Department of Veterans Affairs

Office of Inspector General

Review of the Lease Awarded to Westar Development Company, LLC for the Butler, Pennsylvania Health Care Center

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Executive Summary

Introduction

The Office of Inspector General, Office of Contract Review, initiated a review of the Department of Veterans Affairs' (VA) lease with Westar Development Company, LLC (Westar), a limited liability company. The lease was a build-to-suit lease for the new Butler Health Care Center in Butler, Pennsylvania (Butler HCC) to replace VA's aging health care facility in Butler. The lease was awarded on May 31, 2012, for a 20-year period with a total value of $152.7 million. We initiated our review because of allegations that Westar misrepresented itself as a veteran-owned small business (VOSB), misrepresented its past experience, and that Michael Forlani and his companies were involved with Westar and the Butler HCC project. Forlani and related companies were suspended from Government contracting in December 2011 because of bribery and racketeering charges in an indictment filed in November 2011. Forlani pled guilty to these charges, in August 2012, and was sentenced to eight years in prison.

Results and Conclusions

Our review determined that Westar made false and misleading statements regarding: (1) its veteran ownership status; (2) its past performance and experience; and (3) that it had teaming arrangements with critical team members, in particular, the general contractor (GC). These findings were reported in a Management Advisory Memorandum to the Office of Acquisition, Logistics, and Construction (OALC) on June 13, 2013. As a result of our review and the evidence submitted with the advisory memorandum, VA terminated Westar's lease for default on August 9, 2013. The lease was terminated before building permits were obtained and actual construction started.

At the request of the Principal Executive Director, OALC, we continued our review to determine what happened, why, and what could be done to prevent a similar scenario in the future. We found that a change in the lease acquisition process for the Butler HCC created a preference for Westar since Westar had a purchase contract for the land parcel that was preferred by VA. This preference may have been a contributing factor for VA not critically reviewing and verifying Westar's proposal. We determined that VA did not, nor did VA's broker, take the steps required by the solicitation to verify Westar's veteran-owned status. As a result, Westar received additional points on its technical score. We found that VA did not, nor did VA's broker, conduct any steps to verify the past experience claims by Westar. As a result, Westar received points on the technical evaluation for experience that was not Westar's. We found that VA did not, nor did VA's broker, conduct any steps to verify Westar's teaming arrangements, especially with the GC. As a result, Westar received points on the qualifications of a GC that we found was not able or capable of building the Butler HCC.

Our review also found that VA incorrectly dismissed a protest regarding the awarded lease to Westar. We found that the Contracting Officer (CO) did not appear to have reviewed the protest in earnest. We also determined that the Office of General Counsel (OGC) opinion contained several errors. Records show that the CO had the knowledge necessary to have identified at least one of the errors in OGC's opinion. However, the protest was determined by the CO to have no merit without any follow up or discussion with the developer who filed the protest.

Our review of the lease file and other documentation indicated that key decisions or analysis responsibilities were relegated to VA's real estate broker who was under contract to provide lease acquisition services for the Butler HCC. Documentation indicates that VA officials did not verify certain aspects of Westar's proposal, in particular, Westar's past performance, financial capabilities, and ownership status. The documentation shows that VA officials relied on advice from its real estate broker on these issues. We determined that VA made the award to Westar when in fact; neither VA nor its broker took appropriate steps to verify the past performance and other pertinent assertions made by Westar in its proposal.

We also determined that VA's analysis, that showed that leasing was less costly and financially advantageous to VA than VA constructing and owning its own building, was in error on two accounts. First, the analysis was done for a term of only 15 years and not 20; second, the cost estimate for constructing the building used in the analysis was artificially high. The estimated cost used in VA's analysis was almost twice the final cost estimate in the lease awarded to Westar.

Recommendations

We recommended to the Principal Executive Director, OALC, that VA adheres to the normal two-step process unless certain pre-determined criteria are present to justify a departure from the two-step process. We also recommended that steps be established to ensure the CO is actively involved in decisions. We recommended that VA determine the value of a real estate broker. If a broker is determined to be of value, we recommend that VA define more specific tasks, responsibilities, and deliverables. We recommended that VA ensures that critical information contained in vendor proposals is actively verified such as veteran ownership status, who the owners are for all entities involved, the past performance and experience, and that critical team members are committed and able to do the project.

Management Comments

On March 7, 2014, the Department provided a response from the Principal Executive Director, OALC. While the Department concurred with our recommendations, the Department did not accept responsibility for any of the identified deficiencies and disagreed with five of our findings and conclusions. VA Management's assertions are:

- VA did not have a preference for the Deshon Woods site.
- VA's decision to move to a one-step lease process was justified.
- The lease cost was fair and reasonable and consistent with OMB guidelines.
- The CO's decision to dismiss the protest of the award to Westar was supported.
- VA conducted due diligence when vetting ownership of Westar and VA Butler Partners.

We reviewed VA Management's comments and provided a response in Appendix D of the report. In summary, we found that VA Management's comments ignored the evidence presented in our report and that their assertions listed above were not supported by, and at times were inconsistent with, the uncontested facts. While it is undisputed that Westar made false and misleading representations to VA, our findings and conclusions supported that VA failed to perform appropriate, required verification steps and failed to follow up on key statements made in Westar's proposal.

Maureen Regan

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Introduction

Purpose

In response to allegations, the Office of Inspector General (OIG), Office of Contract Review (OCR), conducted a review of the Department of Veterans Affairs' (VA) lease with Westar Development Company, LLC (Westar), a limited liability company (LLC). Westar was awarded a build-to-suit lease for a new Health Care Center in Butler, Pennsylvania (Butler HCC) in May 2012. In late March 2013, the OIG received an anonymous complaint that Westar was financed and backed by Michael Forlani, a northeast Ohio contractor and developer who pled guilty to bribery and racketeering charges in 2012 and that the information submitted by Westar to VA was false. Mr. Forlani was indicted in November 2011 and pled guilty to the charges. He and the companies identified in the indictment were suspended from Government contracting in December 2011. On April 1, 2013, Forlani was sentenced to eight years in prison. In response to the allegations, the OIG OCR initiated a review of the lease awarded to Westar. The initial purpose of the review was to determine whether the allegations had merit. We substantiated the allegations and on June 13, 2013, issued a Management Advisory Memorandum to the Office of Acquisition, Logistics, and Construction (OALC) with supporting documentation. This document is included as Appendix A (without Attachments). At the request of the Principal Executive Director, OALC, we continued our review to determine what happened, why, and what could be done to prevent similar problems in the future.

Background

On October 26, 2009, Congress passed Public Law 111-82 which authorized 15 major medical facility leases including the Butler HCC. On January 21, 2010, VA advertised for land for the Butler HCC. VA intended to conduct a two-step lease award process where VA first would identify a suitable site and acquire an assignable purchase contract for the land at no more than the appraised value. In the second step, VA would solicit proposals from developers to design and build the Butler HCC on the site VA had acquired through the assignable purchase contract. VA would then assign the land purchase contract to the winning developer who would purchase the land and construct the building. On May 4, 2010, VA conducted a market survey of the proposed sites with the assistance of Public Properties, VA's real estate broker, who was under contract to provide lease acquisition assistance on the Butler HCC lease project. VA determined that one site scored significantly higher. However, there were concerns that this site only met the minimum acreage requirements, had potential wetland issues, and the land was owned by the Butler Township. Because of these concerns, on June 17, 2010, VA advertised that it would use a one-step acquisition (that is, VA would not acquire an assignable purchase contract for the land and each developer would submit a parcel for consideration). VA conducted a second market survey on July 20, 2010, and interested parties submitted 11 parcels for consideration. VA granted a pass or fail grade for each parcel with a passing grade indicating that a developer could use the parcel in a proposal. In this manner, VA approved 5 of the 11 sites to be used by developers submitting a proposal for the Butler HCC build-to-suit lease.

On October 21, 2011, VA issued a Solicitation for Offers, VA-101-10-RP-105 (SFO), for a build-to-suit lease for the new Butler HCC. Proposals were required to use one of the five approved sites. It was up to the developer to negotiate a purchase contract or a long-term lease for the site they were proposing. Westar submitted a proposal on January 10, 2012. Five other proposals were submitted in response to the SFO. Westar was the only offeror that claimed veteran-owned status and received a bonus of four points on the technical evaluation for its veteran-owned status. Westar's site was the Butler Township parcel commonly referred to as the Deshon Woods site. Westar received the highest score on the technical evaluation and was deemed the best value. The lease was awarded to Westar on May 31, 2012.

On June 1, 2012, a Special Agent (SA) with the Federal Bureau of Investigation (FBI) contacted the VA Contracting Officer (CO) and informed him that the FBI was conducting a criminal investigation of Robert J. Berryhill, Vice President of Westar. The SA explained that Berryhill was aware of the criminal investigation and then requested all proposals received from "Robert J. Berryhill, dba Westar Development Company" for the years 2009 through 2012. This verbal request was followed up by a written request from the FBI on June 4, 2012.

On June 19, 2012, a formal protest was filed with the CO by one of the unsuccessful bidders. The basis of the protest was that Westar failed to disclose that one of its principals, Robert J. Berryhill, had admitted to embezzling money from his prior employer. The protest stated that Berryhill was involved in civil litigation with his prior employer because of the embezzlement and that Berryhill was also under investigation by the FBI. The unsuccessful bidder submitted various litigation documents supporting its allegations including a summary judgment decision relating to certain aspects of the civil litigation. That decision was based on Berryhill's admission that he embezzled money from his employer which the judge stated was an undisputed fact. The unsuccessful bidder argued that Westar was required to disclose the embezzlement by Berryhill and that such a disclosure would have resulted in VA determining that Westar was non-responsible. Such a determination would have disqualified Westar as a responsible bidder. Based on advice and guidance from VA's Office of General Counsel (OGC), on July 25, 2012, the CO issued a final decision dismissing the protest because it was without merit. The CO stated that his decision was based on the fact that there was no indictment or conviction of Berryhill nor was he debarred or suspended. The CO further stated that any lack of integrity on the part of Berryhill could not conceivably be imputed to Westar. Even though VA had dismissed the protest, on the same day, VA issued a cure notice to Westar that expressed concerns that the legal proceedings against Berryhill could endanger the Butler HCC project. Westar, through Berryhill and Samuel (Sam)

Calabrese, the President of Westar, responded to the show cause letter on August 1, 2012. In its response, Westar attempted to marginalize the civil litigation and stated that Berryhill had fully cooperated with the FBI and that the Department of Justice had not charged Berryhill with any crime. Westar asserted that Berryhill was not, and never was an owner of Westar. Additionally, Berryhill was being demoted to Project Manager and that the project, if necessary, would continue without Berryhill.

On August 13, 2012, VA sent Westar the notice to proceed. The kick off meeting was held on August 22, 2012. On or about December 27, 2012, the Resident Engineer learned that Westar was changing its general contractor (GC) from LDV, Inc., (LDV) to Marous Brothers Construction (Marous). The Resident Engineer sent a letter to Westar and requested experience and financial information regarding Marous. He stated that the information should be sent to the CO and that the CO must approve any change in the GC. Additional correspondence and discussions took place that ultimately resulted in VA approving the change to Marous.

In late March 2013, the OIG received allegations that Westar was actually conducting business for entities created and managed by Michael Forlani and that Westar had provided false information to VA. Forlani and his related companies were suspended by VA in December 2011 after Forlani was indicted in November 2011. In response to the allegations, we commenced a review by first obtaining a copy of the Butler HCC contract file and gathering other publicly available records.

On April 3, 2013, the Department of Justice filed a criminal information against Berryhill that described five counts of Mail Fraud, two counts of Wire Fraud, one count of False Impersonation of an Officer or Employee of the United States, and one count of Aggravated Identity Theft. Mr. Berryhill pled guilty, on April 23, 2013, and was sentenced, on July 30, 2013, to more than 6 years in prison.

On April 5, 2013, Westar and VA officials held the official groundbreaking ceremony at the Butler HCC site. While site grading and preparation work was being done, final permits and approvals had not been granted to start actual construction at this time.

On April 25, 2013, the OIG first met with VA officials to provide a briefing of concerns and issues after the OIG's initial review of the lease file and other public documents concerning Berryhill and other principals of Westar. On June 13, 2013, the OIG issued an advisory memorandum to VA that provided information that showed Westar made false and misleading statements regarding its past performance, veteran-owned status, and teaming arrangements. Based on the information contained in the advisory memorandum, VA issued a Stop Work Order to Westar on June 21, 2013. When it became clear that work was continuing, VA issued a second Stop Work Order to Westar on July 16, 2013.

On July 11, 2013, VA issued a Show Cause Notice to Westar stating that VA was considering a termination for default. VA provided the reasons for considering a termination for default and gave Westar an opportunity to respond. Westar responded to the CO on July 17, 2013. VA issued a termination for default to Westar on August 9, 2013.

Scope and Methodology

We reviewed the official lease file and lease documents and obtained and reviewed publicly available documents pertinent to our review. We also reviewed information produced in response to subpoenas issued to various individuals and entities associated with and related to Berryhill and Westar. We interviewed VA officials including the VA CO, technical evaluation board (TEB) members, other pertinent officials, and the primary individual at Public Properties. We also had discussions with Berryhill and Westar legal representatives regarding the Butler HCC lease.

We also reviewed four other proposals submitted by Westar for other VA projects to determine if the same issues existed on those proposals. Those proposals are identified in Table 1.

Table 1
Other Westar Proposals Reviewed

Project	Proposal Date
Jacksonville Clinic	04/22/2010
Colorado Springs Clinic	08/03/2011
Winston-Salem HCC	12/03/2012
Monterey HCC	01/22/2013

Results and Conclusions

I. VA's Change to a One-Step Process Created an Advantage for Westar

VA planned to award the Butler HCC lease using the two-step approach. The first step required choosing a site for the Butler HCC and acquiring an assignable purchase contract for the land parcel. This would be done by soliciting land owners for potential sites and applying objective criteria to score the sites and identify the site that best fulfilled VA's needs and requirements. The second step required choosing a developer to build and operate the building on the site selected by VA. This would be done by soliciting proposals from developers who would propose designs on the site where VA had the assignable purchase contract. VA would award the lease to the developer with the best overall value, which would result from a review of the technical evaluation and price. VA would then assign the land contract to the winning developer who would purchase the land and construct the building.

On January 21, 2010, VA issued an advertisement for a 25 to 30 acre site for the Butler HCC. On April 2, 2010, VA revised the requirement to a 15 to 30 acre site for the Butler HCC; six sites were submitted to VA for consideration. VA held a market survey on May 4, 2010 and evaluated and scored the sites. The six sites were ranked as follows:

Table 2
Six Sites Ranked by Score

Rank	Site	Score
1	Butler Township Parcel (Deshon Woods)	90.6
2	Site 2	51.4
3	Site 1	32.8
4	Site 3	32.2
5	Site 5	28.8
6	Site 4	27.8

Based on the survey and scoring shown in Table 2, the Butler Township Parcel (Deshon Woods) was clearly the preferred site. This property is adjacent to the existing Butler VA Medical Center (VAMC) and met the requirements after the reduction of required minimum acreage from 25 to 15 acres. However, VA published notice on June 17, 2010, that VA was switching to a one-step lease process where each developer provided its own site as part of its proposal. Documentation shows that the main reason for the switch was that the Deshon Woods site was owned by Butler Township. The Price Negotiation Memorandum states that there were complications such as wetlands and, "other issues related to VA's procurement process. For example, the preferred site—Site 6, or the Deshon Woods parcel—was put forth by the Township of Butler, who in turn did not have the ability to directly convey the property to VA's selected developer." The Price Negotiation Memorandum does state that there were other sites available and speculates the reason was that the owners did not want to sell at fair market value because of the real estate market downturn. The project manager stated, in her monthly project updates, that the preferred site had “various complications, including wetlands, encroachment of a building that belongs to the Army Reserves, not a clear way for the Township of Butler (who owns the site) to sell directly to VA’s developer, etc.” The project manager also stated that the switch to a one-step will put the “site risks back on the Township to handle.” The project manager further states, in her monthly updates, that “there is a lot of political pressure to keep the HCC as close to the VAMC as possible. The site, even with complications as described above, abuts the VAMC property, which is what made it so desirable to the Director of the Butler VAMC.”

These statements and comments show that VA had a strong preference for the Deshon Woods site and the fundamental reason for switching to the one-step process was that VA apparently thought it could not get an assignable purchase contract on the Deshon Woods site because the property was owned by Butler Township. While not specifically stated in the lease file, it appears the “challenge” was related to the fact that Butler Township could only sell real property under a bid or auction situation. The municipal code for First Class Townships in Pennsylvania, in Article XV Section 1501, stipulates that the sale of real estate shall be sold to the highest bidder in a public call for bids or a public auction. Our review of the lease file did not find any evidence that VA ever had any discussions regarding this issue or that VA requested an opinion from the OGC to determine if VA could submit a bid to the township for the Deshon Woods site.

We discussed the issue with an OGC attorney and were told that VA would not have been prohibited from submitting a bid to Butler Township and acquiring a purchase contract, for the land, with an option to assign the purchase contract to the winning developer. This is exactly what happened with Westar. Zenith Systems, LLC (Zenith) was the highest bidder and eventually assigned the purchase contract to Westar, which in turn assigned the purchase contract to VA Butler Partners, LLC. Records show that Zenith paid $2.3 million for the property, which was about 31 percent higher than the only other bid. The appraised value of the land was $880,000. This means VA could have potentially realized a lower net lease cost had it stayed with the two-step process and paid the lower appraised price for the land by acquiring an assignable interest directly.

VA could have submitted a bid to the township and acquired an assignable purchase contract if they were the highest bidder. Most likely, VA would have been the only bidder since the only two bidders for the one-step process were both developers interested in the Butler HCC project. It would not have made sense for any developer interested in the Butler HCC project to bid against VA because there would have been no expectation that VA would have changed to a one-step process. Accordingly, any developer who outbid VA for the Deshon Woods site could have been burdened with a parcel of land that it could not use.

When VA switched to the one-step approach and Westar won the sealed bid for the Deshon Woods site, Westar gained an advantage over other developers who submitted a proposal to VA. Westar had the parcel of land that VA had identified as the preferred site. This site was scored significantly higher by VA prior to the competitive process and records and interviews revealed that there was political pressure to use the Deshon Woods site.

The fact that VA scored the property high even though it did not meet the minimum acreage requirement of 15 acres is further evidence of a preference in VA for the property; therefore, a preference for Westar's proposal. Westar disclosed that the Army Reserves had not encroached on the Deshon Woods property but rather had a long-term, no-cost lease for the use of about two acres. This lease, which conveyed with the property, is in effect until 2037. This reduced the useable acreage for the Deshon Woods site to about 13.9 acres. At least two other sites were disqualified for being less than the minimum requirement of 15 developable acres. In contrast, VA did not disqualify the Deshon Woods site even though it was less than the minimum required 15 acres.

After VA switched to the one-step process, VA issued a second solicitation for land parcels to evaluate potential sites. In this approach, VA would apply a pass or fail grade to potential sites. VA then would stipulate that any proposal from potential developers would have to use one of the pre-approved sites that received a passing grade. Eleven sites were submitted for consideration and five sites received a passing grade, including the Deshon Woods site. VA held a pre-bid conference on October 26, 2011, and instructed all potential bidders that their proposals had to use one of the five pre-approved sites. It was the developer's responsibility to demonstrate that they had control of the parcel (current title, option to purchase or lease, etc.). Westar was the only bidder able to submit a proposal using the Deshon Woods site as they were the only bidder who had a purchase contract on the Deshon Woods site. Although VA informed the potential bidders that the "sites have all been accepted and they are all on a level playing field as far as the solicitation is concerned," a review of the technical evaluation scoring sheets showed that it included a section titled "Quality of Site." This section gave points specific to the site offered in the proposal. Westar received the highest score (81 percent of potential points) for Quality of Site. The lowest score was 28 percent of potential points and the developer with the second highest total score received 54 percent of potential points for Quality of Site. Because VA had already evaluated the sites and determined that all five sites satisfied all requirements and received a passing grade, the technical evaluation should not have included an element to evaluate the Quality of Site, especially since potential bidders were informed that all five sites were on equal footing. The fact that it was included and that Westar received the highest score shows that there was a preference for the Deshon Woods site and that preference was built into the technical evaluation by requiring the TEB members to "re-score" the sites.

Based on this series of actions by VA, we concluded that VA had a preference for the Deshon Woods site prior to issuing the solicitation. When VA went to a one-step process, and Westar gained sole control of the Deshon Woods site, Westar gained an unfair and undisclosed advantage over other offerors. This could have been avoided if VA's Office of Construction and Facilities Management (CFM) and the CO had sought advice from OGC and submitted a bid for the property before changing to the one-step process.

VA used the two-step process for the other HCC projects, two of which Westar submitted proposals for (Monterey and Winston-Salem). Westar's proposals for the Monterey HCC and Winston-Salem HCC were very similar in form, content, and verbiage. However, Westar did not have the same advantage of controlling the preferred site in either of those proposals since VA had selected the site and obtained an assignable purchase contract for Monterey and Winston-Salem. Although Westar was deemed responsible and responsive to the solicitations and was in the top five for at least the Winston-Salem HCC, it did not receive the award for either of those HCCs.

II. VA Diverted Key Decision and/or Analysis Responsibilities to the Real Estate Broker

At the very outset of the Butler HCC lease project, VA issued a task order for Lease Acquisition Services to Public Properties. The task order, valued at $1 million, identified the Butler HCC and stated that the services to be rendered are outlined in the Contract. The contract stipulated that the successful Offeror for the Butler HCC pays the broker fee: 75 percent at the execution of the contract and the remaining 25 percent when VA moves into the building.

The task order was issued against VA's contract for National Broker Services, which is a multiple award contract. This contract, V101-183-101-01-03, was awarded to Public Properties and includes a Statement of Work (SOW) that is standard for all Broker Contracts. The SOW serves as a guide and provides consistency in policies and procedures for VA acquisition services nationwide. Lease Acquisition Services are described in Section C.4.2 of the SOW. Although there are deliverables that the broker was required to produce, such as a schedule, acquisition strategy, market survey, and final lease documents; our review of this section of the SOW found that the services were largely advisory and even deliverables such as the market survey include explanatory language such as "consult" and "assist." The word "assist" occurred more than 50 times in Section C.4.2 alone. Yet, based on our interview with the CO and members of the TEB, VA did not employ Public Properties to assist in the process, but relied on the broker to verify Veteran-Owned Small Business (VOSB) status and provide both an opinion on the financial status of developers and the validity of Past Experience Survey forms. Emails show that Public Properties essentially took over most of the duties usually performed by the CO.

In our interview with the CO, we discussed the VOSB status of Westar, and learned that the CO could not even recall if Westar was a VOSB. The CO also stated that he could not recall if Westar received any additional points for being a VOSB. In our interview of the TEB members, we were told that Public Properties vetted the VOSB status of Westar. When we interviewed the point of contact for Public Properties, he stated that Public Properties verified Westar's VOSB status by reviewing Westar's certifications in the Central Contractor Registration (CCR). We determined that Public Properties did not review the Vendor Information Pages (VIP) at VA's Center for Veterans Enterprise (CVE) as required under the terms of the solicitation.

TEB members also stated that they sought information and advice from Public Properties concerning the Past Performance Surveys. All TEB members stated that Public Properties had no concerns or issues. In contrast, the point of contact for Public Properties stated that he did comment to the TEB members that the Westar Past Performance Surveys did not appear to represent "Westar's" work, but rather represented past experience of Westar's "team members." In fact, Westar had no prior past performance. A simple inquiry of the Federal Procurement Data System (FPDS) would have shown that Westar had not been awarded any Government contracts. A simple inquiry of VA's Electronic Contract Management System (eCMS) would have shown that the VA contracts identified in the Past Performance Surveys were not awarded to Westar or any of its identified team members.

TEB members also stated that they sought information and advice from Public Properties about the financial capability of the vendors. Most TEB members stated they did not have the expertise or knowledge to make a meaningful determination about the financial status and capability of the offerors. They said that they relied on assurance from Public Properties that there were no apparent issues or red flags regarding the financial condition of each vendor. The TEB members stated that they assumed that the financial condition had been vetted by Public Properties or someone in Central Office. We concluded that no one vetted Westar's financial status. Based on the response to our subpoena, we found that Westar had no business records, no employment records, and no financial records.

The CO stated that Public Properties was generally responsible for reviewing the proposals, ensuring all required documents were submitted, preparing the TEB documentation and scores. Public Properties was also responsible for putting the file and package together and acting as stand-in for the project manager, when necessary. Emails show that Public Properties also performed the pricing analysis and prepared the Price Negotiation Memorandum for the CO.

Had VA or Public Properties conducted even the most minimal review to validate the information contained in Westar's proposal, Westar's proposal would have been rejected. However, our review of proposals submitted by Westar for four other construction projects shows that these issues are not unique to the Butler HCC project. As discussed in Section VII of this report, Westar's proposals were all very similar with regard to representations about past projects that were not properly verified during the award process.

III. The Butler HCC Lease was More Costly than VA Building and Owning the Butler HCC

The value of the lease payments totaled $152,733,559 over the 20-year life of the lease. The cost of construction for the Butler HCC was estimated by Westar to be approximately $65.8 million. The estimated appraised value of the property, once the building was completed, was $90 million. The contract file did not include a Net Present Value (NPV) analysis. When we asked about VA's NPV analysis, VA officials provided a NPV analysis that was done prior to award that showed a NPV of $47.2 million using the Office of Management and Budget (OMB) discount rate of 3.5 percent. OMB guidance contained in Circular A-11 states that the NPV should not exceed 90 percent of the fair market value (FMV) to be considered an operating lease. VA used a FMV of $95.1 million to determine that the NPV was only 49.64 percent of the FMV. Based on this, VA concluded that the price was reasonable and passed the 90 percent of FMV OMB test.

Our review of VA's NPV calculation determined that it was in error. The total lease payments during the 20-year lease are $152.7 million. OMB guidance states the NPV analysis should only include the capital asset component of the lease. This is also referred to as the base lease cost and is arrived at by subtracting the estimated operating expenses and other expenses such as taxes and insurance. In our analysis, we subtracted the estimated expense reported by Westar on GSA Form 1217. This resulted in a base lease cost total of $107.6 million. We determined, as shown in Table 3, that the NPV for the base lease cost is $76.6 million. Our review of the spreadsheet provided by VA found that the spreadsheet appears to duplicate the NPV calculation, thus resulting in an artificially lower NPV. OMB Circular A-11 also states that if the asset does not exist, then the FMV should be the estimated construction costs for the asset, not an estimated appraisal of the future asset. In our analysis we used an estimated construction cost of $76.8 million, which we determined by using Westar's estimate of $65.8 million plus land cost of $1 million and architectural and engineering costs of $10 million. Ninety percent of the estimated construction costs is $69.1 million, which is less than the NPV for the base or capital cost of the lease as shown in Table 3.

Table 3
Current and Net Present Value of
Full Lease Cost and Base Lease Cost

Period	Full Lease Cost[1]	Base Lease Cost[2]
Initial Cost	2,813,953	2,813,953
Year 1	5,283,260	3,569,580
Year 2	7,044,346	4,759,440
Year 3	7,644,000	5,359,200
Year 4	7,644,000	5,359,200
Year 5	7,644,000	5,359,200
Year 6	7,644,000	5,359,200
Year 7	7,644,000	5,359,200
Year 8	7,644,000	5,359,200
Year 9	7,644,000	5,359,200
Year 10	7,644,000	5,359,200
Year 11	7,644,000	5,359,200
Year 12	7,644,000	5,359,200
Year 13	7,644,000	5,359,200
Year 14	7,644,000	5,359,200
Year 15	7,644,000	5,359,200
Year 16	7,644,000	5,359,200
Year 17	7,644,000	5,359,200
Year 18	7,644,000	5,359,200
Year 19	7,644,000	5,359,200
Year 20	7,644,000	5,359,200
Total Lease Payments	$152,733,559	$107,608,573
Discount Rate	3.50%	3.50%
NPV	$108,612,872	$76,692,080

Estimated Cost of Construction	$76,800,000
OMB Operating Lease Threshold (90 percent of estimated construction costs):	$69,120,000

[1] This column represents the actual lease payments.
[2] This column represents the capital cost portion of the lease payment. The operating expense portion of the lease payments have been deducted. Estimated operating costs were estimated by Westar on GSA Form 1217. The base lease cost used in our analysis is lower than the base lease cost of $6.3 million used in the PNM, which would make the NPV higher.

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IV. VA Wrongly Dismissed the Protest of Westar's Award

On June 19, 2012, one of the unsuccessful offerors filed a protest with the CO. This offeror was next in line to receive the award if the protest was upheld. The protest was filed in a timely manner within 10 days of the offeror's briefing on June 14, 2012. The protest was filed for two reasons. First, the unsuccessful offeror thought its proposal represented the best value. Second, and more importantly, the unsuccessful offeror argued that Westar should be disqualified as a non-responsible bidder because of substantial evidence that Berryhill, a principal of Westar, embezzled money from his prior employer (a real estate developer who also does business with the Government).

The evidence of Berryhill's embezzlement from his former employer was an "undisputed" finding in a Court Order issued by the Court of Common Pleas for Cuyahoga County, Ohio, on December 20, 2011, in a civil case involving Berryhill and Westar. The judge wrote that it was undisputed that Berryhill had embezzled the funds. Although the CO requested an opinion from OGC, neither OGC nor the CO did anything to follow-up on the information provided with the protest. On July 23, 2012, OGC issued an opinion to the CO, which the CO relied on in dismissing the protest.

We reviewed the OGC opinion and determined that it contained errors. First, it stated that there was no direct evidence that an FBI investigation existed. OGC referred to the alleged FBI investigation as "rumor and innuendo." However, emails obtained during our review show that the FBI had contacted the CO by telephone on June 1, 2012, informing the CO of the FBI investigation of Berryhill and seeking all proposals submitted by Westar and Berryhill. The FBI agent followed up with a letter on June 4, 2012, and requested all proposals submitted by Berryhill and Westar back to 2009. The agent also stated in the letter that Berryhill was aware of the investigation. The CO coordinated a response to the FBI with OGC Staff Group V. Therefore, there was independent and direct corroboration in VA's files confirming that there was an FBI investigation. Second, as noted above, the decision issued by the judge in the civil case, which was provided with the protest, was based on the undisputed fact of Berryhill's embezzlement. Berryhill admitted to the embezzlement; he did not deny it. However, OGC erroneously advised that there must be an indictment and conviction to make a non-responsibility determination. This is inconsistent with FAR provisions regarding responsibility determinations. FAR 9.104-1 provides general standards regarding making a responsibility determination of a prospective contractor. It does not specifically state an indictment or conviction is necessary, but rather states that the prospective contractor must, "Have a satisfactory record of integrity and business ethics." OGC also stated that any lack of integrity on the part of Berryhill could not be conceivably imputed to Westar. However, not only was Berryhill a principal of Westar, but he was the majority member (owner) of Westar per the records with the Ohio Secretary of State, and Westar had no other employees, no other projects, and no other assets. In addition, Westar was also specifically named in the civil litigation cited in the protest.

On June 3, 2013, we interviewed the CO. The CO's responses to our questions about the protest were inconsistent, inaccurate, and troubling. When asked if he recalled the protest regarding VA's award of the Butler HCC to Westar, he stated he did. However, he stated the protest was also filed with GAO. When we informed the CO that there is no record of a GAO protest and that the protest appeared to have been filed with him alone, the CO said that there must have been two simultaneous protests, one to GAO and one with the Agency. When we questioned the CO on how two simultaneous protests would work, he explained that he would make a decision, the GAO protest would continue, and they would then get a decision from GAO, too. The CO reiterated that he was sure the protest went to GAO and that the protest was denied by GAO. However, there are no records supporting his statement. Our review of the lease file shows that there was only one protest and that it was filed with the CO. No protest was filed with GAO and an unsuccessful offeror or interested party cannot file simultaneous protests.

When we asked the CO to focus on the protest to VA, he stated that he had not made any decision regarding the protest. He asserted that another CO reviewed the file and protest documents and made the decision in consultation with OGC. During further questioning about who made the decision, the CO at times would assert that GAO made the decision, but if there was an agency decision, it was another CO and not him. The CO was asked if he was concerned at all about the protest and whether it had merit. He responded that he was concerned because he was the CO for the Butler HCC. However, at no point during the interview did the CO acknowledge that he had any role in the protest decision.

The documents in the file clearly contradict the CO's responses. The CO for the Butler HCC lease made the decision and signed and issued a final decision to the unsuccessful offeror who filed the protest. We also found the CO's answers troubling because our interview was not unannounced but requested and scheduled days in advance. As such, he had time to review the file prior to the interview.

V. Michael Forlani's Companies Were Involved in the Butler HCC Proposal Submitted by Westar

The OIG review was initiated in late March 2013 based on an anonymous contact who stated that Westar, which was the developer for the Butler HCC, was financed and backed by Michael Forlani. Forlani and his related companies were suspended by VA in December 2011. Forlani was indicted in November 2011 and pled guilty to bribery and racketeering charges in 2012. He was sentenced on April 1, 2013, to eight years in prison. Forlani was the sole member of Veterans Development, LLC (VetDev) when VetDev won the Enhanced Use Lease (EUL) for the 100-acre VA hospital in Brecksville, Ohio. VA used the EUL with VetDev to lease a 6-story administration building, 2,000 space parking garage, and 120-bed domiciliary in the Wade Park section of Cleveland where the main Cleveland VAMC is located. The OIG conducted an in-depth review of the EUL and issued the report titled, *Review of the Enhanced Use Lease between the Department of Veterans Affairs and Veterans Development, LLC,* on September 28, 2012.

Our review determined that Michael Forlani was involved in the Butler HCC from the beginning. We found that Forlani was a named partner in Westar's original expression of interest to VA in early 2010; that Zenith purchased the site where Westar proposed building the Butler HCC; Sam Calabrese, a Forlani employee and consultant, was appointed an executive of Westar; and, Forlani's spouse, Patricia Lawley, was given membership in the original Special Purpose Entities (SPE) created for the Butler HCC. We also found that another member agreed to pay Forlani's spouse the amount paid for the Deshon Woods property.

Westar's Initial Expression of Interest. When VA first solicited parcels of land from interested parties, Westar had submitted two potential parcels for consideration. In the package submitted by Westar, Forlani and Zenith are clearly named as part of the Westar "team." This occurred early in 2010 prior to Forlani's indictment and his name is prominently used in Westar's expression of interest and its submission of land parcels for VA's consideration.

Land Purchase by Zenith. On July 22, 2010, Zenith entered into a purchase contract for the Deshon Woods parcel with the Butler Township. Zenith was a Forlani company and was formerly doing business as Doan Pyramid. Records show that Zenith entered into the purchase contract with Butler Township for $2.385 million. The full purchase price went into escrow until the buyer or affiliated entity entered into a lease with VA for the Butler HCC. The individual representing and signing for Zenith was Sam Calabrese, who was employed by Zenith at the time. Zenith assigned the purchase contract to Westar on August 30, 2011, for unspecified "good and valuable consideration." The assignment was signed by Calabrese for Zenith, as Zenith's General Counsel. Berryhill signed representing Westar as its Senior Vice President. Calabrese was identified as the President of Westar during this time period. In the normal course of business, a clear conflict of interest would have existed for Calabrese to act as General Counsel for Zenith, while an appointed executive for Westar, unless both companies were related.

In addition to the land purchase by Zenith, our review also determined that Zenith arranged for its surety company, Liberty Mutual, to issue a $100,000 bid bond for Westar for the Butler HCC proposal. Our review of the bid bond contained in the contract file found that it was not properly executed by executives of Westar. We issued a subpoena to Liberty Mutual for financials and other records submitted to Liberty Mutual in the process of obtaining the bid bond. Liberty Mutual's first response was that Westar was not a customer of Liberty Mutual as a search determined that there was no account in Westar's name. Further investigation by Liberty Mutual determined that the bid bond was validly issued by an agent of Liberty Mutual at the request of Zenith who does have an account at Liberty Mutual. The Liberty Mutual official stated that it was not uncommon to issue a low risk bond as a "favor" to an entity who is not a customer of Liberty Mutual at the request of a Liberty Mutual customer. The official stated that usually it indicates a "close" relationship between the companies. The official further stated that Westar submitted no financial information because Zenith gave assurance to Liberty Mutual that Zenith would stand behind the bid bond if payment was ever required. Records produced by Liberty Mutual confirm that the bond was approved under an agreement between Michael Forlani on behalf of Zenith and Liberty Mutual. Records also indicate that at Zenith's request, Liberty Mutual provided the bid bond for Westar's Winston-Salem proposal dated December 3, 2012.

The Appointment of Sam Calabrese as President of Westar. Westar was founded and started by Berryhill in 1998. Official records with the Secretary of State for Ohio show that Berryhill was the majority member.[3] Documents from early to mid-2010 show Berryhill's title was President of Westar, while Calabrese's title was Vice President. For example, when Calabrese executed an Option to Purchase Land with a land owner his title was Vice President. However, by late 2010 and early 2011, Berryhill's consistent title was Vice President, and Calabrese's title was President. Berryhill's position or title was reduced to Project Manager for the Butler HCC project after award. Our review of the operating agreements for the subsequent LLCs show that Calabrese's capital contribution was $0. In light of Calabrese's long standing relationship with Forlani, as his attorney at Doan Pyramid and VetDev and the fact that Calabrese made no capital contribution, we conclude it represents additional evidence of Forlani's control of Westar via Calabrese. In his response to a subpoena, Calabrese stated that he was an authorized representative for VetDev from 2006 through 2012 and an employee of Zenith from January 2010 to April 20, 2012. Beginning in 2013, Calabrese was an employee of VetDev Office/Parking and a consultant for VetDev Domiciliary. We subpoenaed all business records for Westar and none were provided. Westar had no employment, financial, corporate or other records usually kept in the normal course of business.

[3] A more complete history of Westar is given in the VOSB section.

Patricia Lawley Trust Investment and Ownership. In September 2011, Westar principals created a SPE to build and manage the Butler HCC. Lenders typically require developers to create an SPE for each project or property the developer has created to protect the lender from a potential failure of another project. Westar principals initially created two SPEs. The first was VA Partners Butler Company, LLC. The members were as follows:

Table 4
VA *Partners Butler* Company, LLC
Membership

Member	Capital Contribution	Membership Interest
Patricia Lawley Trust	$2,385,000	40%
R&D Development (Ross Farro)	0	23%
Mary Berryhill, Trustee	0	17%
Sam Calabrese	0	10%
Thomas Charek, Sr.	0	10%

The second entity was created to manage and maintain the property during construction as well as manage the building once it was completed and occupied by VA. The entity was VA Partners Management Company, LLC. The members were as follows:

Table 5
VA *Partners Management* Company, LLC
Membership

Member	Capital Contribution	Membership Interest
Patricia Lawley Trust	$0	35%
R&D Development (Ross Farro)	0	31%
Mary Berryhill, Trustee	0	24%
Sam Calabrese	0	10%

"Westar" decided not to use these two entities for the Butler HCC for reasons that are not entirely clear. Berryhill told us that he insisted that Forlani and Patricia Lawley, Forlani's wife, be removed from the project because of Forlani's indictment, while Farro stated that they were removed because of concerns raised by the CO. However, the CO stated that he was not aware of Forlani's or Patricia Lawley's involvement, investment, or ownership, and had no discussion with Farro concerning Forlani's or Patricia Lawley's ownership. In May 2012, just weeks before VA awarded the Butler HCC lease to Westar, new LLCs were created with the following membership structure:

Table 6
VA *Butler Partners* Company, LLC
Membership

Member	Capital Contribution	Membership Interest
R&D Development (Ross Farro)	0	38%
Mary Berryhill, Trustee	0	28%
Sam Calabrese	0	17%
Thomas Charek, Sr.	0	17%

Table 7
VA *Management Partners* Company, LLC
Membership

Member	Capital Contribution	Membership Interest
R&D Development (Ross Farro)	0	33%
Mary Berryhill, Trustee	0	33%
Sam Calabrese	0	33%

The newly created LLCs show that no one made any capital contribution. Our review of records show that Patricia Lawley's contribution of $2.385 million was not returned. Farro personally signed two Cognovit Notes[4] to Patricia Lawley for a total amount of $2.658 million. We note that even though Farro was apparently promising to pay Patricia Lawley back her capital contribution, Farro is not credited with any capital contribution.

The documents clearly show that Forlani was involved with Westar and that he, or his spouse, were the only ones that made any significant capital contribution. His name is prominently used in the initial offerings to VA, Zenith purchased the land, Calabrese took over from Berryhill as President, and the original documents name Patricia Lawley as the largest member and the only one who made a capital contribution. While Forlani and Patricia Lawley were officially removed from the membership of the LLCs that were used for the Butler HCC, we cannot be confident that Forlani, or his influence, was completely removed from the project, especially considering that Calabrese was prominently involved in the Butler HCC project prior to the land acquisition by Zenith Systems and continuing through award. However, since VA terminated the lease prior to any money moving from VA to VA Butler Partners Company, LLC, in the form of lease payments, it is impossible to "follow the money" to determine if Forlani or his spouse would have actually received money from the project.

Our review also determined that VA officials did not know who the owner(s) of Westar were. We determined that when VA executed the assignment of the Butler HCC lease

[4] A Cognovit Note is a type of promissory note that allows a creditor to obtain a judgment against a debtor without legal proceedings.

from Westar to VA Butler Partners Company, LLC, VA did not take any steps to determine who the owner(s) of VA Butler Partners Company, LLC were. This allows the possibility of VA contracting with excluded parties and also raises issues of liability and responsibility issues under the performance of the lease. When the lease was awarded, we found that Westar had a single member or owner. However, after the award and assignment of the lease, we determined that VA Butler Partners Company, LLC was wholly owned by another LLC, VA Butler Partners Holding, LLC. This LLC was then owned by four different individuals, trusts, or LLCs. The ownership structure is illustrated in Appendix B.

VI. VA Failed to Verify Westar's Veteran-Owned Small Business Status

Section 2.3.4 of the SFO notified offerors that there would be credit given during the evaluation process for "eligible" Service-Disabled Veteran-Owned Small Businesses (SDVOSB), VOSBs, and other small businesses. SDVOSB would be given full credit and VOSBs would be given partial credit greater than the partial credit given all other small businesses.

To receive full or partial credit, an offeror that is not currently in VetBiz had to become verified by the time of award. The solicitation listed the criteria for verification and stated that the minimum submittal shall include

a. Acknowledgment from www.vetbiz.gov that they had applied and were being processed within the VIP database. A copy of the automatically generated email from VetBiz or a signed acknowledgment of application from VA;
b. A redacted copy of the veteran's VA Service-Connected Disability file; and
c. A copy of the veteran's DD-214, indicating an honorable discharge.
d. Completed registration in VIP was required as part of the Final Proposal Revisions.

Westar misrepresented itself as a 100 percent Veteran-Owned Small Business which resulted in the award of an additional four points during the technical review process. As noted in our June 13, 2013, Management Advisory Memorandum, the evidence does not support a finding that Westar is or ever has been a Veteran-Owned Small Business. We contacted the CVE and determined that no VA Form 0877s were completed or started by Westar nor has CVE ever been contacted by a company that matched Westar's name or DUNS number. In addition, no records were produced in response to our subpoena to Westar that supported any contact or application to CVE had been made. In response to our subpoena request for "Records submitted to the Center for Veterans Enterprise to verify veteran-owned status," Calabrese, through counsel, advised that there were no responsive documents. He further stated that it "was confirmed by Department of Veterans Affairs CO [CO] during the final pre-award meeting that Westar Development Company, LLC was not receiving credit as a Veterans Enterprise as such in the Department of Veterans Administration's [sic] consideration of the Westar Development Company LLC submittal." However, neither Westar nor Calabrese produced any records in response to our subpoenas to support this assertion. In an interview with OIG staff on June 3, 2013, the CO did not recall any such discussion. Furthermore, we could not find any evidence of a discussion of this nature in any emails or other records that we obtained and reviewed. More importantly, Calabrese's statement is inconsistent with the written record because the technical scores show that Westar was given four points based on its claim that it was a veteran-owned small business.

Although it is clear that Westar misrepresented itself as a VOSB, our review determined VA, either independently or through Public Properties, did not take appropriate actions to ensure compliance with the terms and the solicitation before awarding the four points for VOSB status. Because Westar was not registered in VetBiz at the time it submitted its proposal, to be considered for additional points based on its status as a VOSB Westar was required to submit a copy of the automatically generated email from VetBiz or a signed acknowledgement of application from VA and a copy of the veteran's DD-214, indicating an honorable discharge. Westar did not submit the required documentation with its proposal and neither the CO nor Public Properties followed-up on the requirement at the time of submission or when they reviewed the technical scores. The solicitation also stated that completed registrations in VIP was required as part of the Final Proposal Revisions. Westar did not provide the required documentation and neither the CO nor Public Properties followed-up through Westar or by checking VetBiz.

Our review of the four other proposals submitted by Westar found that Westar claimed that it was a VOSB on all four. The latest of these proposals was for the Winston-Salem HCC dated December 3, 2012, and the Monterey HCC dated January 22, 2013. There is no evidence that VA took the steps required to verify the veteran-owned status on any of the other proposals by Westar as required in the solicitation.

VII. VA Took No Action to Verify Westar's Past Performance and Experience

As described in detail in our June 13, 2013, Management Advisory Memorandum (Appendix A), Westar grossly misrepresented its past performance and experience in its proposal. Contrary to representations in the proposal, we determined that Westar had not developed a single project since its inception in 1998. Copious information, including Berryhill's own statements, supports this undisputed fact. In a deposition taken on June 18, 2012, in the civil case involving Carnegie, Berryhill testified that Westar was shelved immediately after he created it in 1998 and that, "Nothing was done with Weststar [sic]." It was not until sometime in or around 2010, a couple of years after Carnegie terminated him for embezzling funds, that Berryhill began using the Westar name to make proposals on several Government projects. Although Westar's 2012 proposal to build/lease the Butler HCC was successful, our queries of the FPDS failed to identify any contracts/leases awarded to Westar prior to the Butler project. Westar further confirmed in its response to the subpoena that it had been dormant since 1998 by acknowledging there was no listing of prior commercial or Government projects that Westar had developed.

We found no evidence in the documents provided that anyone in VA or on VA's behalf attempted to verify Westar's claims regarding past performance and experience. A simple check of FPDS would have shown negative results for Westar. Many of the past performance statements submitted with the proposal identified VA contracts; however, no one verified the information or sought an opinion on performance. A simple check of FPDS and/or eCMS (VA's electronic contract management system) using the identified contract numbers would have shown that vendors listed as subcontractors on the past performance forms were actually the prime contractor. We noted that the CO was listed on several past performance forms as the CO for the stated contract; however, our review of records in eCMS showed that he was not the CO of record. When we spoke to the TEB members, they told us that they had very limited time for the technical evaluation and did not verify any of Westar's past experience. Rather they relied on input from Public Properties that there were no concerns regarding Westar's past performance or experience.

Our review of the four other proposals submitted by Westar found that Westar claimed almost the same identical past experience as in its Butler HCC proposal with only slight differences or variations. The four other proposals identified the same misrepresentations that were in Westar's Butler HCC proposal that reference Westar's assets, facilities, tenants, and other projects. Our review of Westar's Butler proposal and the other four proposals found that Westar used the same Operations and Maintenance Plan. This Operations and Maintenance Plan was a nearly verbatim copy of an Operations and Maintenance Plan used by another developer that Berryhill had previously worked for. In one of the proposals there were several places where Westar failed to change the name of the developer to Westar; however, it does not appear that anyone identified or questioned the discrepancy. Westar had no experience operating and maintaining a building and used, without authorization, another developer's plan as its own. The technical evaluation specifically reviewed and scored the operating and maintenance plan and Westar received 65 percent of the potential points. We found no evidence that VA took steps to verify Westar's past performance or experience in any of the other four proposals submitted by Westar.

VIII. VA Took No Action to Verify Teaming Agreements of Westar

As detailed in our June 13, 2013, Management Advisory Memorandum, we found that Westar did not have any agreements, formal or informal, written or verbal, with two of its critical team members: William Montague, consultant to Westar; and LDV, the identified GC for the Butler HCC. Montague was the former director of the Louis Stokes Cleveland VAMC and his involvement would have brought, at least in appearance, knowledge and credibility to the Westar team. LDV was named as the GC for the Butler HCC; thus, making LDV an absolute critical part of the team. Both of these team members caused Westar to receive a higher technical score during the technical evaluation; however, neither was committed to the Butler HCC with Westar as evidenced by the lack of any formal written agreement or any other documentation that would evidence a relationship between Westar and Montague and Westar and LDV. Although documentation produced in response to the OIG subpoenas shows that there were at least some discussions between Westar and LDV regarding the project, there was no agreement. More importantly, approximately one month after the proposals were submitted, but more than three months prior to award, LDV notified Westar that it would not be able to obtain funding for the project. However, Westar did not notify VA until almost six months after award. Having a qualified and acceptable GC was a requirement for consideration for award. Without LDV or other similarly experienced GC on the project, Westar's proposal would have been rejected.

Although there is no requirement for the offeror to submit documentation showing that there are formal teaming arrangements, because this is often a critical evaluation factor, we recommend that VA require such documentation with the proposal and require that the offeror notify VA of any changes prior to award. This is not dissimilar to contracts that include a technical component relating to the qualifications of personnel who are expected to perform the work under a contract.

Conclusions

Our review of the award of the Butler HCC Lease to Westar determined that Westar received the award based on false and misleading representations. We also determined that changes in VA's process for awarding leases resulted in a preference for Westar, that VA did not follow its own processes, and that VA did not properly verify key information in Westar's proposal even when warning indicators were present. VA's change from a two-step to a one-step process favored Westar because Westar was the only developer who had control of the land parcel that VA clearly favored. The decision to move to the one-step approach is not supported by evidence or a sound decision making process.

VA did not follow the process outlined in the solicitation to verify the VOSB status of Westar. Due to the failure by VA and Public Properties to enforce compliance with the terms of the solicitation, Westar received four points for its representation that it was a veteran-owned business; points that it should not have received. These failures are in part due to relying on the real estate broker to receive and verify the proposals from the developers while there were no clear tasks of what the broker was to do or did regarding issues such as VOSB status, past performance, and financial background of the developers submitting proposals.

We also found that VA incorrectly dismissed the protest of the award to Westar. The decision that the protest was without merit was not supported by the evidence. Although the CO appears to have relied on advice from OGC, the advice was based on factual and legal errors that the CO should have recognized and discussed with OGC. A detailed review of the materials submitted during the protest by the CO, as well as the CO informing OGC of the confirmed FBI investigation of Berryhill, would have likely resulted in a further investigation by VA of Westar and potentially a decision to uphold the protest.

Recommendations

We recommend that the Principal Executive Director, OALC:

1. Adhere to the two-step acquisition process for future leases. VA should develop objective criteria to determine when it is necessary to change to a one-step process and consult with OGC.
2. Determine the need and the value of a real estate broker for lease acquisition and, if a need exists, define specific deliverables and/or tasks a real estate broker is responsible to provide.
3. Ensure the CO takes an active role in decisions and does not abdicate responsibility to the project manager or broker.
4. Determine ownership of each LLC involved for future projects, including the SPE LLC if used by the developer.
5. Ensure that the CO verifies that a vendor is in the CVE database when claiming a veteran-owned business status.
6. Develop procedures or criteria that ensure financial analysis, such as NPV, is accurate and reliable.
7. Establish requirements that Past Performance Survey Forms be verified. Searches should be conducted online in FPDS for Government-wide contracts. Searches should be conducted online in the Electronic Contract Management System (eCMS) for VA contracts. Contact should be made with the project owner to discuss vendor's role as disclosed on the Past Performance Survey Forms. Focus should be on the entity, not only the individuals.
8. Require vendors to submit documentation, such as teaming arrangements, that key team members such as architects, engineers, and GCs are committed and able to do the project.

Acronyms

CCR—Central Contractor Registration

CO—Contracting Officer

CFM—Construction and Facilities Management

CVE—Center for Veterans Enterprise

DUNS—Data Universal Numbering System

eCMS—Electronic Contract Management System

EUL—Enhanced Use Lease

FBI—Federal Bureau of Investigation

FMV—Fair Market Value

FPDS—Federal Procurement Data System

GC—General Contractor

GSA—General Services Administration

HCC—Health Care Center

IDIQ—Indefinite Delivery/Indefinite Quantity

LLC—Limited Liability Company

NPV—Net Present Value

OALC—Office of Acquisition, Logistics, and Construction

OCR—Office of Contract Review

OGC—Office of General Counsel

OIG—Office of Inspector General

OMB—Office of Management and Budget

SA—Special Agent

SDVOSB—Service-Disabled Veteran-Owned Small Businesses

SFO—Solicitation for Offers

SOW—Statement of Work

SPE—Special Purpose Entity

TEB—Technical Evaluation Board

VA—Department of Veterans Affairs

VAMC—Veterans Affairs Medical Center

VIP—Vendor Information Pages

VOSB—Veteran-Owned Small Business

Appendix A

OIG Management Advisory Memorandum Issued to VA on June 13, 2013

DEPARTMENT OF VETERANS AFFAIRS
Office of Inspector General
Washington, DC 20420

June 13, 2013

Office of Inspector General Management Advisory Memorandum Regarding False and Misleading Statements made by Westar Development Company, LLC in its Proposal for the Butler, Pennsylvania Health Care Center

Westar Development Company, LLC (Westar) submitted a proposal on January 10, 2012 in response to SFO VA-101-10-RP-105 (SFO). The SFO was a build lease for a Health Care Center in Butler, Pennsylvania (Butler HCC). Five other responsive proposals were submitted in response to the SFO. Westar received the highest score on the technical evaluation and was deemed the best value. The lease was awarded to Westar on May 31, 2012.

In late March 2013, the Department of Veterans Affairs (VA), Office of Inspector General (OIG) received allegations that Westar was actually conducting business for entities created and managed by Michael Forlani that were suspended by VA in December 2011. Michael Forlani was indicted in November 2011 and pled guilty to bribery and racketeering charges in 2012. He was sentenced on April 1, 2013, to eight years in prison.

In response to the allegations, the OIG Office of Contract Review (OCR) obtained a copy of the Butler HCC contract file and gathered other publicly available records for review. The records show Westar's proposal was submitted by Robert J. Berryhill in his capacity as the Senior Vice President of Westar. The records further show that Berryhill was the primary contact point through the time of award, after which the primary contact point appears to be Samuel Calabrese, who is identified in the proposal as the President of Westar. Based on our initial review of the records, we questioned the veracity of representations contained in Westar's technical proposal, in particular representations relating to past performance, experience, and teaming arrangements for the project. We also questioned whether Westar was a veteran-owned business. VA personnel relied on these representations during the technical evaluation, resulting in technical scores that put Westar eight points ahead of its closest competitor.

Our review of the records also raised concerns as to whether VA properly determined that Westar was a responsible vendor. For example, there are no records of prior Government contracts awarded to Westar despite claims of such contracts in the proposal. Our concerns

Appendix A

regarding Berryhill and Westar intensified when a criminal information was filed on April 3, 2013, against Berryhill. Attachment 1, Criminal Information. Berryhill not only submitted the proposal on behalf of Westar but, according to records maintained by the Ohio Secretary of State, he established Westar and is the majority owner/member. The criminal information included five counts of Mail Fraud, two counts of Wire Fraud, one count of False Impersonation of an Officer or Employee of the United States, and one count of Aggravated Identify Theft. The charges related to the embezzlement of funds for the construction of the FBI office in Knoxville, Tennessee. When the criminal conduct occurred, Berryhill was a Senior Vice President at Carnegie Management and Development Corporation (Carnegie). *Id.* On April 23, 2013, Berryhill pled guilty to all charges and is scheduled to be sentenced in late July.

The contract file shows that information provided to VA as part of a protest filed after the award to Westar raised serious questions regarding the integrity (and thus responsibility) of Berryhill, as an individual, and Westar as a business entity. Documents provided with the protest included records from a civil case in which Berryhill's former employer, Carnegie, sued Berryhill and Westar. One of the documents provided was an Order and Opinion issued by the Judge in the civil case. The Judge's determination regarding the validity of claims against Carnegie filed by Berryhill's wife, as the Trustee for the Berryhill Family Trust, was based on Berryhill's admission that he had embezzled funds from a Carnegie project. Another document included with the protest was a resume that Berryhill posted on LinkedIn which cast doubt on the veracity of statements in the proposal relating to both Berryhill and Westar's experience on similar projects. The OIG subpoena issued to Westar requested business records, including but not limited to meetings, W-2s, K-1s, and 1099s issued by Westar, and all other financial records. The responses stated that no such records exist. Attachment 2, May 24, 2013 Letter Response to Subpoena to Westar. This raises the question whether Westar was a legitimate business entity at the time of award.

We presented our initial concerns to the Office of Acquisitions and Logistics (OAL) and Construction and Facilities Management (CFM) on April 25, 2013. As we obtained additional information, we provided it to OAL and CFM for consideration. For example, the only copy of a bid bond we could find in the record was not signed by the principals. After the meeting, we obtained additional information from Carnegie, as well as property and other public records. We also obtained information through subpoenas issued to various individuals and entities, including Berryhill, Calabrese, Mary Berryhill on behalf of the Berryhill Family Trust, R&D Development, VA Butler Partners Company, LLC, VA Butler Partners Holding, LLC, Carnegie, and Liberty Mutual Insurance Company. In addition, we spoke with Berryhill when he hand-delivered records in response to the subpoena and we interviewed the Butler HCC Contracting Officer.

Based on the information obtained, we concluded that Berryhill and Westar made false and misleading statements in the technical proposal that VA relied on when evaluating the proposal and awarding the lease to Westar. We also concluded that Westar did not qualify as a veteran-owned business. Regardless of whether the information provided with the protest was sufficient for the Contracting Officer to make a determination that Berryhill and/or Westar were not responsible, the false and misleading statements in the technical proposal resulted in Westar receiving higher technical evaluation scores than its competitors. But for these false and misleading statements, Westar would not have been awarded the lease.

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The purpose of this report is to provide VA officials with the information obtained during our review relating to the false and misleading statements regarding past performance, experience, and teaming arrangements for the Butler HCC project. We also provide information as to false and misleading statements concerning Westar's status as a veteran-owned business.

Issue 1: Whether Westar misrepresented its past performance and experience on its proposal for the Butler HCC.

Finding: Westar did misrepresent its past performance and experience in its proposal. Contrary to representations in the proposal, we determined that Westar had not developed a single project since its inception in 1998. Copious information, including Berryhill's own statements, proves this point. In a deposition taken on June 18, 2012, in the civil case involving Carnegie, Berryhill testified that Westar was shelved immediately after he created it in 1998 and that, "Nothing was done with Weststar [sic]." Attachment 3, Robert J. Berryhill June 18, 2012 Deposition Transcript, pp. 58 and 60. It was not until sometime in or around 2010, after Carnegie terminated him for embezzling funds, that Berryhill began using the Westar name to make proposals on several Government projects. Although Westar's 2012 proposal to build/lease the Butler HCC was successful (there may have been another successful proposal made for an Enhanced Use Lease in Louisiana), our queries of the Federal Procurement Data System failed to identify any contracts/leases awarded to Westar prior to the Butler project. Westar further confirmed the fact that it had remained dormant since 1998 when it responded to an OIG subpoena by acknowledging there was no listing of prior commercial or Government projects that Westar had developed. Attachment 2.

It seems to be an undisputed fact that Westar had no prior experience and had no track record of building any projects, let alone a project of the magnitude of the Butler HCC.

Nevertheless, Westar's proposal clearly touts the company's successful experiences in real estate development and management. Our review shows that statements in the proposal related to experience and past performance were deliberately false and misleading. These statements do not merely imply or suggest that Westar has vast experience in this type of project; rather, Westar makes statements that boldly point to its significant experience and proven history of success. For example, Westar makes specific statements in its proposal that reference Westar buildings and tenants. However, the reality is that Westar owns no buildings or properties, and cannot truthfully cite any track record in constructing or managing commercial or government buildings. Documents further reveal Westar's misguided attempts at overcoming such deficiencies. In the Past Performance Survey Form section of the proposal, Westar takes credit for numerous projects in which Westar, as a business entity, was not involved at any level or to any degree. As discussed in detail below, many of the projects actually were awarded to Carnegie. While Berryhill may have performed some work on those projects, he did so as an employee of Carnegie, not Westar. Other projects listed were awarded to vendors who were not part of the team identified in the proposal.

The table on the following page details fifteen specific false and misleading statements regarding Westar's past experience.

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False and Misleading Statement	Location	OIG Findings	Reference
1. "Westar is an asset based company…"	Proposal Letter, p.1 Proposal, p.3	Westar had no assets.	Attachment 2 Attachment 3 pp. 58 & 60
2. "We build high quality, pre-leased credit tenant projects…"	Proposal Letter, p.1	Westar had built nothing.	*Id.*
3. "Because Westar owns and manages all its projects…"	Proposal Letter, p.1 Proposal, p.3	Westar owned no projects.	*Id.*
4. "…tenants enjoy the benefits of superior construction…as well as operationally efficient facilities."	Proposal Letter, p.1	Westar owned no projects, building, facilities, nor had any tenants.	*Id.*
5. "Having successfully completed more than $400,000,000 in projects over the past 10 years, for the Federal Government and private Sector provides the VA with the security of knowing if Westar undertakes a project, ***we will obtain the financing, provide the equity and complete the project on time and on budget*.**"	Proposal Letter, p.2	Westar had completed nothing in the past 10 years.	*Id.*
6. "Each project undertaken has no less than three (3) Senior Management Members…"	Proposal Letter, p.2	Westar had not undertaken a single project at this time.	*Id.*
7. "Because we do not sell our projects…"	Proposal Letter, p.3	Westar has not had a single project to "not sell" yet.	*Id.*
8. "Our LEEDS experience…"	Proposal Letter, p.3	Westar itself has had no experience.	*Id.*
9. "The Post Occupancy Management of our projects are heralded among the best in the industry and **score very high with the government agencies in Westar buildings."**	Proposal Letter, p.3	Westar has no buildings and no track record of project management.	*Id.*
10. "Our **semi-annual and annual inspections and reports…"**	Proposal Letter, p.3	None ever conducted, but written as if there is a track record.	*Id.*
11. "Westar served as the development consultant for the VA Wade Park Campus just recently completed for the VA."	Proposal, p.3	No record or agreement exists to support this statement.	*Id.*
12. "Because of the long-term outlook, Westar buildings are higher quality…"	Proposal, p.3	Westar never owned, built, or managed a building to date.	*Id.*
13. "Westar regards every employee…as a valued team member…"	Proposal, p.3	Westar has no employees.	Attachment 2
14. "Professional success starts with personal integrity."	Proposal, p.3	Berryhill had admitted to embezzlement and was under investigation by the FBI.	Attachment 1
15. "He [Calabrese] has just completed the VA Wade Park EUL facility…"	Proposal, p.4	Sam Calabrese was not the developer and appeared to have a largely legal role as an attorney in the project. This does not qualify him as a developer or give him right to claim credit for the project.	Attachment 4.a

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As part of its proposal for the Butler HCC, Westar included 11 Past Performance Survey Forms that make it appear as if the contract awards were to Westar. As previously stated, Westar had no prior experience and the Butler HCC lease was its first contract award. Attachment 4 is a detailed spreadsheet with supporting documents addressing misrepresentations in each of the 11 Past Performance Survey Forms. It is important to note that most of these contracts/leases occurred when Westar was "shelved" and not active per Berryhill's deposition testimony and at that time period (1998- mid-2009), Berryhill was employed by Carnegie. The 11 non-Westar projects in brief are as follows:

- **a.** **VAMC Enhanced Use Lease, Cleveland and Brecksville, Ohio.** The Past Performance Survey Form indicates that Westar was the primary contractor. However, VA signed the Enhanced Use Lease (EUL) with Veterans Development, LLC whose sole owner and member was Michael Forlani. VA did not award any contracts to Westar or any entity that Westar owned.
- **b.** **Department of Veterans Affairs, James A. Haley VA Hospital, Tampa, FL.** Westar indicated that it had conducted major electrical work at the Tampa VA Medical Center, which included a new generator, and high and low voltage switchgear. The contract award was to LDV, Inc. and Doan Pyramid, a Michael Forlani company, as a Joint Venture.
- **c.** **Canton Federal Building, Canton, OH.** Westar submitted that it developed the Canton, OH Federal Building; however, this was developed by Carnegie, Berryhill's prior employer.
- **d.** **Department of Veterans Affairs, Louis Stokes Medical Center, Cleveland, OH.** Westar represented that it had constructed a new penthouse on the roof (EAST) and done HVAC and electrical renovation work for the Cleveland VA Medical Center. However, per VA records, we found that the contract was awarded to Brigadier Construction, who is listed as a subcontractor on the Past Performance Survey Form.
- **e.** **FBI Building, Springfield, IL.** Westar submitted that it had developed the FBI Building in Springfield, IL. However, we determined that this was a Carnegie project, not a Westar project.
- **f.** **Department of Veterans Affairs, Louis Stokes Medical Center, Cleveland, OH.** Westar submitted that it performed an "electrical medium voltage switchgear upgrade including new power company primary feeders and HVAC cooling tower renovations" for the Cleveland VA Medical Center. Records indicate that LDV, Inc. was the prime contractor for this project not Westar.
- **g.** **GSA IDIQ Contract, Ohio. Westar submitted that it had a GSA IDIQ contract for repair and alterations.** Westar listed eight task orders or projects issued under this IDIQ contract. However, we determined the IDIQ contract holder was Doan Pyramid, a Michael Forlani company.
- **h.** **Department of Veterans Affairs, Louis Stokes Medical Center, Cleveland, OH.** Westar submitted that it had constructed a new penthouse on the roof (WEST) and done

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HVAC and electrical renovation work for the Cleveland VA Medical Center**.** VA records indicate that the Meadows Group was the prime contractor.

i. **FBI RMF/ERT Facility, Cleveland, OH**. Westar stated that it built a 25,000 square foot facility for the FBI that includes office space and vehicle work bays. However, this facility was developed by Carnegie, not Westar.

j. **Social Security Administration Building, West Palm, FL.** Westar claimed credit for developing and building this SSA structure. However, Government records again show this was a Carnegie project.

k. **IRS Regional Office, Springfield, IL**. Westar stated that they built a "World Class Facility" for the United States Government; however, the project was developed by Carnegie.

While it may be true that Berryhill has some level of involvement in some of the projects developed by Carnegie, the completed Past Performance Survey Forms do not identify or even reference Carnegie as the prime contractor. The forms and other statements in the technical proposal more than imply that these were all Westar projects developed and managed by Berryhill and others associated with Westar.

We also found statements in the Westar proposal that misrepresented the prior experience/expertise of Westar principals, namely Berryhill, Matt Duncan, and Calabrese. The proposal gave them credit for projects that they did not work on, grossly overstated their roles on projects, and fabricated work experience. On page 4 of Westar's proposal, Berryhill is credited with numerous projects. The proposal states that he will serve as the project manager "…with the responsibility of oversight from inception to completion. He served in this exact role with primary responsibilities for:

- Canton Federal Center, Canton, OH
- FBI Field Office Headquarters, Knoxville, TN
- FBI Field Office Headquarters, Indianapolis, IN
- FBI Field Office and RMF/ERT Facility in Springfield, IL
- IRS Office Building, Springfield, IL
- Westlake Family Health Center, Westlake, Ohio
- Several large multi-story Office Buildings, including University Hospitals, Cleveland Clinic, Social Security Administration, LESCO, ICI Glidden Paints North American Headquarters, National City Bank Building, Struers International Headquarters, Wachovia Securities Office Building."

The statements in the proposal notwithstanding, documents submitted to VA during the protest and additional records we obtained relating to the civil litigation involving Carnegie, clearly debunk Berryhill's false and misleading claims regarding his involvement, roles, and

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responsibilities in various projects. Carnegie's principals state that Berryhill had no involvement in the Westlake Family Health Center, University Hospitals, Cleveland Clinic, LESCO, ICI Glidden Paints North American Headquarters, National City Bank Building, Struers International Headquarters, and Wachovia Securities Office Building. Attachment 5, May 30, 2013, email from Carnegie. Although Berryhill was fired for embezzlement during the development of the Canton Federal Center, the theft actually occurred during his work on the FBI Field Office Headquarters in Knoxville, TN. Two weeks after the Butler HCC lease was awarded, in response to a motion by Carnegie for a Temporary Restraining Order (TRO), Berryhill agreed not to list or reference any projects developed, constructed, or owned by Carnegie or its related LLCs. He agreed to remove references to the Canton Federal Building, LESCO, Gliatech, FBI Knoxville, FBI Indianapolis, ICI Glidden Paints from his resume and the Westar website. Attachment 6, June 14, 2012 Letter and draft TRO Order.

Statements in the proposal (as compared to statements provided to VA in April 2013 when Berryhill was "fired" by Westar) regarding Duncan's experience are likewise inconsistent and inaccurate. Page 4 of the proposal lists specific projects that Duncan was alleged to have worked on. It states that Duncan brings 25 years of management to the team and that he has structured management plans for the:

- FBI Office Building and RMF/ERT Facility in Springfield, IL
- IRS Office Building, Springfield, IL
- SSA Office Building, West Palm Beach, FL
- ICI Glidden Paints North American Headquarters
- Westlake Health and Medical Center
- University Hospitals
- Cleveland Clinic

Once again, these all appear to be Carnegie projects. Carnegie principals stated that Duncan worked at Carnegie for approximately one year and that he never managed any property for Carnegie. Attachment 5. Westar also claimed that Duncan managed, "Numerous other Westar Medical Office and Retail and Special Use Projects around the country." This statement is clearly false because, as already established, Westar has no other buildings that Duncan could have managed. Further, Westar included a resume for Duncan which states he began working for Westar in August 1999 as Director of Property Management. His responsibilities included, "improving property operations, increasing occupancy and maintaining the strong tenant relationships that have been developed over the years." His resume then shows a promotion at Westar in June 2002 to Vice President in charge of all property management at Westar. Attachment 7, Duncan resume contained in the proposal. However, as already established, it is an undisputed fact that Westar was "shelved" and not used for anything during this time period. When Westar terminated Berryhill after the criminal information was publicized, Westar notified VA that Duncan would take Berryhill's position. To support Duncan's ability to take over for Berryhill, Calabrese, as the President of Westar, submitted a resume for Duncan that did not include the Westar employment contained in the resume included in the proposal. Attachment 8, April 8, 2013 email and attached Duncan resume.

Page 4 of Westar's proposal identifies Calabrese as the President of Westar and states that he will serve as the "Principal-In-Charge." It is not clear when Calabrese became the President of Westar. However, based on the responses to our subpoena Westar has no business or financial record and has never issued W-2s, 1099s, or K-1s. In response to a subpoena issued to Calabrese, we determined that he always has been employed by entities owned and controlled by Michael Forlani or trusts established by Michael Forlani after the FBI investigation became public following the execution of a search warrant.

Westar stated that Calabrese "has just completed the VA Wade Park EUL facility and understands the technical requirements of medical office and treatment facilities." This bold statement gives the appearance that Calabrese was responsible for developing the buildings at the VA Wade Park; however, he was not the developer. The developer was Veterans Development, LLC, a Michael Forlani company. While Calabrese worked for Forlani and had a role in the Wade Park buildings, his role appeared to be mostly legal and advisory in nature. This does not qualify him as a developer or give him the right to claim credit for the project based merely on the fact that he worked on the project. In a narrative response to a request in our subpoena for records relating to his ownership/membership/employment and any other business relationship with various identified companies, Calabrese described his past employment. He stated that from 2006 through 2012 he was not employed by Veterans Development but acted as the authorized representative for the company during that timeframe. Attachment 9, May 24, 2013 response to OIG subpoena from Samuel Calabrese. He also stated that he began employment with Veterans Development Office/Parking, LLC on January 1, 2013, and began consulting for Veterans Development Domiciliary, LLC as a 1099 consultant on January 1, 2013. He further states that he worked for Zenith Systems, LLC as General Counsel from January 1, 2010, to April 12, 2012. From January 1, 2006, to December 31, 2009, he was the General Counsel for Doan Pyramid. Attachment 10, May 24, 2013, response to Calabrese subpoena. All the entities listed are associated with Michael Forlani.

Issue 2: Whether Westar had any formal teaming arrangements.

Finding: We found that Westar did not have any agreements, formal or informal, written or verbal, with two of its critical team members: William Montague, consultant to Westar; and LDV, Inc. (LDV), the identified general contractor for the Butler HCC. Montague was the former director of the Louis Stokes Cleveland VA Medical Center and his involvement would have brought, at least in appearance, knowledge and credibility to the Westar team. LDV was named as the general contractor for the Butler HCC; thus, making LDV an absolute critical part of the team. Both of these team members caused Westar to receive a higher technical score during the technical evaluation; however, neither was committed to the Butler HCC with Westar as evidenced by the lack of any formal written agreement or any other record that would evidence a relationship between Westar and Montague and Westar and LDV.

William Montague. Westar's proposal stated that Montague and his consulting firm was on board as part of the Westar team for the Butler HCC project and that he would provide practical insight into the plans and would work directly with the architect to ensure the interface between VA and the architect was seamless. However, when Berryhill delivered documents in person in response to an OIG subpoena, he stated that by the time Westar received the Butler HCC award, Montague had informed Westar principals that he would not be involved with Westar on the Butler HCC project. Request No. 13 in the subpoena to Westar asked for "documents that support and describe the teaming arrangement with William Montague and/or House of Montague Wealth and Management and Consulting." In Calabrese's written narrative response to Request No. 13 in the OIG subpoena issued to Westar, he states that Montague was going to work directly with Kaczmar/Bowen to ensure practicality of design. Calabrese stated that the agreement was "a verbal agreement with no emails confirming his anticipated role." Calabrese further states that after award "Montague had moved on to other projects and was no longer interested in working on this project. He communicated this decision to not be involved with the project verbally as well. Accordingly, there are no documents regarding his anticipated role in the Project other than as set forth in the Technical Proposal…" Attachment 2, Calabrese response to OIG subpoena to Westar. Based on the responses from Berryhill and Calabrese, there was no commitment by Montague to work on this project. We note that there was less than 5 months between the date the proposals were submitted and the award of the lease. Even if there was an agreement, this significant change in the Westar "team" was never communicated to VA.

LDV. Westar's technical proposal identified LDV as the general contractor to build the Butler HCC. About 50 pages in Section 5 of the Technical Proposal were documents detailing LDV's past experience and stated that VA can be assured of the "quality of construction with the LDV name behind the project." Our review determined that LDV was never involved in the project and was not part of the team. Request No. 19 in the OIG subpoena to Westar requested all "records relating to contracts, agreements, payments to or from, and other relationship or communication with LDV Construction." *Id.* The only document produced was an e-mail dated February 2012, which demonstrates that LDV principals were doubtful that they could ever be part of the Butler HCC project because their surety company, Travelers, had significant concerns regarding a divorce of the owners and that there was still over $44 million in potential or unresolved work. The e-mail shows that LDV was not willing to inform Travelers of the Butler HCC project and had decided that no additional work could be taken on. Attachment 10, February 12, 2012 email from LDV. In his narrative response, Calabrese provided an explanation regarding Tom Charek's role in the project as a partner and his relationship to LDV but did not provide any records responsive to the request. We concluded that there is no documentation to support statements in the Technical Proposal that LDV was part of the Westar "team" and would be the general contractor on the project. Westar misrepresented that LDV would be the general contractor for the Butler HCC. However, even if Westar had some reason to believe that LDV would be the general contractor when the proposal was submitted, the email shows that within a month they were aware that this was not the case and did not notify VA prior to award on May 31, 2012. Emails show that Westar did not notify VA that LDV would not be the general contractor until December 2012 when VA learned that Westar intended to use Marous Brothers. Attachment 11, Emails relating to general contractor substitution.

The technical evaluation gave a potential of 2 points for the construction team qualifications (Westar received a score of 1.48 out of 2), but the reality is that any proposal submitted without

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an identified general contractor for a build lease would most likely have been deemed not responsive and would not even had been forwarded to the technical evaluation team. Therefore, the real impact of Westar falsely stating that LDV was the general contractor for the Butler HCC is not simply getting the 1.48 points, but getting the proposal deemed responsive.

Issue 3: Whether Westar Development Company, LLC (Westar) misrepresented itself as a Veteran-Owned Small Business to qualify for additional points during the bid evaluation process.

Finding: Westar misrepresented itself as a Veteran-Owned Business which resulted in a credit of 4 points during the technical review process. Westar received a score of 39 during the technical review.

Westar represented both during and after the procurement process that it was a 100 percent veteran-owned business. Section 2.3.4 of the SFO notified offerors that there would be credit given during the evaluation process for "eligible" SDVOSBs, VOSBs and other small businesses. SDVOSBs would be given full credit and VOSBs would be given partial credit greater than the partial credit given all other small businesses.

To receive full or partial credit, an offeror that is not currently in VetBiz had to become verified. The solicitation listed the criteria for verification and stated that the minimum submittal shall include

a. Acknowledgment from www.vetbiz.gov that they had applied and were being processed within the VIP database. A copy of the automatically generated email from VetBiz or a signed acknowledgment of application from VA;
b. A redacted copy of the veteran's VA Service-Connected Disability file; and
c. A copy of the veteran's DD214, indicating an honorable discharge.
d. Completed registration in VIP was required as part of the Final Proposal Revisions.

Westar is not and has never been listed in VetBiz. We contacted the Center for Veterans Enterprise (CVE) and were advised that CVE has never been contacted by a company with DUNS 086125650 (Westar's DUNS). CVE has never been contacted by any company using the name Westar Development Company or Diversified Realty Company, and that no 0877s were started or completed by any of the above. Attachment 12, April 25, 2013 email from CVE. In addition, no records were produced in response to our subpoena to Westar, to which we received two responses, one from Berryhill and one from Calabrese. In response to a request for "Records submitted to the Center for Veterans Enterprise to verify veteran-owned status," Calabrese, through counsel, advised that there were no responsive documents. He further stated that it "was confirmed by Department of Veterans Affairs Contracting Officer John Blake during the final pre-award meeting that Westar Development Company, LLC was not receiving credit as a Veterans Enterprise as such in the Department of Veterans Administration's [sic] consideration of the Westar Development Company LLC submittal." However, Calabrese did not produce any records that supported this assertion. In an interview with OIG staff on June 3, 2013, Blake did not recall any such discussion. Furthermore, we could not find any evidence of a discussion of this nature in any emails or other records that we obtained and reviewed. More importantly, Calabrese's statement is inconsistent with the written record because the technical scores show that Westar was given 4 points based on its claim that it was a veteran-owned business. Attachment 13, Revised Technical Evaluation Scores.

Documents maintained by the Ohio Secretary of State show that Westar registered as a Limited Liability Corporation in April 1998. The Articles of Organization, which were filed at that time, show that the company was formed by Berryhill and that he represented the majority of members. The address on East Pioneer Trail in Aurora, Ohio that is listed in the Articles of Organization is the home address for Berryhill. Attachment 14, Ohio Secretary of State records for Westar. Since April 1998 to present, no amendments or changes were made to the filings with the Ohio Secretary of State relating to Westar. When we issued the subpoena to Westar, we sent it to the resident agent listed in the Ohio state records. The letter was returned as undeliverable and the United States Postal Service was unable to provide a forwarding address.

In their August 1, 2012, letter responding to the Contracting Officer's show cause letter, Calabrese and Berryhill, represented that Robert J. "Berryhill has no ownership rights in Westar (which was previously held 100 percent) by his father, a Viet Nam [sic] era veteran." Robert T. Berryhill is Berryhill's father. In response to our subpoena, Calabrese, as the President of Westar, produced an "Assignment of Membership Interest" (Assignment) signed by Robert T. Berryhill on July 24, 2012, stating that he is the sole Member in Westar and that he was selling his membership interest for $10.00 to VA Butler Partners Company, LLC. The document further states that it "was executed to memorialize a verbal agreement reached between the Parties on or before December 1, 2011 that the Assignor would assign his Membership interest to Assignee." Attachment 15, Assignment of Membership Interest. Produced with the Assignment is a document signed the same day titled "Lost Membership Unit Certificate Affidavit and Indemnity Agreement," in which Robert T. Berryhill states that he is the lawful owner of "One Hundred Percent (100%) of all outstanding membership units" of Westar Development Company, LLC. He further represents that his Units are "either uncertified or the certificate representing the Units is lost and missing and/or has been stolen or destroyed and no longer is in his possession" and that he "is legally entitled to the full and exclusive ownership and possession of said certificate and the Units that [he] has not sold, assigned, transferred, hypothecated, pledged, or otherwise disposed of in any manner." Attachment 16, Affidavit of Robert T. Berryhill. In summary, the only official corporate records available show that Berryhill is and always has been the majority owner/member of Westar.

The timing of the Assignment by Robert T. Berryhill is of interest because during Berryhill's (Robert J. Berryhill) July 18, 2012, deposition in a civil case involving Carnegie, Berryhill was questioned regarding his ownership of Westar. The focus of the case was Berryhill's embezzlement of about $300,000 from Carnegie during his employment with the company. Although Berryhill was represented by counsel, two other attorneys, John Climaco and Scott Simpkins, were present. The deposition transcript records show that they were "representing principals of Westar, excluding [Robert J.] Berryhill." Attachment 2, p. 13. When Berryhill was asked whether he had talked to anybody other than his lawyers to prepare for the deposition, he initially stated that he did not. However, upon further questioning, he admitted to talking with

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his wife. When asked specifically about any of the individuals that Climaco represented, he testified that he spoke with Ross Farro, who he identified as a partner, and Calabrese about the protest regarding the Butler medical facility and that he talked to them about the deposition. *Id.*, pp. 22-24. During this entire line of questioning, Berryhill did not make any reference to his father, Robert T. Berryhill. There was no indication that Climaco or Simpkins were representing Robert T. Berryhill and he did not indicate that his father owned 100 percent of Westar. Rather, Berryhill's testimony at this point indicates that Ross Farro and Calabrese are partners/owners/members of Westar.

Later in the deposition, Berryhill testified about a position he held from 1995 to 1998 with Heritage Development Company (Heritage). *Id.* pp. 45-50. When asked about his departure he noted that he had "set up a company called Westar Development Company." *Id.* P. 50. When asked later about his current ownership interest in Westar, Berryhill testified that he had no ownership interest. He stated that he did initially but not at that time. *Id.* pp. 54-55. He subsequently was asked to walk counsel through the ownership of Westar. He testified that he set up the company after he left Heritage. However, before he could do much, Carnegie asked him to work for them. After he started working for Carnegie he "shelved" Westar. *Id.* p. 58. He then testified that he "put it in his father's name" where it was "maintained until prior to an award with a VA Butler project that the partners – VA Butler Partners acquired the interest of Westar Development Company." *Id.* p. 58. Berryhill further testified that he signed the interest over in an operating agreement around October 1998 and testified that the agreement assigning his interest to his father existed. *Id.* p 59.

There are no records corroborating Berryhill's testimony that he assigned the interest in the company over to his father in an operating agreement that still existed. This document was requested in the OIG subpoena to Westar and was not produced by Berryhill or Calabrese. Less than a week after the deposition, Robert T. Berryhill signed the above referenced Assignment and an Affidavit stating that he did not have any records showing his interest in Westar. Furthermore, if an amended operating agreement was created, it was never filed with the Ohio Secretary of State. The only documents relating to the ownership of Westar from its creation to the present identify Berryhill as the majority member.

Even assuming, for the purpose of discussion only, that Berryhill did, in fact, assign his interest in Westar to his father, his deposition testimony and the statements in the Assignment show that the Robert T. Berryhill verbally assigned his interest to VA Butler Partners on or before December 1, 2011, which is more than a month before the proposal was submitted on January 12, 2012. Berryhill testified during his deposition that the ownership changed when they "started going after the project in Butler" in December 2011. Assuming these statements to be true, Westar was not a veteran-owned business when the proposal was submitted in January 2012.

Although ownership is required to qualify as an eligible VOSB, the law also requires that the veteran be at least 51 percent involved in the day-to-day operations of the business. There is no evidence that Robert T. Berryhill was managing Westar at any point in time, especially when the proposal for the Butler HCC was submitted.

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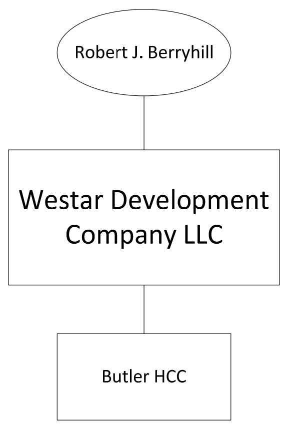
Other facts that raise questions regarding the credibility of statements regarding the ownership of Westar at the time of award include:

- Although both Robert J. and Robert T. Berryhill state that the assignment of Robert T. Berryhill's interest in Westar occurred in December 2011, it is not clear to whom or to what entity the interest was assigned at that time. The July 24, 2012, Assignment assigned the interest to VA Butler Partners Company. However, public records and documents provided in response to the OIG subpoenas show that VA Butler Partners did not exist at that point in time. Documents produced in response to the OIG subpoena show that VA Butler Partners Company was created May 1, 2012. Attachment, 17, May 1, 2012 Delaware Secretary of State. The January 12, 2012, proposal identifies Calabrese as the President of Westar and Robert J. Berryhill as Vice-President. There is no mention of Robert T. Berryhill in the proposal.
- Documents obtained from Carnegie show that after Berryhill was fired for embezzling funds, he started a website for Westar on which he listed as Westar projects that were developed by Carnegie. In June 2012, Carnegie filed for a TRO and Preliminary Injunction. It is clear from the pleading that the TRO is directed at Berryhill. Attachment 18, June 2012, Motion for TRO. The pleading alleges that Berryhill "represents Carnegie projects as projects that he developed personally or through his development company, Westar Development Company, LLC." In his opposition to the TRO, Berryhill does not deny that Westar is his company and he does not assert that his father was the sole-owner or that his father had assigned interest in the company to VA Butler Partners. However, he does state that "Westar's website makes clear that the experience of its principals – Robert Berryhill and Dana Hansen – in describing its involvement in past projects represents the 'principals' effort as a developer or in leading development teams." Documents attached to the pleadings show that the website identifies Berryhill, not Robert T. Berryhill, as the principal. This submission, dated June 6, 2012, is inconsistent with Berryhill's July 18, 2012, testimony that he had no ownership interest in Westar. Attachment 19, Berryhill's Response to the TRO and attachments.
- Records in the System for Award Management, (SAM), show that Westar registered January 7, 2010, shortly after Berryhill was fired from Carnegie. The business is currently identified as a Veteran-Owned Business and Small Business. Berryhill and Calabrese are listed as the contact points. Also, the physical address and mailing address are listed as 114 Barrington Town Center STE 135, Aurora, Ohio. This address is a mailbox center; no business is conducted at this site. In addition, Berryhill, not Robert T. Berryhill is the purchaser of the mail service. Attachment 20, SAM documents.

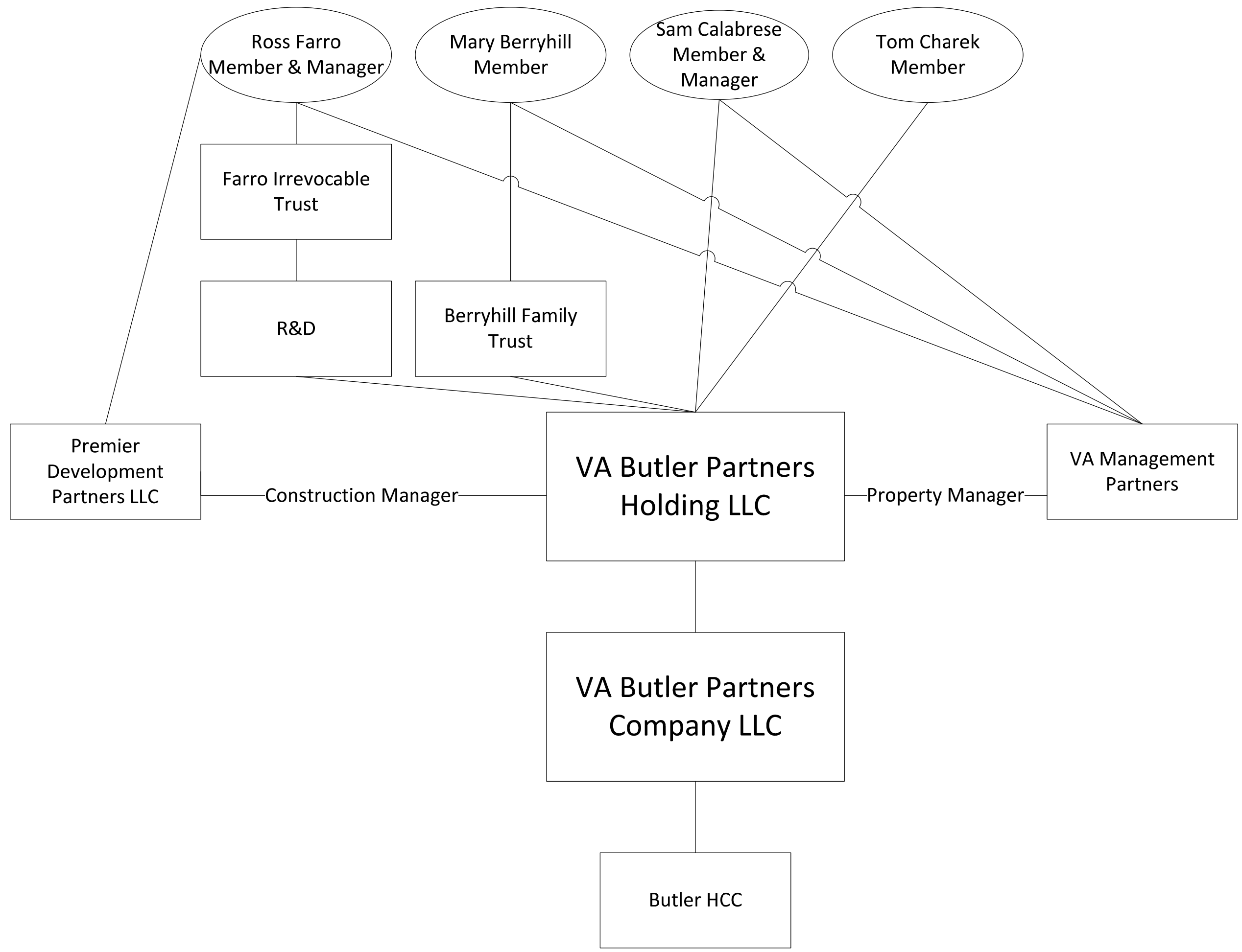
Appendix B

Ownership Structure of Westar and VA Butler Partners Company, LLC

Westar Development Company, LLC



VA Butler Partners Company, LLC



Appendix C

Management Comments

Department of Veterans Affairs

Memorandum

Date: March 7, 2014

From: Principal Executive Director, Office of Acquisition, Logistics, and Construction (003)

Subj: Department of Veterans Affairs Office of Inspector General (OIG) Draft Report: "Review of the Lease Awarded to Westar Development Company, LLC for the Butler, Pennsylvania Health Care Center," (VAIQ No. 7423388)

To: Director, Healthcare Resources Division, Office of Contract Review (55)

1. The Office of Acquisition, Logistics, and Construction (OALC) has reviewed the subject report and generally concurs with OIG that OALC has the opportunity to make improvements to its Prospectus-level Leasing program policies and procedures. Such improvements will help to ensure that a situation like that affecting the Butler Health Care Center (HCC) lease procurement will not happen again.

2. Please note that VA has re-opened the procurement to all offerors in the competitive range. Because it is not a "new" procurement, certain information cannot be revealed without compromising the integrity of the procurement.

3. Subsequent to the August 9, 2013, termination of the lease contract with Westar Development Company, LLC (Westar), for the design, construction and operation of the Butler HCC, VA re-opened the lease procurement to all offerors in the competitive range. As this procurement is currently active, and the subject report reveals procurement-sensitive information, OALC respectfully requests that certain information contained within the report be redacted in order to protect the integrity of the procurement. OALC requests redaction of the following information: names of offerors; weights assigned to factors and sub-factors; number of points received for various evaluation factors; and Westar's cost and pricing information to the extent that the scope of the pricing information exceeds that shown in the Form SF-2 lease document (Attachment 1). If this information were made public, the lease procurement would likely need to be canceled and resolicited, creating a project delay of 12-24 months.

3. To protect the integrity of the procurement, OALC suggests OIG only share the number of sites, ranking of sites, and Westar's pricing as shown in the attached Form SF-2.

4. OALC also provides the following technical comments.

   a. Results and Conclusions I, pages 5-8: OALC acknowledges that the decision-making process to switch from a two-step to one-step procurement could have been

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documented more fully for this project and agrees with OIG's recommendations regarding the same. OALC will implement a new standard operating procedure (SOP) regarding the market survey process and the contracting officer's (CO) determination as to procurement method. The SOP will include the addition of independent evaluators in the market survey process, including the OALC project manager and other OALC technical experts, which should counteract any bias (unintentional or otherwise) in the market survey process.

b. The decision process for moving from a two-step procurement to a one-step procurement was not intentionally biased. The Deshon Woods site as offered in the two-step process was not a suitable site for VA to expend time and resources to secure for the Butler HCC project, even though it was identified by the evaluators as a desirable site. In the two-step process, VA typically looks for a site that is immediately ready for development and can transfer from the site owner to VA's successful offeror with a minimal amount of remediation to undertake or encumbrances to overcome. Because the second-ranked site scored so much lower than Deshon Woods and because of the perceived difficulty in obtaining an assignable option on the Deshon Woods site, OALC decided not to pursue it as a pre-selected site and instead switched to the one-step process, where the burden to produce an immediately developable site is shifted to the offerors. As previously noted, this decision could have been better documented.

b. Results and Conclusions I, page 6, paragraphs 3-4: In the future, if OALC encounters a situation involving a bidding procurement vehicle in a future project, OALC will carefully evaluate this option. At the time, OALC did not believe obtaining interest in the property was a viable option since we had never attempted that before.

c. Results and Conclusions I, page 7, paragraph 3: OALC acknowledges that, due to the fact that sites are further evaluated and scored after they receive a "pass/fail" grade as part of the site selection process, it should not have allowed the statement to be made to offerors that all sites were on equal footing. At the time of the pre-bid conference, VA had no knowledge as to which developer would offer which site, and the comments made were intended to express that offerors had an equal opportunity to pursue any one or more of the acceptable sites. Unfortunately, this statement was presented in a way that could reasonably be construed to address the site

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evaluation rather than availability. OALC will implement a new SOP that addresses how site selection and evaluation are to be described in communications with offerors to prevent this issue from occurring in the future.

While the one-step lease process provides for a pass/fail evaluation of sites, providing a numerical scoring of the "Quality of Site Characteristics" does not provide an unfair advantage to a particular site but simply allows amenities, accessibility, etc. to be further evaluation during competition. "Quality of Site Development" is not something that can be evaluated at the time a site is given a pass/fail as this information is only submitted with the initial offer.

The developer's ability to secure and offer a site that may meet the initial pass/fail minimum criteria for VA's purposes does not guarantee that developer the lease award. If other developers had scored better in other technical categories that were valued as being higher in relative importance to VA (for instance, Architectural Concept and Building Design, which are worth more points than Quality of Site), any of those developers could have established a high enough technical score to have a reasonable chance at the award.

d. In line with the previous request redaction, OALC requests that OIG replace the third paragraph on page 7 of the subject report regarding the technical evaluation scores related to sites offered in the Butler HCC procurement with the following:

> "…Although VA informed the potential bidders that the "sites have all been accepted and they are all on a level playing field as far as the solicitation is concerned," a review of the technical evaluation scoring sheets showed that it included a section titled "Quality of Site." This section was divided into two sub-factors related to the site. The first sub-factor was "Quality of Site Characteristics," which asked evaluators to score the offered sites based on proximity to amenities, "developability," accessibility, and other characteristics inherent to a site that cannot be readily changed by the offeror. The second sub-factor, "Quality of Site Development," asked evaluators to score the offered sites based on how the developers have designed them, including positioning of the facility, landscaping, parking layout and flow, and any "amenities" that developers may provide, such as walking paths or aesthetic improvements. Westar received the highest score for the combined sub-factors in Quality of Site. The lowest score was approximately one-third of Westar's score, and the developer with the second highest total score was approximately two-thirds of Westar's score for Quality of Site. As part of its site selection process, VA had already evaluated the sites and determined that all five sites satisfied all of VA's minimum requirements and received a passing grade. However, because some sites are inherently better for the location of a VA facility, technical evaluators are able to

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award points to the most desirable sites per the sub-factors described above. Therefore, VA should not have stated in the pre-bid conference that all five sites were on equal footing. Rather, VA should have stated that all offerors had an equal opportunity to pursue all or any of the sites that VA identified as meeting its minimum requirements.

e. Results and Conclusions II, page 9, paragraph 2, second sentence: OALC requests that OIG correct the contract number for the National Broker Services Contract against which Public Properties' task order was issued. The proper contract number is V101-183P-101-01-03, awarded in 2005. However, OALC notes that the substance of the two contracts is essentially the same.

f. Results and Conclusions II, pages 9-10: While Public Properties did assemble documents and information for the CO's review, it remained the CO's responsibility to review and approve the information presented by the broker and verify that information presented was correct and complete.

In leasing projects, OALC utilizes its indefinite delivery/indefinite quantity contract (IDIQ) real estate brokers to assist in project management functions, which includes the collection and assembly of information, including past performance verification materials, for the CO's review. By September 2014, OALC will implement a new SOP for its real estate broker Task Order (TO) issuance that will require all leasing TOs to include a list of definitive activities that the brokers must complete and deliverables that they must provide. These changes will be implemented more fully when OALC solicits a new IDIQ real estate broker contract in 2015. For the Butler HCC project, OALC issued a new TO to a different broker firm to handle the re-procurement with a list of items that the firm must complete at each stage of the procurement (attached).

g. Results and Conclusions II, page 10, first paragraph: By September 2014, OALC will implement a new SOP that requires the CO to conduct a responsibility determination independently.

h. Results and Conclusions III, pages 11-12: OALC believes that due diligence was conducted to ensure the award of an operating lease. Just prior to the Butler HCC lease award, VA commissioned and obtained an fair market value appraisal that valued the site and proposed improvements at $90 million, which compared this appraised value to the total net present value (NPV) of the lease, meaning VA was paying less than 90 percent of the fair market value of the asset over the life of the lease. OALC's NPV and scoring calculations are provided in Attachment 2, but OALC requests that these documents not be released publically.

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i. Results and Conclusions IV, pages 13-14: In hindsight, the information now available about Westar and its false and misleading representations would have likely led to a different outcome of the protest. The CO's decision to dismiss the protest was made in conjunction with and support from OGC. The letter dismissing the protest detailed each of the assertions made in the protest and provided logical explanations and support for VA's position, including citations of relevant case law and regulations. Refresher training will be provided to the CO on the protest filing procedures and process in accordance with FAR 33.

j. Results and Conclusions V, pages 13-19: VA had little to none of this information at its disposal during the Butler HCC lease procurement process and in fact, was not entitled to receive such information. As corporate documents are not part of the public record, VA must rely on the information presented by offerors as part of their proposals. As recommended, OALC will make future transactions checks into public databases.

k. Results and Conclusions V, page 19: OALC believes it conducted sufficient inquiry into the novation of the Butler HCC lease. OALC's actions in that regard were conducted in accordance with FAR Subpart 42.1204. In the future, OALC will ensure that the contract file documents what steps were taken.

l. Results and Conclusions VIII, page 24: OALC agrees with OIG's assessment of the necessity of offerors submitting evidence of formal teaming arrangements. By September 2014, OALC will implement an SOP requiring that evidence, in the form of executed contracts, be submitted by the offeror for its design and construction teams for every Prospectus-level leasing project.

n. OALC requests that Recommendation 1 be re-worded as follows to be more consistent with OALC's lease procurement business practices and methodology:

> "For future VA leases, properly document the analysis and determinations of the Contracting Officer pertaining to selection of a two-step versus one-step lease procurement process."

4. OALC generally concurs with OIG's recommendations and provides the following comments:

a. RECOMMENDATION 1 (revised): For future VA leases, properly document the analysis and determinations of the Contracting Officer pertaining to selection of a two-step versus one-step lease procurement process.

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OALC Response: OALC concurs that objective criteria should be established to determine which process should be executed and that the CO's determination should be properly documented. By September 2014, OALC will implement an SOP pertaining to this policy on all Prospectus-level lease projects going forward.

b. RECOMMENDATION 2: Determine the need and the value of a real estate broker for lease acquisition and, if a need exists, define specific deliverables and/or tasks a real estate broker is responsible to provide.

OALC Response: The IDIQ real estate brokers provide a level of expert knowledge on private sector real estate that is instrumental to VA's Prospectus-level Leasing program. However, OALC acknowledges that the IDIQ National Broker Services Contract does not adequately outline the services and deliverables required of its real estate brokers in the lease procurement process. OALC is currently in the solicitation development phase for its next IDIQ real estate broker services contract and will provide additional detail and definitive lists of services and deliverables required of brokers at each lease procurement milestone. Changes will be incorporated into the new IDIQ broker lease contracts by October 2015. By September 2014, OALC will implement a new SOP for its real estate broker TO issuance that will require all leasing TOs to include a list of definitive activities that the brokers must complete and deliverables that they must provide.

For the Butler HCC project, OALC issued a new TO to a different broker firm for the re-procurement with a list of items that the firm must complete at each stage of the procurement (Attachment 3).

c. RECOMMENDATION 3: Ensure the CO takes an active role in decisions and does not abdicate responsibility to project manager or broker.

OALC Response: OALC recently organizationally restructured which has already allowed for a clearer division of labor and decision-making authority between COs and project managers. The COs are now managed by supervisory contracting officers to ensure continuity among department-wide procurement actions. Supervisory contracting and program management staff will work together to issue SOPs as necessary to "tighten" and further refine processes and procedures for Prospectus-level VA leases.

d. RECOMMENDATION 4: Determine ownership of each LLC involved for future projects, including the SPE LLC if used by the developer.

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OALC Response: OALC has begun requesting information on the ownership of LLCs in relation to offering entities as part of the novation process. OALC will formally modify its solicitation requirements to request documentation regarding ownership from offering entities. These changes will be incorporated into the new Solicitation for Offers documents, as part of the Lease-Based Outpatient Clinic Design Guide (LBOPCDG) by August 2014.

e. RECOMMENDATION 5: Ensure that the CO verifies that a vendor is in the CVE database when claiming a Veteran-owned business status.

OALC Response: Since the Butler HCC project, OALC has implemented new vetting procedures to include a peer review process, a pre-award checklist, and vendors' status verification in the CVE database; all of which must be completed and signed before award is considered.

f. RECOMMENDATION 6: Develop procedures or criteria that ensure financial analysis, such as NPV, is accurate and reliable.

OALC Response: OALC has already issued guidance to project managers and its IDIQ real estate brokers as to the proper procedures for NPV and financial analysis.

g. RECOMMENDATION 7: Establish requirements that Past Performance Survey Forms be verified. Searches should be conducted online in FPDS for Government-wide contracts. Searches should be conducted online in the Electronic Contract Management System (eCMS) for VA contracts. Contact should be made with the project owner to discuss vendor's role as disclosed on the Past Performance Survey Forms. Focus should be on the entity, not only the individuals.

OALC Response: Since the Butler HCC project and in addition to the restructuring described above, OALC has implemented new vetting procedures to include a peer review process, a pre-award checklist, verification of references and past performance, and appropriate online database searches; all of which must be completed and signed before award is even considered. By September 2014, OALC will implement an SOP that requires FPDS and other relevant databases to be searched to provide past performance verification. Additionally, the SOP will require that past performance of the offeror's architect and construction contractors be verified.

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g. RECOMMENDATION 8: Require vendors to submit documentation, such as teaming arrangements, that key team members such as architects, engineers, and GCs are committed and able to do the project.

OALC Response: OALC has already implemented an SOP requiring that evidence, in the form of executed contracts, be submitted by the offeror for its design and construction teams for every Prospectus-level Leasing project. OALC will formally implement this requirement in the update of the LBOPCDG by August 2014.

5. Should you have questions regarding this submission, please contact Ms. Annette Powe at (202) 632-5454 or via email at annette.powe@va.gov.

Glenn D. Haggstrom

Appendix D

OIG Response to Management Comments

On March 7, 2014, the Department provided a response from the Principal Executive Director, Office of Acquisition, Logistics, and Construction (OALC). OALC's response was provided in two parts. The first part dealt with technical comments where OALC did agree with some of our findings and conclusions. The second part was OALC's response to each of our recommendations. While OALC generally concurred with all eight of our recommendations, OALC did not fully concur with all of our conclusions and took issue with some of our findings. Our responses to the pertinent factual and technical issues raised by OALC are as follows.

I. <u>VA's Change to a One-Step Process Created an Advantage for Westar</u>. OALC does not concur that there was a bias or preference for the Deshon Woods site as concluded in our report. OALC stated that the reason for switching to a one-step approach was that the Deshon Woods site was not a suitable site for VA to consider in a two-step process; therefore, VA switched to a one-step approach. This statement is inconsistent with the facts and confirms our conclusion that VA was biased towards the Deshon Woods site by stating that VA could not keep the Deshon Woods site for consideration under the two-step process even though there were other viable parcels that were available. The VA statement, "because the second-ranked site scored so much lower than Deshon Woods and the perceived difficulty in obtaining an assignable option on the Deshon Woods site, OALC decided not to pursue it as a pre-selected site and instead switched to the one-step process," does not make sense and supports our finding that when Westar gained control of the Deshon Woods property, Westar gained an advantage. The fact is that other parcels met VA's criteria under the two-step process so there was no need to default to the one-step process except for the fact there was a strong preference for the Deshon Woods site. OALC's response ignores documentation stating that there was pressure to keep the Deshon Woods site in consideration for the Butler HCC. OALC's response also ignores the fact that the Deshon Woods site did not meet the minimum requirement of 15 developable acres and should have received a failing grade under the one-step process as other sites did. OALC did acknowledge that the difficulties in obtaining an assignable purchase contract for the Deshon Woods site were "perceived" and was based on the fact that they believed they could not obtain an assignable purchase contract by placing an offer or bid with Butler Township. OALC states that they will carefully evaluate this option if a similar situation arises in the future. The evidence demonstrates there was a strong preference for the Deshon Woods site and Westar became the beneficiary of this preference when Westar gained sole control of the site. OALC requested that we modify our finding to remove our conclusion that having a Quality of Site factor on the technical evaluation gave Westar an advantage. OALC acknowledges that they should not have stated that all sites were on equal footing at the pre-bid conference, but defend the Quality of Site as a factor to be evaluated. We believe our finding as written is accurate because the Quality of Site factor did give Westar an additional advantage because the evidence was clear that there was a preference for the Deshon Woods. The rating under the original two-step process simply could not be set-aside and ignored and documentation shows that senior VA leadership preferred that site. VA should have taken steps to mitigate or eliminate the preference for the Deshon Woods site when it switched to a one-step process. In reality, the Deshon Woods site did not even meet VA requirements and should have been eliminated from consideration.

II. VA Diverted Key Decision and/or Analysis Responsibilities to the Real Estate Broker. OALC stated in its response that "it remained the CO's responsibility to review and approve the information presented by the broker and verify that information presented was correct and complete." Although OALC did not refute our conclusion that the CO did, in fact, divert key responsibilities to the broker such as verifying veteran ownership status, financial capabilities, and past experience, its response implies that the CO in this case met his burden, when the evidence overwhelmingly shows otherwise. However, OALC does state in its response that they will implement new procedures regarding issuing task orders to brokers by September 2014. OALC also stated that they recently restructured so that COs are managed by supervisory contracting officers and will establish new procedures to tighten their procedures regarding leases.

III. The Butler HCC Lease was More Costly than VA Building and Owning the Butler HCC. OALC asserts that leasing was less costly than building and owning the Butler HCC. OALC determined that the NPV for the lease payments was only 49.64 percent ($47.2 million) of the FMV. The FMV value was determined by OALC by using estimated appraisal of the building which was determined to be $90 million when completed. Our review of OALC's NPV calculation determined that it is in error. The correct NPV of the capital portion of the lease with Westar for the Butler HCC is approximately $76.6 million. OMB guidance also states that agencies should use the estimated construction cost for an asset that does not exist at the time of the award of the lease. Our review estimated construction costs of the Butler HCC to be approximately $76.8 million which is almost the same as our calculated NPV; therefore, the NPV is not less than 90 percent of the estimated construction costs. As noted in the report, our analysis of OALC's calculation shows that OALC shows that the NPV calculation was duplicated, thus resulting in an artificially lower NPV.

IV. VA Wrongly Dismissed the Protest of Westar's Award. OALC does not concur that the CO wrongly dismissed the protest. OALC states the CO made a logical and supported decision based on the information he had at the time and it is only information that became known after the fact that suggests the protest should have been upheld. Our conclusion that the CO wrongly dismissed the protest was based on information the CO had available to him, a fact that OALC's response does not address. The CO had *first-hand* knowledge of the FBI investigation. The FBI agent conducting

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the criminal investigation discussed the investigation with the CO. The CO also incorrectly concluded that Westar was not part of any civil litigation that involved Berryhill, yet the CO was provided court records during the protest that showed that Westar was a named defendant in the civil litigation. The court records also showed that Westar was taking credit for another developer's real estate projects, yet the CO did nothing at that time to verify Westar's alleged past experience. The CO had access to public records that showed that Berryhill was not just a principal, but the majority owner of Westar. The court records provided to the CO contain serious ethical and potentially criminal violations of Berryhill and Westar. Even though no indictments or convictions had been made at that time, the FAR does not require an indictment or conviction to make a responsibility determination, yet the CO incorrectly concluded that since there was no indictment or conviction of Berryhill, that the FAR prevented him from taking action.

V. Michael Forlani's Companies Were Involved in the Butler HCC Proposal Submitted by Westar. OALC states that they simply relied on the information provided by Westar regarding the corporate structure of Westar and its affiliated entities. However, Michael Forlani's companies were clearly identified in Westar's initial expression of interest and Zenith held the purchase agreement for the Deshon Woods site. In early 2012 at the time of Westar's proposal, Zenith and other related Michael Forlani companies were suspended from Government contracts. While we agree that VA should be able to rely on information provided by offerors, the Government has a responsibility to perform due diligence by taking additional steps to investigate when irregularities or red flags are present. This is even more important when the offeror is a vendor who is an unknown developer for a project of this magnitude. Westar made clear disclosures that tied them into Michael Forlani, yet VA did little to ensure Westar was a valid, experienced developer as claimed in its proposal. OALC also states that the novation of the Butler HCC lease from Westar to VA Butler Partners was done in accordance with FAR 42.1204. FAR 42.1204 provides examples of information that should be provided to the CO regarding the transfer such as minutes of owner meetings, articles of incorporation, and financial information. However, neither during our review nor in response to our draft report, OALC did not provide any documentation or other evidence to support its claim.

VI. VA Failed to Verify Westar's Veteran-Owned Small Business Status. OALC did not make any technical comments or take issue with our finding.

VII. VA Took No Action to Verify Past Performance and Experience. OALC did not make any technical comments or take issue with our finding.

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VIII. <u>VA Took No Action to Verify Teaming Agreements of Westar</u>. OALC concurred that it needs to require evidence of teaming arrangements and plans to implement new procedures by September 2014 that will require such evidence. OALC did not make any technical comments or take issue with our finding that it did not verify the teaming arrangements of Westar.

<u>Recommendations</u>

<u>Recommendation 1</u>. We recommended that VA establish criteria to switch from a two-step to a one-step procurement. OALC requested a revision to this recommendation that the CO should simply document their “analysis and determinations” for switching to a one-step procurement for future leases. However, this does not ensure that the reasons for switching to a one-step procurement are valid. We stand by our recommendation that objective criteria or guidelines should be established.

<u>Recommendations 2 through 5</u>. OALC concurred and provided an acceptable implementation plan for each recommendation.

<u>Recommendation 6</u>. OALC stated that they have guidance in place to ensure accurate and reliable financial analysis including calculation of NPV. However, after reviewing OALC’s NPV calculations we provided additional information to OALC questioning the reliability of their NPV calculations and have not received any response.

<u>Recommendations 7 and 8</u>. OALC concurred and provided an acceptable implementation plan for each recommendation.

Appendix E

OIG Contact and Staff Acknowledgements

OIG Contact	Maureen Regan
Acknowledgments	Darryl Joe Mark Myers Ralph Taylor

Appendix F

Report Distribution

VA Distribution

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