



Office of the Inspector General
SOCIAL SECURITY ADMINISTRATION

Management Advisory Report

Whistleblower Protection for
Contractors

152306 *September 2023*



Office of the Inspector General

SOCIAL SECURITY ADMINISTRATION

MEMORANDUM

Date: September 27, 2023

Refer to: 152306

To: Kilolo Kijakazi
Acting Commissioner

From: Gail S. Ennis *Gail S. Ennis*
Inspector General

Subject: Whistleblower Protection for Contractors

The attached final report presents the results of the Office of Audit's review. The objective was to determine whether the Social Security Administration included the required whistleblower rights and protection language in contracts that exceed the simplified acquisition threshold, in accordance with the Federal Acquisition Regulation.

Please provide within 60 days a corrective action plan that addresses each recommendation. If you wish to discuss the final report, please call me or have your staff contact Michelle L. Anderson, Assistant Inspector General for Audit.

Attachment

Whistleblower Protection for Contractors 152306



September 2023

Office of Audit Report Summary

Objective

To determine whether the Social Security Administration (SSA) included the required whistleblower rights and protection language in contracts that exceed the simplified acquisition threshold, in accordance with the Federal Acquisition Regulation (FAR).

Background

Congress has reiterated the importance of whistleblowers by passing and expanding legislation to promote and protect whistleblowing activity. In December 2016, Congress enacted the *Enhancement of Whistleblower Protection for Contractor and Grantee Employees Act* to protect contractors from reprisal for disclosing certain information.

Agencies are required to insert the appropriate FAR clause into contracts that exceed the simplified acquisition threshold. This clause requires that contractors communicate whistleblower rights and protections to their employees.

We obtained from SSA a list of 870 contracts (combining individual delivery, task, and call orders) that were awarded or modified in Fiscal Years 2019 through April 2022 and were over the simplified acquisition threshold. We randomly sampled 150 contracts for our review.

Findings

SSA included the required whistleblower rights and protection language in 140 (93 percent) of the 150 contracts we sampled. Of the remaining 10 contracts, SSA:

- did not include the required FAR clause in 7 (5 percent) and
- could not provide copies of 3 (2 percent).

SSA maintained copies of all 100 SSA-awarded contracts we sampled and 31 (62 percent) of the 50 sampled contracts issued against other Agencies' contracts. The Agency did not have copies of the remaining 19 (38 percent) contracts. However, we obtained 15 of the 19 remaining contracts from other Federal agencies. One contract was canceled; therefore, it did not require the whistleblower clause.

The whistleblower rights and protection clause is important to ensure contractors and their employees understand their whistleblower rights and protect taxpayers by encouraging disclosures of wrongdoing. Without the clause, contractors' employees may be unaware of the protections they have against reprisal, which may ultimately impact their willingness to come forward when witnessing fraud, waste, abuse, and mismanagement.

Recommendations

We recommend SSA:

1. Review its policies and procedures, and revise them as necessary, to ensure required FAR clauses (such as whistleblower rights and protection language) are included in the applicable contracts, including the contracts issued against other Agencies' contracts.
2. Include the whistleblower rights and protection language in the seven contracts in our sample that did not have the clause.
3. Ensure contracts from other Federal agencies are readily available to determine whether the contract includes required FAR clauses, by including a copy of the initial award issued by other Agencies in SSA's Streamlined Acquisition System.

SSA agreed with Recommendations 1 and 2 and disagreed with Recommendation 3.

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ABBREVIATIONS

AWC	Areawide Contracts
C.F.R.	Code of Federal Regulations
FAR	Federal Acquisition Regulation
FSS	Federal Supply Schedule
GSA	General Services Administration
GWAC	Governmentwide Acquisition Contract
OIG	Office of the Inspector General
Pub. L. No.	Public Law Number
SAT	Simplified Acquisition Threshold
SSA	Social Security Administration
U.S.C.	United States Code

OBJECTIVE

Our objective was to determine whether the Social Security Administration (SSA) included the required whistleblower rights and protection language in contracts that exceed the simplified acquisition threshold (SAT), in accordance with the Federal Acquisition Regulation (FAR).

BACKGROUND

Congress has reiterated the importance of whistleblowers by passing and expanding legislation to promote and protect whistleblowing activity. A pilot program to enhance whistleblower protections for agencies' contractors, subcontractors, and grantee employees who reasonably believe they have experienced reprisal as a result of disclosing wrongdoing is in The National Defense Authorization Act for Fiscal Year 2013.¹ In December 2016, Congress enacted the *Enhancement of Whistleblower Protection for Contractor and Grantee Employees Act*.² Specifically, Agencies are required to insert FAR 52.203-17 clause into contracts that exceed the SAT.³ FAR 52.203-17 is as follows:

Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights (June 2020)

(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies in the pilot program on Contractor employee whistleblower protections established at [41 U.S.C. 4712](#) by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and Federal Acquisition Regulation (FAR) [3.908](#).

(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under [41 U.S.C. 4712](#), as described in section FAR [3.908](#).

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts over the simplified acquisition threshold, as defined in FAR [2.101](#) on the date of subcontract award.

FAR 52.203-17 does not apply to contracts awarded by the Department of Defense, National Aeronautics and Space Administration, or Coast Guard. These agencies follow the whistleblower statute in FAR 52.212-4.⁴ Both FAR clauses require that contractors communicate whistleblower rights and protections to their employees.

¹ Protections apply after the whistleblower makes the disclosure to an individual or entity specified by the statute. Moreover, while the legislation expands whistleblower protections to contractor, subcontractor, and grantee employees of certain civilian executive agencies, those protections do not extend to agencies in the "intelligence community" or those agencies who have their own relevant statutory provisions. (41 U.S.C. § 4712; see also GAO-17-227, *Contractor Whistleblower Protections Pilot Program: Improvements Needed to Ensure Effective Implementation* [2017].)

² *Enhancement of Whistleblower Protection for Contractor and Grantee Employees*, Pub. L. No. 114-261.

³ FAR 3.908-9 requires that agencies insert the clause at 52.203-17 into contracts that exceed the SAT. 48 C.F.R. § 3.908-9.

⁴ FAR 52.212-4, *Contract Terms and Conditions—Commercial Products and Commercial Services*.

In addition, FAR 52.212-5, when FAR 52.203-15 is applicable, requires contractors to notify employees of their rights under the whistleblower protection under the *American Recovery and Reinvestment Act of 2009*.⁵

SCOPE AND METHODOLOGY

We obtained from SSA a list of contracts, including individual delivery/task/call orders, awarded or modified in Fiscal Years 2019 through April 2022 that are over the previous SAT of \$150,000. From the SSA list of contacts, we reviewed 870 contracts (combining individual delivery, task, and call orders) awarded or modified in Fiscal Years 2019 through April 2022 that were over the \$250,000 SAT.⁶ SSA provided a data file listing its population in three groups as follows:

- Group 1 included 404 contracts SSA awarded using other Federal agencies' contracts, including Governmentwide Acquisition Contracts (GWAC), Federal Supply Schedule (FSS) contracts, and Areawide Contracts (AWC).⁷
- Group 2 included 109 contracts SSA awarded using its own award where SSA readily found the FAR clause.
- Group 3 included 357 contracts SSA awarded using its own award where SSA could not readily find the FAR clause. SSA stated, "This did not mean the clause is not contained in the contract— only that SSA could not easily find the clause via an automated database search. For this group, it is possible the contracting officer added the clause to the award, but because of the method they used to add the clause, each award document must be reviewed in detail to determine whether the clause was included."

We sampled 50 contracts from each Group for review for a total of 150 sampled contracts. See Appendix A for additional information about our scope and methodology.

⁵ FAR 52.212-5, *Contract Terms and Conditions Required To Implement Statutes or Executive Orders— Commercial Products and Commercial Services*, and FAR 52.203-15, *Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009*.

⁶ The SAT was \$250,000 for our audit period.

⁷ GWACs are task- or delivery-order contracts for information technology established by one agency for Government-wide use. FSS is a long-term government-wide contract with commercial companies that provide access to commercial products and commercial services at fair and reasonable prices. AWCs procure such utility services as electricity, natural gas, water, wastewater, and steam for Federal agencies.

RESULTS OF REVIEW

SSA included the required whistleblower rights and protection language in 140 (93 percent) of 150 sampled contracts but did not include it in 7 (5 percent). In addition, SSA did not provide the contract in 3 (2 percent) of 150 sampled contracts.⁸

Also, SSA did not consistently maintain copies of all the contracts. While SSA maintained a copy of all 100 sampled SSA-awarded contracts, it did not always maintain copies of contracts from other Federal agencies. Specifically, it maintained copies of 31 (62 percent) of 50 sampled contracts issued against other agencies' contracts and did not have a copy of the remaining 19 (38 percent). We, however, obtained copies of 15 of the 19 remaining contracts from other Federal agencies. One contract was canceled; therefore, it did not require the whistleblower clause. We were unable to obtain a copy of the remaining three General Services Administration (GSA) contracts as shown in **Table 1**.

Table 1: Results of Review of Contracts for Whistleblower Clause

Category	Contains the Required Clause or Does Not Require the Clause	Required Clause is Missing	Missing Contract	Total
Group 1: Other Agencies' Contracts (for example, GWAC, FSS, AWC)	45 ⁹	2	3	50
Group 2: SSA Contracts – SSA found Clause	49	1 ¹⁰	0	50
Group 3: SSA Contracts – SSA did not find Clause	46	4	0	50
Total	140	7	3	150

⁸ At the end of fieldwork, we had five missing contracts; however the Agency provided two additional contracts after fieldwork.

⁹ We identified 12 of 45 GWAC/FSS contracts where the only action was closing out the contract. The original contracts did not require the FAR clause because they were completed before 2017 even though the contracts were not closed out until 2020.

¹⁰ The "1" represents our finding in the Group 2 category. When SSA provided the data file, SSA stated they found the clause, therefore we recorded the contract in the "Group 2: SSA Contracts – SSA found Clause" category. When we reviewed the supporting contracts documents we were unable to find the clause, therefore we recorded this contract in the "Required Clause is Missing" category.

Contracts Did Not Consistently Include the Required Language

FAR 3.908-9 requires that agencies insert FAR 52.203-17 into contracts over the SAT, which was \$250,000 for Fiscal Years 2019 through April 2022. In addition, SSA's guidance instructed contracting officers to add FAR 52.203-17 to commercial products and services contracts over the SAT and not funded in whole or in part by *Recovery Act* funds.¹¹ It also instructed contracting staff to modify existing non-commercial contracts that have been awarded since January 2, 2017, to include FAR 52.203-17 if there was 1 or more years left in performance. Further, the guidance states “. . . insert the latest version of FAR 52.203-17 separately, by reference, in the appropriate solicitation or contract section, as identified by [SSA's Office of Acquisition and Grants] clause templates in [SSA's Streamlined Acquisition System].”¹²

Our review of 150 sample contracts noted 7 (5 percent) where SSA did not include the required whistleblower rights and protection language as follows:

- Five SSA contracts (one in Group 2 and four in Group 3) did not have the required whistleblower rights and protection language. Per SSA's guidance, the Office of Acquisition and Grants requires that its contracting staff insert FAR 52.203-15, 52.203-17, 52.212-4, or 52.212-5 in all solicitations and contracts—including those for commercial products or commercial services—over the SAT.¹³ (This does not include FSS and GWAC orders.)
- Two GWAC/FSS/AWC contracts (in Group 1) did not have the FAR clause with the required whistleblower rights and protection language. The two contracts' close-out dates are between 2020 and 2026; therefore, FAR requires that a whistleblower clause be added to these contracts. SSA should ensure the required clause is in the applicable GWAC/FSS/AWC contracts. If the clause is not included, SSA should ensure the clause is included in orders SSA issues against the GWAC/FSS/AWC contracts.

¹¹ SSA, Flash Notice 03 17-01, August 22, 2017.

¹² SSA, Flash Notice 03 17-01.23 December 15, 2021.

¹³ This includes FAR 52.203-15, *Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009*; FAR 52.203-17, *Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights*; FAR 52.212-4, *Contract Terms and Conditions—Commercial Products and Commercial Services*; or FAR 52.212-5, *Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services*.

SSA's guidance states, for ". . . orders against a [GSA], [FSS] or a [GWAC] -- Do not include the deviated clauses for these orders, as GSA or the GWAC owner agency, as applicable, is responsible for including the deviations in its contracts."^{14 15} However, in response to our inquiry regarding two contracts, SSA's Office of Acquisition and Grants reached out to GSA asking why the whistleblower clause was not included in these contracts, and GSA stated, "GSA expects agencies to add [the clauses] at the task/purchase order level." Personnel in SSA's Office of Acquisition and Grants also stated they

. . . followed-up with GSA's Public Building Services Management who clarified that the "AWC does not preclude agencies from adding additional clauses in an authorization (i.e., order) if the ordering agency believes them to be required or appropriate considering the specific details of that authorization." However, they further conceded the statement on GSA's Areawide Public Utilities Contracts website that the areawide contract "incorporates all applicable federal clauses" is "overly broad and may be misleading"; therefore, GSA will be "updating its AWC guidance and address this issue in the new materials. Until that time, contracting officers should incorporate any such clauses not already incorporated in the AWC at the authorization level."

Therefore, SSA should ensure whistleblower FAR clauses are incorporated in the appropriate contracts, whether by GSA or SSA.

While there is a requirement that an agency make "best efforts" to include the clause when a "major modification" is made to an original award that was granted before Pub. L. No. 114-261 was enacted on December 14, 2016, the terms "best efforts" and "major modifications" are not defined in the statute.¹⁶ Therefore, SSA should review and revise its process, as appropriate, to determine whether there are missing clauses (such as the whistleblower clause), document the assessment, and include all applicable clauses in all GWAC/FSS/AWC contracts to demonstrate that SSA is making "best efforts" to comply with Pub. L. No. 114-261.

¹⁴ See Footnote 12.

¹⁵ SSA stated, "A 'deviation' may include using a contract clause that is inconsistent with the FAR (FAR 1.401(a)), as well as using a contract clause with modified or alternate language that is not authorized by the FAR (FAR 1.401(c)). The FAR allows for individual deviations and class deviations. In August 2017, SSA issued a class deviation to use FAR 52.203-17 for all awards over the SAT, including commercial products and commercial services contracts, along with conformed, deviated versions of FAR clauses 52.212-4 and 52.212-5, as applicable. The deviation is necessary while a FAR Case is still pending to amend the FAR which currently refers to the whistleblower protection program at 41 U.S.C. 4712 as a pilot program expiring in 2016 and does not prescribe FAR 52.203-17 for commercial products or commercial services acquisitions. The Civilian Agency Acquisition Council Letter 2017-02, issued July 5, 2017, authorized this deviation."

¹⁶ *Enhancement of Whistleblower Protection for Contractor and Grantee Employees*, Pub. L. No. 114-261.

The Agency Did Not Have Copies of All Contracts Ordered from Other Agencies

SSA did not consistently maintain copies of all the contracts. Specifically, SSA maintained a copy of all 100 SSA-awarded contracts we sampled and 31 (62 percent) of the 50 other agencies' contracts we sampled. The Agency did not have copies of the remaining 19 (38 percent) other agencies' contracts. However, we obtained 15 of the 19 contracts from other Federal agencies. One contract was canceled; therefore, it did not require the whistleblower clause. SSA did not obtain a copy of the three remaining GWAC/FSS/AWC contracts. To ensure the required clause is in the contract, SSA needs to be able to view or refer to these contracts, whether in SSA's contracting files or easily accessible from another agency. For example, when we asked SSA whether the clause was included in these contracts, SSA could not easily provide the answer. Even though SSA stated the contracts were readily available, we found this is not always the case. SSA stated, "SSA researched GSA eLibrary and provided instructions to OIG on how to find the FSS contracts in eLibrary," and that ". . . expired FSS contracts no longer appear in eLibrary and are, therefore, not accessible. SSA has no say in how GSA maintains eLibrary."

SSA informed us the FAR does not require that agencies include terms and conditions in their file documentation; therefore, SSA does not have copies of the base GWAC/FSS/AWC contracts and only references them in its awards. SSA did not provide support for three contracts since it does not obtain copies of the GWAC/FSS/AWC contracts. Therefore, SSA could not confirm whether the GWAC/FSS/AWC contracts include the applicable FAR clauses (such as the whistleblower language).

CONCLUSION

The whistleblower rights and protection clause is important to ensure contractors and their employees understand their whistleblower rights and protect taxpayers by encouraging disclosures of wrongdoing. Without the clause, contractors' employees may be unaware of the protections they have against reprisal, which may ultimately impact their willingness to come forward when witnessing fraud, waste, abuse, and mismanagement.

RECOMMENDATIONS

We recommend SSA:

1. Review its policies and procedures, and revise them as necessary, to ensure required FAR clauses (such as whistleblower rights and protection language) are included in the applicable contracts, including the contracts issued against other Agencies' contracts.
2. Include the whistleblower rights and protection language in the seven contracts in our sample that did not have the clause.
3. Ensure contracts from other Federal agencies are readily available to determine whether the contract includes required FAR clauses, by including a copy of the initial award issued by other Agencies in SSA's Streamlined Acquisition System.

AGENCY COMMENTS AND OFFICE OF THE INSPECTOR GENERAL'S RESPONSE

SSA agreed with Recommendations 1 and 2 and disagreed with Recommendation 3, stating, "Active Federal Supply Schedule and Government-wide Acquisition Contracts are readily available online. There is no operational advantage to saving copies of those contracts to our acquisition system."

We continue to recommend that SSA include other agencies' contracts in its acquisition system to confirm whether all applicable FAR clauses (such as the whistleblower language) are in the other agencies' contracts. See the full text of SSA's comments in Appendix B.



Michelle L. Anderson
Assistant Inspector General for Audit

APPENDICES

Appendix A – SCOPE AND METHODOLOGY

To accomplish our objective, we:

- Reviewed pertinent sections of the Social Security Administration’s (SSA) policies and procedures, applicable laws, and regulations.
- Interviewed staff from SSA’s Office of Acquisition and Grants.
- Contacted other Federal agencies to request copies of contracts.
- Obtained from SSA a list of contracts, including individual delivery/task/call orders, awarded or modified in Fiscal Years 2019 through April 2022 that are over the previous simplified acquisition threshold (SAT) of \$150,000. From the SSA list of contracts, we reviewed a list of 870 contracts (combining individual delivery, task, and call orders) awarded or modified in Fiscal Years 2019 through April 2022 that were over the SAT (i.e., over \$250,000).
 - Group 1 included 404 contracts SSA awarded using other Federal agencies’ contracts, including Governmentwide Acquisition Contracts (GWAC), Federal Supply Schedule (FSS) contracts, and Areawide Contracts (AWC).¹
 - Group 2 included 109 contracts SSA awarded using its own award and SSA readily found the Federal Acquisition Regulation (FAR) clause.
 - Group 3 included 357 contracts SSA awarded using its own award where SSA could not readily find the FAR clause. SSA stated, “This did not mean the clause is not contained in the contract– only that SSA could not easily find the clause via an automated database search. For this group, it is possible the contracting officer added the clause to the award, but because of the method they used to add the clause, each award document must be reviewed in detail to determine whether the clause was included.”
- Used a simple random sample statistical approach to sample from the three groups categories. We sampled 50 items per category for a total of 150 sampled contracts.

¹ GWACs are task- or delivery-order contracts for information technology established by one agency for Government-wide use. FSS is a long-term government-wide contract with commercial companies that provide access to commercial products and commercial services at fair and reasonable prices. AWCs procure such utility services as electricity, natural gas, water, wastewater, and steam for Federal agencies.

Appendix B – AGENCY COMMENTS




SOCIAL SECURITY

MEMORANDUM

Date: September 13, 2023 Refer To: TQA-1

To: Gail S. Ennis
Inspector General

From: Scott Frey 
Chief of Staff

Subject: Office of the Inspector General Draft Report, “Whistleblower Protection for Contractors”
(152306)—INFORMATION

Thank you for the opportunity to review the draft report. We agree with recommendations one and two; however, we disagree with recommendation three.

Active Federal Supply Schedule and Government-wide Acquisition Contracts are readily available online. There is no operational advantage to saving copies of those contracts to our acquisition system.

Please let me know if I can be of further assistance. You may direct staff inquiries to Trae Sommer at (410) 965-9102.



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