OIG Investigation Provides a Rare Peek Behind the USPS Curtain

Fascinating details about how top U.S. Postal Service (USPS) officials make decisions and interact with one another are contained in a recently released report by USPS Office of Inspector General (OIG). The OIG report examines 11 allegations made against Robert Bernstock, the former President of Mailing and Shipping Services. Some charges were as serious as steering sole source contracts to former colleagues, while others were remarkably trivial, such as using his official position to obtain a restaurant reservation. The OIG terminated its 12-month investigation when Bernstock’s employment contract ended in June 2010 and the Department of Justice declined to prosecute potential criminal violations against him.

This article examines the unintended insight the OIG report provides on how the highest levels of postal management interact and the likely impact of the investigation on future noncompetitive purchases.

Summary of the Investigation

Bernstock was named President of Mailing and Shipping Services in June 2008. Previously, he worked at Kraft Foods, Vlasic Foods, Scott’s Miracle-Gro, Campbell’s Soup, and Dial Corporation, and served as a director on various corporate boards, including Nutrisystem, Inc. In his newly-created USPS position, he was responsible for managing and developing all retail and commercial products and services.

The OIG report concluded that Bernstock had: improperly used postal employees and resources to conduct his outside business interests; improperly directed sole source contracts to five of his former colleagues; made an unauthorized oral contract with Goldman Sachs; failed to disclose all of his business interests on federal disclosure forms; and inappropriately attributed $10 million in advertising expenses to artificially inflate the profitability of one segment. The OIG cleared Bernstock of other
allegations, including the allegation that he had used official time or postal funds for travel to his residence in Ohio.

High Ranking USPS Officials Interviewed

An unusually large number of top postal officials were involved in the Bernstock allegations and interviewed by the OIG in its 64-page report. (The report is available on our website under "Related Links" at www.hushblackwell.com/postal.) The following list of those interviewed reads like roll call at an Executive Board meeting:

- Postmaster General
- General Counsel and Senior Vice President
- President of Mailing and Shipping Services
- Chief Human Resources Officer and Executive Vice President
- Chief Financial Officer and Executive Vice President
- Vice President, Expedited Shipping
- Vice President, Supply Management
- Vice President, Retail Operations
- Vice President, Sales
- Treasurer
- Chief Counsel, Ethics and Federal Requirements
- Manager, Compensation
- Goldman Sachs Group, Inc.

Most OIG investigations do not involve a single person at the Vice President or higher level. This one, however, affected at least 10 postal officials at that rank or higher.

No one likes to be interviewed by the OIG, least of all senior officials. Given the high profile of the investigation, they will likely have either read the OIG report or summaries of it. What has yet to be publicly released are the 82 separate exhibits, which include memos documenting the individual interviews with each postal official. If these exhibits are released, they will undoubtedly shed further light on how top management operates.

Invasiveness of the Investigation
The OIG report demonstrates the wide scope of the Inspector General’s ability to freely audit and investigate activities at the Postal Service. The OIG poured over 20 months of Bernstock’s emails, and determined that precisely 1,422 of them involved his outside business interests. In addition, the OIG flyspecked his expense reports, his credit card bills, and most likely his bank accounts as well. They interviewed his administrative assistants, tracked his whereabouts, and cross-checked all his statements with other officials.

**Internal Politics Revealed**

The OIG report provides a rare look into office politics at the highest levels of the Postal Service. At this lofty level, top postal officials bend over backwards to avoid conflict with their peers or higher level officials. Lower level officials are not as reluctant to challenge colleagues and superiors, particularly when they are leveled at officials who are outside their direct line of report.

For example, when Bernstock arrived at the Postal Service, a mid-level USPS lawyer explained that he could not use postal employees or equipment to conduct personal business. Such advice was routine. Bernstock, who maintained many outside business interests, didn’t like the advice and escalated the issue to the General Counsel and the Chief Human Resources Officer. While those officials hold high rank, they are lower on the totem pole than Bernstock. Fearful of Bernstock’s reaction, they instructed the mid-level USPS lawyer not to send Bernstock the memo she had written documenting her advice. Instead, the Chief Human Resources Officer said he would provide Bernstock with the memo. The Chief Human Resources Officer later told the OIG that he thought it would be better if the memo came from the Postmaster General. Ultimately, Bernstock never received the memo.

When Bernstock was appointed to his position, he was “seen as the savior of the Postal Service to fix retail.” Thus, even two of the Postal Service’s highest ranking officials -- the General Counsel and Chief Human Resources Officer -- were afraid to risk offending Bernstock by providing documentation concerning the lawyer’s advice.

In another incident, the USPS Treasurer candidly admitted to the OIG that he cleaned up one of Bernstock’s messes without complaint because “I [didn’t] think I had the political capital to tell Bernstock he should come to me first.” These examples show the trepidation with which top-level postal officials maneuver among their peers.

This same pecking order mentality, however, does not necessarily apply at the lower levels of postal management. The same postal attorney who drafted the initial memorandum intended for Bernstock later wrote another memorandum on a different ethics matter and sent it to him directly. She showed no deference at all to Bernstock’s position within the agency. Most likely, the OIG investigation of Bernstock was prompted by complaints from lower level postal employees who were interviewed by OIG and quoted in the report but whose identity was withheld.
In addition to Bernstock, the OIG report is critical of General Counsel Mary Anne Gibbons, who is depicted as trying to minimize and partially defend Bernstock’s actions without valid justification. For example, Gibbons told the OIG that there were two separate de minimus standards for conducting non-postal activities on postal time: one that applied to hourly employees and one that applied to salaried employees. The OIG report, however, stated that its own checking found only one policy. The OIG also did not accept at face value her statement that the Postmaster General had the authority to allow Bernstock to use his office printer to print some personal documents.

The report goes on to cite other examples of Gibbons’ behavior which provides further illustration of senior management’s reticence to challenge higher level officials. According to the report, Bernstock said that Gibbons “physically ‘covered her ears’ and was adamant that ‘she didn’t want to talk about the past’” when she learned that Bernstock had used postal personnel for his private business interests. Further, although postal employees are required to report violations of postal law to the OIG, Gibbons did not. Finally, while Gibbons described Supply Management’s sole source procedures as a “strong process,” the Vice President of Supply Management contradicted Gibbons’ assessment.

Unlike Gibbons, the Vice President of Supply Management, Susan Brownell, did not try to defend Bernstock or her department’s role in facilitating his questionable activities. At OIG’s request, Brownell examined the six contracts that were awarded to Bernstock’s former colleagues and found that they contained deficiencies, lacked documentation, and lacked the proper signatures. She recommended to Bernstock that he immediately cancel one of the sole source contracts. On the day the OIG released its report, Brownell issued a new Management Instruction to tighten the noncompetitive purchase process.

The contrast between the report’s portrayal of Gibbons and Brownell could lead senior postal officials to conclude that attempting to defend the target of an OIG investigation is unwise. When the subject of a future investigation is a postal contractor or other outside party, agency officials will be even less likely to challenge OIG’s assumptions or depart from the party line. While top USPS officials are likely to be on guard against involvement in similar matters, the OIG is unlikely to conduct another investigation any time soon that involves so many of them.

**Impact on Future Noncompetitive Purchases**

The new Management Instruction on Noncompetitive Purchases (the "MI") prompted by the investigation was issued on June 29, 2010. The MI does not change the four grounds that can be used to justify a noncompetitive purchase, which are: (1) only one supplier exists; (2) industry structure or practice makes competition ineffective; (3) compelling business interest outweighs the benefits of competition; or (4) superior performance under an existing contract.
Instead, the MI tightens the approval process for sole source purchases. Requests for noncompetitive purchases expected to exceed $250,000 must be signed by the Vice President of the requesting office. Anyone making a request must sign a new three-page form that includes a certification that the requester has no financial or other conflicts of interest or loss of impartiality, and that they have not disclosed any nonpublic information to any party interested in the purchase. The contracting officer reviewing the request is directed to ensure that all necessary reviews and approvals, price determinations, and supplier evaluations are documented and included in the contract file.

The approval process has also been revised. All noncompetitive purchases valued at $10 million or more require approval by the Vice President of Supply Management. Requests for noncompetitive purchases of professional, technical and consultant service contracts valued at $1 million or more require approval from the Vice President of Supply Management.

Although the new MI does not specifically address Highway Contract Route (HCR) contract renewals, it is likely that they are not covered by the MI. As a practical matter, if HCR contract renewals fell within the scope of the MI, it would create an enormous paperwork burden and provide little, if any, benefit.

While the new requirements are mostly window dressing (agency policy remains lukewarm toward obtaining competition), contractors can expect the Postal Service to be more thorough in documenting the justification for future noncompetitive purchases.

Most sole source justifications are premised on superior performance by the incumbent contractor. None of the Bernstock sole source contracts relied on this justification. The OIG, however, is currently conducting a survey of noncompetitive purchases, and can be expected to pay greater attention to this area in the future.

**Likely Impact on Postal Procurement**

The OIG report will impact postal procurement in the following areas:

- **More careful analysis and documentation of noncompetitive purchases.** Although the sole source contracts at issue in the OIG report were newly awarded consulting contracts, most noncompetitive purchases are extensions of existing contracts. Nothing has changed in this regard as the new MI still allows USPS to extend and expand existing contracts based on the incumbent’s superior performance. However, such actions now require more documentation and will undergo greater scrutiny. **Expect postal procurement officials to leverage the tighter sole source requirements as grounds for seeking greater concessions from contractors before taking action.**

- **Fewer sole source consulting contracts.** In response to the sole source contracts steered to Bernstock’s former associates, the new MI imposes an extensive conflict of interest and loss of impartiality test on requesting postal officials. Postal officials are now forbidden from requesting that sole source contracts be issued to their former colleagues (within a one year period). **Expect high level postal officials to steer clear of any possible allegations of favoritism.** At lower levels, favoritism could be a concern, given the agency’s
view that its purchasing policies are not mandatory and the lack of an effective administrative review process. In any case, the new MI could result in fewer consulting contracts with individuals who recently left the agency.

- **Continued fear of the OIG.** Postal officials will be skittish when operating in a high profile area or when taking an action that could be questioned by the OIG. Expect procurement officials to feel more hemmed in and less likely to make concessions to contractors, even if they personally believe it is the right thing to do.

- **Emphasis on perceived hurdles created by SOX and the Postal Accountability and Enforcement Act (PAEA).** One of the Bernstock allegations involved the allocation of postal spending into the wrong USPS cost segment, which was alleged to have violated PAEA. Postal officials have already invoked Sarbanes-Oxley as grounds for why they can or cannot take various actions. Expect procurement officials to raise questions as to whether certain procurement actions will impact PAEA or other internal compliance obligations.

- **Watch for OIG’s report on noncompetitive purchasing.** The Postal Service relies heavily on noncompetitive purchasing techniques. For example, only 31% of RFPs were publicized via FedBizOpps.gov or other publications, and an impressive 75% of RFPs were issued to selected or pre-qualified suppliers. The OIG is currently studying private sector noncompetitive purchasing policies and will eventually issue a report on this subject.

**Conclusion**

Contractors can expect greater scrutiny to future sole source procurements. More thorough documentation will be needed to justify noncompetitive purchases. Incumbent contractors who are eligible for noncompetitive extensions to their contracts should expect procurement officials to exert greater pressure for concessions in return for extensions or expansions. In the end, however, the Postal Service is unlikely to make major changes in this area unless forced to do so. Conducting a competitive procurement is more time-consuming, resource-consuming, and riskier than extending an existing contract, so noncompetitive purchases can be expected to continue at roughly the current rate.

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