U.S. OFFICE OF SPECIAL COUNSEL
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Washington, D.C. 20036-4505

The Special Counsel

October 29, 2019

The Honorable Betsy DeVos
Secretary
Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: OSC File No. DI-19-5088

Dear Secretary DeVos:

Pursuant to my responsibilities as Special Counsel, I am referring to you for investigation a whistleblower disclosure alleging that the Department of Education (ED) Office of the Chief Financial Officer, Contracts and Acquisition Management (CAM) in Washington, DC, has violated federal contracting laws and regulations by improperly structuring and funding contracts for research studies. I have determined that there is a substantial likelihood that the allegations disclose violations of laws, rules, or regulations, and gross mismanagement. A report of your investigation, including any remedial actions if warranted, is due to the Office of Special Counsel (OSC) by December 30, 2019.

The whistleblower, [redacted], an ED contracting officer, who consented to the release of [redacted] name, alleges that CAM's contracting and process for paying for research study services violates federal contracting laws in the use of funds estimated to exceed 5 billion dollars. The allegations to be investigated include the following:

- CAM has entered into non-severable research study contracts without ensuring the availability of adequate appropriations, in violation of the Antideficiency Act and other federal laws.
- CAM violates federal law by paying for research study services using appropriations from incorrect appropriation accounts, including using expired funds.

ED's Institute of Educational Services and other components contract for research studies and reports on various issues. These research studies typically take more than one year to complete. Research studies are considered non-severable services because they represent a single undertaking. *See* U.S. Gov't Accountability Office (GAO), Principles of Federal Appropriations Law, 3rd ed., 2004 rev., ch. 5, § B.5, GAO-04-2616SP at 5-23 (Jan. 2004). A non-severable service is chargeable to the fiscal year in which the contract is entered into even though performance may extend into a later fiscal year. *Id.* at 5-24.

The whistleblower alleges that since at least 2008, CAM has been structuring and funding these research study contracts in order to distribute costs over multiple fiscal years in violation of federal contracting law. According to the whistleblower, despite these issues being raised to management, it has failed to bring its practices into compliance with the law. According to the whistleblower, there are two main ways that CAM has used to circumvent the requirement to fully fund research studies up front: (1) breaking up the contracts into smaller pieces; and (2) using multi-year contracting authority.

According to the whistleblower, CAM routinely structures contracts for research studies to split components of the project into separate tasks and funds each task incrementally, meaning that the agency pays for each task using appropriations accounts other than the account for the fiscal year in which the contract was entered into. The whistleblower alleges that this practice violates the Antideficiency Act (ADA), the Adequacy of Appropriations Act, the bona fide needs rule, and the prohibition against making or authorizing an expenditure exceeding and apportionment because these provisions require the agency to fund the entire non-severable service in the fiscal year in which the need for the study arises even though the service will be completed in a later fiscal year. *See* 31 U.S.C. § 1341(a)(1)(a); 41 U.S.C. §11(a); 31 U.S.C. §1502; 31 U.S.C. §1517.

The whistleblower also alleges that CAM structures some research study contracts as multi-year contracts when these contracts do not meet the legal requirements for multi-year contracts. According to GAO, a contract for the needs of the current year, even though performance may extend over several years, is not a multi-year contract. *See* GAO, Principles of Federal Appropriations Law, ch. 5, § B.8 at 5-37. A contract for a research study will produce one report, which takes multiple fiscal years to complete and accordingly does not qualify as a multi-year contract. The whistleblower alleges that CAM has structured these research study contracts as multi-year contracts to avoid fully funding the contracts when they are entered into in violation of the Adequacy of Appropriation Act. *See* 41 U.S.C. §11(a).

The whistleblower also alleges that even if the use of multi-year contracts were permissible for research study contracts, CAM is not funding the contracts in accordance with the requirements for multi-year contracts. The whistleblower further alleges that CAM has improperly used multi-year contracting authority to use multiple different annual appropriations accounts to fund components of research study contracts, including using expired appropriations. According to the whistleblower, these practices violate the bona fides needs rule, which states that an appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law. 31 U.S.C. §1502(a).

The whistleblower conservatively estimates that the amount of government funds affected by these federal contracting law violations exceeds $5 billion. The U.S. Department of Health and Human Services (HHS) engaged in similar contracting practices and, in 2011, reported ADA violations for fiscal years 2002 to 2010 of over $1.4 billion. *See* GAO ADA Reports, Fiscal Year 2011 (Oct. 2010) at 21. HHS reported that it had improperly funded non-severable service contracts incrementally by two or more annual appropriation accounts, used expired funds, and made obligations in excess of apportionment. *See id.* The whistleblower states that, even after CAM management was made aware that HHS had reported these funding practices as ADA violations, CAM continued its improper practices, resulting in a potentially willful violation of the ADA.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses violations of laws, rules, or regulations, and gross mismanagement. Please note that specific allegations and references to specific violations of law, rule, or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, ED must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the report, along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees, and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the Appendix. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact Elizabeth McMurray, Chief of the Retaliation and Disclosure Unit, at (202) 804-7089 for assistance. I am also available for any questions you may have.

As discussed above, your investigative report, including any remedial actions, is due to OSC by December 30, 2019.

Sincerely,

Henry J. Kerner
Special Counsel

Enclosure

cc: The Honorable Sandra Bruce, Acting Inspector General

APPENDIX
AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: https://osc.gov/PublicFiles. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).