normally financed with O&M appropriations.*** See DOD FMR, vol. 2A, ch. 1, para. 010201. Common examples of expenses include: services, fuel, maintenance, repair, overhaul and rework of equipment, and utilities. The ATA Module is an automated subscription service. DoD FMR, Volume 2A, Chapter 1, Paragraph 010212 provides additional guidance concerning Information Technology and Automated Information Systems and indicates other appropriations may be used, to include RDTE, depending on the circumstances surrounding the acquisition.

Third, which appropriation should be used to fund the ATA purchase? Of the five Major Defense Appropriations, three quickly fall out of consideration. The only two that may be applicable to the ATA purchase are Operations and Maintenance (O&M); and Research, Development, Test and Evaluation (RDTE) funds.

## 12. Findings.

a. After reviewing the facts surrounding the ATA service subscription purchase, it is clear INSCOM intended to use a commercial-off-the-shelf (COTS) automated product to manage its time and attendance needs. The software selected was already a fully developed product that did not meet the "investment" fiscal law test. INSCOM determined it must move to an automated system to increase efficiencies, reduce time associated with individual human resource transactions and reduce the high error rate and corresponding rework required to correct the errors. INSCOM selected the AVUE Time and Attendance module to satisfy its needs. The AVUE products contain a COTS platform that is modular in nature and allows clients to subscribe only to the modules they need. All AVUE products come with a Fully Loaded Occupational Content Database, built and maintained for the public sector. Among other things, the AVUE database includes work functions, duties, skills/competencies, performance requirements, employee labor relations, EEO, staffing, recruitment, and a myriad of other public sector HR content. In addition, the subscription includes complete content database customization. All above clearly indicate this was a valid O&M expense, not RDT&E.

b. The AVUE philosophy is clear: AVUE's workflow adapts to the agency, with the expectation that its customers will request enhancements to its database offerings that will more closely fit the way its clients conduct business. All AVUE Modules are enhanced on a recurring basis, with new features appearing approximately every two weeks. Enhancements are included in the fixed subscription price and are offered to all AVUE subscribers. Database enhancements are similarly recurring approximately every two weeks and are also included without additional charge. AVUE literature states that AVUE clients are all a part of a community in which enhancements or additions requested by one are then offered to all as part of the ongoing subscription service (page 12, Attachment 2, AVUE Master Subscription Agreement).

c. INSCOM worked with AVUE throughout the base year and first option year of the contract to familiarize itself with the capabilities offered, requested enhancements to the Module and conducted a pilot program to determine if the ATA Module would fully satisfy INSCOM's needs. INSCOM G1 Deputy Assistant Chief of Staff wrote to AVUE Technologies on 19 July 2010 stating that the goals of the pilot project were met with respect to reducing process cycle time and the number of mistakes made. However, INSCOM also identified 23 additional automated change requests needed to improve the overall automated service. The listing of requested changes was provided with the letter. AVUE Technologies responded on 19 August 2010 that they released all of the requested changes with the exception of two and those two would be released the following week.

d. During the next five months, the list of change requests grew to 90 and the number of electronic errors associated with the ATA Module grew from 10% to 60%. Moreover, the process cycle time grew from 16 minutes per employee to 90 minutes per employee. Many other problems were also cited. These problems began to surface about the time AVUE terminated their in-house IT Programmer who was responsible for correcting system errors and generating customer enhancements. After his departure, contractor enhancement capability and ability to fix system errors was severely impacted. As additional system errors were discovered and the list of change requests grew without resolution, INSCOM lost confidence in the AVUE ATA Module and the contractor's ability to service customer requests. In a 15 February 2011 meeting with the Business Transformation Senior Review Group members, the INSCOM Chief of Staff directed that INSCOM no longer use the ATA Module. He directed the CIO/G6 to coordinate with the Director of Contracting (DOC) to ensure the removal of the Personal Identifiable Information from the contractor's database. He also directed the DOC to determine the best method and timeframe to stop the contract, with coordination and feedback from the G1. The contracting officer considered terminating the contract, but believed termination would incur additional termination costs, so instead allowed the contract to expire when its period of performance ended. This cost benefit analysis is a routine process used by the Government to determine the most appropriate course of action. In this case, the contracting officer determined it was more cost efficient for the Government not to terminate the contract for cause.

### 13. Determination.

a. After a careful review of the facts and circumstances surrounding the AVUE ATA Module purchase, it is my determination that this contract was properly and legally funded with O&M appropriations. The AVUE ATA Module specifically allows for customization of datafields and reports. Its product is specifically designed to adapt to the subscribing Agency. Although INSCOM submitted numerous change requests, the changes requested were relatively minor in nature and did not involve the design of new software. The requests were not of the magnitude requiring major research and developmental upgrades to the AVUE ATA Module. Instead, the changes requested were minor modifications to existing software functionality and should be considered as nothing more than enhancements to the AVUE product. Some change request examples are "Place DoD security banner on Home Page" or "Put the weekly summary schedule above the weekly schedule." Other requests submitted were to modify system generated forms or reports. Many of the requests submitted also pointed out errors identified in the expected performance of the AVUE operating system, eg "Problems with comment box not allowing entries," or "travel comp not flowing to DFAS."

b. DoD FMR Volume 2A, Chapter 1, paragraph 010212, Budgeting for Information Technology and Automated Information Systems, dated October 2008 provides guidance for the use of O&M and RDTE appropriations. Paragraph 5.a states the following: "Software releases categorized as iterations on the basic release and not involving significant performance improvements or extensive testing are considered a maintenance effort. Minor improvements in software functionality which are accomplished during routine maintenance may...be O&M funded." AVUE provides new software releases to its subscribers every two weeks according to its literature. These enhancements are iterative and are available to all subscribers.

Additionally, the changes INSCOM requested did not result in significant software performance improvements or extensive testing, instead they were “minor” improvements. Under the definition above, the changes requested by INSCOM are categorized as a routine maintenance effort vice a developmental effort to the ATA AVUE Module.

c. After careful consideration and review of all relevant material and personal interviews during my investigation, I have determined that no ADA violation occurred. The ADA test is a very finite test with an exceedingly high threshold for actually committing an ADA. My findings remain consistent with what the INSCOM G8 initially recommended as I found no basis in facts or law to support the ADA allegation.

d. My investigation did confirm that some oversight processes were lacking or not properly in place at the time of the act. This was clearly outlined in the original 15-6 investigation, and INSCOM has taken steps to correct these deficiencies as outlined in paragraph 14 below. Additionally, I have found no indication of intentional negligence on any party in my ADA investigation which may have lead to an ADA violation. The command has recognized and corrected the procedural and oversight observations described in the original 15-6 investigation to preclude similar incidents from occurring in the future.

e. The ADA review board should recognize that INSCOM at no time violated any of the ADA statutes, and INSCOM has now fully and substantially corrected faults found in the original 15-6 investigation (see paragraph 14). It would be inconsistent with my investigation findings for further ADA actions. Again, it is my determination that no ADA violation occurred.

#### 14. Corrective Action Taken.

a. While no ADA violations occurred and no action need be taken to correct an ADA violation, INSCOM has taken a number of measures to improve the capabilities of its acquisition processes and how it intends to oversee service contracts. 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, ie 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.

**DEPARTMENT OF THE ARMY  
POTENTIAL ANTIDEFICIENCY ACT REPORT**

**US Army Intelligence and Security Command  
Case Number 12-03 (Allegations of Acquisition Improprieties)**

**Salary Management Module (SMM)**

1. Appropriation Involved/Title. Fiscal Year 2008, 2009, 2010 Operation and Maintenance (2182020), (2192020), (2102020) appropriations.
2. Where Potential Violation Occurred. Potential violation occurred at US Army Intelligence and Security Command, Ft Belvoir, VA, 22060.
3. Name and Location of Activity Issuing the Fund Authorizations. US Army Intelligence and Security Command, Ft Belvoir, VA 22060.
4. Amount of Potential Violation. \$473,243.
5. Date Potential Violations Occurred. Potential violations occurred 25 September 2008, 21 September 2009 and 20 September 2010.
6. Type of Potential Violation. The Whistleblower Investigating Officer identified an apparent 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 and reasonably would not have arisen until a future fiscal year if the Salary Management Module (SMM) required a properly functioning Automated Time and Attendance module first.
7. Effect of Violations on the Next Higher level of Funding. N/A.
8. Responsible individuals. N/A.
9. Signed Statements of Responsible Individuals. N/A.
10. Dates and Description of How Potential Violations Were Discovered. Allegations were raised in a Whistleblower complaint to the US Office of Special Counsel (OSC). OSC informed the Secretary of the Army on 26 May 2011 of the allegations and requested an investigation. Army G2 directed INSCOM on 1 December 2011 to forward three ADA Flash Reports to ASA (FM&C).
11. Causes and Circumstances Surrounding the Potential Violations.
  - a. This contract, awarded off of a GSA Schedule under INSCOM contract number W911W4-08-F-0102, was awarded on 25 September 2008 to Allied Technology Group,

Rockville, MD. The contractor was to provide fully automated salary and compensation subscription service to the INSCOM G8.

b. Among other things, INSCOM expected the Salary Management Module (SMM), developed by AVUE Technologies Corporation, to provide guidance to managers about budget, payroll expenditures, authorized positions, incumbency of positions, likely near-term budget scenarios and forecasts actions affecting salary and payroll. Additionally, the service would help to assess the unit against commonly accepted or desired organizational metrics and would provide expert content concerning compensation flexibilities and various compensation systems.

c. The contract contained a base year and four option years. Base year was priced at \$122,100. Option years were priced at \$158,649; \$192,494; \$228,792; and \$267,687 respectively. In September 2008, September 2009 and September 2010, INSCOM executed the base year and 1<sup>st</sup> and 2<sup>nd</sup> option years of contract W911W4-08-F-0102.

d. INSCOM paid \$473,243 for the SMM services provided under contract W911W4-08-F-0102. The funds provided for this purpose were Operations and Maintenance, Army (O&M) funds.

e. To determine if the proper funding type was provided, several questions must be answered:

First, who is the purchase for? Congress appropriates funds for DOD in the annual DOD Appropriations Act (DODAA). Congress intends that DOD use their appropriated funds for the primary benefit of DOD. In this instance, INSCOM was the primary beneficiary of the purchase. Since INSCOM was the primary beneficiary, INSCOM may obligate appropriated funds for this purchase.

Second, the SSM acquisition must be classified as one of the following: expense items (“expenses”), investment items (“investments”), and/or construction. After reviewing the definitions associated with each of these groups, the ATA expenditure falls into the category of an expense item. Generally, expenses are “the costs of resources consumed in operating and maintaining [DOD],” such as services, supplies, and utilities. ***Expenses are normally financed with O&M appropriations.*** See DOD FMR, vol. 2A, ch. 1, para. 010201. Common examples of expenses include: services, fuel, maintenance, repair, overhaul and rework of equipment, and utilities. The Salary Management Module is an automated subscription service.

Third, which appropriation should be used to fund the SMM purchase? Of the five Major Defense Appropriations, the Operations and Maintenance (O&M) appropriation is best suited to fund this effort.

Fourth, and this question concerns the timing of the obligations, was it proper to obligate funds for the SMM Module during Fiscal Years (FY) 2008, 2009 and 2010? Did a Bona Fide Need for this subscription service exist during FY 2008, 2009 and 2010? Paragraphs 12a.-h. address this question and will provide the analysis that provides the basis for my decision on this issue and the Whistleblower AR 15-6 Investigating Officer’s contention that a Bona Fide Need did not exist for the SMM Module.

## 12. Findings.

a. After reviewing the facts surrounding the SMM service subscription purchase, it is clear INSCOM intended to use a commercial-off-the-shelf (COTS) automated product to manage its salary and compensation needs. It was also important to INSCOM that the salary management solution interface seamlessly with the time and attendance solution. Because INSCOM had previously determined to use the AVUE ATA Module, it also decided to use the AVUE SMM Module since the two modules were completely compatible. As stated previously in Enclosure 1, the AVUE products contain a COTS platform that is modular in nature and allows clients to subscribe only to the modules they need. All AVUE products come with a Fully Loaded Occupational Content Database built and maintained for the public sector. Among other things, the AVUE database includes work functions, duties, skills/competencies, performance requirements, employee labor relations, EEO, staffing, recruitment, and a myriad of other public sector HR content. In addition, the subscription includes complete content database customization.

b. Shortly after INSCOM determined to use the AVUE Modular products for time and attendance and salary management, and for reasons that are not clear, confusion concerning responsibilities for these efforts began, even though the mission need for SMM was valid. The G8 incorrectly believed that the SMM Module was rolled into the same contract as the ATA Module, therefore G1 had the lead. The G1 believed these two requirements remained separate and distinct and its responsibility only concerned the ATA Module. Confusion over responsibilities continued into the option years. Although the G1 formally requested the SMM Module option years be exercised, it always checked with the G8 to ensure the G8 wanted the SMM Module to continue. The G8 responded affirmatively to those inquiries. What is clear is the G8 thought responsibility for the SMM Module was a G1 action, and it is just as clear that the G1 always believed the SMM Module was a G8 responsibility.

c. Another key point of confusion was the belief by many that the ATA Module had to be up and running before the SMM Module could be activated. This simply was not a valid assumption. As mentioned in Enclosure 1 above, the AVUE modules are not dependant on one another. They are each stand-alone modules that can function independently on their own. Subscribers provide key workforce information to the contractor. The contractor loads that information into the appropriate Module. The subscriber then accesses the information in the standard AVUE formats or in subscriber requested customized formats. This could have occurred with the SMM Module, but misunderstandings or misinterpretations of how the AVUE modular products function resulted in the SMM Module not being placed into service upon contract award. Instead, it remained dormant, waiting for the AVUE ATA Module to be fully implemented.

d. This belief that the ATA Module had to be up and running before the SMM Module could be activated also clearly affected the option year decision making process. The extensive delays associated with the ATA Module were not anticipated, as feedback from the contractor was always very convincing that problems would be resolved quickly. Final resolution of issues always seemed to be imminent. Based on this feedback, and when asked by the G1, the G8 felt it was appropriate to exercise the option years, as this would result in rapid activation of

the SMM Module. Accordingly, the G1 then informed the contracting officer to exercise the option.

e. Proper oversight of this contract was not established. No Contracting Officer Representative was appointed to monitor contract performance. The original contracting officer who awarded the contract no longer works in the INSCOM Acquisition Center and was not contacted as part of this investigation. However, it is likely a COR was not appointed because this was a subscription service and the need for a COR was not anticipated. In hindsight, and with a full understanding of the AVUE subscription service and its robust customization feature, it is clear a COR should have been appointed in order to communicate INSCOM change requests and potential non-performance issues to the contractor. Regardless, the requiring activity never reported any dissatisfaction with the contract nor ever informed the contracting officer concerning the non-use of the SMM Module. When instructed by the G1 to exercise the option years, the contracting officer complied.

f. In February 2011, INSCOM decided to terminate its relationship with AVUE ATA contract. INSCOM had lost confidence in the capabilities of the contractor's products and its inability to service customer requests. The INSCOM Chief of Staff directed that the Director of Contracting determine the best method and timeframe with which to stop the contract, with coordination and feedback from the G1. However, there was no corresponding direction to terminate the SMM contract. I attribute this to the intense focus on the failing ATA effort and the overarching concern with removing INSCOM provided Personal Identifiable Information from the contractor's databases. It also indicates the ongoing confusion concerning ownership of the SMM requirement and the belief held by some that the SMM effort was actually a part of the ATA contract. Although the contracting officer assigned to the ATA contract effort considered and ultimately rejected terminating that contract, there was no similar consideration given to terminating the SMM contract.

g. INSCOM received no benefit from the SMM Module contract. The Module was never activated. This failure was due in part to an INSCOM misunderstanding that the AVUE ATA Module had to be fully operational before the SMM Module could be placed into service. It was also due in part to failure by the contractor to successfully engage with INSCOM and implement the service requested. The record shows there was very limited effort initiated by the contractor to implement the SMM Module. The contractor did set up a meeting to discuss the SMM Module, but a number of the key government personnel who attended the meeting, to include senior G8 and G1 personnel; left the meeting before this issue was discussed. There does not appear to be any other instances where the contractor made any effort to fulfill its contractual obligation to provide a functioning, workable SMM Module, despite the fact that it was paid over \$470,000 for this service.

h. The contracting officer has informed the contractor that INSCOM intends to recoup the money spent on the SMM effort. The contracting officer opened discussions with the contractor in May and made him aware of the intent to recover the money. Negotiations are ongoing.

### 13. Determinations.

a. As discussed in the Findings above, and summarized here, there was substantial confusion from the beginning over the ATA and SMM contracts. One obvious reason for this confusion was the G8 didn't realize that a contract separate and distinct from the ATA Module was awarded in response to his request to obtain SMM services. Instead, the G8 incorrectly believed that both the ATA Module and the SMM Module were awarded under the same contract. This line of thinking carried into the option years and why the G8 believed the G1 should submit the option year requests for SMM since he believed both the SMM and ATA Modules were connected to one contract, with the G1 as the lead. Finally, the G8 incorrectly believed the ATA Module must be in place before the SMM Module could be implemented – another incorrect assumption. Additionally, no COR was appointed to oversee the contract and the contractor did not make reasonable effort to engage INSCOM to explain what INSCOM needed to do to place the SMM into service. The combination of all these issues resulted in INSCOM paying for, yet receiving no benefit from the SMM subscription service contract.

b. The Bona Fide Needs rule provides that obligations will only occur in the fiscal year for the material requirements of that fiscal year. In other words, a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made. Despite the fact that INSCOM did not receive any benefit from the SMM subscription service contract it fully paid for during FY 2008, 2009 and 2010, it is my determination that a Bona Fide Need for the SMM subscription services existed throughout those years. That is why the G8 submitted the requirement during FY 2008 and affirmed to the G1 that the option years be exercised in FY 2009 and 2010. The fact that no services were received from the contractor does not mean that the bona fide requirement did not exist. We know the requirement existed because the requiring activity requested the services. In fact, the need for an automated salary and management service still continues to this day.

c. After careful consideration and review of all relevant material and personal interviews during my investigation, I have determined that no ADA violation occurred. The ADA test is a very finite test with an exceedingly high threshold for actually committing an ADA. My findings remain consistent with what the INSCOM G8 initially recommended as I found no basis in facts or law to support the ADA allegation.

d. My investigation did confirm that some oversight processes were lacking or not properly in place at the time of the act. This was clearly outlined in the original 15-6 investigation, and INSCOM has taken steps to correct these deficiencies as outlined in paragraph 14 below. Additionally, I have found no indication of intentional negligence on any party in my ADA investigation. The command has recognized and corrected the procedural and oversight observations described in the original 15-6 investigation to preclude similar incidents from occurring in the future.

e. The ADA review board should recognize that INSCOM at no time violated any of the ADA statutes, and INSCOM has now fully and substantially corrected faults found in the original 15-6 investigation (see paragraph 14). It would be inconsistent with my investigation

findings for further ADA actions. Again, it is my determination that no ADA violation occurred.

14. Corrective Action Taken.

a. While no ADA violations occurred and no action need be taken to correct an ADA violation, INSCOM has taken a number of measures to improve the capabilities of its acquisition processes and especially how it intends to oversee service contracts. 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, ie 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.

**DEPARTMENT OF THE ARMY  
POTENTIAL ANTIDEFICIENCY ACT REPORT**

**US Army Intelligence and Security Command  
Case Number 12-03 (Allegations of Acquisition Improprieties)**

**Program and Resource Management (P&RM) Services**

1. Appropriation Involved/Title. Fiscal Year 2010 Operation and Maintenance, (2102020) appropriations.
2. Where Potential Violation Occurred. Potential violation occurred at US Army Intelligence and Security Command, Ft Belvoir, VA, 22060.
3. Name and Location of Activity Issuing the Fund Authorizations. US Army Intelligence and Security Command, Ft Belvoir, VA 22060.
4. Amount of Potential Violation. Amount was not determined by Whistleblower Investigating Officer, however the investigating officer's report indicates it would be some amount less than \$8,238,429 - the amount of money paid to the contractor for services rendered.
5. Date Potential Violation Occurred. Potential violation occurred 27 August 2010.
6. Type of Potential Violation. The Whistleblower Investigating Officer identified an apparent Bona Fide Need rule violation (31 USC 1502) based on the 27 August 2010 award of P&RM support under Task Order D-0011-0001. The bulk of PR&M services requirement did not exist in FY10 as it appeared the requirements (personnel fill) were being phased in, hence obligating FY10 funds for the full amount of these services was improper.
7. Effect of Violations on the Next Higher level of Funding. N/A.
8. Responsible individuals. N/A.
9. Signed Statements of Responsible Individuals. N/A.
10. Dates and Description of How Potential Violations Were Discovered. Allegations were raised in a Whistleblower complaint to the US Office of Special Counsel (OSC). OSC informed the Secretary of the Army on 26 May 2011 of the allegations and requested an investigation. Army G2 directed INSCOM on 1 December 2011 to forward three ADA Flash Reports to ASA (FM&C).

## 11. Causes and Circumstances Surrounding the Potential Violations.

a. This contract, awarded under INSCOM OMNIBUS contract number W911W4-10-D-0011-0001, was awarded on 27 August 2010 to Silverback7, Woodbridge, VA. The contractor was to provide senior technical support to HQ INSCOM, and subordinate organizations in the areas of Resource Planning, Resource Programming, Resource Budgeting, Resource Execution, Congressional Authorizations and Appropriations, and Resource Oversight support. This support was to be provided in the preparation, review, analysis, coordination and maintenance of documentation and associated databases used in DoD resource management systems to develop, restructure, rebalance, transform and sustain INSCOM organizations.

b. The contract contained a base year and four option years. Base year was priced at \$8,238,430. Option years were priced at \$8,405,495; \$8,769,862; \$9,032,909; and \$9,303,932 respectively. In August 2010, and August 2011 INSCOM executed the base year and 1<sup>st</sup> option year of contract W911W4-10-D-0011-0001.

c. INSCOM paid \$8,238,430 in monthly increments for the P&RM services provided under the base year of contract W911W4-10-D-0011-0001. The funds provided for this purpose were Operations and Maintenance, Army (O&M) funds.

d. To determine if the proper funding type was provided, several questions must be answered:

First, who is the purchase for? Congress appropriates funds for DOD in the annual DOD Appropriations Act (DODAA). Congress intends that DOD use their appropriated funds for the primary benefit of DOD. In this instance, INSCOM was the primary beneficiary of the purchase. Since INSCOM was the primary beneficiary, INSCOM may obligate appropriated funds for this purchase.

Second, the P&RM acquisition must be classified as one of the following: expense items (“expenses”), investment items (“investments”), and/or construction. After reviewing the definitions associated with each of these groups, the P&RM expenditure falls into the category of an expense item. Generally, expenses are “the costs of resources consumed in operating and maintaining [DOD],” such as services, supplies, and utilities. ***Expenses are normally financed with O&M appropriations.*** See DOD FMR, vol. 2A, ch. 1, para. 010201. Common examples of expenses include: services, fuel, maintenance, repair, overhaul and rework of equipment, and utilities. The P&RM effort is a non-personal services contract.

Third, which appropriation should be used to fund the P&RM purchase? Of the five Major Defense Appropriations, the Operations and Maintenance (O&M) appropriation is best suited to fund this effort.

Fourth, and this question concerns the timing of the obligations, was it proper to obligate funds for the P&RM service during Fiscal Year 2010? Did a Bona Fide Need for this subscription service exist during FY 2010? Paragraphs 12a.-d. provide the discussion that will directly address this issue and the Whistleblower AR 15-6 Investigating Officer’s contention that a Bona Fide Need did not exist for the P&RM service.

## 12. Findings.

a. After reviewing the facts surrounding the P&RM service subscription purchase, it is clear INSCOM intended to consolidate all of its P&RM requirements under one contract. The G8 requiring activity believed this was the most effective and efficient way to manage the services required, especially since the services were required in multiple locations.

b. Smaller individual contracts for various P&RM services were in effect when the Silverback7 contract was executed. These contracts remained in effect after contract award to Silverback7 and expired at various times throughout the Silverback7 period of performance. In its proposal, Silverback7 indicated that some savings to the total proposed price may be realized by transitioning employees at the end of the current funding periods on the alternative vehicles. However, this information apparently was not clearly understood by the contracting office and it was not brought to its attention by the requiring activity during any prior planning sessions. Instead, the contracting officer learned about the overlap of services 90-120 days after contract award when the contracting officer representative (COR) brought the issue to his attention. Consequently, Silverback7 assumed responsibility for those services when the smaller contracts expired.

c. INSCOM awarded a firm fixed price performance based contract to Silverback7 to provide P&RM services. It did not award a contract to provide a specific number of personnel. Instead it required specific performance of "services" IAW the performance work statement (PWS). The solicitation did provide historical numbers of personnel used previously to support the effort and contractors simply use that number as a guide when proposing and pricing the work that is identified in the PWS.

d. The contracting officer engaged the contractor with a demand for overpayment for services rendered. After negotiations, the contractor and contracting officer reached an agreement that the contractor would repay funds in the amount of \$1.1 million for services not rendered. The contractor has since reimbursed the US Treasury for the amount stated. The amount repaid was determined to be a fair and equitable adjustment to the contract.

## 13. Determinations.

a. The Bona Fide Needs rule provides that obligations will only occur in the fiscal year for the material requirements of that fiscal year. In other words, a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made. Despite the fact that INSCOM did not provide for an adequate transition of services from the smaller contracts to the Silverback7 contract, it is my determination that a Bona Fide Need for the P&RM services existed throughout the fiscal year. That is why the G8 submitted the requirement during FY 2010 and requested that the option year be exercised in fiscal year 2011. The contract awarded was a firm fixed price performance based service contract and the contractor provided services in a performance based manner throughout the fiscal year. Under FAR 37.102, performance based contracting is the preferred method for buying services. Performance based contracting focuses on outcomes/results and not on buying 'people' and

requires a disciplined approach to managing contract performance. The contractor was not hired to provide personnel, but to provide services which the contractor clearly provided throughout the period of performance. The need for these services continues to this day.

b. After careful consideration and review of all relevant material and personal interviews during my investigation, I have determined that no ADA violation occurred. The ADA test is a very finite test with an exceedingly high threshold for actually committing an ADA. My findings remain consistent with what the INSCOM G8 initially recommended as I found no basis in facts or law to support the ADA allegation.

c. My investigation did confirm that some oversight processes were lacking or not properly in place at the time of the act. This was clearly outlined in the original 15-6 investigation, and INSCOM has taken steps to correct these deficiencies as outlined in paragraph 14 below. Additionally, I have found no indication of intentional negligence on any party in my ADA investigation. The command has recognized and corrected the procedural and oversight observations described in the original 15-6 investigation to preclude similar incidents from occurring in the future.

d. The ADA review board should recognize that INSCOM at no time violated any of the ADA statutes, and INSCOM has now fully and substantially corrected faults found in the original 15-6 investigation (see paragraph 14). It would be inconsistent with my investigation findings for further ADA actions. Again, it is my determination that no ADA violation occurred.

#### 14. Corrective Action Taken.

a. While no ADA violations occurred and no action need be taken to correct an ADA violation, INSCOM has taken a number of measures to improve the capabilities of its acquisition processes and especially how it intends to oversee service contracts. 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, ie 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.