



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

February 6, 2012

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

Re: OSC File No. DI-11-1098

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), enclosed please find an agency report based on disclosures made by a whistleblower at the United States Department of Agriculture (USDA), Forest Service, Cibola National Forest, Engineering and Acquisition Management Departments, Albuquerque, New Mexico. The whistleblower, who wished to remain anonymous, alleged that Forest Service employees provided a potential construction contractor with government estimate information.

The whistleblower's allegations were referred on March 17, 2011, to the Honorable Tom Vilsack, Secretary of Agriculture, to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). On July 29, 2011, Secretary Vilsack submitted the agency's report to this office. I received a supplemental report on October 19, 2011. The whistleblower declined to comment on the reports. As required by law, 5 U.S.C. § 1213(e)(3), I am now transmitting the report to you.

The whistleblower alleged that in June 2010 the Forest Service initiated creation of a government estimate for the "Forest Road 245 Road Maintenance-Upper Section Project" (M.P. 2.727 to 6.500) in the Cibola National Forest. The project entailed maintenance on the upper half of Forest Road (FR) 245, and the agency set aside \$343,000 for its completion. Mr. Greg Martinez was the Contracting Officer for the project. Mr. Richard Graves was assigned as the Contracting Officer's Representative (COR) on the project, and Mr. Kevin Broderick was assigned to review the project along with Mr. Graves. On July 8, 2010, the government estimate of \$205,195 was submitted for the project.

After consulting with Mr. Broderick and others, Mr. Martinez decided to offer the contract under the U.S. Small Business Administration's 8(a) Business Development (BD) Program to Groundhog Excavating, Inc. (Groundhog), a small business that had already handled the repairs to the lower section of FR 245.<sup>1</sup> Mr. Martinez sent a solicitation to

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<sup>1</sup> The 8(a) BD Program, named for Section 8(a) of the Small Business Act, was created "to help small and disadvantaged business compete in the marketplace... [and to help] these companies gain access to federal and private procurement markets." See <http://www.sba.gov/content/8a-business-development> (last accessed March

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Groundhog and received an estimate back of \$350,000, well over the government estimate of \$205,195. The whistleblower alleged that at this point Mr. Graves, who did not have authority to do so, began communicating directly with Groundhog, purportedly in an effort to have the project completed before the end of Fiscal Year 2010. On September 21, 2010, the whistleblower alleged that Mr. Graves stated that he was in contact with Groundhog, without approval of Mr. Martinez, the Contracting Officer, and had negotiated with the contractor to lower its price. The whistleblower stated that when Mr. Graves was asked how much the price had been reduced, he responded, “[t]o the amount we have in our budget.”

Mr. Graves then directed that the original government estimate be updated with new quantities. As a result, the estimate was increased to \$323,053. No official amendment was issued on the contract by the Contracting Officer. The whistleblower alleged that Mr. Graves then requested another quote from Groundhog using the updated quantities. Groundhog submitted a new quote of \$342,337.80 for the higher quantities, which was less than its original quote of \$350,000 for less quantity. The whistleblower alleged that on September 22, 2010, Mr. Graves explained that this occurred because he told the contractor how much money was in the agency’s budget for the project, “because [the agency doesn’t] have time to mess around.” The whistleblower stated that concerns about Mr. Graves’ actions were brought to Mr. Broderick, but no action was taken. The whistleblower disclosed that on September 23, 2010, Mr. Graves was again asked how Groundhog’s new estimate was still more than the government estimate, and Mr. Graves responded that they did not have time to “mess around,” that he told the contractor how much the agency had to spend, and that “we’re going to do it for \$342,337.80.” The whistleblower alleged that the contract was awarded to Groundhog in the agency’s internal system and the funds were obligated, but no work had begun on the project.

Pursuant to Federal Acquisition Regulation (FAR) 48 C.F.R. Part 436.203, when a construction contract is negotiated by USDA the contracting officers may only disclose the overall amount of the government estimate after the contract has been awarded. According to the whistleblower, the government estimate and related information was released to Groundhog during the negotiation process by Mr. Graves, who was not the contracting officer on the project and had no authorization to negotiate the contract independently. This manipulated the contracting process and resulted in a contract with Groundhog that was significantly greater than the original government estimate and greater than the unauthorized updated estimate.

In its report, the agency substantiated the whistleblower’s allegation that Mr. Graves improperly provided Groundhog with government estimate information. Specifically, the agency found that in his capacity as Contracting Officer, Mr. Martinez was authorized to provide Groundhog with a government estimate if necessary, but that Mr. Martinez never delegated that authority to Mr. Graves. The agency confirmed that Mr. Graves was not

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10, 2011). Pursuant to 13 C.F.R. § 124.404, companies participating in the 8(a) BD Program may receive sole source and competitive 8(a) contract support, as well as other contracting benefits. Thus, Mr. Martinez was not required to solicit bids for the project from other contractors.

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authorized to negotiate the contract with Groundhog independently, and that he did so in violation of the FAR. As a result, the agency proposed a seven-day suspension for Mr. Graves, which was ultimately reduced to a Letter of Reprimand. The agency further explained that due to the impending close of the year, Mr. Martinez had already obligated the funding for the project, and therefore, the contract could not be deobligated. In its supplemental report, the agency explained that the contract was awarded to Groundhog in the USDA's Integrated Acquisition System, but Mr. Martinez had not yet issued the start work order.

I have reviewed the original disclosure and the agency's reports. Based on that review, I have determined that the agency's reports contain all of the information required by statute, and the findings appear to be reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency's reports to the Chairmen and Ranking Members of the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture. I have also filed copies of the reports in our public file, which is now available online at [www.osc.gov](http://www.osc.gov), and closed the matter.

Respectfully,



Carolyn N. Lerner

Enclosures