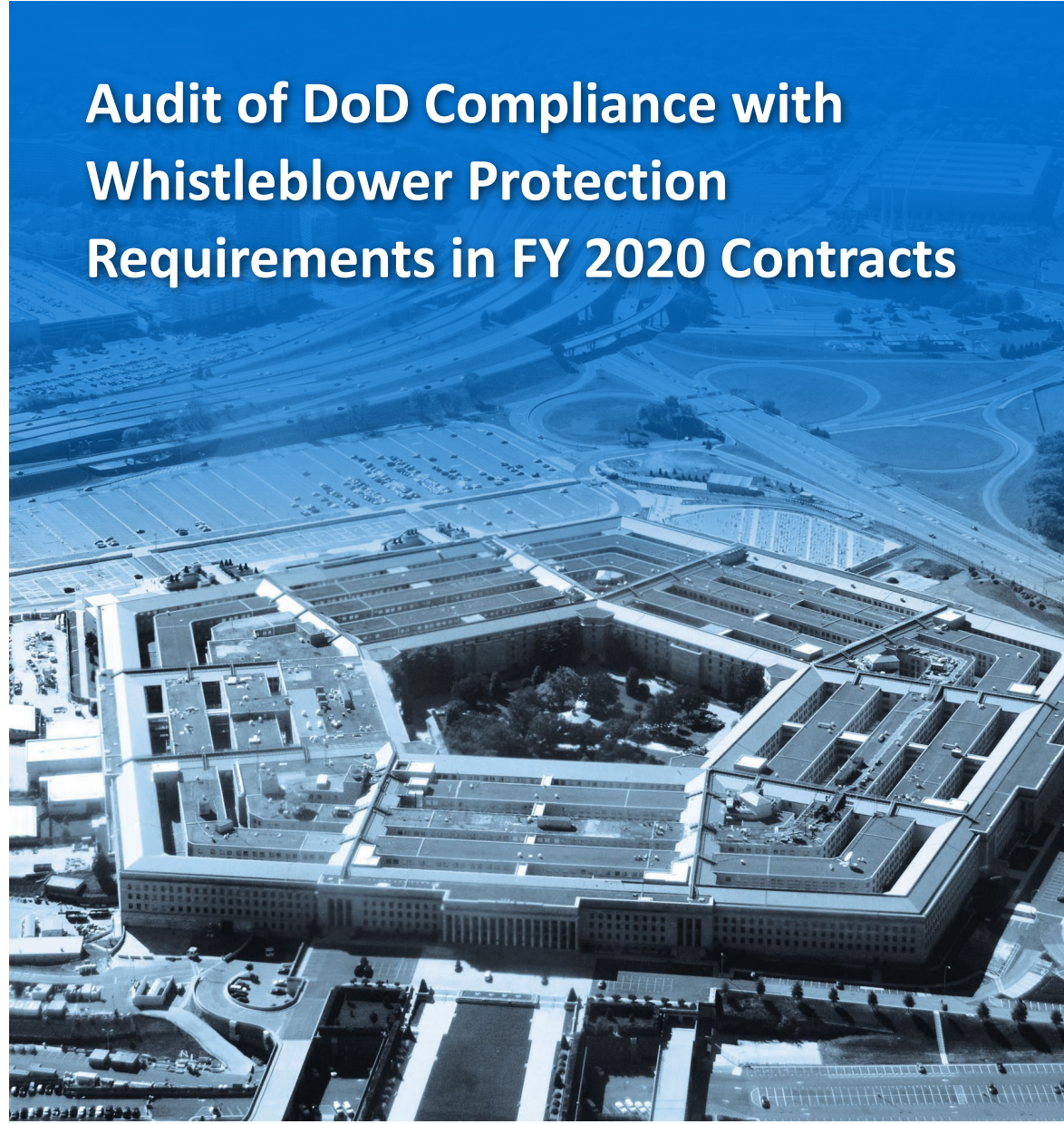




INSPECTOR GENERAL

U.S. Department of Defense

JULY 28, 2023



Audit of DoD Compliance with Whistleblower Protection Requirements in FY 2020 Contracts

INTEGRITY ★ INDEPENDENCE ★ EXCELLENCE





Results in Brief

Audit of DoD Compliance with Whistleblower Protection Requirements in FY 2020 Contracts

July 28, 2023

Objective

The objective of this audit was to determine whether DoD contracting officials included the required whistleblower clauses in contracts and ensured that DoD contractors were compliant with the requirement to inform employees in writing of their whistleblower rights and protections.

Background

Federal law provides statutory protections for Federal employees and DoD contractors who engage in the important act of “whistleblowing,” that is, making a disclosure of what they reasonably believe to be evidence of illegal or improper Government activities. Federal and DoD acquisition regulations require contracting officers to include a whistleblower clause in solicitations and contracts. The clause requires that contractors inform employees in writing of their whistleblower rights and protections.

Finding

DoD contracting officers generally included the required whistleblower clause in contracts but did not go beyond that requirement to verify that the contractors were compliant with the requirement to inform employees in writing of their whistleblower rights and protections. We projected that DoD contracting officers included the required whistleblower clause in 29,793 (95 percent) of the 31,340 FY 2020 contracts and that contracting officers omitted the clause from 860 (2.7 percent) of the 31,340 FY 2020 contracts. However, contracting officers verified that the contractors informed their employees in writing of whistleblower rights and

Finding (cont'd)

protections for only 3 (4 percent) of the 74 of the contracts we reviewed for such follow up. The contracting officers for the other 71 contracts did not verify compliance because DoD guidance does not require contracting officers to do so. Although not including a whistleblower clause in DoD contracts and not informing contractor employees in writing does not impact the whistleblower rights and protections of contractor employees, it may reduce the number of employees who are aware of or understand those rights and protections. It may also reduce the number of critical disclosures made by contractor employees who identify waste, fraud, mismanagement, and abuse and loss of taxpayer dollars. In FY 2022, the DoD recovered more than \$44.5 million as a result of hotline and contractor disclosures.

In addition to our findings regarding the required clauses, we found that one whistleblower clause that did not apply to the DoD, Federal Acquisition Regulation 52.203-17, was still included in 96 (41 percent) of the 235 contracts we reviewed.

Recommendations

We recommend that the Principal Director, Defense Pricing and Contracting: (1) implement controls in the contract-writing, (2) direct contracting officers to review the whistleblower clauses included in contracts and modify the contracts as necessary, and (3) include a reminder on the importance of including required whistleblower clauses in training. We also recommend that the Principal Director issue guidance directing contracting personnel to apply a risk-based approach.

Management Comments and Our Response

The Principal Director, Defense Pricing and Contracting, agreed with the recommendations, and their planned actions should address the recommendations. Therefore, the recommendations are resolved but will remain open. We will close the recommendations once we verify the actions have been implemented.

Please see the Recommendations Table on the next page for the status of recommendations.

Recommendations Table

Management	Recommendations Unresolved	Recommendations Resolved	Recommendations Closed
Principal Director, Defense Pricing and Contracting	None	1.a, 1.b, 1.c, 1.d	None

Note: The following categories are used to describe agency management’s comments to individual recommendations.

- **Unresolved** – Management has not agreed to implement the recommendation or has not proposed actions that will address the recommendation.
- **Resolved** – Management agreed to implement the recommendation or has proposed actions that will address the underlying finding that generated the recommendation.
- **Closed** – DoD OIG verified that the agreed upon corrective actions were implemented.



OFFICE OF INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500

July 28, 2023

MEMORANDUM FOR DISTRIBUTION

SUBJECT: Audit of DoD Compliance with Whistleblower Protection Requirements in FY 2020 Contracts (Report No. DODIG-2023-101)

This final report provides the results of the DoD Office of Inspector General's audit. We previously provided copies of the draft report and requested written comments on the recommendations. We considered management's comments on the draft report when preparing the final report. These comments are included in the report.

The Principal Director, Defense Pricing and Contracting agreed to address all the recommendations presented in the report; therefore, we consider the recommendations resolved and open. As described in the Recommendations, Management Comments, and Our Response section of this report, we will close the recommendations when you provide us documentation showing that all agreed-upon actions to implement the recommendations are completed. Therefore, within 90 days please provide us your response concerning specific actions in process or completed on the recommendations. Send your response to either followup@dodig.mil if unclassified or rfunet@dodig.smil.mil if classified SECRET.

If you have any questions, please contact me at [REDACTED]

FOR THE INSPECTOR GENERAL:

A handwritten signature in black ink, reading "Carol N. Gorman", is positioned below the text "FOR THE INSPECTOR GENERAL:". The signature is written in a cursive style.

Carol N. Gorman
Assistant Inspector General for Audit
Cyberspace Operations and Acquisition,
Contracting, and Sustainment

Distribution:

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Introduction

Objective

The objective of this audit was to determine whether DoD contracting officials included the required whistleblower clauses in contracts and ensured that DoD contractors were compliant with the requirement to inform employees in writing of their whistleblower rights and protections. See Appendix A for a discussion of the scope and methodology and prior audit coverage, and Appendix B for the statistical sample plan and projection.

Background

Public Law 101-12, also known as the “Whistleblower Protection Act of 1989 (WPA),” provides statutory protections for Federal employees who engage in the important act of “whistleblowing,” that is, making a disclosure of what they reasonably believe to be evidence of illegal or improper Government activities.¹ The WPA applies to most Federal Executive Branch employees and becomes applicable if an employee is subject to reprisal for making a protected disclosure. Reprisal is a prohibited personnel practice and occurs when a management official “takes an unfavorable personnel action against an employee, or withholds a favorable personnel action, because an employee made or was thought to have made a disclosure.” The WPA established the Office of Special Counsel to protect Federal employees from prohibited personnel practices by disciplining those who commit prohibited practices and defending individuals subjected to prohibited personnel practices.

Additionally, the DoD Office of Inspector General has a Whistleblower Reprisal Investigations Directorate. Personnel from this directorate investigate allegations of whistleblower reprisal made by members of the Armed Forces; civilian employees of the DoD; employees of DoD contractors and subcontractors; and all DoD employees with access to classified information.

The 2013 National Defense Authorization Act extended whistleblower protection to employees of Government contractors. This extension was codified in Section 2409, title 10, United States Code (10 U.S.C. § 2409) for the DoD and National Aeronautics and Space Administration and 41 USC § 4712 for all other Federal agencies.² Section 2409 states that DoD contractor employees may not be discharged,

¹ Public Law 101-12, “Whistleblower Protection Act of 1989,” April 10, 1989.

² Section 2409, title 10 United States Code, “Contractor employees: protections from reprisal for disclosure of certain information.” Effective January 1, 2022, pursuant to Public Law 116-283, “William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021,” §§ 1801(d)(1) and 1863(b)-(c), Congress renumbered 10 U.S.C. § 2409 as 10 U.S.C. § 4701. Because the contracts we reviewed were issued before the statute was renumbered, we refer to 10 U.S.C. § 2409 throughout this report instead of 10 U.S.C. § 4701.

demoted, or otherwise discriminated against in reprisal for disclosing information that the employee reasonably believes is evidence of gross mismanagement of a Government contract or funds, a danger to public health or safety, or a violation of the law. A person who believes that the employee making the disclosure has been subjected to a reprisal may submit a complaint with the DoD Office of Inspector General, which will conduct an investigation, if warranted. Based on the results of an investigation, the head of the agency is required to determine whether the contractor has subjected an employee to reprisal and either deny relief or apply one or more of the remedies identified in 10 U.S.C. § 2409, including ordering the contractor to stop the reprisal or pay damages to its employee. In addition, 10 U.S.C. § 2409 requires the Secretary of Defense to ensure that contractors and subcontractors inform their employees in writing of their whistleblower rights and protections, in the predominant native language of the workforce.³

Contract Clause Requirements Regarding Whistleblower Protection

DoD contracting officers are required to implement 10 U.S.C. § 2409 for both commercial and noncommercial contracts by including Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) clauses in solicitations and contracts.⁴ For FY 2020 contracts, the FAR and DFARS required contracting officers to use the FAR clause for commercial contracts and the DFARS clause for noncommercial contracts. Table 1 identifies the citations and clauses related to whistleblower protections for contracts issued in FY 2020.

Table 1. Summary of DoD Required Whistleblower Clauses for FY 2020 Contracts

Acquisition Citation	Clause	Description
FAR 12.301	52.212-4	FAR Commercial Item Whistleblower Clause – Required in all commercial contracts. Cites 10 U.S.C. § 2409 and 41 U.S.C. § 4712.
DFARS 203.970	252.203-7002	DFARS Whistleblower Clause – Required in all noncommercial contracts. Cites 10 U.S.C. § 2409.

Note: Defense Pricing and Contracting (DPC) officials revised the DFARS during the audit to require the DFARS Whistleblower Clause to be included in all DoD contracts including those for noncommercial and commercial products and services.

Source: The DoD OIG.

³ Section 2409, title 10 United States Code and Public Law 112-239, “The National Defense Authorization Act for Fiscal Year 2013,” Section 827, “Enhancement of Whistleblower Protections For Contractor Employees.”

⁴ A commercial item is any product or service that is customarily used by the general public or nongovernmental entities for nongovernmental purposes.

Contracts Reviewed

To determine whether DoD contracting officers included the required whistleblower clause in contracts and whether DoD contractors were informing employees in writing of their whistleblower rights and remedies, we reviewed a sample of contracts from a universe of 31,340 contracts awarded in FY 2020 valued at more than \$2.6 trillion.⁵ The universe consisted of small business contracts and other-than-small business contracts from the Army, Navy, Air Force, and Defense agencies/DoD field activities/combatant commands.⁶ Table 2 shows the breakdown of the universe of contracts.

Table 2. Universe of Contracts

Component	Small Business Contracts	Value of Contracts (in Billions)	Other-Than-Small Business Contracts	Value of Contracts (in Billions)	Total Contracts	Total Value of Contracts (in Billions)
Army	4,793	\$205.3	2,294	\$451.0	7,087	\$656.3
Navy	2,414	466.3	1,916	277.7	4,330	744.0
Air Force	2,565	382.0	1,485	458.4	4,050	840.4
Other DoD agencies/ DoD field activities/ combatant commands	11,511	208.1	4,362	158.3	15,873	366.4
Total	21,283	\$1,261.8	10,057	\$1,345.5	31,340	\$2,607.1

Source: The DoD OIG.

We selected a statistical sample of 240 contracts to review to determine whether the appropriate contract clause was included in each contract. The 240 contracts comprised 60 contracts each for the Army, Navy, Air Force, and Defense agencies/DoD field activities/combatant commands, further divided into 30 small businesses and 30 other-than-small businesses.⁷ We subsequently removed five contracts from the sample, decreasing the tested sample to 235 (88 commercial and 147 noncommercial contracts).⁸ Of the five contracts removed from the sample,

⁵ We excluded all modifications and delivery orders on existing contracts from the universe.

⁶ The Government website System for Award Management (SAM.gov) used the contracting officer's business size determination and classified contractor size as either "small business" or "other-than-small business." A small business is defined as one that is independently owned and operated, not dominant in its field of operation, and qualified as a small business under the criteria and size standards in 13 CFR part 121.

⁷ The Defense agencies, DoD field activities, and combatant commands in the sample consist of the Defense Logistics Agency, Defense Media Activity, Defense Information Systems Agency, Defense Threat Reduction Agency, Defense Contract Management Agency, the DoD Education Activity, U.S. Special Operations Command, and the U.S. Transportation Command.

⁸ Although we did not test the 5 contracts, they represent the small part of the 31,340 contracts to which the clause did not apply and are still part of the statistical sample.

we removed three Army contracts because an Army official explained that they were government purchase card transactions.⁹ We removed one Defense agency contract because, according to a U.S. Transportation Command official, the contracting officer issued an order that was not accepted by the contractor; however, the contract number remained in our universe. We removed one combatant command contract because the contracting officer issued the contract to administratively update an FY 2017 contract; therefore, it was not a new contract and was outside of our scope.

We also selected a nonstatistical sample of 74 of the 235 contracts to determine whether DoD contracting officials verified that contractors informed their employees in writing of their whistleblower protections.¹⁰ We then selected a nonstatistical sample of 8 contracts from the 74 to determine whether and how contractors informed their employees in writing of their whistleblower protections. See Appendix B for our sampling information.

⁹ A government purchase card charge authorizes the third party that issued the purchase card to make immediate payment to contractors. Government purchase card contracts are not traditional contracts but contracts generally made with banking institutions to reimburse purchases made on the government purchase card. We removed those contracts from our sample.

¹⁰ For our second sample, we included contracts over the simplified acquisition threshold to ensure our sample included only higher value contracts. Only 14 contracts remained in the sample for Defense agencies/DoD field activities/ combatant commands after removing contracts awarded at the simplified acquisition threshold (\$250,000); therefore, for the second sample of 74, we reviewed all 14 Defense agency/DoD field activity/combatant command contracts.

Finding

DoD Contracting Officers Generally Included the Required Whistleblower Clause in Contracts but Did Not Verify That Contractors Informed Employees of Whistleblower Rights

DoD contracting officers generally included the required whistleblower clause in contracts but did not verify that the contractors were compliant with the requirement to inform employees in writing of their whistleblower rights and protections. Specifically, DoD contracting officers included the required whistleblower clause in 224 of the 235 contracts we reviewed. For the 11 contracts that did not include the required clause, the contracting officers stated that not including the clause was an oversight on their part. Therefore, we projected that DoD contracting officers included the required whistleblower clause in 29,793 (95 percent) of the 31,340 FY 2020 contracts and that contracting officers omitted the clause from 860 (2.7 percent) of the 31,340 FY 2020 contracts.¹¹

Of the 235 contracts, we further reviewed 74 contracts to determine whether the contracting officers verified that contractors were complying with the whistleblower clause requirement to inform their employees of their whistleblower rights. Contracting officers for 3 of the 74 contracts verified that the contractors informed their employees of their whistleblower rights, but contracting officers for the other 71 contracts did not. The contracting officers stated that they did not verify compliance on the 71 contracts because DoD guidance does not require such verification.

Although not including a whistleblower clause in DoD contracts and not informing contractor employees in writing does not impact the whistleblower rights and protections of contractor employees, it may reduce the number of employees that are aware of or understand those rights and protections. It may also reduce the number of critical disclosures made by contractor employees who identify waste, fraud, mismanagement, and abuse and loss of taxpayer dollars. In FY 2022, the DoD recovered more than \$44.5 million as a result of hotline and contractor disclosures.

¹¹ An estimated 95.1 percent of contracts contained the required clause, 2.7 percent of contracts did not include the required clause, and the clause was not applicable for 2.2 percent of the contracts.

In addition to our findings regarding the required clauses, there is one whistleblower clause, FAR 52.203-17, included in the Federal regulations that does not apply to the DoD that we found was still included in 96 (41 percent) of the 235 contracts we reviewed.

Contracting Officers Generally Included the Whistleblower Clause When Required

DoD contracting officers included the required FAR Commercial Item Whistleblower Clause or DFARS Whistleblower Clause in 224 of the 235 FY 2020 contracts we

DoD contracting officers included the required FAR Commercial Item Whistleblower Clause or DFARS Whistleblower Clause in 224 of the 235 FY 2020 contracts we reviewed.

reviewed. Specifically, DoD contracting officials included the FAR Commercial Item Whistleblower Clause in 84 of the 88 commercial contracts awarded and the DFARS Whistleblower Clause in 140 of the 147 noncommercial contracts. For the 11 contracts that did not include the required clause, the contracting

officers stated that not including the clause was an oversight on their part. Table 3 shows the 235 contracts that Service and Defense agencies/DoD field activities/ combatant commands contracting officers awarded, what clause was required, and whether the contracting officers included the required clause in the contracts.

Table 3. Number of Contracts Requiring the DFARS Whistleblower Clause and FAR Commercial Item Whistleblower Clause

DoD Component	DFARS Whistleblower Clause		FAR Commercial Item Whistleblower Clause	
	Contracts Requiring the DFARS Whistleblower Clause	Contracts Missing the DFARS Whistleblower Clause	Contracts Requiring the FAR Commercial Item Whistleblower Clause	Contracts Missing the FAR Commercial Item Whistleblower Clause
Army	36	3	21	0
Navy	30	1	30	0
Air Force	35	3	25	3
Defense agencies/DoD field activities/ combatant commands	46	0	12	1
Total	147	7	88	4
Overall Total Missing the Required Clause			11	

Source: The DoD OIG.

According to the Director for Contracting eBusiness, the DPC took steps in FY 2020 to ensure that contracting officials include the FAR Commercial Item Whistleblower Clause in contracts when applicable. Specifically, the Director stated that the Procurement Data Standard (PDS), contract-writing software, now generates a fatal error if contracting officials do not include the FAR Commercial Item Whistleblower Clause in commercial item contracts when they input contract data into the Electronic Data Access (EDA) system.¹² Receipt of a fatal error requires the contracting officer to add the required clause before adding the contract to EDA. Because PDS now generates a fatal error if the FAR Commercial Item Whistleblower Clause is not included when required, we are not making a recommendation concerning the clause in this report.

The Director stated that the DPC plans to update PDS to generate a fatal error if contracting officials do not include the DFARS Whistleblower Clause when required but have not yet completed the action. Therefore, the Principal Director, DPC should implement controls in PDS to ensure that the exclusion of the DFARS Whistleblower Clause (DFARS clause 252.203-7002) in noncommercial contracts results in a fatal error. In addition, the Principal Director, DPC, should issue a memorandum directing all contracting officers to review the whistleblower clauses included in contracts and modify the contracts to add the required clause. Furthermore, the Principal Director, DPC, should include in contracting officer's initial and refresher training a reminder of the importance of including required whistleblower clauses in contracts.

Contracting Officials Did Not Verify Contractor Compliance with Whistleblower Clauses

We determined that contracting officers verified contractor compliance with the FAR Commercial Item Whistleblower Clause and DFARS Whistleblower Clauses for only 3 of the 74 contracts we reviewed.

We determined that contracting officers verified contractor compliance with the FAR Commercial Item Whistleblower Clause and DFARS Whistleblower Clauses for only 3 of the 74 contracts we reviewed.

For example, U.S. Army Corps of

Engineers contracting officials for one contract verified that the contractor posted the required information in public places; included it in monthly bulletins; posted hotline posters; included relevant language in the contractor's code of ethics; and shared whistleblower rights in its documentation for new employees.¹³

¹² Contracting officials are required to input contract data into EDA, which is a web-based system that users can access to retrieve contracts, contract modifications, vouchers, and other contract data.

¹³ DFARS Clause 252.203-7004, "Display of Hotline Posters," requires the contractor to prominently display the DoD fraud, waste, and abuse hotline poster, prepared by the DoD OIG, in common work areas within business segments performing work under DoD contracts.

The contracting officers for the other 71 contracts were not verifying whether the contractors complied with the whistleblower clauses because DoD guidance does not require contracting officials to validate whether contractors implemented the clauses. Furthermore, contractors are not subject to other inspections or reviews to ensure compliance as required for several other FAR and DFARS clauses. For example, the Office of Federal Contract Compliance Programs conducts periodic reviews to ensure that most Federal contractors with contracts exceeding \$10,000 meet basic nondiscrimination and equal opportunity requirements prescribed in clauses such as FAR Clause 52.222-26, "Equal Opportunity." The whistleblower clauses do not have an inspection or assessment requirement; therefore, it is incumbent upon the contracting officers to ensure compliance with the requirements related to whistleblower rights, as needed.

We contacted contractor officials for 8 of the 71 contracts to determine whether the contractors were informing employees of their whistleblower rights. Contractor officials for all eight contracts provided us with documentation, such as posters and training plans that they used to inform employees of their whistleblower rights. For example, contractor officials from one of the Army contracts provided a copy of a presentation given to employees that included a topic titled, "The Whistleblower Act." In addition, contractor officials for one of the U.S. Special Operations Command contracts stated that they held annual online training that discusses an employee's rights as a whistleblower and hung posters in their office buildings. However, if contracting personnel do not verify compliance with the whistleblower clause, there is no assurance that contractors are in compliance.

A Defense Contract Management Agency (DCMA) official stated that the acquisition workforce is not resourced to verify compliance with the whistleblower clauses and instead focuses their limited resources on matters that affect schedule and cost.¹⁴ However, DCMA personnel are often co-located at contractor facilities or frequently visit contractors as a part of normal contract oversight. While onsite, DCMA personnel, contracting officers, and contracting officer's representatives can verify, at a minimum, that contractors are displaying DoD Hotline posters to notify employees of their rights and protections. This onsite verification would require minimal resources and is a good investment of the DoD's contracting oversight dollars. Verification would ensure that employees are aware of, and can exercise, their whistleblower rights. Although verification may not be necessary for low-risk contracts such as commercial contracts, other contracts, by virtue of the amount of the contract or size of the contractor, may warrant verification. Therefore, the

¹⁴ The DCMA provides contract administration services for the DoD. Of the 235 contracts, the DCMA administered 58 contracts.

Principal Director, DPC, should issue guidance directing contracting personnel to apply a risk-based approach to determine whether contractor compliance with the whistleblower clauses should be verified, and if so, include that requirement in the contract surveillance plan.

Contracting Officers Implemented Corrective Action to Include the Missing Whistleblower Clause

Air Force contracting officers took corrective action and modified two contracts that were missing the FAR Commercial Item Whistleblower Clause after we notified them of the omission. Contracting officers with the 42nd Air Base Wing and the 55th Air Base Wing issued modifications incorporating the FAR Commercial Item Whistleblower Clause into the contracts.

Informed Contractor Employees Can Increase Critical Disclosures

Not including a whistleblower clause in DoD contracts and not informing contractor employees of their rights in writing does not impact the whistleblower rights and protections of contractor employees, but it may reduce the number of employees that are aware of and understand those rights and protections. It may also reduce the number of critical disclosures made by contractor employees who identify waste, fraud, mismanagement, and abuse and loss of taxpayer dollars.

Contractor employees take part in the day-to-day operations and activities of the contractors they work for and are positioned to make critical disclosures. To provide some context to the potential impact contractor disclosures can have, in FY 2022 the DoD recovered more than \$44.5 million as a result of hotline and contractor disclosures. Ensuring that DoD contractor employees are made aware of their rights as whistleblowers is simply a good investment of the DoD's contracting oversight dollars.

Other Matters of Interest

Although the contracting officers generally included the required whistleblower clause in the contracts reviewed, 139 of the 235 contracts also included other whistleblower clauses that were not required. Specifically, DoD contracting officers included the FAR Commercial Item Whistleblower Clause in 2 of the 147 noncommercial contracts, included the DFARS Whistleblower Clause in 71 of the 88 commercial contracts, and the FAR Whistleblower Clause in 96 of the 235 contracts.¹⁵ According to the contracting officers, they were unaware that

¹⁵ Some of the 139 contracts included more than one clause that was not required.

the other whistleblower clauses did not apply. Although the other clauses do not include additional requirements because the whistleblower clauses have similar language, the addition of clauses that are not required can make the contract unnecessarily cumbersome.

We also identified that the DFARS in effect in FY 2020 contained inconsistent information on the use of the DFARS Whistleblower Clause in DoD commercial contracts. However, the DPC revised the DFARS during the audit to remove the inconsistent information and clarify that the DFARS Whistleblower Clause should be included in all DoD contracts, including those for noncommercial and commercial products and services.

Recommendations, Management Comments, and Our Response

Recommendation 1

We recommend that the Principal Director, Defense Pricing and Contracting:

- a. Implement controls in the Procurement Data Standard to ensure that the exclusion of the Defense Federal Acquisition Regulation Supplement clause 252.203-7002 in noncommercial contracts results in a fatal error.**

Defense Pricing and Contracting Comments

The Principal Director, Defense Pricing and Contracting, agreed with our recommendation. The Principal Director agreed to include the business rule implementing the fatal error in the Procurement Data Standard during pre-validation for Defense Federal Acquisition Regulation Supplement clause 252.203-7002. The Principal Director stated that change would be included in the August 31, 2023, Procurement Data Standard release.

Our Response

Comments from the Principal Director addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once we verify that the business rule implementing the fatal error during pre-validation for Defense Federal Acquisition Regulation Supplement clause 252.203-7002 is included in the August 31, 2023, Procurement Data Standard release.

- b. Issue a memorandum directing all contracting officers to review the whistleblower clauses included in contracts and modify the contracts to add the required clause.**

Defense Pricing and Contracting Comments

The Principal Director, Defense Pricing and Contracting, agreed with our recommendation. The Principal Director agreed to issue a policy memorandum within 90 days of the final report.

Our Response

Comments from the Principal Director addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once we verify that the Principal Director issued a policy memorandum directing all contracting officers to review the whistleblower clauses included in contracts and modified the contracts to add the required clause.

- c. Include a reminder of the importance of including required whistleblower clauses in contracts in contracting officer's initial and refresher training.**

Defense Pricing and Contracting Comments

The Principal Director, Defense Pricing and Contracting, agreed with our recommendation. The Principal Director stated that Defense Pricing and Contracting values the importance of initial and refresher training and will issue a memorandum recommending that initial or refresher training relating to the importance of whistleblower compliance be included in the contracting officer's individual development plan during the next training cycle by the end of September 2023.

Our Response

While the comments from the Principal Director did not specifically address the recommendation to update training, the actions described related to individual development plans in combination with the system changes agreed to in response to other recommendations are sufficient to address the intent of this recommendation. Therefore, the recommendation is resolved but will remain open. We will close the recommendation once we verify that the Principal Director issued a memorandum recommending that initial or refresher training relating to the importance of whistleblower compliance be included in the contracting officer's individual development plan during the next training cycle.

- d. Issue guidance directing DoD contracting personnel to apply a risk-based approach to determine whether contractor compliance with the whistleblower clauses should be verified, and if so, include the requirement in the contract's surveillance plan.**

Defense Pricing and Contracting Comments

The Principal Director, Defense Pricing and Contracting, agreed with our recommendation. The Principal Director agreed to issue a policy memorandum within 90 days of the final report.

Our Response

Comments from the Principal Director addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once we verify that the Principal Director issued a policy memorandum directing DoD contracting personnel to apply a risk-based approach to determine whether contractor compliance with the whistleblower clauses should be verified, and if so, include the requirement in the contract's surveillance plan.

Appendix A

Scope and Methodology

We conducted this performance audit from August 2021 through May 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The announced objective of this audit was to determine whether DoD contracting officials included the required whistleblower clauses in contracts and ensured that DoD contractors and subcontractors were compliant with the requirement to inform employees in writing of their whistleblower rights and protections. We revised the objective to determine whether DoD contracting officials included the required whistleblower clauses in contracts and ensured that DoD contractors were compliant with the requirement to inform employees in writing of their whistleblower rights and protections.

Internal Control Assessment and Compliance

We assessed internal controls and compliance with laws and regulations necessary to satisfy the audit objective. In particular, we assessed the control environment internal control that was in place by using contract-writing software that determined when the whistleblower clause was necessary for the contract. Specifically, we identified oversight problems that resulted in contracting officers excluding the whistleblower clause for multiple reasons, including that some contract-writing software programs did not have the functionality in place to determine whether the clause was needed or included in the contract.

In addition, while verification that DoD contractor employees are notified of their whistleblower rights is not required by Federal or DoD guidance, verification is a good investment of the DoD's contracting oversight dollars. However, because our review was limited to these internal control components and underlying principles, it may not have disclosed all internal control deficiencies that may have existed at the time of this audit.

Universe and Sample Information

For FY 2020 contracts, the team used the SAM.gov website to create a query to gather and identify the universe of 31,340 new contracts with a total value of more than \$2.6 trillion. We excluded all modifications and delivery orders

on existing contracts and ensured that the universe included only contracts awarded at or above the simplified acquisition threshold. The universe consisted of small and other-than-small business contracts from the Army, Navy, Air Force, and Defense agencies/DoD field activities/combatant commands.¹⁶ Of the 31,340 contracts identified, contracting officials awarded 21,283 contracts to small businesses. Table 4 shows the number and type of contracts we reviewed per Service and Defense agencies/DoD field activities/combatant commands.

Table 4. Universe of Contracts

DoD Component	Small Business Contracts	Other-Than-Small Business Contracts	Total Contracts
Army	4,793	2,294	7,087
Navy	2,414	1,916	4,330
Air Force	2,565	1,485	4,050
Other DoD agencies/ DoD field activities/ combatant commands	11,511	4,362	15,873
Total	21,283	10,057	31,340

Source: The DoD OIG.

With the assistance of Quantitative Methods Division (QMD) representatives, we selected a sample of 240 contracts to review—60 each for the Army, Navy, Air Force, and Defense agencies/DoD field activities/combatant commands, further divided into 30 for small businesses, and 30 for other-than-small businesses. We downloaded most of the 240 contracts from EDA and received the other contracts from contracting officers after conducting entrance conferences with the respective Service or agency. We removed five contracts from the tested sample—three Army contracts, one Defense agency contract, and one combatant command contract. We removed the three Army contracts from the sample because contracting officers issued them for government purchase card transactions. We removed one Defense agency contract because, according to a U.S. Transportation Command official, the contracting officer issued an order that was not accepted by the contractor; however, the contract number remained in our universe. We removed one combatant command contract because the contracting officer issued the contract only to update the DoD Activity Address Code for a FY 2017 contract; therefore, it was outside of our scope. After we removed the 5 contracts, 235 remained in our sample. See Appendix B for a breakdown of the statistical sample plan and projection.

¹⁶ The Government website, SAM.gov, used contracting officers' business size determination and classified contractor size as either small business or other-than-small business.

QMD representatives then helped us select a nonstatistical sample of 80 contracts, within the 235, to review and determine whether DoD contracting personnel verified that contractors implemented whistleblower requirements. For this sample, we included only contracts over the simplified acquisition threshold; therefore, we removed 6 contracts from the sample, leaving us with 74 contracts. The 74 contracts consisted of 20 contracts each for the Army, Navy, and Air Force, and 14 from Defense agencies/DoD field activities/combatant commands. We further divided the 74 contracts selected into 10 for small businesses and 10 for other-than-small businesses each for the Army, Navy, and Air Force; and 7 for small businesses and 7 for other-than-small businesses for Defense agencies/DoD field activities/combatant commands. We verified the actions DoD contracting officers used to verify whether contractors notified employees of their whistleblower rights and protections.

We then selected a random sample of 8 contracts from the 74 to determine whether, and how, contractors were informing their employees in writing of their whistleblower protections. To select our 8 contracts, we removed 43 contracts that were closed out or had a period of performance or delivery date before August 2, 2022, leaving 31 contracts. We nonstatistically selected 8 contracts from the 31, which included 2 contracts each from the Army, Navy, Air Force, and a Defense agency and a combatant command. Contractor personnel for the eight contractors, through the contracting officers, disclosed how they informed employees in writing of their whistleblower protections.

Review of Documentation and Interviews

To determine the processes and systems used to include the whistleblower clauses in DoD contracts, and to gather evidence and documentation for instances when the whistleblower clauses were not included, we conducted teleconference interviews with contracting officials from the following Service and Defense agencies/DoD field activities/combatant commands.

- Under Secretary Of Defense For Acquisition and Sustainment, Defense Pricing and Contracting
- Department of the Army
- U.S. Army Medical Command
- U.S. Army Corps of Engineers
- National Guard Bureau
- Department of the Navy
- Naval Sea Systems Command
- Naval Air Systems Command

- Naval Supply Systems Command
- Naval Facilities Engineering Systems Command
- Marine Corps
- Military Sealift Command
- Department of the Air Force
- Defense Contract Management Agency
- Defense Information Systems Agency
- Defense Logistics Agency
- Defense Threat Reduction Agency
- DoD Education Activity
- Defense Media Activity
- U.S. Special Operations Command
- U.S. Transportation Command

We downloaded the 240 contracts in our sample from EDA, or Service or Defense agency/DoD field activity/combatant command personnel provided us a copy of the contract. We reviewed the contracts and determined whether the contracting officer included the applicable whistleblower clause. For our smaller sample of 74 contracts, we asked Service and Defense agency/DoD field activity/combatant command personnel what, if any, verification they do to ensure compliance with 10 U.S.C. § 2409. Furthermore, for the sample of eight contracts, we reached out to the applicable contracting officers for additional verification and documentation from contractors. Contractors provided documentation showing how they informed employees in writing of their whistleblower protections, including pictures of notices posted at worksites, whistleblower training information, and whistleblower training rosters.

We also reviewed the following criteria and guidance.

- Public Law 101-12, “Whistleblower Protection Act of 1989 (WPA),” April 10, 1989
- Public Law 112-239, Section 827(d), “Notification of Employees,” January 2, 2013
- DFARS Subpart 203.9, “Whistleblower Protections for Contractor Employees”
- 10 U.S.C. § 2409, “Contractor Employees: Protection from Reprisal for Disclosure of Certain Information”
- DFARS Clause 252.203-7002, “Requirement to Inform Employees of Whistleblower Rights”

- FAR Clause 52.212-4, “Contract Terms and Conditions—Commercial Products and Commercial Services”
- FAR Clause 52.203-17, “Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights.”

Use of Computer-Processed Data

We did not use computer-processed data to perform this audit.

Use of Technical Assistance

QMD assisted with the project sample selection and statistical projection of results. See Appendix B for the statistical sample plan.

Prior Coverage

From January 2018 through September 2020, the Government Accountability Office (GAO), the Department of Justice Office of Inspector General (DOJ OIG), the Department of Energy Office of Inspector General (DOE OIG), and the Federal Deposit Insurance Corporation Office of Inspector General (FDIC OIG) issued eight reports discussing Whistleblower protection requirements.

GAO

Report No. GAO-19-432, “Whistleblowers Key Practices for Congress to Consider When Receiving and Referring Information,” May 2019

The GAO identified key practices Congress could consider when receiving and referring whistleblower information to other committees and Federal agencies. These practices can serve as a resource for congressional offices and staff to intake, prioritize, refer, and follow up with whistleblowers who contact their office or committee. For each step, the GAO identified practices to help offices develop guidelines and procedures as well as for communication, including key questions staff can ask the whistleblower. The GAO did not make recommendations, but offered to assist Congress with practices for working with whistleblowers.

Report No. GAO-18-137, “Department of Veterans Affairs Actions Needed to Address Employee Misconduct Process and Ensure Accountability,” July 2018

The GAO reviewed the extent to which Veterans Affairs (1) collected reliable information associated with employee misconduct and disciplinary actions, (2) adhered to documentation-retention procedures when adjudicating cases of employee misconduct, (3) ensured allegations of misconduct involving senior officials were reviewed according to Veterans Affairs investigative

standards and officials were held accountable, (4) had procedures to investigate whistleblower allegations of misconduct; and (5) maintained data and whistleblower testimony indicating whether retaliation for disclosing misconduct occurred at Veterans Affairs.

Report No. GAO-18-262, “[National Aeronautics and Space Administration] NASA Contractor Whistleblowers: Steps Taken to Implement Program but Improvements to Timeliness and Guidance Needed,” March 2018

The GAO was asked to review NASA’s whistleblower reprisal protections for contractor and grantee employees. The GAO reviewed NASA’s and its Inspector General’s policies and guidance; reviewed a sample of 100 contracts from all NASA centers with contracts in FY 2016; and interviewed relevant officials and contractors, grantees, and advocacy groups. The GAO made recommendations to NASA, including evaluating the process for reviewing reprisal complaints to ensure that NASA is meeting the required timeframe and clarifying guidance on when protections apply to contractor employees.

DoJ OIG

Report No. DOJ OIG 20-108, “Audit of the Environmental and Natural Resources Division’s Procurement and Administration of Expert Witness Contracts,” September 2020

The DOJ OIG determined that Environmental and Natural Resources Division contracting officers inappropriately delegated significant contracting duties to the division’s litigation staff, such as the negotiation of pay rates and contractor oversight. The DOJ OIG also determined that the Environmental and Natural Resources Division did not complete significant acquisition planning steps, such as justifications for pay rates and the use of sole source contracting. Additionally, it found that contracting officers did not properly review contractor invoices or properly authorize contractor personnel. Finally, the DOJ OIG identified areas where it believes the Environmental and Natural Resources Division’s internal controls related to compliance with each contractor’s Statement of Work could be improved. The DOJ OIG recommended that the Environmental and Natural Resources Division provide evidence that all contracts exceeding \$250,000 have been modified to include FAR 52.203-18, the whistleblower provision, and that contractors have informed their workforce of their whistleblower rights.

Report No. DOJ OIG 20-023, “Procedural Reform Recommendation for the Federal Bureau of Prisons on Ensuring That Contractor and Grantee Employees are Notified of Whistleblower Rights and Remedies,” January 2020

The DOJ OIG determined that the Federal Bureau of Prisons and its contractor did not comply with legal requirements to inform contractor employees “in writing of the rights and remedies provided under” 41 U.S.C Section 4712, which provides whistleblower protections to employees of Federal contractors and grantees. Accordingly, the DOJ OIG recommended that the Bureau of Prisons take steps to ensure that its contractors and any grantees are aware of the whistleblower protections that Federal law provides, and that those contractors and any grantees take appropriate actions to notify their employees about whistleblower protections and to conform their internal policies to Federal law.

Report No. DOJ OIG 2016-001875, “Procedural Reform Recommendation for the U.S. Marshals Service,” January 2018

The DOJ OIG determined that the United States Marshals Service contractor maintained an internal written policy that was inconsistent with statutory whistleblower protections for employees of Federal contractors found in section 4712, title 41, United States Code (2020), and that the Marshals Service contract itself also contained a term inconsistent with such protections. Accordingly, the DOJ OIG recommended that the Marshals Service take steps to ensure that its contractors are aware of the whistleblower protections that Federal law provides, and that those contractors take appropriate actions with their internal policies to comply with Federal law. The DOJ OIG further recommended that the Marshals Service examine its contracts to ensure that the contracts included no terms that were inconsistent with Federal whistleblower protections.

DOE OIG

Report No. DOE-OIG-20-04, “Department of Energy’s Incorporation of 41 U.S.C. 4712, Enhanced Whistleblower Protections for Contractor Employees, into its Contracts,” November 2019

The objective of this inspection was to determine whether the Department of Energy had incorporated 41 U.S.C. 4712, Enhanced Contractor Whistleblower Protection, into contracts. This inspection was performed from November 2018 to August 2019 and was limited to the facts and circumstances surrounding the incorporation of FAR clause 52.203-17 into 30 of the Department’s largest contracts. The Department of Energy included FAR clause 52.203-17 in 28 of

the 30 contracts reviewed. The DOE OIG made one suggestion for the Director, Office of Acquisition Management, to 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.

FDIC OIG

Report No. FDIC OIG REV-22-001, “Whistleblower Rights and Protections for FDIC Contractors,” January 2022

Between January 2019 and November 2021, the FDIC awarded more than \$4 billion in contracts. During this period, the FDIC expended nearly \$1 billion on contractor resources and services and more than \$285 million on equipment purchases. Approximately 3,000 contractor and subcontractor employees provided these resources and services. The objective of this review was to determine whether the FDIC aligned its procedures and processes with laws, regulations, and policies designed to ensure notice to contractors and subcontractors about their whistleblower rights and protections. The report contains 10 recommendations for the FDIC to conduct a review of existing contracts, update and implement guidance and procedures, and develop training to ensure that contractors and subcontractors properly inform employees of their whistleblower rights and protections.

Appendix B

Statistical Sample Plan and Projection

Population

Universe of 31,340 contracts obtained through the project data call.

Parameters

We used a 95-percent confidence level to calculate our estimates based on the sample results.

Sample Plan

We developed an attribute sampling design with assistance from QMD in which the population was stratified into the following strata (groups) based on contracting service and the size of the business awarded the contract. QMD selected samples from each stratum without replacement. Table 5 shows the stratum and sample size.

Table 5. Sample Size by Stratum

Stratum Name	Stratum Size Classification	Stratum Population Size	Stratum Sample Size
Army	Other-Than-Small-Business	2,294	30
	Small Business	4,793	30
Navy	Other-Than-Small-Business	1,916	30
	Small Business	2,414	30
Air Force	Other-Than-Small-Business	1,485	30
	Small Business	2,565	30
DoD agencies/ DoD field activities/ combatant commands	Other-Than-Small-Business	4,362	30
	Small Business	11,511	30
Total		31,340	240

Source: The DoD OIG.

Statistical Projections

Based on the results that we provided to QMD analysts, QMD calculated statistical projections with a 95-percent confidence level, as shown in Tables 6 and 7.

Table 6. Projection of Contracts with the Correct Whistleblower Clause

	Lower Bound	Point Estimate	Upper Bound
Contracts with the Correct Whistleblower Clause (Percent)	92.3	95.1	97.8
Number of Contracts with the Correct Whistleblower Clause	28,940	29,793	30,646

Source: The DoD OIG.

We project with a 95-percent confidence level that between 92.3 percent and 97.8 percent of the contracts contained the correct whistleblower clause, with the point estimate of 95.1 percent. The corresponding number of contracts with the correct whistleblower clause is between 28,940 and 30,646, with a point estimate of 29,793.

Table 7. Projection of Contracts Without the Correct Whistleblower Clause

	Lower Bound	Point Estimate	Upper Bound
Contracts without Correct Whistleblower Clause (Percent)	0.9	2.7	4.6
Number of Contracts without the Correct Whistleblower Clause	275	860	1,446

Source: The DoD OIG.

We project with a 95-percent confidence level that between 0.9 percent and 4.6 percent of the contracts did not contain the correct whistleblower clause, with the point estimate of 2.7 percent. The corresponding number of contracts without the correct whistleblower clause is between 275 and 1,446, with a point estimate of 860.

Table 8. Projection of Contracts with Other Whistleblower Clauses

	Lower Bound	Point Estimate	Upper Bound
Contracts with the Other Whistleblower Clauses (Percent)	36.9	43.6	50.2
Number of Contracts with Other Whistleblower Clauses	11,548	13,647	15,746

Source: The DoD OIG.

We project with a 95-percent confidence level that between 36.9 percent and 50.2 percent of the contracts contained other whistleblower clauses when not required, with the point estimate of 43.6 percent. The corresponding number of contracts with the correct whistleblower clause is between 11,548 and 15,746, with a point estimate of 13,647.

Management Comments

Defense Pricing and Contracting



OFFICE OF THE UNDER SECRETARY OF DEFENSE
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WASHINGTON, DC 20301-3000

MEMORANDUM FOR PROGRAM DIRECTOR FOR AUDIT
ACQUISITION, CONTRACTING, AND SUSTAINMENT

SUBJECT: Response to Department of Defense Inspector General Draft Report on Audit of DOD Compliance with Whistleblower Protection Requirements in FY 2020 Contracts (Project No. D2021-D000AV-0150.000)

As requested, I am providing responses to the general content and recommendations contained in subject draft report. I have identified no specific information in the draft report that is Controlled Unclassified Information (CUI) and there is no CUI in this response. Each response below identifies the action Defense Pricing and Contracting will take along with a completion date.

Recommendation 1: We recommend that the Principal Director, Defense Pricing and Contracting (DPC):

- a. Implement controls in the Procurement Data Standard to ensure that the exclusion of the Defense Federal Acquisition Regulation Supplement clause 252.203-7002 in noncommercial contracts results in a fatal error.

Response: Concur. The business rule implementing the fatal error in the Procurement Data Standard (PDS) during pre-validation for this clause will be in the August 31, 2023 PDS release.

- b. Issue a memorandum directing all contracting officers to review the whistleblower clauses included in contracts and modify the contracts to add the required clause.

Response: Concur. DPC will issue a policy memorandum within 90 days of the Department of Defense Inspector General (DoDIG) publishing its final report.

- c. Include a reminder of the importance of including required whistleblower clauses in contracts in contracting officer's initial and refresher training.

Response: Concur. DPC values the importance of initial and refresher training on this topic and will issue a memorandum recommending initial or refresher training on the importance of whistleblower compliance be included in the contracting officer's Individual Development Plan during the next training cycle. DPC will issue this memorandum by the end of September 2023.

- d. Issue guidance directing DoD contracting personnel to apply a risk-based approach to determine whether contractor compliance with the whistleblower clauses should be verified, and if so, include the requirement in the contract's surveillance plan.

Defense Pricing and Contracting (cont'd)

Response: Concur. DPC will issue a policy memorandum within 90 days of the DoDIG publishing its final report.

Please contact [REDACTED], if additional information is required.

TENAGLIA
.JOHN.M.1
John M. Tenaglia
Principal Director,
Defense Pricing and Contracting

Digitally signed by
TENAGLIA.JOHN.
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Date: 2023.06.09
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Acronyms and Abbreviations

DCMA	Defense Contract Management Agency
DFARS	Defense Federal Acquisition Regulation Supplement
DPC	Defense Pricing and Contracting
EDA	Electronic Data Access
FAR	Federal Acquisition Regulation
FOIA	Freedom of Information Act
PDS	Procurement Data Standard
QMD	Quantitative Methods Division
SAM	System for Award Management
U.S.C.	United States Code
WPA	Whistleblower Protection Act of 1989



Whistleblower Protection

U.S. DEPARTMENT OF DEFENSE

Whistleblower Protection safeguards DoD employees against retaliation for protected disclosures that expose possible fraud, waste, and abuse in Government programs. For more information, please visit the Whistleblower webpage at <http://www.dodig.mil/Components/Administrative-Investigations/Whistleblower-Reprisal-Investigations/Whistleblower-Reprisal/> or contact the Whistleblower Protection Coordinator at Whistleblowerprotectioncoordinator@dodig.mil

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