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The Special Counsel

January 15, 2014

The President
The White House
Washington, D.C. 20510

Re: OSC File No. DI-11-2122

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), enclosed please find agency reports based on disclosures made by a whistleblower at the Department of the Army (Army), Intelligence and Security Command (INSCOM), Fort Belvoir, Virginia. The whistleblower, who requested anonymity, alleged that employees engaged in a violation of law, rule, or regulation, gross mismanagement and a gross waste of funds by entering into three improperly executed contracts and by failing to conduct proper oversight of them.

The agency substantiated gross mismanagement of these contracts and potential violations of multiple laws, rules or regulations, resulting in the likely loss of millions of dollars. While the Army ultimately recouped \$1.1 million from one of the contractors based on incomplete performance, this was just one-third of its initial request for recoupment. The Army decided it could not successfully recoup anything from the other two contracts.

The agency initially reported that the execution and administration of two of the contracts apparently violated several statutes and regulations, including the Purpose Statute,¹ the Bona Fide Needs Rule,² and Defense Federal Acquisition Regulations (DFARS) 208.405-70. However, the Army later backtracked in a supplemental report, finding no violations.

The Army undertook numerous steps to avoid similar problems in the future. However, because of the limited monetary recovery and failure to fully explain why no violations occurred, I have determined that the Army's overall resolution of these issues is unreasonable.

The agency substantiated the whistleblower's allegation that private contractor Silverback7, Inc. received full payment on a contract to hire and payroll 49 positions, despite having filled only a fraction of those positions in the first year of the contract.

¹ 31 U.S.C. § 1301(a) (2012).

² 31 U.S.C. § 1502(a) (2012).

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This partial performance resulted in an overpayment to the contractor of approximately \$1.8 million. The agency further determined that senior officials – the INSCOM Contracting Officer and Deputy Resource Manager and Directorate of Contracting leadership – failed to fully review the Silverback7 Task Order to ensure that it was the best acquisition strategy available, resulting in gross mismanagement of the contracts. The agency also substantiated the whistleblower’s allegations that INSCOM’s contracts with Avue Technologies Corporation (Avue) failed to produce usable end items. The agency determined that Avue received overpayment of approximately \$472,000.

On May 26, 2011, OSC referred these allegations to the Honorable John McHugh, Secretary of the Army, to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d).³ On December 16, 2011, Secretary McHugh submitted the agency’s report to OSC, based on the results of an investigation conducted by the Army Deputy Chief of Staff. In response to requests for additional information made by OSC on January 4 and January 19, 2012, the agency submitted a supplemental report on January 31, 2012. The agency submitted additional supplemental reports on March 26, 2012, October 16, 2012, and July 22, 2013. Pursuant to 5 U.S.C. § 1213(e)(1), the whistleblower submitted comments on the agency’s report and supplemental reports on January 17, 2012, February 9, 2012, December 11, 2012, and August 5, 2013. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the reports and the whistleblower’s comments to you.

I. The Silverback7 Contract

a. The Allegations

The whistleblower disclosed that in August 2010, the INSCOM Chief of Staff and Deputy Resource Manager directed the signing of Contract No. W911W4-10-D-0011 on behalf of the Army with private company Silverback7, Inc. According to the whistleblower, the contract was executed to streamline multiple staffing contracts for 49 positions across

³ The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower’s disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g).

Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency’s investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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INSCOM into one contract with employees from one company. The cost of the one-year contract totaled \$8,238,429.80, or approximately \$700,000 per month. However, the whistleblower alleged that from August 2010, when the contract was executed, until February 2011, no positions were staffed by Silverback7, although the company continued to receive monthly payments from the Army. The whistleblower stated that in February 2011, Silverback7 filled 15 of the 49 open positions, but as of May 2, 2011, no additional personnel were added. Thus, the whistleblower alleged that, although Silverback7 has been paid approximately \$6,762,000 for the full 49 positions, only 15 positions were filled by Silverback7 employees, and those were only filled for 4 months of the 12-month contract period, which expired in August 2011. The whistleblower further alleged that the Chief of Staff and Deputy Resource Manager were aware of these staffing shortfalls, but took no action to terminate the contract for default under 48 C.F.R. § 49.402-1.

b. *The Agency Report*

In its report, the agency substantiated the allegation that Silverback7 did not fill the full 49 open positions but was still paid the full contract amount. The report explained that the contract was originally awarded as a firm fixed-price (FFP) contract on August 27, 2010, and that the 49 positions described in the contract Performance Work Statement were a needs estimate based on a historical staffing number. The contract was competitively awarded under INSCOM's "Rapid Labor Service Support Requirements" multiple-award contract, known as Omnibus III (Omnibus). The Omnibus contract included support for an array of programs, including technology and program and resource analysis. According to the report, the Deputy Director of Contracting indicated that the Silverback7 contract was a commercial service requirement, and as such was required by the Federal Acquisition Regulations (FAR) to be awarded as an FFP. The report stated that the Silverback7 contract anticipated the gradual transition of multiple positions covered by several other contracts into one streamlined contract vehicle. The report also noted that the contract was achieved quickly on the day before the expiration of the Omnibus contract, and that end-of-year pressure to complete the contract resulted in a failure on the part of management to fully review the contract. Thus, the contract was not reviewed by the Contract Acquisition Review Board (CARB), even though its high dollar amount and status as a new requirement should have triggered such review. However, the report noted that the contract was not individually reviewed by the CARB because the Omnibus, of which it was a part, underwent a CARB review for a number of support services.

The report explained that because the Silverback7 contract was a FFP anticipating the gradual transition of positions, the contractor could provide any number of personnel deemed necessary to complete the contract goals and still receive the full annual payment of \$8,238,429.80. The Performance of Work Statement associated with the contract indicated that the government was not recommending or suggesting that the historical level of support was required, but took no action when Silverback7 based its proposed contract price on providing the full number of 49 personnel. Indeed, the report notes that in January 2011,

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Silverback7's Monthly Status Report indicated that additional requirements had increased the total number of required positions to 54. The Monthly Status Report also indicated that positions were being "released" onto the contract when their previous contracts ended. As of June 7, 2011, Silverback7 had received a total \$5,148,814.42 and 30 of 42 released positions had been filled. By October 2011, in the second year of the contract, Silverback7 had filled 38 of 43 released positions.

The agency found that although the INSCOM Contracting Officer Representative (COR), Program Analyst, and Supervisory Contract Specialist/ Contracting Officer expressed initial concern that the Silverback7 contract overlapped with already-existing contracts, no action was taken to follow up on the apparent duplication of payments. The report determined that the contract should have been reviewed by the Contracting Officer, Directorate of Contracting leadership, and the INSCOM Resource Manager to "ensure that it was the most advantageous strategy for the government to pursue." Thus, the agency determined that the failure to collaborate between Resource Management and the Director of Contracting resulted in significant duplication of payments and constituted gross mismanagement.

The agency also determined that the execution and administration of the Silverback7 contract potentially violated the Bona Fide Needs rule, which requires that there be a current, identified, bona fide need for the services. According to the report, a majority of the services that were covered by the contract, which was awarded on August 27, 2010, were already being performed under other contracts at the time of the award. Thus, although the agency did not have a bona fide need in Fiscal Year (FY) 2010 for the majority of services included in the Silverback7 contract, the contract was fully obligated using FY 2010 funds, in violation of the Bona Fide Needs rule. The agency noted that the possible violation could have been avoided by using an Indefinite Delivery/ Indefinite Quantity (ID/IQ) fixed-price task order instead of an FFP to contract with Silverback7. An ID/IQ fixed-price task order would have allowed the Resource Manager to determine when specific positions would be phased into the new contract, and would have established line items for each position so that they could be properly funded.

II. The Avue Contracts

a. The Allegations

The whistleblower also disclosed that the Chief of Staff and Deputy Resource Manager approved two contracts with Avue Technologies Corporation, Contract Nos. W911W4-08-F-0102 and W911W4-10-F-1250, which resulted in either no product or unusable product for the agency. The whistleblower alleged that in August 2008, the Army entered into a contract with Avue to produce an automated time and attendance system and another contract to develop a salary management tool. The whistleblower disclosed that with regard to the automated time and attendance system, the agency was unable to use Avue's

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product and discarded it after a short period of use. The whistleblower noted that Avue also revealed after the fact that it did not have the required certifications from the government to do this type of work and had not held the certifications at the time the contract was made. The whistleblower further alleged that Avue failed to produce any end item or progress reports on the development of the million-dollar salary management tool. Thus, the whistleblower alleged that Avue misled the agency in the contracting process and failed to deliver any work product under the contract with regard to the salary management tool. The whistleblower noted that although INSCOM management knew this, no one attempted to intervene or follow up with Avue, and Avue was paid for the contracts with no deliverable product.

b. The Agency Report

The agency substantiated the allegation that Avue's contracts did not result in usable end products and that the failure to properly oversee the contract for the salary management tool constituted gross mismanagement. The agency explained that the Avue contracts were awarded by the INSCOM contracting officer on September 19, 2008. Option years for the salary management tool were exercised in 2009 and 2010, while one option year was exercised for the time and attendance system in 2009. A subsequent order was issued for the time and attendance system in 2010, after INSCOM failed to timely exercise its second option year on the original contract. Both the salary management tool and time and attendance system contracts were deemed to be publication subscriptions and required payment in advance for each annual increment of services. The agency ultimately spent a total of \$1,061,263 on both contracts. A contract officer's representative was not formally appointed for either contract.

According to the report, there was significant confusion within INSCOM as to which organization within INSCOM would be responsible for the implementation of the salary management tool. There was also ongoing confusion about whether the salary management tool was dependent upon successful rollout of the time and attendance system. The report noted that many employees, including the Deputy Resource Manager, believed that the time and attendance system needed to be functional before the salary management tool could be used. The agency was unable to identify any results from the contract for the salary management tool. According to the report, INSCOM employees told investigators that the tool was more like a "concept" that never came to fruition, despite the fact that two option years were exercised on the salary management tool contract. By August 2011, over \$470,000 was expended on the salary management tool, and the contract had not been formally terminated by the government, even though no end product had been procured.

Similarly, the agency determined that INSCOM experienced ongoing issues with Avue's time and attendance system beginning in September 2008. The agency went through several rounds of proposed changes with Avue, but by December 2010, the agency was aware that Avue could not deliver a usable finished product. Between April and June 2010,

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Avue released a pilot of the time and attendance system, which failed. However, the agency continued to make change requests on the time and attendance system through February 2011, when INSCOM finally issued a stop work notice to Avue. The report noted that, although the agency requested that Avue return any personally identifiable data stored on its servers as a result of its work on the time and attendance system, the contract was never formally terminated. According to the INSCOM contracting specialist, the contract was difficult to terminate, as the agency would incur additional termination costs due to the fact that the contracts were subscriptions that were paid in advance. The report found that the agency expended a total of \$588,020 on the time and attendance system, but received no usable end product.

Based upon the foregoing, the agency concluded that the Deputy Resource Manager engaged in gross mismanagement with regard to the salary management tool contract. This determination was based on the failure by the government to initiate action on the contract, failure to terminate the contract, and failure to procure a usable end product. The agency found that the Deputy Resource Manager should have exercised greater oversight over the contract in order to ensure that the agency's expenditure was in INSCOM's best interest. However, the agency did not find that the administration of the time and attendance system constituted gross mismanagement. The report did acknowledge that INSCOM should not have allowed Avue to continue work on the time and attendance system after its failed pilot rollout 2010, and that Avue's failure should have been brought to the attention of the contracting officer prior to making the decision on exercising the 2010/2011 option year on the contract. The report also noted that if a properly trained COR had been assigned to the contract, the performance problems might have been addressed earlier.

The agency also found several potential violations of law, rule or regulation with regard to the Avue contracts. First, the agency confirmed that the failure to designate a COR for either contract was in violation of Army Federal Acquisition Regulations (AFARS) 5101.602-2(i)(a), which provides that a properly trained contracting officer's representative be assigned, in writing, prior to contract award. The agency further found a possible violation of the Purpose Statute with regard to the time and attendance system contract. The time and attendance system was funded as a subscription using Operations and Maintenance funding, as opposed to Research, Development, Test, and Evaluation (RDTE) funding. Pursuant to Department of Defense (DoD) Financial Management Regulation Vol. 1, Chap. 2A, para. 010212, RDTE funding may have been the proper method of payment for the time and attendance system contract because the large number of changes to the system amounted to software development rather than a straightforward acquisition.

The agency further found a potential violation of the Bona Fide Needs rule because the agency appropriated funds for the salary management tool as an "add-on" to the time and attendance system. The appropriation occurred even though most employees understood that the salary management tool was dependent upon the successful rollout of the time and attendance system, which was never achieved. Thus, the agency did not appear to have a

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current need for the salary management tool at the time of the appropriation. The agency also found a violation of 31 U.S.C. § 3324, which prohibits the government from making advance payments. An exception to the prohibition exists for subscriptions to publications that are printed or recorded for use by the agency. Based upon the agency's investigation, and the fact that many changes were necessary under both contracts to meet the agency's needs, the report found that the Avue contracts may not have constituted publications, and therefore advance payments were potentially prohibited.

The report also determined that INSCOM may not have complied with Army policy requiring certain determinations to be made before ordering services under a non-DoD (GSA) contract. Pursuant to Army policy and AFARS 5117.7802, review and approval must be obtained for non-DoD contracts when procuring supplies for services in amounts greater than \$100,000. The agency determined that no such review or approval was obtained for the Avue contracts. Similarly, the agency found that INSCOM failed to properly justify the exercise of option years for both contracts pursuant to Federal Acquisition Regulation (FAR) 17.207. The agency found the exercise of option years questionable, as Avue failed to produce a usable end-product, and found no evidence that INSCOM employees made the required determinations to justify the exercise of option years.

Finally, the agency found a possible violation of DFARS 208.405-70, which requires competition for orders in excess of \$150,000. The second order for the time and attendance system (following the failure to timely exercise a second option year) was awarded on a sole-source basis and was not competed under GSA multiple award schedule contracts. In order to issue sole-source contracts, the agency must justify its action and process an approval pursuant to FAR 8.405-6. The agency found no evidence indicating that the second order was accompanied by a completed justification and approval.

The agency did not substantiate the allegation that Avue misled the agency with regard to the contracting process. Rather, the report found that a key software developer at Avue left the project prior to the rollout of the time and attendance system, and that began a negative downturn in the company's performance. With regard to the allegation that Avue lacked required certification, the agency stated it was unsure which certifications were at issue, but noted that contracted companies are required to protect sensitive information when it is provided to them. The agency found that Avue had a DoD system accreditation that expired in 2009 but did not renew or receive a new accreditation after that time, and that the agency was not notified of the expiration of the accreditation. The report found that appointment of a COR could have alleviated this problem.

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III. Failure to Terminate Contracts Pursuant to Regulation

a. The Allegations

The whistleblower noted that pursuant to 48 C.F.R. § 49.402-1, under contracts containing the Default clause, the government has the right to terminate a contract completely or in part for default if the contractor fails to perform the services within the time specified in the contract, fails to perform any other provision of the contract, or fails to make progress, thus endangering performance of the contract.⁴ The whistleblower alleged that the Chief of Staff and Deputy Resource Manager were aware that the contractors were failing or failed to provide either work progress reports or a deliverable end product. However, the whistleblower alleged that with respect to the Silverback7 and Avue contracts, although the clause was available to them, the Deputy Chief of Staff and the Resource Manager took no action to terminate the contracts for default prior to their end dates.

b. The Agency Report

The agency substantiated this allegation with respect to the Avue contracts. The report found that both the Deputy Resource Manager and the Chief of Staff were aware that Silverback7 and Avue were failing to provide progress reports or usable end products, but did not invoke the termination clause although it was available to them. The agency noted that the Chief of Staff did call a meeting to address the agency's issues with Avue and ordered Avue to stop work on its contract. Further, the report clarified that there was no evidence to support a termination for default or cause in the case of the Silverback7 contract, as the company was not obligated to fully staff all the positions identified in its contract.

IV. Agency Recommendations

In its report, the agency made a number of recommendations, which the Deputy Chief of Staff adopted. The recommendations included:

- Establish a procedure to ensure that CARB reviews occur when the agency's original acquisition strategy changes and for all task orders meeting the dollar threshold or other requirements for CARB review;
- Create a database listing all contracts by functional area to assist in CARB reviews;
- Focus on hiring of personnel with contract experience as part of a planned expansion of INSCOM's Directorate of Contracting;

⁴ The Default clause, located at 48 C.F.R. § 52.249-8, must be inserted in fixed-price supply and service contracts pursuant to 48 C.F.R. § 49.504. The clause allows the Government to terminate the contract for failure to perform under the contract.

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- Review cut-off dates for requesting contract support from the Directorate of Contracting;
- Establish a process to require an Independent Process Review with INSCOM headquarters senior staff for all contracts prior to the exercise of contract option years, including proof of contract success;
- Appoint contracting officer's representatives to all contracts within INSCOM headquarters prior to contract award;
- Negotiate with Silverback7 to recoup "overpayments";
- Review Silverback7 option year terms to ensure the government pays only for those positions that are filled;
- Issue a "flash report" of possible Anti-Deficiency Act violations as a result of the possible Bona Fide Needs rule violations associated with the Avue salary management tool contract and the original contract with Silverback7;
- Seek to recoup advance payments that were made for which no usable end product was received; and
- Review INSCOM legal advisor involvement to ensure that agency acquisition procedures are being followed.

The report indicated that the Deputy Chief of Staff directed the INSCOM Commander to issue a flash report to trigger an investigation of the potential Anti-Deficiency Act violations described above. The Deputy Chief of Staff also issued a memorandum to the Acting Assistant Secretary of the Army (Acquisition, Logistics, & Technology) requesting a comprehensive review of INSCOM Head of Contracting activity to determine if a transfer or realignment of duties would improve INSCOM's contracting performance. Further, the agency indicated that during FY 2011, INSCOM components instituted a disciplined approach to submitting requirements with cut-off dates so that contracting personnel can effectively meet end-of-year deadlines. INSCOM also conducted training on cost and pricing techniques and source selection, instructed contracting officers to incorporate a written acquisition strategy on all contracts exceeding \$150,000, realigned management to enable increased contracting oversight, and added two new positions to engage senior management in the review and policy processes.

V. The Agency Supplemental Reports

In its first supplemental report dated January 31, 2012, in response to additional questions from OSC, the agency noted that two Anti-Deficiency Act violation flash reports were issued on January 18, 2012. The agency also indicated that official notices were sent to Silverback7 and Avue notifying them of the agency's intent to seek recoupment of \$3,570,822 from Silverback7 and \$472,000 from Avue. The supplemental report indicated that no changes were set to be made to the structure of the first option year of the Silverback7 contract, as the agency's requirements had not changed and 43 of the positions were fully staffed. The agency reallocated internal resources to staff the Command Services Office,

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which will be responsible for vetting contracting requirements across INSCOM. The supplemental report indicated the agency's intent to implement a process for more comprehensive review of all contract actions over \$100,000 and require legal input for such actions. The agency also modified its internal training policy to better define the training requirements for acquisition personnel. Further, the supplemental report stated that the Commanding General was waiting for the outcome of the pending Anti-Deficiency Act investigations before issuing any disciplinary action to the individuals found to have engaged in gross mismanagement.

In its second supplemental report, dated March 26, 2012, also in response to questions from OSC, the agency clarified that the Silverback7 option years were reviewed by the Contracting Officer and achieved in accordance with the FAR. The second supplemental report also explains that during the recoupment process, Silverback7 made a repayment offer of \$1.1 million, which the agency accepted after a review of personnel start dates and after the the inclusion of a small business burden rate to its recoupment calculations.

The agency stated in a one-page third supplemental report, issued in October 2012, that it found no violation of the Purpose Statute or the Bona Fide Needs Rule, and thus, no violation of the Anti-Deficiency Act.

In its fourth supplemental report dated July 22, 2013, in response to ongoing concerns from OSC, the agency provided OSC with a summary of the actions taken in response to the potential Anti-Deficiency Act violations and included copies of the underlying investigative reports prepared by the investigating officer. The underlying reports determined that, with regard to the time and attendance module, it was necessary and proper for INSCOM to contract for this identified need, and therefore, there was a proper purpose for the expenditure of Operations and Maintenance funds. The report also determined that the use of the funds was in accordance with applicable law. The report noted that there was a requirement for a salary management tool that existed at the time of obligation in FYs 2008, 2009, and 2010, and thus, no violation occurred. Similarly, the reports determined that a bona fide need did exist in FY2010 when the contract with Silverback7 was executed. Thus, no Anti-Deficiency Act violations were ultimately found.

In the July 2013 supplemental report, the agency also outlined some additional corrective actions taken in response to OSC's referral. Specifically, the agency confirmed that its published training requirements were amended to require specific acquisition training for specific acquisition functions and that monthly training is being held at the INSCOM Acquisition Center to improve the knowledge and performance of acquisition employees. The agency informed commanders via memorandum that CORs must be provided the necessary resources to perform their functions, including access to the contracting officer, and confirmed that CORs must be nominated for all service-related contracts. The agency

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also issued official Letters of Reprimand to two GS-15 senior staff managers involved in the execution and administration of the contracts, as well as a letter of counseling to the contracting officer involved.

In addition, the report again noted that recoupment negotiations were completed with Silverback7 in April 2012, with a total of \$1.1 million recouped by the government. A change in the requirements of the contract made it necessary to re-compete the contract after the first option year, and the government used this opportunity to switch the contract from an FFP vehicle to a Cost Plus Fixed Fee vehicle. A new contract was awarded in March 2013. While the agency also opened negotiations with Avue for recoupment, INSCOM legal counsel and the Principal Assistant Responsible for Contracting office advised that further recoupment negotiations with Avue be dropped, as the cost would exceed the expected benefits. In addition, INSCOM reinforced its CARB, with an emphasis on compliant behavior, training efforts, progress monitoring, and strengthened communications with commands and Directors. INSCOM also published a revised CARB policy in March 2012 to eliminate any gaps in oversight due to contract amounts, and stood up a Command Services Organization to manage the CARB requirements process. INSCOM increased its staff by hiring experienced contracting professionals and improved its training standards for CORs.

VI. The Whistleblower's Comments

The whistleblower was provided an opportunity to comment on the report and supplemental reports. In response to the agency's initial report, the whistleblower noted that the agency did not mention disciplinary action for those individuals shown to have engaged in gross mismanagement with respect to the Silverback7 and Avue contracts, most specifically the Chief of Staff and Deputy Resource Manager. The whistleblower also expressed concern that the report did not immediately seek recoupment of overpayments. The whistleblower clarified the allegation that management "directed" the execution of the contracts. According to the whistleblower, what was specifically alleged was that management exercised pressure on contracting office staff to accomplish the contracts prior to the end of the year, not that either the Chief of Staff or Deputy Resource Manager actually signed the contracts. The whistleblower stated the view that the contracts did not receive a CARB review because the CARB review requirement was written at the senior management level, the same level that failed to initiate a review in this instance. The whistleblower took issue with the agency's determination that no gross mismanagement occurred with regard to the Avue time and attendance system contract and indicated that management was aware of Avue's shortcomings well before February 2011. Further, the whistleblower expressed concern regarding the Deputy Resource Manager's characterization of the Avue contracts as "subscriptions" and noted disbelief that the contracts could reasonably be viewed as such. The whistleblower emphasized that the Deputy Resource Manager was informed on many occasions that all of the positions under the Silverback7 contract would not be open at the same time, and that duplications would occur, but that he continued the contract anyway.

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In comments to the agency's first supplemental report, the whistleblower reiterated concerns about the deferral of disciplinary action pending the outcome of the Anti-Deficiency Act investigation. The whistleblower predicted that the issue would be "swept under the rug" upon the installation of a new Commanding General of INSCOM, and noted that if that were to happen, the senior-level individuals involved in the gross mismanagement would receive no disciplinary action whatsoever. The whistleblower also expressed doubt regarding the impartiality of the individuals appointed to conduct the Anti-Deficiency Act investigation, and noted that this type of action usually produces a "slap on the hand" and increased training for all staff. Additionally, the whistleblower expressed dismay that the original Silverback7 base contract was not immediately ended and new base contract negotiated upon discovery of the gross mismanagement that occurred. The whistleblower questioned whether interest would be applied to the agency's recoupment attempts, and opined that not only should the contracts be immediately terminated, but also that the contractors placed on a "black list" for future business.

The whistleblower also submitted comments on the agency's second supplemental report. The whistleblower stated that the failure to conduct a CARB review of the Silverback7 contract was deliberate, and that the contract itself was obviously inadequate, as it contained no schedule identifying contracts already in place or when to plan for those requirements to be released. The whistleblower stated that the Deputy Resource Manager had this information available but deliberately concealed it from contracting staff, and when confronted with the problems by employees, indicated that he would "assume the risk" of any negative results. The whistleblower also noted that several individuals received Letters of Reprimand as a result of the agency's investigation, and that this could have been avoided if all of the information had been available to contracting employees at the time the contract was executed. The whistleblower further reiterated concerns that no alterations were made to the first option year of the Silverback7 contract, considering the mistakes that were made in the execution of the base contract. The whistleblower noted that the decision was made for 2013 to re-compete the Silverback7 contract, and expressed the belief that the government should seek to recoup a higher dollar amount from Silverback7 that represented the full loss incurred in the first year of the contract. Finally, the whistleblower noted the agency's delay in producing a report of investigation into the potential Anti-Deficiency Act violations, and expressed concern that the delay was an attempt to produce an excuse for management's actions.

In comments on the third and fourth supplemental reports, the whistleblower questioned whether the agency appropriately determined that no Anti-Deficiency Act violations occurred, when the investigating officer indicated in the original report that such violations were likely. The whistleblower noted that the investigating officer in the third supplemental report is not a subject matter expert on the Anti-Deficiency Act and has personal ties to other staff members that could influence his findings. The whistleblower

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also noted that the staff assigned to investigate Anti-Deficiency Act violations work directly for the Program Manager who handled the Silverback7 and Avue contracts, thus creating a potential conflict of interest.

The whistleblower stated that the reports' determinations on the salary management tool failed to recognize that Avue never clarified whether the time and attendance module needed to be completed prior to commencing work on the salary tool. The whistleblower stated that because Avue did not have any salary modules developed at the time, a need for procurement funds that were unavailable should have triggered an Anti-Deficiency Act violation. Further, the whistleblower reiterated that the substantial modifications made to the time and attendance tool should have initiated the use of RDTE funds, instead of Operations and Management funds, which the whistleblower alleged were used improperly and in violation of the Anti-Deficiency Act. Thus, the whistleblower called into question the agency's determination that no Anti-Deficiency Act violations occurred.

The whistleblower also reiterated the concern that management was aware of the ongoing issues but took no action to better oversee the contracts or to review the contractors' performance. The whistleblower stated that contracts were improperly executed, over the objection of Contracting Officers, in order to quickly spend remaining funds within the fiscal year.

The whistleblower also refuted the agency's contention that FFP contracts entitle the contractor to the whole of the proceeds of the contract, regardless of the service provided. The whistleblower stated that the contractor is entitled to the negotiated administrative cost for maintaining the contract, but that additional earnings for individuals or products are not required except as supplied. Thus, the whistleblower contended that for the initial contract year, Silverback7 was entitled to the administrative costs of the contract plus the costs for the 15 individuals supplied to the agency, and no more. The whistleblower also contended that the recoupment from Silverback7 was not truly negotiated, but rather the agency simply accepted the amount the contractor offered.

The whistleblower acknowledged that the Silverback7 contract was re-competed following the first option year, and that the contract was awarded to another contractor. However, the whistleblower noted that Silverback7 lodged two protests against this action, allowing them to continue to receive funds via a contractual bridge. While the whistleblower stated that the protests are frivolous, the delay provided Silverback7 with an additional year of revenue.

The whistleblower also stated that the disciplinary action taken against management officials as a result of the investigation was insufficient. The whistleblower asserted that management's actions were egregious and should have led to removal.

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VII. The Special Counsel's Findings

I have reviewed the original disclosure, the agency reports, and the whistleblower's comments. The agency is taking numerous steps to ensure that improper contracting procedures cease and that all contracting employees receive training. This includes increased oversight of the contracting process, modifications to agency policies, and hiring additional staff. The agency also sought and obtained partial recoupment of overpayments to Silverback7. Perhaps most importantly, the contract with Silverback7 was recently re-competed. I believe that the resulting alteration to the contract is beneficial.

Nonetheless I have remaining concerns regarding the agency's investigation of potential Anti-Deficiency Act and other violations. The agency provided copies of the internal reports supporting its determination that no violations occurred. The agency's original report provided significant detail regarding its findings on this question, and made the reasonable conclusion that there were possible Anti-Deficiency Act violations. However, in the internal reports, the agency found, on the basis of appreciably less information, that no such violations occurred. The internal reports also failed to explain how and why the determinations in the original report were incorrect.

Further, the reports contain inconsistencies. For example, the internal report on the Avue salary module explained that it required extensive changes during the first two years of the contract. The list of these changes grew to 90 items, and the errors associated with the project grew from 10% to 60%. The report noted that when the Avue programmer left the company midway through the contract, the company lost much of its ability to fix the errors. This information appears to indicate that the agency required extensive and complicated changes to the module, rendering it inappropriate for a subscription contract. However, the report concludes that this was not the case, that the contract was properly classified as a subscription, and thus properly funded with Operations and Maintenance Funding. This is troubling, as it appears that the agency is taking leaps of logic to avoid finding a violation of the Anti-Deficiency Act.

I also have reservations regarding the total dollar amount recouped by the agency. The initial report stated that the agency's opening request to Silverback7 was \$3,570,822. In its supplemental reports, the agency provided an updated estimate for recoupment, with an explanation of how the estimate was reduced to \$1.8 million. The agency indicated that this was "close to" the contractor's offer of \$1.1 million. I note that the agency's recalculation differed drastically from its first estimate, calling into question the methodology used in both calculations. Further, I am concerned by the agency's assertion that its estimate of \$1.8 million was close to the \$1.1 million offered by the contractor. The amount accepted by the agency is \$700,000 less than its own estimate; this represents a nearly 40% reduction in total

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recoupment. While there was uncertainty in the negotiations due to the impossibility of determining the exact dollar amount of overpayment, the difference between the agency's greatly reduced estimate and the amount it accepted from Silverback7 is considerable, and I believe requires additional attention.

For these reasons, I find the Army report does not appear to be reasonable. I recommend that further action be taken to ensure that contracting within INSCOM receives proper attention and oversight.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency reports and the whistleblower's comments to the Chairmen and Ranking Members of the Senate and House Committees on Armed Services.⁵ I have also filed copies of the reports and comments in our public file, which is available online at www.osc.gov. This matter is now closed.

Respectfully,



Carolyn N. Lerner

Enclosures

⁵ The Army provided OSC with a report containing employee names and titles (enclosed) and a redacted report with employee names removed. The Army cited the Privacy Act of 1974 (Privacy Act) (5 U.S.C. §552a) as the basis for its redactions to the report produced in response to 5 U.S.C. § 1213, and requested that OSC post the redacted version of the report in our public file. OSC objects to the Army's use of the Privacy Act to remove the names of employees on the basis that the application of the Privacy Act in this manner is overly broad.