Subpart 3.9 - Whistleblower Protections for Contractor Employees

Parent topic: Part 3 - Improper Business Practices and Personal Conflicts of Interest

3.900 Scope of subpart.

This subpart implements various statutory whistleblower programs. This subpart does not implement 10 U.S.C. 4701, which is applicable only to DoD, NASA, and the Coast Guard.

(a) 41 U.S.C. 4712 is implemented in 3.900 through 3.906. These sections do not apply to—

(1) DoD, NASA, and the Coast Guard; or

(2) Any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)). Sections 3.900 through 3.906 do not apply to any disclosure made by an employee of a contractor or *subcontractor* of an element of the intelligence community if such disclosure—

(i) Relates to an activity of an element of the intelligence community; or

(ii) Was discovered during contract or *subcontract* services provided to an element of the intelligence community.

(b) Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), is implemented in 3.909, which is applicable to all agencies.

(c) Section 3.907 of this subpart implements section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), and applies to all contracts funded in whole or in part by that Act.

3.901 Definitions.

As used in this subpart-

Abuse of authority means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the *executive agency* concerned or the successful performance of a contract of such agency.

Authorized official of the Department of Justice means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

Inspector General means an *Inspector General* appointed under chapter 4 of title 5 of the *United States* Code and any *Inspector General* that receives funding from, or has oversight over contracts awarded for, or on behalf of, the *executive agency* concerned. This definition does not apply to 3.907.

Internal confidentiality agreement or statement means a confidentiality agreement or any other written statement that the contractor requires any of its employees or *subcontractors* to sign regarding nondisclosure of contractor information, except that it does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or *subcontractors* sign at the behest of a *Federal agency*.

Subcontract means any contract as defined in subpart 2.1 entered into by a *subcontractor* to furnish *supplies* or services for performance of a prime contract or a *subcontract*. It includes but is not limited to *purchase orders*, and changes and modifications to *purchase orders*.

Subcontractor means any supplier, distributor, vendor, or firm (including a consultant) that furnishes *supplies* or services to or for a prime contractor or another *subcontractor*.

3.902 Classified information.

41 U.S.C. 4712 does not provide any right to disclose *classified information* not otherwise provided by law.

3.903 Policy.

(a)

(1) Contractors and *subcontractors* are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this section, information that the employee reasonably believes is—

(i) Evidence of gross mismanagement of a Federal contract;

(ii) A gross waste of Federal funds;

(iii) An abuse of authority relating to a Federal contract;

(iv) A substantial and specific danger to public health or safety; or

(v) A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract).

(2) A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Disclosure *may* be made to the following entities:

(1) A Member of Congress or a representative of a committee of Congress.

(2) An *Inspector General*.

(3) The Government Accountability Office.

(4) A Federal employee responsible for contract oversight or management at the relevant agency.

(5) An *authorized official of the Department of Justice* or other law enforcement agency.

(6) A court or grand jury.

(7) A management official or other employee of the contractor or *subcontractor* who has the responsibility to investigate, discover, or address misconduct.

(c) An employee who initiates or provides evidence of contractor or *subcontractor* misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract *shall* be deemed to have made a disclosure.

3.904 Complaints.

3.904-1 Procedures for filing complaints.

A contractor or *subcontractor* employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 *may* submit a complaint with the *Inspector General* of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of *Inspector General* hotline or whistleblower internet sites or the complainant *may* directly contact the cognizant Office of the *Inspector General* for submission instructions. A complaint by the employee *may* not be brought under 41 U.S.C. 4712 more than three years after the date on which the alleged reprisal took place.

3.904-2 Procedures for investigating complaints.

(a) Investigation of complaints will be in accordance with 41 U.S.C. 4712(b).

(b) Upon completion of the investigation, the *head of the agency shall* ensure that the report of findings has been provided by the *Inspector General* to the *head of the agency* and to—

(1) The complainant and any person acting on the complainant's behalf; and

(2) The contractor and/or *subcontractor* alleged to have committed the violation.

(c) The complainant, contractor, and/or *subcontractor shall* be afforded the opportunity to submit a written response to the report of findings to the *head of the agency* and the Office of *Inspector General* in a time and manner that permits the *agency head* to take action not later than 30 days after receiving the report, as required by 3.905–1(a).

3.905 Remedies and enforcement of orders.

3.905-1 Remedies.

(a) *Agency response to Inspector General report.* Not later than 30 days after receiving a report

pursuant to 3.904-2, the *head of the agency shall*—

(1) Determine whether sufficient basis exists to conclude that the contractor or *subcontractor* has subjected the employee who submitted the complaint to a reprisal as prohibited by 3.903; and

(2) Either issue an order denying relief or take one or more of the following actions:

(i) Order the contractor or *subcontractor* to take affirmative action to abate the reprisal.

(ii) Order the contractor or *subcontractor* to reinstate the complainant employee to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor or *subcontractor* to pay the complainant employee an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the *head of the agency*.

(iv) Consider disciplinary or corrective action against any official of the *executive agency*, if appropriate.

(b) *Complainant's right to go to court.*

(1) Paragraph (b)(2) of this section applies if—

(i) The *head of the agency* issues an order denying relief; or

(ii)

(A) The *head of the agency* has not issued an order—

(1) Within 210 days after the submission of the complaint; or

(2) Within 30 days after the expiration of an extension of time granted in accordance with 41 U.S.C. 4712(b)(2)(B) for the submission of the report to those stated in 3.904-2(b); and

(B) There is no showing that such delay is due to the bad faith of the complainant.

(2) If the conditions in either paragraph (b)(1)(i) or (ii) of this section are met—

(i) The complainant *shall* be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant *may* bring a de novo action at law or equity against the contractor or *subcontractor* to seek compensatory damages and other relief available under 41 U.S.C. 4712 in the appropriate district court of the *United States*, which *shall* have jurisdiction over such an action without regard to the amount in controversy.

(A) Such an action *shall*, at the request of either party to the action, be tried by the court with a jury.

(B) An action under this authority *may* not be brought more than 2 years after the date on which

remedies are deemed to have been exhausted.

(c) *Admissibility in evidence*. An *Inspector General* determination and an *agency head* order denying relief under this section *shall* be admissible in evidence in any de novo action at law or equity brought pursuant to 41 U.S.C. 4712.

(d) *No waiver*. The rights and remedies provided for in 41 U.S.C. 4712 *may* not be waived by any agreement, policy, form, or condition of employment.

3.905-2 Enforcement of orders.

(a) Whenever a contractor or *subcontractor* fails to comply with an order issued under 3.905–1(a)(2), the *head of the agency* concerned *shall* file an action for enforcement of the order in the U.S. district court for a district in which the reprisal was found to have occurred. In any action brought pursuant to this authority, the court *may* grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant employee upon whose behalf an order was issued *may* also file such an action or join in an action filed by the *head of the agency*.

(b) Any person adversely affected or aggrieved by an order issued under 3.905–1(a)(2) *may* obtain review of the order's conformance with 41 U.S.C. 4712 and its implementing regulations, in the U.S. court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review *may* be filed more than 60 days after issuance of the order by the *head of the agency*. Filing such an appeal *shall* not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

3.906 Contract clause.

The *contracting officer shall* insert the clause at 52.203-17, Contractor Employee Whistleblower Rights, in all *solicitations* and contracts, except *solicitations* and contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community (see 3.900(a)).

3.907 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act).

3.907-1 Definitions.

As used in this section-

Board means the Recovery Accountability and Transparency *Board* established by Section 1521 of the Recovery Act.

Covered funds means any contract payment, grant payment, or other payment received by a contractor if-

(1) The Federal Government provides any portion of the money or property that is provided, requested, or demanded; and

(2) At least some of the funds are appropriated or otherwise made available by the Recovery Act.

Covered information means information that the employee reasonably believes is evidence of gross mismanagement of the contract or *subcontract* related to *covered funds*, gross waste of *covered funds*, a substantial and specific danger to public health or safety related to the implementation or use of *covered funds*, an abuse of authority related to the implementation or use of *covered funds*, or a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to *covered funds*.

Inspector General means an *Inspector General* appointed under the *Inspector General* Act of 1978. In the Department of Defense that is the DoD *Inspector General*. In the case of an *executive agency* that does not have an *Inspector General*, the duties *shall* be performed by an official designated by the head of the *executive agency*.

Non-Federal employer, as used in this section, means any employer that receives Recovery Act funds, including a contractor, *subcontractor*, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal *Acquisition* Regulation.

3.907-2 Policy.

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing *covered information* to any of the following entities or their representatives:

(1) The *Board*.

(2) An *Inspector General*.

(3) The Comptroller General.

(4) A member of Congress.

(5) A State or Federal regulatory or law enforcement agency.

(6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

(7) A court or grand jury.

(8) The head of a *Federal agency*.

3.907-3 Procedures for filing complaints.

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in 3.907-2, *may* submit a complaint regarding the reprisal to the *Inspector General* of the agency that awarded the contract.

(b) The complaint *shall* be signed and *shall* contain-

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The *covered information* giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act; and

(5) The specific nature and date of the reprisal.

(c) A *contracting officer* who receives a complaint of reprisal of the type described in 3.907-2 *shall* forward it to the Office of *Inspector General* and to other designated officials in accordance with agency procedures (*e.g.*, agency legal counsel).

3.907-4 Procedures for investigating complaints.

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

3.907-5 Access to investigative file of Inspector General.

(a) The employee alleging reprisal under this section *shall* have access to the investigation file of the *Inspector General*, in accordance with the Privacy Act, 5 U.S.C. §552a. The investigation of the *Inspector General shall* be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the *agency head* or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the *non-Federal employer shall* have access to the investigative file of the *Inspector General* in accordance with the Privacy Act.

(c) The *Inspector General may* exclude from disclosures made under 3.907-5(a) or (b)-

(1) Information protected from disclosure by a provision of law; and

(2) Any additional information the *Inspector General* determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the *Inspector General* determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An *Inspector General* investigating an alleged reprisal under this section *may* not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with 5 U.S.C. 552a or as required by any other applicable Federal law.

3.907-6 Remedies and enforcement authority.

(a) *Burden of Proof.*

(1) Disclosure as contributing factor in reprisal.

(i) An employee alleging a reprisal under this section *shall* be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section 3.907-2 was a contributing factor in the reprisal.

(ii) A disclosure *may* be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including-

(A) Evidence that the official undertaking the reprisal knew of the disclosure; or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal*. The head of an agency *may* not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907-6(a)(1) if the *non-Federal employer* demonstrates by clear and convincing evidence that the *non-Federal employer* would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an *Inspector General* report in accordance with section 1553 of the Recovery Act, the *head of the agency* concerned *shall* determine whether there is sufficient basis to conclude that the *non-Federal employer* has subjected the complainant to a reprisal prohibited by subsection 3.907-2 and *shall* either issue an order denying relief in whole or in part or *shall* take one or more of the following actions:

(1) Order the employer to take affirmative action to abate the reprisal.

(2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)

(1) The complainant *shall* be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant *may* bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of *United States*, which *shall* have jurisdiction over such an action without regard to the amount in controversy if-

(i) The head of an agency-

(A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint in accordance with section 1553 of the Recovery Act, or in the case of an extension of time in accordance with section 1553 of the Recovery Act, within 30 days after the expiration of the extension of time; or

(C) Decides in accordance with section 1553 of the Recovery Act not to investigate or to discontinue an investigation; and

(ii) There is no showing that such delay or decision is due to the bad faith of the complainant.

(2) Such an action *shall*, at the request of either party to the action, be tried by the court with a jury.

(d) Whenever an employer fails to comply with an order issued under this section, the *head of the agency shall* request the Department of Justice to file an action for enforcement of such order in the *United States* district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court *may* grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under paragraph (b) of this subsection *may* obtain review of the order's conformance with the law, and this section, in the *United States* Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review *may* be filed more than 60 days after issuance of the order by the *head of the agency*.

3.907-7 Contract clause.

Use the clause at 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009, in all *solicitations* and contracts funded in whole or in part with Recovery Act funds.

3.908 [Reserved]

3.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.

3.909-1 Prohibition.

(a) The Government is prohibited from using fiscal year 2015 and subsequent fiscal year funds for a contract with an entity that requires employees or *subcontractors* of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or *subcontractors* from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. See section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions.)

(b) The prohibition in paragraph (a) of this section does not contravene requirements applicable to Standard Form 312 (*Classified Information* Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of *classified information*.

3.909-2 Representation by the offeror.

(a) In order to be eligible for contract award, an *offeror must* represent that it will not require its employees or *subcontractors* to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or *subcontractors* from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the *Inspector General*). Any *offeror* that does not so represent is *ineligible* for award of a contract.

(b) The *contracting officer may* rely on an *offeror*'s representation unless the *contracting officer* has reason to question the representation.

3.909-3 Solicitation provision and contract clause.

When using funding subject to the prohibitions in 3.909-1(a), the *contracting officer shall-*

(a)

(1) Include the provision at 52.203-18, Prohibition on *Contracting* with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation, in all *solicitations*, except as provided in paragraph (a)(2) of this section; and

(2) Do not insert the provision in *solicitations* for a *personal services contract* with an individual if the services are to be performed entirely by the individual, rather than by an employee of the contractor or a *subcontractor*.

(b)

(1) Include the clause at 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, in all *solicitations* and resultant contracts, other than *personal services contracts* with individuals.

(2) Modify existing contracts, other than *personal services contracts* with individuals, to include the clause before obligating FY 2015 or subsequent FY funds that are subject to the same prohibition on internal confidentiality agreements or statements.