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OFFICE OF INSPECTOR GENERAL

Office of Special Reviews

OFFICE OF HUMAN RESOURCES AND
ADMINISTRATION; OFFICE OF ACQUISITION,
LOGISTICS AND CONSTRUCTION

Waste and Abuse by the
Former Assistant Secretary
for Human Resources and
Administration



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Executive Summary

The Office of Inspector General (OIG) investigated allegations received in July 2018 that Peter Shelby, while serving as VA's Assistant Secretary for Human Resources and Administration (HR&A), improperly steered a \$5 million contract for leadership development and training services for the benefit of individuals with whom he had a personal relationship.¹ The OIG substantiated the allegations and determined that the contract resulted entirely in waste.

In February 2018, VA awarded a one-year contract to a Service-Disabled Veteran-Owned Small Business (SDVOSB) (the Small Business) that provides leadership and development training focused on its concept of "Serving Leadership." The contract also involved talent assessment services to be used for evaluating candidates for hiring and promotion decisions. When the contract concluded in August 2019, it became evident that VA had purchased services far in excess of what it could use. With respect to the training services, VA used only 232 of the 17,000 one-year training licenses it purchased for \$3.8 million. With respect to the \$1.2 million spent on talent assessment services, VA received no value whatsoever because the talent assessment services relied upon information technology that lacked the privacy and security certifications required by federal regulations, and therefore could not be used.

This waste came about as a direct result of what the OIG deemed was Mr. Shelby's unethical conduct. In late October 2017, just four months after he was sworn in, Mr. Shelby directed his senior staff to arrange for the award of a contract to the Small Business using VA's statutory authority to contract with SDVOSBs on a sole-source basis (i.e., without competition). When Mr. Shelby's staff told him that VA policy and applicable regulations required VA to solicit proposals from multiple vendors, he became insistent that they pursue a noncompetitive process and disregard VA policy in favor of less stringent statutory requirements. Mr. Shelby persistently pursued the use of VA's statutory sole-source authority despite the objections of procurement officials. When he met resistance from the contracting professionals in VA's Strategic Acquisition Center (SAC), he elevated his arguments to VA's Senior Procurement Executive, who also advised that the procurement would need to be competed unless the Small Business was truly the only vendor that could provide the services.

In January 2018, SAC staff concluded that they could not support the sole-source approach, which resulted in additional consultations between the Head of Contracting Activity, the Senior Procurement Executive, and the Chief Procurement Counsel. Upon receiving word that the contracting officer was not willing to proceed on a sole-source basis, Mr. Shelby convened a meeting with procurement officials and HR&A staff. Records reflect that Mr. Shelby pressed his

¹ The exact amount of the contract was \$4,999,500. Although this investigation began in July 2018, additional lines of inquiry and other factors, including an extension of the period under review, as well as a pause to the OIG's issuance of routine oversight reports during the onset of the COVID-19 pandemic added to the time needed to publish this report.

case that the statutory language should be followed, rather than the more restrictive VA policies and regulations. In addition, he made a series of confusing, vague, and inaccurate representations about the uniqueness of the services provided by the Small Business, which is one basis on which sole sourcing is justifiable. As a result of this meeting, the contracting officer and other officials from the SAC agreed to proceed with the sole-source procurement contingent upon receiving the signature of an Office of General Counsel (OGC) attorney on the justification documentation. Ultimately, an OGC attorney signed an attestation that gave the contracting officer sufficient comfort to proceed. OGC's concurrence did not cure the underlying flaws in the contracting process, which included Mr. Shelby's unethical conduct, and the failure by SAC staff and HR&A staff to conduct adequate market research and planning.

OIG investigators concluded that Mr. Shelby breached his ethical duties by misusing his official position to benefit two friends. Mr. Shelby was friends with the Small Business Owner. Mr. Shelby was also a longtime friend of a vice president of Blanchard Training and Development, Inc., which served as the primary subcontractor being used by the Small Business. When asked when and how he met the Small Business Owner, Mr. Shelby made a series of confusing statements to OIG investigators, and suggested that prior to starting at VA he did not know the Small Business Owner. Yet, three months before Mr. Shelby began his VA appointment, the Small Business Owner sent an email to then VA Secretary David Shulkin recommending Mr. Shelby for the assistant secretary position. In later email correspondence with the Small Business Owner, Mr. Shelby credited the recommendation as "instrumental" in his appointment.

Mr. Shelby's misuse of his position was enabled by the failure of HR&A staff and SAC staff to engage in adequate market research and planning that should have resulted in a determination that it was not appropriate to award this contract on a sole-source basis. The Head of Contracting Activity (HCA) overseeing the VA component that awarded this contract was warned that Mr. Shelby's insistence on sole sourcing the contract to a named supplier was grounds to be suspicious of potential improprieties. Yet, the OIG could identify no evidence that the HCA staff or anyone else asked Mr. Shelby about the nature of his relationship with the vendor. The OIG determined that the award of this contract was inconsistent with provisions of the Federal Acquisition Regulation (FAR), the VA Acquisition Regulation (VAAR), and VA procurement policy.

The SAC staff's failure to ensure the contract's compliance with VA policy, the FAR, and the VAAR was facilitated in part by assurances from the OGC that the sole-source approach was authorized by statute.

Mr. Shelby resigned in July 2018 after learning that he had been recommended for possible removal, apparently for reasons unrelated to this contract. Accordingly, the OIG makes no recommendations with respect to his misconduct. The OIG makes eight recommendations for process improvements and for VA to consider whether any administrative action is warranted

with respect to the conduct of the HR&A and SAC staff who failed to properly safeguard taxpayer funds. In response to this report, VA concurred with all eight recommendations. The entirety of VA's response can be found in appendix C.



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Abbreviations

COR	Contracting Officer's Representative
eCMS	Electronic Contract Management System
FAR	Federal Acquisition Regulation
HCA	Head of Contracting Activity
HR&A	Human Resources and Administration
OGC	Office of General Counsel
OIG	Office of Inspector General
PPM	Procurement Policy Memorandum
SAC	Strategic Acquisition Center
SDVOSB	Service-Disabled Veteran-Owned Small Business
VAAR	VA Acquisition Regulation
VHA	Veterans Health Administration
VISN	Veterans Integrated Service Network



Introduction

In July 2018, the VA Office of Inspector General (OIG) received allegations that Peter Shelby, while serving as VA's Assistant Secretary for Human Resources and Administration (HR&A), had improperly steered a \$5 million contract for leadership development and training services to a company owned by a friend.¹ The allegations related to a contract awarded in February 2018 on a sole-source basis (i.e., without a competitive process) to a Service-Disabled Veteran-Owned Small Business (SDVOSB) (the Small Business).²

The OIG investigated and substantiated that VA entered into a \$5 million contract with the Small Business on a sole-source basis.³ The OIG also found that Mr. Shelby abused his position by violating ethics rules in order to cause VA to award a contract for the benefit of two friends.⁴ The contract at issue resulted in the waste of \$5 million.⁵

This report identifies the federal law, regulations, and VA policy that the OIG determined were not followed in the award of this contract. The OIG referred this matter for consideration by the U.S. Department of Justice, which declined to open an investigation. The report also addresses failures of VA employees to ensure that the contract award process complied with applicable requirements.⁶ This report makes eight recommendations for process improvements and consideration of administrative action with respect to the individuals involved in the award of the contract.

¹ Although this investigation began in July 2018, additional lines of inquiry and other factors, including an extension of the period under review, as well as a pause to the OIG's issuance of routine oversight reports during the onset of the COVID-19 pandemic added to the time needed to publish this report.

² "Sole source acquisition means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source." 48 C.F.R. § 2.101.

³ In this instance, the exact contract price was \$4,999,500 (i.e., \$500 under the limit for sole-source contracts to SDVOSBs under 38 U.S.C. § 8127(c)).

⁴ Mr. Shelby was permitted to resign in lieu of removal on July 10, 2018, for reasons apparently unrelated to the matters addressed in this report. Because he is no longer a VA employee, the OIG makes no recommendations specific to Mr. Shelby.

⁵ Actual disbursements to the vendor totaled \$4,997,879.

⁶ See appendix A for information concerning the OIG's scope and methodology.

Findings and Analysis

Finding 1: Mr. Shelby Misused His Official Position to Direct the Award of a \$5 Million Contract for the Benefit of Two Friends

On June 5, 2017, Mr. Shelby received an email attaching marketing material about the Small Business's services from his friend, the Small Business Owner. The Small Business was certified as an SDVOSB by VA's Center for Verification and Evaluation in January 2016, which under federal law makes it eligible for certain noncompetitive contracting opportunities.⁷ The marketing material pertained to leadership development services that the Small Business could potentially provide to HR&A. Although he had already been granted access to VA email systems, Mr. Shelby had no official duties when he received these materials from the Small Business Owner because he was still waiting to be sworn in as Assistant Secretary for HR&A, which occurred approximately two weeks later. Mr. Shelby acknowledged receipt, writing "please be patient, my friend," and explained that he needed to "get structures and authorities aligned" and begin centralizing HR&A functions before he could consider the Small Business Owner's suggestions. The two agreed to keep in touch and attempt to schedule a meal together. By June 26, 2017, the Small Business's internal sales planning documents referenced a business opportunity described as "Peter Shelby – HR&A Proposal" in the amount of "\$5M yr/plus extension."

Mr. Shelby Directed His Staff to Contract with the Small Business

In October 2017, Mr. Shelby met with senior members of his staff and instructed them to arrange the award of a \$5 million contract for leadership development services to the Small Business.⁸ Mr. Shelby further instructed his staff to pursue this contract award on a noncompetitive basis using statutory provisions that enable VA to award some small contracts to SDVOSBs. The procurement process that followed involved HR&A staff, VA contracting professionals in the Strategic Acquisition Center (SAC), and lawyers from VA's Office of General Counsel (OGC).

The services procured under the contract fell into two categories: (1) leadership development training for VA employees and (2) talent assessment tools to be used as part of VA's applicant

⁷ See 38 U.S.C. § 8127 and 38 C.F.R. Part 74.

⁸ One of the senior staff members told OIG investigators, and contemporaneously had taken notes supporting, that in this initial conversation Mr. Shelby stated that the contemplated contract would be for five years at \$5 million per year (i.e., \$25 million). Mr. Shelby was inconsistent in his statements to OIG investigators as it relates to the anticipated value and duration of the contract. He denied that the contract was intended to exceed one year or \$5 million, but talking points presented by Mr. Shelby to then VA Secretary David Shulkin reflect a contemplated commitment to purchase annual licenses of training material in multiple years. Ultimately, VA awarded a one-year contract for \$5 million to the Small Business, and no subsequent contracts have been awarded.

screening process for hiring and promotion. Although the contract was awarded to the Small Business, delivery involved two subcontractors:

- Blanchard, a large organization that offered leadership training under a model called Situational Leadership. The Small Business used Blanchard’s materials in the delivery of the training. Pursuant to its arrangement with the Small Business, Blanchard received \$1.6 million.
- Infor, a software solutions company that was to provide access to its product, Infor Talent Science a “cloud-based Predictive Talent Analytics and pre-employment testing solution.” The Small Business is not a software company and it does not offer a software product akin to Talent Science. Pursuant to its arrangement with the Small Business, Infor received \$1.1 million.

Mr. Shelby Was Friends with the Small Business Owner and an Executive of Blanchard

Approximately three months before joining VA in June 2017, Mr. Shelby was introduced to the Small Business Owner by the Vice President of Federal Solutions for Blanchard (Blanchard VP), the primary subcontractor under the contract. Mr. Shelby had been friends with the Blanchard VP for years, had previously spoken at Blanchard events, endorsed Blanchard’s products, and received compensation from Blanchard for consulting services. Mr. Shelby provided the Blanchard VP’s name to the White House as a reference during his efforts to be appointed assistant secretary.

Email communications indicate that, upon their introduction, Mr. Shelby and the Small Business Owner developed a friendly relationship.⁹ Emails reflect that in March 2017, while Mr. Shelby was being considered for the assistant secretary position, he was engaging in discussions with the Small Business Owner about working together on VA’s leadership challenges. In April 2017, after an in-person meeting with Mr. Shelby, the Small Business Owner sent an email to then VA Secretary Dr. David Shulkin endorsing Mr. Shelby for the assistant secretary position. Mr. Shelby subsequently credited the Small Business Owner for having “helped open the door with VA” and thanked him for the endorsement, indicating he was certain it had been “instrumental” in his appointment. Mr. Shelby, the Blanchard VP, and the Small Business Owner met for dinner to celebrate Mr. Shelby’s appointment as assistant secretary on June 1, 2017, the day before Mr. Shelby started at VA.

When questioned by OIG investigators, Mr. Shelby made confusing statements that suggested he had not met the Small Business Owner prior to being introduced to him at VA by the then Chief

⁹ In email correspondence, Mr. Shelby and the Small Business Owner both used the words “friend” and “buddy” to refer to one another.

Information Officer. For instance, Mr. Shelby told OIG investigators that, prior to his conversations with the former CIO and Dr. Shulkin, he “had no idea who [the Small Business Owner] was or what he was capable of or what his business was.” Mr. Shelby also told OIG investigators that he was unaware that the Small Business Owner had recommended him to then VA Secretary Shulkin and stated that the Small Business Owner could not have done so because they had not met and did not know each other as of April 5, the day the recommendation was made. Based on the email documentation referenced above, the OIG concluded that these statements to investigators appeared false and/or misleading.

Mr. Shelby’s Conduct Violated the Ethical Prohibition Against Using His Public Office for Private Gain

The Standards of Ethical Conduct for Employees of the Executive Branch (Ethical Standards) govern the conduct of federal government employees and require that they “place loyalty to the Constitution, laws and ethical principles above private gain.”¹⁰ This includes avoiding any actions that create “the appearance that they are violating the law or ethical standards.”¹¹ The Ethical Standards prohibit executive branch employees from using their official positions “for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity...”¹² In addition, an employee may not “coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.”¹³ Mr. Shelby violated the Ethical Standards by directing his staff to arrange for the award of the contract to the Small Business.

Mr. Shelby received in-person ethics training on June 21, 2017, provided by VA’s OGC. OIG analysis of the training presentation provided by OGC reveals that its topics included misuse of position as well as other relevant information concerning conflicts of interest and the appearance of conflicts of interest.¹⁴ The training also admonishes staff to “Seek Advice BEFORE You Act.” (emphasis in original). Mr. Shelby was aware of his ability to obtain advice from OGC’s ethics team. Further, OGC records reflect that he sought advice on six occasions for topics including an offer for free admittance to a breakfast event at the Ritz-Carlton, attendance at various industry events and widely attended gatherings, and a determination concerning his ability to purchase

¹⁰ 5 C.F.R. § 2635.101(a)

¹¹ 5 C.F.R. § 2635.101(b)(14).

¹² 5 C.F.R. § 2635.702

¹³ 5 C.F.R. § 2635.702(a)

¹⁴ See 5 C.F.R. § 2635.702(d) (referencing 5 C.F.R. § 2635.502 and requiring public officials to consider whether a personal friendship may jeopardize the official’s impartiality with respect to the official’s participation in matters affecting the financial interest of the official’s friend).

dinner for union representatives. OGC records do not reflect any request for ethics advice by Mr. Shelby in connection with this contract.

Finding 1 Conclusion

The OIG concludes that Mr. Shelby violated the Ethical Standards by arranging for the sole-source contract award to the Small Business, which resulted in private gain to his friends the Small Business Owner and the Blanchard VP.

Recommendation 1

1. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics and Construction requires in any award made on a noncompetitive basis that the contracting officer obtain a written disclosure and certification by the program sponsor, contracting officer's representative, and other staff involved in the procurement as appropriate, disclosing any personal or professional relationship between such staff and vendor personnel.

Finding 2: Use of VA’s Sole-Source Authority was Not Supported by an Adequate Justification as Required by VA Policy and the VA Acquisition Regulation (VAAR)

Federal law requires “with certain limited exceptions, that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.”¹⁵ Congress has created various statutory exceptions that allow government agencies to award some types of contracts without subjecting them to the complexity and time required for competitive bidding.¹⁶ In this instance, VA’s statutory authority to contract with the Small Business on a sole-source basis was derived from the Veterans Benefits, Health Care, and Information Technology Act of 2006.¹⁷

VA Policy and the VAAR Required the Contracting Officer to Maximize Competition Among SDVOSBs

Generally, procedures that require contracts be competed would prevent an individual such as Mr. Shelby from abusing his or her position by steering a contract to a particular firm. Ensuring compliance with such provisions is one of the duties of the professional contracting staff in VA’s Strategic Acquisition Center (SAC).¹⁸ SAC staff’s role includes advising its VA customers (such as HR&A) about appropriate procurement strategies designed to meet their acquisition needs in a manner that comports with the FAR, VAAR, and VA policy. However, in this case, the authority provided in 38 U.S.C. § 8127 to provide sole-source contracts to SDVOSBs (VA’s Sole-Source Authority) was misused to permit this contract to be awarded to the firm of Mr. Shelby’s choosing.¹⁹ At the time of the award, VA had a policy that—had it been followed—would have resulted in the use of a competitive award process for this contract.

¹⁵ 48 C.F.R. § 6.101 (referencing 10 U.S.C. § 2304 and 41 U.S.C. § 3301) (internal cross-references omitted). The contracting officer is an official who is authorized to enter into binding contracts on behalf of the government. Contracting officers hold a “warrant,” which authorizes the holder to make contracts up to a set amount.

¹⁶ See 41 U.S.C. § 3304 (authorizing general exceptions applicable to all agencies); see also, 38 U.S.C. § 8127 (creating specific exceptions for VA).

¹⁷ Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461 as amended, codified at 38 U.S.C. §§ 8127-8128; see also VA Acquisition Regulation (VAAR) § 819.7007 (Class Deviation dated July 25, 2016).

¹⁸ VA’s Strategic Acquisition Center is subdivided into two functional groups located in separate geographic locations. The SAC in Fredericksburg, Virginia, is responsible for VHA procurement in support of medical centers nationwide. The SAC in Frederick, Maryland, is responsible for procuring services on behalf of all of VA. The office involved in this procurement was the SAC in Frederick, Maryland, which describes its mission as providing “innovative acquisition solutions and business advice to its customers, primarily for professional services.”

¹⁹ Under the statute, and the VAAR provisions implementing it, a VA contracting officer may use a noncompetitive process to award a contract to a verified SDVOSB if (1) the SDVOSB is determined to be a “responsible source,” (2) the award exceeds the simplified acquisition threshold but does not exceed \$5 million, and (3) “in the estimation

In particular, then-applicable VA policy limited VA's Sole-Source Authority by requiring contracting officers to justify in writing various factors supporting a decision to use a noncompetitive procurement process, including "an explanation why only one of the [SDVOSBs] can accomplish the requirement."²⁰ This policy was set forth in VA Procurement Policy Memorandum 2016-05 (VA Policy Memo 2016-05), which also stated that

contracting officers shall obtain competition to the maximum extent practicable when contracting with SDVOSBs and VOSBs. While contracting officers may use other than full and open competition when awarding to SDVOSB and VOSB firms under 38 U.S.C. § 8127(c), the focus should be on competing requirements among SDVOSBs and VOSBs to achieve a fair and reasonable price.²¹

VA's policy of seeking to maximize competition is consistent with the FAR, which requires that "[w]hen not providing for full and open competition, the contracting officer shall solicit offers from as many potential sources as is practicable under the circumstances."²² When the criteria for proceeding on a noncompetitive basis are satisfied, the FAR, VAAR, and VA Policy Memo 2016-05 required the contracting officer to analyze and document the reasons why it was appropriate to use the sole-source process (which is still the case under revised policy as well). This should be documented on a "Justification and Approval for Other than Full and Open Competition" form (J&A form). The J&A form must be reviewed and approved by the Competition Advocate, a position described by the FAR as responsible for "promoting full and open competition" in agency procurements.²³ Mr. Shelby asserted to HR&A staff, OGC attorneys, and SAC staff that the sole-source approach was appropriate because the Small Business was uniquely positioned to perform the services.²⁴

of the contracting officer, the award can be made at a fair and reasonable price that offers best value to the United States. See 38 U.S.C. § 8127.

²⁰ When this contract was awarded, this policy requirement was more stringent than what was required by the statute, the FAR, or the VAAR. The VAAR provision in effect at the time stated, "a determination that only one SDVOSB concern is available to meet the requirement is not required." VAAR § 819.7007 (Class Deviation dated July 25, 2016). In September 2019, VA revised its procurement policy. The revised policy continues to require a justification for the use of noncompetitive procedures, but no longer requires the contracting officer to find that only one SDVOSB is available to meet the contracting requirement.

²¹ VA Procurement Policy Memorandum 2016-05, July 25, 2016. The VA Office of Acquisition and Logistics (OALC) issues Procurement Policy Memoranda (PPMs), which provide mandatory policy guidance that supplements the FAR and VAAR and is to be followed by staff involved in the procurement.

²² 48 C.F.R. § 6.301(d)

²³ 48 C.F.R. § 6.304(a)(2); 48 C.F.R. § 6.502 VA Procurement Policy Memorandum 2016-05, July 25, 2016.

²⁴ HR&A staff and SAC staff told the OIG team that they relied on Mr. Shelby's representations that "no one else in the world can do this" because of the Small Business's purported ownership of intellectual property pertaining to Infor and Blanchard. The OIG identified multiple confusing and misleading statements made by Mr. Shelby concerning the Small Business's ownership of intellectual property. In multiple instances Mr. Shelby claimed that the Small Business "owned the IP for [Blanchard's] Situational Leadership and only they can authorize delivery to

In addition, the same VA policy required that

for all requirements in excess of the simplified acquisition threshold, VA contracting officers shall consider using the competitive set-aside procedures in VAAR 819.7005 or 819.7006, as appropriate, if the market research required by VAAR Part 810 shows a reasonable expectation that offers will be received from two or more eligible firms and award will be made at a fair and reasonable price that offers the best value to the United States.

In this instance, if the market research indicated that two or more SDVOSBs were likely to compete, the contracting officer should have considered using competitive set-aside procedures.²⁵

Mr. Shelby Sought an Exception to VA's Procurement Policy to Enable the Contract Award

In November 2017, to carry out Mr. Shelby's instruction to arrange for the award of a contract to the Small Business, a senior HR&A Program Director worked to begin the contracting process with a subordinate who he assigned to serve as the Contracting Officer's Representative (HR&A COR) for this contract. Shortly thereafter, the HR&A Program Director and HR&A COR were in contact with and sought advice from a contracting officer, other procurement experts in VA's SAC, OGC attorneys, VA's Senior Procurement Executive, as well as other senior officials in HR&A. Email correspondence in November 2017 among SAC contracting staff, the HR&A COR, and others involved in the early stages of the procurement reflects that several individuals expressed skepticism that sole sourcing would be a justifiable approach for procuring leadership training, because it is a service that many vendors provide. On November 8, 2017, the HR&A Program Director wrote to Mr. Shelby "Peter, per your guidance, I reached out to OGC [regarding sole sourcing with an SDVOSB] and then follow[ed]-up with SAC-F. As it stands right now there has been updated policy issued by [the Office of Procurement, Acquisition and Logistics] that supersedes the OGC information communicated to you yesterday. Worst case will require a compelling need sole-source justification explaining specifically why only select

Federal Government." The Small Business, Blanchard, and Infor personnel all confirmed that the Small Business has never had exclusive rights to Blanchard's or Infor's intellectual property. The Small Business Owner explained to the OIG that, while the Small Business had an exclusivity arrangement with Blanchard for certain consulting services, this did not equate to ownership of any intellectual property.

²⁵ See p. 13 for a discussion of deficiencies in the market research. This requirement to consider competitive set-aside procedures where the market research indicates that two or more SDVOSBs might bid on the contract continues to apply under VA's revised policy.

company can perform the work.”²⁶ Mr. Shelby responded that “no one else in the world can do this.”

The results of preliminary market research conducted under the HR&A COR’s supervision in October 2017 showed multiple vendors, including four other SDVOSBs, that purported to be capable of providing the leadership development training services. HR&A and SAC staff were aware and advised Mr. Shelby that, for a sole-source acquisition under 38 U.S.C. § 8127, VA policy required the contracting officer to establish that only one SDVOSB was capable of accomplishing the requirement. In all other circumstances, the requirement would need to be competed among SDVOSBs.²⁷ Thereafter, on November 17, 2017, Mr. Shelby sought a meeting with VA’s then Senior Procurement Executive to discuss exercising VA’s statutory sole-source authority to award the contract to the Small Business without having to provide the justification and documentation required by VA policy.

The Senior Procurement Executive forwarded the meeting request to the SAC Head of Contracting Activity (HCA) (a procurement official three supervisory levels above the contracting officer assigned to this procurement) and instructed that “The policy will not be waived. However, if there is justification for a sole source, all [the contracting officer] needs to do is have their customer justify it and document the file.”²⁸ The Senior Procurement Executive told the OIG investigators that Mr. Shelby derided VA’s policy, recounting,

Peter Shelby saw me down in the lunchroom, and he swore and be damned my policy was crazy, [Mr. Shelby contended] that we could be pushing the easy button, pushing all these things over to SDVOSBs without competition. I said, “Well, that might be good for a supplier, but would it be good for the taxpayer?”

²⁶ Documents confirm that Mr. Shelby consulted with OGC at the outset of this procurement effort. Mr. Shelby’s calendar contains a November 7, 2017, entry for a meeting with the subject “Sole Sourcing.” Invitees included VA’s Chief Procurement Counsel and other OGC attorneys. On November 8, 2017, the HR&A Program Director received an email from a contracting official he consulted that summarized their phone conversation as follows, “Per our phone call, the Assistant Secretary wants to pursue a pilot with [the Small Business] (an SDVOSB) on a sole source basis using the statutory authority the VA has to sole source under \$5M per [VA’s Chief Procurement Counsel]. As I mentioned on the phone, that authority certainly exists but VA policy has supplemented the circumstances under which we are authorized to use that authority.” The HR&A Program Director forwarded this message to VA’s Chief Procurement Counsel and asked whether OGC had information that superseded the relevant policy. The Chief Procurement Counsel responded by referring the HR&A Program Director to the Head of Contracting Activity for the Strategic Acquisition Center.

²⁷ VA Procurement Policy Memorandum 2016-05, July 25, 2016.

²⁸ “The senior procurement executive is responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency.” 41 U.S.C. § 1702. The Senior Procurement Executive explained to OIG investigators that VA delegates significant authority to various “heads of contracting activity” who “effectively run an autonomous contracting organization” with respect to the VA component to which they relate.

And he says, “Well, the law lets you do it.” And I said, “Yeah, we recognize the law lets you do it, Peter. But that’s not good business.”

The Senior Procurement Executive’s statement to OIG investigators is consistent with the record, which reflects that multiple individuals attempted to persuade Mr. Shelby to compete the requirement, but that he insisted on pursuing a sole-source approach that relied on VA’s statutory authority notwithstanding any “self-inflicted limitation” imposed by VA policy.

SAC Staff Recommended a Competitive Acquisition Process

From early November 2017 through mid-January 2018, the contracting officer and other SAC staff members had numerous communications with Mr. Shelby and HR&A staff in which the contracting officer took the position that the contracting opportunity should be competed as an SDVOSB set-aside rather than sole sourced. The primary SAC staff involved in this acquisition included the contracting officer assigned to the procurement; the agency’s Competition Advocate (who was also the contracting officer’s direct supervisor); the SAC Associate Director who supervised the Competition Advocate; and the Head of Contracting Activity (HCA), the senior-most procurement official within SAC who was substantively involved with the procurement (collectively SAC staff). Figure 1 summarizes the hierarchy of SAC staff members involved in approving this procurement.

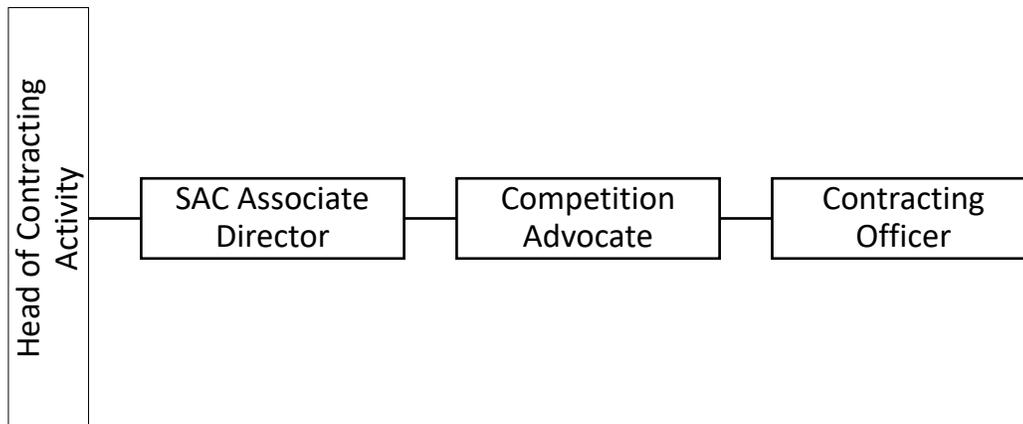


Figure 1. SAC staff involved in procurement
Source: OIG Analysis

According to SAC staff, Mr. Shelby was insistent and intimidating in communicating his request that the contract be awarded to the Small Business. The contracting officer described Mr. Shelby as “completely unprofessional and just yelling and ranting and raving that he had to have this company.”²⁹

²⁹ HR&A staff also described fear of retaliation by Mr. Shelby, telling OIG investigators they were aware of alleged retaliatory actions taken by Mr. Shelby against employees who stood up to him, including some who had lodged

Emails reflect that Mr. Shelby engaged in multiple communications with OGC attorneys, the contracting officer, and other SAC staff concerning VA's Sole-Source Authority and the restrictions VA policy imposed on use of that authority. The Competition Advocate told OIG investigators that he participated in discussions about whether a sole-source award was appropriate as well as efforts to convince Mr. Shelby to compete the contract. The Competition Advocate explained that VA's Sole-Source Authority is used sparingly:

We don't use that very often. Before I came to the VA, my understanding is there was kind of a rocky history at that, where, you know, the VA had that authority. People were using it very aggressively. And I think at some point the senior procurement executive said, 'Hold on a second here. It's great that we've got this, but that doesn't mean it's always the wisest course of action to use. We need to make sure we're getting a little bit more competition here and there,' and there [were] some VA policies that were put into place to lay out some additional groundwork as to when it's appropriate to utilize that, et cetera. So I think, off the top of my head, I think I've signed off on maybe three or four in the last couple of years where we've done that.

As late as January 9, 2018, the HCA wrote to Mr. Shelby and advised that the market research performed by SAC staff identified other sources for the training, including that the primary subcontractor (Blanchard) already had a GSA contract, which the HCA advised "may prevent a sole source justification."

SAC Staff Agreed to Support a Noncompetitive Process After a January 2018 Call with Mr. Shelby

On the evening of January 9, 2018, Mr. Shelby wrote to the HCA and the Senior Procurement Executive questioning SAC staff's continued reticence to award the contract to the Small Business on a sole-source basis—stating that OGC had already approved the acquisition. The next morning, emails reflect that the Senior Procurement Executive and the HCA agreed among themselves that the requirement should be competed as an SDVOSB set-aside. The Senior Procurement Executive wrote to the HCA,

Your note and [the note from the SAC Director] to Peter [Shelby's] program manager outlined the issues correctly with Peter. We must compete this requirement. It appears he is attempting to push for a sole-source award to a firm of his choice, when there are multiple firms who can provide these services. I

complaints against him with the Office of Accountability and Whistleblower Protection in the fall of 2017. The HR&A Executive Director told OIG investigators that fear of reprisal prevented him/her from raising issues with Mr. Shelby. The HR&A Executive Director stated that "threatening to fire people" was a "routine occurrence from Mr. Shelby," and that it was "not unusual" for Mr. Shelby to comment, "I'll whip out my Accountability Act and just start firing people."

don't have to tell you this can be very unstable ground to walk on, as it could potentially lead to ill effects for him personally and the Department if we do not compete.

The Senior Procurement Executive and HCA emailed the Chief Counsel of OGC's Procurement Law Group (Chief Procurement Counsel) to seek clarification about Mr. Shelby's assertion that OGC had approved the procurement. The Chief Procurement Counsel responded and suggested a call and included a subordinate attorney who had previously provided guidance on this procurement (who will be referred to as the Deputy Chief Procurement Counsel). Email records reflect that a call was scheduled for 11:30 a.m. When asked by OIG investigators, the scheduled participants did not have a specific recollection of the call or its content.

Subsequently, Mr. Shelby scheduled a 2:30 p.m. call with SAC staff and HR&A staff involved in the procurement. Emails among call participants reflect that, notwithstanding the email communication about the need to compete the requirement earlier that morning, SAC staff agreed to move forward with the acquisition and would prepare the J&A form and send it to OGC for signature in order to move forward with the award. It was not OGC's usual practice to sign off on J&A forms, and VA's Chief Procurement Counsel told OIG investigators that OGC is no longer signing J&A forms. The HR&A Program Director (the HR&A COR's supervisor) told OIG investigators that he "distinctly recalled" attending a meeting with the Chief Procurement Counsel and SAC staff at which SAC staff conveyed that "the only way we'll move forward is if you, OGC, put your stamp of approval, you know, authorize it." The contracting officer told OIG investigators that OGC's approval persuaded him to change his position about the need to compete the contracting opportunity, stating "Ultimately, what happened was, I said, well, we're not breaking any laws, we're not doing anything wrong, we have the statute on our side."³⁰

After the call with Mr. Shelby on January 10, 2018, the J&A form was revised to include language that appears to advance dueling justifications for the use of a sole-source process. First, it notes in several instances a determination that neither regulation nor statute require a finding that only one SDVOSB can meet the requirements. Second, it describes the Small Business as "the only SDVOSB" capable of providing some of the services. This latter point appears to have satisfied OGC's concern that VA Policy Memo 2016-05 included such a requirement. Emails reflect that on January 16, 2018, the Deputy Chief Procurement Counsel sought and received confirmation from Mr. Shelby concerning the facts Mr. Shelby had represented as relating to the

³⁰ The contracting officer told the OIG that he "insisted that OGC sign off" on the acquisition strategy, and that he relied on OGC to "[tell] me what I'm doing is legal." The contracting officer described this as a "back pocket" justification for using a noncompetitive process. Relatedly, the HR&A COR and the HR&A Program Director both told OIG investigators that despite their misgivings about the propriety of the actions being directed by Mr. Shelby, they ultimately relented to his demands in part because they believed that the Strategic Acquisition Center staff would intervene to prevent any violations of law or policy.

uniqueness of the Small Business’s capabilities.³¹ The J&A form was reviewed and revised multiple times by at least four OGC lawyers. In addition, on January 22, 2018, one of these OGC attorneys, who was not involved in the previous calls or discussions with SAC staff, when reviewing the J&A form wrote,

[Our] office wanted to be sure to highlight the fact that this statement [is] at odds with the attached Procurement Policy Memorandum (PPM). Specifically, Section 7(b) – page 10 of the attached – states that [contracting officers] may use the noncompetitive procedures authorized in VAAR 819.7007 or 819.7008 but states the justification shall include both a description of the number of SDVOSBs or VOSBs reviewed and “an explanation why only one of the firms can accomplish the requirement”. Based on the rest of the J&A, it does seem as though we have a basis for saying that [the Small Business] is the only SDVOSB [that] can accomplish the requirement and therefore it would be a stronger justification to just articulate that fact and ensure the J&A complies with the PPM.

The J&A form describes the uniqueness of the services provided by the Small Business as follows:

While not required by FAR 6.302-5 [the Small Business] is also the only SDVOSB that owns all data rights to the program, provides and specializes in the unique capabilities and expertise of “Situational Leadership” and “Infor Sciences Foundational Talent.”

The Deputy Chief Procurement Counsel signed the J&A form, which had previously been revised to say that OGC concurred “as to the formalities and requirements in FAR 6.302-5.” This statement seems to provide an inaccurate representation of the role of OGC in the transaction. OGC appears to have provided advice to Mr. Shelby and/or the contracting officer that the contract could be awarded using VA’s Sole-Source Authority and VAAR § 819.7007 and emails show that OGC’s input into the J&A form was more substantial than simply a check of “formalities.”

³¹ The Deputy Chief Procurement Counsel told OIG investigators that she would have provided advice pertaining to the FAR, but not necessarily VAAR or VA policy: “The contracting officer should consult those regulations and manuals and follow them. That wouldn’t be something for OGC.” She did not recall whether she was familiar with Policy Memo 2016-5 and did not specifically recall what happened with respect to this contract. Contemporaneous emails reflect that the Deputy Chief Procurement Counsel was a party to discussions concerning the legal analysis of the interplay between VA policy, the VAAR, the FAR, and 38 U.S. § 8127 as applied to the circumstances of a sole-source procurement.

The Sole-Source Justification Relied on Flawed Market Research

“Acquisitions begin with a description of the Government's needs stated in terms sufficient to allow conduct of market research. Market research is then conducted to determine if commercial items or nondevelopmental items are available to meet the Government's needs or could be modified to meet the Government's needs.”³² Market research is the joint responsibility of the HR&A COR and the contracting officer. The FAR acknowledges that the extent of market research will vary depending on the specific circumstances of the acquisition and provides for many methods of conducting market research.³³ However, the OIG identified three mandatory market research requirements that are relevant to this procurement, which were not addressed. Pursuant to the FAR, agencies shall

- “Ensure that legitimate needs are identified and trade-offs evaluated to acquire items that meet those needs;”
- “Determine whether consolidation is necessary and justified;” and
- “Determine whether bundling is necessary and justified.”³⁴

The OIG’s analysis of the market research documentation reflects that the HR&A COR identified four SDVOSBs other than the Small Business that could potentially provide the leadership development training services being sought.³⁵ The market research documentation does not reflect any effort to research vendors that could provide the talent assessment services.³⁶

The HR&A Program Director told OIG investigators that “what made this unique was the talent acquisition piece combined with the leadership development, there was no other small business that could do it. So when you put the two requirements together instead of separate, then you couldn't find anyone else that could do it, so that's how you could legally justify the sole source.” Thus, in this instance, the sole-source justification relied on the combination of two independent requirements (leadership training and talent assessment) that could have been acquired under

³² 48 C.F.R. § 10.002 (internal numbering omitted).

³³ 48 C.F.R. § 10.002(b)(1).

³⁴ 48 C.F.R. § 10.001(a).

³⁵ In addition, HR&A staff and SAC staff were aware that VA had procured training based on a philosophy similar to Blanchard’s Situational Leadership from other vendors in prior years, as well as developed similar internal training through the VHA National Center for Organizational Development.

³⁶ Although not incorporated into the market research, the OIG identified emails among HR&A staff indicating an awareness in November 2017 of at least three vendors other than Infor that might be able to provide the talent assessment services. In addition, documents produced by the Small Business indicated the existence of a competitor SDVOSB through which VA could have procured access to the services provided by Infor. Independent of this contracting effort, VHA’s National Center for Organizational Development (NCOD) had been evaluating potential vendors that could provide talent assessment services. The NCOD’s research identified three other potential sources for talent assessment services in addition to Infor.

separate contracts. Under the FAR, this constitutes a “consolidation,” the necessity of which should have been evaluated as part of the market research.³⁷

Notwithstanding that this consolidation was fundamental to the sole-source justification, none of the individuals involved appear to have assessed whether the combination of the two requirements reflected a “legitimate need,” or whether a “trade off” should have been made to meet the need. Moreover, “bundling” is a subset of consolidation in which the combination of two or more requirements results in a solicitation “that is likely to be unsuitable for award to a small business concern.”³⁸ Although no one involved in this procurement appears to have appreciated it at the time, Mr. Shelby unwittingly called attention to the fact that this combination was limiting the marketplace of available vendors, and potentially excluding other SDVOSBs:

There is no-one, in particular [an] SDVOSB, who is the primary vendor (i.e., OWNS the IP) of Serving Leadership and [Blanchard’s] Situational Leadership; and, is partnered with a candidate screening organization.

The OIG could identify no evidence that any consideration or analysis was performed to determine whether the combination of the two requirements—which was the lynchpin in the sole-source justification—was necessary, appropriate, or in the government’s best interest.

The Contracting Officer Did Not Ensure the Contract Opportunity Was Made Available to the Broadest Number of Verified SDVOSBs

The VAAR requires that contracts awarded without competition under 38 USC § 8127 be supported by a justification form, the J&A,³⁹ containing among other things, “[a] description of efforts made to ensure that offers are solicited from as many potential sources as is practicable, including whether a notice was or will be publicized as required by subpart 5.2 and, if not, which

³⁷ “Consolidation or consolidated requirement—Means a solicitation for a single contract, a multiple-award contract, a task order, or a delivery order to satisfy—(i) Two or more requirements of the Federal agency for supplies or services that have been provided to or performed for the Federal agency under two or more separate contracts, each of which was lower in cost than the total cost of the contract for which offers are solicited; or (ii) Requirements of the Federal agency for construction projects to be performed at two or more discrete sites.” 48 C.F.R. § 2.101.

³⁸ 48 C.F.R. § 2.101. “Bundling may provide substantial benefits to the Government. However, because of the potential impact on small business participation, before conducting an acquisition strategy that involves bundling, the agency shall make a written determination that the bundling is necessary and justified in accordance with 15 U.S.C. 644(e). A bundled requirement is considered necessary and justified if the agency would obtain measurably substantial benefits as compared to meeting its agency’s requirements through separate smaller contracts or orders.” 48 C.F.R. § 7.107-3.

³⁹ “A determination that only one SDVOSB can meet the requirement is not required. However, in accordance with FAR 6.302-5(c)(2)(ii), contracts awarded using this authority shall be supported by a written justification and approval described in FAR 6.303 and 6.304, as applicable.” VAAR § 819.7007 (Class Deviation dated July 25, 2016)

exception under 5.202 applies.”⁴⁰ In the “Efforts to Obtain Competition” portion of the J&A form, the justification states,

In accordance with 819.7007(b), the determination to make a sole-source award to an SDVOSB is a business decision wholly within the discretion of the contracting officer; therefore, the requirement to ensure that offers are solicited from as many potential sources as practicable is not applicable to this procurement.

The justification selectively picks the first clause of VAAR § 819.7007(b) but ignores the second. The entirety of the provision is as follows:

The contracting officer’s determination to make a sole source award is a business decision wholly within the discretion of the contracting officer. **To ensure that opportunities are available to the broadest number of verified SDVOSBs, this authority is to be used judiciously and only when in the best interest of the Government.**⁴¹ (emphasis added)

Neither the J&A form, nor any other documentation in the contracting file reflect any analysis or conclusion by the contracting officer addressing the VAAR § 819.7007(b) admonition that VA’s Sole-Source Authority “is to be used judiciously and only when in the best interest of the government.”⁴² While the determination to make the sole-source award was solely in the contracting officer’s discretion, there is nothing in the J&A that evidences that the opportunity was made available to the broadest number of verified SDVOSBs, that the authority was used “judiciously,” or that the award was “in the best interest of the Government.” Because the contracting officer was aware of other SDVOSBs that could potentially provide the services, the contracting officer may have abused his discretion in awarding the contract to the Small Business (under the authority in 38 U.S.C § 8127) without ensuring the opportunity was made available to other SDVOSBs.

In addition, the contracting officer explained to OIG investigators that one reason he did not think the sole-source approach was suitable was that it risked causing the Small Business to be disqualified from bidding on a subsequent contract for this same requirement—which would preclude a follow-up contract if the services were needed after the first year. Such disqualification would be contrary to the overall objective of the contract, which was to provide leadership training and talent assessment tools throughout VA. Given that this was not an objective that could be accomplished in a single year it is reasonable to question whether it was

⁴⁰ 48 C.F.R. § 6.303-2(b)(6).

⁴¹ VAAR § 819.7007 (Class Deviation dated July 25, 2016); see also Policy Memo 2016 2016-5.

⁴² VAAR § 819.7007 (Class Deviation dated July 25, 2016). This requirement is also stated within Policy Memo 2016 2016-05.

in the government's best interest to use a process that could disqualify the contractor from continuing the work.⁴³ The contract file does not contain any such analysis.

The Contracting Officer's Supervisors Did Not Fully Address Issues Brought to Their Attention

While the contracting officer had primary responsibility for this contract, the OIG determined that his supervisors failed to fully address concerns he raised.⁴⁴ The contracting officer told OIG investigators that he perceived "red flags" relating to Mr. Shelby's refusal to compete the contract, which he raised with his supervisors. The record reflects significant involvement with the procurement by the Competition Advocate, the SAC Associate Director, and the HCA.

In addition to the contracting officer's effort to involve his superiors in the approval, on at least three occasions the Senior Procurement Executive attempted to alert the HCA to the possibility of contracting impropriety, such as improper steering:

- On November 18, 2017, the Senior Procurement Executive wrote, "BTW, my antennae goes up immediately when I see a political appointee insist that a contract go to a specific contractor."
- In later correspondence on the same day, the Senior Procurement Executive wrote, "when a political appointee insists that a contract go sole-source to a named supplier, I always suspect potential improprieties."
- On January 10, 2018, the Senior Procurement Executive wrote, "We must compete this requirement. It appears he is attempting to push for a sole-source award to a firm of his choice, when there are multiple firms who can provide these services. I don't have to tell you this can be very unstable ground to walk on, as it could potentially lead to ill effects for him personally and the Department if we do not compete."

Despite these warnings, the OIG could identify no evidence that the HCA or anyone else probed whether Mr. Shelby might be directing the award of the contract for an improper purpose, such as to benefit a friend. The HCA told OIG investigators that SAC staff relied on Mr. Shelby's representations that the Small Business had exclusive rights to the materials essential to the training program, and that he expected that the market research would have verified the uniqueness arguments advanced by Mr. Shelby. He further recalled directing the Competition

⁴³ The VAAR also states, "A procurement requirement estimated to exceed the legislative threshold of \$5 million shall not be split or subdivided to permit the use of this SDVOSB sole source authority." VAAR § 819.7007 (Class Deviation dated July 25, 2016) The evidence reflects numerous references to anticipated continuation of the program in future years, which would have necessarily exceeded the \$5 million limit given that the contract cost for the first year was only \$500 less than the limit.

⁴⁴ The FAR states that "[n]o contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met." 48 C.F.R. § 1-602-1(b).

Advocate to make certain that the OGC had concurred on the approval of the J&A. The Competition Advocate and the SAC Associate (his supervisor) also told OIG investigators that they relied on Mr. Shelby's representations about the uniqueness of the Small Business's services, the contracting officer's expertise in ensuring compliance with requirements such as conducting market research, and the OGC's concurrence.

Finding 2 Conclusion

In this procurement, the OIG determined that SAC staff's approval of the sole-source award relied on flawed market research and the OGC's agreement to approve the J&A. As a result, the contract failed to satisfy all necessary requirements of law, regulation, and procedure. The OIG concluded that the failures by SAC and HR&A staff were induced but not excused by Mr. Shelby's abuse of his official position and ethical breaches. SAC staff's failure to ensure the contract's compliance with VA policy, the FAR, and the VAAR was facilitated in part by assurances from the OGC's attestation on the J&A form. The contracting officer interpreted the OGC attestation as indicating the procurement complied with statutory requirements, despite the contracting officer's reservations about whether it complied with VA policy. The OIG concludes that compliance with the statutory provision does not provide safe harbor in this instance because the SAC staff were obligated to abide by the requirements of the FAR, the VAAR, and VA policy.

Recommendations 2–5

2. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics and Construction determines what administrative action, if any, should be taken with respect to the conduct and performance of the contracting officer, the Agency Competition Advocate, and the two higher-level supervisors involved in this procurement.
3. The Assistant Secretary for Human Resources and Administration/Operations, Security, and Preparedness determines what administrative action should be taken, if any, with respect to the conduct and performance of the HR&A Program Director and the Contracting Officer's Representative.
4. VA's Senior Procurement Executive determines what action, if any, should be taken with respect to the contracting officer's warrant consistent with the authority granted by VA Acquisition Regulation § 801.690-6.
5. The Acting General Counsel reviews the circumstances of this procurement and uses that information to help determine whether it is appropriate for counsel to sign attestations on Justification and Approval forms, and issues policy guidance in accordance with that determination.

Finding 3: VA Wasted \$5 Million on Services It Could Not Use

The OIG concluded that Mr. Shelby’s insistence on pursuing a sole-source award with the Small Business resulted in a contract that did not conform to VA procurement policy.⁴⁵ In addition, the OIG identified acquisition planning failures that resulted in VA acquiring services that it could not use, which wasted taxpayer funds.

Waste is the act of using or expending resources carelessly, extravagantly, or to no purpose. Importantly, waste can include activities that do not include abuse and does not necessarily involve a violation of law. Rather, waste relates primarily to mismanagement, inappropriate actions, and inadequate oversight.⁴⁶

Waste includes “making procurement or vendor selections that are contrary to existing policies or are unnecessarily extravagant or expensive.”⁴⁷ The OIG determined that VA’s procurement effort proceeded “carelessly” and resulted in the purchase of training licenses that VA had no ability to use before they expired, an investment in the certification of internal training facilitators who ultimately had very little to facilitate, and the purchase of talent assessment tools that could not be used.

HR&A Purchased More Training Than Needed

The leadership development training portion of the contract cost \$3.8 million, which was subdivided further with \$1.7 million for the development and presentation of in-person training sessions by the Small Business staff (including travel) and \$2.1 million for licenses that granted 17,000 VA employees the right to access the training materials for one year. The contract provided for training by the Small Business of 324 VA senior leaders and managers organized into groups, including two sessions for 14 VA employees who were to receive 14 days of facilitator training to enable them to teach the program content to other VA employees. Thereafter, all employees of Veterans Integrated Service Network 15 (VISN 15) would receive access to the training via in-person sessions led by the VA facilitators, or via individual access to the program content through VA’s online training site. Mr. Shelby’s eventual goal was to expand the program to all of VA if the experience with this program demonstrated that it could be successful.

⁴⁵ See Finding 2.

⁴⁶ U.S. Government Accountability Office, Government Auditing Standards, 2018 Revision, July 2018 p. 187 § 8.120

⁴⁷ U.S. Government Accountability Office, Government Auditing Standards, 2018 Revision, July 2018 p. 187 § 8.120, example b.

HR&A Used Only 232 of the 17,000 Training Licenses Purchased

In May 2018, HR&A selected VISN 15 as the location for the program implementation. VISN 15 had 12,217 full-time employees. Taken together with the 324 other unidentified senior leaders, the maximum requirement would have been 12,541 licenses.⁴⁸ Accordingly, HR&A purchased at least 4,459 licenses (costing approximately \$544,000) for which the OIG could identify no articulable use. According to information provided by the Small Business and HR&A staff, 232 individuals accessed the training via in-person training or online.⁴⁹

The OIG concluded that it was not VA officials, but rather the Small Business Owner who determined that VA needed to purchase 17,000 licenses. According to the Small Business Owner, the 17,000 licenses purchased were based on his “guess” about the average size of a VISN. The Small Business Owner told the OIG that he derived this number by dividing the total number of VA full-time employees (which he believed was 360,000) by 21 VISNs (an incorrect number of existing VISNs) to arrive at his rounded 17,000 number.⁵⁰ However, VA records reflect 355,667 full-time employees at that time, and many (86,601) were not employed at any VISN. This “guess” overestimated the average size of a VISN, which according to VA records was 14,948 full-time employees at that time. Because the cost of the 17,000 licenses was based on a per-license fee, this “guess” had a meaningful impact on the contract price. Moreover, HR&A staff were in the superior position of determining how many individuals could reasonably be expected to take the training during the license period, but there is no evidence that any such analysis was ever conducted. The OIG attributes this inadequate acquisition planning to Mr. Shelby’s insistence that the contract be awarded to the Small Business, which caused the contracting process to proceed outside of the ordinary planning progression.

HR&A Could Not Use the Talent Assessment Software

The Small Business subcontracted with Infor to provide HR&A with access to Infor's talent assessment software, which was also sold under an annual licensing arrangement. VA paid \$1.2 million for this portion of the contract. According to the contract, Infor's “software was developed to be accessible to everyone involved in the hiring process at the Department of Veterans Affairs. To that end, the software is built to be a single source for candidate screening, onboarding, development, and succession planning” with integration into USAJOBS, the

⁴⁸ Because some of the 324 unidentified senior leaders may have been VISN 15 employees, VA’s maximum license requirement is more precisely represented as the range between 12,217 and 12,541. For discussion purposes, the OIG will assume that the upper end of the range represents the maximum requirement.

⁴⁹ VA’s use of 232 licenses reflects the actual utilization as of August 19, 2019, when the contract was terminated. The contract was originally scheduled to end on February 29, 2019. However, on January 18, 2019, because of minimal use of the program, the Small Business agreed to extend VA’s access to the 17,000 licenses through August 19, 2019, at no cost to VA. Provisions of 48 C.F.R. § 52.217-8 permit a six-month extension to a contract.

⁵⁰ Both the Small Business Owner and Mr. Shelby incorrectly believed there were 21 VISNs. Although VISNs bear numbers up to 23, several have been consolidated and there are in fact 18 VISNs.

centralized web-based recruiting resource maintained by the U.S. Office of Personnel Management. The contract stated that Infor would “strive” to implement Talent Science “in 12 weeks or less.”

The Talent Science component of the contract had two subparts: The first was the creation of 32 custom performance profiles that drew from data collected about highly rated VA employees in certain positions (such as a medical center director or specialized nurse). The second subcomponent was to use these profiles with Infor's Talent Science product to screen applicants for employment and/or promotion. Infor’s method for gathering the required data about successful VA employees relied on analyses of online assessment results. VA was unable to use either subpart because the services involved the use of cloud-computing services that did not meet federal regulatory requirements.

VA Did Not Ensure Infor’s Software Met Regulatory Requirements Prior to Purchasing

Infor’s Talent Science software uses cloud-based data storage, which requires authorization under the Federal Risk and Authorization Management Program (FedRAMP).⁵¹ The cloud-based storage used by Infor for this program had not been certified under FedRAMP at the time the contract was signed.⁵² The certification issue was not identified until July 2018 (five months after the contract was signed), at which time VA learned that Infor was working to achieve the required certification. The certification was not obtained during the contract performance period, and thus the software was never used as intended.

Prior to approving this contract, VA policy required HR&A to identify “information security and privacy requirements during the requirements analysis based on a specific analysis of availability, integrity, and confidentiality and the technical requirements of the contract.”⁵³ Responsibility for understanding these requirements fell to the HR&A Contracting Officer’s Representative (HR&A COR). In addition, VA policy assigns the contracting officer the responsibility for “coordinating with the requestor to ensure compliance with the VA Information Security Program.”⁵⁴ As part of these responsibilities, the HR&A COR and the

⁵¹ An October 27, 2017, email from the Blanchard VP to the Small Business Owner states, “There is a significant likelihood that Infor may not be able to be included in our procurement due to the fact that their profiling solution is hosted on a network that is not FedRAMP certified.” The Small Business’s November 1, 2017 proposal includes Infor, but makes no reference to the network hosting of Infor’s profiling solution, and the OIG has identified no evidence that the Small Business disclosed this to VA prior to the contract being signed.

⁵² VA Handbook 6517 addresses the need for FedRAMP certification of cloud-based storage services used by VA and its vendors. However, as both the Small Business and Infor personnel pointed out, there is no requirement in the contract that the Infor product be FedRAMP-certified.

⁵³ VA Handbook 6500.6, Contract Security (March 12, 2010) p. 13.

⁵⁴ VA Handbook 6500.6, Contract Security (March 12, 2010) p. 13.

contracting officer assigned to this acquisition had joint responsibility for review and completion of a required “Checklist for Information Security in the Initiation Phase of Acquisitions” (Information Security Checklist).⁵⁵

The Information Security Checklist contained a question addressing the use of contractor-owned information technology systems, including whether there are contractor-owned cloud-computing services. The HR&A COR incorrectly answered this question “no.” The HR&A COR explained to OIG investigators that the proposal did not specifically use the word “cloud” in its description of the Talent Science software. As a result, it did not trigger the HR&A COR to recognize that the proposal contemplated processing or storing VA data outside of VA’s networks. Outside-VA-network data storage would have prompted a “yes” response. The OIG found the HR&A COR’s explanation unpersuasive. Even a perfunctory internet search yields examples of Talent Science prominently described as a cloud-based solution.

Submission of an inaccurate Information Security Checklist resulted in VA’s failure to analyze whether Infor software’s cloud-based services were compatible with regulatory requirements before signing the contract. The inaccurate submission also preempted inclusion of applicable clauses that could have addressed use of the contractor-owned cloud services in the contract. Because performance was not possible given the lack of FedRAMP certification, these services should have been excluded from the contract.

The Small Business’s Substitute Performance Provided No Value to VA

The contracting officer and COR compounded their errors by excusing the contractor’s performance. After determining that the Small Business had not performed, the contracting officer sought reimbursement for the Talent Science portion of the contract on February 26, 2019 (for \$1,210, 657). The Small Business refused and the contracting officer referred the matter to the VA Office of General Counsel for resolution. On April 4, 2019, in lieu of the customized personnel performance profiles called for by the contract, the Small Business provided VA with 32 “best practice” performance profiles. Despite the fact that these profiles were produced outside the contract performance period, and notwithstanding that the profiles were not customized for VA, the contracting officer considered the contract requirement satisfied and abandoned efforts to recoup those funds.⁵⁶

OIG investigators reviewed the profiles provided by the Small Business and determined that they are generic “assessments” of “sample” candidates for 32 different broad position descriptions created by Infor from materials it had used or prepared for other clients. The “best practice”

⁵⁵ VA Handbook 6500.6, Contract Security (March 12, 2010) p. 5.

⁵⁶ The contract performance period pertaining to the talent assessment tools ended on February 19, 2019. The six-month extension to August 19, 2019, only related to the licenses for the Small Business and Blanchard training materials.

performance profiles were not and could not be customized to VA because VA employee and applicant data were never obtained. Moreover, in the absence of Infor's Talent Science software, VA has no apparent use for the best practice profiles. As stated to OIG investigators by the contracting officer referencing his excusing the Small Business's performance, "What the [Program Management Office] will use them for, I have no knowledge."

Furthermore, the contract defines the "positions in scope" for the custom profiles as medical center directors, nurses and doctors. None of the "Best Practice" profiles provided by the Small Business apply to doctors, a "position in scope" of critical importance to VA. They do include the following (none of which are within the defined positions in scope): certified nursing assistant, human services, medical assistant, medical claims examiner, medical front desk, medical technician, paramedic, pharmacist, phlebotomist, physical and occupational therapists, physician assistant, and telemetry. Two of the profiles Infor provided are designed for pediatric care, which is not a recruiting need of critical importance to the VA medical system.⁵⁷

The contracting officer conceded to OIG investigators that he did not look at any of the profiles when he received them or make any effort to determine whether they complied with the contract requirement. The HR&A COR told OIG investigators that the best practice profiles delivered by the Small Business have not been used in VA's recruiting efforts.

Finding 3 Conclusion

The OIG concludes that as a result of poor planning and execution, the entire \$3.8 million spent on training amounts to waste even if a small number of people received some benefit from the training. As VA received no benefit from the \$1.2 million spent on the Talent Science component, the entire amount can be considered waste.

Recommendations 6–8

6. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics and Construction, in consultation with the Office of General Counsel, reviews the Small Business contract to determine what actions should be taken, if any, to recover funds or otherwise address the waste of VA funds.
7. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics and Construction determines what administrative action, if any, should be taken with respect to the contracting officers' acceptance of substitute performance that provided no value to VA.
8. The Assistant Secretary of Human Resources and Administration (HR&A) / Operations, Security, and Preparedness determines what administrative action to take, if any, with respect

⁵⁷ VA shares a medical facility with the Department of Defense that does provide health care to children, but VA does not provide services to children in its own facilities.

to the Contracting Officer Representative's failure to perform diligence sufficient to identify the cloud-computing issues associated with this procurement.

Conclusion

In February 2018, VA wasted \$5 million on a contract for leadership development training and talent assessment tools that it could not use. The contract came about as a result of unethical conduct by Peter Shelby, the then Assistant Secretary for Human Resources and Administration, who advocated for the award of the contract on a noncompetitive basis to the direct benefit of two friends. The OIG concluded that HR&A staff and SAC contracting staff, although acting under significant pressure from Mr. Shelby, failed to adequately perform their duties—permitting VA to award the contract in a manner that did not comply with federal law, regulations, and VA policy.

Recommendations

1. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics and Construction requires in any award made on a noncompetitive basis that the contracting officer obtain a written disclosure and certification by the program sponsor, contracting officer's representative, and other staff involved in the procurement as appropriate, disclosing any personal or professional relationship between such staff and vendor personnel.
2. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics and Construction determines what administrative action, if any, should be taken with respect to the conduct and performance of the contracting officer, the Agency Competition Advocate, and the two higher-level supervisors involved in this procurement.
3. The Assistant Secretary for Human Resources and Administration/Operations, Security, and Preparedness determines what administrative action should be taken, if any, with respect to the conduct and performance of the HR&A Program Director and the Contracting Officer's Representative.
4. VA's Senior Procurement Executive determines what action, if any, should be taken with respect to the contracting officer's warrant consistent with the authority granted by VA Acquisition Regulation § 801.690-6.
5. The Acting General Counsel reviews the circumstances of this procurement and uses that information to help determine whether it is appropriate for counsel to sign attestations on Justification and Approval forms, and issues policy guidance in accordance with that determination.
6. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics and Construction, in consultation with the Office of General Counsel, reviews the Small Business contract to determine what actions should be taken, if any, to recover funds or otherwise address the waste of VA funds.

7. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics and Construction determines what administrative action, if any, should be taken with respect to the contracting officers' acceptance of substitute performance that provided no value to VA.
8. The Assistant Secretary of Human Resources and Administration (HR&A) / Operations, Security, and Preparedness determines what administrative action to take, if any, with respect to the Contracting Officer Representative's failure to perform diligence sufficient to identify the cloud-computing issues associated with this procurement.

Management Comments

VA concurred with the recommendations in this report and provided action plans with target completion dates for each. VA's response in its entirety can be found in appendix C.

OIG Response

The OIG considers all eight recommendations open and will monitor implementation of VA's planned actions.

Appendix A: Scope and Methodology

Scope

The OIG's review period extended from March 2017, when Mr. Shelby was interviewing to become an assistant secretary through the termination of the contract at issue. Initially the contract was scheduled to terminate in February 2019, but the Small Business extended performance through August 19, 2019. Accordingly, the scope of the OIG investigation was extended to incorporate analysis of results from the final termination of the contract.

Methodology

To OIG investigators interviewed 64 people, including current and former VA employees, the vendors involved, and others with relevant information. The team also reviewed voluminous documentation, including VA emails and documents; materials obtained via subpoena from other parties with involvement in the contract; applicable laws and regulations; and relevant VA policy, guidance, and directives.

Scope Limitation

The OIG was unable to interview former VA Secretary David Shulkin who declined to speak with investigators, but instead voluntarily provided written responses through counsel.

Government Standards

The OIG conducted this review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Investigations*.

Appendix B: Monetary Benefits in Accordance with Inspector General Act Amendments

Recommendation	Explanation of Benefits	Better Use of Funds	Questioned Costs
1 through 8	Value of contract awarded in violation of FAR, VAAR, and VA policy.		\$4,999,500
	Total		\$4,999,500

Appendix C: Management Comments

Department of
Veterans Affairs

Memorandum

Date: April 29, 2020

From: Acting Deputy Secretary (001)

Subj: Draft OIG Report, Waste and Abuse by the Former Assistant Secretary for Human Resources and Administration, Project No. 2019-00230-SR-00875

To: Inspector General (50)

1. The Department of Veterans Affairs (VA) takes very seriously the matters raised in the above-referenced draft Office of Inspector General (OIG) report. The draft report concludes that the former Assistant Secretary for Human Resources and Administration misused his official position through his insistence on a sole-source contract for leadership development and training services that benefitted his friends. There is no indication that anyone else employed with VA who was involved in this action had knowledge of the relationship between the former Assistant Secretary and the selected vendor. Nevertheless, as indicated in our responses below, VA agrees that processes should be reviewed to mitigate the opportunity for such issues in the future.

2. The draft report also indicates that the actions of the former Assistant Secretary were facilitated by career employees including an Office of General Counsel (OGC) attorney who “signed an attestation that gave the contracting officer sufficient comfort to proceed.” To clarify, OGC does not authorize the Justification and Approval, but provides advice and assistance in accordance with VA Acquisition Regulation §801.602-2. The final decision as to the action to be taken; however, must be made by the contracting officer in each instance.

3. The following responses provided below by the identified responsible offices address the specific recommendations made by the OIG in its draft report.

Recommendation 1. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics, and Construction requires in any award made on a noncompetitive basis that the contracting officer obtain a written disclosure and

certification by the program sponsor, contracting officer's representative, and other staff involved in the procurement as appropriate, disclosing any personal or professional relationship between such staff and vendor personnel.

Concur: The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics, and Construction (OALC) will require in any award made on a noncompetitive basis that the contracting officer obtain a written disclosure and certification by the program sponsor, contracting officer's representative, and other staff involved in the procurement as appropriate, disclosing any personal or professional relationship between such staff and vendor personnel. This will require collaboration between OALC and OGC to establish processes and procedures which will be comprehensive standards to address the recommendation now and for future sustainment. We anticipate completion of this action by July 21, 2020.

Recommendation 2. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics, and Construction determines what administrative action, if any, should be taken with respect to the conduct and performance of the contracting officer, the Agency Competition Advocate, and the two higher-level supervisors involved in this procurement.

Concur. The Principal Executive Director and Chief Acquisition Officer for OALC will coordinate with VA's Ethics Specialty Team to provide Ethics and Procurement Integrity Act training focused on the subject matter within this draft report (including the need to properly document decisions in the contract file and properly communicate and collaborate at all levels) for the contracting officer, the Agency Competition Advocate, and the two higher-level supervisors. Additionally, the Ethics and Procurement Integrity Act training will be mandated for all Heads of Contracting Activity, Contracting Activity Leadership, Contracting Officers, Contract Specialists, and Program Managers. We anticipate completion of this action by July 21, 2020.

Recommendation 3. The Assistant Secretary for Human Resources and Administration/Operations, Security, and Preparedness determine what administrative action should be taken, if any, with respect to the conduct and performance of the HRA Program Director and the Contracting Officer's Representative.

Concur. The Assistant Secretary for Human Resources and Administration/Operations, Security, and Preparedness (A/S HRA/OSP) reviewed the evidence and determined that the HRA staff, under the Assistant Secretary at the time, did everything within their scope to ensure all policies were followed. The current A/S HRA/OSP signed a memorandum to all staff (one in January 2019 and another in March 2020) reminding them to follow all VA policies (directives and handbooks) related to contracting procedures.

Recommendation 4. VA's Senior Procurement Executive determines what action, if any, should be taken with respect to the contracting officer's warrant consistent with the authority granted by VA Acquisition Regulation § 801.690-6.

Concur. The Senior Procurement Executive (SPE) will coordinate with VA's Ethics Specialty Team to provide the contracting officer Ethics and Procurement Integrity Act training focused on the matter subject to this draft report. SPE will also ensure the contracting officer is advised on the importance of the requirement to properly document decisions in the contract file, along with the necessity of insisting on proper communication and collaboration at all levels. We anticipate completion of this action by July 21, 2020.

Recommendation 5. The Acting General Counsel reviews the circumstances of this procurement and uses that information to help determine whether it is appropriate for counsel to sign attestations on Justification and Approval forms, and issues policy guidance in accordance with that determination.

Concur. The Principal Deputy General Counsel performing the delegable duties of the General Counsel will review the circumstances of this procurement and use that information to help determine whether it is appropriate for counsel to sign attestations on Justification and Approval forms, and will coordinate with OALC if it is necessary to issue policy guidance in accordance with that determination. We anticipate completion of this action by July 21, 2020.

Recommendation 6. The Assistant Secretary for the Office of Acquisition, Logistics, and Construction, in consultation with the Office of General Counsel, reviews the [Small Business] contract to determine what actions should be taken, if any, to recover funds or otherwise address the waste of VA funds.

Concur. The Principal Executive Director and Chief Acquisition Officer for OALC, in consultation with OGC, will review the [Small Business] contract to determine what actions should be taken, if any, to recover funds or otherwise address the waste of VA funds. We anticipate completion of this action by July 21, 2020.

Recommendation 7. The Principal Executive Director and Chief Acquisition Officer for the Office of Acquisition, Logistics, and Construction determines what administrative action, if any, should be taken with respect to the contracting officers' acceptance of substitute performance that provided no value to VA.

Concur. The Principal Executive Director and Chief Acquisition Officer for OALC, in coordination with VA's Procurement Law Group, will determine what administrative action, if any, should be taken with respect to the contracting officers' acceptance of substitute performance. Any meaningful input will result from a review of the contract and subsequent determination of whether the actions by the contracting officer were reasonable. We anticipate completion of this action by July 21, 2020.

Recommendation 8. The Assistant Secretary of Human Resources and Administration (HRA) / Operations, Security, and Preparedness determine what administrative action to take, if any, with respect to the Contracting Officer Representative's failure to perform diligence sufficient to identify the cloud-computing issues associated with this procurement.

Concur. A/S HRA/OSP reviewed the evidence and determined that the HRA staff did everything within their scope to ensure all policies were followed. The current A/S HRA/OSP issued written guidance in January 2019 and again in March 2020 addressing the roles and responsibilities with respect to the performance and responsibilities of all HRA/OSP personnel involved in establishing requirements, including information technology, and all contracting actions.

(Original signed by:)
Pamela Powers

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