



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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JAN 25 2012

The Honorable Claire McCaskill
Chairman
Subcommittee on Contracting Oversight
Committee on Oversight and Government Reform
United States Senate
Washington, DC 20510-6262

Dear Madam Chairman:

This is in response to an email dated December 20, 2011, from Ms. Kelsey Stroud of your staff, providing a copy of the hearing transcript along with four Questions for the Record (QFRs) for Mrs. Marguerite Garrison, Deputy Inspector General for Administrative Investigations, related to the December 6, 2011, hearing, "Whistleblower Protections for Government Contractors."

The responses to the QFRs are attached. In addition, pages to the hearing transcript with minor edits are also attached.

Should you have any questions regarding this matter, please contact me at (703) 604-8324.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Crane".

John R. Crane
Assistant Inspector General
Communications and Congressional Liaison

Enclosure:
As stated

Post-Hearing Questions for the Record
Submitted to
Mrs. Marguerite Garrison, Deputy Inspector General for Administrative Investigations,
U.S. Department of Defense
From Senator McCaskill
“WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR WHISTLEBLOWERS”
Tuesday, December 6, 2011, 10:00 A.M.
United States Senate, Subcommittee on Contracting Oversight,
Committee on Homeland Security and Governmental Affairs

- 1. You told Senator Portman that the DFARS have been effective at improving notification to contractor whistleblower of their rights, but did not know to what extent. Could you please provide information to support this contention?**

Based on a recommendation from the DoD Inspector General (DoD IG), Section 842 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417, required Defense contractors to inform their employees in writing of their whistleblower rights and protections under Title 10, United States Code, Section 2409. The Defense Federal Acquisition Regulation Supplement (DFARS) provision implementing this requirement was issued in January 2009. We note that between FY 2009 and FY 2011 the number of Defense contractor whistleblower reprisal complaints we received increased more than 50%, from 44 to 68. Based on the increase in reprisal complaints filed by Defense contractor employees, we believe it likely that the DFARS provision has meant that more Defense contractor employees are now informed about, and therefore exercising, their whistleblower rights.

In addition, we believe the DFARS has been strengthened by a rule promulgated in the September 16, 2011, Federal Register (76 Fed. Reg. 57,671), which requires companies that have contracts with the Department of Defense to display DoD IG fraud hotline posters in common work areas and at contract work sites. Additionally, if the contractor maintains a company website as a method of providing information to employees, the contractor must display an electronic version of the poster on the website. DoD OIG has also recently introduced a poster specifically for informing contractor employees of their whistleblower protections. The poster, a copy of which is attached, states that Defense contractor employees have “whistleblower rights” and that employees should contact the DoD Hotline if they have reported serious wrongdoing and believe they have suffered retaliation.

The DoD OIG Hotline website includes information regarding contractor employees’ and others’ whistleblower protections. The page for whistleblower reprisal complaints, at http://www.dodig.mil/HOTLINE/reprisal_complaint.htm, describes reprisal under each of the statutes under which we have authority and offers a downloadable guide for filing complaints, in addition to listing the steps involved in filing a complaint.

- 2. As was raised during the hearing, you have been reviewing whistleblower claims under two different versions of the statute (10 U.S.C. § 2409). Could you please explain the legal rationale behind this interpretation and provide the documentation that the Office of Inspector General relied on to make this determination?**

You asked the basis for our legal opinion that the January 2008 amendment in PL 110-181, Section 846, to 10 USC §2409, Defense Contractor Employee Whistleblower Protection Act ("statute"), was not effective immediately upon passage but instead required implementation, i.e., in the publication of the Defense Federal Acquisition Regulation Supplement (DFARS) subpart 203.9 in January 2009, which implemented the statutory amendments.

Our legal opinion is fundamentally grounded in the fact that defense contractor whistleblower rights flow through the contract and are set at the time the contract is awarded or modified, as are the penalties and sanctions on contractors for violations. The contract terms, established in the DFARS, are essentially the "law" that applies to the particular contractor and its employees. As a general proposition, a contractor cannot be sanctioned because the government changed the rules after the contract terms were set.

Additionally, because the statute is a procurement provision, it is reasonable to expect the amendment's expansion of the scope of a qualifying communication will impact on contractor operations and costs, e.g., in developing internal reporting and tracking mechanisms, which would be an expense that was not included in contractor's bid under the Federal Acquisition Regulation (FAR). In short, the amended statute has the potential to expand vastly a contractor's exposure to reprisal claims beyond the exposure to which the contractor had bargained for.

Further, the DFARS itself states it implements the amended statute. In fact, the interim rule was published under the authority of the Secretary of Defense to determine that "urgent and compelling reasons" existed to publish an interim rule prior to public comment. There would have been no necessity for the Secretary of Defense to invoke "urgent and compelling" circumstances to publish an interim DFARS if the statutory amendments were already controlling.

Finally, our analysis also considered that courts are wary of the executive branch wielding the "judicial" power of imposing penalties/restitution. Courts construe penalty provisions narrowly and agencies must take care to ensure that legal rights and due process are respected. This implies a regulatory framework for imposing the penalties/orders/restitution on the contractor and notice to the contractor of this framework. This notice is accomplished through the contract.

After considering the issue in depth, we concluded, based on the factors noted above, that the statutory amendment took effect upon implementation and incorporation into contract terms rather than immediately on passage.

- 3. Have you reviewed any whistleblower cases under 10 U.S.C. § 2409, as amended by the 2008 National Defense Authorization Act? To your knowledge, does the government reimburse the costs of legal expenses in whistleblower reprisal lawsuits for some contractors?**

DoD OIG has not yet investigated any cases under 10 U.S.C. § 2409, as amended by the National Defense Authorization Act for Fiscal Year 2008. We have, however, investigated one complaint under section 1553 of the American Recovery and Reinvestment Act of 2009.

We have no information on which to base a response to the question on government reimbursement of legal expenses.

- 4. During the hearing you said that a statute of limitations on whistleblower complaints would help expedite whistleblower investigations by IGs. Could you please explain this statement further and how you think the S. 241 could be changed to address this?**

Many whistleblower protection statutes enacted in the past decade provide for a statutory filing deadline of 180 days from the date upon which the unfavorable personnel action was taken and communicated to the employee. Statutory filing deadlines serve the purpose of prompt resolution of complaints. The more promptly an investigation can commence after an alleged act of whistleblower reprisal, the more likely the investigation will be thorough, accurate, and fair. Testimony will be less affected by the degradation of memory over time, and documentary evidence will be less likely to have been destroyed, altered, or lost. In addition, prompt resolution may prevent the build-up of tension in the workplace or uncertainty about the futures of the complainant as well as the responsible management officials.