



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

March 9, 2015

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

Re: OSC File No. DI-12-3737

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 Health and Human Services (HHS), National Institutes of Health (NIH), Office of Acquisition Services, Real Estate Contracting Branch (RECB), Bethesda, Maryland. The whistleblower, Monica Hughes, consented to the release of her name. Ms. Hughes, a realty specialist at the NIH Office of Acquisition Services, disclosed that two NIH employees inappropriately and without authorization entered into a series of goods and services contracts on behalf of NIH.

The agency did not substantiate Ms. Hughes's allegations. Rather, it determined that no law, rule, or regulation was violated by the employees' actions, because the actions taken by NIH employees were authorized by a special appropriation passed by Congress related to the acquisition of a NIH facility in Baltimore, Maryland, and that appropriation exempted the agency from the usual restrictions and requirements related to the acquisition process. I have reviewed the agency's reports and the whistleblower's comments and determined that the agency's findings are not reasonable.

Ms. Hughes's allegations were referred to then-Secretary of Health and Human Services Kathleen Sebelius to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). The NIH Office of Management Assessment, Office of Acquisition Logistics and Management, and Office of Human Resources collaborated to carry out the investigation. On December 17, 2012, then-Secretary Sebelius submitted the agency's report to this office. OSC received a supplemental report on April 26, 2013. Pursuant to 5 U.S.C. § 1213(e)(1), the whistleblower provided comments on the findings of the Secretary's office. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the report and Ms. Hughes's comments to you.

The President
March 9, 2015
Page 2 of 7

I. The Allegations

Ms. Hughes alleged that Contracting Officers Pat Rice and Donna Ouellet, who were authorized only to enter into contracts for the acquisition of leasehold interests in real property, improperly entered into a series of goods and services contracts with a construction company, George S. Hall, Inc. (GSH). The contacts concerned the repair of structural deficiencies found in a building that NIH leased from BRC Lease Co. (BRC), located at 251 Bayview Boulevard, Baltimore, Maryland. Mr. Rice and Ms. Ouellet had previously leased the BRC building on behalf of NIH.

Ms. Hughes disclosed that Mr. Rice and Ms. Ouellet were certified as 1170 contracting officers. According to the Office of Personnel Management's (OPM) "Position Classification Standard for Purchasing Series," the GS-1170 Realty Series involves "acquiring real estate or space by lease, purchase, rental, exchange or donation." This certification provided Mr. Rice and Ms. Ouellet with the authority to contract for the lease of the building in question from BRC on behalf of NIH. However, the GS-1170 certification does not cover contracts with third parties in order to cure structural deficiencies in leased properties. This type of contract requires a GS-1102 certification, which OPM describes as "involv[ing the use of] sealed bidding or negotiation procedures to acquire supplies, services, or construction." According to Ms. Hughes, Mr. Rice and Ms. Ouellet did not have GS-1102 certifications. Therefore, their involvement in contacting for the repairs was improper. Any contract for supplies, services, or construction in relation to a building leased by an employee with GS-1170 certification must be entered into by the lessor, which in this instance is BRC. GSH is a third-party construction company with no leasing authority over the building in question; thus, Ms. Hughes alleged Mr. Rice and Ms. Ouellet exceeded the scope of their authority when they entered these contracts.

Ms. Hughes explained that Mr. Rice assumed responsibility for overseeing the BRC lease on April 28, 2006. On July 17, 2008, he entered a contract with GSH to cure structural deficiencies within the building leased from BRC. Ms. Hughes explained to Mr. Rice that he held only a GS-1170 certification, which permitted him to engage in contracts for real estate, and that any structural deficiencies in leased property must be cured by the lessor. This limitation is included on both Mr. Rice's and Ms. Ouellet's Certificates of Appointment as a United States Contracting Officer that read, "This appointment as lease contracting officer allows you to award and administer contracts... for the acquisition of leasehold interests in real property and the alteration of space... provided the alterations are performed by the Lessor." According to Ms. Hughes, GSH had no leasing authority for the BRC building in question.

Ms. Hughes also pointed to FAR 1.602-1(b), which stipulates that, "no contract shall be entered into unless the contracting officer ensures that all requirements of . . . regulations, and all other applicable procedures, including clearances and

The President
March 9, 2015
Page 3 of 7

approvals, have been met.” She alleged that Mr. Rice and Ms. Ouellet’s execution of the contract with GSH on behalf of NIH constituted a potential FAR violation. Ms. Hughes noted that a FAR violation could result in harmful consequences for NIH, as FAR 1.602-3(a) defines an unauthorized commitment as “an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.” While such unauthorized commitments may be cured through ratification, defined in FAR 1.602-3(a) as “the act of approving an unauthorized commitment by an official who has the authority to do so,” Ms. Hughes alleged that the contracts Mr. Rice and Ms. Ouellet entered into with GSH were not ratified by any official with such authority.

Ms. Hughes provided OSC with a modification to the contract with GSH that Mr. Rice signed on April 11, 2012. This modification stipulated that NIH would make an additional payment of \$343,898.03 to GSH in exchange for the “[provision of] architectural, mechanical, electrical and structural engineering services for renovations to the existing 2nd floor vivarium, including the addition of two MRI suites.” This modification brought the total value of the contract between NIH and GSH to \$30,195,095.85 as of April 11, 2012. Since that date, Ms. Hughes alleges that the cost of the GSH transaction to NIH rose by over \$3 million to a total value of \$33,568,642.32 at the time that OSC referred the allegations to the Secretary.

Ms. Hughes brought her concerns to the attention of NIH employees in May 2012. She informed Ms. Sharon Bruce, director of the Office of Acquisitions, Mr. Daniel Wheeland, director of the Office of Research Facilities, and Ms. Diane Frasier, head of Contracting Activity, of Mr. Rice’s and Ms. Ouellet’s alleged violations. However, at the time of OSC’s referral, Ms. Hughes asserted that no action had been taken regarding her allegations concerning Mr. Rice and Ms. Ouellet.

II. The Agency Reports

The report clarified that in 2001 NIH entered into a lease with FSK Land Corporation (FSK) to construct and lease back a biomedical research facility. FSK later assigned the lease to BRC in 2004. In 2008, NIH issued a cure notice to BRC stating that BRC failed to provide required maintenance and warranty services, or provide facility service fees to GSH. NIH and GSH later entered into a payment contract incorporating the terms and conditions originally stated in the lease. Subsequently, NIH issued a default notice to BRC for failure to diligently or promptly correct the failures in the cure notice. The default notice also indicated that NIH would offset rent payment to BRC to cure the default. The report asserts that this mitigated the risks to NIH’s mission and facility occupants by avoiding an interruption of services.

In its report, the agency noted that Congress expressly authorized the NIH Director to “enter into and administer a long-term lease for facilities for the purpose of providing

The President
March 9, 2015
Page 4 of 7

laboratory, office and other space... at the Bayview Campus in Baltimore, Maryland... notwithstanding any other provision of law.” Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, app. A, tit. II, § 221, 114 Stat. 2763, 2763A-30, (2000). The agency argues that this reflects Congress’ intent to exempt the lease of the Bayview property from the usual lease requirements, including competition requirements. The report further stated that, generally, lease contracting warrants contain limitations as required by the General Services Administration Acquisition Regulation (GSAR). Thus, Mr. Rice’s 2006 contracting warrant limited his authority to “award[ing] and administer[ing] contracts... for the acquisition of leasehold interests... and the alteration of space... provided the alterations are performed by the Lessor.” However, the agency asserts that it was not bound by the limitations of the GSAR because of the statutory authority provided in the direct appropriation. The agency notes that the appropriation does not define the term “administer” as used in the statute, but states that it is “reasonable to interpret the term to include modifications that are necessary during the term of the lease to ensure that any building defects are properly remediated and that the building is made fit for both human and animal use...”

Further, the agency asserts that BRC’s failure to pay GSH stopped ongoing work in the Bayview building, placing the health and safety of personnel and animals at risk.¹ Thus, NIH extended Mr. Rice’s contracting authority to allow him to contract directly with GSH to obtain goods and services “to protect human and animal life...” Mr. Rice’s May 2008 warrant removed the requirement that alterations be performed by the lessor and added acquisition actions to the warrant language. However, the report does not address Ms. Ouellet’s role or warrant, other than to note that she received a similarly expanded warrant and authority. The report argues that the expanded warrants, in combination with the appropriation language, gave Mr. Rice and Ms. Ouellet the authority to enter into the contracts with GSH, thus avoiding any FAR violations.

In its supplemental report, the agency again asserted its position that Congress’s direct appropriation exempted NIH from any restrictions regarding its contracting activities in relation to the Bayview campus. The supplemental report stated that NIH interprets the term “lease” in the context of the appropriation as including physical use of the property and real property services commonly provided by the lessor, usually via subcontract with third-party providers. Thus, the agency interprets the appropriation as providing the necessary authority to enter into the GSH contracts. The report notes that contracting for real property services in connection with a lease is a fundamental function of lease administration, although usually such services are provided by a third party. The agency also asserts that its interpretation of the term “administer” is consistent with GSAR in the context of Mr. Rice’s expanded warrant and that administration of the lease would include contracting directly with GSH.

¹ The report does not describe the nature or severity of the risk to the inhabitants, nor does it indicate whether such a risk was imminent.

The President
March 9, 2015
Page 5 of 7

The agency also addressed concerns that expanded warrants were issued to all staff, and not just to Mr. Rice and Ms. Ouellet, calling into question the assertion that the warrants were issued expressly to execute the special appropriation. The supplemental report stated that there are six contracting officers whose warrants contained the expanded language, which has been applied to newly issued warrants since 2008 to grant the requisite authority to administer the Bayview facility. However, the supplemental report also clarified that Mr. Rice and Ms. Ouellet are no longer permitted to sign off on the GSH contract, and that all such actions would in future be executed by the director of the Office of Acquisition, who holds both an 1102 and an 1170 warrant.

III. The Whistleblower's Comments

Ms. Hughes addressed several points of concern in her comments on the agency's report. She notes that that GSH contract is not limited to curing deficiencies in the Bayview facility, but also includes construction for parking, new requirements, and handyman services. Further, the contract is open-ended, and exceeded \$60 million over the period between 2008 and 2013.

Ms. Hughes reiterated that the lease between NIH and BRC is still current and active with a term of 20 years. She noted that the full appropriation, which is not included in the agency's report, concludes with the requirement that the House and Senate Appropriations Committees be notified of the terms and conditions of the lease upon its execution. Ms. Hughes argues that once NIH entered into the lease with BRC for the Bayview campus, the appropriation was fulfilled, and did not anticipate additional non-lease contracts.

Ms. Hughes also asserted that to "administer" a lease means "lease administration." She noted that all warranted leasing officials are required to take a lease administration class as a prerequisite to obtaining a warrant. According to Ms. Hughes, lease administration includes modifying the lease with the lessor or owner and allows for any necessary changes to modify the lease terms. She noted that this is usually accomplished through a supplemental lease agreement, and could include actions such as modifying overtime HVAC requirements, changes to cleaning hours, installation of emergency generators, modifications to the rental rate, painting, etc. Ms. Hughes stated that services to the tenant by another contractor are not considered administration of the lease, because the actions are not taken by the lessor. Rather, services to the tenant that are acquired by the tenant are separate contracts with an entity other than the lessor. Thus, such contracts should not be considered part of the lease.

Ms. Hughes further noted that the special appropriation does not provide for contingencies should the lessor default at a later point in time, nor does it offer a separate appropriation for a service contract in addition to the "long-term" lease. Thus, should the

The President
March 9, 2015
Page 6 of 7

lessor default, as occurred in this instance, the agency would be required to follow the laws, rules, and regulations for curing an existing lease. Ms. Hughes argues that the phrase “[n]otwithstanding any other provision of law” relates to the standard laws under which the agency would usually enter into an administer a long-term lease. However, it would not relate to contracting outside of the existing lease, including the service contracts with GSH.

Ms. Hughes highlights that the term “lease” is defined by the FAR as a “conveyance to the Government of the right of exclusive possession of real property for a definite period of time by a landlord.” In this instance, the landlord is BRC, not GSH. Further, Ms. Hughes states that GSH is not working on behalf of the landlord, as BRC terminated its relationship with GSH in 2008. Thus, Ms. Hughes contends that GSH does not have the authority to grant a conveyance to the government, and the GSH contract with NIH does not constitute a lease. Because the GSH contract is not a lease, it is not part of the special appropriation. Specifically, Ms. Hughes explains that in 2007, BRC and NIH entered into a supplemental lease agreement to procure services through GSH. BRC subsequently defaulted and terminated GSH, at which point NIH entered into a separate contract with GSH. Ms. Hughes argues that, because the contract with GSH is not included in the appropriation, the agency should have followed the GSAM guidelines for alterations through a separate contract. GSAM 570.503 requires that if the government chooses to contract out the work rather than contract directly with the lessor, it must use standard contracting procedures for construction contracts, which the agency did not do in this instance. Ms. Hughes further argues that if specially appropriated funds were used to pay for the GSH contracts, the agency is in potential violation of the FAR and other acquisition regulations.

Ms. Hughes also explains that while GS-1170 and GS-1102 warrants are similar in the nature of the work done under each, the training requirements are quite different. In order to obtain an 1102 warrant, an employee must have FAC-C level III certification. This requires Federal Acquisition Certification in Contracting (FAC-C) level I and II certifications, a Bachelor’s degree, and 24 accredited college credits within certain coursework such as accounting and finance. At the time the contract with GSH was executed, there were several employees in the NIH Office of Acquisitions who did have the proper FAC-C level III training and could have properly executed the contract. However, according to Ms. Hughes, at the time of her comments, neither Mr. Rice nor Mr. Ouellet had completed FAC-C I training.

Further, Ms. Hughes notes that all employees received updated warrants with the language described in the agency’s report. According to Ms. Hughes, the warrants were not specially issued to handle the GSH service contract, they were simply the standard warrant for GS-1170 contracting officers, none of which had any FAC-C certifications. In addition, the warrants specifically include real property, leasehold interest, and lease alterations. In her supplemental comments, Ms. Hughes highlighted that the contracts

The Special Counsel

The President
March 9, 2015
Page 7 of 7

with GSH do not fall into any of the categories included in the expanded warrant, and posited that the warrant language is therefore not relevant to the GSH contracts.

IV. The Special Counsel's Findings

I have reviewed the original disclosure, the agency reports, and the whistleblower's comments. I have determined that the agency report contains all of the information required by statute. However, the agency's findings do not appear to be reasonable. The agency takes the position that the language in the special appropriation grants NIH carte blanche contracting authority for Bayview without regard for any laws, rules, or regulations related to acquisitions. This includes exemption from the standard interpretations of the terms "lease," "lease administration," and from all warrant restrictions which, without legal support, appears to be an unreasonably expansive interpretation. Further, the agency's reliance on the expanded warrants for Mr. Rice and Ms. Ouellet is called into question by the language contained in the warrants, and by the fact that all employees received similarly expanded warrants, which Ms. Hughes indicated was unrelated to the Bayview contract. However, while I find that the agency's report does not appear to be reasonable, I do note that it has taken at least partial corrective action by clarifying that Mr. Rice and Ms. Ouellet will no longer be permitted to enter those types of contracts. Rather, the director of the Office of Acquisitions will do so in the future.

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 Chair and Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions and the Chair and Ranking Member of the House Committee on Energy and Commerce. 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, and closed this matter.

Respectfully,



Carolyn N. Lerner

Enclosures