



APR 26 2013

Refer to: Case #2012-179

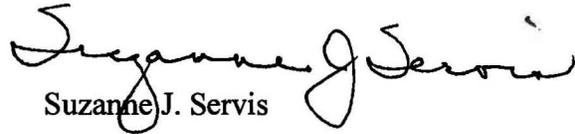
TO: Siobhan Smith Bradley, Attorney, Disclosure Unit
U.S. Office of Special Counsel

FROM: Director, Office of Management Assessment, OM, OD

SUBJECT: OSC File No. DI-12-3737 - Request for Supplemental Report

Enclosed is the National Institutes of Health (NIH) response to the Office of Special Counsel's follow-up questions about OSC File No. DI-12-3737, dated March 28, 2013. The NIH Office of Management Assessment coordinated responses to your questions with subject matter experts from the Office of Acquisition and Logistics Management, the Office of Facilities Management, and the HHS Office of General Counsel.

NIH appreciates the opportunity to provide this response.


Suzanne J. Servis

Enclosure

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Enclosure

BACKGROUND. This memorandum is to respond to the request of the U.S. Office of Special Counsel (OSC) to the National Institutes of Health to supplement its response to OSC File No. DI-12-3737 by answering additional questions contained in a March 28, 2013 email (attached). In sum, given the exigent circumstances, the Contracting Officer's expanded warrant language, in conjunction with NIH's broad legislative authority to enter into and administer the Bayview lease granted by Public Law No. 106-54, authorized the Contracting Officer to contract directly with GSH for the real property services that would be normally provided by the lessor under a GSA delegation of authority.

1. OSC COMMENT. The term "lease" is defined by the GSA Acquisition Manual Part 570.102 as, "a conveyance to the Government of the right of exclusive possession of real property for a definite period of time by a landlord. It may include operations services provided by the landlord." In our conversation on March 28, 2013, the agency noted that 41 C.F.R. § 102-73.50 exempts from GSA requirements those agencies with independent statutory authority to acquire leased space. The agency also indicated that it might rely on other authority on this point.

OSC REQUEST. We are requesting an explanation of the agency's definition of "lease" for the purposes of these contracts and the bases on which the agency relies.

Response. The Bayview lease was entered into pursuant to independent statutory authority, which provides "Notwithstanding any other provision of law, the Director, National Institutes of Health, may enter into and administer a long-term lease for facilities for the purpose of providing laboratory, office and other space for biomedical and behavioral research at the Bayview Campus in Baltimore, Maryland . . ." NIH's use of the term "lease" is based upon the longstanding use of the term within the federal sector and is not inconsistent with the GSA Acquisition Regulation (GSAR) Part 570. The established practice employed by the federal government when entering into long-term leases is that the lessor is responsible for providing the Government with possession of and access to the leased premises and also for the necessary operational support services, including building, utilities, compliance activities, permits, alterations, improvements, custodial, maintenance and other services. In summary, the term "lease" is interpreted by NIH to include the physical access to and use of the property, but also real property services commonly provided by the Lessor – most often via subcontract with third-party service providers.

2. OSC COMMENT. Using the GSA definition of "lease," the appropriation does not appear to anticipate contracts other than leases for real property.

OSC REQUEST. We are requesting an explanation of the basis for which the GSH contract is considered a lease, or part of the original lease, under the definition of lease the agency provides.

Response. As we have previously noted, NIH has independent statutory authority to enter into and administer this long term lease "notwithstanding any other provision of law." Under this broad authority, NIH had authority to take necessary corrective action to avoid losing critical real property services that it needed and to prevent foreseeable serious harm to the premise's

occupants, research animals, and NIH's medical research mission. Therefore, subsequent contract work to administer the lease was appropriate. Accordingly, the Contracting Officer entered into a service contract directly with GSH in order to continue receiving the essential and anticipated real property services that NIH had the duty to administer.

By way of background, contracting for real property services in connection with a lease is a fundamental function of lease "administration." Contracting Officers commonly obtain such services from the lessor of a building through a third-party via subcontract. Here, the original Bayview facility lease was executed with FSK Land Corporation (FSK), and that BRC Lease Company, LLC (BRC), is successor as Lessor to FSK. The Bayview facility lease agreement with BRC provided the real property services through a BRC subcontract award to GSH. However, BRC repeatedly failed to cure its performance issues and refused to pay GSH for the services provided.

The Contracting Officer therefore exercised the authority granted by his 2008 warrant to administer contracts for the acquisition of real property, leasehold interest and lease alterations by entering into a service contract directly with GSH to continue to procure the needed real property services. Leasing Contracting Officers' delegated authorities to enter into contractual instruments depend upon the nature and scope of their contracting warrants and delegations of authority. The Contracting Officer's warrant provided authority to contract directly with GSH in connection with the leasehold interest. The Contracting Officer's actions were also within the scope of OPM's GS-1170 Classification Standard, which explain that Leasing Contracting Officers are expected to "apply new theories and standards to problems not susceptible to treatment by accepted and established realty practices and procedures and use knowledge and skills to analyze and resolve conflicts in policy and program objectives and/or problems in very complex or controversial transactions involving negotiations."

3. OSC COMMENT. The original lease was executed with BRC. While Appendix D to the agency's report determines that it is reasonable to assume that the term "administer" as used by the Public Law 106-54, Section 221 anticipates modifications, the report does not explain how it came to this conclusion or provide information to support this finding.

OSC REQUEST. We are requesting an explanation of the agency's contention that the term "administer," as understood in federal contracting, includes the execution of additional, non-lease contracts, such as the contract between NIH and GSH.

Response. The term "administer" is not defined in the Public Law 106-54. Nor is it specifically defined in the Federal Acquisition Regulation (FAR) or the GSAR. The common dictionary definition of administer is "to manage." Although the Bayview lease is administered under statutory authority and is not constrained by GSA regulation or delegation of authority, GSAR language referring to the authority of contracting officers may be instructive. GSAR 570.103(b) provides "You have exclusive authority to enter into and administer leases on the Government's behalf to the extent provided in your certificate of appointment as a contracting officer." In view of the authority granted the Contracting Officer by the expanded warrant language, it is reasonable to construe the term administer to include contracting directly with GSH or taking

other contract administration actions necessary to manage the Bayview facility.

4. OSC REQUEST. In our conversation on March 28, 2013, the agency indicated that the term “modification” was used in the report to refer to modifications to the building, not to the lease itself. However, in our re-reading the report, it is apparent that modification also refers on several occasions to modifications to the lease itself, including on Page 4 of the report and in Appendices B and D. Further, the report does not contain an explanation of why a new and separate non-lease contract is considered to be a modification to the existing lease, which is still in force. We ask that these points be clarified in further detail.

Response. For the reasons explained in NIH’s initial response, the Contracting Officer modified the BRC lease to remove the GSH facility management services aspect from the lease on a prospective basis because BRC's failure to fix the deficiencies required immediate and decisive action by NIH. The facility services that were thereafter provided by GSH under the direct facility management contract resulted in modifications to the interior, exterior and operating systems of the building that were necessary to bring the building into tenable and functional condition. These actions were believed to be authorized and necessary as part of the Contracting Officer’s lease administration responsibilities.

5. OSC REQUEST. Although the report finds that Mr. Rice and Ms. Ouellet received expanded warrants, it is OSC’s understanding that everyone in the group received the same amended warrants. If that is the case, these warrants were not issued to execute the special appropriation; they were merely newly issued warrants. Please provide clarification on this point.

Response. The above referred-to expanded warrant language was necessary to grant the requisite authority to administer the Bayview facility without having to contract for real property services through the Lessor as would be the case under a GSA delegation of authority. The expanded warrant language has been applied to newly issued warrants since May 2008. The new warrant language permits NIH greater flexibility by allowing the Contracting Officers in NIH’s Real Estate Contracting Branch (RECB) the authority to specifically administer the Bayview lease by either making modifications to the lease or contracting directly with GSH. There are currently six RECB Contracting Officers whose warrants contain the expanded language. It is also NIH’s long-standing business practice to standardize warrant language to the maximum extent practicable. Where NIH’s leasehold interests are acquired through a GSA delegation of authority, the Contracting Officer is required contract for real property services through the Lessor under applicable GSA regulations and policy, such as the GSAR. The expanded warrant language would therefore have no effect on the administration of NIH leasehold interests acquired through a GSA delegation of authority

6. OSC REQUEST. We note that, though not mentioned in the report, Mr. Rice and Ms. Ouellet are no longer permitted to sign off on the GSH contract. The current director, who has the requisite training and authority, is working on the GSH contract. In our conversation on March 28, 2013, the agency indicated that this step was taken in an abundance of caution, as the director holds both 1102 and 1170 warrants and Mr. Rice and Ms. Ouellet do not. We are

requesting that this information be explained in the supplemental report.

Response. Upon receipt of the allegations in the U.S. Office of Special Counsel File Number DI-12-3737, NIH deemed it prudent to have any future contract actions affecting the GSH contract to be executed by the Director of the Office of Acquisition within the Office of Research Facilities, who possesses two warrants: a GS-1102 Contracting Officer warrant and a GS-1170 Realty Specialist. This is not unprecedented. The Director's predecessor also had both types of warrants and, in fact, signed the original lease for the Bayview Biomedical Research Center. Currently, no Contracting Officer in the RECB, despite possessing the above referred-to expanded warrant authority, is presently executing any contract actions affecting the GSH contract.