

November 2005

U.S. OFFICE OF  
SPECIAL COUNSEL

Selected Contracting  
and Human Capital  
Issues



G A O

Accountability \* Integrity \* Reliability



Highlights of [GAO-06-16](#), a report to congressional requesters

## Why GAO Did This Study

In January 2005, the U.S. Office of Special Counsel (OSC) implemented a plan, in part, to address a backlog of pending cases. This report discusses actions related to the development of this plan, including whether required practices and procedures were followed in contracting for the services of a management consulting company and in hiring an intermittent employee as a consultant. Also, the report identifies avenues of redress available to OSC employees for filing prohibited personnel practice allegations against OSC, and other redress options that could be made available.

## What GAO Recommends

We recommend that the Director of ARC's Division of Procurement ensure that documents prepared by program offices are carefully reviewed for compliance with competition requirements. We also recommend that the Special Counsel put in place procedures to ensure that only authorized officials act as contracting officer's representatives. ARC and OSC agreed with our recommendations. However, OSC suggested several changes based on their concerns with other aspects of the report. We believe our report is accurate as written.

Congress should consider granting OSC employees alternative means of addressing prohibited personnel practice allegations when they involve the two top OSC officials.

[www.gao.gov/cgi-bin/getrpt?GAO-06-16](http://www.gao.gov/cgi-bin/getrpt?GAO-06-16).

To view the full product, including the scope and methodology, click on the link above. For more information, contact George H. Stalcup at (202) 512-9490 or [stalcupg@gao.gov](mailto:stalcupg@gao.gov).

# U.S. OFFICE OF SPECIAL COUNSEL

## Selected Contracting and Human Capital Issues

### What GAO Found

At OSC's request, the Administrative Resource Center (ARC), an office within the U.S. Department of the Treasury's Bureau of the Public Debt which provides OSC with contracting support for a fee, issued a \$140,000 sole-source task order for an organizational assessment to a consulting firm, Military Professional Resources, Inc. (MPRI). In doing so, several required steps were not taken:

- competition was not sought among Schedule vendors and there was no convincing demonstration of why a sole-source order was necessary.
- the determination of the reasonableness of MPRI's price was not documented, and
- OSC officials performed duties normally done by contracting officer's representatives without authorization or training and, further, performed other duties that should have been reserved for the contracting officer.

ARC officials told us they relied largely on OSC's input in justifying the sole-source order and determining MPRI's price to be reasonable and that they were unaware that the OSC officials had performed contracting-related duties. They told us that they are now paying particular attention to requests from their customers, including OSC, for sole-source orders. OSC officials said that they relied on ARC's expertise, as their contracting office, to ensure that proper contracting procedures were followed.

The tasks specified in the statement of work for the consultant that OSC hired as an intermittent employee and that he completed before his departure were consistent with Office of Personnel Management criteria for appropriate uses of expert and consultant appointments. The intermittent employee was tasked with two major lines of work related to efficiency and curriculum development. OSC management expressed confidence in the individual's qualifications and was within its discretion to both hire him and set his level of compensation.

While OSC employees, like other federal employees, are protected against prohibited personnel practices and may seek redress from OSC in making such allegations, this option becomes unworkable because of potential conflicts of interest when an OSC employee raises such an allegation of a prohibited personnel practice against either of the two top OSC officials. Two other federal agencies with redress roles, the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission, have taken steps to address potential conflicts of interest when their own employees use their agency's respective redress processes. Steps could be taken to ensure that OSC employees have alternative avenues of recourse; for example, they could have an external investigation conducted through an independent body or broader appeal rights to the MSPB. OSC could not independently implement these options, and would need to be given authority to do so.

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# Contents

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## Letter

Results in Brief	1
Background	3
Order for Organizational Assessment Did Not Comply with Rules Tasks Specified for OSC-Appointed Intermittent Employee Were Consistent with OPM Criteria	5
Redress Actions for OSC Employees Are Not Workable in Certain Cases; Other Agencies Have Developed Procedures for Internal Cases	7
Additional Redress Options Could Be Made Available to OSC Employees	12
Conclusions	16
Matter for Congressional Consideration	20
Recommendations for Executive Action	21
Agency Comments	22

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## Appendixes

<b>Appendix I: Comments from the Office of Special Counsel</b>	26
<b>Appendix II: Comments from the Administrative Resource Center, Bureau of the Public Debt, U.S. Department of the Treasury</b>	29

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**Abbreviations**

ALJ	administrative law judge
ADEA	Age Discrimination in Employment Act
ARC	Administrative Resource Center
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
ECIE	Executive Council on Integrity and Efficiency
FAR	Federal Acquisition Regulation
FBI	Federal Bureau of Investigation
GSA	General Services Administration
MOBIS	Management, Organizational and Business Improvement Services
MPRI	Military Professional Resources, Inc.
MSPB	Merit Systems Protection Board
OEO	Office of Equal Opportunity
OGE	Office of Government Ethics
OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSC	Office of Special Counsel
PCIE	President's Council on Integrity and Efficiency

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United States Government Accountability Office  
Washington, D.C. 20548

November 17, 2005

### Congressional Requesters

The Office of Special Counsel (OSC) is charged with safeguarding the merit system by protecting federal employees from prohibited personnel practices, such as retaliation against whistleblowing, discrimination, and nepotism.<sup>1</sup> If an employee, former employee, or applicant for employment in the federal government believes that a prohibited personnel practice has occurred, that individual may file a complaint with OSC.<sup>2</sup> In March 2004, we reported that OSC had not been consistently processing its cases within statutory time limits, creating backlogs.<sup>3</sup> In January 2005, in part to reduce these backlogs, the Special Counsel created a plan to reorganize OSC offices and change certain internal procedures.

You raised some questions about certain actions taken as part of OSC's plan, including OSC's sole-source procurement of an organizational assessment from a management consulting company and the hiring of an intermittent employee to perform consulting services. Additionally, you had questions about redress options that were available to OSC employees who might want to file a prohibited personnel practice allegation against OSC. This report responds to your interest by assessing (1) whether required practices and procedures were followed in contracting for the services of a management consulting company to conduct an organizational assessment, (2) whether OSC followed required procedures and policies when it hired an individual to perform consulting services on an intermittent basis, (3) the avenues of redress available to OSC employees who wish to file prohibited personnel practice allegations and how two other federal agencies with redress roles handle complaints by their employees against their agency, and (4) other redress options that could be made available to OSC employees.

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<sup>1</sup>Prohibited personnel practices are specified in 5 U.S.C. § 2302(b).

<sup>2</sup>5 U.S.C. § 1214. OSC also carries out a number of other responsibilities, including handling whistleblower disclosure claims, advising federal and certain state and local employees concerning permissible political activities under the Hatch Act and handling alleged violations of that act, and handling complaints concerning the employment rights of individuals serving in the uniformed military service.

<sup>3</sup>GAO, *U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress*, [GAO-04-36](#) (Washington, D.C.: Mar. 8, 2004).

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To assess OSC's actions related to contracting for the organizational assessment, we reviewed OSC's memorandum of understanding with the Administrative Resource Center (ARC), an office within the U.S. Department of the Treasury's Bureau of the Public Debt, to provide procurement assistance to OSC for a fee. We reviewed the task order that ARC issued to the company on behalf of OSC, as well as other documents, such as OSC's sole-source justification and the company's statement of work. We reviewed relevant sections of the Federal Acquisition Regulation (FAR) and the General Services Administration's (GSA) ordering procedures, in effect at the time the order was placed, for Schedule contracts.<sup>4</sup> We met with current and former OSC officials knowledgeable about the procedures that were followed in selecting the company to do the organizational assessment. We also interviewed contracting officials at ARC. For our work on the hiring of the intermittent employee, we reviewed relevant Office of Personnel Management (OPM) criteria, as well as documents related to this particular hiring process and the individual's completed work at OSC. We also obtained data from OSC officials on general personnel policies and procedures for making expert and consultant appointments. However, we did not assess the employee's qualifications to perform the tasks specified in the statement of work.

In developing information on the process that OSC employees follow when making prohibited personnel practice allegations against OSC, we reviewed current OSC policies and procedures and met with current and former OSC officials. We also met with officials from the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC) to determine how they handle their own employees' appeals or complaints against their agency. Finally, we discussed potential redress options for OSC employees with numerous OSC officials, former and current, as well as MSPB and EEOC staff. We conducted our review from February 2005 through August 2005 in accordance with generally accepted government auditing standards.

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<sup>4</sup>Under the Schedule program, GSA establishes long-term governmentwide contracts with commercial firms to provide access to commercial supplies and services at volume discount pricing. Ordering agencies place delivery or task orders against these contracts.

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## Results in Brief

ARC did not satisfy competition requirements in issuing a \$140,000 sole-source task order for an organizational assessment, at OSC's request, to the consulting firm Military Professional Resources, Inc. (MPRI).<sup>5</sup> The required justification for waiving competition was not a convincing demonstration of why a sole-source order was necessary. It did not explain how MPRI was determined to be uniquely qualified to perform the work. In addition, neither ARC, which was responsible for doing so, nor OSC documented that MPRI's price was determined to be reasonable. Finally, OSC officials performed duties, normally done by contracting officer's representatives, without authorization or training and, further, performed other duties that should have been reserved for the contracting officer, such as soliciting proposals and negotiating the price with MPRI. As the contracting office for OSC, ARC is responsible for ensuring that any justification for waiving competition is adequate and that proper contracting procedures are followed. ARC officials said they relied largely on OSC's input in justifying the sole-source order and determining MPRI's price to be reasonable. They were unaware that the OSC officials had performed the duties of contracting officer's representatives. They told us that they are now paying particular attention to requests from their customers, including OSC, for sole-source orders. OSC officials said that they relied on ARC's expertise, as their contracting office, to ensure that proper contracting practices were followed. We are making recommendations to OSC and ARC to help ensure that the problems we identified do not occur in the future.

OSC also hired an intermittent employee on March 17, 2004. The tasks specified in the employee's statement of work and that he completed before his departure were consistent with OPM criteria for appropriate uses of expert and consultant appointments. The consultant, who was employed on an intermittent basis, was tasked with two major lines of work related to efficiency and curriculum development. OSC management expressed confidence in the individual's qualifications and was within its discretion to both hire him and set his level of compensation.

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<sup>5</sup>MPRI is a wholly-owned subsidiary of L3 Communications, whose core competencies, according to the company, center on security sector reform, institution-building, leadership development, training, education, and emergency management.

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While OSC employees, like other federal employees, are protected against prohibited personnel practices and may seek redress from OSC in making such allegations, this option becomes unworkable when an OSC employee raises such an allegation of prohibited personnel practice against the two top officials of OSC—the Special Counsel or the Deputy Special Counsel. This was recently illustrated when two prohibited personnel practice complaints were filed against the Special Counsel. Citing a potential conflict of interest, the complainants requested that the cases be forwarded to the President’s Council on Integrity and Efficiency (PCIE),<sup>6</sup> as an independent third party for review. While OSC policies and procedures do not provide specific options to OSC employees in such cases, this case was subsequently forwarded to the PCIE. Two other federal agencies with redress roles, the MSPB and the EEOC, have taken steps to address potential conflicts of interest when their own employees use their agencies’ respective redress processes. However, OSC would need specific authority to implement options, such as establishing the right to an external investigation or broader appeal rights to the MSPB, since OSC does not have the mechanism to provide for such investigations and the MSPB appeals process is in statute.

Due to the unique nature of OSC and the difficulties involved when a prohibited personnel practice allegation is made against the Special Counsel or the Deputy Special Counsel, Congress should consider affording OSC employees (and former employees and applicants for employment) alternative means of addressing prohibited personnel practice allegations other than going through OSC. These means could include establishing (1) a right to an external investigation through an independent entity, where the entity would forward its findings to the President, who would decide the appropriate action, as is done when OSC handles allegations of prohibited personnel practices against Senate-confirmed presidential appointees; or (2) an expansion of the personnel actions that could be the basis for an appeal directly to the MSPB.

Both ARC and OSC agreed with our recommendations. OSC expressed concern that some facts were not mentioned in the report and questioned the tone of the section pertaining to the sole-source order with MPRI. OSC suggested several wording changes to the report. While we clarified our wording in several places based on close-out discussions with OSC

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<sup>6</sup>The PCIE is an interagency council, including presidentially appointed inspectors general, charged with promoting integrity and efficiency in federal programs.



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officials, we did not make the changes suggested by OSC in its comment letter because they were not supported by the evidence we developed during our review and OSC did not provide any additional evidence in its comments.

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## Background

OSC, which does not have in-house contracting staff, has an agreement with ARC, an office within Treasury's Bureau of the Public Debt, to provide contracting support for a fee. As a member of the Treasury franchise fund, ARC does not receive direct appropriated funds, but instead relies on revenue from its federal agency customers to pay organizational expenses. Franchise funds are government-run, self-supporting, business-like enterprises that provide a variety of common administrative services, such as payroll processing, information technology support, and contracting.<sup>7</sup>

The agreement between ARC and OSC is a mechanism for interagency contracting. This type of fee-for-service procurement process generally involves three parties: the agency requiring a good or service, the agency placing the order or awarding the contract, and the contractors that provide the goods and services. The requiring agency officials determine the goods or services needed and, if applicable, prepare a statement of work, sometimes with the assistance of the ordering agency. The contracting officer at the ordering agency ensures that the contract or order is properly awarded or issued (including any required competition) and administered under applicable regulations and agency requirements. If contract performance will be ongoing, a contracting officer's representative—generally an official at the requiring agency with relevant technical expertise—is normally designated by the contracting officer to monitor the contractor's performance and serve as the liaison between the contracting officer and the contractor. While interagency contracting can offer the benefits of improved efficiency and timeliness, this approach needs to be effectively managed. Due to the challenges associated with interagency contracts, we recently designated interagency contracting as a governmentwide high-risk area.<sup>8</sup>

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<sup>7</sup>We recently issued a report on franchise funds: *Interagency Contracting: Franchise Funds Provide Convenience, but Value to DOD is Not Demonstrated*, [GAO-05-456](#) (Washington, D.C.: July 29, 2005).

<sup>8</sup>GAO, *High-Risk Series: An Update*, [GAO-05-207](#) (Washington, D.C.: January 2005).

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As authorized by OSC's appropriation, OSC may use 5 U.S.C. § 3109 to hire intermittent consultants.<sup>9</sup> Section 3109 permits agencies, when authorized by an appropriation or other statute, to acquire the temporary or intermittent services of experts or consultants. Under the statute, appointments of experts and consultants may be made without regard to competitive service provisions and classification and pay requirements. Individuals appointed under this authority may not be paid in excess of the highest rate payable for a GS-15 unless a higher rate is expressly provided for by statute or an appropriation. Under section 3109, OPM is responsible for prescribing criteria governing circumstances in which it is appropriate to employ an expert or consultant and for prescribing criteria for setting pay.

Section 3109 of title 5 and OPM's implementing regulations in 5 C.F.R. Part 304 provide for broad discretion in the appointment of experts and consultants. In promulgating its regulations, OPM recognized that agencies need to obtain outside opinion and expertise to improve federal programs, operations, and services and that by bringing in the talent and insights of experts and consultants, agencies can work more economically and effectively.<sup>10</sup>

OSC's primary mission is to protect federal employees from prohibited personnel practices. It carries out this mission by conducting investigations, attempting informal resolution through discussions with the agency during the investigation phase (or by offering mediation), and, when necessary, prosecuting corrective and disciplinary actions before the MSPB. An individual may also request that the Special Counsel go before the MSPB to seek to delay an adverse personnel action, such as a termination, pending an OSC investigation. If an agency fails to remedy a prohibited personnel practice upon request by OSC, corrective action may be obtained through litigation before the MSPB. OSC may also seek disciplinary action against an employee believed to be responsible for committing a prohibited personnel practice by filing a complaint with the MSPB. However, when the disciplinary action involves presidential

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<sup>9</sup>See Pub. L. No. 108-199, Consolidated Appropriations Act, 2004, 118 Stat. 3, Division F – Transportation, Treasury, and Independent Agencies Appropriations, at 118 Stat. 339-340 (Jan. 23, 2004). See also, Pub. L. No. 108-447, Consolidated Appropriations Act, 2005, 118 Stat. 2809, Division H – Transportation, Treasury, Independent Agencies and General Government Appropriations, at 118 Stat. 3263-3264 (Dec. 8, 2004).

<sup>10</sup>59 *Fed. Reg.* 67232, Dec. 29, 1994.

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appointees (subject to Senate confirmation), OSC forwards its complaint against the appointee, a statement of supporting facts, and any response of the appointee to the President for appropriate action.<sup>11</sup>

Obtaining the assistance of OSC may be an individual's only recourse with regard to an alleged prohibited personnel practice, unless the individual can pursue the matter with the MSPB or through the discrimination complaint process. Only employees who have been subject to an adverse action, such as a termination, demotion, or suspension beyond 14 days, may appeal to the MSPB and argue that such adverse action was the result of a prohibited personnel practice. An employee would not be able to go directly to the MSPB to complain that a geographic relocation was the result of a prohibited personnel practice. Even when an employee alleges that he or she was retaliated against for whistleblowing, he or she must first go to OSC and wait 120 days before filing directly with the MSPB, unless that employee was subject to an adverse action as noted above. An employee may also pursue resolution of a prohibited personnel practice through the federal equal employment opportunity (EEO) process if the prohibited practice relates to discrimination covered under the antidiscrimination laws enforced by the EEOC.<sup>12</sup>

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## Order for Organizational Assessment Did Not Comply with Rules

In contracting with MPRI for the organizational assessment, several required steps were not taken:

- competition was not sought among Schedule vendors, and there was no convincing demonstration of why a sole-source order was necessary,
- the determination of the reasonableness of MPRI's price was not documented, and
- OSC officials performed duties normally done by contracting officer's representatives without authorization or training and, further, performed other duties that should have been reserved for the contracting officer.

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<sup>11</sup>5 U.S.C. § 1215(b).

<sup>12</sup>See GAO, *Equal Employment Opportunity: SSA Region X's Changes to Its EEO Process Illustrate Need for Agencywide Procedures*, [GAO-03-604](#) (Washington, D.C.: July 2003), for a discussion of EEO laws applicable to federal employees and the process governing EEO complaints.

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## No Competition Was Sought and Waiver Lacked Credibility

Contracting officers are generally required by the Competition in Contracting Act<sup>13</sup> to promote and provide for full and open competition in soliciting offers and awarding government contracts. Use of GSA's Schedule program is considered a competitive procedure as long as the procedures established for the program are followed.<sup>14</sup> In this instance, GSA's procedures required ordering offices to prepare a request for quotes and evaluate contractor catalogs and price lists, transmit the request to at least three contractors, and after evaluating the responses, place the order with the Schedule contractor that represented the best value. GSA's Schedule for Management, Organizational and Business Improvement Services (MOBIS), under which the MPRI task order was issued, includes these special ordering procedures. At the time the MPRI order was placed (April 2004), neither the FAR nor GSA's ordering procedures explicitly provided for sole-source orders under GSA Schedule contracts. However, ordering offices could meet competition requirements by properly justifying such an order.<sup>15</sup>

Rather than follow the required GSA special ordering procedures by placing the task order competitively on behalf of OSC, ARC approved a written sole-source justification prepared by OSC. The justification stipulated that the required services were available from only one responsible source—MPRI—and no other contractor could satisfy agency requirements. When supplies or services are available from only one responsible source and no other type of supplies or services will satisfy agency requirements, full and open competition need not be provided for.<sup>16</sup> However, the justification merely asserted that “no other contractor except MPRI, Inc. has the experience and background in this type of sensitive assessment.” It did not contain sufficient facts and rationale to justify a sole-source order and did not provide the minimum required information.<sup>17</sup>

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<sup>13</sup>41 U.S.C. § 253.

<sup>14</sup>See FAR 6.102(d)(3) and 8.404(a).

<sup>15</sup>Effective July 2004, new procedures in FAR 8.405-6 set forth criteria for documenting justification and approval of sole-source Schedule orders.

<sup>16</sup>41 U.S.C. § 253(c)(1); FAR 6.302-1.

<sup>17</sup>FAR subpart 6.3 describes the minimum required information in justifying a sole-source award. The new procedures in FAR 8.405-6 for sole-source justification and approval of Schedule orders were not in effect at the time the OSC order was placed with MPRI.

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For example, the justification did not

- demonstrate that the proposed contractor’s unique qualifications or the nature of the acquisition required an exception to full and open competition,
- describe efforts made to ensure that offers were solicited from as many potential sources as practicable,
- determine that the anticipated cost would be fair and reasonable, or
- describe the market research conducted and the results.

The only support in OSC’s justification for the statement that MPRI was uniquely qualified for the task is a statement that “an informal market survey reveals that only MPRI has the demonstrated past performance in bringing together the required unbiased and highly ethical subject matter experts to complete this type of assessment in the time allocated.” However, the cited market survey does not provide a credible foundation for the conclusion that only MPRI could perform the work. The Special Counsel and his Deputy asked three vendors, including MPRI, for presentations. OSC officials could not recall how these three vendors were selected, and no documentation was available—such as a request for quotes—that set forth the requirement to which the vendors were responding. Rather, the request was communicated orally to the vendors. OSC provided us with proposals submitted by two of the vendors and stated that MPRI submitted a statement of work as its proposal. This statement of work subsequently became part of ARC’s official contract file. We found that the summary statement of OSC’s requirement and the scope of work differ among the three proposals. OSC officials explained that the two vendors’ proposals were not well-matched to what the Special Counsel had communicated to them as OSC’s requirements and that MPRI offered a “no-frills” approach that met OSC’s needs. Nevertheless, in the absence of a documented request for quotes or other solicitation tool, it is not possible to determine whether MPRI and the other vendors were responding to the same set of requirements. Further, our recent search of GSA’s Web site revealed that 1,668 vendors (1,163 of them small businesses) had contracts under GSA’s MOBIS schedule, many of which could have potentially performed the required services.

The sole-source justification listed other factors as well. It stated that “there is insufficient time and no contractor’s [sic] currently have the expertise to meet Government’s requirements given the required budget limitations.” There is no explanation in the justification as to why only this contractor could perform the task within the required time frame. In fact,

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despite the reference to urgency, 3 days before the period of performance was to end, OSC asked ARC to change the required completion date, almost doubling the time frame from 3 to 5-½ months (with no increase in price). While acknowledging that the final, written report was a contract deliverable in the statement of work, OSC officials explained that MPRI met their needs within the 3-month period by providing a briefing on its findings that enabled OSC to begin addressing the problems that had been identified. Further, contracting without providing for full and open competition cannot be justified on the basis of concerns related to the amount of funds available.<sup>18</sup> Thus, the justification's reference to budget constraints necessitating a sole-source order is not a valid rationale.<sup>19</sup>

ARC contracting officials did not question or validate OSC's justification, but told us they relied to a great extent on OSC's input in justifying the sole-source order. They said that they are now paying closer attention to requests from customer agencies, including OSC, for sole-source orders. OSC officials told us that, because ARC did not raise questions about the justification, they assumed it was adequate.

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## Price Reasonableness Determination Not Documented

A sole-source justification is required to document a determination by the contracting officer that the anticipated cost to the government will be fair and reasonable. Neither ARC, which was responsible for doing so, nor OSC adequately documented that MPRI's price was reasonable. Although vendors' GSA Schedule labor rates have already been determined by GSA to be fair and reasonable, ordering agencies are required to evaluate the contractor's price for orders requiring a statement of work. The contractor's price is based on the labor rates in the Schedule contract, the mix of labor categories, and the level of effort required to perform the services. Normally, when ordering services from GSA Schedules that require a statement of work, the ordering office is responsible for evaluating the contractor's level of effort and mix of labor proposed to perform the specific tasks being ordered and for making a determination as to whether the price is reasonable.

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<sup>18</sup>41 U.S.C. § 253(f)(5); FAR 6.301(c).

<sup>19</sup>The sole-source justification cites an estimated cost of \$110,000. However, the task order was issued in the amount of \$140,000. OSC officials told us that the additional cost was for a human resource analysis that was added to the scope of the work.

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ARC officials told us that they relied on OSC to conduct the price reasonableness assessment by reviewing a breakout of MPRI's price by skill mix, number of hours, and rates for each labor category. They maintain that the minimum requirements for price reasonableness documentation were met. However, we found no documentation demonstrating that the required price evaluation had been performed. OSC officials stated that the informal market survey was adequate to determine MPRI's price as reasonable because MPRI's price—which the Deputy Special Counsel negotiated with the vendor—was lower than the other vendors' prices. However, the absence of a solicitation instrument that would show all three vendors responded to the same requirement, and the disparities in the vendors' proposed scopes of work, do not support OSC's assertion.

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### Unauthorized OSC Officials Performed Duties of Contracting Officer's Representatives

One of the contracting officer's key responsibilities is ensuring that the government monitors the contractor's performance. The contracting officer, in this case ARC, may designate a contracting officer's representative in the requiring agency, in this case OSC, to act as the contracting officer's technical expert and representative in the monitoring and administration of a contract or task order. ARC's standard designation letter to contracting officer's representatives outlines the scope of these responsibilities, including such things as monitoring the contractor's performance, representing the government in meetings with the contractor, keeping the contracting officer informed, and reviewing the contractor's invoices. ARC follows Treasury's training program for contracting officer's representatives, which consists of a basic acquisition course of at least 24 hours that includes pre-award, post-award, and procurement ethics training.

ARC contracting staff named OSC's former human resource chief, who had taken the required training, as the contracting officer's representative for the MPRI task order.<sup>20</sup> However, two other OSC officials not named by ARC, the Special Assistant and Director of Management and Budget and the Deputy Special Counsel, who had not received the training, effectively acted in the role of contracting officer's representatives on the MPRI

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<sup>20</sup>This official retired in September 2004.

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order.<sup>21</sup> In an April 20, 2004, e-mail to OSC staff, the Special Counsel named the Special Assistant as the liaison between the agency and the contractor. The statement of work names this official as the “governing authority” for the effort and as responsible for coordinating with the contractor on “any other direct costs” and certain travel requirements. Also, the Deputy Special Counsel was responsible for approving MPRI’s contract execution plan and the contract deliverables.

Further, ARC’s delegation letter to contracting officer’s representatives prohibits the delegation of or responsibility for certain duties, such as soliciting proposals, making commitments or promises to a contractor relating to the award of a contract, and negotiating the price with the contractor. The Special Counsel and Deputy Special Counsel, as discussed above, solicited proposals from three vendors, and the Deputy negotiated the final price with MPRI, functions that should have been performed by the ARC contracting officer.

ARC contracting staff were not aware that the OSC officials had performed these duties until we informed them. They said that only the former human resource chief had received the training and authorization to act as a contracting officer’s representative. OSC officials said that ARC, as their contracting office, never told them they were not following proper contracting practices.

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## Tasks Specified for OSC-Appointed Intermittent Employee Were Consistent with OPM Criteria

The tasks specified in the statement of work for the consultant that OSC hired on March 17, 2004, and that he completed before his departure were consistent with OPM criteria for appropriate uses of expert and consultant appointments. The employee, who was employed on an intermittent basis, was tasked with two major lines of work related to efficiency and curriculum development. OSC management expressed confidence in his qualifications and used its discretion to both hire him and set his compensation rate.

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<sup>21</sup>The Special Counsel’s Special Assistant was certified as a contracting officer’s representative on September 16, 2004, 2 weeks before the period of performance of the MPRI order ended. However, this official was never designated as a contracting officer’s representative for the MPRI order, according to the ARC contracting officer.



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## OSC Gave Intermittent Employee Two Significant Tasks and Said Pay Was Based on Qualifications

OPM regulations permit agency heads to establish expert or consultant pay rates, but in doing so to consider specified factors, including level of difficulty of the work, qualifications of the expert or consultant, and pay rates of individuals performing comparable work.<sup>22</sup> At the suggestion of the Special Counsel, OSC officials hired Alan J. Hicks as an intermittent employee on March 17, 2004, using the appointment authority under 5 U.S.C. § 3109. According to the appointment paperwork, Mr. Hicks's appointment was to last from March 17, 2004, until March 16, 2005, and he was to work an intermittent schedule. His pay rate was set slightly below the highest rate for a GS-15.<sup>23</sup> Mr. Hicks resigned his appointment effective October 24, 2004. During the 7 months Mr. Hicks was employed by OSC, he worked a total of 123 hours for a total of \$6,621.09 in pay.

Before hiring Mr. Hicks, the Special Counsel identified him as a possible consultant based on prior knowledge of Mr. Hicks's work as the headmaster of a private secondary school. The Deputy Special Counsel told us that he justified Mr. Hicks's pay on the basis of his qualifications—specifically, his experience as headmaster and his educational level.<sup>24</sup> He also noted that the Special Counsel had worked with Mr. Hicks and respected his opinion and judgment. According to Mr. Hicks's resume, during the 10 years of his headmaster position, he was responsible for a number of administrative functions, including designing and writing student curricula, recruiting and training faculty and staff, establishing financial and organizational structures of the school, hiring and management decisions, as well as teaching history, logic, and biology. According to his resume, Mr. Hicks had also taught at the college level.

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<sup>22</sup>5 C.F.R. § 304.104.

<sup>23</sup>Mr. Hicks's basic pay was set at \$53.83 per hour; the maximum rate at the time of his appointment was \$54.47 per hour.

<sup>24</sup>Although the Deputy Special Counsel indicated that Mr. Hicks had a Ph.D., Mr. Hicks's resume showed that he had completed coursework for a Ph.D. but had not completed his dissertation. Subsequently, an OSC official indicated that the Deputy Special Counsel misspoke about Mr. Hicks's educational level.

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## Statement of Work and Duties Actually Performed by Intermittent Employee Were Consistent with OPM Criteria

OPM regulations provide that agencies may appoint qualified experts or consultants to an expert or consultant position that requires only intermittent and/or temporary employment.<sup>25</sup> While OPM regulations do not establish specific criteria for determining qualifications, they do generally describe the expectations for such positions and what constitutes appropriate tasks for experts and consultants to perform. For example, the regulations describe a consultant as a person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. Furthermore, a consultant position is one that requires providing advice, views, opinions, alternatives, or recommendations on a temporary or intermittent basis on issues, problems, or questions presented by a federal official. The regulations also provide examples of inappropriate uses of expert/consultant appointments, including work performed by the agency's regular employees.

Mr. Hicks's tasks were related to addressing OSC's backlog that we identified in our March 2004 report.<sup>26</sup> Specifically, an OSC official noted that his experience in curricula development at the boarding school was viewed as key to cross-train employees in different units so those employees could be utilized in a number of ways to address workload. According to the OSC official, Mr. Hicks's efforts would complement those of MPRI. The official said he was confident that Mr. Hicks was fully qualified to do the work, and that OSC used management discretion to approve the appointment. Another official observed that Mr. Hicks provided both an outside perspective and experience that regular OSC staff did not have. Officials also said that although Mr. Hicks only worked at OSC for a short time, the agency was pleased with the value he added.

Both the duties set out in Mr. Hicks's statement of work, as well as those duties he actually performed, were consistent with OPM regulations. According to the statement of work prepared by the human resource chief at the Deputy Special Counsel's direction, Mr. Hicks was to (1) review and analyze OSC program policies and procedures for efficiency and make recommendations and develop written revisions to these policies and procedures and (2) develop a long-term training curriculum and deliver training. Shortly before he terminated his consultant work for OSC,

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<sup>25</sup> C.F.R. Part 304.

<sup>26</sup> GAO-04-36.

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Mr. Hicks submitted a report outlining the work that he performed. In his report, Mr. Hicks made a number of observations on his concurrence with MPRI's conclusions. The report also said he was involved in a number of other tasks, including

- examining operational training manuals,
- meeting with staff concerning the procedures for handling whistleblower disclosure complaints,
- assisting with and attending the Special Counsel's testimony before a congressional subcommittee,
- preparing a paper for presentation at a staff retreat on philosophical matters related to work,
- meeting with MPRI to discuss its assessments and to share his observations based on his work, and
- having numerous conversations with the Special Counsel concerning the assessment team, his recommendations for curriculum and training, and the need for streamlined procedures.

While most of the tasks that Mr. Hicks actually performed were consistent with those enumerated in his statement of work, Mr. Hicks also worked on whistleblower disclosure cases.<sup>27</sup> According to an OSC official, Mr. Hicks spent approximately 25 percent of his time working through 50 disclosure case files. The OSC official stated that Mr. Hicks was not provided disclosure case files that contained sensitive information for which a security clearance would have been required.

While Mr. Hicks noted in his report that this work on the disclosure cases "served the dual purpose of analysis of procedures and a reduction of backlog," an OSC official stated that Mr. Hicks's efforts were related to an analysis of the process of handling disclosures and not the type of efforts OSC's disclosure unit employees perform in handling such cases. According to the OSC official, while Mr. Hicks contacted some of the whistleblowers directly, it was for the purpose of determining those individuals' impressions about the process. This official stated that these activities were performed at the initiative of the Special Counsel and his senior staff, in order for Mr. Hicks to gain a better understanding of those processes and procedures specified in the statement of work. This official stated that prior to Mr. Hicks's arrival at OSC, the Special Counsel

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<sup>27</sup>Whistleblower disclosures are federal employees' allegations of wrongdoing by other federal employees, such as violations of laws and "gross waste" of funds.

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forwarded to Mr. Hicks statutory provisions on OSC's duties relating to disclosures from whistleblowers, including the obligation of OSC to maintain the confidentiality of a whistleblower's identity.<sup>28</sup>

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## Redress Actions for OSC Employees Are Not Workable in Certain Cases; Other Agencies Have Developed Procedures for Internal Cases

Although OSC employees, like other federal employees, can seek redress for alleged prohibited personnel practices through OSC, this may be unworkable for OSC employees in certain circumstances. Two other agencies with redress roles, MSPB and EEOC, have acknowledged the need to avoid conflicts when their employees have complaints and have taken steps to avoid such conflicts when their employees use their agency's respective redress processes.

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## Seeking Redress through OSC Can Be Unworkable for OSC Employees for Allegations Against the Special Counsel or Deputy Special Counsel

Title 5 of the *United States Code* protects federal employees, including OSC employees, from prohibited personnel practices.<sup>29</sup> OSC employees who believe that a prohibited personnel practice has occurred may seek redress from OSC. OSC employees may also seek redress through appealing adverse actions to the MSPB and filing EEO complaints.

According to OSC officials, there are two ways in which an OSC employee could bring a prohibited personnel practice allegation within OSC. First, OSC employees may use the agency's administrative grievance system.<sup>30</sup> If fact-finding is needed for a complaint filed against OSC staff, an OSC employee who has not been involved in the matter being grieved and, when possible, does not occupy a position subordinate to any official involved in the matter being grieved, is selected to conduct a review and prepare a report. Ideally, that employee is also located in a different geographic area; for example, an OSC employee in Dallas could be assigned to a complaint filed in Washington, D.C. OSC officials stated that this would ensure objectivity and independence in the processing of the complaint. Fact-

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<sup>28</sup>5 U.S.C. § 1213(h).

<sup>29</sup>Former federal employees and applicants for federal employment are also protected against prohibited personnel practices. See 5 U.S.C. § 2302(b).

<sup>30</sup>OSC's Directive No. 1400-36, dated October 12, 2000, addresses the agency's administrative grievance process.

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finding is conducted informally and includes the collection of documents and statements of witnesses, as necessary. The grievant's second-level supervisor would render a decision based upon the fact-finder's report and any comments on the report provided by the grievant. The grievant may appeal this decision to the Deputy Special Counsel, or, if the matter was grieved to the Deputy Special Counsel in the first instance, to the Special Counsel. Both current and former OSC officials stated that this process could be successfully used when the prohibited personnel practice allegation relates to the actions of an official below the Deputy Special Counsel level. However, if the administrative grievance system were to be used to address grievances against the Special Counsel or the Deputy Special Counsel, there would be a conflict of interest since the final decision maker in this process is the Special Counsel.

Second, OSC officials stated that OSC employees who believe a prohibited personnel practice has occurred can file a complaint with OSC in the same fashion as an individual from outside OSC. However, OSC employees do not have an outside agency to represent them in an independent manner—the role that OSC plays for non-OSC employees in cases involving prohibited personnel practices. When an employee raises a prohibited personnel practice allegation against the Special Counsel, addressing such an allegation within OSC becomes unworkable because, OSC officials stated, all OSC employees ultimately report to the Special Counsel. OSC officials also stated that there cannot be an independent review when the employee performing the investigation reports to the individual being investigated. According to former and current OSC officials, the difficulty also extends to allegations against the Deputy Special Counsel because the Deputy Special Counsel, who is typically a noncareer senior executive, has a confidential relationship with the Special Counsel.

According to the previous Special Counsel, an effort among senior staff to establish procedures for handling OSC employee allegations of prohibited personnel practices against senior OSC officers, including the Special Counsel, was initiated during her tenure. However, the effort was not completed, she said, noting that OSC staff did not reach a consensus over what the alternative process should be for handling complaints against the Special Counsel. The previous Special Counsel and current OSC officials who were involved in this effort told us that one of the options being considered was to have the matter investigated by an outside inspector general. At the time, however, concern was expressed about allowing inspectors general, who were subject to OSC's investigative and prosecutorial authority, to investigate the Special Counsel.

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## Investigation of Allegations Against the Special Counsel Was Sent to the Integrity Committee of the PCIE

The potential difficulties described above were recently illustrated when a complaint was filed anonymously against the Special Counsel on behalf of a number of OSC employees.<sup>31</sup> The complainants requested that the complaint be referred to the chairman of the PCIE for an independent investigation, including a recommendation for corrective or disciplinary action. The PCIE is an interagency council, including presidentially appointed inspectors general, charged with promoting integrity and efficiency in federal programs.<sup>32</sup> The complaint stated that OSC could not investigate these allegations because the Special Counsel could not oversee an investigation of which he is the subject and that all OSC staff are his subordinates. The complaint further observed that the complainants' ability to remain anonymous would be jeopardized if any OSC staff were assigned to work on the investigation. As discussed above, current OSC policy and procedures do not provide for special handling of complaints against the Special Counsel or the Deputy Special Counsel. The Deputy Special Counsel told us that he and the Special Counsel agreed that OSC should not handle the complaint, and subsequently forwarded it to the PCIE's Integrity Committee and notified the chair of the PCIE.<sup>33</sup> In mid-October, 2005, the chair assigned OPM's inspector general to conduct the investigation.

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<sup>31</sup>An alliance of public interest organizations also joined the OSC employees as complainants.

<sup>32</sup>Executive Order 12805, "Integrity and Efficiency in Federal Programs," 57 *Fed. Reg.* 20627, May 11, 1992. The chair of the PCIE is the Deputy Director for Management of the Office of Management and Budget (OMB). Members of the PCIE include all civilian presidentially appointed inspectors general, Associate Deputy Director for Investigations of the Federal Bureau of Investigation (FBI), Director of the Office of Government Ethics (OGE), the Special Counsel, and the Deputy Director of OPM. A second council of federal inspectors general, the Executive Council on Integrity and Efficiency (ECIE), is composed of all civilian statutory inspectors general that are not represented on the PCIE. The chair of the PCIE also serves as chair of the ECIE.

<sup>33</sup>The Integrity Committee of the PCIE is responsible for receiving, reviewing, and referring for investigation administrative allegations against inspectors general and certain inspector general staff members. Executive Order 12993, "Administrative Allegations Against Inspectors General," 61 *Fed. Reg.* 13043, March 21, 1996.

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## Other Agencies with Redress Roles Have Addressed Procedures for Complaints Against Them by Their Own Employees

Two other agencies in the executive branch with major roles in ensuring the protection of employee rights, the MSPB and EEOC, have taken steps to address potential conflicts of interest when their own employees use their agencies' respective redress processes.

The MSPB is an independent quasi-judicial agency established to protect federal merit systems against prohibited personnel practices and to ensure adequate protection for employees against abuses by agency management. MSPB carries out this mission, in part, by adjudicating federal employee appeals of adverse personnel actions.

The MSPB has developed regulations which state that MSPB employee appeals are not to be heard by board-employed administrative judges who hear appeals from employees of other federal agencies, but instead are to be heard by administrative law judges (ALJ).<sup>34</sup> According to the MSPB General Counsel, MSPB does not employ its own ALJs; rather, MSPB has a memorandum of understanding with the National Labor Relations Board to use its ALJs for MSPB employee appeals and other matters, including whistleblower retaliation cases brought by OSC.

MSPB regulations further provide that the board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. The regulations provide that if an initial decision rendered by the ALJ is appealed to the board, the initial decision will not be altered unless there has been "harmful procedural irregularity" in the proceedings or there is a clear error of law. According to the MSPB General Counsel, this provides the board with very limited review authority. Finally, the regulations state what procedures are to be followed if a board member must recuse himself or herself from a specific case.<sup>35</sup>

The EEOC is responsible for enforcing the federal sector employment discrimination prohibitions contained in the federal antidiscrimination statutes, including Title VII of the Civil Rights Act of 1964, as amended.<sup>36</sup> As

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<sup>34</sup>5 C.F.R. § 1201.13.

<sup>35</sup>5 C.F.R. § 1200.3.

<sup>36</sup>The EEOC also has enforcement responsibility over federal sector employment discrimination prohibitions under the Rehabilitation Act of 1973, the Equal Pay Act of 1963, and the Age Discrimination in Employment Act (ADEA), as amended.

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part of this responsibility, EEOC provides for the adjudication of complaints and hearing of appeals.

As is the case for all individuals who file a formal complaint of discrimination, EEOC employees may either request a hearing before an administrative judge or a final decision by the agency itself. However, according to EEOC officials, when EEOC employees request a hearing over their complaint of discrimination, such hearings are not to be conducted by the administrative judges employed by EEOC, but rather through contract administrative judges. EEOC officials state that using contract administrative judges is necessary to preserve the neutrality of the process, since EEOC's administrative judges are coworkers of any EEOC complainant.

EEOC officials also told us that if an employee of its Office of Equal Opportunity (OEO), EEOC's own EEO office, raises an allegation of discrimination, the matter is sent outside the agency to another agency's EEO office for informal counseling, investigation, and/or mediation to guard against potential conflicts of interest within the OEO.

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## Additional Redress Options Could Be Made Available to OSC Employees

Steps can be taken to ensure that OSC employees have alternative avenues of recourse when their prohibited personnel practice allegations involve the Special Counsel or the Deputy Special Counsel. Potential options are discussed below. However, unlike the MSPB and the EEOC, which have taken steps to address potential conflicts of interest when their own employees use their respective redress processes, OSC would need explicit authority for implementing such options.

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## Independent Body Could Conduct External Investigation

OSC employees could be afforded an external investigation of their prohibited personnel practice allegations against the Special Counsel or Deputy Special Counsel through an independent entity. Most of the current and former OSC officials we spoke with acknowledged that the option of such an external investigation is warranted. If such an external investigation were authorized, it may be desirable to also provide the results of the investigation to the President, who has the authority to take appropriate corrective action. However, OSC would need specific authority to implement this option since OSC does not have the mechanism to provide for such investigations.



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## OSC Employees Could Be Given Broader Appeal Rights to MSPB

OSC employees could be afforded expanded rights to appeal directly to MSPB that would specifically encompass prohibited personnel actions involving the Special Counsel or the Deputy Special Counsel. As discussed above, OSC employees, as is the case with other federal employees, can take allegations of prohibited personnel practices to the MSPB only when certain adverse actions have been taken against those employees. One OSC official observed that care should be taken in expanding jurisdiction so as to prevent minor personnel actions from being appealable to the board. Since the MSPB appeals process is in statute, this option would require legislation for implementation.

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## Conclusions

OSC employees who believe a prohibited personnel practice has occurred can file a complaint with OSC in the same fashion as an individual from outside the agency. However, OSC employees do not have an external, independent agency like OSC to represent them. This becomes particularly important when the complaint is filed against the Special Counsel or the Deputy Special Counsel. When an employee raises a prohibited personnel practice allegation against the Special Counsel, addressing such an allegation within OSC becomes unworkable because OSC employees ultimately report to the Special Counsel, including the complainant and any staff who would conduct an internal investigation. This difficulty extends to allegations against the Deputy Special Counsel because this individual has a confidential relationship with the Special Counsel. Steps could be taken to ensure that OSC employees, who cannot effectively obtain the services of OSC in addressing allegations of prohibited personnel practices, have alternative avenues of redress.

Adequate management oversight is critical to ensuring that, in an interagency contracting environment, the requiring agency and the agency ordering the services on its behalf work together to follow proper contracting procedures. In agreeing to issue the sole-source order for the organizational assessment despite the flawed justification, and in being uninvolved in and unaware of the pre- and post-award activities conducted by OSC officials, ARC contracting officials neglected to fulfill their responsibilities. For their part, OSC officials demonstrated a lack of awareness of their responsibilities in the process of engaging MPRI and overseeing the contractor's work.

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## Matter for Congressional Consideration

Due to the unique nature of OSC and the difficulties involved when a prohibited personnel practice allegation is made against the Special Counsel or the Deputy Special Counsel, Congress should consider affording OSC employees (and former employees and applicants for employment) alternative means of addressing prohibited personnel practice allegations other than going through OSC. These means could include establishing (1) a right to an external investigation through an independent entity, where the entity would forward its findings to the President, who would decide the appropriate action, as is done when OSC handles allegations of prohibited personnel practices against Senate-confirmed presidential appointees; or (2) an expansion of the personnel actions that could be the basis for an appeal directly to the MSPB.

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## Recommendations for Executive Action

We recommend that the Director of ARC's Division of Procurement take the following two actions to ensure that (1) documents prepared by program offices requesting contracting assistance—such as statements of work and sole-source justifications—are carefully reviewed for compliance with competition requirements and (2) ARC contracting staff, through regular communication with the program offices they support, ensure that only authorized program officials act as contracting officer's representatives.

We also recommend that the Special Counsel put in place procedures to ensure that only those officials who have taken the required training and been designated as contracting officer's representatives act in that role and that program staff do not exceed their authority in interacting with contractors.

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## Agency Comments

On September 23, 2005, we provided a draft of this report to OSC and to ARC for review and comment. OSC's written response is included in appendix I, and ARC's written response is included in appendix II.

OSC and ARC agreed with our recommendations. However, OSC suggested several wording changes to the report and expressed concern about the tone of the section on the sole-source order with MPRI. While we clarified our wording in several places, we did not make other changes suggested by OSC in its comment letter for the reasons discussed below.

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OSC recommended we add a paragraph that, in addition to making reference to our earlier report on case backlogs at OSC (which is discussed in the first paragraph of our current report), would make other points that are already addressed in our report. Thus, we did not include OSC's suggested language.

OSC pointed out that ARC, as the contracting office, did not question the sole-source justification and that, if it had done so, another approach could have been taken for the procurement. Our report already clearly reflects the fact that this was ARC's responsibility and that ARC contracting personnel did not question the validity of the sole-source justification but, rather, relied on OSC's rationale.

OSC suggested we revise the wording in our report to state that program staff participated in negotiations with MPRI, rather than state that the Deputy Special Counsel negotiated the price with the company. Our discussions with OSC officials—including one with the Deputy himself—support our finding that the Deputy negotiated the final price with MPRI, and we have added the word “final” to make that clear. There is no evidence that ARC “set the final price,” as OSC suggests; rather, ARC issued a task order using the final price provided to it by OSC.

OSC also took exception to our statements that the Deputy Special Counsel was responsible for approving MPRI's contract execution plan and contract deliverables and suggested we change the wording to “Also, OSC program officials were included in the approval process for MPRI's contract execution plan and contract deliverables.” Again, the evidence supports our finding as stated in the report. In fact, the contract's statement of work names the Deputy as the contracting officer's representative, as the official responsible for approving MPRI's contract execution plan, and as the recipient of the contractor's monthly reports. Further, the contract execution plan is addressed to the Deputy and it identifies him as the contracting officer's representative.

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As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies of this report to OSC, the Bureau of the Public Debt, and interested parties. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. If

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you or your staff have questions about this report, please call me at (202) 512-9490. Key contributors to this report included Kimberly Gianopoulos, Karin Fangman, Sharon Hogan, Michele Mackin, and Adam Vodraska.

A handwritten signature in black ink that reads "George H. Stalcup". The signature is written in a cursive style with a large initial "G" and a distinct "H" and "S".

George H. Stalcup  
Director, Strategic Issues

---

*List of Requesters*

The Honorable Steny H. Hoyer  
Minority Whip  
House of Representatives

The Honorable Henry A. Waxman  
Ranking Minority Member  
Committee on Government Reform  
House of Representatives

The Honorable Danny K. Davis  
Ranking Minority Member  
Subcommittee on Federal Workforce and Agency Organization  
Committee on Government Reform  
House of Representatives

The Honorable Edolphus Towns  
Ranking Minority Member  
Subcommittee on Government Management,  
Finance, and Accountability  
Committee on Government Reform  
House of Representatives

The Honorable Barney Frank  
Ranking Minority Member  
Committee on Financial Services  
House of Representatives

The Honorable Eliot L. Engel  
House of Representatives

# Comments from the Office of Special Counsel



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505  
[www.osc.gov](http://www.osc.gov)

The Special Counsel

October 25, 2005

The Honorable David M. Walker  
Comptroller General of the United States  
Government Accountability Office  
441 G Street N.W.  
Washington, D.C. 20548

Re: Response to GAO Draft Report #GAO-06-16

Copy sent via facsimile to George Stalcup (202-512-4516) and original sent via First Class Mail

Dear General Walker:

This letter is in response to the Government Accountability Office (GAO) Draft Report (#GAO-06-16), dated October 2005, on Selected Contracting and Human Capital Issues and supersedes my prior letter of October 12, 2005. We appreciate the opportunity to respond to the draft report. We agree with your U.S. Office of Special Counsel (OSC) recommendations but have some concerns about facts not mentioned in the draft report and recommend adding additional language.

#### **Recommendation for Executive Action**

I fully concur with the recommendations on page 24. Since we became aware of the issue, it has been resolved. I will ensure that only those officials who have taken the required training and have been properly designated will act in the role of contracting officials.

#### **Requested Additions**

We recommend adding the following paragraph to page 1 for context to the problems confronting OSC when I took office.

*Upon taking office as the new Special Counsel, in January 2004, one major issue confronted the Office of Special Counsel (OSC), a serious backlog of cases in all of the units within the agency, as documented in GAO Report (#GAO-04-36), dated March 2004, on case management-related operations of the U.S. Office of Special. The highlights of this report stated that OSC had "not been consistently processing cases within statutory time limits, creating backlogs." GAO recommended "that the Special Counsel provide Congress with a detailed strategy designed to" reduce the backlog of cases. The backlog had plagued the agency for several years. The OSC Annual Report to Congress repeatedly discussed this problem. The MPRI sole source contract at issue was the first step in devising the strategy required by GAO and OSC, officials felt pressure to act quickly.*

**The Special Counsel**

The Honorable David M. Walker  
Page 2 of 3

**Concerns**

I do not believe the general tone of the section regarding the MPRI sole source contract properly reflects the complexity of the factual and legal setting. The following email was sent to GAO officials on September 6, 2005, without rebuttal, that accurately reflects OSC's position.

There were several major points that we agreed upon, that were not in the initial Statement of Facts. The FAR makes it clear that ARC had the authority and responsibility to control the sole source issue. ARC at anytime could have prevented the contract from coming into effect. If the sole source justification wasn't sufficient, it was incumbent on ARC officials to begin a "dialogue" to ensure that it was sufficient. Then a case could be made or not. There would be no need for second guessing at this point. OSC officials even made it clear to ARC that OSC was relying on ARC's expertise in this area, since we had not worked in this area of law. We pay [ARC] \$20,000 per year to provide this service, because OSC personnel do not have this type of training. The FAR states clearly that once ARC officials sign the sole sources justification, they "bought it." With all of this in mind, at no time did any ARC official inform any OSC official that the sole source justification wasn't sufficient or that there was a possible violation of a law, rule or regulation...

The draft report fails to adequately reflect procurement officials' facilitation and guidance of program staff involvement during the process. The following points represent slight changes to the draft language that would easily and sufficiently cure these deficiencies.

- The language at page 11 first full paragraph needs more clarity "--which the Deputy Special Counsel negotiated with the vendor--" and should be replaced with "--which program staff were involved discussing with the vendor because they were uninformed by responsible procurement staff--."
- The language at page 12 at the bottom of page is imprecise "the Deputy negotiated a price with MPRI" and should be replaced with "program staff were involved with the negotiation process, yet procurement officials set the final price."
- There is similar language at page 3, tenth line from the top "...and negotiating a price with MPRI." This clause would be more precise to read "...and involvement in the negotiation process."
- The language at page 12, last sentence, first full paragraph is out of context: "Also, the Deputy Special Counsel was responsible for approving MPRI's contract execution plan and the contract deliverables." It should read as follows: "Also, OSC program officials were included in the approval process for MPRI's contract execution plan and contract deliverables."

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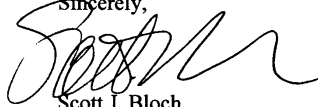
**Appendix I**  
**Comments from the Office of Special Counsel**

**The Special Counsel**

The Honorable David M. Walker  
Page 3 of 3

We again thank you for the opportunity to respond to GAO Draft Report (#GAO-06-16), dated October 2005, on Selected Contracting and Human Capital Issues.

Sincerely,



Scott J. Bloch  
Special Counsel



# Comments from the Administrative Resource Center, Bureau of the Public Debt, U.S. Department of the Treasury



DEPARTMENT OF THE TREASURY  
BUREAU OF THE PUBLIC DEBT  
WASHINGTON, DC 20239-0001

October 5, 2005

Mr. George H. Stalcup  
Director, Strategic Issues  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Mr. Stalcup:

I am writing to provide the Administrative Resource Center's (ARC) comments on the Government Accountability Office's draft report entitled *U.S. OFFICE OF SPECIAL COUNSEL Selected Contracting and Human Capital Issues*. ARC is one of several offices that I am responsible for within the Department of the Treasury's Bureau of the Public Debt.

**Recommendations:** GAO recommended that the Director of ARC's Division of Procurement ensure that (1) documents prepared by program offices requesting contracting assistance, such as statements of work and sole-source justifications, are carefully reviewed for compliance with competition requirements and (2) ARC contracting staff, through regular communication with the program offices they support, ensure that only authorized program officials act as contracting officer's representatives.

**Response:** ARC Procurement will become even more vigilant in reviewing such documents and ensuring that only authorized personnel are participating in the administration of contracts. Also, ARC Procurement has a dedicated compliance team, reporting directly to the ARC Procurement Director, which will ensure that these areas receive an enhanced degree of consideration in future compliance reviews.

Thank you for the opportunity to respond to the draft GAO report. If you have any questions or wish to discuss these comments further, please contact my office at (202) 504-3500.

Sincerely,

A handwritten signature in black ink, appearing to read "Van Zeck".

Van Zeck  
Commissioner

[www.treasurydirect.gov](http://www.treasurydirect.gov)

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