



OFFICE OF INSPECTOR GENERAL

U.S. Department of Energy

INSPECTION REPORT

DOE-OIG-20-04

November 2019

**DEPARTMENT OF ENERGY'S
INCORPORATION OF 41 U.S.C. 4712
ENHANCED WHISTLEBLOWER
PROTECTIONS FOR CONTRACTOR
EMPLOYEES INTO ITS CONTRACTS**



Department of Energy
Washington, DC 20585

November 4, 2019

MEMORANDUM FOR THE SECRETARY

A handwritten signature in black ink, appearing to read "Teri L. Donaldson".

FROM: Teri L. Donaldson
Inspector General

SUBJECT: INFORMATION: Inspection Report on “Department of Energy’s Incorporation of 41 U.S.C. 4712 Enhanced Whistleblower Protections for Contractor Employees into its Contracts”

In January 2013, Congress enacted legislation (hereafter referred to as 41 U.S.C. 4712)¹, effective July 1, 2013, to provide enhanced protections to contractor, subcontractor, and grantee employees who reasonably believe they experienced reprisal as a result of disclosing certain wrongdoing to specified entities and individuals. To provide these protections to employees, the Department of Energy is required to: (1) include the Federal Acquisition Regulation (FAR) clause 52.203-17 in contracts over the simplified acquisition threshold (\$250,000 as of February 2018) and awarded after September 30, 2013; and (2) make “best efforts” to include the FAR clause in any “major modification” to an existing contract awarded before the law went into effect. Because whistleblowers play an important role in keeping our Government and its contractors honest, efficient, and accountable, we initiated this inspection to determine whether the Department had incorporated the 41 U.S.C. 4712 enhanced contractor whistleblower protections into its contracts.

In October 2013, the Department issued guidance encouraging Contracting Officers to include the clause in major modifications to contracts and orders awarded. In addition, the Department held meetings with procurement directors to obtain a status update on successes and obstacles to incorporate the clause into existing contracts. We reviewed 30 of the Department’s largest contracts, totaling approximately \$386 billion, and found that the Department successfully incorporated the FAR clause into 28 of those contracts. For the two contracts that did not have the FAR clause (one with Bechtel National, Inc. (Bechtel)) and another with URS-CH2M Oak Ridge LLC (UCOR)), Department contracting officials attempted to incorporate the FAR clause bilaterally (agreed upon by both parties) following passage of the law. However, the contractors did not agree to include it in their contracts, citing numerous reasons, including that the FAR

¹ Public Law 112-239, *National Defense Authorization Act for Fiscal Year 2013*, Section 828, *Pilot Program for Enhancement of Contractor Employee Whistleblower Protections* (added in 41 U.S.C. 4712, *Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information*), was passed on January 2, 2013. The pilot program was made permanent by Section 1 of Public Law 114-261, *Enhancement of Whistleblower Protection for Contractor and Grantee Employees*, on December 14, 2016.

clause is only mandatory for new contracts, whistleblower protections already existed, and the addition could potentially create additional costs. Department officials stated that they do not have the unilateral right to insert the FAR clause; therefore, there was no way to include the FAR clause without contractor agreement.

Both of these contracts (UCOR and Bechtel) were awarded before the law went into effect. As such, 41 U.S.C 4712 requires the head of the contracting agency to make “best efforts” during major modifications to include a clause in contracts awarded before the legislation went into effect but did not define the term “best efforts.” For the Bechtel contract, the Contracting Officer told us that there were discussions regarding the FAR clause during the negotiations for the 2016 major modification, which extended the contract through 2022 and increased the contract cost by more than \$3 billion; however, the FAR clause was not included into the contract. For the UCOR contract, the Department exercised an option in October 2015, valued at about \$774 million, to extend the contract for 4 years, which was a major modification that extended the contract until July 2020. The Contracting Officer contacted UCOR in an attempt to include the FAR clause prior to this major modification; however, the attempt was unsuccessful. Therefore, the Contracting Officer stated that during the subsequent negotiation with UCOR officials about this major modification, there were no further discussions of including the FAR clause.

Because the Department was successful in its efforts to include the FAR clause in 28 of the 30 contracts we reviewed, employees of these contractors have been afforded the additional whistleblower protections under 41 U.S.C. 4712. While the thousands of contractor and subcontractor employees for the two contracts without the FAR clause are still covered under the Department’s existing whistleblower program², they have not been afforded the additional whistleblower protections under 41 U.S.C. 4712, such as the increased statute of limitations from 90 days to 3 years for filing a complaint. Attachment 3 includes a detailed comparison of the Department’s contractor whistleblower program and the enhanced program designed under 41 U.S.C. 4712. If major modifications are made to the Bechtel or UCOR contracts in the future, we suggest that the Director, Office of Acquisition Management work with the Head of Contracting Activity for the Office of Environmental Management to ensure that Contracting Officers make best efforts to include the FAR clause.

Attachments

cc: Deputy Secretary
Chief of Staff

² The Department’s contractor whistleblower program is codified in 10 CFR 708, *DOE Contractor Employee Protection Program*.

OBJECTIVE, SCOPE, AND METHODOLOGY

OBJECTIVE

We conducted this inspection to determine whether the Department of Energy had incorporated the 41 U.S.C. 4712 enhanced contractor whistleblower protections into its contracts.

SCOPE

This inspection was performed from November 2018 to August 2019 at the Hanford Site, consisting of the Richland Operations Office and the Office of River Protection in Richland, Washington; Idaho Operations Office in Idaho Falls, Idaho; and Department Headquarters in Washington, DC. The scope of the inspection was limited to the facts and circumstances surrounding the incorporation of the contractor whistleblower protections Federal Acquisition Regulation clause 52.203-17 into 30 of the Department's largest contracts. The inspection was conducted under Office of Inspector General project number A19DN005.

METHODOLOGY

To accomplish our objective, we:

- Reviewed applicable laws, regulations, policies, and procedures;
- Reviewed relevant reports issued by the Office of Inspector General and the Government Accountability Office;
- Conducted interviews with Federal personnel and contractor personnel from URS-CH2M Oak Ridge LLC; Bechtel National, Inc.; CH2M Hill Plateau Remediation Company; and Battelle Energy Alliance; and
- Judgmentally selected 30 of the Department's active, operational contracts with performance period end dates on or after February 1, 2019, that had the largest total award amounts and determined if they contained the Federal Acquisition Regulation clause 52.203-17. The 30 selected contracts totaled approximately \$386 billion and represented 94 percent of the Department's approximate \$411 billion in total active contracts as of January 2019. We did not conduct a statistical sample; therefore, we cannot project our inspection results to the population.

We conducted this inspection in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*. Those standards require that we plan and perform the inspection to obtain sufficient, appropriate evidence to provide a reasonable basis for our conclusions and observations based on our inspection objective. We believe that the evidence obtained provided a reasonable basis for our conclusions and observations based on our inspection objective. Accordingly, the inspection included tests of controls and compliance with laws and regulations to the extent necessary to satisfy the inspection objective. Because our review was limited, it would not necessarily have disclosed all

internal control deficiencies that may have existed at the time of our inspection. We relied on computer-processed data to some extent to satisfy our objective. Based on our comparison of computer-processed data to supporting documents, we determined that the data was sufficiently reliable.

Management officials waived an exit conference on August 22, 2019.

RELATED REPORT**Government Accountability Office**

Report on [*DEPARTMENT OF ENERGY: Whistleblower Protections Needs Strengthening*](#) (GAO-16-618, July 2016). The report concluded that several factors at the Department of Energy may limit the use and effectiveness of mechanisms for contractor employees to raise concerns and seek whistleblower protections. The Government Accountability Office also noted that the Department has infrequently used its enforcement authority to hold contractors accountable for unlawful retaliation, issuing two violation notices in the past 20 years. The Government Accountability Office made six recommendations, including that the Department conduct independent assessments of the environment for raising concerns, evaluate whether the whistleblower pilot program will mitigate challenges with the existing program, expedite timeframes for clarifying regulations, and clarify policies to hold contractors accountable.

Contractor Whistleblower Protections

	10 CFR Part 708	41 U.S.C. 4712
Who is Covered?	Employees of Department of Energy contractors, including subcontractors	Employees of contractors, subcontractors, or grantees
To Whom Can Disclosures be Made?	Department of Energy Official, member of Congress, any other Government official who has oversight responsibility of the conduct of operations at the Department of Energy site, employer, or higher-tier contractor	Congress member or representative of Congressional committee; Inspector General; Government Accountability Office; Federal employee responsible for contract or grant oversight or management at the relevant agency; authorized official of the Department of Justice or other law enforcement agency; court or grand jury; management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or investigate misconduct
What Is Protected Activity?	<p>Disclosing information that the employee reasonably believes reveals:</p> <ol style="list-style-type: none"> (1) substantial violation of a law, rule, or regulation (2) substantial and specific danger to employees or to public health or safety (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority <p>Or, participating in a Congressional or administrative proceeding conducted under this regulation</p> <p>Or, refusing to participate in an activity, policy, or practice if the employee believes participation would:</p> <ol style="list-style-type: none"> (1) constitute a violation of a Federal health or safety law or (2) cause the employee to have a reasonable fear of serious injury 	<p>Disclosing information that the employee reasonably believes is evidence of:</p> <ol style="list-style-type: none"> (1) gross mismanagement of a Federal contract or grant (2) gross waste of Federal funds (3) abuse of authority relating to a Federal contract or grant (4) substantial and specific danger to public health or safety (5) violation of law, rule, or regulation related to a Federal contract (including the competition for a negotiation of a contract) or grant

	10 CFR Part 708	41 U.S.C. 4712
	to the employee, other employees, or members of the public	
What Are Retaliatory Acts?	An action (including intimidation, threats, restraint, coercion, or similar action) regarding employment, such as discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions, or privileges of employment	Discharged, demoted, or otherwise discriminated against for making protected disclosure
To Whom Should Initial Filing Be Made?	Director of the Office of Employee Concerns (EC Director) if Contracting Officer is located in Department of Energy Headquarters or the Head of Field Element if employed by contractor at Department of Energy field facility site	Office of Inspector General
Statute of Limitations?	90 days after date employee knew, or reasonably should have known, of alleged retaliation	3 years after date on which alleged reprisal occurred
Who Investigates Complaints?	Office of Hearings and Appeals (OHA) Investigator	Office of Inspector General
Who Conducts Hearings?	OHA Administrative Judge	N/A
Who Issues Remedial Orders?	The Head of Field Element or EC Director will implement final agency decision by forwarding decision to contractor or subcontractor involved	After receiving the Inspector General's report, within 30 days, the head of executive agency determines whether or not there is sufficient basis to conclude that complainant was subjected to a reprisal and may issue an order for relief
Appeals	(1) Employee can appeal OHA Administrative Judge's decision with OHA Director	Can seek review of head of agency's order in the United States Court of Appeals for the circuit

	10 CFR Part 708	41 U.S.C. 4712
	<ul style="list-style-type: none"> (2) Employee can appeal EC Director or Head of Field Element dismissal to OHA Director (3) Employee can petition OHA Director's decision for Secretarial review 	<p>which reprisal is alleged to have taken place</p>
Remedies	<ul style="list-style-type: none"> (1) Reinstatement (2) Transfer preference (3) Back pay (4) Reimbursement for reasonable costs and expenses (5) Other remedies deemed necessary to abate the violation and provide relief 	<ul style="list-style-type: none"> (1) Affirmative action to abate reprisal (2) Reinstatement and compensatory damages (including back pay), employment benefits, and other terms and conditions that would apply had the reprisal not occurred (3) Reimbursement for reasonable costs and expenses

Source: Department of Energy's Facility Contractor Operations Group

FEEDBACK

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