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The Special Counsel

September 30, 2015

The President
The White House
Washington, D.C. 20500

Re: OSC File Nos. DI-12-3751 and DI-12-3765

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), enclosed please find agency reports based on disclosures made by whistleblowers at the Department of the Navy (Navy), Fleet Readiness Center Southwest (FRCSW), North Island, California. The whistleblowers, Martin Braeunig and Victor Juarez, both quality assurance (QA) specialists, consented to the release of their names. The whistleblowers alleged that the Navy knowingly purchased bearings for use on Navy aircraft from a Japanese supplier in violation of the Buy American Act and the Defense Federal Acquisition Regulation Supplement (DFARS). The whistleblowers further alleged that the purchased bearings are prone to corrosion and pose a threat to the safety of the public.

The agency's investigation found that two contracts for the purchase of foreign bearings were improperly executed and that management failed to properly oversee the procurement process to ensure the use of domestic bearings. However, the agency did not find that the improperly purchased bearings posed a danger to the health and safety of aircraft or personnel. As a result of these findings, the Navy undertook several corrective actions, including a risk assessment of the use of refurbished bearings and a search for a domestic supplier. I have determined that the reports meet all statutory requirements and the findings appear to be reasonable.

The whistleblowers' allegations were referred to Secretary of the Navy Ray Mabus to conduct an investigation pursuant to 5 U.S.C. § 1213 (c) and (d). On June 7, 2013, Secretary Mabus submitted the agency's report to OSC based on an investigation conducted by the Naval Inspector General. The whistleblowers submitted comments on the reports pursuant to § 1213(e)(1). As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the reports and comments to you.[1]

[1] The Office of Special Counsel (OSC) is authorized by law to receive disclosure of information from federal employees alleging violation 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 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

I. The Whistleblowers' Allegations

Mr. Braeunig and Mr. Juarez are QA specialists in the QA Department at FRCSW. QA specialists are responsible for checking the quality of the work conducted by Production Department employees and ensuring that the work is completed in accordance with appropriate procedures and authorizations. Mr. Braeunig is also the certified QA specialist for the Pneudraulic/Hydraulic Shop, Aircraft Components, and T-34/T-44 Landing Gear Actuator Pilots for FRCSW.

Mr. Braeunig and Mr. Juarez disclosed that FRCSW knowingly obtained bearings for use in the T-34/T-44 program from a Japanese supplier in violation of federal law and regulation. The whistleblowers explained that the T-34/T-44 are training aircraft used by the Navy to train pilots. The T-34 is a single engine propeller aircraft, while the T-44 is a dual propeller aircraft. Both aircraft have retractable landing gear that make the fuselage more streamlined when flying. The bearings at issue are used on the T-34/T-44 landing hear actuators, which employees at FRCSW North Island overhaul and repair. According to Mr. Braeunig, the actuators have bearings inside that must be removed and replaced pursuant to Naval Air Systems Command (NAVAIR) instruction 01-1A-503, U.S. Navy Bearing Manual. Mr. Braeunig explained that each bearing is considered inventory of the Department of Defense and is purchased individually, as an end product, through the DLA/Fleet and Industrial Supply Center. They are then installed in individual components of the aircraft.

The whistleblowers explained that the purchase of foreign-manufactured bearings potentially violates 41 U.S.C. §§ 8301-8305 (Buy American Act) and DFARS 225-7009-2. Section 8302(a) of the Buy American Act requires that only American-manufactured articles, materials, and supplies should be acquired for public use. The Act provides for a waiver of the restriction by the Secretary of Defense for countries with which the United States has a reciprocal defense procurement memorandum of understanding (MOU); however, DoD does not have such a MOU with Japan.

DFARS 225.7009-2 explicitly restricts the purchase of ball and roller bearings or bearing components unless the bearings and components are manufactured in the United States or Canada. Further, DFARS 225.7009-5 requires that, in any DoD contract for the procurement of ball and roller bearings as end items, a clause on the restriction of such procurements must be included in the contract. The clause, which is found at DFARS 252.225-7016, requires that each ball and roller bearing be manufactured in the United States, its outlying areas, or Canada. The clause provides exceptions to the restriction for ball or roller bearings acquired as commercial components of a noncommercial end product, or commercial or noncommercial components of a commercial component of a noncommercial end product. It also provides for a waiver of the restriction upon request by the contractor in accordance with DFARS 225.7009-4. DFARS 225.7009-4 allows waivers to be made on a case-by-case basis by the Secretary of the Navy or

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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).

the Defense Logistics Agency (DLA) Component Acquisition Executive. In order to obtain a waiver, information must be presented to the House and Senate Committees on Appropriations demonstrating that either adequate domestic supplies are not available to meet DOD requirements timely or acquisition must be made to acquire capability for national security purposes.

On April 1, 2011, Mr. Braeunig attended a meeting regarding the procurement of bearings for the T-34/T-44 program. At that meeting, Mr. Braeunig stated that he informed Business Office employee Rick Rojas that he believed procurement of the bearings could become problematic because of limited availability and that QA would require proper documentation in order to use foreign-made bearings. Mr. Braeunig contended that he continued to raise this issue at weekly program staff meetings, including to his first-line supervisor, Kenneth Boone, who brought the issue to Supervisory Management Analyst/ Division Head Rick Baskin.

Mr. Braeunig alleged that several months after this initial meeting, Mr. Rojas informed him that American-made bearings had become too expensive and that only Japanese-made bearings could be procured. Mr. Braeunig requested official documentation from the Business Office stating that procurement of the Japanese bearings was legal, but that the Business Office and the Production Shop both ignored his repeated requests. Thus, Mr. Braeunig explained that when the time came for him to sign off on the work documents for those aircraft components containing Japanese bearings, he refused to do so without the appropriate paperwork. Instead, the Production Shop submitted a Request for Engineering Instructions (REI) to the Engineering Department to ascertain whether foreign bearings could be utilized. In its initial response, the Engineering Department stated that the use of foreign-made bearings was prohibited pursuant to DFARS. Mr. Braeunig disclosed that in a response email, Mr. Rojas directed the Engineering Department to answer the REI with regard only to the form, fit, and function of the bearings at issue, and to remove any reference to a possible DFARS violation.

Mr. Braeunig explained that in September 2011, Mr. Rojas contacted Mr. Boone for his opinion on the appropriate use of foreign bearings. According to Mr. Braeunig, Mr. Boone agreed with the assessment that foreign bearings could not be used, under DFARS, without proper documentation, which was not produced. Mr. Braeunig explained that Mr. Rojas then reached out to a variety of management officials, including Captain John C. Smajdek, commanding officer FRCSW; Commander Kyle Turco, chief quality officer; Don Coles, QA department head; and Rick Baskin for input, but none could provide a clear answer on whether the procurement was permissible. They also received an opinion from Gerry Giacalone, a DLA employee, stating that the procurement was legal provided the contract was under $3,000. Mr. Braeunig explained that he informed management that while the dollar amount of the procurement was a factor, the foreign source of the bearings was prohibited by both DFARS § 225.7016 and the Buy American Act. However, management asserted that the Legal Department authorized the procurement.

Despite Mr. Braeunig's repeated requests in both his professional capacity and in relation to his personnel matters, management never provided Mr. Braeunig with documentation showing authorization for the procurement of Japanese-made bearings. Management continued to assert

that the purchases were proper. Through a series of emails sent on March 13, and 14, 2012, Mr. Braeunig demonstrated that Barbara J. Amster, counsel, Naval Supply Systems Command FLC San Diego, consulted with Amy Williams, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, as to the appropriateness of the purchase. He explained that Ms. Williams, in her response to Ms. Amster, supported the contention that the bearings could not be purchased, regardless of their end use, because the restrictions apply when the bearings are purchased as end items. Mr. Braeunig stated that this response was forwarded to Captain John C. Smajdek, who responded that finding an alternate domestic source would take too long, and argued that because the bearings to be purchased were the same as those originally included in the landing gear when the aircraft were purchased, an alternative source was possibly not necessary. Despite Mr. Brauenig's repeated protests, the product work order paperwork was stamped and certified by David Beard, QA specialist, on May 17, 2012, and the bearings were purchased from the Japanese source, in potential violation of both the Buy American Act and DFARS.

In addition to these violations, Mr. Braeunig contended that the bearings posed an additional safety hazard to pilots and to the public. Mr. Braeunig alleged that subsequent to the purchase, QA personnel became aware that the bearings had an ongoing corrosion issue. He stated that many bearings arrived with visible corrosion defects. Mr. Braeunig explained that corrosion can cause friction inside the landing gear actuator, which can lead to breakage of the bearing housing. If the bearing housing breaks, the resulting loose parts of the bearing can jam the gears, preventing the landing gear from fully extending. While bearings with obvious defects are not used on aircraft, Mr. Braeunig contended that there was an ongoing concern that the bearings are not safe for use on Navy aircraft. He pointed to two incidents, neither of which occurred on Navy aircraft, but which both involved the bearings being used at FRCSW. In both incidents, the involved aircraft experienced difficulty deploying their landing gear due to faulty bearings.

II. The Agency Report

a. Improper Purchase of Bearings

The agency substantiated two of the whistleblowers' allegations. First, the agency determined that the foreign purchase bearing executed in April 2012 violated the DoD Appropriations Act and associated DFARS provisions.[2] The agency found that in April 2012, Ralph Franchi, contracting officer, improperly executed a contract for the purchase of bearings that were not produced in the United States or Canada, as required. The agency determined that while the Buy American Act does contain an exception for micropurchases of $3,000 or less, DFARS 225.7009 (which implements the DoD Appropriations Act) specifically prohibits the purchase of foreign-made ball bearings as end items, regardless of the purchase dollar amount.

[2] Upon determining that violations of the DOD Appropriations Act had occurred, the commanding officer sent a "flash report" advising the Assistant Secretary of the Navy of a potential Anti-Deficiency Act violation. A preliminary inquiry determined that waivers issued by the Secretary after the fact would cure the Anti-Deficiency Act violations. However, the Secretary chose not to grant the waivers, in part because a domestic supplier was identified for the ball bearings at issue. This led to a referral for additional inquiry to the Office of the Secretary of Defense.

Foreign-made ball bearings may be purchased as end items only if a waiver has been granted pursuant to DFARS 225.7009-4. Further, DFARS 225.7009-5 requires contracting officers to include the clause found at DFARS 252.225-7016 which mandates that each ball and roller bearing be manufactured in the United States, its outlying areas, or Canada.

The agency found that on April 6, 2012, Mr. Franchi drafted and signed a contract with Global Parts, Inc., for the purchase of double row ball bearings for use in the T-34 actuators. The contract did not reference the DFARS restrictions on such purchases, nor did it include the required DFARS 252.225-7016 clause. The report noted that Mr. Franchi was required by Naval Supply Instruction 5801.1 to refer the purchase to counsel because foreign-made supplies were involved, but he did not do so. In his interview with investigators, Mr. Franchi acknowledged that he did not seek a legal opinion prior to executing the purchase. He also stated that he believed that the micropurchase exception was applicable to the contract following discussions with Ms. Amster. The report noted that when the purchase was made, no waiver had been submitted or granted under DFARS 225.7009-4.

Ms. Amster admitted to investigators that she was mistaken in her belief that the micropurchase exception was applicable to the purchase of the bearings. She stated that she assumed she would have an opportunity to review the purchase when it was sent to her office for review. However, as the purchase was never submitted, it was not reviewed.

The agency also learned through its investigation that Mr. Franchi executed a similar contract for foreign-made bearings on July 29, 2011, for parts to support the T-34/T-44 landing gear overhaul production line. The contract was for $89,252.99. Each line item in the contract was considered an end item under the DoD Appropriations Act, including ball bearings for the T-34 and T-44 actuators that were made in Japan. The contract did not contain the required DFARS clauses. The agency believes that five of the bearings purchased under the contract were installed in T-34 actuators. Mr. Franchi did not request a legal review of the contract. Investigators also discovered two additional purchases, made on a government purchase card, for ball bearings for the T-34 and T-44 actuators. Both purchases were made in 2012 and each totaled less than $3,000.

The agency stated that the purchases for foreign-made bearings must comply with both the Buy American Act and the DoD Appropriations Act for the applicable year. Because the April 2012 contract and the 2012 government credit card purchases were for less than $3,000, they did not need to comply with the Buy American Act. However, under the DoD Appropriations Act, as implemented by DFARS § 225.7009, waivers should have been obtained for both of those purchases as well as the 2011 contract. The agency did not find that Mr. Franchi, Ms. Amster, or any other employee attempted to circumvent the purchase requirements; rather, the agency determined that the employees either overlooked the DoD Appropriations Act requirements, or mistakenly believed that it contained a micropurchase exception similar to the Buy American Act. However, the agency found that Mr. Franchi was ultimately responsible for the contracting errors in the purchases, and that Ms. Amster's mistaken interpretation of the applicable regulations played a significant role.

As a result of its findings, the Inspector General made a number of recommendations, including that Naval Supply Systems Command ensure that all purchasing agents and contracting officers receive training on items that have statutory or regulatory purchase restrictions; management take appropriate action to hold Mr. Franchi accountable for executing two contracts without the required clauses; and, the Assistant Secretary of the Navy consider whether changes to DFARS would enable employees who are not familiar with the purchase of foreign-made items to identify restrictions and understand requirements. The report also noted that Ms. Amster received a letter of caution for her role in the purchases.

b. Corrosion of Bearings

The agency also substantiated the allegation that the foreign-made bearings at issue were prone to corrosion. Specifically, the agency found that the bearings, which were produced in Japan and China, arrived at FRCSW with signs of corrosion.[3] The FRCSW Materials Lab began keeping a logbook to track T-34/T-44 bearings in May 2012. According to the logbook, between May 2012 and January 2013 the Materials Lab received 170 bearings that were tested and examined for corrosion, of which 29 were rejected for signs of corrosion. In July 2012, a new procedure was put into place for receiving, inspecting and storing the bearings at issue. The new procedure stated that the Materials Lab should inspect all foreign-made bearings and old U.S. stock bearings for corrosion, fit, form, and function, separate out the rejected bearings, and repackage passed bearings for use by the production line. Thus, the bearing samples tested as part of the agency's investigation included only two bearings still in their original packaging.

The agency's test of the bearings determined that only one corrosive defect was found on a U.S.-manufactured bearing. Minor discoloration was found on two additional bearings, which did not rise to the level required for rejection. Further, none of the bearings were found to be compromised, including those showing limited corrosion. There was no difference in quality found between the U.S.-manufactured bearings and foreign-made bearings. Thus, the agency did not find that the bearings posed a threat to health or safety.

The agency report addressed two specific incident reports regarding bearings that were raised by the whistleblowers, both of which involved reviews by civilian agencies. The first involved a Beech model T42A Cochise aircraft that had an issue with its landing gear in 2004. The Federal Aviation Administration reviewed that incident was reviewed and found that while the bearing involved in the incident was the same as those purchased by the Navy in 2012, they had not been overhauled after 2,000 hours of use, as required, and therefore failed past its service life. The second incident involved a Beechcraft Baron aircraft and occurred in 1984. In that instance, the Aircraft Owners and Pilots Association produced a report that determined that the bearings in use had exceeded their service life by 2,538 hours at the time they failed. The Naval Safety Center Aviation Department was not able to produce any other hazard or mishap reports involving faulty bearings. In addition, the Defense Criminal Investigative Service looked into the safety of the bearings and found no safety issue with their use. Based upon that review, the DLA

[3] Some of the ball bearings for the T-34 and T-44 were also manufactured in the United States and purchased from old surplus stock, some of which were manufactured in the 1980s. These bearings also showed signs of corrosion.

Inspector General's review, and the Naval Inspector General's own review, the agency determined that the bearings pose no danger to public health or safety.

In response to these findings, the Inspector General recommended that the DLA and FRCSW continue to track the condition of all bearings ordered for and used on the T-34/T-44 overhaul production line; the FRCSW Materials Lab should continue to track and report on the condition of all bearings delivered to FRCSW; and the DLA Aviation North Island and Fleet Readiness Centers and Fleet Logistics Center San Diego ensure that going forward, contracts for the purchase of bearings for FRCSW include the required clauses referencing packing requirements.

c. Failure to Oversee Procurement Process

With regard to the whistleblowers' allegation that management failed to properly oversee the purchase and installation of the bearings, the agency explained the difficulty that the DLA experienced in obtaining domestically-produced bearings. The investigation found evidence that in attempting to resolve this problem in 2012, Ms. Amster referenced some potential issues with DFARS in an email to Mr. Giacalone. Ms. Amster also informed several other members of management that she was "pretty sure [they could not] buy foreign-made bearings as standalone items." Amy Williams stated similar opinions, which were shared with a number of members of management. Despite this, Mr. Giacalone executed the purchase request for bearings in March 2012, including a draft waiver.

After submission of the draft waiver, Patricia Foley, senior procurement analyst, advised Capt. Smajdek, Ms. Amster, Ms. Williams, and Mr. Giacalone that such waivers are rarely approved by the Secretary, and again referenced the specific DFARS restriction on the purchase of bearings. In response, Ms. Amster informed Mr. Giacalone that she believed the option of receiving a waiver was foreclosed. Mr. Giacalone then directed Ms. Amster how to proceed. According to her interview, Ms. Amster then reviewed the DFARS again and concluded that the purchase of the bearings would be appropriate if kept below the micropurchase threshold. In an email to Mr. Giacalone, Ms. Amster stated "Keep it under $3,000 and we do not have to worry about the Buy American Act either!" The agency determined that the purchase of the bearings was essentially predicated on this single statement by Ms. Amster.

Based upon its review of the circumstances, the agency determined that the FRCSW contracting officer failed to exercise due diligence when he did not follow-up on Ms. Foley's email indicating that a waiver was required for purchase. The agency also found that Cmdr. Turco, Mr. Baskin, and Mr. Coles also failed to exercise due diligence when they did not take steps to follow-up on Mr. Boone and Mr. Brauenig's concerns. Thus, the agency determined that FRCSW leadership mismanaged the T-34/T-44 landing gear actuator production process.

As a result of its findings, the Inspector General recommended a number of corrective actions. These included a recommendation that NAVAIR review the landing gear overhaul acquisition process with an emphasis on the sufficiency of it acquisition and contracting resources. The Inspector General also recommended that the Secretary waive the purchase

restrictions on bearings under the DoD Appropriations Act and grant additional waiver requests as necessary to allow for the timely purchase of any additional required bearings. Further, the Inspector General suggested that the Assistant Secretary for Research, Development, and Acquisition consider whether to amend the DoD Appropriations Act to allow the purchase of foreign-made bearings, in consideration of the ongoing difficulty in procuring domestic bearings. The recommendations also included a review of work processes at all Fleet Readiness Centers to determine the extent to which the Quality Department should be responsible for assessing compliance with acquisition rules and regulations and that both the Naval Air Systems Command and the Commander, Fleet Readiness Centers, review FRCSW Quality Assurance policy and practice in light of OSC's four referrals over the last ten years regarding significant QA issues at FRCSW.

d. Mr. Beard's Actions

Finally, the agency determined that although Mr. Beard signed the paperwork authorizing the use of the improperly purchased bearings, he did not know that the purchase was in violation of DFARS at the time he signed. The report noted that Mr. Braeunig and Mr. Boone did not discuss the details of their concern regarding the bearings with Mr. Beard, and that Mr. Beard would not have been expected to conduct an inquiry into the legality of the purchase. Mr. Beard contacted Ms. Amster to ensure the paperwork was proper, and was informed that it was. Thus, the agency found that Mr. Beard's actions were reasonable when he signed the paperwork. However, the Inspector General recommended that FRCSW provide Mr. Beard with a copy of the report and explain why the purchase of the bearings was improper. The Inspector General also recommended that QA personnel be briefed on their responsibilities and whether they include issues beyond technical suitability.

III. The Whistleblowers' Comments

In their comments, the whistleblowers raised concerns regarding the failure of the agency to address the "qualifying country" requirement of the Buy American Act. The whistleblowers noted that the report addressed the issue of micropurchases, but believe the qualifying country requirement should have been included in more detail. The whistleblowers also expressed their belief that issues of integrity and confidence are raised when production is placed ahead of quality and compliance, which they believe is the case here. They reiterated the seriousness of a bearings failure in an aircraft component, and noted that it is QA's responsibility to ensure compliance with all requirements. The whistleblowers further opined that all members of management involved in the purchase of the bearings were aware of the issues surrounding the purchase, but chose to continue regardless.

The whistleblowers took exception to the report's findings regarding Mr. Beard's actions. They noted Mr. Beard's experience and the requirements for QA personnel with regard to compliance. They expressed the position that Mr. Beard's self-professed lack of knowledge regarding the situation should have compelled him to speak with his supervisor, Mr. Boone, before signing the paperwork, or to have recused himself completely from the matter. Finally, the

whistleblowers took issue with the lack of disciplinary action by the agency against Mr. Beard, Cmdr. Turco, and other FRCSW employees.

IV. The Special Counsel's Findings and Conclusions

I have reviewed the original disclosures, the agency's report, and the whistleblowers' comments. The whistleblowers raised legitimate concerns regarding the agency's report, particularly in reference to the gravity of the repercussions should a defective part be used. However, it appears that the agency took these concerns seriously and implemented a significant number of recommendations to monitor the acquisition, testing, and integration of bearings in the future. For these reasons, I have determined that the findings of the agency head appear reasonable and the agency report meets all statutory requirements.

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As required by 5 U.S.C. § 1213(e)(3), I have sent unredacted copies of the agency's reports and the whistleblowers' comments to the Chairs and Ranking Members of the Senate and House Committees on Armed Services. I have also filed copies of the redacted reports and whistleblowers' comments in our public file, which is now available online at www.osc.gov.[4]

Respectfully,

Carolyn N. Lerner

Enclosures

[4] The Navy provided OSC with a report containing employee names (enclosed), and a redacted report in which employees' names were removed. The Navy cited the Freedom of Information Act (FOIA) (5 U.S.C. § 552(b)(6)), Privacy Act of 1974 (Privacy Act) (5 U.S.C. §552a), and DOD policy as the bases 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 Navy's use of FOIA to remove these names because under FOIA, such withholding of information is discretionary, not mandatory, and therefore does not fit within the exceptions to disclosure under 5 U.S.C. § 1219(b), but has agreed to post the redacted version as an accommodation. OSC also objects to the Navy's reliance of the Privacy Act on the basis that the application of the Privacy Act in this manner is overly broad.