



DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

MANAGEMENT ADVISORY MEMORANDUM

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FEBRUARY 2021

Notification of Concerns Regarding the Department of Justice's Compliance with Laws, Regulations, and Policies Regarding Whistleblower Rights and Protections for Contract Workers Supporting Department of Justice Programs

AUDIT DIVISION



February 10, 2021

Management Advisory Memorandum

To: Michael H. Allen
Deputy Assistant Attorney General and Senior Procurement Executive
Justice Management Division

A handwritten signature in blue ink that reads "Michael E. Horowitz".

From: Michael E. Horowitz
Inspector General

Subject: Notification of Concerns Regarding the Department of Justice's Compliance with Laws, Regulations, and Policies Regarding Whistleblower Rights and Protections for Contract Workers Supporting Department of Justice Programs

The purpose of this memorandum is to advise you of a systemic issue that the Office of the Inspector General (OIG) has identified related to the Department of Justice's (Department) compliance with laws, regulations, and established internal policies designed to ensure notice to prime contractors and subcontractors (hereafter, contract workers or workers collectively) about their whistleblower rights and protections. In 2018, the OIG's annual *Top Management and Performance Challenges Facing the Department of Justice* cited multiple recommendations to Department components to enhance their education of managers about whistleblower protections and to ensure that their policies as well as the policies of Department contractors comply with the legal requirements. Since then, several OIG audits and investigations have noted that contracting officers neither included mandatory contract clauses regarding whistleblower rights and reprisal protections nor verified whether contractors informed their workers of such content as required. We also identified a contractor that required its workers to sign non-disclosure agreements (NDA) that did not mention protected disclosures of wrongdoing.

While the Department, through actions taken to address recommendations in our reports and previous advisory memoranda, has made progress towards bolstering contract worker whistleblower rights and protections, we are providing this memorandum to summarize the issues and concerns that we believe should be addressed comprehensively throughout the Department. The audits and investigations that form the basis for this memorandum include reviews of contracts administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Federal Bureau of Prisons (BOP), the Drug Enforcement Administration (DEA), the Environment and Natural Resources Division (ENRD), and the United States Marshals Service (USMS). Considering the critical role that whistleblowers play in helping our government to remain efficient and accountable, and to ensure appropriate stewardship of taxpayer dollars, we believe that the Department should make a more concerted effort to: (1) reacquaint all Department personnel whom closely interact with contract workers (e.g., contracting officers, contracting officer's representatives, task monitors,

program managers, etc.) with laws, regulations, and internal policies that govern contract worker whistleblower rights and protections; and (2) enhance existing internal policies and procedures to clarify: (a) when to convey whistleblower rights and protections to contract workers and (b) how to verify whether this has occurred.

Compliance with Laws and Regulations

Federal law (41 U.S.C. § 4712) prohibits a federal contractor from discharging, demoting, or otherwise discriminating against a contract worker as a reprisal for disclosing information that the worker reasonably believes is evidence of gross waste, gross mismanagement, abuse of authority, or a violation of law, rule, or regulation related to a contract.¹ The statute also requires the head of each executive agency to ensure that its contractors inform their workers in writing of the rights and remedies under the statute.

Similar to 41 U.S.C. § 4712, FAR Subpart 3.903, *Whistleblower Protections for Contractor Employees, Policy*, prohibits government contractors from retaliating against a contract worker for making a protected disclosure. The regulation also requires contracting officers to insert FAR clause 52.203-17, *Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights* in all solicitations and contracts that exceed the Simplified Acquisition Threshold (SAT).²

The Department has the responsibility to ensure its contractors inform their workers of whistleblower rights and protections. In various audits, we found instances where the contracting officers did not include the mandatory whistleblower protection clause in existing and new contracts. In other instances, the contract clause was included, but the contracting officers did not follow up with the contractors' management to verify that they had informed workers of their whistleblower rights and protections as required.

For example, in the audit of two contracts that totaled approximately \$29 million awarded by ATF for crime gun intelligence support of the National Integrated Ballistic Information Network, we found that the contracts did not incorporate the required whistleblower protection clauses. As a result, the contract workers may not have been aware of their rights and the protections for disclosing any wrongdoing within the contract performance. In response to our audit, ATF identified 74 other non-compliant contracts, which required subsequent modification to include FAR clause 52.203-17.³ We also found that FAR clause 52.203-17 was not included in eight ENRD expert witness contracts and that ENRD neither documented nor followed up with the contractors to verify that they had

¹ In order to be protected, a disclosure must be made to one of the seven offices or officials listed in 41 U.S.C. § 4712(a)(2). Section 4712's protections also extend to subcontractors, grantees, and subgrantees. This memorandum focuses only on contractors and subcontractors.

² FAR Part 13 details *Simplified Acquisition Procedures*, which are steps to streamline the purchase of relatively simple supply and service requirements, characterized by a total value not exceeding the SAT. For the contracts referenced in this memorandum that were awarded prior to February 16, 2018, the SAT was not to exceed \$150,000 and \$250,000 for those awarded later.

³ DOJ OIG, [Audit of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Administration of the National Integrated Ballistic Information Network and Its Sole-Source Contracts Awarded to Shearwater Systems, LLC](#), Audit Report 20-067 (June 2020)

informed contract workers of their whistleblower rights.⁴ Additionally, we continue to find in ongoing OIG audits that this FAR clause is not included in Department contracts, and we are not seeing evidence that the contractor informed the contract workers of their whistleblower rights and protections.

In addition, two OIG investigations found that the Department's components needed to do more to ensure that their contractors were aware of the whistleblower protections that federal law provides for contractor employees, and to ensure that their contractors took appropriate action to conform their internal policies to federal law. Specifically, in an investigation into a complaint of reprisal by former employees of a USMS contractor in which the claims of reprisal were not substantiated, the OIG concluded that the contractor's written policies on chain of command reporting, and the USMS contract itself, were inconsistent with statutory whistleblower protections for employees of contractors found in 41 U.S.C. § 4712 because they prohibited any discussions with government officials outside of the employee's chain of command without prior authorization. Such a prohibition is also contrary to the whistleblower protections described in FAR Subpart 3.908-3(a). The USMS is currently updating its internal policies and procedures to ensure that it does not write contracts that limit existing whistleblower protections for contract workers by imposing requirements that preclude protected disclosures.⁵

In another investigation into a complaint of reprisal by a former employee of a BOP contractor, the OIG found that the employee suffered reprisal for making a protected disclosure directly to a BOP official. In part, the OIG found that the contractor had imposed a 6-month probationary period on the employee, during which the employee was prohibited from having any further contact with the BOP official who had received the disclosure or any other person associated with the BOP or another federal agency connected to the contract. The imposition of a "no contact" probationary period was in direct conflict with the plain language of 41 U.S.C. § 4712, which permits a contractor employee to make a protected disclosure to certain federal employees and states that the rights and remedies of § 4712 may not be waived. In addition, the OIG found that the contractor did not provide its employees with any written materials to communicate the rights and remedies available to them under § 4712.⁶

Compliance with Established DOJ Internal Policies

To implement the requirements of 41 U.S.C. § 4712 and FAR Subpart 3.908-9, the Department's Justice Management Division (JMD) issued Procurement Guidance Document (PGD) 16-05, *Implementation of Requirement of Notification to Contractors of Employee Whistleblower Rights*, on August 9, 2016, effective immediately. PGD 16-05 required contracting officers to insert FAR clause 52.203-17 into all new contracts. Additionally, for all new and existing contracts, the guidance required contracting officers:

⁴ DOJ OIG, [Audit of the Environment and Natural Resources Division's Procurement and Administration of Expert Witness Contracts](#), Audit Report 20-108 (September 2020)

⁵ DOJ OIG, [Procedural Reform Recommendation for the U.S. Marshals Service](#), Investigation Report 2016-001875 (January 2018)

⁶ DOJ OIG, [Procedural Reform Recommendation for the Federal Bureau of Prisons on Ensuring That Contractor and Grantee Employees Are Notified of Whistleblower Rights and Remedies](#), Investigation Report 20-023 (January 2020)

- (1) provide contractors with a “Whistleblower Information for DOJ Contractors, Subcontractors, and Grantees” document (Whistleblower Information document);
- (2) direct the contractors and subcontractors to distribute the Whistleblower Information document to their employees; and
- (3) direct the contractor to provide an affirmative response notifying the DOJ of their successful distribution of the Whistleblower Information document to its employees, which should be added to the contract file.

Although JMD issued PGD 16-05 in August 2016, some components remain unaware of the guidance or are aware and do not follow the guidance. For example, in the audit of the previously mentioned two ATF crime gun intelligence contracts, we found that contracting officials were unaware of PGD 16-05 and therefore did not include the required whistleblower clause in the contract terms and conditions. One contracting official explained that ATF acquisition professionals follow a policy checklist and the requirement was not listed on this checklist. As a result, neither ATF nor the contractor informed the contract workers of their whistleblower rights and protections prior to the audit inquiry.

In an audit of a nearly \$39 million 2018 DEA contract for linguistic services, we found that the non-disclosure agreements we reviewed did not inform individuals of their whistleblower rights under 41 U.S.C. § 4712, and therefore the terms and conditions of the non-disclosure agreements conflicted with the statutory protections under section 4712.⁷

Moreover, in the OIG’s ongoing audits of Department contracts, we continue to find similar issues described in this section.

Conclusion and Recommendations

We are providing this information so that the Department can address the above-described systemic findings to ensure that the Department, its components, and its contractors are fully compliant with requirements of whistleblower protection laws and regulations. We specifically recommend that the Department:

- (1) reacquaint all Department personnel that closely interact with contract workers (e.g. contracting officers, contracting officer’s representatives, task monitors, program managers, etc.) with laws, regulations, and internal policies that govern contract worker whistleblower rights and protections; and
- (2) enhance existing internal policies and procedures to clarify: (a) when to convey whistleblower rights and protections to contract workers and (b) how to verify whether this has occurred.

If you have any questions regarding the information in this memorandum, please contact me at (202) 514-3435 or Jason R. Malmstrom, Assistant Inspector General for Audit, at (202) 616-4633.

⁷ DOJ OIG, [Audit of the DEA’s Regional Linguist Services Contract Awarded to Conduit Language Specialists, Inc.](#), Audit Report 18-08 (January 2018).

cc: Louise Duhamel
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Bradley Weinsheimer
Associate Deputy Attorney General

JUSTICE MANAGEMENT DIVISION'S RESPONSE TO
THE MANAGEMENT ADVISORY MEMORANDUM



U.S. Department of Justice

Justice Management Division

Washington, D.C. 20530

November 20, 2020

MEMORANDUM TO: Michael E. Horowitz
Inspector General
United States Department of Justice

FROM Michael H. Allen
Deputy Assistant Attorney General and
Senior Procurement Executive
Justice Management Division

MICHAEL
ALLEN

Digitally signed by
MICHAEL ALLEN
Date: 2020.11.20
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SUBJECT: Response to the Office of the Inspector General's Draft
Management Advisory Memorandum, *Notification of Concerns
Regarding the Department of Justice's Compliance with Laws,
Regulations, and Policies Regarding Whistleblower Rights and
Protections for Contract Workers Supporting Department of
Justice Programs*

This memorandum provides a response to the Office of the Inspector General's (OIG) October 26, 2020, draft Management Advisory Memorandum (MAM) entitled, a *Notification of Concerns Regarding the Department of Justice's Compliance with Laws, Regulations, and Policies Regarding Whistleblower Rights and Protections for Contract Workers Supporting Department of Justice Programs*. The Justice Management Division appreciates the opportunity to review and comment on the draft Management Advisory Memorandum.

The OIG's MAM identified findings related to the Department, its components, and its contractors' compliance with requirements of whistleblower protection laws and regulations. The specific recommendations and our response follows.

- (1) Reacquaint all Department personnel that closely interact with contract workers (e.g. contracting officers, contracting officer's representatives, task monitors, program managers, etc.) with laws, regulations, and internal policies that govern contract worker whistleblower rights and protections; and

By the third quarter of fiscal year 2021, the JMD Office of Acquisition Management (OAM) will issue a Department-wide Acquisition Policy Notice (APN) to all DOJ bureaus and components reinforcing the laws, regulations, and internal policies that govern contract worker whistleblower rights and protections.

- (2) **Enhance existing internal policies and procedures to clarify: (a) when to convey whistleblower rights and protections to contract workers and (b) how to verify whether this has occurred.**

In 2016, the DOJ commenced activities to update its portfolio of acquisition policies and procedures. This comprehensive approach to updating acquisition guidance resulted in the rescission and revision of numerous policies through a consolidation of guidance into Department-wide Policy Statements and Policy Instructions. The approach also entailed a significant rewrite of the Department of Justice's Federal Acquisition Regulation (FAR) supplement, the Justice Acquisition Regulation (JAR).

Given the Department's prioritization of requirements regarding Whistleblower protections, the DOJ added the current and applicable Whistleblower requirements into its JAR update which were originally addressed in legacy Procurement Guidance Document (PGD) 16-05. One requirement that was not included in the JAR update is the mandate that bureaus receive an affirmative response notifying DOJ that the contractor has successfully distributed the Whistleblower information to its employees. This DOJ requirement was established prior to the Federal Acquisition Council's release of final FAR language that govern government-wide implementation of acquisition-related Whistleblower protections. Neither the applicable Whistleblower statutes, nor the final FAR language require this verification process and for components with a large volume of contracts, it may be impractical. Therefore, the current JAR update being processed through the formal rulemaking process does not include such a requirement for bureaus.

As part of the aforementioned APN, DOJ will explain when to convey Whistleblower rights and protections and eliminate the verification requirement for bureaus in order to clarify its Departmental guidance until the JAR update has been finalized and DOJ can formally rescind PGD 16-05.

Thank you for the opportunity to respond to this draft Management Advisory Memorandum, and for your continued collaboration to improve the administration of Departmental programs. If you have any questions regarding this response, please contact Louise Duhamel, Acting Assistant Director, Audit Liaison Group, Internal Review and Evaluation Office, Justice Management Division, at (202) 514-4006 or me at 202-514-3101.

cc: Louise M. Duhamel
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**OFFICE OF THE INSPECTOR GENERAL
ANALYSIS AND SUMMARY OF ACTIONS
NECESSARY TO RESOLVE AND CLOSE THE
RECOMMENDATIONS**

The Office of the Inspector General (OIG) provided a draft of this advisory memorandum to the Justice Management Division (JMD). JMD's response is incorporated in Attachment 1 of this final memorandum. JMD did not state whether it agreed with our recommendations. However, JMD described the actions it has taken and will implement in response to our concerns. As a result, Recommendation Number 1 is resolved and Recommendation Number 2 is unresolved. The following discussion provides the OIG analysis of the response and summary of actions necessary to resolve and close the recommendations.

Recommendations for JMD:

- 1. Reacquaint all Department personnel that closely interact with contract workers (e.g. contracting officers, contracting officer's representatives, task monitors, program managers, etc.) with laws, regulations, and internal policies that govern contract worker whistleblower rights and protections.**

Resolved. JMD did not state whether it agreed with this recommendation, but the actions it described in its response to address this recommendation correspond to actions necessary to resolve and ultimately close the recommendation. Therefore, this recommendation is resolved. JMD stated in its response that, by the third quarter of Fiscal Year 2021, its Office of Acquisition Management (OAM) plans to issue a Department-wide Acquisition Policy Notice (APN) to all Department of Justice (DOJ) bureaus and components reinforcing the laws, regulations, and internal policies that govern contract worker whistleblower rights and protections.

This recommendation can be closed when JMD provides evidence that the OAM has disseminated the aforementioned APN to the contracting offices in all DOJ bureaus and components.

- 2. Enhance existing internal policies and procedures to clarify: (a) when to convey whistleblower rights and protections to contract workers and (b) how to verify whether this has occurred.**

Unresolved. JMD did not state whether it agreed with this recommendation, but the actions described in its response correspond with certain actions necessary to resolve and ultimately close this recommendation. However, JMD's response did not address how the Department will verify whether contract workers have been notified of their whistleblower rights and protections. JMD stated in its response that the Department began updating its portfolio of acquisition policies and procedures in 2016. This update included: (1) revising the Justice Acquisition Regulation (JAR) and (2) consolidating numerous department-wide

policy statements and instructions. The Department added the current and applicable whistleblower requirements to the JAR, which were originally addressed in the legacy DOJ Procurement Guidance Document (PGD) 16-05. However, according to JMD, the DOJ-specific mandate that bureaus obtain an affirmative response that the contractor has distributed the Whistleblower Information document to its employees was not retained because this requirement was established prior to the Federal Acquisition Council's release of final Federal Acquisition Regulation (FAR) language for government-wide implementation of acquisition related whistleblower protections. JMD further stated that neither the applicable whistleblower statutes nor the final FAR language requires this verification and for components with a large volume of contracts, it may be impractical. JMD also stated that the aforementioned APN will explain when to convey whistleblower rights and protections and eliminate the verification requirement for bureaus in order to clarify its Departmental guidance until the JAR update has been finalized and DOJ can formally rescind PGD 16-05.

While the impending final versions of the JAR and APN will eliminate the requirement that contracting officials verify that contractors have notified their workers of whistleblower rights and protections, we believe that the existing PGD 16-05 establishes the proactive internal controls necessary to ensure that the contract workers that support the Department's acquisitions above the Simplified Acquisition Threshold are informed of their whistleblower rights and protections. Following the rescission of PGD 16-05, the proposed revisions to the JAR and APN will not address the concern that DOJ contracting officials do not have an established process to "ensure" that contract workers are notified of their whistleblower rights and protections, as required by 41 U.S.C. § 4712.

This recommendation can be closed when JMD: (1) furnishes a copy of the final APN that details when to convey whistleblower rights and protections to contract workers and (2) establishes procedures that ensure the components consistently apply the final APN, which should include a method to confirm that contract workers are notified of their whistleblower rights and responsibilities (e.g., periodically sampling acquisitions above the Simplified Acquisition Threshold).