



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

March 26, 2012

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

Dear Ms. McMullen:

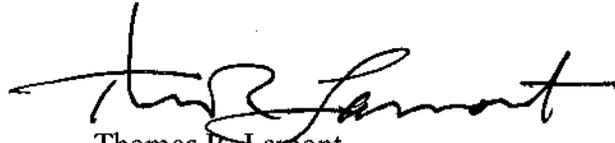
The following information is provide in response to your March 14 and 19, 2012 requests for additional information supplementing the Army report submitted to the Office of the Special Counsel on December 16, 2011. You requested that I provide you with a Supplemental Report that consolidates the response previously provided by the Army in its March 9, 2012 transmission to you and also respond to your additional clarifying questions posed on March 14 and March 19, 2012 to the Army's March 9, 2012 submission.

Your latest questions centered sought clarification of the Army's March 9, 2012 responses and focused on the following matters: (1) the document states that the option years were evaluated in accordance with the FAR. It does not state whether that evaluation occurred during the original contract approval, or as part of this investigation; (2) the original report, however, concludes that the original oversight and approval process for this contract was inherently flawed and constituted gross mismanagement. If the evaluation of the contract years occurred during the original approval process, it seems to conflict with the original report to now rely upon an evaluation that was found to be improper; (3) the new document twice emphasizes that per the FAR, contracts such as this one are performance-based and focused on outcomes, not individual people. Thus, the number of positions filled is immaterial. However, the entire recoupment process appears to be based on the premise that there were not enough people to warrant the payments made. Again, there seems to be a conflict between the two documents; and (4) will the agency review Option Year 2, using the new processes in place, before exercising it?

I am forwarding to you the Army's second Supplemental Report comprised of its March 9, 2012 submission and its answers to the above questions posed on March 14 and March 19, 2012.

If you have any questions regarding this submission or on other matters related to the above OSC case, please direct them to Ms. Cassandra Tsintolas Johnson, 703-614-3500. I want to ensure that you have all of the necessary information you need to complete your review and analysis of the Army's Reports and the whistleblower's allegations.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Lamont". The signature is fluid and cursive, with a large initial "T" and "L".

Thomas R. Lamont
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosures

INSCOM PROVIDED RESPONSES TO OSC QUESTIONS POSED ON
MARCH 14 AND MARCH 19, 2012

1. The document states that the option years were evaluated in accordance with the FAR. It does not state whether that evaluation occurred during the original contract approval, or as part of this investigation.

Response: The Army Regulation 15-6 Investigating Officer did not evaluate the option years as part of her investigation. Evaluation of the base and all options was conducted by the Contracting Officer in accordance with FAR Subparts 15.4 and 17.2, prior to award. Note this was a request for Task Order proposal under a multiple award IDIQ (Fair Opportunity competition). Options must be evaluated prior to award in accordance with FAR 17.206. Each year's pricing, to include the options, is evaluated and documented in the award decision document. Price is considered again, prior to exercising each option. Whether or not to "exercise the option," is dependent on input from the requiring activity concerning its continued need/requirement and factors in FAR 17.207, discussed below.

In this case, evaluations of the Task Order proposals, specifically each year's pricing (base year + 4 one year option periods) were evaluated before award as documented in the Price Negotiation Memorandum. Prior to exercising option year one, price was also considered in accordance with FAR Subpart 17 as discussed below. The overall price was evaluated as was the contractor's option year one pricing which was reasonable and supported. In fact it was \$2 million lower than the government's independent cost estimate.

The FAR provides that prior to the exercise of an option, the Contracting Officer must determine that:

1) funds are available; 2) the requirement covered by the option fulfills an existing need, and 3) the exercise of the option is the most advantageous method of fulfilling the need, price and other factor considered (e.g., a new solicitation would not result in a better price or more advantageous offer than that presented in the option) and 4) the contractor is not suspended or debarred.

Thus, the "exercise of the option" was conducted in accordance with FAR (17.207(c) and (d)). In this case, services were still required (#2) as indicated by the 'requiring activity's' documented request to the Contracting Officer. Nor were any issues of nonperformance were communicated to the contracting officer prior to the option exercise. The contracting officer addressed all factors (1-4) above and thus, properly evaluated the option. Issues stemming from this investigation were never brought to the contracting officer's attention and the Contractor Performance Assessment Reporting System (CPARS) data was input by the Contracting Officer's Representative (COR) indicating successful performance by the contractor. Note also that the Task Order option exercise was exercised prior to the release of the Investigating Officer's findings.

Enclosure 1

Accordingly, there was no documented poor performance issue from the COR or requiring activity officials that would have indicated to the contracting officer that the option should not be exercised.

2. The original report, however, concludes that the original oversight and approval process for this contract was inherently flawed and constituted gross mismanagement. If the evaluation of the contract years occurred during the original approval process, it seems to conflict with the original report to now rely upon an evaluation that was found to be improper.

Response: Based on both the Investigating Officer's report and INSCOM's subsequent reviews, we will conduct an additional review with program officials of the requirement. The Investigating Officer's report was not issued until after Option Year 1 was exercised, thus, the findings of mismanagement were not known to the Contracting Officer. INSCOM will make a determination whether or not to exercise the option or re-compete after a review. Nevertheless, an explanation of INSCOM's approach to the Option Year 1 exercise follows.

There are multiple levels and layers of contract approvals at different times. As stated above, "*evaluation of options*" is different than "*exercise of options*" and these actions occur at different times. The Contracting Officer properly evaluated the options before award and later exercised the option based on the requiring activity's documented request and articulated need for the services. Moreover, the Investigating Officer did not find that the Contracting Officer failed to follow FAR requirements regarding evaluation of the options at the time of the original award, and she did not conclude that exercise of Option Year 1 amounted to gross mismanagement.

What the Investigating Officer did find, however, was that the acquisition strategy for the Base Year was flawed because it failed to take into account that, for some period of time, the contractor would not be required to perform at certain locations (functions) because other contractors were performing the same work. Further, she found that without a more flexible contract structure to account for this phased performance, the contractor would be invoicing for work it did not actually engage in. Again, it was the *pre-award requirements oversight and approval process*, with respect to the Base Year strategy, that the Investigating Officer questioned (e.g., the failure to vet the requirements through the Contract Acquisition Review Board).

Thus, while the Investigating Officer may have faulted INSCOM for the financial outcome associated with the Base Year, she apparently did not harbor the same concerns for the Option Year 1 exercise. In fact, hindsight now suggests that at the time of option exercise, unlike during the initial stages of the Base Year, the contractor appeared to be performing most of the functions called for in the Performance Work Statement. Moreover, as noted above in response to Question 1, the INSCOM contracting activity's option exercise was based on articulated need and, at the time of option exercise, the Investigating Officer's concerns about the Base Year were unknown.

3. Further, the new document twice emphasizes that per the FAR, contracts such as this one are performance-based and focused on outcomes, not individual people. Thus, the number of positions filled is immaterial. However, the entire recoupment process appears to be based on

the premise that there were not enough people to warrant the payments made. Again, there seems to be a conflict between the two documents.

Response: The contract is a performance based service contract and did not require “bodies” as per FAR Part 37. The contract’s terms did *not* require 49 persons; it required performance of “services” in accordance with the performance work statement. Again, for the purposes of assisting potential offerors in understanding the effort, the government referenced, in the solicitation’s background section, the number of people previously used (49) to do the work. However, the contract terms did not require 49 people. Effectively, when the government identifies historical numbers of persons used previously to perform an effort in the solicitation, contractors simply use that number as a baseline when proposing and pricing. That is the case here.

Because of the Investigating Officer’s recommendation to recoup, we initially conducted a simple monthly calculation to arrive at a negotiating position despite the fact we knew it was high and that legally we have little recourse to demand repayment in this particular case.

INSCOM conducted a second calculation to validate the contractor’s repayment offer of \$1.1 million. INSCOM believes it would also address an earlier question posed by OSC (on February 13, 2012) regarding contractor personnel start dates which would focus on a calculation of work not performed” as a basis for recoupment. Thus, INSCOM did a second calculation for them and compared it to the repayment offer of \$1.1 million made by the contractor, as INSCOM anticipated that is how the contractor calculated their repayment offer. Accordingly, INSCOM estimated a small business burden rate to apply after INSCOM calculated the alleged “work not performed” which was based on the contractor’s status reports and personnel start dates. That number was very close to the contractor’s repayment offer of \$1.1 million. Thus, INSCOM found that reasonable based on its calculation which was \$1.7 million. Understanding and validating the contractor’s offer given INSCOM’s initial negotiation start point, was not only valuable but important given these circumstances.

4. Will the agency review Option Year 2, using the new processes in place, before exercising it?

Response: See the discussion to Question 2 above for a discussion of this matter.

INSCOM PROVIDED RESPONSES TO OSC QUESTIONS POSED ON
FEBRUARY 13, 2012

1. The documentation does not include a detailed explanation of the Army's rationale or calculations of the amount to be recouped. For example, is the government seeking interest in addition to the base overpayment?

Response: Given the nature of the contract type, a simple logical calculation was conducted based on the following: A 1 year negotiated Firm Fixed Price of \$8,238,429 and 12 monthly payments @ \$686,535.82. The monthly payments were then divided by 42 contractors (based on government direction (individual unknown) to release 42 to fill – see contractor status reports), for a per person/per month total of \$16,346.09. The \$16K was then multiplied by the employee fill rate per month as indicated on the previous spread sheet, the total of which was \$4.2M. The \$4.2M was further reduced by a 15% overhead/administration fee, low by our calculations, as the contractor was incurring a cost to administer the contract from date of award. The end result was a \$3.5M opening position given the 15-6 recoupment recommendation.

However, by definition, a FFP is not generally subject to adjustment (see below para except in certain circumstances, e.g., FP w/ economic adjustment and FP redeterminable; a termination (for convenience or default) is not considered an adjustment). Actual cost of performance can vary greatly – e.g., if the cost exceeds the price negotiated, the contractor can suffer substantial losses. Conversely, if the costs are far under the price, the government will have paid substantially more. Thus, care in selecting contract type is crucial.

Because the contract was awarded as a Fixed Price (FFP), performance based service contract, no calculations based on labor category and rate by fill dates were performed. The contract was not a fixed price redeterminable type (FAR 16.205 and 206) or a fixed price with economic adjustment, FAR 16.203, which contain clauses that permit price adjustments. Those contract types were not appropriate in this case. Thus, the simple calculation as above, was made for the purpose of obtaining a negotiating objective start point. The background section of the solicitation referenced 49 personnel, estimate based on historical numbers, to assist offerors. The contractor's proposal was evaluated and was determined fair and reasonable. The contract terms did not include a requirement for 49 persons given it was a performance based service contract which does not require numbers of personnel.

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. This is the most misunderstood and misapplied concept, thus the misaligned reliance on 'people' providing the services under this contract action. The contract was not structured to phase in functions as the other contracts expired –it was simply negotiated as a FFP and it did not require 49 persons. The 49 was an estimate in the solicitation as a reference point for offerors.

Enclosure 2

However, we have since conducted a preliminary calculation based on those reports. The calculations derived from the attached spreadsheet are different from our initial calculation provided earlier to you in our January 31, 2012 response, and is further explained above. They are aimed at (1) understanding the contractor's repayment offer of \$1.1 given the initial 'SWAG' (\$3.5M) negotiating position, and (2) to provide a better estimate of the actual work 'not performed' by position/start date. below.

We have since conducted a separate and more detailed calculation to estimate work not performed given that specific salary information is sensitive contractor information. Actual salaries paid to employees are not normally shared with the Government in Government contracts. Thus, we do not have visibility of that information in the instant case. The following calculation is based on the contractor's monthly status reports and fill rate by the employee start date, at **the fully burdened labor rate (FBLR)** proposed (e.g., inclusive of overhead, fringe benefits, etc) for the base year. Our calculations were based on taking the total FBLR yearly rate for each labor category and establishing a projected monthly salary cost (Note: actual salaries cannot be determined given there was no requirement for cost breakouts). We then calculated the effort not worked by multiplying the monthly salary cost by the number of months not worked resulting in a total cost of \$3.1M for 37 employees (the number of employees listed in the September 2011 report – the last month of the base year). Because the contractor was performing and incurring administrative costs, we factored in an estimated burden rate for a small business (60%) in order make a projection on estimated salaries for work not performed. Administrative costs were being incurred thus must be accounted for in any position regarding recoupment. By reducing the \$3.1M by the estimated burden rate of 60%, we conceptually represented the percentage of salaries for which work was not performed. Thus, 60% of \$3.1M is \$1.8M. That rate nearly equates to the \$1.1M repayment offer made by Silverback7; given we cannot determine salary or burden rates with 100% certainty. Thus, it appears to be a very fair offer given the FFP nature of the performance based contract negotiated and not subject to adjustment under FAR.

Lastly, the Government does not intend to assess an interest charge at this point. Per FAR 32.608-1 and the clause at FAR 52.232-17, the contracting officer may charge interest on a contract debt only if that debt remains unpaid after 30 days from issuance of a demand for payment. As the parties are still negotiating a settlement and the contracting officer has not issued a final decision, no specific demand for payment has been issued.

2. The documentation also does not include the length of time each position was filled. Please provide this information with the position title and the begin and end date.

Response: The contractor's monthly status reports provide this information. At your request, these documents can be provided to your office separately as they are extremely large electronic files and will take multiple emails to receive. We can also provide hard copy documents. Please inform us of your desired method of document receipt so that we may best accommodate your request. Those reports detail the fill rate by category and date. However, the above calculations/information and attached spreadsheet are synthesized based on these monthly reports.

3. We are still unclear as to why Option Year 1 is being exercised on the Silverback Contract, instead of replacing the existing contract with a Indefinite Delivery/Indefinite Quantity contract. Option Year 1, according to the documents provided, is a higher fixed cost than the original contract year, a portion of which the Army is attempting to recoup. It thus stands to reason that the Army is going to be overpaying again in Option Year 1 and any options exercised thereafter, even if only by 6 individual positions.

Response: The task order was awarded under an existing IDIQ contract. Task Order 001 to contract W911W4-10-D-0011, included a base year and four one-year option periods commencing on 13 September 2010 -- 12 September 2011. All option years were evaluated in accordance with FAR 17.206 along with the base year cost prior to award. The period of performance for Option Year 1 is 13 September 2011 – 12 September 2012. This option was exercised by modification one, dated 31 August 2011 per FAR Subpart 17.2. The option was exercised based on the requiring activity's validation of the need and request to contracting.

If INSCOM were to terminate immediately, the cost and time to award a new contract would significantly increase (cost prohibitive) as there is inadequate time to plan a proper acquisition. The services are still required; thus, terminating would result in degradation of mission support due to a gap in service or the need for a bridge contract until a fair opportunity to recompetes is conducted. Additionally, under the FAR termination for convenience clause (52.249-2) included in the contract, the contractor must submit a termination settlement proposal. The contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination, which includes a reasonable allowance for profit on work performed.

Option years are often higher based on escalation factors; e.g., due to such factors as inflation, salary/rate increases, and fringe G&A, and overhead increases, etc. Per the FAR and performance-based service contracting, outcomes and not 'people' are purchased thus, the number of positions or people is immaterial. Based on the contractor's monthly status reports, they have been operating at the full performance level during the option year (Sept 2011, option yr one, 43 contractors were on board).

4. Is disciplinary action being delayed pending the outcome of the ADA investigation because the penalties for an ADA violation are criminal and/or more stringent? Is there precedent for taking administrative action in addition to any penalties for a possible ADA violation? Will all employees subject to possible disciplinary action also be reached by the ADA investigation? We will require an update on the status of the disciplinary actions planned and/or taken following the resolution of the ADA investigation.

For ease of reference, each portion of the above inquiry is addressed separately below:

Is disciplinary action being delayed pending the outcome of the ADA investigation because the penalties for an ADA violation are criminal and/or more stringent?

Response: The Command is extremely concerned about the findings and conclusions contained in the Army's report to the whistleblower allegations referred by the Office of Special Counsel

(OSC) to the Secretary of the Army (and the Army Regulation 15-6 Investigating Officer's Report upon which the Army report to OSC was based) and understands the serious nature of an ADA violation. As directed by the Assistant Secretary of the Army (Financial Management and Comptroller) (ASA (FM&C)), in response to the INSCOM flash report, INSCOM appointed a formal investigating officer on February 8, 2012 to conduct a preliminary ADA investigation which will include an exhaustive review of the underlying facts related to the ADA. In accordance with DoD Financial Management Regulations (DoD FMR), the command has 3 months to complete that investigation and submit it to Army Headquarters, ASA (FM&C) for review. Once the Army has rendered a decision as to whether the actions constitute a potential ADA violation, INSCOM will be able to better assess at that time which actions are appropriate for administrative disciplinary corrective action and which ones are ADA related and must wait for the Department of Defense ADA process to be completed before disciplinary action can be taken for that conduct.

Is there precedent for taking administrative action in addition to any penalties for a possible ADA violation?

Response: INSCOM believes that it will be better postured to take appropriate action at the completion of that preliminary investigation with regard to misconduct / performance of duties not amounting to an ADA violation. Appropriate action can include purely administrative matters (e.g. assignment of duties), to counseling, to formal adverse disciplinary action, or may include a combination of these various actions. Each action must be appropriate to the circumstances and provide the employee with his or her due process rights. The outgoing INSCOM Commanding General, Major General Mary A. Legere, has already counseled senior leaders, including those leaders involved in the underlying actions, regarding her expectations of their duty performance based upon the Army's report to OSC including the potential that ADA violations were committed.

Will all employees subject to possible disciplinary action also be reached by the ADA investigation?

Response: The preliminary ADA investigation will be extremely thorough and ensures that the command has the benefit of that detailed investigation before initiating any disciplinary or administrative action. INSCOM believes that it will be better able to assess the scope and depth of the suspected mismanagement and other possible indicia of misconduct once the preliminary ADA investigation has been completed and in conjunction with the OSC report and the underlying Investigating Officer's report. In the interest of fairness to the individual employees and in order to ensure that any agency action is able to withstand third party scrutiny, it is necessary to conclude an appropriate investigation prior to taking any action.

We will require an update on the status of the disciplinary actions planned and/or taken following the resolution of the ADA investigation.

Response: INSCOM has worked closely with the Army's Office of the General Counsel on this matter and will continue to do so. Upon completion of the investigation, the Command will address all misconduct supported by the facts of the investigation and will keep Army Headquarters fully advised.