

T&E COMMITTEE #3
July 8, 2013

MEMORANDUM

July 3, 2013

TO: Transportation, Infrastructure, Energy and Environment Committee
FROM: Glenn Orlin, Deputy Council Administrator
SUBJECT: Inspector General Report – administration of DOT tree planting services contracts

The Office of the Inspector General has completed its investigation of the Department of Transportation's tree planting services contract administration, stemmed by allegations from a former employee of one of DOT's contractors. The IG's report is on ©1-26 and includes the Executive Branch's initial response in a memorandum from the Chief Administrative Officer (©23-26). Subsequently, DOT's Director has issued his reply to the report (©27-29).

The Council's procedure on IG reports is for the appropriate Committee to review the report with OIG and appropriate parties, focusing on policy and management issues raised by report. The Committee may recommend a change in policy or law to the Council, or it may recommend to the Council President a draft letter on the report to appropriate parties. The Council President will then circulate the draft letter for Councilmembers' comments.

Inspector General Edward Blansitt and his staff will brief the Committee on OIG's findings, and DOT Director Arthur Holmes, Jr., will summarize his department's response, followed by questions from Councilmembers.

Office of the Inspector General
Report of Investigation
Administration of Montgomery County Department of Transportation
Tree Planting Services Contracts

April 26, 2013

Report Summary

The Office of the Inspector General (OIG) received a complaint alleging that a contractor for the Department of Transportation, Division of Highways, Tree Maintenance Section had failed to comply with the terms of the contract and that the Contract Administrator had misused funds and mismanaged the contract. We also investigated an allegation that the Chief of the Tree Maintenance Section for the program initiated an action against the Complainant, a contractor's employee, in retaliation for disclosing information about contract administration and performance he reasonably believed to be gross mismanagement, or a gross waste of money.

The objectives of our investigation were to determine the validity of the Complainant's allegations. Our investigation covered the period of the tree planting services contract, November 13, 2009 through November 12, 2012.

We found that the MCDOT Division of Highway Services Tree Maintenance Section mismanaged the tree planting services contract and misused the arborist inspection contract and estimate that if uncorrected, the program funds misused could be in excess of \$180,000.

We also found that the Complainant's removal resulted from his reports of mismanagement by the Contract Administrator to the contractor who was his then employer, and his stated intent to report the alleged mismanagement to a higher authority in the County. Montgomery County Code has two sections intended to prevent retaliation against contractors and employees for revealing information about fraud, waste, and or mismanagement. The events described in this report appear to violate the spirit, if not the letter of either Code section.

Our report recommends corrective actions that should be undertaken by the Department of Transportation.

The Chief Administrative Officer's response to our draft report includes a list of points regarding the report's findings he believes should be clarified or corrected, that we have addressed in the final report. However, the response indicates agreement with all of our recommendations. He acknowledges that improvement in the administration and enforcement of the contract is necessary, and indicates that MCDOT's Director has begun to take some corrective actions and make other improvements in response to the report's findings and recommendations.

Introduction

The Office of the Inspector General conducted an investigation of the Montgomery County Department of Transportation, Division of Highways, Tree Maintenance Section's (MCDOT) administration of its roadside tree planting program, its inspection services, and its related Tree Planting Services contract(s)¹ with a tree planting services firm (TPS contractor). We also investigated allegations that the Chief of the MCDOT Tree Maintenance Section (Contract Administrator) for the program initiated an action against a contractor's employee in retaliation for disclosing information about contract administration and performance he reasonably believed to be gross mismanagement, or a gross waste of money.

On June 7, 2012, the Office of the Inspector General (OIG) received a complaint alleging that the TPS contractor had failed to comply with the terms of the TPS contract and the Contract Administrator had misused funds and mismanaged the MCDOT Tree Planting Services procurement contract (TPS contract).

The allegations against the Contract Administrator were made by an individual (Complainant) who had provided inspection services and presented himself as a certified arborist employed by an arborist inspection firm under contract with the County (Arborist contractor). Subsequently, the Arborist contractor withdrew the Complainant from his assignment working for the MCDOT Tree Maintenance Section and replaced him with a new arborist (Replacement arborist). The Complainant's employment was terminated by the Arborist contractor on June 13, 2012.

Objectives, Scope, and Methodology

The objectives of our investigation were to determine the validity of the Complainant's allegations of MCDOT's contract mismanagement, misuse of county funds, and potential act of retaliation. Our investigation covered the period of the current tree planting services contract, which became effective November 13, 2009 and terminated November 12, 2012.

Three planting seasons and 1,170 tree plantings were covered by this review. We did not review the legal or fiscal authority for the County's tree planting services program, nor did we conduct a best practices comparison to the tree planting policies of other jurisdictions.

The objective, scope, and methodology of our investigation are detailed in Appendix A.

¹ Tree Planting Services Contract # 0506020055-AB dated November 13, 2009 by and between Montgomery County Maryland and the TPS contractor. In a contract amendment dated 15 May, 2012, the TPS contractor notified the County of a change of its business name. A secondary Tree Planting Services Contract was awarded to another tree planting services firm (Secondary TPS contractor) under contract # 0506020055-BB. We found no evidence that the Secondary TPS contractor was issued a work order under the contract; thus, they were not included in this investigation.

Background

Under Maryland law governing roadside trees², the planting and care of all trees growing within the right of way of a public road³ are governed by State laws, rules, and regulations.⁴ The Maryland Department of Natural Resources (DNR) may issue a permit to a County to administer a continuing program of general care of trees located in public road rights of way for which the County possesses easements.⁵

The DNR Forest Service issues “blanket” permits that allow a County to perform any or all of the following types of tree care: tree removal, tree pruning, tree clearance from overhead facilities, tree planting, ground disturbance, protection of tree roots, and use of pesticides.⁶ Permits are valid for a calendar year, and may be renewed.⁷ The Montgomery County Department of Transportation’s web page states that the County performs tree maintenance under a permit from the State, and that the Department’s Tree Maintenance Section in the Division of Highway Services performs “pruning, removal, insect and disease control, planting, root cutting, etc.”⁸

MCDOT reports that it plants approximately 1,800 trees per year to replace trees that have been removed from the public right-of-way. The Montgomery County tree planting services contract specifies that trees are to be planted between October 15 and May 31, and that a contractor must plant during fall and spring planting seasons. The County will replace a tree when a request is received, an arborist inspection supports approval of the request, and funds are appropriated by the County Council and encumbered. A County arborist inspects the property to identify appropriate species, location, and timing of the replacement.

MCDOT has issued standards for approved street tree varieties.⁹ Size variations are acceptable if in conformity with the standards issued by the American Nursery & Landscape Association in its “American Standard for Nursery Stock, Z60, 1-2004.”¹⁰

MCDOT has also issued product standards and planting procedures to be followed when the County or a County-retained contractor plants a tree. Generally, these standards and procedures have been designed to meet the American Standard for Nursery Stock.

During the period covered by this review, Montgomery County awarded tree planting service and arborist inspection service contracts to two independent contractors determined under a sealed-bid procurement contract. Both contractors are Montgomery County-based firms. Montgomery County paid \$158,184¹¹ for plant material and planting services under a contract

² Md. Code, Natural Resources Article (Md. Nat. Res. Art.), Title 5, Subtitle 4, Part I. Roadside Trees. A County may supplement State law, under Md. Nat. Res. Art. § 5-403(d)

³ Md. Nat. Res. Art. § 5-401.

⁴ Md. Nat. Res. Art. § 5-402.

⁵ Code of Maryland Regulations (COMAR) Title 08 Natural Resources § 08.07.02.

⁶ Md. Nat. Res. Art. § 5-406 and COMAR § 08.07.02.

⁷ COMAR § 08.07.02.

⁸ <http://www6.montgomerycountymd.gov/hwytml.asp?url=/content/dot/highway/tree.asp>. Dec. 14, 2012.

⁹ Standard No. MC-703.01 – Approved Street Tree Varieties, Major (Large) Trees, and Standard No. MC-703.02 – Approved Street Tree Varieties, Minor (Small) Trees.

¹⁰ American Nursery and Landscape Association. “American Standard for Nursery Stock.” Z60, 1-2004 (May 12, 2004): Web. 31 Oct. 2012. <<http://www.jerseygrown.nj.gov/jgstandards.pdf>>.

¹¹ Two planting programs in the fall of 2010 totaling \$50,000 were authorized under Purchase Order (“PO”) #1001818, a program for the fall of 2011 with a value of \$49,045 was authorized under PO # 1012985, a planting program valued at \$49,959 was authorized in the spring of 2012 under an undisclosed PO #, and an additional expenditure of \$9,180 for

awarded to the TPS contractor, and \$236,847¹² for arborist inspection services awarded under a contract to the Arborist contractor.

Findings

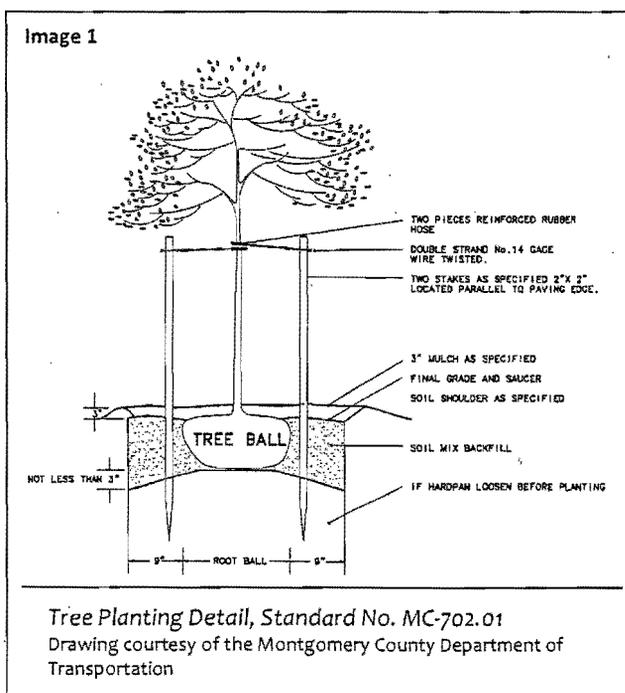
Finding 1. The MCDOT Division of Highway Services Tree Maintenance Section mismanaged the tree planting services contract and misused the arborist inspection contract.

We estimate the program funds misused to be in excess of \$180,000.¹³ A long term consequence is that Montgomery County has more than 1,100 trees in the rights of way that could fail to develop the root structure necessary to prevent felling by wind and snow storms, and could have life spans up to 60% shorter than the expected life of a correctly planted tree of the same species.

Finding 1 (a). The MCDOT, Division of Highway Services' Tree Maintenance Section mismanaged the tree planting services program by accepting and paying for planting services and materials provided by the TPS Contractor that the arborist inspectors identified as improperly planted, damaged, or diseased.

The OIG reviewed e-mail messages exchanged among MCDOT, the arborist inspectors, and the TPS contractor for the period from January through August 2012. These messages evidenced notifications from the arborist inspectors, (both the Complainant and the Replacement arborist) to the TPS contractor and the MCDOT Contract Administrator about the need for corrective action to remedy the TPS contractor's improper planting techniques.

The arborist inspector reports identified that during the 2012 spring planting season, 45% of the trees provided by the TPS contractor failed to meet the planting standards and specifications established within the TPS contract. MCDOT accepted and paid for these trees even though it had received arborist inspection reports that had identified the improper planting techniques that would be expected to adversely affect the trees.



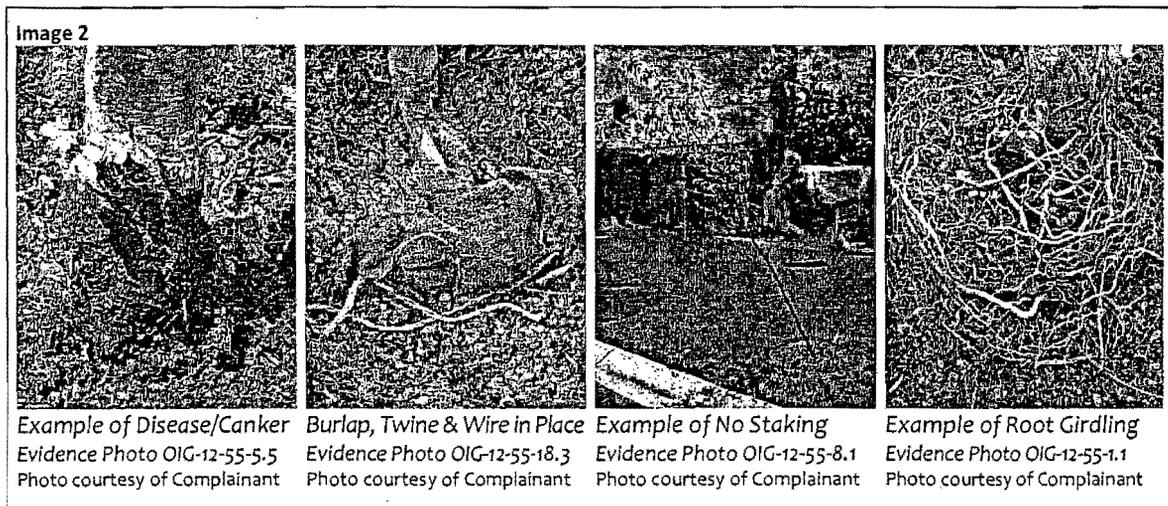
an additional year of after care and extended guarantee was authorized under PO # 1018660 during the spring of 2012.

¹² The arborist contractor has received a total of \$509,897 since January 1, 2011 for all arborist-related services.

\$236,847 was paid for arborist services related to the tree planting services program. The residual \$273,050 is related to other arborist inspection services not the subject of this investigation.

¹³ See Appendix C.

The TPS contract contains planting procedures and specification that TPS contractors are to observe (see Image 1). During a June 14, 2012 meeting with the OIG scheduled to follow-up on his June 7 complaint to the OIG, the Complainant alleged the TPS contractor had not complied with the tree planting specifications of the TPS contract, and presented 278 photographs as evidence. Of these, 133 indicated the location of the tree and contained narrative descriptions about trees that had been planted so deep as to promote disease, trees where the contractor had failed to remove or pull back the burlap, twine, and wires from the top two-thirds of the root ball, trees that had not been properly staked when support was required, and tree roots that had become girdled by the nursery's container due to the TPS contractor's failure to spread them out¹⁴ (see Image 2).



OIG staff reviewed the annotated photographic documentation with an independent, third party consulting arborist,¹⁵ who observed that in 21 of the 36 TPS contract irregularities documented by the Complainant, *a depth of planting, a presence of burlap, wire, or twine, root girdling, or disease or canker could be expected to shorten the life span of the surviving contractor-planted trees – perhaps to as little as 10 to 20 years – and make the trees more susceptible to falling in storms for want of a properly established root system.* The consulting arborist noted during his meeting with the OIG that *generally, healthy trees of the species used by the County might be expected to live for 70 to 80 years.*¹⁶ He further opined that the Complainant's assertions appeared to be fair and credible, and that there appeared to be reasonable cause to either reject the work provided by the TPS contractor, refuse to authorize payment for failing to meet contract specifications, pursue replacement under guarantee, or all of the foregoing.

¹⁴ A root that partially or entirely encircles the trunk and/or buttress roots, which could restrict growth and downward movement of photosynthate and or water and nutrients up. Guideline Specifications for Nursery Tree Quality, Urban Tree Foundation and California Department of Forestry.

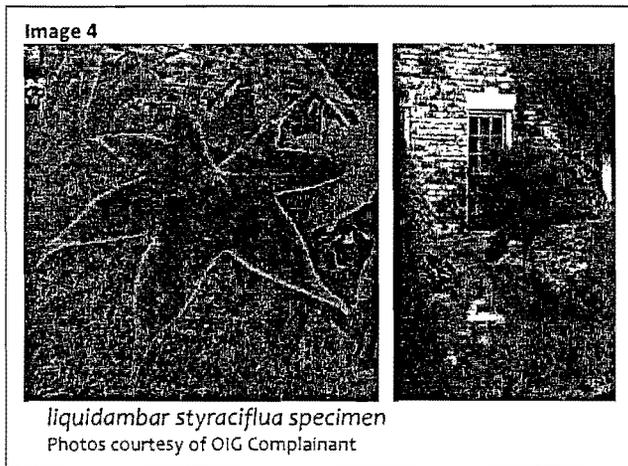
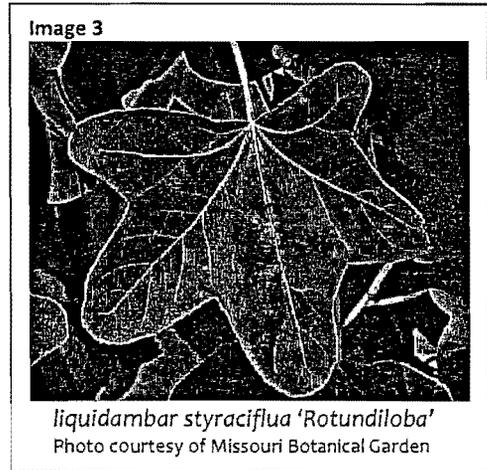
¹⁵ The OIG engaged the assistance of a consulting arborist registered with the American Society of Consulting Arborists, who presented, among other qualifications, expertise in tree risk assessment, forensic investigation, and service as an expert witness in litigation.

¹⁶ Attested statement of consulting arborist, excerpted from transcript of July 16, 2012 meeting with OIG staff.

Finding 1 (b). The TPS contractor unilaterally substituted and the MCDOT Tree Maintenance Section authorized payment for trees that were not the cultivar specified in the contract.

MCDOT accepted and paid for plant material that did not meet contract specifications. Payment was authorized despite receiving arborist inspection reports that identified the improper material. The TPS contractor substituted plant material over multiple planting seasons without prior authorization, despite giving MCDOT assurances that the substitution had been limited to the spring 2012 planting season.

The TPS contract specifically identifies *Liquidambar styraciflua* 'Rotundiloba' (Rotundiloba) as the sweet gum cultivar that is to be used for the county's tree planting program. The leaves of the Rotundiloba have distinctively rounded lobes (see Image 3), and the tree does not set fruit, a requirement set by MCDOT.¹⁷ During a meeting with the OIG, the Complainant presented physical and photographic evidence of sweet gum specimens collected from trees planted by the TPS contractor which exhibited the distinctly pointed leaf lobes and the presence of gum ball fruit that are indicators of the common sweet gum, *Liquidambar styraciflua* (see Image 4). The TPS contract



states that "[s]ubstitutes of trees may only be made with the approval of the Contract Administrator, or designee," that "plant material provided under the terms of the contract shall be inspected by the Contract Administrator...for conformance to species, size, color, quantity, and quality...prior to planting," and that payment of an invoice "shall be based on the proper completion of all work covered by this contract."

Between May 23 and July 30, 2012, two arborist inspectors provided MCDOT and the TPS contractor with fourteen locations

where sweet gum trees were bearing the distinctive gum ball fruit, negating the possibility that these trees were the Rotundiloba cultivar.

On May 25 the Contract Administrator authorized payment for the sweet gums despite receipt of the arborist inspection reports that identified the improper planting material.

In a subsequent, May 29 e-mail, the TPS contractor stated that the "trees are NOT the rotundiloba, but they are a fruitless variety, called 'Happy Daze' This fruitless variety has the same or very

¹⁷ Missouri Botanical Garden. "*Liquidambar styraciflua* 'Rotundiloba'." Web. 6 August 2012
<<http://www.missouribotanicalgarden.org/gardens-gardening/your-garden/plant-finder/plant-details/kc/u950/liquidambar-styraciflua-rotundiloba.aspx>>.

similar leaf to the regular Sweetgum, so they can easily be confused. I think you will agree, based on the website link I have below, we are ok to [sic] on these trees. Please confirm.”

The Director of the Montgomery County Department of Transportation (Director) stated that after conducting research and finding that “both sweetgum cultivars were the same price (and that the ‘Hapdell’ cultivar was seedless)...MCDOT determined that ‘Hapdell’ cultivar was an acceptable variation of a fruitless sweetgum; therefore no further action was taken.” On May 29, one hour after receiving the TPS contractor’s substitution request, the Contract Administrator responded “Looks good to me. I confirm.” That approval, however, came four days after MCDOT approved payment of the invoice.¹⁸



The TPS contract states that “[s]ubstitutes of trees may only be made with the approval of the Contract Administrator, or designee.” The TPS contractor did not receive approval before substituting plant material. MCDOT had not modified the TPS contract, nor the County Standard No. MC-703.01 to allow for the ‘Hapdel’ cultivar.

On July 26, the TPS contractor further qualified its use of *Liquidambar styraciflua* ‘Hapdel’ (Happy Daze®)¹⁹ stating that “the Sweetgum’s that we planted in the Fall of 2011, were the fruitless, Rotundiloba’s as we were able to locate them at that time.”

The OIG conducted an on-site inspection of a sample of 32 of the 152 Rotundiloba sweet gums invoiced for the spring 2012, fall 2011, and fall 2010 planting programs. Eighteen of these 32 specimens (56%) were planted in 2011. At each location, the tree was documented, photographed (see Image 5), a leaf cutting collected, and when present, gum ball fruits were collected. Five of the 32 specimens (16%) selected by OIG presented seed balls.

Specimens collected by the OIG were examined by a highly credentialed third party arbor scientist (Arbor scientist) who determined that none of the samples represented a Rotundiloba cultivar,²⁰ but who could not confirm that the specimens presented were Happy Daze®. The Arbor scientist opined that as a nearly seedless cultivar, Happy Daze® could *not* be considered consistently fruitless – a threshold set by MCDOT – and would thus still be capable of bearing fruit.

During interviews with the OIG, the Chief of the MCDOT Division of Highway Services (MCDOT Division Chief) reported that a TPS contractor’s unilateral action to substitute plant material would represent a breach of the contract. The Contract Administrator stated that he would not knowingly approve payment for trees that had been substituted without approval, but asserted that Happy Daze®, a fruitless sweet gum cultivar previously unfamiliar to him, would be an acceptable substitute for the contractually required Rotundiloba. He also acknowledged that he had likely authorized the payment.

¹⁸ Invoice # 4566, dated May 17, 2012, and approved May 25, 2012.

¹⁹ “Happy Daze” is a registered trademark of Discov-Tree Partners, LLC, 3000 West Springfield Ave., Champaign, IL 61822.

²⁰ Of the 32 trees sampled, 18 leaf cuttings were collected. Gum balls were collected from 3 of the 18 specimens. We found no evidence that a tree had been planted at four locations, and we were unable to locate one address. We collected no specimen from 9 trees because these were oversamples that were inspected solely due to proximity to another sample.

No reason was offered to explain why the County would accept trees thought to be “nearly seedless”²¹ rather than the fruitless *Rotundiloba* required by the contract. The only apparent benefit of doing so was the ability to avoid forcing the TPS contractor to replace the 191 trees that had already been planted and for which the Contract Administrator had already authorized payment.

Finding 1 (c). The TPS contractor presented invoices to MCDOT for work not authorized at time of performance, which MCDOT accepted and paid.

Documents and invoice statements indicate funds had not been encumbered, and a purchase order had not been issued before the TPS contractor commenced its spring 2012 planting work. Further, MCDOT had not ensured that plant material and planting techniques met TPS contract specifications before approving the invoice for payment.

The TPS contract specifies that a contractor must not undertake any contract performance until it receives a purchase order authorizing work for the next contract term. The TPS contract also requires payment to be based upon the proper completion of all work, as do Montgomery County Procurement Regulations.²²

In an April 19 e-mail the TPS contractor asked what needed to be done to receive payment for its most recent work, indicating that it “[could not] afford to let the \$50k invoicing and payment go too much longer.” MCDOT’s Contract Administrator responded that “I have a requisition, for the \$50k and it is in process to become a [purchase order]. Once it does, we will submit the invoice.” The TPS contractor’s invoice for the spring, 2012 tree planting program was dated May 17, 2012, and payment of the invoice was authorized by MCDOT on May 25, 2012.²³ When the invoice was prepared on May 17, it indicated that the purchase order number was “to be provided.”

Although the invoice was approved on May 25, a later document indicated neither the planting nor replacement and replanting required to meet TPS contract specifications had been concluded by that date. In an e-mail dated May 29, the TPS contractor indicated it had “completed our fix up of the trees in the Kenwood”, had “completed the remaining few trees that needed to be planted”, and had “completed the staking of several of the ‘old’ Decoverly trees.”

Finding 1(d). MCDOT authorized purchase of extended guarantees for trees that arborists had identified as likely to fail due to improper planting techniques.

The TPS contract allows for MCDOT to purchase one additional year of extended warranty for any tree. The extended warranty costs \$150 per tree regardless the species or original cost. At the conclusion of the spring 2012 planting program, MCDOT purchased extended warranties even though no evidence was found to suggest that MCDOT had ever purchased extended warranties prior to this date.

An invoice to MCDOT from the TPS contractor, dated June 11, 2012 was initially rejected by another MCDOT employee for lack of information. A revised invoice, that was submitted on

²¹ Landscape Plants. Oregon State University, Department of Horticulture. "*Liquidambar styraciflua* 'Happydaze'." Web. 12 December 2012 < <http://oregonstate.edu/dept/ldplants/listhap.htm>>.

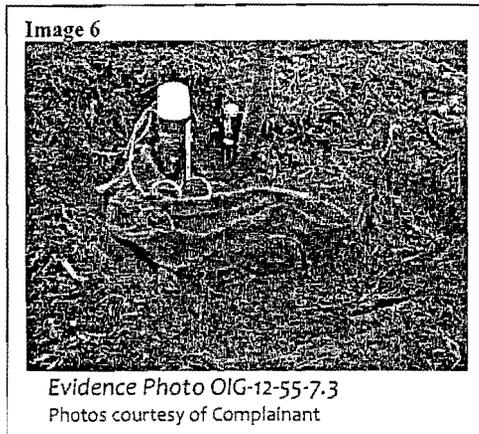
²² Code of Montgomery County Regulations, 11B.00.01.08.1.2.

²³ Invoice # 4566 for \$49,959.00 for tree planting completed per detailed listings.

June 29, 2012 and approved by the Contract Administrator that same day (#4602), shows that MCDOT paid \$150 per tree for one year of additional after care and extended guarantees on 55 trees. In total, that invoice (#4602) shows \$8,250 for the extended warranties, \$600 for tree guards, and \$330 for relocation of trees - a total of \$9,180. All of the trees for which the extended warranties were purchased were either Okame cherry (*Prunus x incamp*) or Yoshino cherry (*Prunus x yedoensis*).

The invoice identifies each tree for which the extended warranty was purchased by species and address. The extended warranties covered 34% of all cherry trees purchased during the spring 2012 planting program including 5 trees in the Kenwood neighborhood. The spring 2012 invoice price was \$95 for an Okame cherry and \$79 for a Yoshino cherry. At \$8,250, the extended warranties cost \$3,409 more than did the initial purchase of the cherry trees.

Twenty-eight inspection reports focus on the Complainant's allegations that the root flares of trees in the Kenwood area of Montgomery County had been planted too deep, that the trees were falling over because girdling had contributed to the lack of an adequate root system, and that the trees needed staking for support (see Image 6).



The TPS contractor counter asserted in twelve rebuttals that the trees were failing because the Complainant had exposed their roots and because the Complainant directed the use of inadequate staking methods.

Documents evidence that the Complainant asserted the root flares had been exposed because the trees that had been planted too deep were beginning to display rot and canker on the tree trunk, and needed to be exposed to air to dry until the TPS contractor replanted the tree to lift its root flare. The Complainant asserted that such work should be remedial, no cost action required under the TPS contract's performance requirements.

In a November 16, 2012 interview the Contract Administrator stated "my understanding of this invoice was there was a problem with a lot of holes out there, and we didn't know how long they had been out there and they [the TPS contractor] were telling me they weren't going to guarantee those trees"

In a November 16, 2012 interview the Division Chief stated "we have express notice that I now have 30 open holes."

On June 7, 2012 the Complainant provided photographs of his inspection of 36 trees, of which only 10 were either Okame or Yoshino Cherry and only four of which showed excavation. A total of twenty-seven trees showed excavation. Of those, 10 trees had been planted prior to the 2012 spring planting season.

It is illogical to pay \$150 to obtain one additional year of extended warranty when a tree that fails after the lapse of the initial guarantee could be replaced in any subsequent year with a new tree, a full one-year warranty, and at the lower cost of seventy-nine or ninety-five dollars.²⁴

²⁴ Although the TPS contract § C (2) makes provision for annual price adjustments, these prices have not changed since the TPS contract was initially bid.

Further, since the TPS contractor's refusal to honor the warranty was supposedly based on the Complainant's excavation related to 30 trees, most of which are not covered by the extended after care warranty, and only 8 of which were Okame or Yoshino Cherry, there is no logical explanation for purchasing this extended warranty on 55 Cherry trees..

Documents we obtained from MCDOT indicate that the TPS Contractor was pressuring the Contract Administrator to compensate the TPS contractor for its work to cure the non-contract-compliant planting techniques identified in arborist inspection reports. In a May 29 e-mail to the Contract Administrator, the TPS contractor inquired "Can you please advise of how I should be [bill?] for the approx[imate] \$9k amount." In a June 7 e-mail, the TPS contractor states "we are still awaiting our payment for all of this Springs work, and the 'additional work' P.O. too."

In a third e-mail to the Contract Administrator dated June 28, the TPS contractor states "When I reviewed our contract line items, this 'after care' line item is much more in line with the scope of work that was required to go back and 'fix' tree problems. Some of these were related to the type of 'Excavation' inspection that was done on numerous trees, as well as the method of staking that we were directed to do initially."

The Contract Administrator approved payment of this invoice on June 29, 2012. No other documents after June 29 evidence any additional attempts by the TPS Contractor to pressure the Contract Administrator for \$9,000 compensation for its additional work, nor were any additional payments made to the TPS Contractor for 2012 spring planting season work.

During interviews with the OIG, the MCDOT Division Chief stated that he knew of no reason that should prompt the County to purchase an extended warranty, while the Contract Administrator stated he believed the purchase to be justified.

Finding 1 (e). MCDOT contracted for arborist inspection services but did not follow-up on inspection reports.

MCDOT chose to contract for external arborist inspection services instead of directly employing an arborist. In November 2011, MCDOT engaged the Arborist contractor to provide arborist consultation and inspection services related to administration of the TPS contract. The Arborist contractor assigned the Complainant in this investigation to MCDOT on or about April 10, 2012. Under the arborist inspection services contract, the Arborist contractor paid the Complainant \$55,700 per work year to serve as an arborist inspector for MCDOT. MCDOT paid \$171,850 per work year to the Arborist contractor to secure the Complainant's services plus a \$1,200 per month vehicle allowance.

From April 10 through May 24, 2012 the Complainant complied with his responsibilities under the arborist inspection and consultation services contract by providing oral, photographic, and written inspection reports to the TPS contractor and the MCDOT Contract Administrator. As previously detailed, these inspection reports documented plant material or planting techniques that did not meet the TPS contract specifications and that should be replaced and/or replanted.

On July 25, a Replacement arborist inspector e-mailed a tree inspection list to the Contract Administrator on which 188 tree plantings that did not meet the planting procedures and specifications contained in the TPS contract were identified (11 additional planting exceptions identified by the Complainant were not included on this list). In all, 45% of the 437 trees planted

during the 2012 spring planting program were found to exhibit some deviation from the TPS contract planting procedures and specifications.

Finding 1 (f). MCDOT acted to address deficiencies only after the OIG announced this investigation on July 17, 2012 and after the reports noted by the contracted Replacement arborist in late July mirrored those of the Complainant.

As noted above, a Replacement arborist inspector e-mailed a tree inspection report to the Contract Administrator in which he identified 188 tree plantings that did not meet the planting procedures and specifications contained in the TPS contract on July 25, 2012.

Although we found evidence that the Contract Administrator did, in some cases, append comments in a follow-up e-mail message to the TPS contractor, we found no evidence of a formal notification from the Contract Administrator to the TPS contractor to cure planting defects until August 9, 2012 – *three weeks after the Inspector General announced the commencement of his investigation.* In the August 9 cure notice, MCDOT reported that it had discovered burlap, twine, and wire around the upper two-thirds of the root ball on 14 of the 43 trees it inspected. The cure notice did not report that an arborist inspector had indicated that nine of these 43 trees had defoliated (per a June 1 inspection report), nor did it make any mention of trees within this sample the Complainant had reported that exhibited girdled roots or that had been planted too deeply.

During interviews with the OIG, the MCDOT Division Chief opined that he viewed the tree planting services contract as fairly small in terms of scope, effect, and risk, and admitted that he did not have a lot of conversation about its administration with the Contract Administrator.

Furthermore, the Contract Administrator claimed that short staffing and workload had the impact of loosened enforcement on the acceptance inspection, and that he had relied upon the inspection at the end of the guarantee period as a fail-safe back up to identify problem trees to be corrected and dead trees to be replaced. He admitted to the OIG that he dismissed most of the allegations made by the Complainant that dealt with issues of longer term consequence (such as trunk canker/rot and root girdling) that were corroborated as credible by the OIG-engaged arborist consultant.

An inspection at the end of the one-year guarantee period would only yield a binary decision at that point in time: Is the tree alive, or is it dead or dying? That inspection would not reveal the root girdling, root constriction, or other planting defects reported by the arborist inspectors that would have the effect of shortening the tree's life or making it more susceptible to felling by wind or snow storms.

The Contract Administrator also acknowledged that the intent of the contract is to provide written notifications of non-compliance, but that he had instead relied upon verbal notification.

Finding 2. The primary reason for the removal of the Complainant from the County contract was that he reported what he reasonably believed to be serious waste and mismanagement by the Contract Administrator to officials he reasonably believed were in a position to take appropriate corrective actions.

Montgomery county Code has two sections intended to prevent retaliation against contractors and employees for revealing information about fraud, waste, and or mismanagement.

Under the Montgomery County Code Chapter 11B - Contracts and Procurement, Section 35A – Disclosure of Illegal or Improper Actions, “*a covered employee²⁵ must not be subjected to a personnel action²⁶ by the Employer²⁷ for disclosing, to a County official or employee, information involving the solicitation, award, administration, or performance of any contract that the employee reasonably believes is an abuse of authority, gross mismanagement, or gross waste of money.*”²⁸ (See Appendix B for full text.)

Under the Montgomery County Code Chapter 2 - Administration, Section 151 –Inspector General, the act of “*retaliating or threatening to retaliate against any person for filing a complaint with the Inspector General, furnishing information, or cooperating in any audit, study, or investigation*” is designated a Class A violation of the Code.²⁹ (See Appendix B for full text.)

The Complainant raised legitimate concerns with the Arborist contractor in writing on June 7, 2012, one week before he was terminated. We found nothing to evidence whether the Arborist contractor made an effort to address the Complainant’s concerns regarding the TPS contract mismanagement. We did, however, find evidence that the Arborist contractor reported those allegations to the individual against whom the allegations were made - the Contract Administrator - who, in a subsequent email, informed the Arborist contractor that the services of the Complainant were no longer required by the County.

The events described in this report appear to violate the spirit, if not the letter of either Code section.

Finding 2 (a). Complainant’s removal resulted from his reports of mismanagement by the Contract Administrator to his then employer, the Arborist contractor, and his stated intent to report the alleged mismanagement to a higher authority in the County.

On June 7, 2012 the Complainant contacted the OIG alleging the MCDOT Contract Administrator’s mismanagement of the TPS contract. In his conversation with the OIG, the Complainant alleged that the Contract Administrator had demonstrated a reluctance to enforce the performance and guarantee provisions of the TPS contract with respect to correcting or replacing trees that did not meet MCDOT planting specifications. In his written statement to the

²⁵ Montgomery County Code, § 11B-35A(a) defines a *Covered employee* as an employee of a contractor or subcontractor that performs or performed services under a contract subject to § 11B-35A of the Code.

²⁶ Montgomery County Code, § 11B-35A(a) defines a *Personnel action* as an act or omission by the employer that has a significant adverse impact on the employee, or a change in the employee’s duties or responsibilities which is inconsistent with the employee’s position and salary.

²⁷ Montgomery County Code, § 11B-35A(a) defines an *Employer* as a contractor or subcontractor that, through the use of a covered employee, performs or performed services under a County contract.

²⁸ Montgomery County Code, § 11B-35A(b)(1) and § 11B-35A(c).

²⁹ Montgomery County Code, § 2-151(m)(3).

OIG, the Complainant also alleged that the Contract Administrator had pressed him on three separate occasions to approve the TPS contractor's work in order for its invoice to be paid, and that on each occasion he declined to approve the invoice because the TPS contractor had not met the plant material and planting specification of the TPS contract.

In a June 7, 2012 e-mail to the Arborist contractor, his employer, bearing the subject "Course of Action", the Complainant reported those issues related to mismanagement of the TPS contract and the related waste of county funds that had also been alleged to the OIG earlier that same day. That e-mail advised his employers that he discovered during his inspections "...the [TPS contractor] had improperly installed approximately 800 trees in the Fall 2011 and Spring 2011 [sic - 2012] planting periods. In addition many of these trees were the wrong species and many had defective root and upper crown systems. This substandard work failed to meet even the minimum standards of the contract and therefore shall be rejected. The failure rate was at/close to 100 percent, which is unprecedented in my experience.

Instead of defaulting [TPS contractor] I was asked by [the Contract Administrator] to approve the Spring 2012 bill of \$50,000 given his verbal assurance that he would require [the TPS contractor] to perform some, but not all, remedial work. However in private he stated to me that he was not going to require [the TPS contractor] to perform any rework..."

The Complainant later stated: "In my estimate, the cost of bringing the 800 trees up to contract specifications exceeds \$60,000 in rework." His e-mail also referred to a May 31, 2012 meeting with his employer in which he had brought these problems to their attention and requested direction on how to handle the situation, but indicated that to that date he had received none.

Termination of the Complainant by the Arborist contractor

The June 7 e-mail was subsequently forwarded by the Arborist contractor to the Contract Administrator on June 12, 2012 preceded by the single sentence: "This is the June 7th email we received from [Complainant]."

On the morning of June 13, 2012, the Contract Administrator sent an e-mail to the Arborist contractor stating: "we no longer need the services of arborist [Complainant]."

Later that morning, the Arborist contractor terminated its employment of the Complainant.

On July 18, 2012 the Complainant wrote to the Inspector General alleging that "my discharge was in retaliation for my reporting on the improper actions by [the Contract Administrator]."

The timing of these events links the Complainant's reporting of the allegations of mismanagement to his discharge.

Timing of Events Preceding Complainant's Termination from Employment

Date & Time	Event	Stmt*	Mail*	Tel*
31 May @ 10:00 am	Complainant seeks Arborist contractor management direction regarding MCDOT's TPS contract mismanagement issues	✓		
7 Jun @ 10:28 am	Complainant files detailed complaint with Office of the Inspector General alleging MCDOT's mismanagement of the TPS contract, payment for incorrect plant material and improper planting techniques, and misuse of funds by MCDOT	✓		
7:01 pm	Complainant sends follow-up e-mail to Arborist contractor management seeking direction regarding MCDOT's TPS contract mismanagement issues		✓	
8 Jun am	Arborist contractor manager questions why Complainant sent e-mail; Complainant tells Arborist contractor manager he was going to file a complaint with the county inspector's office	✓		
11 Jun @ 10:18 am	Arborist contractor manager places 42 sec phone call to Contract Administrator			✓
12:50 pm	Contract Administrator places 2:48 min phone call to Arborist contractor manager			✓
late pm	Arborist contractor manager tells Complainant that Arborist contractor executive management will speak with someone in County upper management	✓		
12 Jun @ 7:15 am	Contract Administrator and Complainant meet Contract Administrator inquires who else has been told besides Complainant's employer Complainant replies "I filed a complaint with a higher department in the County"	✓		
8:52 am	Contract Administrator places 36 sec phone call to Arborist contractor manager			✓
10:28 am	Arborist contractor manager forwards Complainant's June 7 follow-up e-mail to Contract Administrator		✓	
late pm	Arborist contractor manager asks Complainant to meet with Arborist contractor management next day at 7:30 am	✓		
13 Jun @ 7:13 am	Contract Administrator sends e-mail to Arborist contractor manager stating "we no longer need services of arborist [the Complainant]"		✓	
7:13 am	Arborist contractor manager sends reply e-mail to Contract Administrator "This is all that I need"		✓	
7:14 am	Arborist contractor manager sends e-mail to Contract Administrator stating "When you can, please send me the e-mail we discussed"		✓	
7:30 am	Complainant is terminated by Arborist contractor management	✓		
8:05 am	Complainant sends e-mail to OIG stating "I have just been terminated..."		✓	

* **Stmt** – Complainant's July 18, 2012 written statement to the OIG
Mail – e-mail documents obtained during the OIG's investigation
Tel – Entry from MCDOT telephone system time log obtained during the OIG's investigation. Only land line calls are presented. Requested mobile phone call records were not provided.

DLLR hearing to determine whether Complainant caused his own discharge for being abusive to the TPS contractor

In an e-mail statement to the OIG, the Complainant related that he had been advised during a July 10 telephone interview with a representative of the Maryland Department of Labor, Licensing, and Regulation (DLLR) Division of Unemployment Insurance (DUI) that the Complainant's employer had stated that the Complainant caused his own discharge by being abusive to the TPS contractor.

In its hearing, the DLLR attempted to determine whether the Complainant's separation from employment resulted from a disqualifying reason, that is, had he: a.) voluntarily quit for good cause, b.) demonstrated gross/aggravated misconduct connected with the work, or c.) exhibited misconduct connected with his work.

In sworn testimony before a DLLR³⁰ Appeals Hearing Examiner, the Complainant stated that on June 8th “I then told [the manager for the Arborist contractor] that I was going to contact the County Inspector’s office, and the County Attorney if I had to.” The manager for the Arborist contractor, who participated in the DLLR hearing, neither objected to nor refuted the Complainant’s statement. The Complainant also asserted in his written statement to the OIG that on June 12 the Contract Administrator questioned who else had been told about this, to which the Complainant stated that he had responded that he had “filed a complaint with a higher department in the county.”

During the testimony, when the DLLR Appeals Hearing Examiner inquired if “The County asked that [the Complainant] be let go and [the Arborist contractor] complied – Is that correct Mr. [manager of the Arborist contractor]?” the manager of the Arborist contractor confirmed “That’s correct.”

In his concluding remarks, the DLLR Appeals Hearing Examiner stated “All [the Arborist contractor] told me is that [the Complainant] was discharged at the request of this [Contract Administrator] for the County ... and [the Complainant has] fully explained why [the Contract Administrator] might have some motivation to ask that [the Complainant] be discharged, and the employer in this case had an interest in continuing its contract with the County, I guess through [the Contract Administrator].”

On September 13, 2012, the DUI issued its Unemployment Insurance Appeals Decision ruling in favor of the Complainant’s claim for unemployment benefits.³¹

The Hearing Examiner concluded that the Complainant’s employer had offered insufficient evidence to show that the Complainant had committed any acts of misconduct and that the Complainant had offered detailed and specific testimony that showed he was discharged for essentially doing his job. The Examiner held that the Complainant “did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the claimant’s employment relationship, during hours of employment, or on the employer’s premises,” and that the Complainant was eligible for benefits.³²

Finding 2 (b). Various events cited by the MCDOT Division Chief and Contract Administrator may have contributed to their decision to ask that the Complainant be replaced, but, the timing of events evidences that the Complainant’s allegations of mismanagement by the Contract Administrator were the catalyst.

During interviews with the OIG, both the MCDOT Division Chief and the Contract Administrator claimed that the catalyst for their request that the Arborist contractor remove the Complainant from the contract was related to the excavation of six-inch holes around the base of 30 Cherry trees in Kenwood, the Complainant’s grinding stumps in a public right of way without permit or authorization, and the Complainant’s combative and insubordinate interaction with staff, contractors, and the public.

³⁰ Unemployment Insurance Appeals Hearing, September 4, 2012, Maryland Department of Labor, Licensing and Regulation, Division of Appeals, Appeal Number 1225576.

³¹ Unemployment Insurance Appeals Decision, Maryland Department of Labor, Licensing and Regulation, Division of Appeals, Appeal Number 1225576.

³² Appeals Decision, *op. cit.*

The MCDOT Division Chief related that “when I discovered [the Complainant] had dug 30 six-inch diameter holes and left them in the right of way, I’ve now got a guy who doesn’t understand public safety...he doesn’t understand the risk he’s now caused Montgomery County, and on top of that I’m finding that he’s ordering stump removals without a permit. Two very serious issues in my mind. That couldn’t be tolerated and I ordered his removal.”

“The fact the holes were left open creates a major liability issue for Montgomery County Government” he continued. “[We] have 30 open holes, 30 tripping hazards, and we’re subject to a \$200,000 hit on each one of them.”

The MCDOT Division Chief told the OIG that although he didn’t know how or if the Complainant would be reassigned by the Arborist contractor, he had ordered the Complainant’s removal from assignment with MCDOT. Although the Division Chief offered that he normally would have sought out an employee’s side of the story on allegations such as these, he admitted that he had never spoken with the Complainant. “I view consultants as interchangeable parts. I mean, we hire them, we can ask for their replacement. What [their employer does] with him is up to them...[the Complainant] just didn’t seem to be a good fit.” The Division Chief further opined that the Complainant’s goals and values were not consistent with “DoT and he should be replaced with someone more consistent with our way of doing business.”

MCDOT’s message to the Arborist contractor that the services of the Complainant were no longer required and his subsequent removal from employment occurred within seven days following his written allegations of mismanagement by the Contract Administrator to the Arborist contractor and to the Inspector General. The Arborist contractor forwarded the written allegations to the Contract Administrator one day before the Complainant was removed. As evidenced earlier in this report, we confirmed the validity of those allegations.

In contrast, the events the MCDOT Division Chief and the MCDOT Contract Administrator claimed as reasons for the removal had occurred six to eight weeks earlier. We found no evidence that the Contract Administrator had raised either the open holes or stump removal as concerns with either the Complainant, or with the Arborist contractor who employed and would be responsible for the behavior of the Complainant, prior to the June 13 date the Complainant was terminated.

The first mention of the stump removal we found during our document review was in a June 19 e-mail from the Contract Administrator to the Arborist contractor. This e-mail, which was sent one week after the Complainant’s termination, documented the explanation from MCDOT for requesting the Complainant’s removal. In that e-mail, MCDOT indicated the Complainant had ordered stumps removed in order to allow for the planting of new cherry trees, and that upon learning of the removal, the MCDOT Division Chief had ordered the Complainant’s release. We traced the tree planting at this address and discovered that the Complainant had conducted a post-planting inspection of these trees on April 13 – the first week of the Complainant’s assignment as inspector for the tree planting services program, and more than two months before the first mention of the stump removal by the Contract Administrator and the Complainant’s termination. The stumps would have been removed before that date in order to facilitate the planting.

No evidence of the alleged combative and insubordinate behavior of the Complainant was offered by the Arborist contractor during the DLLR hearing. We found no evidence such behavior had been raised by the Contract Administrator to the Arborist contractor.

The manager of the Arborist contractor acknowledged under sworn testimony that the Contract Administrator had asked that the Complainant be let go. The MCDOT Division Chief acknowledged that he did not speak with the Complainant and ordered the Complainant's removal from assignment with MCDOT, and supported that action even after a cure notice was sent to the TSP contractor, almost a month after our investigation began.

Recommendations

1. We recommend that the Director of the Montgomery County Department of Transportation take appropriate actions to ensure that:
 - all trees planted by the Tree Planting Services Contractor during 2010, 2011, and 2012 are immediately inspected for compliance with plant material and all planting technique specifications of the tree planting services contract, and when warranted, that the Tree Planting Services Contractor be required to effect corrective action at no cost to the County,
 - the Contract Administrator for the Montgomery County Department of Transportation, Division of Highway Services' Tree Maintenance Section enforces all of the performance specifications contained in its Tree Planting Services contracts,
 - the Contract Administrator for the Montgomery County Department of Transportation, Division of Highway Services' Tree Maintenance Section observes the procurement and payment authorization requirements of Montgomery County Code and Regulations, and
 - the Chief of the MCDOT Division of Highway Services exercises all of his responsibilities, including timely supervisory oversight of the activities of the Tree Maintenance Section.
2. We recommend that the Director of the Montgomery County Department of Transportation review all other contracts in which Chief of the MCDOT Tree Maintenance Section is named as Contract Administrator, or where the named Contract Administrator reports through the Chief of the MCDOT Division of Highway Services, to ensure such contracts are being administered in compliance with contract terms and applicable State and County laws and regulations.
3. We recommend that the Director of the Montgomery County Department of Transportation review how arborist inspection services are provided to determine whether it might be more cost effective to in-source that activity to a County employee arborist.
4. We recommend that the Director of the Montgomery County Department of Transportation consult the County Attorney and Chief Administrative Officer to determine appropriate administrative actions.

Summary of Chief Administrative Officer's Response

The Chief Administrative Officer's (CAO) response to the final draft report is included in its entirety in Appendix D.

The CAO response indicates agreement with all of our recommendations. He acknowledges that improvement in the administration and enforcement of the TPS contract is necessary, and indicates that MCDOT's Director has begun to take some corrective actions and make other improvements in response to the report's findings and recommendations.

In his response, the CAO asserts certain corrections, updates, or clarifying points regarding the report's findings and its supporting documents.

- a. The CAO disagrees with our report's estimated monetary waste outlined in Appendix C, arguing that it is the result of extrapolation of the deficiencies discovered in the 2012 planting season and that deficiencies found in one planting season should not be applied to planting and inspection services in the prior years, as there is no evidence substantiating this. Also, those deficiencies discovered in the 2012 planting season have either already been corrected or will be corrected in the spring 2013 planting season.

We hope that all of the deficiencies will be corrected, thus avoiding 100% of the potential waste. However, our estimates are based on the best information available: the pattern of deficiencies detected when the Replacement arborist was directed to inspect the trees planted in the 2012 season, and the consistent pattern of deficiencies documented by the Complainant that related to trees planted by the TPS contractor during the 2010, 2011, and 2012 planting seasons.

- b. The CAO notes that as a normal practice, prior to the expiration of the one-year warranty, all planting deficiencies are required to be corrected in accordance with all relevant contract specifications and standards at no additional cost to the County.

Twelve of the thirty-six planting deficiencies documented by the Complainant related to trees planted during 2010 and 2011 that apparently were not previously detected or corrected.

- c. The CAO also notes that \$2,470 of the estimated loss originally presented in Appendix C is based on the difference between the cost of the Rotundiloba cultivar and the cost of the regular species Styraciflua, which is not a loss to the county if the contractor planted the Hapdel cultivar which is the same wholesale price as Rotundiloba cultivar. He also states that of the over 150 sweet gums planted during these three planting seasons, only 14 have been detected to have seed balls (a trait of the regular species). MCDOT investigation discovered that the contractor inadvertently received a limited number of incorrect trees from the nursery. As required by MCDOT, any of those planted sweet gums that develop seed balls will be replaced by the contractor at no additional cost to the County.

We modified the appropriate section of our report to clarify the finding. The TPS contractor asserted that he had substituted Hapdel trees for the Rotundiloba but did not provide appropriate documentation to support that assertion. We modified Appendix C to delete this cost based on the County's expectation that any of the trees that develop seed balls will be replaced at no cost to the County.

- d. The draft report reviewed by the CAO referenced documentation reviewed by OIG that appeared to evidence payment made for a tree that was not planted, and payment by MCDOT for a small number of replacement trees that were under warranty. The CAO determined that MCDOT has verified that trees were actually planted in those locations, (confirmed by their data base inventory and from a site inspection conducted on January 18, 2013) and investigated each specific location. MCDOT found that no replacement trees had been paid for while under warranty.

The number of exceptions we identified in the draft report represented only .01% of the invoices reviewed and we acknowledge were not representative of the invoices reviewed. Since those matters have been addressed by MCDOT, we have modified our report and findings accordingly.

- e. The CAO states that: “the primary reasons that MCDOT requested the Arborist Contractor replace its Arborist were his poor judgment in regard to public safety, poor attitude, and communication manners. His combative attitude toward the public and coworkers, and insubordinate behavior toward supervisors and managers demonstrated that he was not suited to perform the services as Arborist under the consultant contract. It should be also noted that the Complainant was neither terminated nor fired by MCDOT. MCDOT requested the Arborist Contractor replace the Complainant with another Arborist.”

We modified our finding to ensure it is clear that the Complainant was removed from working on the County contract by the Arborist contractor at the request of MCDOT. However, the substance of our findings and conclusions relative to the Contract Administrator’s and Division Chief’s actions are unchanged.

Two additional comments are contained in the CAO response. Neither caused us to alter our findings.

Appendix A: Objectives, Scope, and Methodology

Our investigation was conducted between June 2012 and November 2012 in accordance with the investigation standards contained in the *Quality Standards for Investigations*, issued by the Council of the Inspectors General on Integrity and Efficiency (November 2011).

The objectives of our investigation were to determine whether MCDOT had:

- authorized payment for trees that were not the species specified in the contract even after receiving an arborist inspection report that identified the error,
- failed to cause replacement of trees under guarantee after receiving inspection reports that identified improperly planted, damaged, diseased, or incorrect tree species,
- replaced previously identified improperly planted, damaged, diseased, or incorrect tree species before expiration of guarantee period and at additional taxpayer expense, and
- initiated an action against a contractor's employee in retaliation for disclosing information about contract administration and performance reasonably believed to be gross mismanagement, or a gross waste of money.

The scope of our review included all trees provided by the Tree Planting Services Contractor under the tree planting services contract they entered into with Montgomery County on November 13, 2009.

Our review methodology included:

- Reviewing the Montgomery County Procurement Laws and Regulations;
- Reviewing the Tree Planting Services contract dated November 13, 2009, as amended;
- Reviewing tree-related service requests received from County residents during 2011 and 2012;
- Reviewing invoices for tree planting services provided under the contract, and cross referencing charges to service requests and arborist inspection reports;
- Reviewing photographic and written documentation relating to the alleged instance of contract non-compliance, and providing such photographs and documents to an independent arborist consultant;
- Applying judgmental sampling to select a sample of alleged *liquidambar styraciflua* 'Rotundiloba' trees, field inspecting the tree sample selected, collecting photographic and physical evidence for each tree, and reviewing the collected data with an arborist with the United States Department of Agriculture's National Arboretum;
- Reviewing research data regarding *liquidambar styraciflua* cultivars, identification information contained in the *Manual of Woody Landscape Plants* by Michael A. Dirr³³ and its companion iPhone App, *Dirr Tree and Shrub Finder*,³⁴ and tree planting standards published by the American Nursery and Landscape Association in its American Standard for Nursery Stock Z60, 1-2004;
- Reviewing e-mail correspondence among selected MCDOT employees;
- Reviewing telephone logs for selected MCDOT employees;
- Reviewing the Complainant's Case File for the Maryland Department of Labor, Licensing and Regulation Unemployment Insurance Claim Number 1225576 and the audio recording of the Appeals Hearing related to the case; and
- Conducting interviews with selected MCDOT employees.

³³ Dirr, Michael A., *Manual of Woody Landscape Plants*. 5th Ed. Champaign, Illinois: Stipes, 1975. Print.

³⁴ Dirr, Michael A., *Dirr Tree and Shrub Finder*. Ver. 1.0. Portland, OR. Timber Press, Inc. 2010. iPhone App.

Appendix B: Excerpts from Montgomery County Code

Chapter 2. Administration.

Sec. 2-151. Inspector General.

- (l) *Access to information.*
- (5) An employee of the County government or any instrumentality of the County, and an employee of any contractor or subcontractor with the County or any instrumentality of the County, must not be retaliated against or penalized, or threatened with retaliation or penalty, for providing information to, cooperating with, or in any way assisting the Inspector General in connection with any activity of that Office under this Section.
- (m) *Compliance.* Each of the following acts is a Class A violation:
 - (1) withholding or refusing to respond to a valid request for documents or information under this Section;
 - (2) giving false or misleading information in connection with any audit, study, or investigation under this Section;
 - (3) retaliating or threatening to retaliate against any person for filing a complaint with the Inspector General, furnishing information, or cooperating in any audit, study, or investigation under this Section.

Chapter 11B. Contracts and Procurement.

Sec. 11B-35. Contract dispute resolution.

- (b) *Policy.* A covered employee must not be subjected to a personnel action by the Employer for disclosing, to a County official or employee, information involving the solicitation, award, administration, or performance of any contract that the employee reasonably believes is:
 - (1) an abuse of authority, gross mismanagement, or gross waste of money;
 - (2) a substantial and specific danger to public health or safety; or
 - (3) a violation of law.
- (c) Each contract must:
 - (1) prohibit retaliation by the Employer against a covered employee who discloses any illegal or improper action described in subsection (b); and
 - (2) specify that an aggrieved covered employee, as a third-party beneficiary, may by civil action recover compensatory damages, including interest and a reasonable attorney's fee, against the employer for retaliation in violation of this Section.
- (d) In addition to other authority granted by law, the Director may cancel, terminate, or suspend a contract, in whole or in part, and declare a contractor or subcontractor ineligible for further County contracts based upon a final court judgment in favor of a covered employee for retaliation in violation of this Section. The Director may impose other appropriate sanctions and remedies as provided in applicable regulations or by contract. Each Contractor must bind its subcontractors contractually to comply with this Section.

Appendix C: Potential Monetary Impact of MCDOT Contract Mismanagement

Estimated Monetary Waste Due to MCDOT Contract Mismanagement

Potential Monetary Waste					Projected \$
Estimated Value of Deficient Tree Planting Services					\$67,856
<u>Invoice #</u>	<u>PO #</u>	<u>Date</u>	<u>Amount</u>	<u>Count</u>	
3897	1001818	1/10/11	\$48,783	323	
9	1001818	3/20/11	1,217	9	
4362	1012985	12/16/11	49,045	400	
4566	1018495	5/17/12	49,959	438	
			\$149,004	1,170	
2012 planting inspection exceptions			45.54%		
			\$67,856		
Estimated Overcharge for Arborist Inspection Service					\$107,860
Arborist contractor invoices for TPS arborist			\$236,847		
2012 planting inspection exceptions			45.54%		
			\$107,860		
Total Potential Monetary Waste					\$175,717
Value of Questioned Costs					
Cost to Purchase Unwarranted Extended Warranties					\$8,580
<u>Invoice #</u>	<u>PO #</u>	<u>Date</u>	<u>Amount</u>		
4602	1018660	6/11/12	\$9,180		
		less cost of tree guards	(600)		
			\$8,580		
Total Value of Questioned Costs					\$8,580
Total Potential Value of Contractual Mismanagement					\$184,297

Appendix D: Chief Administrative Officer's Response



OFFICES OF THE COUNTY EXECUTIVE

Isiah Leggett
County Executive

Timothy L. Firestine
Chief Administrative Officer

MEMORANDUM

February 15, 2013

TO: Edward L. Blansitt, Inspector General

FROM: Timothy L. Firestine, Chief Administrative Officer 

SUBJECT: Report of Investigation, Administration of Montgomery County Department of Transportation Tree Planting Services Contracts

I am in receipt of your memo and Report of Investigation of the Department of Transportation, Division of Highways, Tree Maintenance Section's (MCDOT) administration of the roadside tree planting program and its related Tree Planting Services (TPS) contract with a tree planting services firm. I am very encouraged that your review found no instances of fraud. I agree with your suggested recommendations related to MCDOT's roadside tree planting program and the contract administration of its related services. We have taken corrective actions and are in the process of making other improvements in response to your report.

Before providing specific responses to your recommendations, I would like to refer you to pages 3-4 of this document which include a list of corrections, updates, or clarifying points regarding the report's findings or its supporting documents.

I thank you for the opportunity to respond to this report and I sincerely appreciate the detailed nature of your investigation and the effort put forth in its development. Please find below specific responses to your recommendations.

IG Recommendation 1: *We recommend that the Director of the Montgomery County Department of Transportation take appropriate actions to ensure that:*

- *all trees planted by the Tree Planting Services Contractor during 2010, 2011, and 2012 are immediately inspected for compliance with plant material and all planting technique specifications of the tree planting services contract, and when warranted, that the Tree*

Planting Services Contractor be required to effect corrective action at no cost to the County.

CAO Response: MCDOT is re-inspecting all of the trees planted in the fall of 2010, fall of 2011, and the spring of 2012 to ensure compliance according to the Contract. These re-inspections are currently underway and will require several months to complete. Also, when warranted, the contractor will be required to bring all deficiencies into compliance with all relevant contract specifications at no additional cost to the County.

- *the Contract Administrator for the Montgomery County Department of Transportation, Division of Highway Services' Tree Maintenance Section enforces all of the performance specifications contained in its Tree Planting Services contracts.*

CAO Response: Concur. The MCDOT Director will ensure full compliance.

- *the Contract Administrator for the Montgomery County Department of Transportation, Division of Highway Services' Tree Maintenance Section observes the procurement and payment authorization requirements of Montgomery County Code and Regulations.*

CAO Response: Concur. The MCDOT Director will ensure full compliance.

- *the Chief of the MCDOT Division of Highway Services exercises all of his responsibilities, including timely supervisory oversight of the activities of the Tree Maintenance Section.*

CAO Response: Concur. The MCDOT Director will ensure full compliance.

IG Recommendation 2: *We recommend that the Director of the Montgomery County Department of Transportation review all other contracts in which Chief of the MCDOT Tree Maintenance Section is named as Contract Administrator, or where the named Contract Administrator reports through the Chief of the MCDOT Division of Highway Services, to ensure such contracts are being administered in compliance with contract terms and applicable State and County laws and regulations.*

CAO Response: Concur. The MCDOT Director will ensure full compliance.

IG Recommendation 3: *We recommend that the Director of the Montgomery County Department of Transportation review how arborist inspection services are provided to determine whether it might be more cost effective to in-source that activity to a County employee arborist.*

CAO Response: Concur. The MCDOT Director will conduct the recommended review and assess the efficiency and effectiveness of each option.

IG Recommendation 4: *We recommend that the Director of the Montgomery County Department of Transportation consult the County Attorney and Chief Administrative Officer to determine appropriate administrative actions.*

CAO Response: Concur. The Director of the Department of Transportation will consult with me and the County Attorney to determine appropriate administrative and contract enforcement actions.

Edward L. Blansitt, Inspector General
February 15, 2013
Page 3

The following is a list of corrections, updates, or clarifying points regarding the report's findings and its supporting documents:

1. The report's assumed monetary waste outlined in Appendix C is the result of extrapolation of the deficiencies discovered in the 2012 planting season. The deficiencies found in one planting season should not be applied to planting and inspection services in the prior years, as there is no evidence substantiating this. Also, those deficiencies discovered in the 2012 planting season have either already been corrected or will be corrected in the spring 2013 planting season.
2. Please note that as a normal practice, prior to the expiration of the one-year warranty, all planting deficiencies are required to be corrected in accordance with all relevant contract specifications and standards at no additional cost to the County,.
3. Appendix C calculations were based on the difference between the cost of the Rotundiloba cultivar and the cost of the regular species Styraciflua, showing a loss of \$2,470. It should be noted that the contractor did not plant the regular Styraciflua species but rather planted the Hapdel cultivar which is the same wholesale price as Rotundiloba cultivar.
4. Of the over 150 sweet gums planted during these three planting seasons, only 14 have been detected to have seed balls (a trait of the regular species). MCDOT investigation discovered that the contractor inadvertently received a limited number of incorrect trees from the nursery. As required by MCDOT, any of those planted sweet gums that develop seed balls will be replaced by the contractor at no additional cost to the County.
5. It should be noted that the total Arborist contractor invoices of \$509,897 mentioned in the report is for all Arborist services which include the Emergency Tree Program located in the General Fund Operating Budget as well as the Tree Preservation Program, which is funded by the Capital Improvements Program. Neither of these two programs fund TPS contract services, and are therefore outside of the scope of this audit.
6. The MCDOT tree experts believe that exposing root balls to the open air and other environmental elements for an indeterminate amount of time is likely fatal to the health of the tree, more so than simply allowing the tree root to develop on its own. Therefore, regarding the extension of the warranty, it was MCDOT's decision to extend the contract warranty at a lower cost, rather than replacing the trees that would have required the safety hazard to be exposed for up to (6) six months awaiting the next planting season.
7. Regarding the report's reference to the payment made for a tree that was not planted, please note that MCDOT has verified that trees were actually planted in both locations. The planting at 6100 Kennedy Drive did not replace the tree canceled at 6417 Kennedy Drive. Both sites did receive trees in the spring of 2012 planting cycle and both addresses were invoiced for one (1) tree. MCDOT confirmed this by their data base inventory and from a site inspection conducted on January 18, 2013.

Edward L. Blansitt, Inspector General
February 15, 2013
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8. We investigated each specific location where the report referred to the payment by MCDOT for replacement trees that were under warranty. We found that no replacement trees had been paid for while under warranty. MCDOT acknowledges that its current software and concomitant outputs (work orders) can be difficult to decipher and easily misinterpreted. A few examples of MCDOT's findings are noted below (the examples given below are for brevity and represent MCDOT's overall findings):

- 15549 Peach Leaf Lane – A 16-inch diameter pin oak was removed from the right-of-way in May 2008 and a 13-inch diameter pin oak was removed in January 2010. The 16-inch diameter pin oak was replaced with a 2-inch caliper swamp white oak in the fall of 2010. The resident then requested another tree in December 2011 to replace the 13-inch diameter pin oak removed in 2010. The replacement requested in the December 2011 work order was for the 13-inch diameter pin oak removed in 2010; not the 2-inch diameter swamp white oak planted in 2010. The tree removed in 2010 has yet to be replaced and the tree planted in the fall of 2010 remains in good health.
- 15500 Tierra Drive – This site is a large triangular geographical area at the convergence of three (3) streets. This large site lacks its own specific address (for purposes of asset identification), therefore a nearby house address is used for documentation purposes. The lack of a specific address is due to the archaic nature of the Tree Manager Database which uses street addresses rather than "x" and "y" coordinates. This issue alone affects the ability to be concise with tree locations, making it difficult and oftentimes confusing. The County's Oracle solution is scheduled to replace this system within the next year or so.

9. The primary reasons that MCDOT requested the Arborist Contractor replace its Arborist were his poor judgment in regard to public safety, poor attitude, and communication manners. His combative attitude toward the public and coworkers, and insubordinate behavior toward supervisors and managers demonstrated that he was not suited to perform the services as Arborist under the consultant contract. It should be also noted that the Complainant was neither terminated nor fired by MCDOT. MCDOT requested the Arborist Contractor replace the Complainant with another Arborist.

In conclusion, we acknowledge that improvement in the administration and enforcement of the TPS contract is necessary. The MCDOT Director has already taken some corrective actions and is in the process of making other improvements in response to your report and input from me and the County Attorney. We thank you and your staff for conducting this review and referral of its report for our comments, and action.

If you have any questions, please contact me or contact Art Holmes at (240) 777-7167 or Arthur.Holmes@montgomerycountymd.gov.

TLF:fk



DEPARTMENT OF TRANSPORTATION

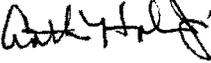
Isiah Leggett
County Executive

MEMORANDUM

Arthur Holmes, Jr.
Director

July 2, 2013

TO: Roger Berliner, Chair
Transportation, Infrastructure, Energy, and Environment Committee
Montgomery County Council

FROM: Arthur Holmes, Jr, Director 
Department of Transportation

SUBJECT: IG Investigation of Tree Planting Contract

This is in response to a recent report by the Office of Inspector General (OIG) regarding the Montgomery County Department of Transportation (MCDOT) tree planting services contract. According to the report, MCDOT mismanaged the tree planting services contract and misused the arborist inspection contact. As a result, the report stated, the misuse of program funds could be in excess of \$180,000. I respectfully disagree with these findings, and offer the following responses to the allegations.

1. Regarding the Appendix "C" Potential Monetary Impact of the MCDOT Contract Mismanagement, the Office of the Inspector General (OIG) extrapolated an unsubstantiated 45 percent (45%) deficiency for the 2012 plantings and applied the same rate to all plantings in the 2010 and 2011 planting seasons. The trees planted in 2012 were under warranty and the department had yet to conduct the comprehensive inspection for those plantings as per standard procedure. The department procedure for new planting inspection was conducted under two separate visits. The first inspection was immediately following the planting to assure that the proper species were planted at proper location(s); the second, more detailed inspections, would have taken place prior to the expiration of the warranty. In addition, under Appendix C, the OIG calculated an overcharge for the arborist inspection service. This resulted from using the value of \$236,847, which was the amount paid for the arborist inspection services related to tree trimming and tree removal. The amount paid for arborist inspection services related to tree planting was only \$52,488.

The report alleges that the department accepted a substitute cultivar version of a Sweet Gum tree in lieu of what was specified in the contract. The department did not accept a substitute, but allowed the contractor to plant a different seedless cultivar of the same species as specified in the contract. The department provided the OIG sufficient documentation to prove that the cost of the different cultivars were the same.

Office of the Director 

2. The report states that the complainant's allegations of mismanagement by the Contract Administrator (CA) was the catalyst in the decision made by the MCDOT Division Chief tasking for a replacement for the complainant. This is not the case. The Complainant, without authorization, took it upon himself to dig holes, 6 inches in diameter and 18 inches deep, in close proximity to 55 trees planted in a prior season, which were under warranty; furthermore, these trees had not yet undergone a comprehensive inspection by the Department, as explained above in number 1. This action created unsafe conditions for the public and exposed the County to significant liability issues. Once the CA learned about this action, he directed the Complainant to go back and fill in the holes. The Complainant failed to comply with this directive. At this point, the CA brought this issue, and other similar violations of County Codes, to the attention of the Division Chief, and the decision was made to require the Tree Planting Services Contractor (TPS) to fill in the holes and to extend the warranty. In addition, the Division Chief asked the Arborist Contractor to replace the arborist. The justifications of this action are the individual committed several unauthorized actions, conducted work without a proper permit; exhibited insubordination, combative behavior, and most importantly, created a safety hazard to the public, and exposed the County to significant liability issues. This action was taken only because of the Complainant's combative and insubordinate behavior, unacceptable conduct and complete disregard for public safety.
3. The report alleges that the Department failed to follow up on inspections reported by the Complainant. The arborist (Complainant) involved in the planting program was responsible for sending written reports of his inspections to the TPS contractor for follow up and corrective action. However, the Complainant did not consistently follow these procedures and continued to report his findings, primarily verbally, to the CA and failed to provide a comprehensive written list of findings to the TPS or the CA. It should also be noted that the Complainant primarily used his personal email for business communication and seldom used the County email system as directed. We understand the Arborist Consultant made a telephone available to the Complainant for business use. To the best of our knowledge, the Complainant never used the telephone provided and continued using his personal communication device; for reasons unknown.

The report alleges that the Department took corrective action only after the announcement of the investigation. Departmental emails previously provided to the OIG show that corrective action was undertaken before the July 17 OIG announcement of its investigation. Around May 23, 2012, at the Complainants request, and combined with his combative and insubordinate behavior in the tree planting program, the CA reassigned the Complainant to the pruning and removal programs. On May 24, 2012, a new arborist was assigned to the planting program to review all planting done in 2012. On June 13, 2012, the Division Chief was made aware of the unauthorized open tree pit excavations and stump grinding activity. All of this was conducted without permission or without permit authorization, and resulted in exposing the public to unsafe conditions and exposing the county to multiple tort liability. This, and other previously mentioned issues, led to his replacement.



Roger Berliner
July 2, 2013
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In conclusion, I would like to thank the OIG for a comprehensive review of MCDOT tree planting program. As pointed out in the report, "we hope that all of the deficiencies will be corrected, thus avoiding 100% of the potential waste". I assure the committee that corrective action has been taken and continues for all plantings done in 2010, 2011 and 2012, at no additional cost to the County. Furthermore, corrective internal actions have been taken to prevent any future problems with this program.

AH:swl

cc: Nancy Floreen, Councilmember
Hans Riemer, Councilmember

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Administration of Montgomery County Department of Transportation Tree Planting Services Contracts

Presentation of Final Report to the Montgomery County Council
Transportation, Infrastructure, Energy & Environment Committee

July 8, 2013



MONTGOMERY COUNTY MARYLAND

OFFICE OF THE INSPECTOR GENERAL

Administration of Department of Transportation Tree Planting Services Contracts

Background

- OIG received a complaint on June 7, 2012 alleging that a contractor for the Department of Transportation, Division of Highways, Tree Maintenance Section had failed to comply with the terms of the contract and that the Contract Administrator had misused funds and mismanaged the contract.
- The complainant, a certified arborist employed by a firm under contract with MCDOT to inspect work performed by the tree planting services (TPS) contractor, subsequently alleged that his discharge on June 13, 2012 was in retaliation for reporting on the improper actions by the Contract Administrator and is a violation of Montgomery County Code 11B-35A.

Objective:

To Determine the validity of the complainant's allegations



Administration of Department of Transportation Tree Planting Services Contracts

Finding 1 Mismanagement of the tree planting services contract and misuse of the arborist inspection contract

The MCDOT, Division of Highway Services' Tree Maintenance Section accepted and paid for:

- work performed without authorizing documents;
- planting services and materials provided by the TPS Contractor for which the arborist inspectors identified improper depth of planting, presence of burlap, wire, or twine, root girdling, disease or canker irregularities that could limit root development and shorten the life span (45% did not meet planting standards);
- plant material substituted by contractor over multiple planting seasons without prior authorization. -- Chief of the MCDOT Division of Highway Services stated to the OIG that contractor's unilateral action to substitute plant material would represent a breach of the contract.

Contract Administrator gave notification to contractor to cure planting defects in an August 2012 letter – at least *three weeks after the Office of Inspector General announced the commencement of this investigation.*



Administration of Department of Transportation Tree Planting Services Contracts

Finding 1 Mismanagement of the tree planting services contract and misuse of the arborist inspection contract

MCDOT purchased extended guarantees at a cost exceeding replacement cost of the trees.

- One year of extended warranty was obtained on 55 cherry trees for \$8,250 and \$930 in incidental costs - a total of \$9,180.
 - Extended warranties cost \$150 per tree compared to \$79 for a new Okame cherry tree or \$95 for a new Yoshino cherry tree with a full one-year warranty.
 - The Contract Administrator stated he believed the purchase to be justified because the TPS contractor would not honor original guarantee on trees that complainant had excavated. Complainant documented inspection of 36 trees of all species over multiple years.
 - The MCDOT Division Chief stated that he knew of no reason that should prompt the County to purchase an extended warranty.
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Administration of Department of Transportation Tree Planting Services Contracts

Recommendations – Finding 1

1. We recommended that the MCDOT ensure:
 - inspection of the trees planted by the contractor, corrective action and enforcement of contract terms;
 - timely supervisory oversight of the activities of the Tree Maintenance Section and compliance with the procurement and payment authorization requirements of Montgomery County Code and regulations;
 - review of all other contracts for which this Contract Administrator was responsible to ensure those contracts were administered in compliance with contract terms and applicable State and County laws and regulations;
 - review of how arborist inspection services are provided to determine whether it might be more cost effective to in-source that activity to a County employee.
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Administration of Department of Transportation Tree Planting Services Contracts

Finding 2 Complainant removed from the County contract for reporting what he believed to waste and mismanagement by Contract Administrator

- From April 10 through May 24, 2012, Complainant provided inspection reports to contractor and MCDOT documenting exceptions to contract specifications.
 - The Complainant raised legitimate concerns about the Contract Administrator with the OIG and with Complainant's employer, the Arborist contractor, in writing on June 7, 2012.
 - The Arborist contractor reported those allegations to the Contract Administrator on June 12, 2012. On the morning of June 13, 2012, the Contract Administrator sent an e-mail to the Arborist contractor stating: "we no longer need the services of arborist [Complainant]." The Arborist contractor terminated its employment of the Complainant later that day.
 - Division Chief normally would have sought out an employee's side of the story but admitted that he had never spoken with the Complainant.
 - A Maryland DLLR Hearing Examiner concluded that the Complainant's employer had offered insufficient evidence of any acts of misconduct by the Complainant.
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Administration of Department of Transportation Tree Planting Services Contracts

Recommendation – Finding 2

We recommended that MCDOT consult the County Attorney and Chief Administrative Officer to determine appropriate administrative actions.

Montgomery County Code Section 11B-35A

- b) *Policy.* A covered employee [*an employee of a contractor or subcontractor that performs or performed services under a contract subject to Sec. 11B-35A of the code*] must not be subjected to a personnel action by the Employer for disclosing, to a County official or employee, information involving the solicitation, award, administration, or performance of any contract that the employee reasonably believes is:
- (1) an abuse of authority, gross mismanagement, or gross waste of money;
 - (2) a substantial and specific danger to public health or safety; or
 - (3) a violation of law.
- (c) Each contract must:
- (1) prohibit retaliation by the Employer against a covered employee who discloses any illegal or improper action described in subsection (b)
-

Administration of Department of Transportation Tree Planting Services Contracts

Chief Administrative Officer's Response:

- indicates agreement with all of our recommendations,
 - acknowledged improvement in contract administration and enforcement is necessary,
 - indicated MCDOT's Director has begun to take some corrective actions and make other improvements in response to the report's findings and recommendations,
- included a list of points regarding the report's findings he believed should be clarified or corrected.

We considered each of the CAO's points and made adjustments we considered appropriate in the final report, but also expressed that we did not agree with several of the comments.

