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Archive Detail

Regulation Type: DFARS Open Date: 01/07/2013
 Case No: 2013-D010 Status Code: (599) Final Rule Published
 DARS Analyst: Williams, Amy Status Date: 02/28/2014
 Sponsor: OSD Rule Type: Final
 Origin: Statutory
 Committee Staff Level DFARS

Title: (S) Enhancement of Contractor Employee Whistleblower Protections
 Synopsis: Implements section 827 of the NDAA for FY 2013.

Status History:

Date	Status
02/28/2014	Published final DFARS rule in Federal Register (79 FR 11336). Effective upon publication.
01/30/2014	OIRA cleared final DFARS rule. DAR editor preparing for publication.
01/29/2014	DAR editor submitted draft final DFARS rule to OIRA. OIRA reviewing.
01/24/2014	DAR editor received DoD approval to publish draft final DFARS rule. Will notify OASD(LA).
01/17/2014	DAR editor requested DoD approval to publish draft final DFARS rule.
12/18/2013	Case manager forwarded draft final DFARS rule to DAR editor. DAR editor reviewing.
12/18/2013	DARC agreed to draft final DFARS rule. DAR staff processing.
12/13/2013	DARC received draft final DFARS rule from DARS staff. Reclama on 12/18/2013.
12/11/2013	DARC Director tasked DARS staff to review public comments and draft final DFARS rule. Report due 12/18/2013.
11/29/2013	Public comment period ended. DAR staff processing.
09/30/2013	Published interim DFARS rule in Federal Register (78 FR 59851). Effective upon publication. Public comment period ends 11/29/2013.
09/10/2013	OIRA cleared interim DFARS rule. DAR editor preparing for publication.
03/28/2013	DAR editor submitted draft proposed DFARS rule to OIRA. 9/5/2013, OFPP/OMB agreed to revised draft interim rule. Uploaded revised documents in ROCIS.
03/27/2013	Additional data:05/15: Responded to additional OIRA questions. 5/28/13 rcd OIRA/OFPP comments. 6/11/13 Responses to OIRA. 6/19/13, add'l OIRA/OFPP comments. 6/24/13 received add'l comments from OIRA/WH GC. 6/24/13 responded to OIRA. 7/3/13,Rec'd add'l oFPP cmts. 7/9/13, sent DoD response to OIRA/OFPP. Sent revised FRN to OIRA/OFPP on 7-11-13. Uploaded into ROCIS on 7-15-13. resubmitted revised FRN & text

	as interim rule to OIRA on 8-9-13. 8/29/2013, OIRA agreed to convert to interim rule.
03/22/2013	DAR editor preparing to re-submit to OIRA.
03/21/2013	DAR editor sent draft proposed DFARS rule to OIRA. OIRA reviewing. 3-22-13 Deemed significant by OIRA.
03/21/2013	DAR editor received DoD approval to publish draft proposed DFARS rule.
03/20/2013	DAR editor requested DoD approval to publish draft proposed DFARS rule.
02/20/2013	Case manager forwarded draft proposed rule to DAR editor. DAR editor reviewing.
02/20/2013	DARC agreed to draft proposed DFARS rule. Case manager processing.
02/05/2013	DARC received Suspension, Debarment, and Business Ethics Cmte draft proposed DFARS rule. Will discuss draft proposed DFARS rule on 02/20/2013.
01/07/2013	DARC Director tasked Debarment, Suspension, & Business Ethics Committee to draft proposed DFARS rule. Report due 02/06/2013.

Open Case:

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Open Case record

Regulation Type: DFARS Open Date: 01/07/2013
 Case No: 2013-D010 Status Code: (161) (H) AT OIRA
 DARS Analyst: Murphy, Meredith Status Date: 03/28/2013
 FAR Analyst: Rule Type: Proposed
 Sponsor: OSD
 Origin: Statutory
 Committee: Staff Level DFARS

Title: (S) Enhancement of Contractor Employees Whistleblower Protections

Synopsis: Implements section 827 of the NDAA for FY 2013.

Date	Status
03/28/2013	DAR editor sent draft proposed DFARS rule to OIRA. OIRA reviewing. 05/15: Responded to additional questions forwarded by OIRA. 5/28 rcd OIRA/OFPP comments; sent to CM for resolution. Sent DoD responses to OIRA on 6-11-13. rcd add'l OIRA/OFPP comments on 6-19-13; sent to CM for resolution. Rcd add'l comment from OIRA on 6-19-13. received add'l comments from OIRA/WH GC on 6-24-13; provided DoD response to OIRA on 6-24-13. Rec's add'l oFPP cmts 7/3/13; on 7/9/13, sent DoD response to OIRA/OFPP. Sent revised FRN to OIRA/OFPP on 7-11-13. Uploaded into ROCIS on 7-15-13 revised FRN and text.
03/22/2013	DAR editor preparing to re-submit to OIRA.
Status History:	03/21/2013
	DAR editor sent draft proposed DFARS rule to OIRA. OIRA reviewing. 3-22-13 Deemed significant by OIRA.
03/21/2013	DAR editor received DoD approval to publish draft proposed DFARS rule.
03/20/2013	DAR editor requested DoD approval to publish draft proposed DFARS rule.
02/20/2013	Case manager forwarded draft proposed rule to DAR editor. DAR editor reviewing.
02/20/2013	DARC agreed to draft proposed DFARS rule. Case manager processing.
02/05/2013	DARC received Suspension, Debarment, and Business Ethics Cmte draft proposed DFARS rule. Will discuss draft proposed DFARS rule on 02/20/2013.
01/07/2013	DARC Director tasked Debarment, Suspension, & Business Ethics Committee to draft proposed DFARS rule. Report due 02/06/2013.

DFARS Case 2013-D010
Enhancement of Contractor Employees Whistleblower Protections
Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR
EMPLOYEES

203.900 Scope of subpart.

[(a)]This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239). It is applicable in lieu of, rather than as a supplement to, FAR subpart 3.9.]

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(1) Relates to an activity or an element of the intelligence community; or

(2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

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“Abuse of authority,” as used in this subpart, means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

“Reprisal,” see DFARS 203.903(1), Policy.]

203.903 Policy.

~~The following policy applies to DoD instead of the policy at FAR 3.903:~~

(1) [Policy.]10 U.S.C. 2409 prohibits contractors [or subcontractors]from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities[listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,]a substantial and specific danger to public health or safety, or a violation of law[, rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[. Such reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(2) Entities to whom disclosure may be made]

(i) A Member of Congress or a representative of a committee of Congress.

~~(ii) A representative of a committee of Congress.~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

(i[~~ii~~]v) The Government Accountability Office.

([~~i~~]v) A DoD employee responsible for contract oversight or management.

(vi) An authorized official of the Department of Justice[or other law enforcement agency].

[(vii) A court or grand jury.

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(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [*Contracting officer actions.*] A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

~~In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.~~

[(a) Any employee of a contractor or subcontractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the Department of Defense.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The substantial violation of law giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed; and
- (5) The specific nature and date of the reprisal.]

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203.905 Procedures for investigating complaints.

~~The following procedures apply to DoD instead of the procedures at FAR 3.905:~~

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days, as agreed upon with the complainant].

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

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(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under 10 U.S.C. 2409 as implemented by DFARS subpart 203.9 more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221, Individual Right of Action in Certain Reprisal Cases, shall be controlling for the purposes of any investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

—(i) S[] shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and [shall take one or more of the following actions:

(i) Order the contractor to take affirmative action to abate the reprisal.

(ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.]

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~~—(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).~~

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights to disclose classified information not otherwise provided by law.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

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PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.

As prescribed in 203.970, use the following clause:

REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS (JAN-2009[DATE])

[a] This contract and employees working on this contract will be subject to the enhanced contractor employee whistleblower protections at 10 U.S.C. 2409, as amended by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and the implementing regulations at DFARS 203.9.

[b] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[c] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

* * * * *

252.244-7000 Subcontracts for Commercial Items.

As prescribed in 244.403, use the following clause:

SUBCONTRACTS FOR COMMERCIAL ITEMS (JUN 2013)

(a) The Contractor is not required to flow down the terms of any Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial items at any tier under this contract, unless so specified in the particular clause.

(b) While not required, the Contractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligation.

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(c) The Contractor shall include the terms of this clause, including this paragraph (c), in subcontracts awarded under this contract, including subcontracts for the acquisition of commercial items.

(End of clause)

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Employees Whistleblower Protections (DFARS Case
2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement a section of the
National Defense Authorization Act for Fiscal Year 2013 that
enhances whistleblower protections for contractor and
subcontractor employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date

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60 days after date of publication in the FEDERAL REGISTER], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information

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provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted on January 2, 2013) included enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of the NDAA for agencies subject to title 10 and title 41 of the United States Code, respectively. These enhanced whistleblower protections and the associated cost principles changes are being implemented by two DFARS (for DoD) and two FAR (for title 41 agencies) cases, which are independent, but parallel, rulemakings because of some differences in the operations of the underlying statutes

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and because the title 41 statute is only a four-year pilot program.

Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings. Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to title 10 agencies.

Section 828, "Pilot program for Enhancement of contractor [employee whistleblower] protection from reprisal for disclosure of certain information," of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the effectiveness of 41 U.S.C. 4705, "Protection of contractor employees from reprisal for disclosure of certain information," and its implementing regulations at FAR 3.901 through 3.906. The FAR

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will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239).

Section 827(g) amends 10 U.S.C. 2324(k), "Allowable costs under defense contracts." In a like manner, section 828(d) amends 41 U.S.C. 4310, "Proceedings cost not allowable," to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower statute (10 U.S.C. 2409 or 41 U.S.C. 4712, respectively). See FAR Case 2013-017, entitled Allowability of Legal Costs for Whistleblower Proceedings.

II. Discussion

The current FAR addresses whistleblower protections for contractor employees at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409, as amended, and will be applicable in lieu of, rather than as a supplement to, FAR subpart 3.9. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the

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clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

- (a) (1): Amended grounds for disclosure.
- (a) (2): Amended persons and bodies to whom disclosure could result in reprisal.
- (a) (3) (A): Provided a definition of who is deemed to have made a disclosure, see 203.903(3).
- (a) (3) (B): Added prohibition against reprisal even if undertaken at request of a DoD or Administration official.
- (b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.
- (b) (2) (B): Provided a reporting timeframe for any additional period for investigation.
- (b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.
- (b) (4): Added a three-year time limit for bringing a complaint.
- (c) (1) (B): Modified the types of damages that may be ordered.

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(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

Additionally, because 10 U.S.C. 2409 had been partially implemented in FAR subpart 3.9 and DFARS subpart 203.9 prior to the NDAA for FY 2013 amendments, and the implementing regulations at FAR 3.9 are proposed to state that the FAR subpart does not implement 10 U.S.C. 2409, some sections of the

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FAR must now be implemented in the DFARS so that all of 10 U.S.C. 2409, as amended, is completely implemented in the DFARS.

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The term "abuse of authority" is a recommended addition to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section

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would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors

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the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within

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the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k). Section 827 changes are applicable to DoD and NASA. Each agency will amend its FAR supplement to incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the

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prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have a situation occur that requires an employee to use the whistleblower provisions. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. A firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

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The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection additional requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

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Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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DAR Council Weekly Status Report 2/20/2013

<u>Case Number</u>	<u>Case Manager</u>	<u>Reg</u>	<u>Sponsor</u>	<u>Council Action</u>	<u>Remarks</u>
2013-P009	Kitchens, Heather	PGI	OSD	Report Due	Report Due

Title Pre-Award Coordination for FAA Certification

Action Taken Reclama 2/27/2013

<u>Case Number</u>	<u>Case Manager</u>	<u>Reg</u>	<u>Sponsor</u>	<u>Council Action</u>	<u>Remarks</u>
2013-D019	Williams, Amy	DFARS	OSD	Report Due	Report Due

Title Least Developed Countries that are Designated Countries

Action Taken Reclama 2/27/2013

<u>Case Number</u>	<u>Case Manager</u>	<u>Reg</u>	<u>Sponsor</u>	<u>Council Action</u>	<u>Remarks</u>
2013-D018	Brewer, Janetta	DFARS	OSD	Report Due	Report Due

Title Reports to DoD on Penetrations of Networks and Information Systems

Action Taken Report Due 3/20/2013 (1st. ext)

<u>Case Number</u>	<u>Case Manager</u>	<u>Reg</u>	<u>Sponsor</u>	<u>Council Action</u>	<u>Remarks</u>
2013-D015	Murphy	DFARS	O	Discuss	Discuss

Title Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States

Action Taken Discuss 3/6/2013

<u>Case Number</u>	<u>Case Manager</u>	<u>Reg</u>	<u>Sponsor</u>	<u>Council Action</u>	<u>Remarks</u>
2013-D014	Stewart, Kortnee	DFARS	OSD	Report Due	Report Due

Title Clauses with Alternates--Limitation of Government's Obligation

Action Taken Report Due 3/6/2013 (1st ext.)

<u>Case Number</u>	<u>Case Manager</u>	<u>Reg</u>	<u>Sponsor</u>	<u>Council Action</u>	<u>Remarks</u>
2013-D011	Renna, Marylee	DFARS	OSD	Report Due	Report Due

Title Minimizing the Use of Materials Containing Hexavalent Chromium--Further Implementation

Action Taken Report Due 3/6/2013 (1st ext.)

<u>Case Number</u>	<u>Case Manager</u>	<u>Reg</u>	<u>Sponsor</u>	<u>Council Action</u>	<u>Remarks</u>
2013-D010	Murphy, Meredith	DFARS	OSD	Discuss	Discuss 2/20/2013

Title (S) Enhancement of Whistleblower Protections for Contractor Employees

Action Taken DARC Has Agreed to Draft Final Rule

<u>Case Number</u>	<u>Case Manager</u>	<u>Reg</u>	<u>Sponsor</u>	<u>Council Action</u>	<u>Remarks</u>
2013-D006	Warren, Fernell	DFARS	OSD	Report Due	Report Due

Title Approval of Rental Waiver Requests

Action Taken Report Due 3/6/2013 (4th ext.)

Case Management Record

DFARS Case: 2013-D010		Date Submitted: 01/09/2013	
Title: Enhancement of Contractor Whistleblower Protections			
Recommended Due Date: <u>02/06/2013</u>			
<input checked="" type="checkbox"/> Report <input type="checkbox"/> Reclama			
<input type="checkbox"/> Discussion <input type="checkbox"/> Other _____			
Priority: 1	Submitted By: M. Murphy	Origination Code: L	
Case Manager(s): M. Murphy		Case References:	
PGI Cite:		FAR Case:	
Cognizant Committee: Staff			
Coordination: DPAP/CPIC			
Additional Information:			
<p>This is a new case to implement section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," of the NDAA for FY 2013. Section 827 requires implementation in the DFARS within 180 days after enactment of the statute.</p> <p>The case will require changing and updating DFARS subpart 203.9, entitled, "Whistleblower Protections for Contractor Employees."</p> <p>A due date for the report on the proposed rule of <u>February 6, 2013</u>, 8s requested.</p>			

Priorities: 1 = Statutory or very high priority; 2 = all other

Origination codes: A-Army; C-CAAC; D-DLA; E-Executive Branch (OFPP/OMB); F-Air Force; G-GAO; I-DoDIG; L-Legislation, M-DCMA; N-Navy; O-OSD; P-Public; R-DCAA; S-NASA

10 U.S.C. 2324k
As amended by section 827
of the NDAA for FY 2013

10 USC Sec. 2324
(112-90)

01/03/2012

Sec. 2324. Allowable costs under defense contracts

- (a) Indirect Cost That Violates a FAR Cost Principle. * * *
 - (b) Penalty for Violation of Cost Principle. * * *
 - (c) Waiver of Penalty. * * *
 - (d) Applicability of Contract Disputes Procedure to Disallowance of Cost and Assessment of Penalty. * * *
 - (e) Specific Costs Not Allowable. * * *
 - (f) Required Regulations. * * *
 - (g) Applicability of Regulations to Subcontractors. * * *
 - (h) Contractor Certification Required. * * *
 - (i) Penalties for Submission of Cost Known as Not Allowable. * * *
 - (j) Contractor To Have Burden of Proof. * * *
 - (k) Proceeding Costs Not Allowable. - (1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State [commenced by the United States, by a State, or by a contractor employee submitting a complaint under section 2409 of this title] are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).
- (2) A disposition referred to in paragraph (1)(B) is any of the following:
- (A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).
 - (B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).
 - (C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty [the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title] by reason of the violation or failure referred to in paragraph (1).

cost principles
←

10 U.S.C. 2324k
As amended by section 827
of the NDAA for FY 2013

(D) A final decision -

- (i) to debar or suspend the contractor;
- (ii) to rescind or void the contract; or
- (iii) to terminate the contract for default;

by reason of the violation or failure referred to in paragraph (1).

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the head of the agency or Secretary of the military department concerned that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the agency head or Secretary determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the agency or military department.

(5) (A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B) (i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or

10 U.S.C. 2324k
As amended by section 827
of the NDAA for FY 2013

administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term "proceeding" includes an investigation.

(B) The term "costs", with respect to a proceeding -

(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding; and

(ii) includes -

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor;

(III) the cost of the services of accountants and consultants retained by the contractor; and

(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

(C) The term "penalty" does not include restitution, reimbursement, or compensatory damages.

(1) Definitions. * * *

Sec. 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) Prohibition of Reprisals. - ~~[(1)]~~ An employee of a contractor [or subcontractor] may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice [a person or body described in paragraph (2)] information that the employee reasonably believes is evidence of gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant. [evidence of the following:

(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

(C) A substantial and specific danger to public health or safety.

(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of congress;

(B) An Inspector General.

(C) The Government Accountability Office.

(D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(3) For the purposes of paragraph (1)-

(A) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

FAR 3.901?

(B) Reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.]

(b) Investigation of Complaints. - (1) A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense, or the Inspector General of the National Aeronautics and Space Administration in the case of a complaint regarding the National Aeronautics and Space Administration. Unless the Inspector General determines that the complaint is frivolous, [fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant,]the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.

fail to allege
insert

(2) (A) Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is-

(A) made with the consent of the person alleging the reprisal;

7

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.]

(c) Remedy and Enforcement Authority. - (1) Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor to take affirmative action to abate the reprisal.

(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with ~~the compensation~~ (including back pay) [compensatory damages (including back pay)], employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(2) If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b) (2) (B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, [, compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon whose behalf an order was issued may also file such

FAR 3.906 (a)
?

FAR?

an action or join in an action filed by the head of the agency.] and compensatory and exemplary damages.

(5) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

FAR 3

(6) The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

FAR 7

(7) The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

(d) Notification of Employees. The Secretary of Defense and the Administrator of the National Aeronautics and Space Administration shall ensure that contractors and subcontractors of the Department of Defense and the National Aeronautics and Space Administration, as applicable, inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

chg to 252.203-7002?

(e) Exceptions.-(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure-

(A) relates to an activity or an element of the intelligence community;
or

(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.]

([f]d) Construction. - Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

([g]e) Definitions. - In this section:

(1) The term "agency" means an agency named in section 2303 of this title.

(2) The term "head of an agency" has the meaning provided by section 2302(1) of this title.

(3) The term "contract" means a contract awarded by the head of an agency.

(4) The term "contractor" means a person awarded a contract or a grant with an agency.

(5) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the Secretary of Defense.

(6) The term "abuse of authority" means the following:

(A) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense or the successful performance of a Department contract or grant.

(B) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the National Aeronautics and Space Administration or the successful performance of an Administration contract or grant.]

*FAR, or
DFARS
Clause
(208-
1002)*

SEC. 827. ENHANCEMENT OF WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES.

(a) **IN GENERAL.**—Subsection (a) of section 2409 of title 10, United States Code, is amended—

(1) by inserting “(1)” before “An employee”;

(2) in paragraph (1), as so designated—

(A) by inserting “or subcontractor” after “employee of a contractor”;

(B) by striking “a Member of Congress” and all that follows through “the Department of Justice” and inserting “a person or body described in paragraph (2)”; and

(C) by striking “evidence of” and all that follows and inserting the following: “evidence of the following:

“(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

“(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

“(C) A substantial and specific danger to public health or safety.”;

and

(3) by adding at the end the following new paragraphs:

“(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

“(A) A Member of Congress or a representative of a committee of Congress.

“(B) An Inspector General.

“(C) The Government Accountability Office.

“(D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.

“(E) An authorized official of the Department of Justice or other law enforcement agency.

“(F) A court or grand jury.

“(G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

“(3) For the purposes of paragraph (1)—

“(A) an employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

“(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.”.

(b) INVESTIGATION OF COMPLAINTS.—Subsection (b) of such section is amended—

(1) in paragraph (1), by inserting “fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant,” after “is frivolous,”;

(2) in paragraph (2)—

(A) in subparagraph (A), by inserting “, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant” after “is frivolous”; and

(B) in subparagraph (B), by inserting “, up to 180 days,” after “such additional period of time”; and

(3) by adding at the end the following new paragraphs:

“(3) The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

“(A) made with the consent of the person alleging the reprisal;

“(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

“(C) necessary to conduct an investigation of the alleged reprisal.

“(4) A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.”.

(c) REMEDY AND ENFORCEMENT AUTHORITY.—Subsection (c) of such section is amended—

(1) in paragraph (1)(B), by striking “the compensation (including back pay)” and inserting “compensatory damages (including back pay)”;

(2) in paragraph (2), by adding at the end following new sentence: “An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.”;

(3) in paragraph (4), by striking “and compensatory and exemplary damages.” and inserting “, compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.”;

(4) in paragraph (5), by adding at the end the following new sentence: “Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.”; and

(5) by adding at the end the following new paragraphs:

“(6) The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

“(7) The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.”.

(d) NOTIFICATION OF EMPLOYEES.—Such section is further amended—

(1) by redesignating subsections (d) and (e) as subsections (f) and (g), respectively; and

(2) by inserting after subsection (c) the following new subsection (d):

“(d) NOTIFICATION OF EMPLOYEES.—The Secretary of Defense and the Administrator of the National Aeronautics and Space Administration shall ensure that contractors and subcontractors of the Department of Defense and the National Aeronautics and Space Administration, as applicable, inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.”.

(e) EXCEPTIONS FOR INTELLIGENCE COMMUNITY.—Such section is further amended by inserting after subsection (d), as added by subsection (d)(2) of this section, the following new subsection (e):

“(e) EXCEPTIONS.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

“(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

“(A) relates to an activity of an element of the intelligence community;
or

“(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.”.

(f) ABUSE OF AUTHORITY DEFINED.—Subsection (g) of such section, as redesignated by subsection (d)(1) of this section, is further amended by adding at the end the following new paragraph:

“(6) The term ‘abuse of authority’ means the following:

“(A) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense or the successful performance of a Department contract or grant.

“(B) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the National Aeronautics and Space Administration or the successful performance of an Administration contract or grant.”.

(g) ALLOWABILITY OF LEGAL FEES.—Section 2324(k) of such title is amended—

(1) in paragraph (1), by striking “commenced by the United States or a State” and inserting “commenced by the United States, by a State, or by a contractor employee submitting a complaint under section 2409 of this title”; and

(2) in paragraph (2)(C), by striking “the imposition of a monetary penalty” and inserting “the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title”.

(h) CONSTRUCTION.—Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law.

(i) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall take effect on the date that is 180 days after the date of the enactment of this Act, and shall apply to—

(A) all contracts awarded on or after such date;

(B) all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; and

(C) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments.

(2) REVISION OF SUPPLEMENTS TO THE FAR.—Not later than 180 days after the date of the enactment of this Act, the Department of Defense Supplement to the Federal Acquisition Regulation and the National Aeronautics and Space Administration Supplement to the Federal Acquisition Regulation shall each be revised to implement the requirements arising under the amendments made by this section.

(3) INCLUSION OF CONTRACT CLAUSE IN CONTRACTS AWARDED BEFORE EFFECTIVE DATE.—At the time of any major modification to a contract that was awarded before the date that is 180 days after the date of the enactment of this Act, the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section of the contract.

Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Monday, June 24, 2013 4:53 PM
To: 'Seehra, Jasmeet'
Cc: FN-OMB-DFAR Rules; Wise, Julia; Williams, Amy, Ms, OSD-ATL; Murphy, Meredith K Ms OSD ATL; Stewart, Kortnee R Ms OSD ATL
Subject: RE: DFARS whistleblower rule -- Case 2013-D013
Attachments: 2013-D010 (p) FRN_revised per OFPP comments_061913_DoD response 062413.doc; 2013-D010 (p) DFARS revised text w changes_DoD edits 062413 to comments_061113 - ds (3).doc
Signed By: (b)(6)

Jasmeet,

Regarding the two comments from WH GC, DoD submits the following:

DFARS text.

1. GC comment on pg 2 of 7; we have determined that the definition of "reprisal" is not required and therefore being removed. Consequently, I have made corresponding changes to text after definition of "Abuse of authority" and at 203.903 (1) Policy, added the word "Such" to last sentence in red.
2. GC comment on pg 3 of 7; Section 203.904 item 4 has been revised to incorporate GC recommended edit. DFARS 203.904 (a) and (b) are straight out of FAR 3.904.

FRN.

We have accepted additional background information on pages 3 & 4 addressing FAR cases 2013-017 and 2013-015. See attached red-line FRN with changes.

Please contact me for any questions and advise when to submit clean copies of FRN and rule.

V/r,

Manny Quinones

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Monday, June 24, 2013 12:25 PM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia
Subject: DFARS whistleblower rule -- Case 2013-D013

Please see the attached files with comments from WH GC

Murphy, Meredith K Ms OSD ATL

From: Seehra, Jasmeet (b)(6)
Sent: Monday, June 24, 2013 6:03 PM
To: Quinones, Manuel Mr OSD ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Williams, Amy, Ms, OSD-ATL; Murphy, Meredith K Ms OSD ATL; Stewart, Kortnee R Ms OSD ATL
Subject: RE: DFARS whistleblower rule -- Case 2013-D013

I'm getting a bit lost here. Where are you in responding to OFPP comments sent on 6/19?

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL (b)(6)
Sent: Monday, June 24, 2013 4:53 PM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules; Wise, Julia; Williams, Amy, Ms, OSD-ATL; Murphy, Meredith K Ms OSD ATL; Stewart, Kortnee R Ms OSD ATL
Subject: RE: DFARS whistleblower rule -- Case 2013-D013

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V/r,

Manny Quinones

(b)(6)

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From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Monday, June 24, 2013 12:25 PM

To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL

Cc: FN-OMB-DFAR Rules; Wise, Julia

Subject: DFARS whistleblower rule – Case 2013-D013

Please see the attached files with comments from WH GC

Enhancement of Whistleblower Protections for Contractor Employees
Section 827 of the NDAA for FY 2013
Summary of Enhancements

DFARS Case 2013-D010, Enhancement of Whistleblower Protections for Contractor Employees

Prior Authority: 10 U.S.C. 2409, as amended by section 846 of the NDAA for FY 2009 and section 842 of the NDAA for FY 2009.

New Authority: Section 827 of the NDAA for FY 2013 and 10 U.S.C. 2409, as amended by paragraphs (a) through (f) of section 827.

Enhancements:

- Exemption for any element of the intelligence community.
- Addition of several entities to the list of persons/offices to whom disclosure qualifies as whistleblowing, thereby entitling the whistleblower to protection from reprisal.
- Addition of procedures for contractor employee whistleblowers to file complaints of reprisal.
- Addition of remedies that an agency head may require a contractor to take when an Inspector General determines that the contractor has taken reprisal actions against an employee whistleblower.
- Prohibition against reprisal, even if it is undertaken at the request of a DoD or Administration official.
- Requirement for the contractor to inform its employees, in the predominant native language of the workforce, of their employee whistleblower rights and protections.
- Prohibition against the Inspector General responding to any inquiry or disclosing any information form or about any person alleging reprisal, except under very limited circumstances.
- Addition of definitions of “abuse of authority” and “reprisal.”

DFARS Case 2013-D010,

Prior Authority: 10 U.S.C.2324(k).

New Authority: Section 827 of the NDAA for FY 2013 and 10 U.S.C. 2324(k), as amended by paragraph (g) of section 827.

Enhancements:

- Applicability of cost principle to proceedings commenced by a contractor employee submitting a complaint under 10 U.S.C. 2409, not just proceedings commenced by the United States or a State.
- Legal fees are unallowable if there is an order to take correction action under 10 U.S.C. 2409, not just if there is imposition of a monetary penalty.

Enhancement of Whistleblower Protections for Contractor Employees
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- Legal fees are unallowable if there is an order to take correction action under 10 U.S.C. 2409, not just if there is imposition of a monetary penalty.

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, June 13, 2013 3:15 PM
To: Neilson, Linda, SES, OSD-ATL; Williams, Amy, Ms, OSD-ATL; Quinones, Manuel Mr OSD ATL
Subject: DFARS Case 2013-D010, Issue Paper Requested by OIRA
Attachments: 2013-D010_Issue Paper for OIRA.docx
Signed By: (b)(6)

I understand that Mr. Greenawalt, in today's telecom, asked for an issue paper on the DFARS whistleblower case. Attached is my first draft of an issue paper. Please let me know if you want the paper to address a different aspect(s) of the case or have corrections/additions that I should make.
Regards,
Meredith

DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

ISSUE PAPER FOR OIRA

June 13, 2013

ISSUE: What does the DFARS case do vis-à-vis FAR Case 2013-015, Pilot Program for Enhancement of Contractor Whistleblower Protections?

BACKGROUND:

Prior to the January 2, 2013, enactment of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239), the laws governing protections for contractor whistleblowers were covered in the Federal Acquisition Regulation (FAR) at subpart 3.9 and supplemented for the Department of Defense (DoD) at subpart 203.9 of the DoD FAR Supplement (DFARS).

The NDAA for FY 2013 included two relevant provisions:

- Section 827, Enhancement of Whistleblower Protections for Contractor Employees; and
- Section 828, Pilot Program for Enhancement of Contractor Employee Whistleblower Protections.

The NDAA for FY 2013 severed the prior statutory relationship and gave agencies subject to title 10 of the United States Code (U.S.C.), i.e., DoD, NASA, and the Coast Guard, a separate statute—10 U.S.C. 2409, Contractor Employees: Protections from Reprisal for Disclosure of Certain Information. Agencies subject to title 41, U.S.C., the “civilian agencies,” are now required to comply with 41 U.S.C. 4712, Pilot Program for Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information.

In addition to creating a four-year pilot program for civilian agencies at 41 U.S.C. 4712, section 828 also suspended the previously applicable statute, 41 U.S.C. 4705, for the four-year period of the civilian agencies’ pilot program. Thus, 10 U.S.C. 2409 is now a standalone legal provision applicable only to DoD, NASA, and the Coast Guard. Further, paragraph (i)(2) of section 827 of the NDAA for FY 2013 directed DoD to revise the DFARS “to implement the requirements arising under the amendments made by this section.”

DISCUSSION:

The actual changes to DFARS subpart 203.9 that are proposed to implement section 827 of the NDAA for FY 2013 are limited to those required to conform the subpart to the changes made to 10 U.S.C. 2409, e.g., exempting the intelligence community; clarifying the responsibilities and duties of the Inspector General; expanding the remedies available to contractor whistleblowers; and expanding the clause requirement to notify contractor employees.

DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

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From: Seehra, Jasmeet (b)(6)
Sent: Wednesday, June 19, 2013 11:33 AM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL; Neilson, Linda, SES, OSD-ATL
Cc: Seehra, Jasmeet; FN-OMB-DFAR Rules; Wise, Julia
Subject: OFPP comments on Whistleblower rules -- DFARS Cases 2013-D010 and 2013-D022
Attachments: winmail.dat

FAR 2013-015

Please note OFPP is providing comments on the allowability case (which is not yet here at OIRA) as well as the enhancement case.

OFPP Recommendation

OFPP does not object to the DFARS cases (2013-D010 proposed rule and 2013-D022 interim rule) except to note that the references to NDAA FY 2013 (PL 112-239) in DFARS 2013-D022 needs to be corrected (from PL 113-239) in both the FRN and the DFARS text (see attachments).

Background

Sections 827 and 828 of NDAA FY 2013 (PL 112-239) enacted parallel enhanced whistleblower protections for contractor employees on contracts with DOD (title 10) and civilian (title 41) agencies, respectively. Effectively, the changes to the title 10 version are permanent, while the title 41 version is temporary.

As enacted, the DFARS implementation of the enhanced whistleblower protections (2013-D010 proposed rule) will be effective for contracts awarded on or after the date that is 180 days after the date of enactment (Jan 2, 2013) (at the very least, but practicably, the DFARS implementation will be effective for contracts awarded on or after the effective date of the final rule on enhanced whistleblower protection for contractor employees, a date that is subsequent to the date that is 180 days after enactment).

The DFARS implementation of the allowability of the legal costs with respect to enhanced whistleblower protections (2013-D022) is upon FR publication of the interim rule, placing potential contractors on immediate notice regarding the allowability of the legal costs with respect to enhanced whistleblower protections. Effectively, these two DFARS cases implement practically the enhanced whistleblower protections for contracts awarded on or after the effective date for the final rule on enhanced whistleblower protections (which will be the later of 180 days after enactment or the effective date of the final rule for 2013-D010).

OFPP's Concern

Effective Date Issue. It is fine for DoD to proceed with DFARS rule because their implementation is consistent with the effective date per the statute. However, there is a potential for public confusion as to the effective date of governmentwide enhanced whistleblower protections for contractor employees. The effective dates for the FAR and DFARS rules will be different (even though the substantive rules are otherwise effectively identical) because of internal statutory inconsistencies for the FAR rule. (The statute that the DFARS rules are implementing provided for a specific statutory effective date of 180 days after enactment, while the statute that the FAR rules are implementing has two conflicting implementation dates.)

Due to an internal statutory inconsistency in sec 828 on the effective date of the changes in title 41, the FAR Council has to decide on a particular course of action for the FAR implementation. (The FAR rule is currently under OFPP's review). The tentative decision (per discussions among the OGCs for CAAC, DARC and OFPP/OMB with further consultations planned with DOJ) is to make enhanced whistleblower protections in title 41 effective as of the earliest date provided for in the statute, that is upon the date of enactment. That would provide the longest period of coverage for enhanced protection for the contractor employees which is the focus of the statutory changes for enhanced whistleblower protections. This approach would implement enhanced whistleblower protections with staggered implementation dates governmentwide depending on the agency awarding the contract. The FAR rule is effective upon the enactment of the statute (Jan 2, 2013), but the DFARS rule is not effective until at least 180 days later (as it will be effective upon the later of 180 days after enactment or the effective date of the final rule, DFARS 2013-D010)). Thus, the rights of a contractor employee for whistleblower protection, as well as the Government's liability for the reimbursement of legal costs arising from whistleblower proceedings, will be different for contracts awarded during the transition from the current whistleblower protections to the enhanced protections, i.e., during the period beginning with the date of enactment and ending with the date before the effective date of the final rule, DFARS 2013-D010, depending on the agency that awarded the contract.

For contracts awarded after the effective date of both the FAR and DFARS substantive rules, the protections and coverage will be the same, irrespective of the agency awarding the contract.

Example. If during the transition from the current whistleblower protections to the enhanced whistleblower protections, consider the following factors:

- (1) a contractor awarded identical contracts for the same thing on Feb 1, 2013 to DOD and to a civilian agency,
- (2) a contractor employee reported identical contractor malfeasance in the performance of both contracts, and
- (3) the contractor committed reprisals against the whistleblower contractor employee, the contractor employee will have greater protections for reporting the identical contractor malfeasance in the performance of the civilian agency FAR contract than for the DOD DFARS contract.

In the worst case scenario, the contractor employee will have no protection under the DOD DFARS contract for reporting identical contractor malfeasance, but the contractor employee is protected under the civilian agency FAR contract for reporting the same conduct. Similarly, as the allowability of the legal costs is contingent upon the implementation of enhanced whistleblower protections, the Government will be liable for the reimbursement of legal costs arising from the whistleblower proceedings on the DOD DFARS contract, but the Government will be able to disallow the identical legal costs arising from the whistleblower proceedings on the civilian agency FAR contract.

We are happy to meet to discuss this issue as it pertains to these rules.

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Wednesday, June 19, 2013 12:41 PM
To: Leatherman, Richard, OIG DoD
Cc: Ayzenberg, Victor CTR OSD ATL; Ross, Sandra, Ms, OSD-ATL
Subject: RE: Contractor Whistleblower Reprisal - Suspense Tracker #1610
Signed By: (b)(6)

Mr. Leatherman,

DFARS Case 2013-D010, entitled Enhancement of Contractor Whistleblower Protections, was opened as a proposed rule on January 7, 2013. The proposed rule has been under review at OIRA/OMB since March 28, 2013, so it's very unlikely that we'll be able to publish a final rule within the statutory prescribed time.

Because the case is considered to be pre-decisional until publication as a proposed rule, I can only tell you that it closely follows the language in section 827 of the NDAA for FY 2013. Once OIRA releases the rule for publication, however, I should be able to share the draft internally and will do so through Sandra Ross, DPAP/CPIC, who is our DPAP liaison with the DoD OIG.

Regards,
Meredith Murphy
DARS Case Manager

(b)(6)

-----Original Message-----

From: Ayzenberg, Victor CTR OSD ATL On Behalf Of RSS dd - ATL DFARS
Sent: Tuesday, June 18, 2013 9:47 AM
To: Murphy, Meredith K Ms OSD ATL
Subject: FW: Contractor Whistleblower Reprisal - Suspense Tracker #1610

Meredith,

Please help Mr. Leatherman

Thank you

V/R,

Victor Ayzenberg
DPAP / DARS ITPoC
<http://www.acq.osd.mil/dpap>

-----Original Message-----

From: Leatherman, Richard, OIG DoD
Sent: Monday, June 17, 2013 15:03
To: RSS dd - ATL DFARS
Subject: Contractor Whistleblower Reprisal

Greetings,

af

I am with the DoD IG Directorate that investigates whistleblower reprisal complaints filed by DoD contractors. With the signing of the FY 2013 NDAA in January, new whistleblower rules were included that are scheduled to effect on 1 July 2013. Is a revision to the DFARS being readied for release on or about 1 July that incorporates the changes? If so, because we have to investigate the cases, we would appreciate a copy of the changes as soon as possible.

Thank you

Rich Leatherman

Outreach Specialist

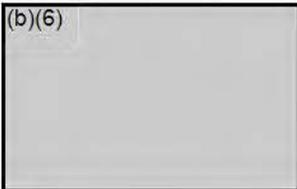
Whistleblower Reprisal Investigations

Department of Defense Inspector General

4800 Mark Center Drive

Alexandria, VA 22350-1500

(b)(6)

A rectangular area of the document is redacted with a solid grey fill. The text "(b)(6)" is printed in the top-left corner of this redacted area.

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Murphy, Meredith K Ms OSD ATL

From: McConahie, Teresa (b)(6)
Sent: Tuesday, June 18, 2013 10:56 AM
To: Pomponio, Leigh (HQ-LP011)
Cc: Van Houten, Ann; Murphy, Meredith K Ms OSD ATL; Francis, Camara; Stivaletti-Petty, Linda; McConahie, Teresa
Subject: RE: CONTRACTOR WHISTLEBLOWER PROTECTIONS; SECTION 827 OF THE FY2013 NDAA

Leigh,

Good morning. Thank you for your response on this however, I have been informed that DoD and NASA are proceeding with writing their separate rules (DFAR and NFS) as required by the statute. I am still of the opinion that covering DoD and NASA in the FAR would be less redundant (i.e., I'm not certain our rule makers really thought about the fact that the 2 agencies could be covered in the FAR vice writing 2 separate rules) but, that is not the view of others and not my battle to engage in.

With that in mind, DHS will be writing an HSAR rule to implement Section 827 of the FY2013 NDAA for the U.S. Coast Guard. Ms. Meredith Murphy kindly forwarded me a copy of the draft DFARS rule and I was hoping that you might forward a copy of your draft NFS rule. We would be most appreciative.

Thank you so much.

Teri McConahie

Procurement Analyst

Acquisition Policy & Legislation

Office of the Chief Procurement Officer

Department of Homeland Security

(b)(6)

(b)(6)

From: Pomponio, Leigh (HQ-LP011) (b)(6)
Sent: Wednesday, June 05, 2013 12:04 PM
To: McConahie, Teresa; Murphy, Meredith K Ms OSD ATL (b)(6)
Cc: Laura Auletta (M1V10) (b)(6)
Subject: RE: CONTRACTOR WHISTLEBLOWER PROTECTIONS; SECTION 827 OF THE FY2013 NDAA

Hi Teri,

We normally do include identical requirements that pertain to DoD, NASA, and Coast Guard in the FAR with that notation. I believe the reason that Section 827 of 2013 NDAA is being implemented independently by the three agencies is because the requirements are not the same. The legislation includes separate, similar paragraphs for each agency.

The current (2013) action is further complicated because the original 2088 NDAA coverage only applied to DoD. They put it in their DFARS at that time. The 2009 NDAA changed DoD coverage and they revised the DFARS accordingly. Consequently, DoD has had coverage on contractor whistleblower protections in DFARS for many years. Now the 2013 NDAA brings in NASA and Coast Guard, "enchancing" whistleblower protections that don't currently exist, and the requirements are not identical to DoD.

Although NASA's proposed rule is written and is currently under review by Counsel, I would certainly favor FAR coverage for the three agencies to the extent possible. I am bringing Meredith Murphy into the discussion; she authored the DFARS rule.

Leigh Pomponio

Procurement Analyst

HQ NASA

(b)(6)

From: McConahie, Teresa [mailto:(b)(6)]
Sent: Wednesday, June 05, 2013 8:10 AM
To: Pomponio, Leigh (HQ-LP011)
Cc: McConahie, Teresa
Subject: CONTRACTOR WHISTLEBLOWER PROTECTIONS; SECTION 827 OF THE FY2013 NDAA
Importance: High

Good morning. My name is Teri McConahie; I am a senior procurement analyst with the Department of Homeland Security (DHS) and the DHS representative to the Civilian Agency Acquisition Council (CAAC).

The CAAC recently approved FAR Case 2013-015, Pilot Program for Enhancement of Contractor Employee Whistleblower Protections, implementing Section 828 of the FY2013 NDAA. This rule is applicable to all federal agencies excluding DoD, NASA, and the United States Coast Guard (USCG).

I understand that the Department of Defense (DoD) has prepared a DFARS case to implement Section 827 of the FY2013 NDAA for DoD (in the Defense Acquisition Regulation Supplement (DFARS) and that the rule is currently, and has been for at least 2 weeks, at OIRA. It is also my understanding that NASA will be preparing a separate case to implement Section 827 of the FY2013 NDAA for NASA (in its NASA FAR Supplement). Because the USCG is part of DHS, we will also be preparing a separate case to implement Section 827 of the FY2013 NDAA for USCG (in our Homeland Security Acquisition Regulation).

We (DHS) are of the opinion that given there are 3 agencies subject to Section 827 of the FY2013 NDAA that it would be more efficient to include implementation of Section 827 of the FY2013 NDAA for DoD, NASA, and the USCG in the FAR vice writing 3 separate cases/rules to implement. We have recently contacted the CAAC Chairperson to discuss this alternative and they are not prepared to agree/concur with the approach unless OIRA is in support of it. I believe someone from GSA will be contacting OIRA to discuss but am not certain when that may occur. I just wanted to bring this to your attention and to ask if this approach (i.e., implementing Section 827 in the FAR) is 'appealing' to NASA.

Thank you in advance for your time.

Teri McConahie

Senior Procurement Analyst

DHS CAAC Representative

Acquisition Policy & Legislation

Office of the Chief Procurement Officer

Department of Homeland Security

(b)(6)

(b)(6)

Murphy, Meredith K Ms OSD ATL

From: Marissa Petrussek - M1V1C (b)(6)
Sent: Thursday, June 20, 2013 1:55 PM
To: Deborah Erwin (M1V1CA)
Cc: Laura Auletta - M1V1C; William Clark - M1V1CA; Neilson, Linda, SES, OSD-ATL; Williams, Amy, Ms, OSD-ATL; Murphy, Meredith K Ms OSD ATL; Pomponio, Leigh (HQ-LP011); Chambers, Marilyn (HQ-LP011); Karlos Morgan - M1V1CA
Subject: Request for Legal Review: 2013-016
Attachments: Tab A_2013-016 (f) FAR_Case Resolution_062013 (1).docx; Tab A_2013-016 (f) FAR_Case Resolution_062013_CC.docx; Tab B_2013-016 (f) FRN_CaseResolution_06042013.docx

Deborah,

Official legal review and concurrence is requested for FAR Case 2013-016 - EPEAT Items . Included in this email is a clean and annotated copy of the rule and FRN. If you have any questions, please feel free to contact me.

Thanks,
Marissa

--
Marissa Petrussek Ryba
Acquisition Policy Division
Office of Governmentwide Policy
U. S. General Services Administration
One Constitution Square
1275 1st Street, NE
Washington, DC 20002
Email (b)(6)
Office Phone (b)(6)
Blackberry: (b)(6)

Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Tuesday, June 11, 2013 6:20 PM
To: Murphy, Meredith K Ms OSD ATL
Subject: FW: OFPP comments on DFAR Case on Whistleblowing
Attachments: 2013-D010 (p) DFARS revised text w changes & comments_061113.doc; 2013-D010 (p) FRN_revised per OFPP comments_061113.doc
Signed By: (b)(6)

Meredith,

Here is a copy for your records of DoD's responses to OIRA comments of 5/28.

Thanks much!

Manny

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL
Sent: Tuesday, June 11, 2013 6:15 PM
To: 'Seehra, Jasmeet'
Cc: FN-OMB-DFAR Rules; Wise, Julia; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Subject: RE: OFPP comments on DFAR Case on Whistleblowing

Jasmeet,

Please find attached DoD responses to OFPP comments of 5/28/13.

Please contact me for any questions and let me know when to submit clean copies of the revised DFARS text and FRN.

Thank you.

V/r,

Manny Quinones
OUSD(AT&L) DPAP/DARS
(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, May 28, 2013 2:28 PM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia
Subject: OFPP comments on DFAR Case on Whistleblowing

Please see the attached files with OFPP edits.

**DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule**

Changes made by DoD in response to OFPP comments are highlighted in yellow.

**PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST**

**SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES**

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[,] and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)].

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

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Comment [MQ1]: Response is applicable to various OMB comments.

Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based in an independent statute that applies only to Title 10 agencies. Please see FAR Case 2013-015, which would implement section 828 of the NDAA for FY 2013 (a 4-year pilot program) and suspend FAR 3.901 through 3.906 (this case was forwarded to OFPP for review on June 3rd).

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [Policy.] 10 U.S.C. 2409 prohibits contractors [or subcontractors] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities [listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,] a substantial and specific danger to public health or safety, or a violation of law [rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[.] **A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.**

[(2) **Entities to whom disclosure may be made covered.**]

(i) A Member of Congress, ~~or a representative of a committee of Congress.~~

~~(ii) A representative of a committee of Congress.~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

(i)(ii) The Government Accountability Office.

Comment [WJ2]: The “abuse of authority” definition is consistent with the FAR definition.

The reprisal definition is not in the FAR. Is this unique to the provision that DoD is implementing? Is this definition in 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)?

Comment [MQ3]: Yes. The definition of “reprisal” is in sec 827 of the NDAA for FY 2013. No change.

Comment [WJ4]: Reprisal is defined. Do we need to add this language that is in the statute? It is in the FAR too.

Comment [MQ5]: The language does not need to be added to 203.903(1) because it is already included at 203.906(4). No change.

Comment [WJ6]: For consistency with the FAR.

Comment [MQ7]: Accept change.

Comment [WJ8]: Deletion and move for consistency with the law.

Comment [MQ9]: Accept change. Will revise 203.903(2) and renumber the remaining items.

Comment [WJ10]: Do you need to define IG? FAR defines IG in the definition section as follows:

“Inspector General” means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the executive agency concerned.

Comment [MQ11]: No separate definition is needed because the words used in this list adequately explain which IG is relevant. Please note that, for interagency acquisitions, it could be an IG other than the DoD IG. No change.

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(v) A DoD employee responsible for contract oversight or management.

(vi) An authorized official of an agency or the Department of Justice [or other law enforcement agency].

(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) **Disclosure clarified.** An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) **Contracting officer actions.** A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The substantial violation of law giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act;

and

(5) The specific nature and date of the reprisal.

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Comment [W312]: The FAR removes the subtitle. Do you need to change for consistency?

Comment [M313]: While we strive to maintain consistency with the FAR, ensuring clarity of rule to readers is of high importance. The title here is considered helpful to readers. No change.

Comment [W314]: Will DoD COs know who this is referring to?

Comment [W315]: Are these procedures addition to the procedures below? Are these procedures in the PGI? If yes, reference below section or include a PGI reference.

Comment [M316]: The default is to refer the issue to legal counsel, which will in most cases be the correct procedure. However, DoD agencies, e.g., Navy or Army, are authorized to issue their own implementing procedures, and this phrase was included in order to offer DoD agencies the opportunity to require referral to an office other than legal counsel. There will not be further "agency procedures" at the DoD level, and further agency procedures at the Services level, while not expected, are authorized.

(c) In addition, to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

Comment [MQ17]: Noted. The rule will be reviewed prior to publication to ensure we are amending the latest baseline. Appropriate numbering changes will be made to ensure alignment to the latest baseline.

Comment [WJ18]: This will change as well.

Do the following procedures apply to subcontractors?

Comment [MQ19]: Noted; see response 19 above.

This sentence should be deleted. All of subpart 203.9 now applies to DoD. Will revise to delete first sentence of 203.905.

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ANY DISTRIBUTION OF THIS DOCUMENT MUST CONTAIN THIS LEGEND.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221(e) Individual Right of Action in Certain Reprisal Cases) in shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) S[a] shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and [shall take one or more of the following actions:

(i) Order the contractor to take affirmative action to abate the reprisal.

(ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including

Comment [WJ20]: Put the title of this section in parentheses.

Comment [MQ21]: Agree. Paragraph (e) does not have a title, so the sentence will be revised to put section title in parentheses.

Comment [WJ22]: Where is the following information, from the statute, in this remedies section?

(A) Order the contractor or grantee to take affirmative action to abate the reprisal.

(B) Order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

Where is the "allowability of legal fees" addressed?

Comment [MQ23]:

1. Actually, it was covered at FAR 2.906(a), to which the DFARS referred at 203.906(1)(i). But, as was noted in item 1 above, we can no longer rely on references to the FAR, given that the DFARS is now implementing a standalone statute. Therefore, the DFARS text shall be revised to incorporate the missing language from section 827 (10 U.S.C. 2409, as amended). Will revise 203.906, as recommended, to add missing language from 10 U.S.C. 2409, as amended.

2. The allowability of legal fees is being addressed in a separate case, DFARS 2013-D022. This proposed rule (DFARS case 2013-D022) was submitted to OIRA for review on June 3rd. No change.

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attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

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As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights not otherwise provided by law to disclose classified information.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN-2009[DATE])**

[a] The Contractor shall inform its employees in writing[, **in the predominant native language of the workforce,**] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

Comment [WJ24]: Has this been defined so workers know what we mean?

Comment [MQ25]: We do not know what workers understand or don't understand regarding their right and protections. The contractor is the entity that must comply with this contract clause/requirement to inform their workforce. If this requirement is unclear—we presume that there will be comments to that effect submitted during the public comment period.

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case. [This is being

Comment [A1]: Is there an effective date?

Comment [A2]: Effective 180 days after enactment.

Comment [A3]: Please explain what the purpose is of these changes.

Comment [A4]: We cannot explain what the purpose or intent was of the Congress in making these changes. There is no relevant report language, so we could only speculate.

Comment [A5]: Ignore my comment in the text.

Please include the DFARS case number and title if known.

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addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings.

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II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 [, as amended.] ~~and two prior amendments to it.~~ The subpart covers the policy,

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Comment [A6]: Please include the titles and sections of the two prior amendments.

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procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

- (a) (1): Amended grounds for disclosure.
- (a) (2): Amended persons and bodies to whom disclosure could result in reprisal.
- (a) (3) (A): Definition of who is deemed to have made a disclosure.

Comment [A7]: Where is this in the DFARS text?

Comment [A8]: Please see 203.903(3).

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(a) (3) (B): ~~Prohibition against reprisal even if undertaken at request of a DoD or Administration official. Definition of what is excluded from the definition of reprisal.~~

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Comment [A9]: Where is this in the DFARS text?

Comment [A10]: Please see amended description at left.

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(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b) (2) (B): Provided a reporting timeframe ~~line~~ for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

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(c)(7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g)(6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating

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to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and **certain** contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided

Comment [A11]: Why is the word "certain" added?

Comment [A12]: The word "certain" has been added because only some, not all, contractor or subcontractor officials are covered. The only officials covered are a "management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct." A disclosure to a co-worker who had no such responsibilities would not be covered by subpart 203.9.

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by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O.

Comment [A13]: How will this be determined? Use same phrase from trafficking case - "significant portion" is used in the trafficking rule.

Comment [A14]: The term "predominant native language of the workforce" originates from statute. We believe this was phrased as it is, so that a contractor would not be compelled to provide the notifications in dozens of different languages, i.e., if 70% of employees come from English-speaking countries, then notifications in English would meet the requirement.

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12866, Regulatory Planning and Review, dated September 30, 1993.

This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their

employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013.

Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and

10 U.S.C. 2324(k). ~~making the Section 827 changes are~~

applicable to DoD and NASA. Each agency will amend ~~is amending~~

Comment [A15]: Although disclosure is not new, it now flows to subcontractors. So is this a new reporting requirement for primes?

Comment [A16]: There are no reporting requirements for prime contractors or subcontractors.

Comment [A17]: What about Coast Guard.

Comment [A18]: Only DoD and NASA are specifically mentioned in section 827. We understand that DHS is still determining applicability to the Coast Guard.

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its FAR supplement to incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will ~~have~~ have a situation occur that requires an employee to use the whistleblower provisions~~, employees~~.

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Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

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There are ~~[no]no minimal~~ reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. ~~However, a~~ firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit

Comment [A19]: Disagree. There are NO required contractor or subcontractor reporting requirements at all. What MAY be asked for in a particular instance is not within the purview here.

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such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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**DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule**

Changes made by DoD in response to OFPP comments are highlighted in yellow.

**PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST**

**SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES**

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)].

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

ATTENTION: THIS IS A CONFIDENTIAL, DELIBERATIVE, AND PRE-DECISIONAL DEFENSE ACQUISITION REGULATIONS SYSTEM DOCUMENT, PROTECTED FROM UNAUTHORIZED DISCLOSURE PURSUANT TO THE FREEDOM OF INFORMATION ACT AND OTHER LEGAL AUTHORITIES. THIS DOCUMENT SHALL NOT BE DISTRIBUTED OUTSIDE AUTHORIZED RULEMAKING CHANNELS WITHOUT THE PRIOR APPROVAL OF A REPRESENTATIVE OF THE DEFENSE ACQUISITION REGULATIONS SYSTEM. IF YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, YOU MAY NOT READ, COPY, DISTRIBUTE, OR USE THE DOCUMENT OR INFORMATION CONTAINED THEREIN. FURTHERMORE, YOU MUST IMMEDIATELY NOTIFY THE SENDER BY REPLY EMAIL OR OTHER MEANS AND THEN DELETE OR DESTROY ALL COPIES OF THE DOCUMENT. ANY DISTRIBUTION OF THIS DOCUMENT MUST CONTAIN THIS LEGEND.

Comment [MQ1]: Response is applicable to various OMB comments.

Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based in an independent statute that applies only to Title 10 agencies. Please see FAR Case 2013-015, which would implement section 828 of the NDAA for FY 2013 (a 4-year pilot program) and suspend FAR 3.901 through 3.906 (this case was forwarded to OFPP for review on June 3rd).

6/11/13

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [Policy.] 10 U.S.C. 2409 prohibits contractors [or subcontractors] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities [listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,] a substantial and specific danger to public health or safety, or a violation of law[, rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[.] **A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.**

[(2) **Entities to whom disclosure may be made covered,**]

(i) A Member of Congress; **or a representative of a committee of Congress.**

~~(ii) A representative of a committee of Congress.~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

(i)(ii) The Government Accountability Office.

Comment [W32]: The “abuse of authority” definition is consistent with the FAR definition.

The reprisal definition is not in the FAR. Is this unique to the provision that DoD is implementing? Is this definition in 527 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-299)?

Comment [M03]: Yes. The definition of “reprisal” is in sec 827 of the NDAA for FY 2013. No change.

Comment [W34]: Reprisal is defined. Do we need to add this language that is in the statute? It is in the FAR too.

Comment [M05]: The language does not need to be added to 203.903(1) because it is already included at 203.906(4). No change.

Comment [W36]: For consistency with the FAR.

Comment [M07]: Accept change.

Comment [W38]: Deletion and move for consistency with the law.

Comment [M09]: Accept change. Will revise 203.903(2) and renumber the remaining items.

Comment [W310]: Do you need to define IG? FAR defines IG in the definition section as follows:

“Inspector General” means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the executive agency concerned.

Comment [M11]: No separate definition is needed because the words used in this list adequately explain which IG is relevant. Please note that, for interagency acquisitions, it could be an IG other than the DoD IG. No change.

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(ii)v) A DoD employee responsible for contract oversight or management.

(vi) An authorized official of an agency or the Department of Justice [or other law enforcement agency].

[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

[(2[4]) *Contracting officer actions.*]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The substantial violation of law giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act;

and

(5) The specific nature and date of the reprisal.

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Comment [WJ12]: The FAR removes the subtitle. Do you need to change for consistency?

Comment [MQ13]: While we strive to maintain consistency with the FAR, ensuring clarity of rule to readers is of high importance. The title here is considered helpful to readers. No change.

Comment [WJ14]: Will DoD COs know who this is referring to?

Comment [WJ15]: Are these procedures addition to the procedures below? Are these procedures in the PGI? If yes, reference below section or include a PGI reference.

Comment [MQ16]: The default is to refer the issue to legal counsel, which will in most cases be the correct procedure. However, DoD agencies, e.g., Navy or Army, are authorized to issue their own implementing procedures, and this phrase was included in order to offer DoD agencies the opportunity to require referral to an office other than legal counsel. There will not be further "agency procedures" at the DoD level, and further agency procedures at the Services level, while not expected, are authorized.

(c) In addition, to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

Comment [MQ17]: Noted. The rule will be reviewed prior to publication to ensure we are amending the latest baseline. Appropriate numbering changes will be made to ensure alignment to the latest baseline.

Comment [WJ18]: This will change as well. Do the following procedures apply to subcontractors?

Comment [MQ19]: Noted; see response 19 above.

This sentence should be deleted. All of subpart 203.9 now applies to DoD. Will revise to delete first sentence of 203.905.

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[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221(e) Individual Right of Action in Certain Reprisal Cases) in shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

—(i) S[s]hall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and [shall take one or more of the following actions:

(i) Order the contractor to take affirmative action to abate the reprisal.

(ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including

Comment [WJ20]: Put the title of this section in parenthesis.

Comment [MQ21]: Agree. Paragraph (e) does not have a title, so the sentence will be revised to put section title in parenthesis.

Comment [WJ22]: Where is the following information, from the statute, in this remedies section?

(A) Order the contractor or grantee to take affirmative action to abate the reprisal.

(B) Order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

Where is the "allowability of legal fees" addressed?

Comment [MQ23]:

1. Actually, it was covered at FAR 3.906(e), to which the DFARS referred at 203.906(1)(ii). But, as was noted in item 1 above, we can no longer rely on references to the FAR, given that the DFARS is now implementing a standalone statute. Therefore, the DFARS text shall be revised to incorporate the missing language from section 827 (10 U.S.C. 2409, as amended). Will revise 203.906, as recommended, to add missing language from 10 U.S.C. 2409, as amended.

2. The allowability of legal fees is being addressed in a separate case, DFARS 2013-D022. This proposed rule (DFARS case 2013-D022) was submitted to OIRA for review on June 3rd. No change.

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attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

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As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights not otherwise provided by law to disclose classified information.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights. As prescribed in 203.970, use the following clause:

REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS (JAN-2009[DATE])

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

Comment [WJ24]: Has this been defined so workers know what we mean?
Comment [MQ25]: We do not know what workers understand or don't understand regarding their right and protections. The contractor is the entity that must comply with this contract clause/requirement to inform their workforce. If this requirement is unclear—we presume that there will be comments to that effect submitted during the public comment period.

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Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, June 06, 2013 5:36 PM
To: Quinones, Manuel Mr OSD ATL
Subject: OFPP Comments on DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-010_Matrix of OMB Comments_Responses.docx; 2013-D010 (P) DFARS_text revised per OFPP cmts_060613.doc; 2013-D010 (p) FRN_Revised per OFPP comments_060613.doc
Signed By: (b)(6)

Attached are a matrix of the OFPP comments on the DFARS text, the amended DFARS text, and the FRN with OFPP comments, my responses, and my changes.

Please review when you get time and let me know what changes you want made in any or all of the above. Also, please let me know if you would like to have a "clean" copy of the FRN.

Regards,
Meredith

Cmt #	DFARS Ref	OMB Comment	DoD Response	Change
1	General	Various	Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage, i.e., the DFARS coverage does not implement or supplement the FAR. The DoD contractor whistleblower rules are based in an independent statute that applies only to Title 10 agencies. Please see FAR Case 2013-015, which would implement section 828 of the NDAA for FY 2013 (a 4-year pilot program) and suspend FAR 3.901 through 3.906 (this case was forwarded to OFPP for review on June 3 rd).	See specific comments
2	203.901	<p>The "abuse of authority" definition is consistent with the FAR definition.</p> <p>The reprisal definition is not in the FAR. Is this unique to the provision that DoD is implementing? Is this definition in 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)?</p>	Yes, it is.	n/c
3	203.903(1)	<p>A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.</p> <p>Reprisal is defined. Do we need to add this language that is in the statute? It is in the FAR too.</p>	No, the language does not need to be added to 203.903(1) because it is already included at 203.906(4).	n/c

4	203.903(2)	(2) Entities to whom disclosure may be made For consistency with the FAR	Please see item 1. The DFARS does not need to be consistent with the FAR because the DFARS coverage is not implementing or supplementing the FAR coverage.	n/c
5	203.903(2)	(i) A Member of Congress [or a representative of a committee of Congress.] (ii) A representative of a committee of Congress. For consistency with the FAR.	Accepted.	Revise 203.903(2) and renumber the remaining items.
6	203.903(2)	(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD. Do you need to define IG? FAR defines IG in the definition section as follows: "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the executive agency concerned.	No separate definition is needed because the words used in this list adequately explain which IG is relevant. Please note that, for interagency acquisitions, it could be an IG other than the DoD IG.	Revise 203.902(2)(iii) (now (ii)) to add back in the previously lined-through phrase.
7	203.903(2)	[(3) Disclosure clarified. The FAR removes the subtitle. Do you need to change for consistency?	Please see item 1 above. Because the DFARS is not implementing or supplementing the FAR, there is no need for consistency in the titling. The title here is considered helpful to readers.	n/c
8	203.903(2)	(2[4]) [Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.	The default is to refer the issue to legal counsel, which will in most cases be the correct procedure. However, DoD agencies, e.g., Navy or Army, are authorized to issue their own implementing procedures, and this phrase was included in order to offer the agencies the opportunity to require referral to	n/c

		<p>Will DoD COs know who this is referring to? Are these procedures addition to the procedures below? Are these procedures in the PGI? If yes, reference below section or include a PGI reference.</p>	<p>an office other than legal counsel. There will not be further "agency procedures" at the DoD level, and further agency procedures at the Services level, while not expected, are authorized.</p>	
9	203.904	<p>In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General. This will change to 3.908-4 when the FAR Case is issued as a final rule</p>	<p>No, it won't, given item 1 above. Therefore, the DFARS should incorporate the material from FAR 3.904 that now applies to it.</p>	<p>Revise 203.904 to incorporate appropriate material from 3.904.</p>
10	203.905	<p>The following procedures apply to DoD instead of the procedures at FAR 3.905: This will change as well.</p> <p>Do the following procedures apply to subcontractors?</p>	<p>Please see item 1 above. Given that the DFARS is now a standalone rule, this sentence should be deleted. All of subpart 203.9 now applies to DoD.</p>	<p>Delete the first sentence of 203.905.</p>
11	203.905	<p>5 U.S.C. 1221(e) shall be controlling... Put the title of this section in parenthesis.</p>	<p>Agree. Paragraph (e) does not have a title, so the sentence will be revised to accommodate the section title.</p>	<p>Revise to insert title in parenthesis.</p>
12	203.906	<p>(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency— 'Where is the following information, from the statute, in this remedies section? (A) Order the contractor or grantee to take affirmative action to abate the reprisal. '(B) Order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.</p>	<p>Actually, it was covered at FAR 3.906(a), to which the DFARS referred at 203.906(1)(ii). But, as was noted in item 1 above, we can no longer rely on references to the FAR, given that the DFARS is now implementing a standalone statute. Therefore, the DFARS is revised to incorporate the missing language from section 827 (10 U.S.C. 2409, as amended).</p>	<p>Revise 203.906 to add missing language from 10 U.S.C. 2409, as amended.</p>

		<p>{C} Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.</p> <p>Where is the "allowability of legal fees" addressed?</p>	<p>The allowability of legal fees is being addressed in a separate case, DFARS 2013-D022. This proposed rule was submitted to OIRA for review on June 3rd.</p>	
13	252.203-7002	<p>[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,]... Has this been defined so workers know what we mean?</p>	<p>We don't know what the workers understand or don't understand. However, it's doubtful that any "workers" will be viewing the contract or its clauses. The contractor is the entity that must comply with this requirement, and—if it is unclear—we assume that there will be comments to that effect submitted during the public comment period.</p>	n/c

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[,] and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity of an element of the intelligence community;
- or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [**Policy.**] 10 U.S.C. 2409 prohibits contractors [or subcontractors] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the ~~following~~ entities [listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,] a substantial and specific danger to public health or safety, or a violation of law [, rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[.]

[(2) **Entities covered.**]

(i) A Member of Congress or a

~~(ii) A representative of a committee of Congress.~~

~~(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.~~

~~(iiiiv) The Government Accountability Office.~~

(iv) A DoD employee responsible for contract oversight or management.

(v) An authorized official of an agency or the Department of Justice [or other law enforcement agency].

[(vi) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [*Contracting officer actions.*]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;**
 - (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;**
 - (3) The substantial violation of law giving rise to the disclosure;**
 - (4) The nature of the disclosure giving rise to the discriminatory act;**
- and**
- (5) The specific nature and date of the reprisal.**

(c)]In addition, ~~to the procedures at FAR 3.904,~~ any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in

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203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~ **[e the complaint]**.

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period **[, up to 180 days,]** to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

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(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221(e) Individual Right of Action in Certain Reprisal Cases shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

~~—(i) S[s] shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and [shall take one or more of the following actions:~~

- (i) Order the contractor to take affirmative action to abate the reprisal.
- (ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
- (iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

~~(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).~~

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

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(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS (JAN-2009[DATE])

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and

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protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case. [This is being

Comment [A1]: Is there an effective date?

Comment [A2]: Effective 180 days after enactment.

Comment [A3]: Please explain what the purpose is of these changes.

Comment [A4]: We cannot explain what the purpose or intent was of the Congress in making these changes. There is no relevant report language, so we could only speculate.

Comment [A5]: Ignore my comment in the text.

Please include the DFARS case number in title if known.

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addressed in DFARS Case 2013-D022, Allowability of Legal Costs
for Whistleblower Proceedings.]

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II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS

subpart 203.9 implements 10 U.S.C. 2409[, as amended.] ~~and two~~

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~~prior amendments to it.~~ The subpart covers the policy,

Comment [A6]: Please include the titles and sections of the two prior amendments

procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

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A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

(a)(1): Amended grounds for disclosure.

(a)(2): Amended persons and bodies to whom disclosure could result in reprisal.

(a)(3)(A): Definition of who is deemed to have made a disclosure.

Comment [A7]: Where is this in the DFARS text?

Comment [A8]: Please see 203 903(3)

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(a)(3)(B): Prohibition against reprisal even if undertaken at request of a DoD or Administration official~~Definition of what is excluded from the definition of reprisal.~~

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Comment [A9]: Where is this in the DFARS text?

Comment [A10]: Please see amended description at left.

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(b)(1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b)(2)(B): Provided a reporting timeframe~~line~~ for any additional period for investigation.

(b)(3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b)(4): Added a three-year time limit for bringing a complaint.

(c)(1)(B): Modified the types of damages that may be ordered.

(c)(2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c)(4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c)(5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c)(6): Stated the legal burden of proof to be used.

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(c)(7): Prohibited any waiver of the rights and remedies in the statute.

(d): Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating

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to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and ~~certain~~ contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

Comment [A11]: Why is the word "certain" added?

Comment [A12]: Because only some, not all, contractor or subcontractor officials are covered. The only ones covered are a "management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct." A disclosure to a co-worker who had no such responsibilities would not be covered by subpart 203.9.

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided

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by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O.

Comment [A13]: How will this be determined? Use same phrase from trafficking case - "significant portion" is used in the trafficking rule.

Comment [A14]: We believe this was phrased as it is so that a contractor would not be compelled to provide the notifications in dozens of different languages, i.e., if 48 of 50 employees speak English, one speaks Spanish, and one speaks Portuguese, then notifications in English would meet the requirement.

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12866, Regulatory Planning and Review, dated September 30, 1993.

This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency will amend its FAR supplement to

Comment [A15]: Although disclosure is not new, it now flows to subcontractors. So is this a new reporting requirement for primes?

Comment [A16]: There are no reporting requirements for prime contractors or subcontractors.

Comment [A17]: Only DoD and NASA are specifically mentioned in section 827. We understand that DHS is still determining applicability to the Coast Guard.

Comment [A18]: What about Coast Guard.

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04-25-2013 Revision

Incorporating these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have employees and that require employees to use the whistleblower provisions.

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Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

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04/25/2013 Revision

There are ~~[no] no minimal~~ reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. However, ~~a~~ firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

Comment [A19]: Disagree. There are NO required contractor or subcontractor reporting requirements at all. What MAY be asked for in a particular instance is not within the purview here.

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The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit

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04/25/2013 Revision

such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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Murphy, Meredith K Ms OSD ATL

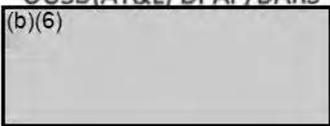
From: Stewart, Kortnee R Ms OSD ATL
Sent: Thursday, May 30, 2013 11:19 AM
To: Murphy, Meredith K Ms OSD ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: FW: OFPP comments on DFAR Case on Whistleblowing
Attachments: 2013-D010 (p) FRN_OFPP comments 5-28-13.doc; 2013-D010 (p) DFARS text_OFPP comments 5-28-13.doc

Importance: High

Meredith,
Please see OFPP comments below and provide me with responses.

Thanks!
Kortnee Stewart
Associate, Regulatory Analysis & Management
OUSD(AT&L) DPAP/DARS

(b)(6)



-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, May 28, 2013 2:28 PM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia
Subject: OFPP comments on DFAR Case on Whistleblowing

Please see the attached files with OFPP edits.

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)]This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community;
- or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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"Reprisal" means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

Comment [W11]: The "abuse of authority" definition is consistent with the FAR definition.

The reprisal definition is not in the FAR. Is this unique to the provision that DoD is implementing? Is this definition in 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)?

yes, it is

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [Policy.] 10 U.S.C. 2409 prohibits contractors [or subcontractors] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities [listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,] a substantial and specific danger to public health or safety, or a violation of law[, rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[.] **A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.**

Comment [W12]: Reprisal is defined. Do we need to add this language that is in the statute? It is in the FAR too.

It's at 203.906(4)

[(2) Entities to whom disclosure may be made covered.]

OK

Comment [W13]: For consistency with the FAR.

(i) A Member of Congress, or a representative of a committee of Congress.

(ii) ~~A representative of a committee of Congress.~~

Comment [W14]: Deletion and move for consistency with the law.

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

Comment [W15]: Do you need to define IG? FAR defines IG in the definition section as follows:

(iv) The Government Accountability Office.

"Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the executive agency concerned.

(v) A DoD employee responsible for contract oversight or management.

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(vi) An authorized official of an agency or the Department of Justice [or other law enforcement agency].

[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) **Disclosure clarified.** An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

Comment [W36]: The FAR removes the subtitle. Do you need to change for consistency?

[(2) **Contracting officer actions.**]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

Comment [W37]: Will DoD COs know who this is referring to?

Comment [W38]: Are these procedures addition to the procedures below? Are these procedures in the PGI? If yes, reference below section or include a PGI reference.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

Comment [W39]: This will change to 3.908-4 when the FAR Case is issued as a final rule

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

Comment [W310]: This will change as well.

Do the following procedures apply to subcontractors?

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

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(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

Comment [WJ11]: Put the title of this section in parenthesis.

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203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

Comment [W312]: Where is the following information, from the statute, in this remedies section?

(A) Order the contractor or grantee to take affirmative action to abate the reprisal.

(B) Order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

Where is the "allowability of legal fees" addressed?

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(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights not otherwise provided by law to disclose classified information.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.

As prescribed in [203.970](#), use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(~~JAN-2000~~[DATE])**

[a] The Contractor shall inform its employees in writing [, **in the predominant native language of the workforce,**] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart [203.9](#) of the Defense Federal Acquisition Regulation Supplement.

Comment [WJ13]: Has this been defined so workers know what we mean?

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Thursday, May 16, 2013 11:55 AM
To: Murphy, Meredith K Ms OSD ATL
Subject: FW: DOJ/OLC comments on DFAR Case on Whistleblowing x
Attachments: 2013-010 (P) OIRA Cmts & Responses_051413.docx; 2013-D010 (P) DFARS_text revised 051513.doc
Signed By: (b)(6)

Meredith,

Please see latest text baseline and response to OIRA.

Manny

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL
Sent: Thursday, May 16, 2013 11:36 AM
To: 'Seehra, Jasmeet'
Subject: RE: DOJ/OLC comments on DFAR Case on Whistleblowing x

Jasmeet,

Please find attached comments & responses matrix with DoD's responses to latest set of comments received on 5-14-13 highlighted in yellow.

Also included is latest version of DFARS text that incorporates corrections per comments & responses matrix.

Please let me know if you have any other questions.

V/r,

Manny Quinones
OSD(AT&L) DPAP/DARS

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, May 14, 2013 5:15 PM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL; Neilson, Linda, SES, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Hitter, Thomas E.; Hinchman, Robert (OLP) (b)(6)
Subject: DOJ/OLC comments on DFAR Case on Whistleblowing

Folks - please see below and attached.

From: Mizer, Benjamin (OLC) [mailto:(b)(6)]
Sent: Tuesday, May 14, 2013 4:38 PM
To: Seehra, Jasmeet

Cc: Hinchman, Robert (OLP); Heim, Laura
Subject: RE: DFAR Case on Whistlerblowing

Jasmeet, with apologies for the delay, we had just a couple of small suggestions on the DFAR proposed rule. On section 203.907 ("Classified information"), we would simply note that, as we explained on the conference call a while back, the rule does not and need not include an explicit carve-out for disclosure of privileged information, since background legal rules protect such information. But it would also be appropriate for such a carve-out to be made explicit should you choose.

Please let us know if we can be of any further assistance.

All the best,
Ben

DFARS CASE 2013-010

OIRA COMMENTS AND RESPONSES

CMT #	AGENCY	DFARS	COMMENT	RESPONSE
1	National Courts	203.901	<p>10 USC 2409(a), as amended, provides that an agency may not take action in reprisal for a variety of activities, including disclosure of "a substantial and specific danger to public health or safety." The new implementing regulation, however, at section 203.901, states that "reprisal means discharging, demoting, or otherwise discriminating against an employee for disclosing that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract."</p> <p>Thus, the regulation is narrower than the statute in that it does not include the provision of the statute pertaining to "a substantial and specific danger to public health or safety," and it is unclear whether that language was omitted from the regulation inadvertently or intentionally.</p>	<p>Concur. The definition at DFARS 203.901 is revised to match the policy at 203.903(1) (and 10 U.S.C. 2409(a)).</p>
2	National Courts	203.904	<p>The statute, as amended, expressly applies to employees of contractors or subcontractors. The proposed implementing regulations, however, do not consistently reference subcontractors and may</p>	<p>The FAR Drafting Conventions (which apply to FAR supplements such as the DFARS) are written for applicability to prime contractors, as the Government only has privity of contract with the prime contractor. Application to subcontractors</p>

DFARS Case 2013-010
 Enhancement of Contractor
 Whistleblower Protections
 Draft Proposed Rule

			lead to confusion. First, section 203.904, which retains its pre-amendment language, states that "any contractor employee who believes he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General." It may be appropriate to add the words "or subcontractor" to this provision, because the regulation referenced, 203.903, applies to employees of subcontractors.	is achieved via flowdown provisions in solicitation provisions and contract clauses. Thus, the drafting convention is that reference is made to contractors and contractor employees and applied to subcontractors and subcontractor employees via the applicable flowdown provision. Therefore, the clause at DFARS 252.203-7002 is revised to conform to these drafting conventions by including the flowdown requirement as a separate paragraph (b).
3	National Courts	203.905	section 203.905 retains language requiring the DoD Inspector General, upon determining that a complaint merits further investigation, to notify and provide a written report to the "complainant, the contractor alleged to have committed the violation, and the head of the agency." Again, it may be appropriate to add the words "or subcontractor" to this subsection.	The Government does not have privity of contract with subcontractors. Therefore, it is appropriate to inform the prime contractor because, if the Government wishes to impose remedies, it can only do so through the entity with which it has a contract, <i>i.e.</i> , the prime contractor.
4	National Courts	203.906	The remedies provision of the regulation, section 203.906, retains language potentially implying that the remedies provided by the statute do not apply to subcontractors. The language states, in pertinent part, that "the head of the agency. . . [s]hall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903. . ." If the remedies were also intended to apply to subcontractors, the regulation should reference subcontractors.	The Government does not have privity of contract with subcontractors. Therefore, it is appropriate to inform the prime contractor because, if the Government wishes to impose remedies, it can only do so through the entity with which it has a contract, <i>i.e.</i> , the prime contractor.
5	National Courts	252.203-7002	The proposed rule indicates that contract clause 252.203-7002 is to be amended to require contract clauses mandating that subcontractors "inform	The clause at DFARS 252.203-7002 is revised to conform to these drafting conventions by including the flowdown requirement as a

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			<p>employees in writing of their whistleblower rights." The new clause states:</p> <p>(a) The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.</p> <p>(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.</p>	<p>separate paragraph (b) (see #2 above).</p>
6	DOJ	203.900(b)	<p>NDAAs sec. 827 lists grantees as well. Were grantees left out of the regulations because DFARS does not cover the administration of DoD grants?</p>	<p>Yes, the FAR and DFARS address contracts, not grants. No change to draft DFARS.</p>
7	DOJ	203.900(b)(1)	<p>Change "or" to "of" an element of the intelligence community, to match the statutory language.</p>	<p>Agree. Revision made to DFARS text.</p>
8	DOJ	203.903(2)(iii)	<p>The phrase "that receives funding from or has oversight over contracts awarded for or on behalf of DoD" is not included in 10 U.S.C. 2409.</p>	<p>Agree; neither was it included in section 827 of the NDAAs for FY 2013. The phrase is a "left over" from the existing DFARS contractor whistleblower coverage and is removed from the latest draft of the DFARS.</p>

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PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(1) Relates to an activity ~~of~~ an element of the intelligence community;
or

(2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [**Policy.**]10 U.S.C. 2409 prohibits contractors [or subcontractors]from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities[listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,]a substantial and specific danger to public health or safety, or a violation of law[, rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[.]

[(2) Entities covered.]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) ~~An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.~~
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.
- (vi) An authorized official of an agency or the Department of Justice [or other law enforcement agency].
- [(vii) A court or grand jury.
- (viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [*Contracting officer actions.*]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) ~~Unless t~~**The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].**

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

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(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

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(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

ATTENTION: THIS IS A CONFIDENTIAL, DELIBERATIVE, AND PRE-DECISIONAL FEDERAL ACQUISITION REGULATIONS SYSTEM DOCUMENT, PROTECTED FROM UNAUTHORIZED DISCLOSURE PURSUANT TO THE FREEDOM OF INFORMATION ACT AND OTHER LEGAL AUTHORITIES. THIS DOCUMENT SHALL NOT BE DISTRIBUTED OUTSIDE AUTHORIZED RULEMAKING CHANNELS WITHOUT THE PRIOR APPROVAL OF THE DARC DIRECTOR. IF YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, YOU MAY NOT READ, COPY, DISTRIBUTE, OR USE THE DOCUMENT OR INFORMATION CONTAINED THEREIN. FURTHERMORE, YOU MUST IMMEDIATELY NOTIFY THE SENDER BY REPLY EMAIL OR OTHER MEANS AND THEN DELETE OR DESTROY ALL COPIES OF THE DOCUMENT.

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* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN-2009[DATE])**

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
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* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)]This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity of an element of the intelligence community;
- or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) **[Policy.]**10 U.S.C. 2409 prohibits contractors **[or subcontractors]**from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the ~~following~~ **entities [listed at paragraph (2) of this section]**, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, **[an abuse of authority relating to a DoD contract,]**a substantial and specific danger to public health or safety, or a violation of law **[, rule, or regulation]** related to a DoD contract (including the competition for or negotiation of a contract):**[.]**

[(2) Entities covered.]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General ~~that receives funding from or has oversight over contracts awarded for or on behalf of DoD.~~
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.
- (vi) An authorized official of an agency or the Department of Justice **[or other law enforcement agency]**.
- [(vii) A court or grand jury.**
- (viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]**

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[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

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(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

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(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN-2009[DATE])**

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

ATTENTION: THIS IS A CONFIDENTIAL, DELIBERATIVE, AND PRE-DECISIONAL FEDERAL ACQUISITION REGULATIONS SYSTEM DOCUMENT, PROTECTED FROM UNAUTHORIZED DISCLOSURE PURSUANT TO THE FREEDOM OF INFORMATION ACT AND OTHER LEGAL AUTHORITIES. THIS DOCUMENT SHALL NOT BE DISTRIBUTED OUTSIDE AUTHORIZED RULEMAKING CHANNELS WITHOUT THE PRIOR APPROVAL OF THE DARIC DIRECTOR. IF YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, YOU MAY NOT READ, COPY, DISTRIBUTE, OR USE THE DOCUMENT OR INFORMATION CONTAINED THEREIN. FURTHERMORE, YOU MUST IMMEDIATELY NOTIFY THE SENDER BY REPLY EMAIL OR OTHER MEANS AND THEN DELETE OR DESTROY ALL COPIES OF THE DOCUMENT.

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OIRA COMMENTS AND RESPONSES

CMT #	AGENCY	DFARS	COMMENT	RESPONSE
1	National Courts	203.901	<p>10 USC 2409(a), as amended, provides that an agency may not take action in reprisal for a variety of activities, including disclosure of "a substantial and specific danger to public health or safety." The new implementing regulation, however, at section 203.901, states that "reprisal means discharging, demoting, or otherwise discriminating against an employee for disclosing that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract."</p> <p>Thus, the regulation is narrower than the statute in that it does not include the provision of the statute pertaining to "a substantial and specific danger to public health or safety," and it is unclear whether that language was omitted from the regulation inadvertently or intentionally.</p>	<p>Concur. The definition at DFARS 203.901 is revised to match the policy at 203.903(1) (and 10 U.S.C. 2409(a)).</p>
2	National Courts	203.904	<p>The statute, as amended, expressly applies to employees of contractors or subcontractors. The proposed implementing regulations, however, do not consistently reference subcontractors and may</p>	<p>The FAR Drafting Conventions (which apply to FAR supplements such as the DFARS) are written for applicability to prime contractors, as the Government only has privity of contract with the prime contractor. Application to subcontractors</p>

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			lead to confusion. First, section 203.904, which retains its pre-amendment language, states that "any contractor employee who believes he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General." It may be appropriate to add the words "or subcontractor" to this provision, because the regulation referenced, 203.903, applies to employees of subcontractors.	is achieved via flowdown provisions in solicitation provisions and contract clauses. Thus, the drafting convention is that reference is made to contractors and contractor employees and applied to subcontractors and subcontractor employees via the applicable flowdown provision. Therefore, the clause at DFARS 252.203-7002 is revised to conform to these drafting conventions by including the flowdown requirement as a separate paragraph (b).
3	National Courts	203.905	section 203.905 retains language requiring the DoD Inspector General, upon determining that a complaint merits further investigation, to notify and provide a written report to the "complainant, the contractor alleged to have committed the violation, and the head of the agency." Again, it may be appropriate to add the words "or subcontractor" to this subsection.	The Government does not have privity of contract with subcontractors. Therefore, it is appropriate to inform the prime contractor because, if the Government wishes to impose remedies, it can only do so through the entity with which it has a contract, <i>i.e.</i> , the prime contractor.
4	National Courts	203.906	The remedies provision of the regulation, section 203.906, retains language potentially implying that the remedies provided by the statute do not apply to subcontractors. The language states, in pertinent part, that "the head of the agency. . . [s]hall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903. . ." If the remedies were also intended to apply to subcontractors, the regulation should reference subcontractors.	The Government does not have privity of contract with subcontractors. Therefore, it is appropriate to inform the prime contractor because, if the Government wishes to impose remedies, it can only do so through the entity with which it has a contract, <i>i.e.</i> , the prime contractor.
5	National Courts	252.203-7002	The proposed rule indicates that contract clause 252.203-7002 is to be amended to require contract clauses mandating that subcontractors "inform	The clause at DFARS 252.203-7002 is revised to conform to these drafting conventions by including the flowdown requirement as a

DFARS Case 2013-010
 Enhancement of Contractor
 Whistleblower Protections
 Draft Proposed Rule

			<p>employees in writing of their whistleblower rights." The new clause states:</p> <p>(a) The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.</p> <p>(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.</p>	<p>separate paragraph (b) (see #2 above).</p>
6	DOJ	203.900(b)	<p>NDAAs sec. 827 lists grantees as well. Were grantees left out of the regulations because DFARS does not cover the administration of DoD grants?</p>	<p>Yes, the FAR and DFARS address contracts, not grants. No change to draft DFARS.</p>
7	DOJ	203.900(b)(1)	<p>Change "or" to "of" an element of the intelligence community, to match the statutory language.</p>	<p>Agree. Revision made to DFARS text.</p>
8	DOJ	203.903(2)(iii)	<p>The phrase "that receives funding from or has oversight over contracts awarded for or on behalf of DoD" is not included in 10 U.S.C. 2409.</p>	<p>Agree; neither was it included in section 827 of the NDAAs for FY 2013. The phrase is a "left over" from the existing DFARS contractor whistleblower coverage and is removed from the latest draft of the DFARS.</p>

Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Tuesday, May 14, 2013 5:21 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Subject: FW: DOJ/OLC comments on DFAR Case on Whistleblowing
Attachments: 2013-D010 (p) DFARS text (OIRA) 042513 revision + OLC.DOC
Signed By: (b)(6)

Hi Meredith,

Please see additional comment from OIRA/DoJ just received.

Please let me know how to respond.

R/

Manny

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, May 14, 2013 5:15 PM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL; Neilson, Linda, SES, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Hitter, Thomas E.; Hinchman, Robert (OLP) (b)(6)
Subject: DOJ/OLC comments on DFAR Case on Whistleblowing

Folks - please see below and attached.

From: Mizer, Benjamin (OLC) [mailto:(b)(6)]
Sent: Tuesday, May 14, 2013 4:38 PM
To: Seehra, Jasmeet
Cc: Hinchman, Robert (OLP); Heim, Laura
Subject: RE: DFAR Case on Whistlerblowing

Jasmeet, with apologies for the delay, we had just a couple of small suggestions on the DFAR proposed rule. On section 203.907 ("Classified information"), we would simply note that, as we explained on the conference call a while back, the rule does not and need not include an explicit carve-out for disclosure of privileged information, since background legal rules protect such information. But it would also be appropriate for such a carve-out to be made explicit should you choose.

Please let us know if we can be of any further assistance.

All the best,
Ben

cl

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[,] and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity of an element of the intelligence community;
or
(2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

Comment [alc1]: NDAA sec. 827 lists grantees as well. Were grantees left out of the regulations because DFARS does not cover the administration of DoD grants?

Comment [alc2]: Revised to match statutory language.

203.901 Definitions.

As used in this subpart—

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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"Reprisal" means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) **[Policy.]** 10 U.S.C. 2409 prohibits contractors **[or subcontractors]** from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the ~~following entities~~ **[listed at paragraph (2) of this section]**, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, **[an abuse of authority relating to a DoD contract,]** a substantial and specific danger to public health or safety, or a violation of law **[, rule, or regulation]** related to a DoD contract (including the competition for or negotiation of a contract):**[.]**

[(2) Entities covered.]

(i) A Member of Congress.

(ii) A representative of a committee of Congress.

(iii) An Inspector General ~~that~~ receives funding from or has oversight over contracts awarded for or on behalf of DoD.

(iv) The Government Accountability Office.

(v) A DoD employee responsible for contract oversight or management.

(vi) An authorized official of an agency or the Department of Justice **[or other law enforcement agency].**

[(vii) A court or grand jury.]

Comment [c1c3]: 10 U.S.C. 2409 does not include this language

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(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

[(3[4]) Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) ~~Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the [DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation[e the complaint].~~

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

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(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

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(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

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As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights not otherwise provided by law to disclose classified information.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN 2009[DATE])**

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Thursday, April 25, 2013 6:49 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Williams, Amy, Ms, OSD-ATL
Subject: FW: DOJ comments on DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010 (P) FRN_042513 revision.doc; 2013-D010 DFARS text (p) OIRA revised 041513.doc
Signed By: (b)(6)

Meredith, your copy.

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL
Sent: Thursday, April 25, 2013 6:49 PM
To: 'Seehra, Jasmeet'
Cc: Stewart, Kortnee R Ms OSD ATL
Subject: DOJ comments on DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections

Ms Seehra,

Please find attached the revised FRN and text files for DFARS case 2013-D010, as agreed to during this morning's teleconference call with OIRA, OFPP, DOJ OLC, DoD, NASA, and GSA regarding the FAR whistleblower case (2013-015).

Revised FRN and text files now incorporate changes to implement paragraph (h) of section 827 of the NDAA for 2013 as follows:

(1) Text pg 5 of 6 - Adds a new section 203.907, entitled "Classified information." Also, page 1 was revised to include the public law number for the NDAA for FY 2013.

(2) FRN pg 7 of 12 - Explains paragraph (h) of section 827 and the addition of a new section DFARS 203.907, entitled "Classified information."

Please contact me if you have any questions or need additional information.

V/r,

Manny

Manuel Quinones
Deputy for Regulatory Analysis and Management
OUSD(AT&L) DPAP/DARS

(b)(6)

Fax: 571-372-6101

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Monday, April 15, 2013 5:44 PM
To: Quinones, Manuel Mr OSD ATL
Subject: RE: DOJ comments on DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections

We're still waiting for comments from OFPP -- so let me hold on circulating this back to DOJ for the moment.

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL (b)(6)
Sent: Monday, April 15, 2013 5:18 PM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules
Subject: RE: DOJ comments on DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections

Ms Seehra,

Please find attached the matrix with DoD's responses to comments from the National Courts and the associated revised draft DFARS proposed rule.

Please contact me for any questions or if you need additional information.

V/r,

Manny Quinones

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, April 09, 2013 2:01 PM
To: Quinones, Manuel Mr OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Hinchman, Robert (OLP)
Subject: DOJ comments on DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections

National Courts offers the following comments about the proposed DFARS:

(1) 10 USC 2409(a), as amended, provides that an agency may not take action in reprisal for a variety of activities, including disclosure of "a substantial and specific danger to public health or safety." The new implementing regulation, however, at section 203.901, states that "reprisal means discharging, demoting, or otherwise discriminating against an employee for disclosing that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract."

Thus, the regulation is narrower than the statute in that it does not include the provision of the statute pertaining to "a substantial and specific danger to public health or safety," and it is unclear whether that language was omitted from the regulation inadvertently or intentionally.

(2) The statute, as amended, expressly applies to employees of contractors or subcontractors. The proposed implementing regulations, however, do not consistently reference subcontractors and may lead to confusion. First, section 203.904, which retains its pre-amendment language, states

that "any contractor employee who believes he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General." It may be appropriate to add the words "or subcontractor" to this provision, because the regulation referenced, 203.903, applies to employees of subcontractors.

Second, section 203.905 retains language requiring the DoD Inspector General, upon determining that a complaint merits further investigation, to notify and provide a written report to the "complainant, the contractor alleged to have committed the violation, and the head of the agency." Again, it may be appropriate to add the words "or subcontractor" to this subsection.

Third, the remedies provision of the regulation, section 203.906, retains language potentially implying that the remedies provided by the statute do not apply to subcontractors. The language states, in pertinent part, that "the head of the agency. . . [s]hall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903. .

.. " If the remedies were also intended to apply to subcontractors, the regulation should reference subcontractors.

Finally, the proposed rule indicates that contract clause 252.203-7002 is to be amended to require contract clauses mandating that subcontractors "inform employees in writing of their whistleblower rights." See Proposed Rule at p. 7. The new clause states:

(a) The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.

(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement statutory amendments to whistleblower protections for contractor employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted in writing to the address shown below on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER], to be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

II. Discussion

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The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 and two prior amendments to it. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

(a) (1): Amended grounds for disclosure.

(a) (2): Amended persons and bodies to whom disclosure could result in reprisal.

(a) (3) (A): Definition of who is deemed to have made a disclosure.

(a) (3) (B): Definition of what is excluded from the definition of reprisal.

(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

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(b)(2)(B): Provided a time line for any additional period for investigation.

(b)(3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b)(4): Added a three-year time limit for bringing a complaint.

(c)(1)(B): Modified the types of damages that may be ordered.

(c)(2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c)(4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c)(5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c)(6): Stated the legal burden of proof to be used.

(c)(7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

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(e): Created an exemption for elements of the intelligence community.

(g)(6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section

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would include a clarification of what constitutes a
"disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived.

Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The

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proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

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DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy,

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procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large. However, not all entities will have whistleblower employees. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of

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an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of

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04/25/2013 Revision

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community;
- or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [**Policy.**]10 U.S.C. 2409 prohibits contractors [**or subcontractors**] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities [**listed at paragraph (2) of this section**], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [**an abuse of authority relating to a DoD contract,**] a substantial and specific danger to public health or safety, or a violation of law [**, rule, or regulation**] related to a DoD contract (including the competition for or negotiation of a contract):[.]

[**(2) Entities covered.**]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.
- (vi) An authorized official of an agency or the Department of Justice [**or other law enforcement agency**].
- [(vii) A court or grand jury.
- (viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) **[Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].**

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

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(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

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(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN-2009[DATE])**

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, April 25, 2013 11:36 AM
To: Quinones, Manuel Mr OSD ATL
Cc: Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL; Neilson, Linda, SES, OSD-ATL
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010 (P) DFARS_042513 revision.doc; 2013-D010 (P) FRN_042513 revision.doc
Signed By: (b)(6)
Importance: High

Please see the attached revised DFARS text and FRN, which incorporate changes to implement paragraph (h) of section 827 of the NDAA for FY 2013, as agreed to during this morning's telephone call with OIRA, OFPP, DOJ OLC, DoD, NASA, and GSA regarding the FAR whistleblower case (2013-015).

The change is added as a new section 203.907, Classified information, on page 5 of 6. We also added an edit on page 1 to include the public law number for the NDAA for FY 2013.

In the FRN, the addition is explained on page 7 of 12 at the end of the paragraph beginning with the changes to 203.906. The clause, which was discussed in that paragraph, is now a separate paragraph beginning immediately after the revised paragraph.

If, once you've reviewed the proposed changes, you agree, please forward them to Ms. Seehra at OIRA.

Regards,
Meredith

BTW, I doublechecked to make certain that I used the right baseline version of the DFARS (the version that incorporates the changes to the DFARS that we have already agreed to with OIRA).

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Monday, April 15, 2013 4:17 PM
To: Quinones, Manuel Mr OSD ATL
Cc: Stewart, Kortnee R Ms OSD ATL
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-010 (P) OIRA Cmts & Responses.docx; 2013-D010 (P) DFARS_Revised per OIRA Cmts.doc
Signed By: (b)(6)

Manny,

Attached are (a) a matrix of the comments received with a response for each and (b) a revised DFARS text. There were no comments made on the FRN.

I had the draft responses and changes reviewed by both Chip Retson and Sandy Ross. I will send copies of their e-mails separately.

Given that the case went to OIRA on March 21st, may I assume that these are all the comments that will be coming on this case?

Thanks, Meredith

Murphy, Meredith K Ms OSD ATL

From: Ross, Sandra, Ms, OSD-ATL
Sent: Monday, April 15, 2013 11:12 AM
To: Retson, Nicholas P OSD ATL; Murphy, Meredith K Ms OSD ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: RE: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Signed By: (b)(6)

Meredith,

I agree with Chip. As I read the proposed rule, the contractor employee, whether from the prime or subcontractor, can disclose to the IG. Accordingly, the IG would then inform complainant of its action - I don't think it's necessary to inform the prime or the sub. I don't see a problem with the text as revised.

Sandy

Sandra K. Ross
Contract Policy and International Contracting (CPIC)
Defense Procurement and Acquisition Policy (DPAP)
3060 Pentagon, Room 5E621
Washington, DC 20310-3060
Phone: (b)(6)
FAX: 703-614-1254
<http://www.acq.osd.mil/dpap>

-----Original Message-----

From: Retson, Nicholas P OSD ATL
Sent: Monday, April 15, 2013 8:19 AM
To: Murphy, Meredith K Ms OSD ATL; Ross, Sandra, Ms, OSD-ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: RE: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Meredith -- I think your proposed responses are "spot-on" and ensure the application and protection to employees of subcontractors. Based on our conversation about access to subcontractor records by IGs, let me know what you discover.

Thx

Chip

-----Original Message-----

From: Murphy, Meredith K Ms OSD ATL
Sent: Wednesday, April 10, 2013 7:12 PM
To: Retson, Nicholas P OSD ATL; Ross, Sandra, Ms, OSD-ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

We've received comments on the draft proposed rule from the Department of Justice through OIRA, and I've attempted to respond to the comments, but I need your input on a couple of the responses because I'm not sure that I've got the procedure or legal policy right.

The attached matrix included the verbatim comment and my proposed response. The attached DFARS text includes the revisions, to 203.901 and the clause at 252.2203-7002.

I'm sure of the answer on #1 and #5, but I need help on #2-#4. For example, if the IG had an issue with a subcontractor's treatment of its employee, would the IG tell it to the prime contractor or directly to the subcontractor? IF the latter, what's the prime's liability to the Government if the subcontractor does/does not comply? And, how would the prime contractor even know about it if the IG didn't tell the prime?

We AREN'T totally consistent in our use of contractor and subcontractor. I think that I caused the confusion by trying to state the law very literally. Is there a better, more consistent way to do this?

BTW, Chip, there are a lot of lawyers on the DFARS Suspension and Debarment Committee, and none of them raised these issues.

Thanks for your help,
Meredith

P.S. We should respond to OIRA within the next 3-4 business days.

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Monday, April 15, 2013 8:30 AM
To: Retson, Nicholas P OSD ATL
Subject: RE: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: IG References.docx
Signed By: (b)(6)

Chip, in the DFARS, the references to the IG are in the current and proposed subpart 203.9, as well as in subpart 203.10 and the related clause at 252.203-7003 (attached).

See what you think.

Regards,
Meredith

-----Original Message-----

From: Retson, Nicholas P OSD ATL
Sent: Monday, April 15, 2013 8:19 AM
To: Murphy, Meredith K Ms OSD ATL; Ross, Sandra, Ms, OSD-ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: RE: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

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Thx

Chip

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From: Murphy, Meredith K Ms OSD ATL
Sent: Wednesday, April 10, 2013 7:12 PM
To: Retson, Nicholas P OSD ATL; Ross, Sandra, Ms, OSD-ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

We've received comments on the draft proposed rule from the Department of Justice through OIRA, and I've attempted to respond to the comments, but I need your input on a couple of the responses because I'm not sure that I've got the procedure or legal policy right.

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I'm sure of the answer on #1 and #5, but I need help on #2-#4. For example, if the IG had an issue with a subcontractor's treatment of its employee, would the IG tell it to the prime contractor or directly to the subcontractor? IF the latter, what's the prime's liability to the Government if the subcontractor does/does not comply? And, how would the prime contractor even know about it if the IG didn't tell the prime?

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BTW, Chip, there are a lot of lawyers on the DFARS Suspension and Debarment Committee, and none of them raised these issues.

Thanks for your help,
Meredith

P.S. We should respond to OIRA within the next 3-4 business days.

**SUBPART 203.10--CONTRACTOR CODE OF BUSINESS ETHICS AND
CONDUCT**

(Revised December 31, 2012)

203.1003 Requirements.

(b) *Notification of possible contractor violation.* Upon notification of a possible contractor violation of the type described in FAR 3.1003(b), coordinate the matter with the following office:

Department of Defense Office of ◀ **Inspector General** ▶
Investigative Policy and Oversight Contractor Disclosure Program
4800 Mark Center Drive, Suite 11H25
Arlington, VA 22350-1500
Toll-Free Telephone: 866-429-8011.

203.1004 Contract clauses.

(a) Use the clause at 252.203-7003, Agency Office of the ◀ **Inspector General** ▶, in

solicitations and contracts that include the FAR clause 52.203-13, Contractor Code

of Business Ethics and Conduct.

(b)(2)(ii) Unless the contract is for the acquisition of a commercial item or will be performed entirely outside the United States, if the contract exceeds \$5 million, use the clause at 252.203-7004, Display of Fraud Hotline Poster(s), in lieu of the clause at FAR 52.203-14, Display of Hotline Poster(s). If the Department of Homeland Security (DHS) provides disaster relief funds for the contract, DHS will provide information on how to obtain and display the DHS fraud hotline poster.

* * * * *

252.203-7003, Agency Office of the ◀ Inspector General ▶.

As prescribed in 203.1004(a), use the following clause:

AGENCY OFFICE OF THE ◀ INSPECTOR GENERAL ▶ (DEC 2012)

The agency office of the ◀ **Inspector General** ▶ referenced in paragraphs (c) and (d) of FAR clause 52.203-13, Contractor Code of Business Ethics and Conduct, is the DoD Office of
◀ **Inspector General** ▶ at the following address:

Department of Defense Office of ▶ **Inspector General** ▶
Investigative Policy and Oversight

Contractor Disclosure Program

4800 Mark Center Drive, Suite 11H25
Alexandria, VA 22350-1500

Toll Free Telephone: 866-429-8011

(End of clause)

DFARS CASE 2013-010

OIRA COMMENTS AND RESPONSES

CMT #	AGENCY	DFARS	COMMENT	RESPONSE
1	National Courts	203.901	<p>10 USC 2409(a), as amended, provides that an agency may not take action in reprisal for a variety of activities, including disclosure of "a substantial and specific danger to public health or safety." The new implementing regulation, however, at section 203.901, states that "reprisal means discharging, demoting, or otherwise discriminating against an employee for disclosing that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract."</p> <p>Thus, the regulation is narrower than the statute in that it does not include the provision of the statute pertaining to "a substantial and specific danger to public health or safety," and it is unclear whether that language was omitted from the regulation inadvertently or intentionally.</p>	<p>Concur. The definition at DFARS 203.901 is revised to match the policy at 203.903(1) (and 10 U.S.C. 2409(a)).</p>
2	National Courts	203.904	<p>The statute, as amended, expressly applies to employees of contractors or subcontractors. The proposed implementing regulations, however, do not consistently reference subcontractors and may lead to confusion. First, section 203.904, which retains its</p>	<p>The FAR Drafting Conventions (which apply to FAR supplements such as the DFARS) are written for applicability to prime contractors, as the Government only has privity of contract with the prime contractor. Application to subcontractors is achieved via flowdown provisions in solicitation</p>

DFARS Case 2013-010
 Enhancement of Contractor
 Whistleblower Protections
 Draft Proposed Rule

			pre-amendment language, states that "any contractor employee who believes he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General." It may be appropriate to add the words "or subcontractor" to this provision, because the regulation referenced, 203.903, applies to employees of subcontractors.	provisions and contract clauses. Thus, the drafting convention is that reference is made to contractors and contractor employees and applied to subcontractors and subcontractor employees via the applicable flowdown provision. Therefore, the clause at DFARS 252.203-7002 is revised to conform to these drafting conventions by including the flowdown requirement as a separate paragraph (b).
3	National Courts	203.905	section 203.905 retains language requiring the DoD Inspector General, upon determining that a complaint merits further investigation, to notify and provide a written report to the "complainant, the contractor alleged to have committed the violation, and the head of the agency." Again, it may be appropriate to add the words "or subcontractor" to this subsection.	The Government does not have privity of contract with subcontractors. Therefore, it is appropriate to inform the prime contractor because, if the Government wishes to impose remedies, it can only do so through the entity with which it has a contract, <i>i.e.</i> , the prime contractor.
4	National Courts	203.906	The remedies provision of the regulation, section 203.906, retains language potentially implying that the remedies provided by the statute do not apply to subcontractors. The language states, in pertinent part, that "the head of the agency. . . [s]hall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903. . . ." If the remedies were also intended to apply to subcontractors, the regulation should reference subcontractors.	The Government does not have privity of contract with subcontractors. Therefore, it is appropriate to inform the prime contractor because, if the Government wishes to impose remedies, it can only do so through the entity with which it has a contract, <i>i.e.</i> , the prime contractor.
5	National Courts	252.203-7002	The proposed rule indicates that contract clause 252.203-7002 is to be amended to require contract clauses mandating that subcontractors "inform employees in writing of their whistleblower rights."	The clause at DFARS 252.203-7002 is revised to conform to these drafting conventions by including the flowdown requirement as a separate paragraph (b) (see #2 above).

DFARS Case 2013-010
 Enhancement of Contractor
 Whistleblower Protections
 Draft Proposed Rule

			<p>The new clause states:</p> <p>(a) The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.</p> <p>(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.</p>	

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule

**PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST**

* * * * *

**SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES**

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(1) Relates to an activity or an element of the intelligence community;

or

(2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [**Policy.**]10 U.S.C. 2409 prohibits contractors [**or subcontractors**]from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the ~~following~~ entities[**listed at paragraph (2) of this section**], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [**an abuse of authority relating to a DoD contract,**]a substantial and specific danger to public health or safety, or a violation of law[, **rule, or regulation**] related to a DoD contract (including the competition for or negotiation of a contract):[.]

[**(2) Entities covered.**]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.
- (vi) An authorized official of an agency or the Department of Justice[**or other law enforcement agency**].
- [(vii) A court or grand jury.
- (viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

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(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

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(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. **[An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]**

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.]

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

ATTENTION: THIS IS A CONFIDENTIAL, DELIBERATIVE, AND PRE-DECISIONAL FEDERAL ACQUISITION REGULATIONS SYSTEM DOCUMENT, PROTECTED FROM UNAUTHORIZED DISCLOSURE PURSUANT TO THE FREEDOM OF INFORMATION ACT AND OTHER LEGAL AUTHORITIES. THIS DOCUMENT SHALL NOT BE DISTRIBUTED OUTSIDE AUTHORIZED RULEMAKING CHANNELS WITHOUT THE PRIOR APPROVAL OF THE DARC DIRECTOR. IF YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, YOU MAY NOT READ, COPY, DISTRIBUTE, OR USE THE DOCUMENT OR INFORMATION CONTAINED THEREIN. FURTHERMORE, YOU MUST IMMEDIATELY NOTIFY THE SENDER BY REPLY EMAIL OR OTHER MEANS AND THEN DELETE OR DESTROY ALL COPIES OF THE DOCUMENT.

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* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN 2000[DATE])**

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Thursday, March 28, 2013 3:43 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Stewart, Kortnee R Ms OSD ATL
Subject: DFARS Case 2013-D010, Enhancements of Contractor Whistleblower Protections
Attachments: 2013-D010 FRN (p)_OIRA 032813.doc; 2013-D010 DFARS text (p) OIRA 032813.doc; 2013-D010 (p) IRFA 032813.docx
Signed By: (b)(6)

Meredith,

Please find attached the latest baseline documents that were sent out by OIRA for interagency coordination. Please use these documents when answering any OMB/OIRA comments.

Thanks,

Manny

ATTENTION: THIS IS A CONFIDENTIAL, DELIBERATIVE, AND PRE-DECISIONAL DEFENSE ACQUISITION REGULATIONS SYSTEM DOCUMENT, PROTECTED FROM UNAUTHORIZED DISCLOSURE PURSUANT TO THE FREEDOM OF INFORMATION ACT AND OTHER LEGAL AUTHORITIES. THIS DOCUMENT SHALL NOT BE DISTRIBUTED OUTSIDE AUTHORIZED RULEMAKING CHANNELS WITHOUT THE PRIOR APPROVAL OF A REPRESENTATIVE OF THE DEFENSE ACQUISITION REGULATIONS SYSTEM. IF YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, YOU MAY NOT READ, COPY, DISTRIBUTE, OR USE THE DOCUMENT OR INFORMATION CONTAINED THEREIN. FURTHERMORE, YOU MUST IMMEDIATELY NOTIFY THE SENDER BY REPLY E-MAIL OR OTHER MEANS AND THEN DELETE OR DESTROY ALL COPIES OF THE DOCUMENT. ANY DISTRIBUTION OF THIS DOCUMENT MUST CONTAIN THIS LEGEND.

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)]This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[,] and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community;
- or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

Abuse of authority means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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Reprisal means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [**Policy.**]10 U.S.C. 2409 prohibits contractors [or subcontractors]from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following-entities[listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,]a substantial and specific danger to public health or safety, or a violation of law[, rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[.]

[(2) *Entities covered.*]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.
- (vi) An authorized official of an agency or the Department of Justice[or other law enforcement agency].
- [(vii) A court or grand jury.
- (viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [Contracting officer actions.] A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) ~~Unless t~~The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

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(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

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(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. **[An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]**

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.]

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN 2009[DATE])**

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

II. Discussion

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The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 and two prior amendments to it. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

- (a) (1): Amended grounds for disclosure.
- (a) (2): Amended persons and bodies to whom disclosure could result in reprisal.
- (a) (3) (A): Definition of who is deemed to have made a disclosure.
- (a) (3) (B): Definition of what is excluded from the definition of reprisal.
- (b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

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(b) (2) (B): Provided a time line for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

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(e): Created an exemption for elements of the intelligence community.

(g)(6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section

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would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

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III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such

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protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large. However, not all entities will have whistleblower

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employees. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage.

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Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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INITIAL REGULATORY FLEXIBILITY ANALYSIS

DFARS Case 2013-D010

Enhancement of Contractor Whistleblower Protections

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603.

1. Reasons for the action.

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees.

2. Objectives of, and legal basis for, the rule.

This action is necessary because of amendments made by section 827 of the National Defense Authorization Act for Fiscal Year 2013. Section 827 amends 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to the DFARS proposed rule. DFARS case 2013-D010 proposes to make revisions to DFARS subpart 203.9, "Whistleblower Protections for Contractor Employees." This DFARS subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

3. Description of and estimate of the number of small entities to which the rule will apply.

The rule will apply to all entities, small as well as large. However, not all entities will have whistleblower employees. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish

human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

None. Because of the terms used in the statute, DoD is unable to exempt small entities or to establish a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Friday, March 22, 2013 11:04 AM
To: Murphy, Meredith K Ms OSD ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: FW: DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010 FRN (p)_OIRA.doc; 2013-D010 DFARS text (p) OIRA.doc
Signed By: (b)(6)

We are deeming this rule significant.

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL (b)(6)
Sent: Thursday, March 21, 2013 6:41 PM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules; Stewart, Kortnee R Ms OSD ATL
Subject: Notification of Planned Regulatory Action, DFARS Case 2013-D010 (proposed)

Ms. Seehra,

We plan to publish the attached proposed rule to amend the DFARS as follows:

Enhancement of Contractor Whistleblower Protections (DFARS Case 2013-D010)

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. The rule will apply to all entities, small as well as large. DoD does not expect this rule to have a significant economic impact on small businesses.

In accordance with section 6.(a)(3)(A) of Executive Order 12866, we will begin processing this rule for publication on April 5, 2013.

Notification has been provided to the Hill that this DFARS rule is being sent to OMB for consideration (and subsequent publication in the Federal Register.

Please contact me for any questions.

V/r,

Manuel Quinones
Deputy for Regulatory Analysis and Management
OUSD(AT&I) DPAP/DARS

(b)(6)

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ACQUISITION,
TECHNOLOGY
AND LOGISTICS

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

ACTION MEMO

March 18, 2013

FOR: DIRECTOR, DEFENSE PROCUREMENT AND ACQUISITION POLICY

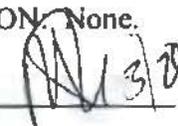
FROM: Deputy Director, Defense Procurement and Acquisition Policy, for the Defense Acquisition Regulations System 

SUBJECT: Amendment to the Defense Federal Acquisition Regulation Supplement (DFARS Cases 2012-D054 and 2013-D010)

- Request approval to publish one draft final DFARS rule and one draft proposed DFARS rule. A summary of the rules is at Tab A. TABs B through C1 are the draft DFARS changes and Federal Register notices.
- The draft final rule at TAB B provides guidance relating to the release of fundamental research information. The draft proposed rule at TAB C implements statutory amendments to whistleblower protections for contractor employees. DoD does not expect these rules to increase cost to the Government or contractors.

RECOMMENDATION: Approve publication of the draft final and proposed DFARS rules.

COORDINATION: None.

DECISION:  Approve:

_____ Disapprove:

_____ Other: _____

Attachments:
As stated

SUMMARY OF DFARS RULES

Final Rule:

Release of Fundamental Research Information (DFARS Case 2012-D054) (TAB B)

Amends the DFARS to provide guidance relating to the release of fundamental research information. This final rule implements guidance provided by the Undersecretary of Defense for Acquisition, Technology and Logistics (AT&L) in a memorandum dated May 24, 2010, by providing a fundamental research exception to the general rule against disclosure of unclassified information. The subject matter of this final rule was previously included in proposed rule 2011-D039, which was published in the Federal Register on June 29th, 2011 (76 FR 38089); however, the text was deemed more appropriate for a stand-alone case because this subject matter deals with the release of information and not the safeguarding of information. This rule is not expected to increase costs for contractors or the Government.

Proposed Rule:

(S) Enhancement of Contractor Whistleblower Protections (DFARS Case 2013-D010 (TAB C)

Proposes to amend the DFARS to implement statutory amendments to whistleblower protections for contractor employees. The rule proposes to revise the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 of the NDAA for FY (Pub. L. 112-239, enacted January 2, 2013). This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights." This rule is not expected to increase costs for contractors or the Government.

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Draft Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[,] and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community;
- or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

Abuse of authority means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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Reprisal means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [**Policy.**] 10 U.S.C. 2409 prohibits contractors [or subcontractors] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities [listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,] a substantial and specific danger to public health or safety, or a violation of law[, rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[.]

[(2) *Entities covered.*]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.
- (vi) An authorized official of an agency or the Department of Justice [or other law enforcement agency].
- [(vii) A court or grand jury.
- (viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [*Contracting officer actions.*]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) **[Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].**

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

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(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

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(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. **[An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]**

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.]

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in [203.970](#), use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN 2009[DATE])**

[a] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart [203.9](#) of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

II. Discussion

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The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 and two prior amendments to it. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

(a)(1): Amended grounds for disclosure.

(a)(2): Amended persons and bodies to whom disclosure could result in reprisal.

(a)(3)(A): Definition of who is deemed to have made a disclosure.

(a)(3)(B): Definition of what is excluded from the definition of reprisal.

(b)(1): Provided an additional basis on which the Inspector General may determine not to investigate.

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(b)(2)(B): Provided a time line for any additional period for investigation.

(b)(3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b)(4): Added a three-year time limit for bringing a complaint.

(c)(1)(B): Modified the types of damages that may be ordered.

(c)(2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c)(4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c)(5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c)(6): Stated the legal burden of proof to be used.

(c)(7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

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(e): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section

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would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

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III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a

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whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

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The rule will apply to all entities, small as well as large. However, not all entities will have whistleblower employees. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small

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entities or establishing a dollar threshold for coverage.

Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

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Editor, Defense Acquisition Regulations System.

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UNCLASSIFIED SYSTEM

Office of the Under Secretary of Defense for Acquisition, Technology and Logistics Correspondence Cover Sheet

Tasked Org: Action Type: Action Number:

DPAP/DARS D, DPAP, Approval USA001607-13

Subject:

Amendment to the Defense Federal Acquisition Regulation Supplement (DFARS Cases 2012-D054, Release of Fundamental Research Information, Final Rule and 2013-D010, Enhancement of Contractor Whistleblower Protections, Proposed Rule)

Table with 4 columns: Initials, Date, Comments. Includes checkboxes for OPS, DUSD/DIR Level, and Tasked Org. Handwritten entries include initials 'MY', date '20 MAR', and 'AM 3-18-2013'.

Table with 4 columns: Initials, Date, Comments. Includes checkboxes for approval. Handwritten entries include initials 'DE', 'ML', and 'QJW' with dates '3-18-13'.

Disposition Instructions:

For D, DPAP approval at Action Memo. Policy Vault - No, Info Release - No, Web Posting - No. Return to Deborah Grinkley to archive signed documents to O\DFARS Pulication Mgmt\Publication\B2 ATP\XXX and Read File. Email signed documents to case manager(s) and copy editors. Return hardcopy package to appropriate editor for DFARS ATP Files.

SACCP COVER SHEET
UNCLASSIFIED

PRIORITY Normal	SUSPENSE DATE	CORRESPONDENCE DATE	CONTROL NUMBER USA001607-13
REQUEST TYPE All other items	RESPONSE TYPE FAA		
ORIGINATOR Manuel Quinones			
RECIPIENT Director, Defense Procurement and Acquisition Policy			
SUBJECT Amendment to the Defense Federal Acquisition Regulation Supplement (DFARS Cases 2012-D054, Release of Fundamental Research Information, Final Rule and 2013-D010, Enhancement of Contractor Whistleblower Protections, Proposed Rule)			
COMMENTS			

COORDINATION & DISTRIBUTION RECORD

Subject: Amendments to the DFARS (DFARS Case 2012-D054 and 2013-D010)

- Dave, please—

Review and provide to Deputy Director/Director, DARS, to approve.

After Deputy Director/Director, DARS, initials the Action Memo, put into SACCP and send to front office.

Once returned from front office:

1. Scan into folder on O drive signed copies of Action Memo and Determination of Urgency (if any), and copy of Summary (if any).
2. E-mail signed documents above and any summary to each case manager; and copy the Editor.
3. Return hard copy package to the Editor.

- Documents are located at O:\DFARS_Publication_Mgmt\B1 Ready for ATP\ATP 20130313 (mq)

Prepared by: Manny Quinones

mq

Date

3/14/2013

Reviewed by: Amy Williams

AW - see new comments 3/15

Date

3/14/13

Processed by: Dave Emmey

Date

Approved by: Linda Neilson

Date

Distribution:

DPAP(DARS)

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Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Tuesday, March 12, 2013 5:16 PM
To: Quinones, Manuel Mr OSD ATL
Subject: Updates to DFARS Cased 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010 (P) FRN_031213.docx; 2013-D010_IRFA_031213.dotx
Signed By: (b)(6)
Importance: High

Manny, attached are an updated IRFA and FRN with the changes incorporated as you suggested.
Regards,
Meredith

INITIAL REGULATORY FLEXIBILITY ANALYSIS

DFARS Case 2013-D010

Enhancement of Contractor Whistleblower Protections

This initial regulatory flexibility analysis has been prepared consistent with 5 U.S.C. 603.

1. Reasons for the action.

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees.

2. Objectives of, and legal basis for, the rule.

These amendments are made by section 827 of the National Defense Authorization Act for Fiscal Year 2013. Section 827 amends 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to the DFARS proposed rule. DFARS proposes revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

3. Description of and estimate of the number of small entities to which the rule will apply.

The rule will apply to all entities, small as well as large. However, not all entities will have whistleblower employees. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This

documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

None. Because of the terms used in the statute, DoD is unable to exempt small entities or to establish a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DFARS Case 2013-D010
Enhancement of Whistleblower Protections
for Contractor Employees
Draft Proposed Rule (031213)

(Billing Code 5001-08-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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Enhancement of Whistleblower Protections
for Contractor Employees
Draft Proposed Rule (031213)

ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check

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www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6094."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure," and it amends paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts." Section 827 is addressed to DoD and the National Aeronautics and

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Space Administration. This case proposes to make amendments to implement section 827 for DoD.

II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-peculiar rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 and two prior amendments to it. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. The following changes are made to title 10, United States Code, at the locations noted:

10 U.S.C. 2409:

(a) (1): Amended grounds for disclosure

(a) (2): Amended persons and bodies to whom disclosure could result in reprisal.

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Enhancement of Whistleblower Protections
for Contractor Employees
Draft Proposed Rule (031213)

(a) (3) (A): Definition of who is deemed to have made a disclosure.

(a) (3) (B): Definition of what is excluded from the definition of reprisal.

(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b) (2) (B): Provided a time line for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

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Enhancement of Whistleblower Protections
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Draft Proposed Rule (031213)

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

B. Section 827 changes to 10 U.S.C. 2324. The following changes are made to title 10, United States Code, at the locations noted:

10 U.S.C. 2324:

(k) (1): Addressed allowable costs incurred by contractors in connection with civil, criminal, or administrative proceedings.

(k) (2) (C): Expanded the types of corrective actions or monetary penalties that may be imposed.

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C. Proposed Changes to DFARS.

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. In addition, the entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to

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Draft Proposed Rule (031213)

this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower

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rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small

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DFARS Case 2013-D010
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for Contractor Employees
Draft Proposed Rule (031213)

entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees. These amendments are made by section 827 of the National Defense Authorization Act for Fiscal Year 2013. Section 827 amends 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to the DFARS proposed rule. DFARS proposes revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002,

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for Contractor Employees
Draft Proposed Rule (031213)

entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large. However, not all entities will have whistleblower employees. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

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DFARS Case 2013-D010
Enhancement of Whistleblower Protections
for Contractor Employees
Draft Proposed Rule (031213)

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

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DFARS Case 2013-D010
Enhancement of Whistleblower Protections
for Contractor Employees
Draft Proposed Rule (031213)

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones

Editor, Defense Acquisition Regulations System.

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INITIAL REGULATORY FLEXIBILITY ANALYSIS

DFARS Case 2013-D010

Enhancement of Contractor Whistleblower Protections

This initial regulatory flexibility analysis has been prepared consistent with 5 U.S.C. 603.

1. Reasons for the action.

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees.

2. Objectives of, and legal basis for, the rule.

These amendments are made by section 827 of the National Defense Authorization Act for Fiscal Year 2013. Section 827 amends 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to the DFARS proposed rule. DFARS proposes revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

3. Description of and estimate of the number of small entities to which the rule will apply.

The rule will apply to all entities, small as well as large. However, not all entities will have whistleblower employees. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This

documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

None. Because of the terms used in the statute, DoD is unable to exempt small entities or to establish a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Wednesday, February 20, 2013 10:45 AM
To: Quinones, Manuel Mr OSD ATL
Subject: FORWARDED FOR EDITING: DFARS CASE 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010 (P) DFARS_DARC-Agreed_022013.docx; 2013-D010 (P) FRN_020513.docx; 2013-D010 IRFA 011013.dotx
Signed By: (b)(6)

Attached for editing and publication is the draft proposed rule agreed to by the DARC on February 20, 2013.

Regards,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Deneault, Leslie <(b)(6)>
Sent: Thursday, February 07, 2013 1:08 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Manning, Leonardo
Subject: 2013-D010 Whistleblower Protections Training
Attachments: 2013-D010 Whistleblower Protections Training.docx
Signed By: (b)(6)

Hi Meredith,

No planned changes to training as shown on the form. Leslie

DFARS Case Training Form

Purpose of this form: To identify to DAU the DFARS cases that may require DoD contracting training curricula.

I. To be completed by Committee Chair:

Date: 01/31/2013 **Case No/Title:** 2013-D010, Enhancement of Contractor Whistleblower Protections

DFARS Committee: Suspension, Debarment, and Business Ethics Committee

Committee Chair (name/e-mail/phone number): M. Murphy (b)(6)
(b)(6)

Case Manager (Name/e-mail/phone number): Same as above

Subject Matter Experts: Sandra Ross/DPAP/CPIC

Brief Description of Case (include summary from FRN and brief additional background to include scope and impact):

The proposed rule is implementing section 827 of the NDAA for FY 2013. It would modify DFARS subpart 203.9, Whistleblower Protections for Contractor Employees (see attached DFARS and FRN).

II. To be completed by DAU:

Training Required for DoD Contracting Workforce:

Yes _____ (Continue with rest of form)

No X

Training Mode Recommended (check one or more):

Continuous Learning Module _____

Change to CON course curriculum _____

Community of Practice, BLOG, or Other (please specify): _____

Rapid Deployment Training _____

Email the form, with a copy of the report, including tabs, to: Leslie Deneault (DAU) at (b)(6) or (b)(6) and (b)(6)

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Tuesday, February 05, 2013 2:29 PM
To: Maskew, Karen D DLA CIV ACQUISITION (b)(6) Belton, Clarence CIV ASSTSECNAV RDA WASHINGTON DC, DASN AM (b)(6) Bowman, Susan E CIV USAF SAF/GCQ; Dina Jeffers; Evelyn-Bellamy, Tatia M.; Greg Snyder; Kerry Pilz; Laura Welsh; Leigh Pomponio; Leslie Deneault DAU; Lincoln, Aaron B.; LtCol Ronnie Doud; Marilyn Chambers; Michele Pavlak ; Neilson, Linda, SES, OSD-ATL; Nichols, Teka M CTR OSD ATL; Patterson, Margaret K CIV (US); Retson, Nicholas P OSD ATL; Stefanie Low; Thompson, John A CIV Dept of Navy, ASNRDA AGC; (b)(6) (b)(6) Williams, Amy, Ms, OSD-ATL
Cc: Nichols, Teka M CTR OSD ATL
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010 (P) CMR_Cmte Rpt_020613.dotx; 2013-D010 (P) Signed Cmte Rpt_020613.pdf; 2013-D010 (P) DFARS_013113.docx; 2013-D010 (P) FRN_020513.docx; 2013-D010_Section 827.docx; 10 USC 2409, as amended by section 827.docx; 10 USC 2324k, as amended by section 827.docx; 2013-D010_Statute_DFARS Cross-Walk_012213.docx; 2013-D010 (P) Training Form_013113.dotx; 2013-D010 (P) Data Collection Form_013113.dotx; 2013-D010_IRFA_011013.dotx; 2013-D010 (P) Cmte Rpt Cklist_013113.dotx
Signed By: (b)(6)

DARC Members:

Attached for your review and discussion on 2/20/2013 is the draft proposed rule for subject case, which would implement section 827 of the NDAA for FY 2013.

Please submit your comments to me as well as to the other DARC members. If you have questions, please e-mail them to me or call me at (b)(6)

Regards,
Meredith Murphy
DARS Case Manager

Murphy, Meredith K Ms OSD ATL

From: Romney, Lisa, Ms, OSD-ATL
Sent: Thursday, January 31, 2013 5:54 PM
To: Murphy, Meredith K Ms OSD ATL
Subject: RE: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Signed By: (b)(6)

No impact to business systems...thanks!

-----Original Message-----

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, January 31, 2013 5:09 PM
To: Romney, Lisa, Ms, OSD-ATL
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Lisa, please review the attached Data Collection form for any impact. A draft DFARS and FRN are attached for your information. (This is the first of my cases from the NDAA for FY 2013. Unfortunately, it's not nearly the last of them.)

Regards,
Meredith

(b)(6)

Murphy, Meredith K Ms OSD ATL

From: Woodward, Noel L DLA CIV GENERAL COUNSEL (b)(6)
Sent: Friday, February 01, 2013 9:24 AM
To: Murphy, Meredith K Ms OSD ATL; Ross, Sandra, Ms, OSD-ATL; Vogt, Robert; (b)(6)
Subject: RE: Draft Proposed Rule, DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Meredith,

I ended up stuck downtown at an anti-counterfeit meeting yesterday. Yes, I would like to review, and I will provide comments NLT noon on Tuesday.

Noël L. Woodward, Associate General Counsel

(b)(6)

-----Original Message-----

From: Murphy, Meredith K Ms OSD ATL (b)(6)
Sent: Friday, February 01, 2013 9:20 AM
To: Ross, Sandra, Ms, OSD-ATL; Vogt, Robert; Rivest, Mark A COL MIL USA OTJAG (b)(6)
Woodward, Noel L DLA CIV GENERAL COUNSEL
Subject: Draft Proposed Rule, DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Noel, you were not able to participate in the Committee telecom and haven't submitted comments on this case to date. Please let me know if you want your name listed as a participant on this case.

SUSPENSE: Tuesday, February 4, 2013, noon

Please review the attached materials and provide me with your comments or concurrence NLT than noon on Tuesday, 2/4.

There shouldn't be any surprises in the materials, but if there are, let me know because they were inadvertent.

Thanks again to all who participated in yesterday's telecom.

Regards,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, January 31, 2013 5:06 PM
To: Leslie Deneault DAU (b)(6)
Subject: 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010 (P) Training Form_0193113.dotx; 2013-D010 (P) DFARS_013113.docx; 2013-D010 (P) FRN 013113.docx
Signed By: (b)(6)

Leslie, please complete the attached training form, based on the draft DFARS and FRN attached for this proposed rule.
Thanks very much,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, January 31, 2013 5:09 PM
To: Romney, Lisa, Ms, OSD-ATL
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010 (P) Data Collection Form_013113.dotx; 2013-D010 (P) DFARS_013113.docx;
2013-D010 (P) FRN_013113.docx
Signed By: (b)(6)

Lisa, please review the attached Data Collection form for any impact. A draft DFARS and FRN are attached for your information. (This is the first of my cases from the NDAA for FY 2013. Unfortunately, it's not nearly the last of them.)

Regards,
Meredith

(b)(6)

Murphy, Meredith K Ms OSD ATL

From: Deborah Erwin - M1V1CA (b)(6)
Sent: Thursday, January 24, 2013 5:48 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Williams, Amy, Ms, OSD-ATL; Leigh Pomponio (b)(6)
Subject: Re: Section 827, NDAA for FY 2013

Meredith -

I agree with your thoughts, that the FAR already has the whistleblower coverage, and that the new changes can only apply to DoD and NASA contracts. Whether to change the FAR to add them is a policy call, not a legal call. I don't have strong feelings about this, one way or the other.

Deb

CONFIDENTIALITY NOTICE: This e-mail message contains confidential, privileged information intended solely for the addressee. Please do not forward this message without permission. To maintain attorney-client confidentiality, this message should be distributed only to those officials within the agency who have a need for this information.

On Thu, Jan 24, 2013 at 3:23 PM, Murphy, Meredith K Ms OSD ATL (b)(6) wrote:

Deborah,

Please see the attached section 827 from Public Law 112-239 and the annotated 10 U.S.C. 2409 and 10 U.S.C. 2324 that are modified by section 827. I am working section 827 as a DFARS case (2013-D010) but think that 4 of the provisions belong in the FAR instead. Mark Gomersall and I are in conversations about the cost principles piece (FAR 31.205-47), but Amy suggested that I touch base with you on the other two provisions that I think may belong in FAR subpart 3.9 instead of in a DoD or NASA FAR Supplement.

It seems to me that 10 U.S.C. 2409(c)(4) and (c)(5) (prior to the latest revisions) are already addressed in the FAR at 3.906(b) and (c), respectively. These topics are not unnecessarily repeated in the DFARS, so it seems that the proper location for the latest amendments (which, admittedly, apply to only DoD and NASA) would be in the FAR.

Amy suggested that I get your thoughts on this matter sooner rather than later (which is always a good idea in my book).

Thanks for your help,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, January 24, 2013 3:23 PM
To: Deborah Erwin (M1V1CA) (b)(6)
Cc: Williams, Amy, Ms, OSD-ATL; Leigh Pomponio (leigh.pomponio@nasa.gov)
Subject: Section 827, NDAA for FY 2013
Attachments: 2013-D010_Section 827.docx; 10 USC 2409, as amended by section 827.docx; 10 USC 2324k, as amended by section 827.docx; 2013-D010_Statute_DFARS Cross-Walk_012213.docx
Signed By: (b)(6)

Deborah,

Please see the attached section 827 from Public Law 112-239 and the annotated 10 U.S.C. 2409 and 10 U.S.C. 2324 that are modified by section 827. I am working section 827 as a DFARS case (2013-D010) but think that 4 of the provisions belong in the FAR instead. Mark Gomersall and I are in conversations about the cost principles piece (FAR 31.205-47), but Amy suggested that I touch base with you on the other two provisions that I think may belong in FAR subpart 3.9 instead of in a DoD or NASA FAR Supplement.

It seems to me that 10 U.S.C. 2409(c)(4) and (c)(5) (prior to the latest revisions) are already addressed in the FAR at 3.906(b) and (c), respectively. These topics are not unnecessarily repeated in the DFARS, so it seems that the proper location for the latest amendments (which, admittedly, apply to only DoD and NASA) would be in the FAR.

Amy suggested that I get your thoughts on this matter sooner rather than later (which is always a good idea in my book).

Thanks for your help,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, January 24, 2013 2:49 PM
To: Ross, Sandra, Ms. OSD-ATL; Vogt, Robert, (b)(6)
(b)(6) Rivest, Mark A COL MIL USA OTJAG
(b)(6)
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Attachments: 2013-D010_Section 827.docx; 10 USC 2409, as amended by section 827.docx; 10 USC 2324k, as amended by section 827.docx; 2013-D010_5 USC 1221(e)_TAB X.docx; 2013-D010 (P) DFARS_012213.docx; 2013-D010 (P) FRN_010913.docx; 2013-D010 Statute DFARS Cross-Walk 012213.docx
Signed By: (b)(6)
Importance: High

You are the current members of the DFARS Debarment, Suspension, and Business Ethics Committee. We are working with the Navy and Air Force DARC members to replace the members from their Service who have recently left/retired.

In the meantime, the National Defense Authorization Act for Fiscal Year 2013, enacted January 2, 2013, as Public Law 112-239, included a section 827 entitled "Enhancement of Whistleblower Protections for Contractor Employees." Section 827 modified 10 U.S.C. 2409 and 10 U.S.C. 2324. I'm attaching copies of section 827 and marked-up copies of the two Title 10 provisions. Also referenced in section 827 is the legal burden of proof cited in 5 U.S.C. 1221(e), so that provision of the law is also attached.

As the default chair of the committee, I've tried to make your lives easier by drafting (with the help of Sandy Ross, DPAP/CPIC) DFARS text to implement section 827. I've created a cross-walk so that you can quickly see what from section 827 is covered where in the draft DFARS and the few sections of the new law that I think should go into the FAR (and where they should be placed). Nothing about this is sacred; it's just a draft to kick things off. Please review the attached materials and draft FRN in preparation for a conference call committee meeting next THURSDAY, JANUARY 31st.

Please let me know by return e-mail or telephone call whether you will be available for a conference call next Thursday and, if so, whether the morning or afternoon is preferred. Once I've heard back from you all, I'll set up a conference call-in number. Of course, you are always welcome to come in person to the DARS offices at the Mark Center in Alexandria (strangely, most people aren't keen on doing that).

Also, please send in any comments to all of the committee members to facilitate communication.

Thanks for your help on this important case.

Regards,
Meredith Murphy
OUSD/AT&L
DPAP/DARS
(b)(6)

DFARS Case 2013-D010
 Enhancement of Contractor Whistle-
 blower Protections
 Cross-walk

No.	10 U.S.C. 2409	Proposed DFARS/FAR Location
1	(a)(1) & (a)(1)(A)	203.903(1)
2	(a)(2)	203.903(2)
3	(a)(3)(A)	203.903(3)
4	(a)(3)(B)	203.906(4)
5	(b)(1)	203.905(1)
6	(b)(2)(B)	203.905(3)
7	(b)(3)	203.905(4)
8	(b)(4)	203.905(4)
9	(c)(1)(B)	FAR 3.906(a)
10	(c)(2)	203.906(2)(ii)
11	(c)(4)	FAR 3.906(b)
12	(c)(5)	FAR 3.906(c)
13	(c)(6)	203.905(6)
14	(c)(7)	203.906(5)
15	(d)	252.203-7002
16	(e)	203.900(b)
17	(g)(6)	203.901
	10 U.S.C. 2324	
18	(k)(1)	FAR 31.205-47(b)
19	(k)(2)(C)	FAR 31.205-47(b)

DFARS Case 2013-D010

Enhancement of Contractor Whistleblower Protections

Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)]This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,]-and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

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“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) [**Policy.**] 10 U.S.C. 2409 prohibits contractors [**or subcontractors**] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the ~~following~~ **entities listed at paragraph (3) of this section**], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [**an abuse of authority relating to a DoD contract,**] a substantial and specific danger to public health or safety, or a violation of law[, **rule, or regulation**] related to a DoD contract (including the competition for or negotiation of a contract):[.]

[(2) Entities covered.]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.

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(vi) An authorized official of an agency or the Department of Justice| or other law enforcement agency].

[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [*Contracting officer actions.*]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous or fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation[e the complaint].

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(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

- (i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;
- (ii) Conduct an investigation; and
- (iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

- (i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and
- (ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

- (i) Made with the consent of the person alleging reprisal;**
- (ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or**
- (iii) Necessary to conduct an investigation of the alleged reprisal.**

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

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(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency —

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. **[An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]**

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(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.]

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN 2009)**

The Contractor **[and its subcontractors]** shall inform its employees in writing**[, in the predominant native language of the workforce,]** of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in **[s]**Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

(End of clause)

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5 USC Sec. 1221

Sec. 1221. Individual right of action in certain reprisal cases

* * * * *

(e) (1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b) (8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b) (8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that -

(A) the official taking the personnel action knew of the disclosure;
and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

NEXT >

Subpart 3.9—Whistleblower Protections for Contractor Employees

3.900 Scope of subpart.

(a) Sections 3.901 through 3.906 of this subpart implement 10 U.S.C. 2409 and 41 U.S.C. 265, as amended by Sections 6005 and 6006 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355).

(b) Section 3.907 of this subpart implements Section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), and applies to all contracts funded in whole or in part by that Act.

3.901 Definitions.

As used in this subpart—

"Authorized official of an agency" means an officer or employee responsible for contracting, program management, audit, inspection, investigation, or enforcement of any law or regulation relating to Government procurement or the subject matter of the contract.

"Authorized official of the Department of Justice" means any person responsible for the investigation, enforcement, or prosecution of any law or regulation.

"Inspector General" means an Inspector General appointed under the Inspector General Act of 1978, as amended. In the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency.

3.902 [Reserved]**3.903 Policy.**

Government contractors shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract)

3.904 Procedures for filing complaints.

(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may file a complaint with the Inspector General of the agency that awarded the contract

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The substantial violation of law giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act; and
- (5) The specific nature and date of the reprisal

3.905 Procedures for investigating complaints.

(a) Upon receipt of a complaint, the Inspector General shall conduct an initial inquiry. If the Inspector General determines that the complaint is frivolous or for other reasons does not merit further investigation, the inspector General shall advise the complainant that no further action on the complaint will be taken.

(b) If the Inspector General determines that the complaint merits further investigation, the Inspector General shall notify the complainant, contractor, and head of the contracting activity. The Inspector General shall conduct an investigation and provide a written report of findings to the head of the agency or designee.

(c) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to—

- (1) The complainant and any person acting on the complainant's behalf;
- (2) The contractor alleged to have committed the violation; and
- (3) The head of the contracting activity.

(d) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(e) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

3.906 Remedies.

(a) If the head of the agency or designee determines that a contractor has subjected one of its employees to a reprisal for providing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice, the head of the agency or designee may take one or more of the following actions

(1) Order the contractor to take affirmative action to abate the reprisal.

(2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken

(3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(b) Whenever a contractor fails to comply with an order, the head of the agency or designee shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

(c) Any person adversely affected or aggrieved by an order issued under this section may obtain review of the order's conformance with the law, and this subpart, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency or designee. Review shall conform to Chapter 7 of Title 5, United States Code.

2409(c)(5)

2409(c)
(1)(B)← 2409(c)
(4)

3.907 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 (the Recovery Act).**3.907-1 Definitions.**

As used in this section—

"Board" means the Recovery Accountability and Transparency Board established by Section 1521 of the Recovery Act

"Covered funds" means any contract payment, grant payment, or other payment received by a contractor if—

- (1) The Federal Government provides any portion of the money or property that is provided, requested, or demanded, and
- (2) At least some of the funds are appropriated or otherwise made available by the Recovery Act

"Covered information" means information that the employee reasonably believes is evidence of gross mismanagement of the contract or subcontract related to covered funds, gross waste of covered funds, a substantial and specific danger to public health or safety related to the implementation or use of covered funds, an abuse of authority related to the implementation or use of covered funds, or a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds

"Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 in the Department of Defense that is the DoD Inspector General. In the case of an executive agency that does not have an Inspector General, the duties shall be performed by an official designated by the head of the executive agency

"Non-Federal employer," as used in this section, means any employer that receives Recovery Act funds, including a contractor, subcontractor, or other recipient of funds pursuant to a contract or other agreement awarded and administered in accordance with the Federal Acquisition Regulation.

3.907-2 Policy.

Non-Federal employers are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing covered information to any of the following entities or their representatives:

- (1) The Board
- (2) An Inspector General
- (3) The Comptroller General
- (4) A member of Congress.
- (5) A State or Federal regulatory or law enforcement agency
- (6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct
- (7) A court or grand jury
- (8) The head of a Federal agency.

3.907-3 Procedures for filing complaints.

(a) An employee who believes that he or she has been subjected to reprisal prohibited by the Recovery Act, Section 1553 as set forth in [3.907-2](#), may submit a complaint regarding the reprisal to the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;
- (3) The covered information giving rise to the disclosure,
- (4) The nature of the disclosure giving rise to the discriminatory act, and
- (5) The specific nature and date of the reprisal.

(c) A contracting officer who receives a complaint of reprisal of the type described in [3.907-2](#) shall forward it to the Office of Inspector General and to other designated officials in accordance with agency procedures (e.g., agency legal counsel).

3.907-4 Procedures for investigating complaints.

Investigation of complaints will be in accordance with section 1553 of the Recovery Act.

3.907-5 Access to investigative file of Inspector General.

(a) The employee alleging reprisal under this section shall have access to the investigation file of the Inspector General, in accordance with the Privacy Act, [5 U.S.C. 552a](#). The investigation of the Inspector General shall be deemed closed for the purposes of disclosure under such section when an employee files an appeal to the agency head or a court of competent jurisdiction.

(b) In the event the employee alleging reprisal brings a civil action under section 1553(c)(3) of the Recovery Act, the employee alleging the reprisal and the non-Federal employer shall have access to the investigative file of the Inspector General in accordance with the Privacy Act.

(c) The Inspector General may exclude from disclosures made under [3.907-5](#)(a) or (b)—

- (1) Information protected from disclosure by a provision of law; and
- (2) Any additional information the Inspector General determines disclosure of which would impede a continuing investigation, provided that such information is disclosed once such disclosure would no longer impede such investigation, unless the Inspector General determines that the disclosure of law enforcement techniques, procedures, or information could reasonably be expected to risk circumvention of the law or disclose the identity of a confidential source.

(d) An Inspector General investigating an alleged reprisal under this section may not respond to any inquiry or disclose any information from or about any person alleging such reprisal, except in accordance with [5 U.S.C. 552a](#), or as required by any other applicable Federal law.

3.907-6 Remedies and enforcement authority.

(a) *Burden of Proof.*

(1) Disclosure as contributing factor in reprisal

(i) An employee alleging a reprisal under this section shall be deemed to have affirmatively established the occurrence of the reprisal if the employee demonstrates that a disclosure described in section [3.907-2](#) was a contributing factor in the reprisal.

(ii) A disclosure may be demonstrated as a contributing factor in a reprisal for purposes of this paragraph by circumstantial evidence, including—

(A) Evidence that the official undertaking the reprisal knew of the disclosure, or

(B) Evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.

(2) *Opportunity for rebuttal.* The head of an agency may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established under section 3.907-9(a)(1) if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

(b) No later than 30 days after receiving an Inspector General report in accordance with section 1553 of the Recovery Act, the head of the agency concerned shall determine whether there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection 3.907-2 and shall either issue an order denying relief in whole or in part or shall take one or more of the following actions:

(1) Order the employer to take affirmative action to abate the reprisal.

(2) Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal.

(c)(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate district court of United States, which shall have jurisdiction over such an action without regard to the amount in controversy if—

(i) The head of an agency—

(A) Issues an order denying relief in whole or in part under paragraph (a) of this section;

(B) Has not issued an order within 210 days after the submission of a complaint in accordance with section 1553 of the Recovery Act, or in the case of an extension of time in accordance with section 1553 of the Recovery Act, within 30 days after the expiration of the extension of time; or

(C) Decides in accordance with section 1553 of the Recovery Act not to investigate or to discontinue an investigation; and

(ii) There is no showing that such delay or decision is due to the bad faith of the complainant.

(2) Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(d) Whenever an employer fails to comply with an order issued under this section, the head of the agency shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorneys fees and costs.

(e) Any person adversely affected or aggrieved by an order issued under paragraph (b) of this subsection may obtain review of the order's conformance with the law, and this section, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency.

3.907-7 Contract clause.

Use the clause at 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 in all solicitations and contracts funded in whole or in part with Recovery Act funds.

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business. That portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work) is compensation for personal services and is unallowable as stated in 31.205-6(m)(2).

31.205-47 Costs related to legal and other proceedings.

(a) *Definitions.* As used in this subpart—

"Costs" include, but are not limited to, administrative and clerical expenses; the costs of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; costs of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bears a direct relationship to the proceeding.

"Fraud," as used in this subsection, means—

- (1) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents;
- (2) Acts which constitute a cause for debarment or suspension under 9.406-2(a) and 9.407-2(a); and
- (3) Acts which violate the False Claims Act, 31 U.S.C. sections 3729-3731, or the Anti-Kickback Act, 41 U.S.C. sections 51 and 54.

"Penalty," does not include restitution, reimbursement, or compensatory damages.

"Proceeding," includes an investigation.

(b) Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees), or costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is—

(1) In a criminal proceeding, a conviction;

(2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct;

(3) A final decision by an appropriate official of an executive agency to—

- (i) Debar or suspend the contractor;
- (ii) Rescind or void a contract; or
- (iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation.

(4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in paragraphs (b)(1) through (3) of this subsection (but see paragraphs (c) and (d) of this subsection); or

(5) Not covered by paragraphs (b)(1) through (4) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (4) of this subsection.

(c)(1) To the extent they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by the United States that is resolved by consent or compromise pursuant to an agreement entered into between the contractor and the United States, and which are unallowable solely because of paragraph (b) of this subsection, may be allowed to the extent specifically provided in such agreement

(2) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding, that are not otherwise unallowable by regulation or by separate agreement with the United States, may be allowed if the contracting officer, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits.

(d) To the extent that they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by a State, local, or foreign government may be allowable when the contracting officer (or other official specified in agency procedures) determines, that the costs were incurred either:

- (1) As a direct result of a specific term or condition of a Federal contract; or
- (2) As a result of compliance with specific written direction of the cognizant contracting officer.

(e) Costs incurred in connection with proceedings described in paragraph (b) of this subsection, but which are not made unallowable by that paragraph, may be allowable to the extent that:

- (1) The costs are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;
- (2) The costs are not otherwise recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and
- (3) The percentage of costs allowed does not exceed the percentage determined to be appropriate considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. Such percentage shall not exceed 80 percent. Agreements reached under paragraph (c) of this subsection shall be subject to this limitation. If, however, an agreement described in paragraph (c)(1) of this subsection explicitly states the amount of otherwise allowable incurred legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied. The amount of reimbursement allowed for legal costs in connection with any proceeding described in paragraph (c)(2) of this subsection shall be determined by the cognizant contracting officer, but shall not exceed 80 percent of otherwise allowable legal costs incurred.

(f) Costs not covered elsewhere in this subsection are unallowable if incurred in connection with:

(1) Defense against Federal Government claims or appeals or the prosecution of claims or appeals against the Federal Government (see 2.101).

(2) Organization, reorganization, (including mergers and acquisitions) or resisting mergers and acquisitions (see also 31.205-27).

(3) Defense of antitrust suits.

(4) Defense of suits brought by employees or ex-employees of the contractor under section 2 of the Major Fraud Act of 1988 where the contractor was found liable or settled.

(5) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors arising from either—

- (i) An agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or
- (ii) Dual sourcing, coproduction, or similar programs, are unallowable, except when—

(A) Incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, or

(B) When agreed to in writing by the contracting officer.

(6) Patent infringement litigation, unless otherwise provided for in the contract.

(7) Representation of, or assistance to, individuals, groups, or legal entities which the contractor is not legally bound to provide, arising from an action where the participant was convicted of violation of a law or regulation or was found liable in a civil or administrative proceeding.

(8) Protests of Federal Government solicitations or contract awards, or the defense against protests of such solicitations or contract awards, unless the costs of defending against a protest are incurred pursuant to a written request from the cognizant contracting officer.

(g) Costs which may be unallowable under 31.205-47, including directly associated costs, shall be segregated and accounted for by the contractor separately. During the pendency of any proceeding covered by paragraph (b) and paragraphs (f)(4) and (f)(7) of this subsection, the

contracting officer shall generally withhold payment of such costs. However, if in the best interests of the Government, the contracting officer may provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreement by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

31.205-48 Research and development costs.

"Research and development," as used in this subsection, means the type of technical effort described in 41.205-13 but sponsored by a grant or required in the performance of a contract. When costs are incurred in excess of either the price of a contract or amount of a grant for research and development effort, the excess is unallowable under any other Government contract.

31.205-49 Goodwill.

Goodwill, an unidentifiable intangible asset, originates under the purchase method of accounting for a business combination when the price paid by the acquiring company exceeds the sum of the identifiable individual assets acquired less liabilities assumed, based upon their fair values. The excess is commonly referred to as goodwill. Goodwill may arise from the acquisition of a company as a whole or a portion thereof. Any costs for amortization, expensing, write-off, or write-down of goodwill (however represented) are unallowable.

31.205-50 [Reserved]

31.205-51 Costs of alcoholic beverages.

Costs of alcoholic beverages are unallowable.

31.205-52 Asset valuations resulting from business combinations.

(a) For tangible capital assets, when the purchase method of accounting for a business combination is used, whether or not the contract or subcontract is subject to CAS, the allowable depreciation and cost of money shall be based on the capitalized asset values measured and assigned in accordance with 48 CFR 9904.404-50(d), if allocable, reasonable, and not otherwise unallowable.

(b) For intangible capital assets, when the purchase method of accounting for a business combination is used, allowable amortization and cost of money shall be limited to the total of the amounts that would have been allowed had the combination not taken place.

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[NEXT >](#)

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Monday, January 07, 2013 3:55 PM
To: Maskew, Karen D DLA CIV ACQUISITION (b)(6) Belton, Clarence CIV ASSTSECNAV RDA WASHINGTON DC, DASN AM (b)(6) Bowman, Susan E CIV USAF SAF/GCQ; Dina Jeffers; Evelyn-Bellamy, Tatia M.; Greg Snyder; Kerry Pilz; Laura Welsh; Leigh Pomponio; Leslie Deneault DAU; Lincoln, Aaron B.; LtCol Ronnie Doud; Marilyn Chambers; Michele Pavlak ; Neilson, Linda, SES, OSD-ATL; Nichols, Teka M CTR OSD ATL; Patterson, Margaret K CIV (US); Retson, Nicholas P OSD ATL; Stefanie Low; Thompson, John A CIV Dept of Navy, ASNRDA AGC; (b)(6)
(b)(6) Williams, Amy, Ms, OSD-ATL
Subject: New DFARS Case
Attachments: 2013-D010 New Case CMR_010713.dotx; 2013-D010_Section 827.docx
Signed By: (b)(6)

Please see attached CMR.
Regards,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Monday, January 07, 2013 2:50 PM
To: Ross, Sandra, Ms, OSD-ATL
Subject: New DFARS Case 2013-D010, Enhancement of Whistleblower Protections for Contractor Employees
Attachments: 2013-D010_Section 827.docx; 10 USC 2409, as amended by section 827.docx; 10 USC 2324k, as amended by section 827.docx
Signed By: (b)(6)

Welcome back, Sandy. DARS has a gift for you; we have a new DFARS case, DFARS 2013-D010, subject as above. I'm attaching section 827 of the NDAA for FY 2013, which this case will implement. I'm also attaching 10 U.S.C. 2409 and 2324k, with the changes made by section 827 underlined. That's about as far as I've gotten so far, but it's only Monday. I tentatively said we'd work this as a staff case, but I'd like your input as to whether it should be assigned to a DFARS Committee (suspension, debarment, and business ethics?).

Happy new year,
Meredith



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FARSearch using Zoom

Enter one or more keywords to search for using the Zoom Search Engine.
Note that '*' and '?' wildcards are supported.

Search for: Results per page: 10

Category: All FAR DFARS AFARS AF FARS AGAR AIDAR CAR DARS DEAR DIAR DLAD DOSAR DOLAR DTAR EDAR EPAAR FEHBAR GSAM HHSAR HSAR HUDAR IAAR JAR LIFAR NFS NMCARS NRCAR USSOCOM USTRANSCOM TAR VAAR

Match: any search words all search words

Search results for: contractor whistleblower protections in category "DFARS"

3 results found containing all search terms. 124 results found containing some search terms.

13 pages of results.

1. [DFARS 252.000 thru 252.214](#) [DFARS]

... 252.204-7004 Alternate A, Central Contractor Registration. 252.204-7005 Oral ... Requirement to Inform Employees of Whistleblower Rights. 252.203-7003, ... of employee whistleblower rights and protections under 10 U.S.C. ...

Terms matched: 3 - Score: 14211 - 19 Nov 2012 - URL:

http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars252_000.htm

2. [DFARS Table of Contents](#) [DFARS]

... protection, and marking of contractor bid or proposal information ... violations. SUBPART 203.9 — WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES ... Scope of subpart. 203.903 Policy. 203.904 Procedures for ...

Terms matched: 3 - Score: 13860 - 19 Dec 2012 - URL:

<http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/DfarTOC.htm>

3. [DFARS 203](#) [DFARS]

... protection, and marking of contractor bid or proposal information ... violations. SUBPART 203.9 — WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES ... Scope of subpart. 203.903 Policy. 203.904 Procedures for ...

Terms matched: 3 - Score: 13836 - 19 Nov 2012 - URL:

<http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars203.htm>

4. [DFARS 252.220 thru 252.226](#) [DFARS]

... Contractors Performing Private Security Functions. 252.225-7040 Contractor Personnel Authorized to Accompany U.S. Armed ... to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine ...

Terms matched: 2 - Score: 7815 - 11 Dec 2012 - URL:

http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars252_220.htm

5. [DFARS 228](#) [DFARS]

... 30,000, require the prime contractor to obtain from each of its construction ... performance and payment protections in favor of the prime contractor as follows: (1 ...

Terms matched: 2 - Score: 7089 - 19 Nov 2012 - URL:

<http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars228.htm>

6. [DFARS 239](#) [DFARS]

... or other standard. 239.7102-3 Information assurance contractor training and certification. 239.7103 Contract clauses ... officer — (a) The required protections, i.e., an established National ...

Terms matched: 2 - Score: 6916 - 19 Nov 2012 - URL:

<http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars239.htm>

7. [DFARS 252.227 thru 252.231](#) [DFARS]

... Validation of Restrictive Markings on Technical Data. 252.227-7038 Patent Rights — Ownership by the Contractor (Large Business). 252.227-7039 Patents --Reporting of Subject Inventions. 252.228 -7000 Reimbursement ...

Terms matched: 1 - Score: 1626 - 19 Nov 2012 - URL:

http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars252_227.htm

8. [DFARS 252.237 thru 252.245](#) [DFARS]

... . 252.237-7008 Group Interment. 252.237-7009 Permits. 252.237-7010 Prohibition on Interrogation of Detainees by Contractor Personnel. 252.237-7011 Preparation History. 252.237-7012 Instruction to Offerors (Count-of-Articles). ...

Terms matched: 1 - Score: 1029 - 19 Nov 2012 - URL:

http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars252_237.htm

9. [DFARS 252.215 thru 252.219](#) [DFARS]

... by the system that is needed for management purposes (b) General. The Contractor shall establish, maintain, and comply with an acceptable estimating system. (...

Terms matched: 1 - Score: 612 - 19 Nov 2012 - URL:

http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars252_215.htm

10. [DFARS 252.246 thru End](#) [DFARS]

... Limitation. 252.247-7013 Contract Areas of Performance. 252.247-7014 Demurrage. 252.247-7015 Requirements. 252.247-7016 Contractor Liability for Loss or Damage. 252.247-7017 Erroneous Shipments. 252.247-7018 Subcontracting. 252.247-7019 ...

Terms matched: 1 - Score: 591 - 19 Nov 2012 - URL:

http://farsite.hill.af.mil/reghtml/regs/FAR2AFMCFARS/FARDFARS/DFARS/Dfars252_246.htm

Result Pages: 1 [2](#) [3](#) [4](#) [5](#) [6](#) [7](#) [8](#) [9](#) [10](#) [11](#) [Next >>](#)

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INITIAL REGULATORY FLEXIBILITY ANALYSIS

DFARS Case 2013-D010

Enhancement of Contractor Employees Whistleblower Protections

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603.

1. Reasons for the action.

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees.

2. Objectives of, and legal basis for, the rule.

This action is necessary because of amendments made by section 827 of the National Defense Authorization Act for Fiscal Year 2013. Section 827 amends 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to the DFARS proposed rule. DFARS case 2013-D010 proposes to make revisions to DFARS subpart 203.9, "Whistleblower Protections for Contractor Employees." This DFARS subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

3. Description of and estimate of the number of small entities to which the rule will apply.

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have a situation occur that requires an employee to use the whistleblower provisions. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

None. Because of the terms used in the statute, DoD is unable to exempt small entities or to establish a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

06/11/2013 Revision

(Billing Code 5001-06-F)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of ~~Contractor~~ ^{EGOS} Whistleblower Protections ^{to DFARS} (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013), effective 180 days after enactment. Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

Comment [A1]: Is there an effective date?

Comment [A2]: Effective 180 days after enactment.

Comment [A3]: Please explain what the purpose is of these changes.

Comment [A4]: We cannot explain what the purpose or intent was of the Congress in making these changes. There is no relevant report language, so we could only speculate.

Comment [A5]: Ignore my comment in the text.

Please include the DFARS case number as true if known.

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This is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings.] Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to Title 10 agencies.

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Section 828, Pilot Program for Enhancement of Contractor Whistleblower Protections, of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a "pilot program" (4-year program) to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors for the next four years and suspend FAR 3.901 through 3.906. The FAR will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239). Section 827(g) amends 10 U.S.C. 2324(k) and section 828(d) similarly amends 41 U.S.C. 4310 to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower section (10 U.S.C. 2409 or 41

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U.S.C. 4712, respectively see FAR Case 2013-017, Allowability of Legal Costs for Whistleblower Proceedings.

II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 [, as amended.] ~~and two prior amendments to it.~~ The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

- (a) (1): Amended grounds for disclosure.
- (a) (2): Amended persons and bodies to whom disclosure could result in reprisal.
- (a) (3) (A): Definition of who is deemed to have made a disclosure see 203.903(3).

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Comment [A6]: Please include the titles and sections of the two prior amendments.

Comment [A7]: Where is this in the DFARS text?

Comment [A8]: Please see 203.903(3).

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(a) (3) (B): Prohibition against reprisal even if undertaken at request of a DoD or Administration official~~Definition of what is excluded from the definition of reprisal.~~

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Comment [A9]: Where is this in the DFARS text?

Comment [A10]: Please see amended description at left.

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(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b) (2) (B): Provided a reporting timeframe line for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

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(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating

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to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and **certain** contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided

Comment [A11]: Why is the word "certain" added?

Comment [A12]: The word "certain" has been added because only some, not all, contractor or subcontractor officials are covered. The only officials covered are a "management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct." A disclosure to a co-worker who had no such responsibilities would not be covered by subpart 203.9.

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by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O.

Comment [A13]: How will this be determined? Use same phrase from trafficking case - "significant portion" is used in the trafficking rule.

Comment [A14]: The term "predominant native language of the workforce" originates from statute. We believe this was phrased as it is, so that a contractor would not be compelled to provide the notifications in dozens of different languages, i.e., if 70% of employees come from English-speaking countries, then notifications in English would meet the requirement.

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12866, Regulatory Planning and Review, dated September 30, 1993.

This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their

employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k), ~~making the Section 827 changes are~~

applicable to DoD and NASA. Each agency will ~~amend~~ ~~is amending~~

Comment [A15]: Although disclosure is not new, it now flows to subcontractors. So is this a new reporting requirement for primes?

Comment [A16]: There are no reporting requirements for prime contractors or subcontractors.

Comment [A17]: What about Coast Guard.

Comment [A18]: Only DoD and NASA are specifically mentioned in section 827. We understand that DHS is still determining applicability to the Coast Guard.

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its FAR supplement to incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will ~~have~~ have a situation occur that requires an employee to use the whistleblower provisions~~, employees~~.

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Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

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There are ~~[no]no-minimal~~ reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. ~~However, a~~ firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit

Comment [A19]: Disagree. There are NO required contractor or subcontractor reporting requirements at all. What MAY be asked for in a particular instance is not within the purview here.

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06/11/2013 Revision

such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

ACTION MEMO

March 18, 2013

FOR: DIRECTOR, DEFENSE PROCUREMENT AND ACQUISITION POLICY

FROM: Deputy Director, Defense Procurement and Acquisition Policy, for the Defense Acquisition Regulations System *oh*

SUBJECT: Amendment to the Defense Federal Acquisition Regulation Supplement (DFARS Cases 2012-D054 and 2013-D010)

- Request approval to publish one draft final DFARS rule and one draft proposed DFARS rule. A summary of the rules is at Tab A. TABs B through C1 are the draft DFARS changes and Federal Register notices.
- The draft final rule at TAB B provides guidance relating to the release of fundamental research information. The draft proposed rule at TAB C implements statutory amendments to whistleblower protections for contractor employees. DoD does not expect these rules to increase cost to the Government or contractors.

RECOMMENDATION: Approve publication of the draft final and proposed DFARS rules.

COORDINATION: None.

DECISION: *MU 3/20* Approve:
 _____ Disapprove:
 _____ Other: _____

Attachments:
As stated

(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.

o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.

o Fax: 571-372-6094.

o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate FAR case.

II. Discussion

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The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 and two prior amendments to it. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

(a)(1): Amended grounds for disclosure

(a)(2): Amended persons and bodies to whom disclosure could result in reprisal.

(a)(3)(A): Definition of who is deemed to have made a disclosure.

(a)(3)(B): Definition of what is excluded from the definition of reprisal.

(b)(1): Provided an additional basis on which the Inspector General may determine not to investigate.

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(b) (2) (B): Provided a time line for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

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(e): Created an exemption for elements of the intelligence community.

(g)(6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section

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would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

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IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a

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whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

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There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small

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Editor, Defense Acquisition Regulations System.

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DFARS Case 2013-D010

Enhancement of Contractor Whistleblower Protections

Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

* * * * *

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR
EMPLOYEES

203.900 Scope of subpart.

[(a)]This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] ~~and~~ [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[,] and section 827 of the National Defense Authorization Act for Fiscal Year 2013].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart —

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“Reprisal” means discharging, demoting, or otherwise discriminating against an employee for disclosing information that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) **[Policy.]** 10 U.S.C. 2409 prohibits contractors ~~for subcontractors~~ **[from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities] listed at paragraph (2) of this section**, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, **[an abuse of authority relating to a DoD contract,** a substantial and specific danger to public health or safety, or a violation of law**], rule, or regulation]** related to a DoD contract (including the competition for or negotiation of a contract):**].]**

[(2) Entities covered.]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.

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(vi) An authorized official of an agency or the Department of Justice [or other law enforcement agency].

[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

[2(4)] [Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) **[Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~ [e the complaint].**

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(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

- (i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;
- (ii) Conduct an investigation; and
- (iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

- (i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and
- (ii) If unable to submit a report within 180 days, will submit the report within the additional time period, **up to 180 days,** to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

- (i) Made with the consent of the person alleging reprisal;**
- (ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or**
- (iii) Necessary to conduct an investigation of the alleged reprisal.**

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

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(6) The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. **[An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]**

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(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.]

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(~~JAN 2009~~[DATE])**

The Contractor [and its subcontractors] shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

(End of clause)

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Case Management Record

DFARS Case: 2013-D010		Date Submitted: 02/06/2013	
Title: Enhancement of Contractor Whistleblower Protections			
Recommended Due Date: <u>02/20/2013</u>			
<input type="checkbox"/> Report		<input type="checkbox"/> Reclama	
<input checked="" type="checkbox"/> Discussion		<input type="checkbox"/> Other _____	
Priority: 1	Submitted By: M. Murphy	Origination Code: L	
Case Manager(s): M. Murphy		Case References:	
PGI Cite:		FAR Case:	
Cognizant Committee: Suspension, Debarment, and Business Ethics Committee			
Coordination: DPAP/CPIC			
Additional Information: Attached is the report of the Committee for the proposed rule. The proposed rule implements section 827 of the NDAA for FY 2013. A DARC discussion date of <u>February 20, 2013</u> , is requested.			

Priorities: 1 = Statutory or very high priority; 2 = all other

Origination codes: A-Army; C-CAAC; D-DLA; E-Executive Branch (OFPP/OMB); F-Air Force; G-GAO; I-DoDIG; L-Legislation, M-DCMA; N-Navy; O-OSD; P-Public; R-DCAA; S-NASA

February 6, 2013

**MEMORANDUM FOR: DIRECTOR, DEFENSE ACQUISITION REGULATIONS
COUNCIL**

**SUBJECT: DFARS Case 2013-D010, Enhancement of
Whistleblower Protections**

I. **Case Summary.** This case was opened on January 7, 2013, and referred to the DFARS Suspension, Debarment, and Business Ethics Committee to draft a proposed rule to implement section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239, enacted on January 2, 2013). Section 827 (TAB C) made extensive changes to 10 U.S.C. 2409, "Contractor employees: protection from reprisal or disclosure," and amended paragraph (k) of 10 U.S.C. 2324, "Allowable costs under defense contracts." Annotated copies of 10 U.S.C. 2409 and 10 U.S.C. 2324(k) are attached (TABs D and E). A cross-walk between the title 10 provisions and the regulations is provided (TAB F).

II. **Recommendation.** Publish TAB A as a proposed rule with the Federal Register Notice at TAB B.

III. Background and Analysis.

The FAR addresses this subject at subpart 3.9, and the DoD-peculiar rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." Section 827 applies only to DoD and NASA. NASA is addressing its requirements in its own NASA FAR Supplement case. DFARS subpart 203.9 implements 10 U.S.C. 2409 and two prior amendments to it. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

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The FRN, at sections II.A and B, goes into detail regarding the requirements of each subparagraph of the amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k).

- (1) Because the material in 10 U.S.C. 2324(k), prior to the section 827 amendments, was addressed in the FAR at 31.205-47(b), even though title 10 of the United States Code applies only to DoD, NASA, and the Coast Guard, the Committee has referred that portion of section 827 for separate implementation.
- (2) Two other subparagraphs of section 827 were deemed by the Committee to be more appropriate to FAR subpart 3.9, Whistleblower Protections for Contractor Employees, than to the DFARs. 10 U.S.C. 2409(c)(4), prior to the enactment of section 827, was implemented in paragraph (b) of FAR 3.906, Remedies. FAR 3.906(b) currently reads as follows:

(b) Whenever a contractor fails to comply with an order, the head of the agency or designee shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this section, the court may grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

10 U.S.C. 2409(c)(4), prior to section 827, read as follows:

(4) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief,

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including injunctive relief and compensatory and exemplary damages.

DFARS subpart 203.9 does not address the types of relief that may be granted by a court. Therefore, when section 827 expanded the types of relief that might be provided, the FAR seemed to be a better location for it. The Committee pursued the same logic regarding the amendments made to 10 U.S.C. 2409(c)(5), which expand on the appeals process, currently addressed only at FAR 3.906(c), not in the DFARS coverage.

The clause at DFARS 252.203-7002 has been amended to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. Also, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

Generally, the language that the Committee proposes to add to the DFARS is taken directly from the language of the statute.

The Committee does not propose any changes to the applicability of DFARS subpart 3.9, other than the explicit elimination of applicability of the subpart to the intelligence community, as directed by section 827.

IV. Training. A completed training form is attached (TAB G).

V. Associated Impacts of the Change.

A. A completed Data Collection form is attached (TAB H). DPAP/PDI reported no electronic-systems impact of the proposed rule.

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B. An initial regulatory flexibility analysis is attached (TAB I). A summary of the impact on small entities has been included in the FRN.

VII. Collateral Requirements.

- A. The proposed changes are not significant, but public comment will be requested. This is not a significant regulatory action pursuant to Executive Order 12866 or a major rule under 5 U.S.C. 804. Appropriate language has been included in the FRN.
- B. There are no information collection requirements associated with this proposed rule. A statement to that effect is included in the FRN.

VIII. Concurrences. The Committee members listed below participated in the preparation of this report and concur in it.

Signature:



Meredith Murphy
Chair, Suspension, Debarment,
and Business Ethics Committee

Committee:

Meredith Murphy, OSD/DARS (Chair)
Sandra Ross, OSD/CPIC
Robert Vogt, DCMA
Mark Rivest, Army
Noel Woodward, DLA

Enclosures:

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TAB A DFARS
TAB B Federal Register Notice (FRN)
TAB C Section 827, NDAA for FY 2013
TAB D 10 U.S.C. 2409, annotated
TAB E 10 U.S.C. 2324(k), annotated
TAB F Cross-walk between annotated statutes and
regulations
TAB G Training Form
TAB H Data Collection/Reporting Checklist
TAB I IRFA
TAB J DFARS Case Checklist

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[(b)] **This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—**

- (1) **Relates to an activity or an element of the intelligence community; or**
- (2) **Was discovered during contract or subcontract services provided to an element of the intelligence community.**

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203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) ^a **[Policy.]** 10 U.S.C. 2409 prohibits contractors **[or subcontractors]** from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the ~~following~~ entities **[listed at paragraph (2) of this section]**, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, **[an abuse of authority relating to a DoD contract,** a substantial and specific danger to public health or safety, or a violation of law **[, rule, or regulation]** related to a DoD contract (including the competition for or negotiation of a contract):**].**

[(2) Entities covered.]

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.
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[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

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203.904 Procedures for filing complaints.

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) **[Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation[c the complaint].**

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(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

- (i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;
- (ii) Conduct an investigation; and
- (iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General -

- (i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and
- (ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

- (i) Made with the consent of the person alleging reprisal;**
- (ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or**
- (iii) Necessary to conduct an investigation of the alleged reprisal.**

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

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(6) **The legal burden of proof specified at 5 U.S.C. 1221(e) shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]**

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

(i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. **[An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]**

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(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(~~JAN-2009~~[DATE])**

The Contractor **[and its subcontractors]**shall inform its employees in writing**[, in the predominant native language of the workforce,]** of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in **[s]**Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

(End of clause)

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DFARS Case 2013-D010
Enhancement of Whistleblower Protections
for Contractor Employees
Draft Proposed Rule (020513)

(Billing Code 5001-08-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-

**Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)**

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [**Insert date
60 days after date of publication in the FEDERAL REGISTER**], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check

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www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6094."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure," and it amends paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts." Section 827 is addressed to DoD and the National Aeronautics and

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Space Administration. This case proposes to make amendments to implement section 827 for DoD.

II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-peculiar rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 and two prior amendments to it. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. The following changes are made to title 10, United States Code, at the locations noted:

10 U.S.C. 2409:

- (a)(1): Amended grounds for disclosure
- (a)(2): Amended persons and bodies to whom disclosure could result in reprisal.

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(a) (3) (A): Definition of who is deemed to have made a disclosure.

(a) (3) (B): Definition of what is excluded from the definition of reprisal.

(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b) (2) (B): Provided a time line for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

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(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

B. Section 827 changes to 10 U.S.C. 2324. The following changes are made to title 10, United States Code, at the locations noted:

10 U.S.C. 2324:

(k) (1): Addressed allowable costs incurred by contractors in connection with civil, criminal, or administrative proceedings.

(k) (2) (C): Expanded the types of corrective actions or monetary penalties that may be imposed.

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C. Proposed Changes to DFARS.

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. In addition, the entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to

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this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower

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rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small

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entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees. These amendments are made by section 827 of the National Defense Authorization Act for Fiscal Year 2013. Section 827 amends 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to the DFARS proposed rule. DFARS proposes revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002,

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entitled "Requirement to Inform Employees of Whistleblower Rights."

Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. Of course, there is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute,

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DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage.

Regardless of the size of a whistleblower employee's alleged wrongdoing, the employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

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Government procurement.

Manuel Quinones

Editor, Defense Acquisition Regulations System.

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SEC. 827. ENHANCEMENT OF WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES.

(a) **IN GENERAL.**—Subsection (a) of section 2409 of title 10, United States Code, is amended—

(1) by inserting “(1)” before “An employee”;

(2) in paragraph (1), as so designated—

(A) by inserting “or subcontractor” after “employee of a contractor”;

(B) by striking “a Member of Congress” and all that follows through “the Department of Justice” and inserting “a person or body described in paragraph (2)”; and

(C) by striking “evidence of” and all that follows and inserting the following: “evidence of the following:

“(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

“(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

“(C) A substantial and specific danger to public health or safety.”;

and

(3) by adding at the end the following new paragraphs:

“(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

“(A) A Member of Congress or a representative of a committee of Congress.

“(B) An Inspector General.

“(C) The Government Accountability Office.

“(D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.

“(E) An authorized official of the Department of Justice or other law enforcement agency.

“(F) A court or grand jury.

“(G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

“(3) For the purposes of paragraph (1)—

“(A) an employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

“(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.”.

(b) INVESTIGATION OF COMPLAINTS.—Subsection (b) of such section is amended—

(1) in paragraph (1), by inserting “fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant,” after “is frivolous.”;

(2) in paragraph (2)—

(A) in subparagraph (A), by inserting “, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant” after “is frivolous”; and

(B) in subparagraph (B), by inserting “, up to 180 days,” after “such additional period of time”; and

(3) by adding at the end the following new paragraphs:

“(3) The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

“(A) made with the consent of the person alleging the reprisal;

“(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

“(C) necessary to conduct an investigation of the alleged reprisal.

“(4) A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.”.

(c) REMEDY AND ENFORCEMENT AUTHORITY.—Subsection (c) of such section is amended—

(1) in paragraph (1)(B), by striking “the compensation (including back pay)” and inserting “compensatory damages (including back pay)”;

(2) in paragraph (2), by adding at the end following new sentence: “An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.”;

(3) in paragraph (4), by striking “and compensatory and exemplary damages.” and inserting “, compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.”;

(4) in paragraph (5), by adding at the end the following new sentence: “Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.”; and

(5) by adding at the end the following new paragraphs:

“(6) The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

“(7) The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.”.

(d) NOTIFICATION OF EMPLOYEES.—Such section is further amended—

(1) by redesignating subsections (d) and (e) as subsections (f) and (g), respectively; and

(2) by inserting after subsection (c) the following new subsection (d):

“(d) NOTIFICATION OF EMPLOYEES.—The Secretary of Defense and the Administrator of the National Aeronautics and Space Administration shall ensure that contractors and subcontractors of the Department of Defense and the National Aeronautics and Space Administration, as applicable, inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.”.

(e) EXCEPTIONS FOR INTELLIGENCE COMMUNITY.—Such section is further amended by inserting after subsection (d), as added by subsection (d)(2) of this section, the following new subsection (e):

“(e) EXCEPTIONS.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

“(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

“(A) relates to an activity of an element of the intelligence community;
or

“(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.”.

(f) ABUSE OF AUTHORITY DEFINED.—Subsection (g) of such section, as redesignated by subsection (d)(1) of this section, is further amended by adding at the end the following new paragraph:

“(6) The term ‘abuse of authority’ means the following:

“(A) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense or the successful performance of a Department contract or grant.

“(B) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the National Aeronautics and Space Administration or the successful performance of an Administration contract or grant.”.

(g) ALLOWABILITY OF LEGAL FEES.—Section 2324(k) of such title is amended—

(1) in paragraph (1), by striking “commenced by the United States or a State” and inserting “commenced by the United States, by a State, or by a contractor employee submitting a complaint under section 2409 of this title”; and

(2) in paragraph (2)(C), by striking “the imposition of a monetary penalty” and inserting “the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title”.

(h) CONSTRUCTION.—Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law.

(i) EFFECTIVE DATE.—

(1) **IN GENERAL.**—The amendments made by this section shall take effect on the date that is 180 days after the date of the enactment of this Act, and shall apply to—

- (A) all contracts awarded on or after such date;
- (B) all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; and
- (C) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments.

(2) **REVISION OF SUPPLEMENTS TO THE FAR.**—Not later than 180 days after the date of the enactment of this Act, the Department of Defense Supplement to the Federal Acquisition Regulation and the National Aeronautics and Space Administration Supplement to the Federal Acquisition Regulation shall each be revised to implement the requirements arising under the amendments made by this section.

(3) **INCLUSION OF CONTRACT CLAUSE IN CONTRACTS AWARDED BEFORE EFFECTIVE DATE.**—At the time of any major modification to a contract that was awarded before the date that is 180 days after the date of the enactment of this Act, the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section of the contract.

10 USC Sec. 2409
(112-90)

01/03/2012

Sec. 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) **Prohibition of Reprisals.** - ~~[(1)]An employee of a contractor [or subcontractor]may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice [a person or body described in paragraph (2)] information that the employee reasonably believes is evidence of gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant. [evidence of the following:~~

(A) Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

(B) Gross mismanagement of a National Aeronautics and Space Administration contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.

(C) A substantial and specific danger to public health or safety.

(2) The persons and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of Congress;

(B) An Inspector General.

(C) The Government Accountability Office.

(D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.

(E) An authorized official of the Department of Justice or other law enforcement agency.

(F) A court or grand jury.

(G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(3) For the purposes of paragraph (1)-

(A) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Department of Defense or National Aeronautics and Space Administration contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

(B) Reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.]

(b) Investigation of Complaints. - (1) A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense, or the Inspector General of the National Aeronautics and Space Administration in the case of a complaint regarding the National Aeronautics and Space Administration. Unless the Inspector General determines that the complaint is frivolous, [fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant,]the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.

(2) (A) Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous [, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant,] or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time [, up to 180 days,]as shall be agreed upon between the Inspector General and the person submitting the complaint.

(3) The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is-

(A) made with the consent of the person alleging the reprisal;

(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

(C) necessary to conduct an investigation of the alleged reprisal.

(4) A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.]

(c) Remedy and Enforcement Authority. - (1) Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the agency concerned shall determine whether there is sufficient basis to conclude that the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

(A) Order the contractor to take affirmative action to abate the reprisal.

(B) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with ~~the compensation (including back pay)~~ compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(C) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(2) If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

(4) Whenever a person fails to comply with an order issued under paragraph (1), the head of the agency shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon

whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.] and ~~compensatory and exemplary damages.~~

(5) Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

(6) The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

(7) The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

(d) Notification of Employees. The Secretary of Defense and the Administrator of the National Aeronautics and Space Administration shall ensure that contractors and subcontractors of the Department of Defense and the National Aeronautics and Space Administration, as applicable, inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

(e) Exceptions.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)).

(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

(A) relates to an activity or an element of the intelligence community; or

(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.]

([f]d) Construction. - Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

([g]e) Definitions. - In this section:

(1) The term "agency" means an agency named in section 2303 of this title.

(2) The term "head of an agency" has the meaning provided by section 2302(1) of this title.

(3) The term "contract" means a contract awarded by the head of an agency.

(4) The term "contractor" means a person awarded a contract or a grant with an agency.

(5) The term "Inspector General" means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, the Secretary of Defense.

(6) The term "abuse of authority" means the following:

(A) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the Department of Defense or the successful performance of a Department contract or grant.

(B) An arbitrary and capricious exercise of authority that is inconsistent with the mission of the National Aeronautics and Space Administration or the successful performance of an Administration contract or grant.]

Sec. 2324. Allowable costs under defense contracts

- (a) Indirect Cost That Violates a FAR Cost Principle. * * *
 - (b) Penalty for Violation of Cost Principle. * * *
 - (c) Waiver of Penalty. * * *
 - (d) Applicability of Contract Disputes Procedure to Disallowance of Cost and Assessment of Penalty. * * *
 - (e) Specific Costs Not Allowable. * * *
 - (f) Required Regulations. * * *
 - (g) Applicability of Regulations to Subcontractors. * * *
 - (h) Contractor Certification Required. * * *
 - (i) Penalties for Submission of Cost Known as Not Allowable. * * *
 - (j) Contractor To Have Burden of Proof. * * *
 - (k) Proceeding Costs Not Allowable. - (1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding ~~commenced by the United States or a State~~ commenced by the United States, by a State, or by a contractor employee submitting a complaint under section 2409 of this title are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).
- (2) A disposition referred to in paragraph (1)(B) is any of the following:
- (A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).
 - (B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).
 - (C) In the case of any civil or administrative proceeding, ~~the imposition of a monetary penalty~~ the imposition of a monetary penalty or an order to take corrective action under section 2409 of this title by reason of the violation or failure referred to in paragraph (1).

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As amended by section 827
of the NDAA for FY 2013

(D) A final decision -

- (i) to debar or suspend the contractor;
- (ii) to rescind or void the contract; or
- (iii) to terminate the contract for default;

by reason of the violation or failure referred to in paragraph (1).

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the head of the agency or Secretary of the military department concerned that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the agency head or Secretary determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the agency or military department.

(5) (A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B) (i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or

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As amended by section 827
of the NDAA for FY 2013

administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term "proceeding" includes an investigation.

(B) The term "costs", with respect to a proceeding -

(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding; and

(ii) includes -

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor;

(III) the cost of the services of accountants and consultants retained by the contractor; and

(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

(C) The term "penalty" does not include restitution, reimbursement, or compensatory damages.

(1) Definitions. * * *

DFARS Case 2013-D010
 Enhancement of Contractor Whistle-
 blower Protections
 Cross-walk

No.	10 U.S.C. 2409	Proposed DFARS/FAR Location
1	(a)(1) & (a)(1)(A)	203.903(1)
2	(a)(2)	203.903(2)
3	(a)(3)(A)	203.903(3)
4	(a)(3)(B)	203.906(4)
5	(b)(1)	203.905(1)
6	(b)(2)(B)	203.905(3)
7	(b)(3)	203.905(4)
8	(b)(4)	203.905(4)
9	(c)(1)(B)	FAR 3.906(a)
10	(c)(2)	203.906(2)(ii)
11	(c)(4)	FAR 3.906(b)
12	(c)(5)	FAR 3.906(c)
13	(c)(6)	203.905(6)
14	(c)(7)	203.906(5)
15	(d)	252.203-7002
16	(e)	203.900(b)
17	(g)(6)	203.901
	10 U.S.C. 2324	
18	(k)(1)	FAR 31.205-47(b)
19	(k)(2)(C)	FAR 31.205-47(b)

DFARS Case Training Form

Purpose of this form: To identify to DAU the DFARS cases that ~~may require~~ DoD contracting training curricula.

I. To be completed by Committee Chair:

Date: 01/31/2013 **Case No/Title:** 2013-D010, Enhancement of Contractor Whistleblower Protections

DFARS Committee: Suspension, Debarment, and Business Ethics Committee

Committee Chair (name/e-mail/phone number): M. Murphy (b)(6)

Case Manager (Name/e-mail/phone number): Same as above

Subject Matter Experts: Sandra Ross/DPAP/CPIC

Brief Description of Case (include summary from FRN and brief additional background to include scope and impact):

The proposed rule is implementing section 827 of the NDAA for FY 2013. It would modify DFARS subpart 203.9, Whistleblower Protections for Contractor Employees (see attached DFARS and FRN).

II. To be completed by DAU:

Training Required for DoD Contracting Workforce:

Yes _____ (Continue with rest of form)

No _____

Training Mode Recommended (check one or more):

Continuous Learning Module _____

Change to CON course curriculum _____

Community of Practice, BLOG, or Other (please specify): _____

Rapid Deployment Training _____

Email the form, with a copy of the report including tabs, to: Leslie Deneault (DAU) at (b)(6) or (b)(6) and (b)(6)

DFARS Data Collection/Reporting Needs Checklist

Date: 01/31/2013 Case No/Title: 2013-D010, Enhancement of Contractor Whistleblower Protections

Case Manager (Name/e-mail/phone number): Meredith Murphy (b)(6)

(b)(6)

Please provide responses to the following questions. Changes in information technology at both the Integrated Acquisition Environment (IAE) level and in agency contract writing systems may need to be effected before the rule can be implemented.

If any of the questions are answered "yes", please provide this form to the contacts listed below immediately. If the initial analysis confirms information technology changes will be needed, the committee lead will need to provide continuous updates to the IAE to ensure system changes are available when the rule is implemented.

1. Does this case or the underlying statute require collection of data or include any reporting requirements?

Yes No X

2. Will there be any changes in definitions, certification, or thresholds?

Yes X No
(see attached DFARS 203.901.)

3. Will this case establish any new clauses or provisions, or will it change the text of any existing clauses or provisions?

Yes X No
(See attached 252.203-7002.)

4. Will this case affect anything in Part 204 (i.e., line item structure, contractual instrument identification, contract reporting requirements, etc.)?

Yes No X

5. Will this case require a new DD Form, or change an existing DD Form?

Yes No X

DFARS Data Collection/Reporting Needs Checklist

For DFARS Cases send completed document by E-mail to:

- Defense Procurement & Acquisition Policy (DPAP) / Policy – (b)(6)

INITIAL REGULATORY FLEXIBILITY ANALYSIS
DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections

This initial regulatory flexibility analysis has been prepared consistent with 5 U.S.C. 603.

1. Reasons for the action.

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees.

2. Objectives of, and legal basis for, the rule.

These amendments are made by section 827 of the National Defense Authorization Act for Fiscal Year 2013. Section 827 amends 10 U.S.C. 2409 and 10 U.S.C. 2324(k), making the changes applicable to DoD and NASA. Each agency is amending its FAR supplement. This IRFA pertains only to the DFARS proposed rule. DFARS proposes revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

3. Description of and estimate of the number of small entities to which the rule will apply.

Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. Of course, there is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee as a Government prime contractor or subcontractor.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule.

There are no reporting requirements associated with the proposed rule. However, a firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of

an investigation of the accusation, not as a result of a contract clause.

5. Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

Because of the terms used in the statute, DoD is unable to exempt small entities or to establish a dollar threshold for coverage. Regardless of the size of a whistleblower employee's alleged wrongdoing, the employee must be protected from retaliation by his/her employer.

A QUALITY DFARS COMMITTEE REPORT SHOULD INCLUDE:

1. PREPARATION OF THE COMMITTEE REPORT

- a. The report format in the DFARS Operating Guide is followed.
- b. All aspects of the source document, e.g., statute, Executive Order, policy memo, etc., are fully and accurately implemented.
- c. Committee deliberations are explained in the Report (issues identified, rationale pro/con, and resolution). Major alternatives/options that were considered are explained.
- d. Tab A is the DFARS text, or for an interim rule adopted as final without change, include a copy of the Federal Register publication of the interim rule. TAB B is the FRN.
- e. The training form and the data collection/reporting checklist for business systems were sent to the people listed on the forms.
- f. The report and sensitive documents (FRN, rule, IRFA/FRFA, etc.) include the restrictive markings in the footer at the bottom of each page with page numbers, e.g., 1 of 1, 1 of 10, etc.

2. DRAFT DFARS CHANGES

- a. Centered at the top of the page on three separate lines is the case number, rule title, and type of rule. Above the DFARS text, a legend shows the date of the committee report, baseline reference, e.g., DFARS current version of 05/11/11 or as shown on DARS webpage, and how the line-in-line-out changes are marked.
- b. If this is a final rule following a proposed rule, the proposed rule DFARS text changes are marked as the first set of line-in-line-out changes, and second set of changes are the committee changes marked with underlining, showing the change from the proposed rule to the final rule.
- c. The DFARS text changes have been double-checked against the DFARS baseline cited in 2a above for marking accuracy.
- d. All the terms used in the draft DFARS text conform to definitions in 2.101, 202.101, or a relevant subpart.
- e. The impact on commercial items, commercially available off-the-shelf (COTS) items, and use of simplified procedures has been considered. (Include any necessary changes to 212.5, 252.212-7001, and 252.244-7000).
- f. If the draft rule contains a representation or certification that will be included in ORCA, the appropriate changes have been made to 204.1202 and 252.204-7007, and for commercial items 252.212-7000.
- g. A search has been run through the DFARS for the section numbers being changed, to catch cross-references which need updating. Key word search might also reveal other areas that might require updating. Use Hill AFB search engine.

3. FEDERAL REGISTER NOTICE (FRN)

- a. The FRN conforms to each of the templates in DFARS Operating Guide.
- b. The FRN describes the major DFARS text changes.

DFARS Case 2013-D010
Enhancement of Whistleblower Protections
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Draft Proposed Rule

- c. The Regulatory Flexibility Act statement and the Paperwork Reduction Act statement (if any) are supported by available Federal Procurement Data System or other data.
- d. The Initial Regulatory Flexibility Analysis (IRFA) or Final Regulatory Flexibility Analysis (FRFA) – conforms to the statutory format and it discusses the actual impact on small businesses. --OR-- If there is no IRFA/FRFA, there is a strong rationale supporting the assertion of no impact. For a final rule, include a certification in the FRN, which will then be extracted and used to obtain DPAP's signature of the certification document.
- e. Paperwork Reduction Act - for existing collection requirements includes OMB Clearance Numbers/Titles and address any impact by the rule. If new collection requirement, the 60/30 day collection notices are included in the rule preamble.
- f. If a statute is made applicable to COTS items/commercial items/below the simplified acquisition threshold (SAT), the D&Fs are described in the FRN.
- If this rule follows the receipt of public comments:**
- g. If the committee uses its Microsoft Word documents from the proposed/interim rule as the starting point for the final rule, the Word documents have been updated to show the FRN version as actually published in the Federal Register (e.g., include changes made by OMB before publication). The documents have been further updated to show this is now a final rule.
- h. If this rule is following a proposed rule or Advance Notice of Proposed Rulemaking (ANPR), the FRN describes the major changes made to the proposed rule or ANPR.
- i. Where there are multiple public comments on a topic, they have been grouped together under one topic heading.
- j. The description of each comment(s) accurately summarizes that comment.
- k. The committee's response to each comment is adequate.
- l. If a comment's response says that a change to DFARS section X is being made, the change appears in Tab A DFARS text changes and is also addressed in the FRN.
- m. Regulations.gov shows the same public comments as the committee considered (not more or fewer).
- n. The previous rule PDF is an attachment to the case.

4. OTHER REQUIRED TABS.

- a. Paperwork Reduction Act. The Supporting Statement for any information collection requirement is attached (required if draft rule will impose new information collection requirement or affect an existing requirement).
- b. An IRFA or FRFA is attached (unless the FRN justifies that there will be no impact on small entities - in that case a Certification is usually required for DPAP signature).
- c. The DFARS Case Training Form is attached.
- d. The Data Collection/Reporting Checklist for business systems is attached.
- e. Draft D&F (to be signed by Director, DPAP) for application of a rule based on statute to commercial items, COTS items, or below the SAT (required if statute does not impose civil or criminal penalties, does not specifically require application to commercial items, COTS items, or below the SAT)
- f. A list of respondents and matrix of public comments (required if public comments were received from more than two respondents)

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- g. A copy of the statute, Executive order, or other source document used by the committee is attached.
- h. A separate Determination of Urgency, if required.
- i. A marked up copy of any form being changed.
- j. This Report Checklist,

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Wednesday, July 31, 2013 8:34 AM
To: Quinones, Manuel Mr OSD ATL
Subject: RE: NSS edits to DFARS case 2013-D010 -- Enhancement of Contractor Employee Whistleblower Protections
Attachments: 2013-D010 DFARS text (p) NSS Cmmts w DoD notes_073113.doc; 2013-D010 FRN (p)_NSS Cmmts w DoD Notes_073113.doc
Signed By: (b)(6)

Manny, please see my comments on the documents. Most of the NSS comments should not be accepted (and, could you please tell me what the heck NSS is in the first place?).

Thanks, Meredith

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL
Sent: Tuesday, July 30, 2013 5:24 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Williams, Amy, Ms, OSD-ATL
Subject: FW: NSS edits to DFARS case 2013-D010 -- Enhancement of Contractor Employee Whistleblower Protections

Hi Meredith,

Please review and provide me your response as to whether you concur/non-concur with additional comments from OFPP/OIRA. See below email and attached redlines from OFPP.

Thanks,

Manny

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, July 30, 2013 4:29 PM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia
Subject: NSS edits to DFARS case 2013-D010 -- Enhancement of Contractor Employee Whistleblower Protections

Folks – while we are trying to finish up EOP vetting on this case we got some additional comments from NSS. OFPP reviewed their comments and agreed with some and added comments on others in the attached documents.

Please let me know if you have any issues with taking these comments.

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority,” as used in this subpart, means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) **[Policy.]** 10 U.S.C. 2409 prohibits contractors **[or subcontractors]** from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities **[listed at paragraph (2) of this section]**, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, **[an abuse of authority relating to a DoD contract,]** a substantial and specific danger to public health or safety, or a violation of law **[, rule, or regulation]** related to a DoD contract (including the competition for or negotiation of a contract): **[Such reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.]**

[(2) Entities to whom disclosure may be made]

(i) A Member of Congress or a representative of a committee of Congress.

~~(ii) A representative of a committee of Congress.~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

(i)(ii)(v) The Government Accountability Office.

(i)(v) A DoD employee responsible for contract oversight or management.

(vi) An authorized official of an agency or the Department of Justice **[or other law enforcement agency]**.

[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(3[4]) [Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

[(a) Any employee of a contractor or subcontractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the agency that awarded the contract.]

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The ~~substantial~~ violation of law, rule, or regulation giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed; and

(5) The specific nature and date of the reprisal.

[(c) ~~In addition, to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.]~~

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

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Comment [m1]: Agree with OFPP; language was copied from existing FAR 3.904. No change is necessary.

Comment [WJ2]: "Substantial" is consistent with regulatory language at FAR 3.904 Procedures for filing complaints.

The Rules and regulations are governed by the underlying law, so not sure this add is necessary

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Comment [m3]: Paragraph (c) is no longer necessary and should be struck through, given the additional material that has been inserted above in this section.

(1) ~~Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the [DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation[~~ **e the complaint].**

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period **[up to 180 days,]** to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

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... ANY DISTRIBUTION OF THIS DOCUMENT MUST CONTAIN THIS LEGEND. ...

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221, (burden of proof in Individual Right of Action in Certain Reprisal Cases) in shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

~~(i) S[] shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and [shall either issue an order denying relief or shall take one or more of the following actions:~~

- ~~(i) Order the contractor to take affirmative action to abate the reprisal.~~
- ~~(ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.~~
- ~~(iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.]~~

~~(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).~~

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after

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the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [**An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.**]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration executive official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration executive branch official making the request.]

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights not otherwise provided by law to disclose classified information.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

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Comment [WJ3]: This language is in the law and this rule pertains to DoD contracts.

However, we do wonder about contracts awarded by another agency on behalf of DoD and funded by DoD.

Comment [m4]: Agree with DFPP. The language in the law (at 10 U.S.C. 2409(a)(3)(B)), is "a Department or Administration official." "DoD" is our (DFARS) language for "Department." No change should be made.

Comment [NYF5]: Is this language necessary? The same language is in 203.903 on "Policy" above.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(~~JAN-2009~~[DATE])

[a] The Contractor shall inform its employees in writing, **in the predominant native language of the workforce,** of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] **The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]**

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.

o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.

o Fax: 571-372-6094.

o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

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This is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings. Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to Title 10 agencies.

Section 828, Pilot Program for Enhancement of Contractor Whistleblower Protections, of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the use of FAR 3.901 through 3.906. The FAR will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239).

Section 827(g) amends 10 U.S.C. 2324(k). In a like manner, section 828(d) amends 41 U.S.C. 4310 to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower section (10 U.S.C. 2409 or 41

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U.S.C. 4712, respectively). See FAR Case 2013-017, entitled Allowability of Legal Costs for Whistleblower Proceedings.

II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409, as amended. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

(a)(1): Amended grounds for disclosure.

(a)(2): Amended persons and bodies to whom disclosure ~~could~~ result in reprisal may be made and for which reprisal is prohibited.

(a)(3)(A): Provided a definition of who is deemed to have made a disclosure, see 203.903(3).

Comment [A1]: Don't care, this is purely editorial.

Comment [A2]: The prohibition of reprisal element is listed below.

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(a) (3) (B): Added prohibition against reprisal even if undertaken at request of ~~a DoD or Administration~~ an executive branch official.

(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b) (2) (B): Provided a reporting timeframe for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit ~~from~~ for bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

Comment [A3]: This language is in the law and this rule pertains to DoD contracts.

However, we do wonder about contracts awarded by another agency on behalf of DoD and funded by DoD.

Comment [A4]: Do not change; does not match up with the language in the law. See my comment on page 6 of the DFARS text.

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(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d): Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

~~Minimal~~ Amendments are proposed for DFARS 203.903, Policy.

The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating

Comment [A5]: Would not characterize as minimal.

Comment [A6]: Fine by me.

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to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is revised to add the specific procedures for filing complaints from FAR 3.904. ~~unchanged by the this proposed rule.~~ DFARS 203.905 is proposed to be amended to address

specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided

Comment [A7]: Recommend amending to add "rule, or regulation" after "law" to match amendment in 203.903. Also may wish to consider amending to incorporate suggested edits in 203.904.

Comment [A8]: Agree. This statement has not been correct since the last round of OFPP comments.

Comment [A9]: This is not correct. They do need to add a description for 203.904.

A description of 203.903 amendment language is above.

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by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O.

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12866, Regulatory Planning and Review, dated September 30, 1993.

This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k). Section 827 changes are applicable to DoD and NASA. Each agency will amend its FAR supplement to

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incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have a situation occur that requires an employee to use the whistleblower provisions. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

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There are no reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. A firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit

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such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection additional requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Tuesday, July 30, 2013 5:24 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Williams, Amy, Ms, OSD-ATL
Subject: FW: NSS edits to DFARS case 2013-D010 -- Enhancement of Contractor Employee Whistleblower Protections
Attachments: 2013-D010 FRN (p)_revised 062513withOFPP com.doc; 2013-D010 DFARS text (p) revised 062513wOFPPreview.doc
Signed By: (b)(6)

Hi Meredith,

Please review and provide me your response as to whether you concur/non-concur with additional comments from OFPP/OIRA. See below email and attached redlines from OFPP.

Thanks,

Manny

-----Original Message-----

From: Seehra, Jasmeet (mailto:(b)(6))
Sent: Tuesday, July 30, 2013 4:29 PM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia
Subject: NSS edits to DFARS case 2013-D010 -- Enhancement of Contractor Employee Whistleblower Protections

Folks – while we are trying to finish up EOP vetting on this case we got some additional comments from NSS. OFPP reviewed their comments and agreed with some and added comments on others in the attached documents.

Please let me know if you have any issues with taking these comments.

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Proposed Rule

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)].

[(b) This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority,” as used in this subpart, means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) **[Policy.]** 10 U.S.C. 2409 prohibits contractors **[or subcontractors]** from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the ~~following entities~~ **[listed at paragraph (2) of this section]**, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, **[an abuse of authority relating to a DoD contract,]** a substantial and specific danger to public health or safety, or a violation of law **[, rule, or regulation]** related to a DoD contract (including the competition for or negotiation of a contract): **[. Such reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.]**

[(2) Entities to whom disclosure may be made]

(i) A Member of Congress or a representative of a committee of Congress.

~~(ii) A representative of a committee of Congress.~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

~~(i[iii]v)~~ The Government Accountability Office.

~~(i[i]v)~~ A DoD employee responsible for contract oversight or management.

(vi) An authorized official of an agency or the Department of Justice **[or other law enforcement agency].**

~~(vii)~~ A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

(a) Any employee of a contractor or subcontractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The ~~substantial~~ violation of law, rule, or regulation giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed; and

(5) The specific nature and date of the reprisal.

(c)]In addition, ~~to the procedures at FAR 3.904,~~ any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

~~The following procedures apply to DoD instead of the procedures at FAR 3.905:~~

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Comment [WJ1]: "Substantial" is consistent with regulatory language at FAR 3.904 Procedures for filing complaints.

The Rules and regulations are governed by the underlying law, so not sure this add is necessary

(1) ~~Unless t~~The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days.] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

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(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221, (burden of proof in Individual Right of Action in Certain Reprisal Cases) in shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

~~(i) S[] shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and [shall either issue an order denying relief or shall take one or more of the following actions:~~

- (i) Order the contractor to take affirmative action to abate the reprisal.
- (ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
- (iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.]

~~(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).~~

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after

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the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

branch
[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration ~~an executive official~~, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration ~~executive branch~~ *branch* official making the request.]

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights not otherwise provided by law to disclose classified information.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

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Comment [WJ2]: This language is in the law and this rule pertains to DoD contracts.

However, we do wonder about contracts awarded by another agency on behalf of DoD and funded by DoD.

Comment [NYF3]: Is this language necessary? The same language is in 203.903 on "Policy" above.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN-2000[DATE])**

[a] The Contractor shall inform its employees in writing [in the predominant native language of the workforce.] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.

o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.

o Fax: 571-372-6094.

o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

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This is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings. Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to Title 10 agencies.

Section 828, Pilot Program for Enhancement of Contractor Whistleblower Protections, of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the use of FAR 3.901 through 3.906. The FAR will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239).

Section 827(g) amends 10 U.S.C. 2324(k). In a like manner, section 828(d) amends 41 U.S.C. 4310 to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower section (10 U.S.C. 2409 or 41

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U.S.C. 4712, respectively). See FAR Case 2013-017, entitled Allowability of Legal Costs for Whistleblower Proceedings.

II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409, as amended. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows: .

(a) (1): Amended grounds for disclosure,

(a) (2): Amended persons and bodies to whom disclosure ~~could~~ result in reprisal may be made and for which reprisal is prohibited.

(a) (3) (A): Provided a definition of who is deemed to have made a disclosure, see 203.903(3).

Comment [A1]: The prohibition of reprisal element is listed below.

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(a) (3) (B): Added prohibition against reprisal even if undertaken at request of ~~a DoD or Administration~~ an executive branch official.

Comment [A2]: This language is in the law and this rule pertains to DoD contracts

(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

However, we do wonder about contracts awarded by another agency on behalf of DoD and funded by DoD.

(b) (2) (B): Provided a reporting timeframe for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit ~~from~~ for bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

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(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d): Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy.

The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating

Comment [A3]: Would not characterize as minimal.

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to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by ~~the~~ this proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided

Comment [A4]: Recommend amending to add ", rule, or regulation" after "law" to match amendment in 203.903. Also may wish to consider amending to incorporate suggested edits in 203.904.

Comment [A5]: This is not correct. They do need to add a description for 203.904.

A description of 203.903 amendment language is above.

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by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

The clause prescribed at DFARS 203.970 is 252.203 7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O.

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12866, Regulatory Planning and Review, dated September 30, 1993.

This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k). Section 827 changes are applicable to DoD and NASA. Each agency will amend its FAR supplement to

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incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have a situation occur that requires an employee to use the whistleblower provisions. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

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There are no reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. A firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit

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such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection additional requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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Quinones, Manuel Mr OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Monday, July 15, 2013 4:04 PM
To: 'Seehra, Jasmeet'
Subject: RE: DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings
Attachments: 2013-D010 DFARS text_OIRA revised 071513.doc; 2013-D010 FRN_OIRA_revised 071513.doc
Signed By: (b)(6)

Jasmeet,

Attached are the clean copies of 2013_D010 and they have been uploaded in rocis this afternoon.

Please let me know if you need anything else.

Thanks,

V/r,

Manny

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Friday, July 12, 2013 11:26 AM
To: Quinones, Manuel Mr OSD ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Stewart, Kortnee R Ms OSD ATL; Wong, Ray; Williams, Amy, Ms, OSD-ATL
Subject: RE: DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings

So I chatted with OFPP -- let's get 2013-D010 uploaded into rocis -- it's open for amendment.

I'll use these versions of 2013-D022 to start interagency circulation.

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL [mailto:(b)(6)]
Sent: Thursday, July 11, 2013 4:40 PM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules; Wise, Julia; Stewart, Kortnee R Ms OSD ATL; Wong, Ray; Williams, Amy, Ms, OSD-ATL
Subject: RE: DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings

Jasmeet,

Please find attached, as requested, the revised (clean copy) of the FRN for 2013-D022, Allowability of Legal costs for Whistleblower Proceedings. I have revised the FRN to state that "Title 10 agencies are required by the terms of section 827 (i)(2) to revise their respective FAR supplements." Also included is the redline version with comments and responses for 2013-D022.

Finally, attached for your consideration, is the revised (clean copy) of the FRN for 2013, D010, Enhancement of Contractor Whistleblower Protections.

Both 2013-D022 and 2013-D010 FRNs were sent to us in earlier email.

Please contact me if you need anything else.

V/r,

Manny Quinones

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Thursday, July 11, 2013 11:13 AM
To: Quinones, Manuel Mr OSD ATL; Williams, Amy, Ms, OSD-ATL; Stewart, Kortnee R Ms OSD ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Wong, Ray
Subject: DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings

Please see the correction on page 4. If DOD can make this change and send me clean versions ASAP, I can start interagency circulation today.

-----Original Message-----

From: Wise, Julia
Sent: Thursday, July 11, 2013 11:02 AM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules; Wong, Ray
Subject: FW: DOD response to OFPP comments on DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings

Ray made one correction on page 4, but is he fine if they do not accept it. See the top of page 4 -re DOD being one of title 10 agencies.

-----Original Message-----

From: Seehra, Jasmeet
Sent: Tuesday, July 09, 2013 12:18 PM
To: Wise, Julia
Cc: FN-OMB-DFAR Rules
Subject: DOD response to OFPP comments on DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings

Ok to take in?

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL [mailto:(b)(6)]
Sent: Tuesday, July 09, 2013 11:49 AM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules; Wise, Julia; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL

Subject: RE: OFPP comments on DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings

Jasmeet,

DoD concurs with OFPP edits subject to a few minor changes to the preamble. DoD accepts all edits to the DFARS text.

Please find attached (1) the two redline versions (FRN & text) of OFPP comments with DoD responses along with (2) the revised (clean copies) of the FRN and the DFARS text.

Please let me know if you need anything else.

V/r,

Manny Quinones

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]

Sent: Monday, July 08, 2013 3:37 PM

To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL

Cc: FN-OMB-DFAR Rules; Wise, Julia

Subject: FW: OFPP comments on DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings

Folks -- are you ok with OFPP edits? If so, can I get clean versions for agency circulation? We have an ok to upload into rocis -- but only if you and OFPP are ok with the revisions to the documents. I circulated the FAR rule this morning and would like to get the DFAR rule out at roughly the same time.

-----Original Message-----

From: Seehra, Jasmeet

Sent: Wednesday, July 03, 2013 4:03 PM

To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL (b)(6) 'Williams, Amy, Ms, OSD-ATL'

Cc: FN-OMB-DFAR Rules; Wise, Julia

Subject: OFPP comments on DFARS Cases 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings

Please see the attached documents and let me know if you can accept these edits.

**Government
Executive**

Defense Whistleblower Protections Expand to Subcontractors

By Charles S. Clark

July 1, 2013

Monday, July 1, marks the first day employees of subcontractors on Defense contracts enjoy new protections against reprisals from supervisors for reporting waste or fraud, as required under the 2013 National Defense Authorization Act signed by President Obama in January.

"Previously, subcontractors could complain to a boss, but not to a government office," noted Marguerite Garrison, deputy inspector general for administrative investigations at the Defense Department's inspector general's office, who met with reporters Thursday to get out the word.

The new law expands protections for whistleblowers against reprisals for disclosures they make "to a court, grand jury, management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover or address misconduct," her guidance explains. Workplace information campaigns must be in the language of the workforce.

The new protections -- long favored by whistleblower advocacy groups and pursued by Sen. Claire McCaskill, D-Mo., also alter the burden of proof on a preponderance of evidence to "bring it up to par with protections in other statutes," said Nilgun Tolek, the Pentagon IG's director of whistleblower reprisal investigations. "Congress has been going in this direction for a long time."

The new protections, however, are not retroactive, the officials explained, so they don't apply to contracts let before July 1, nor to task orders added before that date. And the regulations are still being incorporated into the Defense supplement to the Federal Acquisition Regulation. "The language is all wrapped up in contract law," Garrison said. "It's a long-term implementation that plays out over time."

Allegations the law might affect, said Tolek, would include, for example, "when someone sees a bunch of equipment that's part of the contract work being thrown out when it's perfectly good." The employee could raise his or her concern with the Defense Contract Management Agency, and "whether they're right or not, they're protected from the company" reprisals. Other examples include billing against one contract the work done on another contract, overbilling, or swapping in young people on assignments when they don't have the advertised expertise, she said.

The IG's administrative investigations office does not handle criminal cases under qui tam or the False Claims Act, which are done by the IG's Defense Criminal Investigative Service.

In anticipation of the change, the IG administrative investigations staff grew by 30 percent to 40 percent in the past two years, Garrison said, and they expect a rise in the number of complaints. In 2006, the office received

only 16 complaints to its hotline -- "the bellybutton of the DoD inspector general," she said. By 2012, the number had grown to 85, though only one was substantiated. "Whether we'll see an increase in complaints, we anticipate additional investigators and expect to do the investigations in-house" rather than delegate them to the service IGs, Garrison said.

"Even if we don't get more complaints, we will do more investigations because of threshold issues in the management chain that had prevented us in the past from going forward," which made the workload statistics look negative, added Tolek. And many of the complaints do not pan out --one would-be whistleblower thought he was a Defense contractor but actually was doing work for the State Department, she said.

Garrison and her team have been speaking to companies and industry councils on the need to go beyond the previous practice of putting posters up in the workplace and on the company website to inform workers of their whistleblower protections. "Soldiers, sailors, Marines and airmen call the hotline because they know they have protection," Garrison said, "but contractors need an education process."

Garrison says she still has to educate her own workforce on how to read a contract. "We're in uncharted territory. Will we get it right 100 percent of the time? No. We will make mistakes, but will learn as we go."

(Image via [AlexRoz/Shutterstock.com](http://www.alexroz.com))

By Charles S. Clark

July 1, 2013

<http://www.govexec.com/contracting/2013/07/defense-whistleblower-protections-expand-subcontractors/65801/>

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Monday, July 01, 2013 6:07 PM
To: Quinones, Manuel Mr OSD ATL
Subject: DFARS Case 2013-D010, Revised IRFA
Attachments: 2013-D010 (P) IRFA_070113.docx
Signed By: (b)(6)

Manny, the attached IRFA has been revised to match up with the latest version of the FRN (which incorporates OFPP-provided changes).

Regards,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Monday, July 01, 2013 5:56 PM
To: Quinones, Manuel Mr OSD ATL
Subject: DFARS Case 2013-D007, Further Implementation of Trafficking in Persons Policy
Signed By: (b)(6)

Importance: High

Manny,

Please let OFPP and OIRA know that the May 24th response accepting the HHS comment about adding the PROTECT Act as a reason for publishing this proposed DFARS case was sent in error.

As HHS explains, the PROTECT Act was enacted to prohibited sex tourism, a subject which is important but is completely unrelated to DoD policies for combating trafficking in persons. DoD will not make the proposed HHS addition to the FRN.

Regards,
Meredith

**HHS Comments to Defense Federal Acquisition Regulation Supplement:
Further Implementation of Trafficking in Persons Policy**

Suggested Changes

1. On page 6 of the Department of Defense Federal Register notice, in the second paragraph under the heading "IV. Regulatory Flexibility Act," ACF suggests the addition highlighted here:

This rule proposes to amend the Defense Federal Acquisition Regulation Supplement to require DoD contractors to report violations of The Trafficking Victims Protection Act of 2000 and its subsequent reauthorizations, and Section 105 of the PROTECT Act of 2003 without delay whenever they become aware of violations regarding DoD contracts or subcontracts.

BACKGROUND:

The PROTECT Act strengthens laws punishing offenders who travel abroad to prey on children ("sex tourism"), which includes child sex trafficking.

2. ACF also suggests an additional change in reference to hotlines specific to human trafficking: Include posting the National Human Trafficking Resource Center.

BACKGROUND:

Section 1203 of the Trafficking Victims Protection Act of 2013 (woven into the reauthorization of the Violence Against Women Act) states:

(a) Task Force Activities- Section 105(d)(6) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7103(d)(6)) is amended by inserting ', and make reasonable efforts to distribute information to enable all relevant Federal Government agencies to publicize the National Human Trafficking Resource Center Hotline on their websites, in all headquarters offices, and in all field offices throughout the United States' before the period at the end.

Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Tuesday, June 25, 2013 2:16 PM
To: Murphy, Meredith K Ms OSD ATL
Subject: FW: DFARS whistleblower rule -- Case 2013-D013
Attachments: 2013-D010 FRN (p) revised 062513.doc; 2013-D010 DFARS text (p) revised 062513.doc
Signed By: (b)(6)

Meredith,

Here's your copy for the records. Please use this as our latest baseline. Also please update DARMIS.

Thanks,

Manny

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL
Sent: Tuesday, June 25, 2013 2:12 PM
To: 'Seehra, Jasmeet'
Cc: Stewart, Kortnee R Ms OSD ATL
Subject: RE: DFARS whistleblower rule -- Case 2013-D013

Jasmeet,

Please find attached latest revised FRN and DFARS rule for 2013-D010. Revised documents have been uploaded into rocis.

Please let me know if there is anything else you need.

V/r,

Manny

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, June 25, 2013 10:15 AM
To: Quinones, Manuel Mr OSD ATL
Cc: FN-OMB-DFAR Rules
Subject: RE: DFARS whistleblower rule -- Case 2013-D013

Can I get the cleaned up files this morning for this case?

-----Original Message-----

From: Seehra, Jasmeet
Sent: Tuesday, June 25, 2013 9:26 AM
To: Quinones, Manuel Mr OSD ATL
Cc: FN-OMB-DFAR Rules

Subject: DFARS whistleblower rule -- Case 2013-D013

Please upload the revised documents.

-----Original Message-----

From: Wise, Julia
Sent: Tuesday, June 25, 2013 9:22 AM
To: Seehra, Jasmeet
Subject: FW: DFARS whistleblower rule -- Case 2013-D013

This FRN represents all of OFPP changes that we requested and they agreed to accept. They did not accept a few changes, but I'm fine with them not doing so. Call me if you have questions. Thanks.

-----Original Message-----

From: Seehra, Jasmeet
Sent: Tuesday, June 25, 2013 8:56 AM
To: Wise, Julia
Subject: FW: DFARS whistleblower rule -- Case 2013-D013

Here's what they are saying.

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL [mailto:(b)(6)]
Sent: Monday, June 24, 2013 6:37 PM
To: Seehra, Jasmeet
Subject: RE: DFARS whistleblower rule -- Case 2013-D013

Jasmeet,

Responses to both OFPP and WH GC are incorporated in the revised FRN and text documents.

On 6-19, we received comments to the FRN from OFPP recommending additional changes in the FRN to make reader aware of two related, but independent, FAR cases. We have accepted those OFPP recommended changes (see FRN note below).

On 6-24, we received two comments to the DFARS text/rule from WH GC (initials DJS) regarding the definition of reprisal and such. We accepted their viewpoint and have deleted the definition of reprisal (see DFARS text note below).

I hope this helps. If not, I'm here in the office--(b)(6) Please feel free to call me.

Manny

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Monday, June 24, 2013 6:03 PM
To: Quinones, Manuel Mr OSD ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Williams, Amy, Ms, OSD-ATL; Murphy, Meredith K Ms OSD ATL; Stewart, Kortnee R Ms OSD ATL
Subject: RE: DFARS whistleblower rule -- Case 2013-D013

I'm getting a bit lost here. Where are you in responding to OFPP comments sent on 6/19?

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL [mailto:(b)(6)]

Sent: Monday, June 24, 2013 4:53 PM

To: Seehra, Jasmeet

Cc: FN-OMB-DFAR Rules; Wise, Julia; Williams, Amy, Ms, OSD-ATL; Murphy, Meredith K Ms OSD ATL; Stewart, Kortnee R Ms OSD ATL

Subject: RE: DFARS whistleblower rule -- Case 2013-D013

Jasmeet,

Regarding the two comments from WH GC, DoD submits the following:

DFARS text; WH GC comments 6-24 ().

1. GC comment on pg 2 of 7; we have determined that the definition of "reprisal" is not required and therefore being removed. Consequently, I have made corresponding changes to text after definition of "Abuse of authority" and at 203.903 (1) Policy, added the word "Such" to last sentence in red.

2. GC comment on pg 3 of 7; Section 203.904 item 4 has been revised to incorporate GC recommended edit. DFARS 203.904 (a) and (b) are straight out of FAR 3.904.

FRN; OFPP comment 6-19-13.

We have accepted additional background information on pages 3 & 4 addressing FAR cases 2013-017 and 2013-015. See attached red-line FRN with changes accepting OFPP comments of 6-19-13.

Please contact me for any questions and advise when to submit clean copies of FRN and rule.

V/r,

Manny Quinones

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]

Sent: Monday, June 24, 2013 12:25 PM

To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL

Cc: FN-OMB-DFAR Rules; Wise, Julia

Subject: DFARS whistleblower rule -- Case 2013-D013

Please see the attached files with comments from WH GC

DFARS Case 2013-D010
Enhancement of Contractor Whistleblower Protections
Proposed Rule

**PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST**

* * * * *

**SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES**

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[,] and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)[].

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(1) Relates to an activity or an element of the intelligence community; or

(2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

“Abuse of authority,” as used in this subpart, means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

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ANY DISTRIBUTION OF THIS DOCUMENT MUST CONTAIN THIS LEGEND.

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) **[Policy.]** 10 U.S.C. 2409 prohibits contractors **[or subcontractors]** from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the ~~following~~ entities **[listed at paragraph (2) of this section]**, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, **[an abuse of authority relating to a DoD contract,]** a substantial and specific danger to public health or safety, or a violation of law **[, rule, or regulation]** related to a DoD contract (including the competition for or negotiation of a contract): **[. Such reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.]**

[(2) Entities to whom disclosure may be made]

(i) A Member of Congress or a representative of a committee of Congress.

~~(ii) A representative of a committee of Congress.~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

~~(i[iii]v)~~ The Government Accountability Office.

~~([i]v)~~ A DoD employee responsible for contract oversight or management.

(vi) An authorized official of an agency or the Department of Justice **[or other law enforcement agency].**

~~[(vi)]~~ A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

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[(3) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [Contracting officer actions.]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

[(a) Any employee of a contractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the agency that awarded the contract.]

(b) The complaint shall be signed and shall contain—

- (1) The name of the contractor;**
- (2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;**
- (3) The substantial violation of law giving rise to the disclosure;**
- (4) The nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed; and**
- (5) The specific nature and date of the reprisal.**

(c)]In addition, ~~to the procedures at FAR 3.904,~~ any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

~~The following procedures apply to DoD instead of the procedures at FAR 3.905:~~

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in

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203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the DoD Inspector General will ~~make a determination as to whether a complaint is frivolous or merits further investigation~~ [e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days,] to which the person submitting the complaint agrees.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

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(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221, Individual Right of Action in Certain Reprisal Cases) in shall be controlling for the purposes of an investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

—(i) S[s]hall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and shall take one or more of the following actions:

- (i) Order the contractor to take affirmative action to abate the reprisal.
- (ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
- (iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with , bringing the complaint regarding the reprisal, as determined by the head of the agency.]

~~(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).~~

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

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ANY DISTRIBUTION OF THIS DOCUMENT MUST CONTAIN THIS LEGEND.

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights not otherwise provided by law to disclose classified information.]

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

* * * * *

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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* * * * *

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN-2009[DATE])**

[a] The Contractor shall inform its employees in writing[, **in the predominant native language of the workforce,**] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[b] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.

o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.

o Fax: 571-372-6094.

o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

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This is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings. Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to Title 10 agencies.

Section 828, Pilot Program for Enhancement of Contractor Whistleblower Protections, of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the use of FAR 3.901 through 3.906. The FAR will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239).

Section 827(g) amends 10 U.S.C. 2324(k). In a like manner, section 828(d) amends 41 U.S.C. 4310 to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower section (10 U.S.C. 2409 or 41

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U.S.C. 4712, respectively). See FAR Case 2013-017, entitled Allowability of Legal Costs for Whistleblower Proceedings.

II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409, as amended. The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

- A. Section 827 changes to 10 U.S.C. 2409.** Section 827 revised 10 U.S.C. 2409 as follows:
- (a)(1): Amended grounds for disclosure.
 - (a)(2): Amended persons and bodies to whom disclosure could result in reprisal.
 - (a)(3)(A): Provided a definition of who is deemed to have made a disclosure, see 203.903(3).
 - (a)(3)(B): Added prohibition against reprisal even if undertaken at request of a DoD or Administration.

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(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b) (2) (B): Provided a reporting timeframe for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

(c) (7): Prohibited any waiver of the rights and remedies in the statute.

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(d) Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury,

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and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

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The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

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IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k). Section 827 changes are applicable to DoD and NASA. Each agency will amend its FAR supplement to incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to

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subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have a situation occur that requires an employee to use the whistleblower provisions. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. A firm accused of retaliating against an employee whistleblower is

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likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

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The rule does not contain any information collection additional requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Wednesday, June 19, 2013 6:06 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Stewart, Kortnee R Ms OSD ATL; Quinones, Manuel Mr OSD ATL
Subject: FW: Additional OFPP comments on DFAR Case 2013-D010 Whistleblower Protection
Attachments: 2013-D010 (p) DFARS revised text w changes & comments_061113.doc; 2013-D010 (p) FRN revised per OFPP comments_061913.doc
Signed By: (b)(6)

Please see an additional change in the DFARS FRN to make the reader aware of two related, but independent, FAR cases underway to address section 828 of the NDAA FY 13.

----- Original Message -----

From: Quinones, Manuel Mr OSD ATL [mailto:(b)(6)]
Sent: Tuesday, June 11, 2013 06:14 PM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules; Wise, Julia; Stewart, Kortnee R Ms OSD ATL (b)(6); Williams, Amy, Ms, OSD-ATL (b)(6)
Subject: RE: OFPP comments on DFAR Case on Whistleblowing

Jasmeet,

Please find attached DoD responses to OFPP comments of 5/28/13.

Please contact me for any questions and let me know when to submit clean copies of the revised DFARS text and FRN.

Thank you.

V/r,

Manny Quinones
OUSD(AT&L) DPAP/DARS

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, May 28, 2013 2:28 PM
To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia
Subject: OFPP comments on DFAR Case on Whistleblowing

Please see the attached files with OFPP edits.

19

06/2013 Revision

(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Whistleblower Protections (DFARS Case 2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date
60 days after date of publication in the FEDERAL REGISTER], to
be considered in the formation of a final rule.

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06/11/2013 Revision

ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

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submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013), effective 180 days after enactment. Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

Comment [A1]: Is there an effective date?

Comment [A2]: Effective 180 days after enactment.

Comment [A3]: Please explain what the purpose is of these changes.

Comment [A4]: We cannot explain what the purpose or intent was of the Congress in making these changes. There is no relevant report language, so we could only speculate.

Comment [A5]: Ignore my comment in the text.

Please include the DFARS case number as title if known.

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This is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings.] Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to Title 10 agencies.

Section 828, Pilot Program for Enhancement of Contractor Whistleblower Protections, of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a "pilot program" (4-year program) to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors for the next four years and suspend FAR 3.901 through 3.906. The FAR will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239). Section 827(g) amends 10 U.S.C. 2324(k) and section 828(d) similarly amends 41 U.S.C. 4310 to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower section (10 U.S.C. 2409 or 41

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U.S.C. 4712, respectively see FAR Case 2013-017, Allowability of Legal Costs for Whistleblower Proceedings.

II. Discussion

The current FAR addresses this subject at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409 [, as amended.] ~~and two prior amendments to it.~~ The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

- (a) (1): Amended grounds for disclosure.
- (a) (2): Amended persons and bodies to whom disclosure could result in reprisal.

(a) (3) (A): Definition of who is deemed to have made a disclosure see 203.903(3).

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Comment [A6]: Please include the titles and sections of the two prior amendments.

Comment [A7]: Where is this in the DFARS text?

Comment [A8]: Please see 203.903(3).

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(a) (3) (B): Prohibition against reprisal even if undertaken at request of a DoD or Administration official~~Definition of what is excluded from the definition of reprisal.~~

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Comment [A9]: Where is this in the DFARS text?

Comment [A10]: Please see amended description at left.

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(b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b) (2) (B): Provided a reporting timeframe ~~line~~ for any additional period for investigation.

(b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b) (4): Added a three-year time limit for bringing a complaint.

(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

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(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" and "reprisal" are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating

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to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury, and **certain** contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided

Comment [A11]: Why is the word "certain" added?

Comment [A12]: The word "certain" has been added because only some, not all, contractor or subcontractor officials are covered. The only officials covered are a "management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct." A disclosure to a co-worker who had no such responsibilities would not be covered by subpart 203.9.

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by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O.

Comment [A13]: How will this be determined? Use same phrase from trafficking case - "significant portion" is used in the trafficking rule.

Comment [A14]: The term "predominant native language of the workforce" originates from statute. We believe this was phrased as it is, so that a contractor would not be compelled to provide the notifications in dozens of different languages, i.e., if 70% of employees come from English-speaking countries, then notifications in English would meet the requirement.

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12866, Regulatory Planning and Review, dated September 30, 1993.

This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their

employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k). ~~7, making the~~ Section 827 changes are

applicable to DoD and NASA. Each agency will amend ~~is amending~~

Comment [A15]: Although disclosure is not new, it now flows to subcontractors. So is this a new reporting requirement for primes?

Comment [A16]: There are no reporting requirements for prime contractors or subcontractors.

Comment [A17]: What about Coast Guard.

Comment [A18]: Only DoD and NASA are specifically mentioned in section 827. We understand that DHS is still determining applicability to the Coast Guard.

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its FAR supplement to incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will ~~have~~ have a situation occur that requires an employee to use the whistleblower provisions, ~~employees~~.

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Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

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There are ~~[no] no minimal~~ reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. ~~However, a~~ firm accused of retaliating against an employee whistleblower is likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit

Comment [A19]: Disagree. There are NO required contractor or subcontractor reporting requirements at all. What MAY be asked for in a particular instance is not within the purview here.

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such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Friday, July 12, 2013 11:55 AM
To: Quinones, Manuel Mr OSD ATL
Subject: RE: DFARS whistleblower rule -- Case 2013-D010, Enhancement of Contractor Employees Whistleblower Protections
Attachments: 2013-D010 FRN_OFPP edits 071113_DoD Revs 071213.doc
Signed By: (b)(6)

Please see my mark-up of OFPP's latest changes, along with comments explaining the reasons for my edits.

Regards,
Meredith

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL
Sent: Friday, July 12, 2013 10:28 AM
To: Murphy, Meredith K Ms OSD ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: Fw: DFARS whistleblower rule -- Case 2013-D010, Enhancement of Contractor Employees Whistleblower Protections

Best Regards,

Manny Quinones

(b)(6)

----- Original Message -----

From: Seehra, Jasmeet [\(b\)\(6\)](mailto:(b)(6))
Sent: Friday, July 12, 2013 09:20 AM
To: Quinones, Manuel Mr OSD ATL
Cc: FN-OMB-DFAR Rule (b)(6) Wise, Julia (b)(6)
Subject: DFARS whistleblower rule -- Case 2013-D010, Enhancement of Contractor Employees Whistleblower Protections

Please see the attached files -- is this ok for DOD?

-----Original Message-----

From: Wise, Julia
Sent: Thursday, July 11, 2013 1:08 PM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules
Subject: FW: DFARS whistleblower rule -- Case 2013-D010, Enhancement of Contractor Employees Whistleblower Protections

I made minor changes in the preamble on page 1 and 4. No changes to the text.

(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Employees Whistleblower Protections (DFARS Case
2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement a section of the
National Defense Authorization Act for Fiscal Year 2013 that
statutory amendments to the enhances whistleblower protections
for contractor and subcontractor employees.

Comment [A1]: Without our change, it's not
actually a sentence.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date

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provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

~~The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) enacted enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of NDAA for titles 10 and 41 agencies, respectively. These enhanced whistleblower protections are being implemented by two DFARS (for title 10 agencies) and two FAR (for title 41 agencies) cases which are independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes.~~

Comment (A2): This common introductory paragraph provides overall context for the NDAA '13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA '13.

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~~DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure of certain information." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.~~

Comment [A3]: ~~Commented out.~~

Comment [A4]: Accepted.

Comment [A5]: Deleting this paragraph because it is now redundant to the revised "Background" material.

Comment [A6]: Otherwise, we use "enacted" twice in the same sentence (and the same line).

Comment [A7]: Without this change, no one will know what titles 10 and 41 belong to.

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The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) enacted included enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of the NDAA for titles 10 and 41 agencies subject to title 10 and title 41 of the United States Code, respectively. These enhanced whistleblower protections and the associated cost principles changes are being implemented by two DFARS (for DoD

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~~only one of the title 10 agencies), title 10 agencies) and two FAR (for title 41 agencies) cases, which are independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes and because the title 41 statute is only a four-year pilot program.~~

~~This Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324,~~ is being addressed in DFARS Case 2013-D022,

Allowability of Legal Costs for Whistleblower Proceedings.

Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to ~~title 10 agencies.~~

Section 828, "~~Pilot Program for Enhancement of Contractor [employee whistleblower] protections from reprisal for disclosure of certain information,~~" of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend ~~the effectiveness of 41 U.S.C. 4705, "Protection of contractor employees from~~

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Comment [A8]: Delete. To do otherwise would raise more questions than it would answer.

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Comment [A9]: Delete. Differences are not minor.

Comment [A10]: This common introductory paragraph provides overall context for the NDAA'13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA'13.

Comment [A11]: Copy except for changes highlighted in yellow. DFARS applies only to DoD, not other title 10 agencies.

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Comment [A12]: Accepted.

Comment [A13]: Complete title

Comment [A14]: Accepted.

Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Friday, July 12, 2013 11:40 AM
To: Murphy, Meredith K Ms OSD ATL
Subject: FW: DFARS whistleblower rule -- Case 2013-D010, Enhancement of Contractor Employees Whistleblower Protections
Attachments: 2013-D010 DFARS text_OFPP Revs_DoD edits_070913.doc; 2013-D010 FRN_OFPP Revs_OFPPedits_071113.doc
Signed By: (b)(6)

Please see the attached files -- is this ok for DOD?

-----Original Message-----

From: Wise, Julia
Sent: Thursday, July 11, 2013 1:08 PM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules
Subject: FW: DFARS whistleblower rule -- Case 2013-D010, Enhancement of Contractor Employees Whistleblower Protections

I made minor changes in the preamble on page 1 and 4. No changes to the text.

(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Employees Whistleblower Protections (DFARS Case
2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement a section of the
National Defense Authorization Act for Fiscal Year 2013 that
statutory amendments to the *enhances* whistleblower protections for
contractor and subcontractor employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date

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~~DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure of certain information." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.~~

Comment [A1]: Complete

Comment [A3]: Accepted

Comment [A4]: Deleting this paragraph because it is now redundant to the revised "Background" material.

The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) ² ~~enacted~~ ^{included} enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of the NDAA for ~~titles 10 and 41~~ agencies, respectively. These enhanced whistleblower protections and the associated cost principles changes are being implemented by two DFARS (for DoD ~~only one of the title 10 agencies~~) ^{title 10 agencies} and two FAR (for title

Subject to titles 10 and 41 of the United States Code

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41 agencies) cases, which are independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes and because the title 41 statute is only a four-year pilot program.

This Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings.

Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to Title 10 agencies.

Section 828, "Pilot Program for Enhancement of Contractor [employee whistleblower] Protections from Reprisal for Disclosure of Certain Information," of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the effectiveness of 41 U.S.C. 4705, "Protection of Contractor Employees from Reprisal for Disclosure of Certain Information," and its

Comment [A5]: This common introductory paragraph provides overall context for the NDAA'13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA'13.

Comment [A6]: Concur except for changes highlighted in yellow. DFARS applies only to DoD, not other title 10 agencies.

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Comment [A7]: Accepted.

Comment [A8]: Completeable

Comment [A9]: Accepted.

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Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Monday, July 01, 2013 4:13 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Quinones, Manuel Mr OSD ATL
Subject: FW: DFARS whistleblower rule -- Case 2013-D010
Attachments: 2013-D010 FRN (p)_revised 062713-OFPP.doc; 2013-D010 DFARS text (p) revised 062713-OFPP.doc
Signed By: (b)(6)

A couple of things on this case.

Per Julia's email below we need to change the title of this case. I'll have our program manager for rocis take care of it on this side -- you will not be able change the title of a rule currently under review. Please check in with Patricia Topping's staff -- Morgan Park who tends to take care of the unified agenda for DOD will need to note this for the fall agenda submission to OMB.

Julia has revised the FRN and text (see attached). Please run this through your chop chain. Assuming you are ok with these changes, you can re-submit the files when I let you know the older ones (uploaded on 6/25) have been removed and the title change is completed.

-----Original Message-----

From: Wise, Julia
Sent: Thursday, June 27, 2013 6:50 PM
To: Seehra, Jasmeet
Cc: Wong, Ray
Subject: RE: DFARS whistleblower rule -- Case 2013-D013 THE CASE NUMBER IS DFARS Case 2013-D010 (use these attachments)

Hi Jasmeet,

Here is the revised FRN and text for the DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections. We changed the titles in both documents, but please ensure that the title of the case is changed from "Enhancement of Contractor Whistleblower Protections" to "Enhancement of Contractor Employee Whistleblower Protections."

Thanks,

Julia

Murphy, Meredith K Ms OSD ATL

From: GOINS, MARK (b)(6)
Sent: Monday, July 01, 2013 11:37 AM
To: Mark Crawford; Marissa Petrussek (M1V1C) (b)(6) Chambers, Marilyn (HQ-LP011) (b)(6) Roark, Douglas S Mr OSD ATL; Snell, Ronald; Stein, James (b)(6) (b)(6) McCrary, Jeremy (b)(6)
Cc: Murphy, Meredith K Ms OSD ATL (b)(6) Ernst, Robert P. CIV NAVAIR 4.1.1.5
Subject: RE: Counterfeiting Confidential Tip off - Transit through Belgium allow counterfeit parts (repacked as false country of origin) shipment to final destination

Hello Mark:

Thank you for the information and for staying in touch. In general, CBP has been aware of the challenges involved with the intransit situation.

Despite the challenges we recently conducted a joint operation with French Customs. The press release can be viewed at the link below.

I will make use of your information regarding Belgium. If more specific information becomes available I'd be happy to see it.

Regards, Mark Goins

http://cbp.gov/xp/cgov/newsroom/news_releases/national/05222013_2.xml

CBP, French Customs Seize Critical Counterfeit Electronic Components

(Wednesday, May 22, 2013)

-----Original Message-----

From: Mark Crawford [mailto:(b)(6)]
Sent: Monday, July 01, 2013 7:01 AM
To: Marissa Petrussek (M1V1C) (b)(6) Chambers, Marilyn (HQ-LP011) (b)(6) Roark, Douglas S Mr OSD ATL; Snell, Ronald; Stein, James (b)(6) (b)(6) McCrary, Jeremy (b)(6) GOINS, MARK (b)(6)
Cc: Murphy, Meredith K Ms OSD ATL (b)(6)
Subject: FW: Counterfeiting Confidential Tip off - Transit through Belgium allow counterfeit parts (repacked as false country of origin) shipment to final destination

To:
Goins, Mark
U.S. Customs and Border Protection
Office of International Trade
555 Battery Street - Room 316
San Francisco, CA 94111

(b)(6)

From:

Mark H. Crawford
Senior Trade & Industry Analyst
Office of Technology Evaluation
Bureau of Industry and Security
U.S. Department of Commerce
1401 Constitution Ave. NW, H-3887
Washington DC 20230

(b)(6)

Mark:

FYI- In case you were not aware of this counterfeiting situation, I am providing the following information. I hope all is well with you.

Regards,

Mark

-----Original Message-----

From: Brad Botwin
Sent: Monday, July 01, 2013 9:16 AM
To: Mark Crawford
Subject: FW: Counterfeiting Confidential Tip off - Transit through Belgium allow counterfeit parts (repacked as false country of origin) shipment to final destination

-----Original Message-----

From: (b)(6)
Sent: Sunday, June 30, 2013 7:48 AM
To: Brad Botwin
Subject: Counterfeiting Confidential Tip off - Transit through Belgium allow counterfeit parts (repacked as false country of origin) shipment to final destination

TIP OFF from Sanjoy RoyChoudhury to support ANTICOUNTERFEITING (support International Trademark association)
I have confidential counterfeiting information about a Belgian company .

Refer to attached letter from International Trademark Association addressed to EU commissioner
Counterfeiting parts from China , Taiwan imported in Belgium , then repacked as European Union or false country of
false declaration in in Transit in Belgian traders warehouse . Belgian Traders misdeclare origin for their benefits to
export to worldwide desination including USA

Under the revised Regulation on Customs Enforcement of Intellectual Property Rights 1383/2003, customs officials cannot stop counterfeits in transit unless there is an infringement as defined under substantive law. Because the act of transit is not defined as an infringement in substantive law, EU customs can only detain counterfeits if they are destined for the EU market and release those in transit from one Member State to a third country even if it is evident that the goods are fake. This practice is detrimental to the global fight against counterfeiting and is not consistent with the EU's notable efforts in other areas to protect consumers and businesses against trademark counterfeiting

Kind Regards

Sanjiv RoyChoudhury mobile (b)(6)

(b)(6)

MBA Post Graduate (Marketing) ,Bachelor of Engineering. (Mechanical) ,Chartered Engineer (IIE)
Member, American Association Cost Engineers , Member, Institute Of Industrial Engineers, USA

**DFARS Case 2013-D010
Enhancement of Contractor Employees Whistleblower Protections
Proposed Rule**

**PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST**

**SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES**

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)]. It is applicable in lieu of, rather than as a supplement to, FAR subpart 3.9.

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

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Comment [w1]: Normally, the DFARS supplements the FAR; but not in this case where the FAR is not applicable at all because it has a different statutory basis.

Comment [MQ2]: Accepted.

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"Abuse of authority," as used in this subpart, means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

"Reprisal," see DFARS 203.903(1), Policy.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) —(1) [Policy.] 10 U.S.C. 2409 prohibits contractors [or subcontractors] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities [listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,] a substantial and specific danger to public health or safety, or a violation of law [rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[. Such reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

~~(i) The use of the term "contractors" shall mean "contractors and subcontractors."~~

[(2) Entities to whom disclosure may be made]

(i) A Member of Congress or a representative of a committee of Congress.

~~(ii) A representative of a committee of Congress.~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

(i)(ii)v) The Government Accountability Office.

(i)(ii)v) A DoD employee responsible for contract oversight or management.

Comment [M3]: Accepted.

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Numbering Style: 1, 2, 3, ... + Start at: 1 +
Alignment: Left + Aligned at: 0.25" + Indent at: 0.5"

Comment [w4]: Add! last sentence duplicative of 203.906(4). Retain here, and delete duplicate at 203.906(4).

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Numbering Style: i, ii, iii, ... + Start at: 1 +
Alignment: Left + Aligned at: 0.75" + Indent at: 1.25"

Comment [w5]: Make "contractor" mean "contractor and subcontractor" to avoid need to add "subcontractor" throughout subpart.

Comment [m6]: Do not concur with recommendation because adding this here is not required. Agree with deletion at 203.906(4). No need to add statement here because "or subcontractors" is used where applicable throughout the subpart. Deleted (1) since and we never have a (i) without a (ii).

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(vi) An authorized official of ~~an agency or~~ the Department of Justice [or other law enforcement agency].

[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [*Contracting officer actions.*] A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

(a) Any employee of a contractor or subcontractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the Department of ~~Defense~~ agency that awarded the contract.

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The substantial violation of law giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed; and

(5) The specific nature and date of the reprisal.

(e) ~~In addition, to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated~~

Comment [w7]: 10 usc 2409(b)(1)

Comment [w8]: Para (a) is duplicative of para (c). Retain here, and delete duplicate para (c).

Comment [MQ9]: Accepted.

Comment [MQ10]:

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~~against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.~~

203.905 Procedures for investigating complaints.

~~The following procedures apply to DoD instead of the procedures at FAR 3.905:~~

(1) ~~[Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation[e the complaint].~~

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) ~~If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days, as agreed upon with the complainant] to which the person submitting the complaint agrees.~~

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

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Comment [w11]: Para (c) is duplicative of para (a). delete.

Comment [MQ12]: Accepted.

Comment [w13]: Reworded for readability.

Comment [MQ14]: Accepted.

(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under 10 U.S.C. 2409 as implemented by DFARS subpart 203.9 this section more than three years after the date on which the alleged reprisal took place.

Comment [w15]: Reference to statute is more definitive than "this section".

Comment [MQ16]: Accepted

(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221, Individual Right of Action in Certain Reprisal Cases, in shall be controlling for the purposes of any investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

—(i) S[s] shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and [shall take one or more of the following actions:

- (i) Order the contractor to take affirmative action to abate the reprisal.
- (ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
- (iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing

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the complaint regarding the reprisal, as determined by the head of the agency.]

(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(d).

~~[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.]~~

~~(5[4]) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.~~

203.907 Classified information.

As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights to

Comment [w17]: What about 10 USC 2409 (c)(4) and (5) re enforcement? (see FAR 3.907-6(d) and (e))???

NEED TO ADD PARAGRAPH on enforcement, 10 USC 2409(c)(4) and (5). It is currently covered by FAR 3.907-6(d) and (e) which will NO LONGER be applicable to DOD (title 10 agencies) with FAR implementation of enhanced whistleblower protections.

Placement of provision for enforcement recommended to be part of remedies per statute.

Comment [w18]: Duplicative of policy statement, 203.903. Delete

Comment [MQ19]: Accepted

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~~disclose classified information not otherwise provided by law to disclose classified information.]~~

Comment [MQ20]: Accepted.

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights. As prescribed in 203.970, use the following clause:

REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS (JAN 2009[DATE])

[a] This contract and employees working on this contract will be subject to the enhanced contractor employee whistleblower protections at 10 U.S.C. 2409, as amended by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and the implementing regulations at DFARS 203.9.

Comment [w21]: States clearly in contract that enhanced whistleblower protections are applicable.

Comment [MQ22]: Accepted.

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Comment [w23]: NEED TO ADD IN DFARS, parallel clauses to FAR 52.212-4, 52.203-15, and 52.244-6.

[b] The Contractor shall inform its employees in writing[, in the predominant native language of the workforce,] of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

DFARS versions of 52.203-15 and 52.244-6 need to reference the new 252.203-7002 cl to inform employees of their rights. And DFARS version of 52.212-4 needs to require compliance with 10 USC 2409 (that is being deleted from FAR rulemaking to implement enhanced whistleblower protections).

[bc] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

Comment [m24]: There is no DFARS parallel to 52.212-4. The clause above (252.203-7003) is the DFARS clause that's parallel to FAR 52.203-15. The DFARS clause that is parallel to FAR 52.244-6 is printed at the left in order to show that no changes are necessary to the DFARS clause because it does not change with the addition of new DFARS requirements (i.e., contains to clause listing to be amended).

(End of clause)

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additions

252.244-7000 Subcontracts for Commercial Items. As prescribed in 244.403, use the following clause:

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SUBCONTRACTS FOR COMMERCIAL ITEMS (JUN 2013)

(a) The Contractor is not required to flow down the terms of any Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial items at any tier under this contract, unless so specified in the particular clause.

(b) While not required, the Contractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligation.

(c) The Contractor shall include the terms of this clause, including this paragraph (c), in subcontracts awarded under this contract, including subcontracts for the acquisition of commercial items.

(End of clause)

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Employees Whistleblower Protections (DFARS Case
2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before **[Insert date**

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60 days after date of publication in the FEDERAL REGISTER], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information

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provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

~~The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) enacted enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of NDAA for titles 10 and 41 agencies, respectively. These enhanced whistleblower protections are being implemented by two DFARS (for title 10 agencies) and two FAR (for title 41 agencies) cases which are independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes.~~

Comment [A1]: This common introductory paragraph provides overall context for the NDAA'13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA'13.

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~~DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure of certain information." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.~~

Comment [A2]: Complete title

Comment [A3]: Accepted

Comment [A4]: Deleting this paragraph because it is now redundant to the revised "Background" material

The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) enacted enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of the NDAA for titles 10 and 41 agencies, respectively. These enhanced whistleblower protections and the associated cost principles changes are being implemented by two DFARS (for DoD only title 10 agencies) and two FAR (for title 41 agencies) cases, which are

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independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes and because the title 41 statute is only a four-year pilot program.

This Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, is being addressed in DFARS Case 2013-D022,

Allowability of Legal Costs for Whistleblower Proceedings.

Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to Title 10 agencies.

Section 828, "Pilot Program for Enhancement of Contractor [employee whistleblower] Protections from Reprisal for disclosure of certain information," of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the effectiveness of 41 U.S.C. 4705, "Protection of contractor employees from reprisal for disclosure of certain information," and its implementing regulations at use of FAR 3.901 through 3.906. The

Comment [A5]: This common introductory paragraph provides overall context for the NDAA '13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA '13.

Comment [A6]: Concur except for changes highlighted in yellow. DFARS applies only to DoD, not other title 10 agencies.

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Comment [A7]: Accepted.

Comment [A8]: Complete title

Comment [A9]: Accepted.

Comment [A10]: Accepted.

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FAR will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239).

Section 827(g) amends 10 U.S.C. 2324(k), "Allowable costs under defense contracts." In a like manner, section 828(d) amends 41 U.S.C. 4310, "Proceedings cost not allowable," to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower statute (10 U.S.C. 2409 or 41 U.S.C. 4712, respectively). See FAR Case 2013-017, entitled Allowability of Legal Costs for Whistleblower Proceedings.

II. Discussion

The current FAR addresses whistleblower protections. The current FAR addresses this subject whistleblower protections for contractor employees at subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409, as amended, and will be applicable in lieu of, rather than as a supplement to, FAR subpart 3.9. The subpart covers the policy, procedures for

Comment [A11]: Complete title for readability

Comment [A12]: Agree

Comment [A13]: These are statutes, not section

Comment [A14]: Agree

Comment [A15]: States clearly what the subject is

Comment [A16]: Agree

Comment [A17]: Language change because this is a proposed, not final, rule

Comment [A18]: This NDAA revision separates title 10 and title 41 coverage. New FAR amendments states that FAR provisions do not apply to title 10 agencies

Comment [A19]: Accepted

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filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

- (a) (1): Amended grounds for disclosure.
- (a) (2): Amended persons and bodies to whom disclosure could result in reprisal.
- (a) (3) (A): Provided a definition of who is deemed to have made a disclosure, see 203.903(3).
- (a) (3) (B): Added prohibition against reprisal even if undertaken at request of a DoD or Administration.
- (b) (1): Provided an additional basis on which the Inspector General may determine not to investigate.
- (b) (2) (B): Provided a reporting timeframe for any additional period for investigation.
- (b) (3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.
- (b) (4): Added a three-year time limit for bringing a complaint.

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(c)(1)(B): Modified the types of damages that may be ordered.

(c)(2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c)(4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c)(5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c)(6): Stated the legal burden of proof to be used.

(c)(7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g)(6): Added a definition of "abuse of authority."

Additionally, ~~because~~^{since} 10 U.S.C. 2409 was had been partially implemented in FAR subpart 3.9 and DFARS subpart 203.903 prior to the NDAA for FY 2013 amendments, and the NDAA FY 2013 implementing regulations at FAR 3.9 are proposed to states that

Comment [A20]: "Since" refers to the passage of time; "because" refers to a reason for something.

Comment [A21]: It's the entire subpart, not just one section of 203.9.

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~~At the FAR subpart does not implement 10 U.S.C. 2409, some~~
~~sections of the FAR must now be implemented in the DFARS so that~~
~~all of 10 U.S.C. 2409, as amended, is completely implemented in~~
~~DFARS.~~

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately in DFARS Case 2013-D022,

Allowability of Legal Costs for Whistleblower Proceedings.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart.

~~The term definitions of "abuse of authority" and "reprisal"~~
~~(referencing DFARS 203.903 Policy) are is a recommended additions~~

to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to

Comment [A22]: Must implement FAR provisions on enforcement and clause references into DFARS.

Comment [A23]: Concur with one change (since vice because)

Comment [A24]: Agree

Comment [A25]: Agree with changes, as shown

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include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

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The clause prescribed at DFARS 203.970 is 252.203 7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

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IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2439 and 10 U.S.C. 2324(k). Section 827 changes are applicable to DoD and NASA. Each agency will amend its FAR supplement to incorporate these provisions. This DFARS pertains only to this DFARS proposed rule. This rule proposes to make revisions to

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subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have a situation occur that requires an employee to use the whistleblower provisions. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. A firm accused of retaliating against an employee whistleblower is

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likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D010), in correspondence.

V. Paperwork Reduction Act

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The rule does not contain any information collection additional requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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Murphy, Meredith K Ms OSD ATL

From: Murphy, Meredith K Ms OSD ATL
Sent: Wednesday, July 03, 2013 6:19 PM
To: Quinones, Manuel Mr OSD ATL
Cc: Williams, Amy, Ms, OSD-ATL
Subject: 2013-D010, DFARS Whistleblower Case--OFPP Further Edits
Attachments: 2013-D010 DFARS_OFPP Revs_DoD edits_070313.doc; 2013-D010 FRN_OFPP Revs_DoD edits_070313.doc
Signed By: (b)(6)

Please see my attached further edits to the OFPP edits provided earlier today.

Regards,
Meredith

**DFARS Case 2013-D010
Enhancement of Contractor Employees Whistleblower Protections
Proposed Rule**

**PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST**

**SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES**

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)]. It is applicable in lieu of, rather than as a supplement to, FAR subpart 3.9.

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

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Comment [w1]: Normally, the DFARS supplements the FAR; but not in this case where the FAR is not applicable at all because it has a different statutory basis.

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“Abuse of authority,” as used in this subpart, means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

“Reprisal,” see DFARS 203.903(1), Policy.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) —(4) [Policy.] 10 U.S.C. 2409 prohibits contractors [or subcontractors] from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities [listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,] a substantial and specific danger to public health or safety, or a violation of law [rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract);. Such reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

~~The use of the term “contractors” shall mean “contractors and subcontractors.”~~

[(2) Entities to whom disclosure may be made]

(i) A Member of Congress or a representative of a committee of Congress.

~~(ii) A representative of a committee of Congress.~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

(i) (ii) (v) The Government Accountability Office.

(ii) (v) A DoD employee responsible for contract oversight or management.

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Numbering Style: 1, 2, 3, ... + Start at: 1 +
Alignment: Left + Aligned at: 0.25" + Indent at: 0.5"

Comment [w2]: Add'l last sentence duplicative of 203.906(4). Retain here, and delete duplicate at 203.906(4).

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Numbering Style: i, ii, iii, ... + Start at: 1 +
Alignment: Left + Aligned at: 0.75" + Indent at: 1.25"

Comment [w3]: Make "contractor" mean "contractor and subcontractor" to avoid need to add "subcontractor" throughout subpart.

Comment [m4]: Disagree with adding this here; am fine with deletion at 203.906(4). No need to say this because you've added "or subcontractors" where applicable throughout the subpart and we never have a (i) without a (ii).

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(vi) An authorized official of ~~an agency or~~ the Department of Justice [or other law enforcement agency].

[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

[(2)(4) *Contracting officer actions.*]A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

(a) Any employee of a contractor or subcontractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the Department of Defense agency that awarded the contract.

Comment [w5]: 10 usc 2409(b)(1)

Comment [w6]: Para (a) is duplicative of para (c). Retain here, and delete duplicate para (c).

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The substantial violation of law giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed; and

(5) The specific nature and date of the reprisal.

(e) In addition, to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated

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against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

Comment [w7]: Para (c) is duplicative of para (a). delete.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period[, up to 180 days, as agreed upon with the complainant] to which the person submitting the complaint agrees.

Comment [w8]: Reworded for readability.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

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(i) Made with the consent of the person alleging reprisal;

(ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or

(iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under 10 U.S.C. 2409 as implemented by DFARS subpart 203.9~~this section more~~ than three years after the date on which the alleged reprisal took place.

Comment [w9]: Reference to statute is more definitive than "this section".

(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221, Individual Right of Action in Certain Reprisal Cases, ~~in~~ shall be controlling for the purposes of any investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

—(i) ~~S[s]~~ shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and shall take one or more of the following actions:

- (i) Order the contractor to take affirmative action to abate the reprisal.
- (ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
- (iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing

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the complaint regarding the reprisal, as determined by the head of the agency.]

~~(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).~~

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. [An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

~~{(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.~~

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights to

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Comment [w10]: What about 10 usc 2409 (c)(4) and (5) re enforcement? (see FAR 3.907-6(d) and (e))???

NEED TO ADD PARAGRAPH on enforcement, 10 USC 2409(c)(4) and (5). It is currently covered by FAR 3.907-6(d) and (e) which will NO LONGER be applicable to DOD (title 10 agencies) with FAR implementation of enhanced whistleblower protections.

Placement of provision for enforcement recommended to be part of remedies per statute.

Comment [w11]: Duplicative of policy statement, 203.903. Delete

~~disclose classified information not otherwise provided by law to disclose classified information.]~~

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN 2009[DATE])**

[a] This contract and employees working on this contract will be subject to the enhanced contractor employee whistleblower protections at 10 U.S.C. 2409, as amended by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and the implementing regulations at DFARS 203.9.

[b] The Contractor shall inform its employees in writing **[, in the predominant native language of the workforce,]** of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[bc] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

additions

Comment [w12]: States clearly in contract that enhanced whistleblower protections are applicable.

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Comment [w13]: NEED TO ADD IN DFARS, parallel clauses to FAR 52.212-4, 52.203-15, and 52.244-6.

DFARS versions of 52.203-15 and 52.244-6 need to reference the new 252.203-7002 cl to inform employees of their rights. And DFARS version of 52.212-4 needs to require compliance with 10 USC 2409 (that is being deleted from FAR rulemaking to implement enhanced whistleblower protections.

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Employees Whistleblower Protections (DFARS Case
2013-D010)

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before [Insert date

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60 days after date of publication in the FEDERAL REGISTER], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information

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provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

~~The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) enacted enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of NDAA for titles 10 and 41 agencies, respectively. These enhanced whistleblower protections are being implemented by two DFARS (for title 10 agencies) and two FAR (for title 41 agencies) cases which are independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes.~~

Comment [A1]: This common introductory paragraph provides overall context for the NDAA'13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA'13.

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~~DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure of certain information." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS [redacted].~~

Comment [A2]: Complete title

Comment [A3]: Deleting this paragraph because it is now redundant to the revised "Background" material

The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) enacted enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of the NDAA for titles 10 and 41 agencies, respectively. These enhanced whistleblower protections and the associated cost principles changes are being implemented by two DFARS (for DoD only title 10 agencies) and two FAR (for title 41 agencies) cases, which are

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independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes and because the title 41 statute is only a four-year pilot program.

~~This Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324,~~ is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings. Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to ~~t~~ Title 10 agencies.

Section 828, "~~P~~ilot ~~P~~rogram for ~~E~~nhancement of ~~C~~ontractor ~~[employee W]histleblower] ~~P~~rotections ~~from reprisal for disclosure of certain information,~~" of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the effectiveness of 41 U.S.C. 4705, "Protection of contractor employees from reprisal for disclosure of certain information," and its implementing regulations ~~at use of~~ FAR 3.901 through 3.906. The~~

Comment [A4]: This common introductory paragraph provides overall context for the NDAA '13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA '13.

Formatted: Indent: First line: 0.25"

Comment [A5]: Complete title

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FAR will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239).

Section 827(g) amends 10 U.S.C. 2324(k), "Allowable costs under defense contracts." In a like manner, section 828(d) amends 41 U.S.C. 4310, "Proceedings cost not allowable," to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower statutection (10 U.S.C. 2409 or 41 U.S.C. 4712, respectively). See FAR Case 2013-017, entitled Allowability of Legal Costs for Whistleblower Proceedings.

Comment [A6]: Complete title for readability

Comment [A7]: These are statutes, not section

II. Discussion

The current FAR addresses whistleblower protections ~~The current FAR addresses this subject whistleblower protections~~ for contractor employees ~~in~~ subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409, as amended, and will ~~be~~ applicable in lieu of, rather than as a supplement to, FAR ~~subpart~~ 3.9. The subpart covers the policy, procedures for

Comment [A8]: States clearly what the subject is

Comment [A9]: Language change because this is a proposal, not final rule.

Comment [A10]: This NDAA revision separates title 10 and title 41 coverage. New FAR amendments states that FAR provisions do not apply to title 10 agencies.

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filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

(a)(1): Amended grounds for disclosure.

(a)(2): Amended persons and bodies to whom disclosure could result in reprisal.

(a)(3)(A): Provided a definition of who is deemed to have made a disclosure, see 203.903(3).

(a)(3)(B): Added prohibition against reprisal even if undertaken at request of a DoD or Administration.

(b)(1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b)(2)(B): Provided a reporting timeframe for any additional period for investigation.

(b)(3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b)(4): Added a three-year time limit for bringing a complaint.

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(c)(1)(B): Modified the types of damages that may be ordered.

(c)(2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c)(4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c)(5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c)(6): Stated the legal burden of proof to be used.

(c)(7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g)(6): Added a definition of "abuse of authority."

Additionally, ~~because~~^{since} 10 U.S.C. 2409 ~~was~~ had been partially implemented in FAR subpart 3.9 and DFARS ~~subpart 203.903~~ prior to the NDAA for FY 2013 amendments, and the NDAA FY 2013 implementing regulations at FAR 3.9 are proposed to states that

Comment [A11]: "Since" refers to the passage of time, "because" refers to a reason for something.

Comment [A12]: It's the entire subpart, not just one section of 203.9

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if the FAR subpart does not implement 10 U.S.C. 2409, some sections of the FAR must now be implemented in the DFARS so that all of 10 U.S.C. 2409, as amended, is completely implemented in DFARS.

Comment [A13]: Must implement FAR provisions on enforcement and clause references into DFARS

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The ~~term definitions of "abuse of authority" and "reprisal"~~ (referencing DFARS 203.903 Policy) are a recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to

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include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

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The clause prescribed at DFARS 203.970 is 252.203-7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

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IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k). Section 827 changes are applicable to DoD and NASA. Each agency will amend its FAR supplement to incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to

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subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203 7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have a situation occur that requires an employee to use the whistleblower provisions. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. A firm accused of retaliating against an employee whistleblower is

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likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013 D010), in correspondence.

V. Paperwork Reduction Act

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The rule does not contain any information collection additional requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Wednesday, July 03, 2013 4:40 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL
Subject: FW: DFARS whistleblower rule -- Case 2013-D010, Enhancement of Contractor Employees Whistleblower Protections
Attachments: 130702 ofpp 2013-D010 DFARS text (p) revised 070113.doc; 130702 ofpp 2013-D010 FRN (p) revised 070113.doc
Signed By: (b)(6)

Please see the attached file for additional edits from OFPP.

If these are acceptable to DOD, we can place the case in final vetting.

-----Original Message-----

From: Wise, Julia
Sent: Tuesday, July 02, 2013 6:06 PM
To: Seehra, Jasmeet
Cc: FN-OMB-DFAR Rules; Wong, Ray
Subject: RE: DFARS whistleblower rule -- Case 2013-D010, Enhancement of Contractor Employees Whistleblower Protections

Yes, there a number of additional changes that should be made as we suggest so the case can be approved. Please see the edits in the attached documents.

-----Original Message-----

From: Seehra, Jasmeet
Sent: Monday, July 01, 2013 4:48 PM
To: Wise, Julia; Wong, Ray; Quinones, Manuel Mr OSD ATL
Cc: FN-OMB-DFAR Rules
Subject: DFARS whistleblower rule -- Case 2013-D013

Thanks.

Julia and Ray -- any other edits?

We're in the middle of the publishing cycle for the spring regulatory agenda so I will probably email you tomorrow once the name change and deletion of files is completed. Timing slows down a bit in the last phases of publishing.

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL (mailto:(b)(6))
Sent: Monday, July 01, 2013 4:38 PM
To: Seehra, Jasmeet; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Wong, Ray
Subject: RE: DFARS whistleblower rule -- Case 2013-D013

Jasmeet,

We accept the case title name change. Attached is the latest version with recommended name change using baseline uploaded into ROCIS. That version had been agreed-upon by OFPP.

I will contact Patricia ad Morgan to take care of the name change.

Please contact me for any questions of if you need anything else.

V/r,

Manny Quinones

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]

Sent: Monday, July 01, 2013 4:03 PM

To: Quinones, Manuel Mr OSD ATL; Stewart, Kortnee R Ms OSD ATL; Williams, Amy, Ms, OSD-ATL

Cc: FN-OMB-DFAR Rules; Wise, Julia; Wong, Ray

Subject: DFARS whistleblower rule -- Case 2013-D013

A couple of things on this case.

Per Julia's email below we need to change the title of this case. I'll have our program manager for rocis take care of it on this side -- you will not be able change the title of a rule currently under review. Please check in with Patricia Topping's staff -- Morgan Park who tends to take care of the unified agenda for DOD will need to note this for the fall agenda submission to OMB.

Julia has revised the FRN and text (see attached). Please run this through your chop chain. Assuming you are ok with these changes, you can re-submit the files when I let you know the older ones (uploaded on 6/25) have been removed and the title change is completed.

-----Original Message-----

From: Wise, Julia

Sent: Thursday, June 27, 2013 6:50 PM

To: Seehra, Jasmeet

Cc: Wong, Ray

Subject: RE: DFARS whistleblower rule -- Case 2013-D013 THE CASE NUMBER IS DFARS Case 2013-D010 (use these attachments

Hi Jasmeet,

Here is the revised FRN and text for the DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections. We changed the titles in both documents, but please ensure that the title of the case is changed from "Enhancement of Contractor Whistleblower Protections" to "Enhancement of Contractor Employee Whistleblower Protections."

Thanks,

Julia

**DFARS Case 2013-D010
Enhancement of Contractor Employees Whistleblower Protections
Proposed Rule**

**PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL
CONFLICTS OF INTEREST**

**SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR
CONTRACTOR EMPLOYEES**

203.900 Scope of subpart.

[(a)] This subpart implements 10 U.S.C. 2409 as amended by [s]Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181)[,] and [s]Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417)[, and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)]. **It is applicable in lieu of, rather than as a supplement to, FAR subpart 3.9.**

[(b)] This subpart does not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

- (1) Relates to an activity or an element of the intelligence community; or
- (2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

203.901 Definitions.

As used in this subpart—

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Comment [w1]: Normally, the DFARS supplements the FAR; but not in this case where the FAR is not applicable at all because it has a different statutory basis.

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"Abuse of authority," as used in this subpart, means an arbitrary and capricious exercise of authority that is inconsistent with the mission of DoD or the successful performance of a DoD contract.

"Reprisal," see DFARS 203.903(1), Policy.]

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) — (1) [Policy.]10 U.S.C. 2409 prohibits contractors [or subcontractors]from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities [listed at paragraph (2) of this section], information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, [an abuse of authority relating to a DoD contract,]a substantial and specific danger to public health or safety, or a violation of law [, rule, or regulation] related to a DoD contract (including the competition for or negotiation of a contract):[. Such reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(i) The use of the term "contractors" shall mean "contractors and subcontractors."

[(2) Entities to whom disclosure may be made]

(i) A Member of Congress or a representative of a committee of Congress.

~~**(ii) A representative of a committee of Congress.**~~

(iii) An Inspector General that receives funding from or has oversight over contracts awarded for or on behalf of DoD.

(i) (ii) The Government Accountability Office.

(ii) (v) A DoD employee responsible for contract oversight or management.

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at: 0.5"

Comment [w2]: Add'l last sentence duplicative of 203.906(4). Retain here, and delete duplicate at 203.906(4).

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Comment [w3]: Make "contractor" mean "contractor and subcontractor" to avoid need to add "subcontractor" throughout subpart.

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(vi) An authorized official of ~~an agency or~~ the Department of Justice [or other law enforcement agency].

[(vii) A court or grand jury.

(viii) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.]

[(3) *Disclosure clarified.* An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a DoD contract shall be deemed to have made a disclosure.]

(2[4]) [*Contracting officer actions.*] A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

~~[(a) Any employee of a contractor or subcontractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the Inspector General of the Department of Defense agency that awarded the contract.~~

Comment [w4]: 10 usc 2409(b)(1)

Comment [w5]: Para (a) is duplicative of para (c). Retain here, and delete duplicate para (c).

(b) The complaint shall be signed and shall contain—

(1) The name of the contractor;

(2) The contract number, if known; if not, a description reasonably sufficient to identify the contract(s) involved;

(3) The substantial violation of law giving rise to the disclosure;

(4) The nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed; and

(5) The specific nature and date of the reprisal.

~~[(c) In addition, to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated~~

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against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

Comment [w6]: Para (c) is duplicative of para (a). delete.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

(1) [Unless t]The [DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903(1), or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the]DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation[e the complaint].

(2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—

(i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;

(ii) Conduct an investigation; and

(iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.

(3) The DoD Inspector General—

(i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and

(ii) If unable to submit a report within 180 days, will submit the report within the additional time period], up to 180 days, as agreed upon with the complainant] to which the person submitting the complaint agrees.

Comment [w7]: Reworded for readability.

[(4) The DoD Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

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- (i) Made with the consent of the person alleging reprisal;
- (ii) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or
- (iii) Necessary to conduct an investigation of the alleged reprisal.

(5) A complaint may not be brought under 10 U.S.C. 2409 as implemented by DFARS subpart 203.9~~this section~~ more than three years after the date on which the alleged reprisal took place.

Comment [w8]: Reference to statute is more definitive than "this section".

(6) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221, Individual Right of Action in Certain Reprisal Cases) ~~in~~ shall be controlling for the purposes of any investigation conducted by the DoD Inspector General, decision by the head of an agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.]

203.906 Remedies.

(1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—

—(i) ~~S~~ [s] shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and shall take one or more of the following actions:

- (i) Order the contractor to take affirmative action to abate the reprisal.
- (ii) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
- (iii) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing

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the complaint regarding the reprisal, as determined by the head of the agency.]

~~(ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).~~

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. **[An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.]**

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

~~[(4) Reprisal is prohibited, even if it is undertaken at the request of a DoD or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the DoD or Administration official making the request.~~

(5) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

203.907 Classified information.

As provided in section 827(h) of the National Defense Authorization Act for Fiscal Year 2013, nothing in this coverage provides any rights to

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Comment [w9]: What about 10 usc 2409 (c)(4) and (5) re enforcement? (see FAR 3.907-6(d) and (e))???

NEED TO ADD PARAGRAPH on enforcement, 10 USC 2409(c)(4) and (5). It is currently covered by FAR 3.907-6(d) and (e) which will NO LONGER be applicable to DOD (title 10 agencies) with FAR implementation of enhanced whistleblower protections.

Placement of provision for enforcement recommended to be part of remedies per statute.

Comment [w10]: Duplicative of policy statement, 203.903. Delete

~~disclose classified information not otherwise provided by law to disclose classified information.]~~

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.203-7002 Requirement to Inform Employees of Whistleblower Rights.
As prescribed in 203.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
(JAN 2009[DATE])**

[a] ~~This contract and employees working on this contract will be subject to the enhanced contractor employee whistleblower protections at 10 U.S.C. 2409 as amended by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and the implementing regulations at DFARS 203.9.~~

[b] The Contractor shall inform its employees in writing, **in the predominant native language of the workforce,** of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in [s]Subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

[bc] The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.]

(End of clause)

~~additions~~

Comment [w11]: States clearly in contract that enhanced whistleblower protections are applicable.

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Comment [w12]: NEED TO ADD IN DFARS, parallel clauses to FAR 52.212-4, 52.203-15, and 52.244-6.

DFARS versions of 52.203-15 and 52.244-6 need to reference the new 252.203-7002 cl to inform employees of their rights. And DFARS version of 52.212-4 needs to require compliance with 10 USC 2409 (that is being deleted from FAR rulemaking to implement enhanced whistleblower protections.

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(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

RIN 0750-AH97

**Defense Federal Acquisition Regulation Supplement: Enhancement
of Contractor Employees Whistleblower Protections (DFARS Case
2013-D010)**

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY:

DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to implement statutory amendments
to whistleblower protections for contractor and subcontractor
employees.

DATES:

Comment Date: Comments on the proposed rule should be submitted
in writing to the address shown below on or before **[Insert date**

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60 days after date of publication in the FEDERAL REGISTER], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013-D010, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D010" under the heading, "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D010" on your attached document.
- o E-mail: dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information

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provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6098; facsimile 571-372-6101."

SUPPLEMENTARY INFORMATION:

I. Background

~~The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 3, 2013) enacted enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of NDAA for titles 10 and 41 agencies, respectively. These enhanced whistleblower protections are being implemented by two DFARS (for title 10 agencies) and two FAR (for title 41 agencies) cases which are independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes.~~

Comment [A1]: This common introductory paragraph provides overall context for the NDAA '13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA '13.

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DoD is proposing to amend the DFARS to implement a policy enhancing the whistleblower protections for contractor employees as modified by section 827 (except paragraph (g)) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827, entitled "Enhancement of Whistleblower Protections for Contractor Employees," made extensive changes to 10 U.S.C. 2409, entitled "Contractor employees: protection from reprisal or disclosure of certain information." Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324, entitled "Allowable costs under defense contracts," will be addressed under a separate DFARS case.

Comment [A2]: Complete title

The National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013) enacted enhanced whistleblower protections for contractor and subcontractor employees in separate, but parallel, sections of NDAA for titles 10 and 41 agencies, respectively. These enhanced whistleblower protections are being implemented by two DFARS (for title 10 agencies) and two FAR (for title 41 agencies) cases, which are

and the assoc'd cost principles changes

DoD only

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and because the Title 41 Statute is only a four-year pilot program

independent, but parallel, rulemakings because of some minor differences in the operations of the underlying statutes.

This Paragraph (g) of section 827, which amended paragraph (k) of 10 U.S.C. 2324 is being addressed in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings. Section 827 of the NDAA for FY 2013 created a standalone statute for DoD that is not dependent on the FAR coverage. The DoD contractor whistleblower rules are based on an independent statute that applies only to Title 10 agencies.

Comment [A3]: This common introductory paragraph provides overall context for the NDAA '13 enhanced whistleblower protections, and gives a quick non-technical summary of why there are four separate rulemakings to implement the enhanced whistleblower protections per NDAA '13.
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Section 828, "Pilot Program for Enhancement of Contractor [employee whistleblower] Protections from Reprisal for disclosure of certain information," of the NDAA for FY 2013 will be implemented in the FAR, see FAR Case 2013-015. Section 828 establishes a four-year "pilot program" to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the effectiveness of 41 U.S.C. 4705, "Protection of contractor employees from reprisal for disclosure of certain information," and its implementing regulations at use of FAR 3.901 through 3.906. The

Comment [A4]: Complete title

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FAR will also incorporate sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239).

Section 827(g) amends 10 U.S.C. 2324(k), "Allowable costs under defense **contracts**." In a like manner, section 828(d) amends 41 U.S.C. 4310, "Proceedings cost not allowable," to address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower ~~statute~~ (10 U.S.C. 2409 or 41 U.S.C. **4712**, respectively). See FAR Case 2013-017, entitled Allowability of Legal Costs for Whistleblower Proceedings.

Comment [A5]: Complete title for confidentiality

Comment [A5]: These are statutes, not sections

II. Discussion

~~The current FAR address whistleblower protections~~ ~~The current FAR addresses this subject~~ ~~whistleblower protections~~ for contractor employees **at** subpart 3.9, and the DoD-unique rules are contained in DFARS subpart 203.9, entitled "Whistleblower Protections for Contractor Employees." DFARS subpart 203.9 implements 10 U.S.C. 2409, as amended, and is applicable in lieu of, rather than as a supplement to, FAR **subpart** 3.9. The subpart covers the policy, procedures for

Comment [A7]: States clearly what the subject is

Comment [A8]: This NDAA revision separates title 10 and title 41 coverage. New FAR amendments states that FAR provisions do not apply to title 10 agencies.

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filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

A. Section 827 changes to 10 U.S.C. 2409. Section 827 revised 10 U.S.C. 2409 as follows:

(a)(1): Amended grounds for disclosure.

(a)(2): Amended persons and bodies to whom disclosure could result in reprisal.

(a)(3)(A): Provided a definition of who is deemed to have made a disclosure, see 203.90313).

(a)(3)(B): Added prohibition against reprisal even if undertaken at request of a DoD or Administration.

(b)(1): Provided an additional basis on which the Inspector General may determine not to investigate.

(b)(2)(B): Provided a reporting timeframe for any additional period for investigation.

(b)(3): Provided specific exemptions to the prohibition against disclosure of information from or about any person alleging the reprisal.

(b)(4): Added a three year time limit for bringing a complaint.

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(c) (1) (B): Modified the types of damages that may be ordered.

(c) (2): Created a two-year time limit from bringing an action if remedies have been denied or after remedies are deemed to have been exhausted.

(c) (4): Expanded on the types of relief that may be granted when a person fails to comply with an order for relief.

(c) (5): Clarified that filing an appeal generally may not be grounds for staying enforcement of the order.

(c) (6): Stated the legal burden of proof to be used.

(c) (7): Prohibited any waiver of the rights and remedies in the statute.

(d) Added a new requirement to notify employees of their rights and remedies.

(e): Created an exemption for elements of the intelligence community.

(g) (6): Added a definition of "abuse of authority."

Additionally, since 10 U.S.C. 2409 was partially implemented in FAR subpart 3.9 and DFARS 203.903 prior to the NDAA FY 2013 amendments, and the NDAA FY 2013 implementing regulations at FAR 3.9 states that it does not implement 10 U.S.C. 2409, some

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sections of the FAR must now be implemented in the DFARS so that all of 10 U.S.C. 2409, as amended, is completely implemented in DFARS.

Comment [A9]: Must implement FAR provisions on enforcement and clause references into DFARS.

B. Proposed Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are proposed to be implemented in DFARS subpart 203.9. The statutory changes to 10 U.S.C. 2324(k) made by section 827 are being implemented separately in DFARS Case 2013-D022, Allowability of Legal Costs for Whistleblower Proceedings.

The proposed rule would amend DFARS 203.900, Scope of subpart, to add a reference to section 827 and to implement the exclusion of the intelligence community from applicability of the subpart. The definitions of "abuse of authority" ~~and reprisal~~ ^{is proposed to be} ~~(referencing DFARS 203.903 Policy)~~ ^{ed} are recommended additions to DFARS 203.901, Definitions.

Minimal amendments are proposed for DFARS 203.903, Policy. The applicability of the subpart would be expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered would be expanded to include other law enforcement agencies, a court or grand jury,

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and certain contractor or subcontractor management officials or employees. In addition, the proposed changes to this section would include a clarification of what constitutes a "disclosure."

DFARS 203.904 is unchanged by the proposed rule. DFARS 203.905 is proposed to be amended to address specific reasons for which the DoD Inspector General would be justified in not investigating a complaint of discrimination or reprisal, add timelines, and clarify the narrow circumstances under which the DoD Inspector General could respond to any inquiry or disclose information about alleged reprisal.

The remedies at DFARS 203.906 are proposed to be amended to prohibit reprisal, add a time limit for bringing an action, and state that the rights and remedies provided in DFARS subpart 203.9 cannot be waived. Paragraph (h) of section 827 provides that nothing in the new law may be construed to provide any rights to disclose classified information not otherwise provided by law. This important caveat has been included in a new section 203.907, entitled "Classified information."

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The clause prescribed at DFARS 201.970 is 252.203 7002, Requirement to Inform Employees of Whistleblower Rights. The proposed rule would amend the clause to apply to subcontractors the specific requirement to inform employees in writing of their whistleblower rights. In addition, the written notification of employee whistleblower rights and protections would be required in the predominant native language of the workforce.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 5(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

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IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et. seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case will only clarify contractors' rights and the remedies available to their employees. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement amendments to the existing protections for contractor whistleblower employees as a result of amendments made by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. Section 827 of the NDAA for FY 2013 amended 10 U.S.C. 2409 and 10 U.S.C. 2324(k). Section 827 changes are applicable to DoD and NASA. Each agency will amend its FAR supplement to incorporate these provisions. This IRFA pertains only to this DFARS proposed rule. This rule proposes to make revisions to

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subpart 203.9, "Whistleblower Protections for Contractor Employees." The subpart covers the policy, procedures for filing and investigating complaints, remedies, and the prescription for the clause at DFARS 252.203-7002, entitled "Requirement to Inform Employees of Whistleblower Rights."

The rule will apply to all entities, small as well as large, at the prime contract and subcontract level. However, not all entities will have a situation occur that requires an employee to use the whistleblower provisions. Given that a whistleblower employee may work for any size business, the impact on small businesses is directly associated with the number of whistleblowers it employs. There is no way to predict this number in advance. However, a small entity could be impacted by a whistleblower employee either as a Government prime contractor or subcontractor. In addition, the impact on an entity is directly related to the seriousness of the alleged wrongdoing.

There are no reporting requirements associated with reporting of the wrongdoing as stated in the proposed rule. A firm accused of retaliating against an employee whistleblower is

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likely to be required to furnish human resources documentation to disprove the accusation. This documentation, however, would only be required in the course of an investigation of the accusation, not as a result of a contract clause.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Because of the terms used in the statute, DoD is unable to create alternatives, such as exempting small entities or establishing a dollar threshold for coverage. Regardless of the size of the business, a whistleblower employee must be protected from retaliation by his/her employer.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D0107) in correspondence.

V. Paperwork Reduction Act

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The rule does not contain any information collection additional requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

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Murphy, Meredith K Ms OSD ATL

From: Quinones, Manuel Mr OSD ATL
Sent: Monday, April 15, 2013 5:19 PM
To: Murphy, Meredith K Ms OSD ATL
Cc: Williams, Amy, Ms, OSD-ATL
Subject: FW: DOJ comments on DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections
Attachments: 2013-010 (P) OIRA 041513 Cmts & Responses.docx; 2013-D010 DFARS text (p) OIRA revised 041513.doc
Signed By: (b)(6)

FYI.

-----Original Message-----

From: Quinones, Manuel Mr OSD ATL
Sent: Monday, April 15, 2013 5:18 PM
To: 'Seehra, Jasmeet'
Cc: FN-OMB-DFAR Rules
Subject: RE: DOJ comments on DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections

Ms Seehra,

Please find attached the matrix with DoD's responses to comments from the National Courts and the associated revised draft DFARS proposed rule.

Please contact me for any questions or if you need additional information.

V/r,

Manny Quinones

(b)(6)

-----Original Message-----

From: Seehra, Jasmeet [mailto:(b)(6)]
Sent: Tuesday, April 09, 2013 2:01 PM
To: Quinones, Manuel Mr OSD ATL; Williams, Amy, Ms, OSD-ATL
Cc: FN-OMB-DFAR Rules; Wise, Julia; Hinchman, Robert (OLP)
Subject: DOJ comments on DFARS Case 2013-D010 -- Enhancement of Contractor Whistleblower Protections

National Courts offers the following comments about the proposed DFARS:

(1) 10 USC 2409(a), as amended, provides that an agency may not take action in reprisal for a variety of activities, including disclosure of "a substantial and specific danger to public health or safety." The new implementing regulation, however, at section 203.901, states that "reprisal means discharging, demoting, or otherwise discriminating against an employee for disclosing that the employee reasonably believes is evidence of gross mismanagement, gross waste, an abuse of authority, or a violation of law, rule, or regulation related to a DoD contract."

Thus, the regulation is narrower than the statute in that it does not include the provision of the statute pertaining to "a substantial and specific danger to public health or safety," and it is unclear whether that language was omitted from the regulation inadvertently or intentionally.

(2) The statute, as amended, expressly applies to employees of contractors or subcontractors. The proposed implementing regulations, however, do not consistently reference subcontractors and may lead to confusion. First, section 203.904, which retains its pre-amendment language, states that "any contractor employee who believes he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General." It may be appropriate to add the words "or subcontractor" to this provision, because the regulation referenced, 203.903, applies to employees of subcontractors.

Second, section 203.905 retains language requiring the DoD Inspector General, upon determining that a complaint merits further investigation, to notify and provide a written report to the "complainant, the contractor alleged to have committed the violation, and the head of the agency." Again, it may be appropriate to add the words "or subcontractor" to this subsection.

Third, the remedies provision of the regulation, section 203.906, retains language potentially implying that the remedies provided by the statute do not apply to subcontractors. The language states, in pertinent part, that "the head of the agency. . . [s]hall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903. .

..". If the remedies were also intended to apply to subcontractors, the regulation should reference subcontractors.

Finally, the proposed rule indicates that contract clause 252.203-7002 is to be amended to require contract clauses mandating that subcontractors "inform employees in writing of their whistleblower rights." See Proposed Rule at p. 7. The new clause states:

(a) The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in subpart 203.9 of the Defense Federal Acquisition Regulation Supplement.

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.

Murphy, Meredith K Ms OSD ATL

From: Woodward, Noel L DLA CIV GENERAL COUNSEL (b)(6)
Sent: Tuesday, February 05, 2013 12:46 PM
To: Murphy, Meredith K Ms OSD ATL
Subject: RE: Draft Proposed Rule, DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Meredith,

I don't have any comments.

Noël L. Woodward, Associate General Counsel

(b)(6)

-----Original Message-----

From: Murphy, Meredith K Ms OSD ATL [mailto:(b)(6)]
Sent: Tuesday, February 05, 2013 11:51 AM
To: Vogt, Robert; Ross, Sandra, Ms, OSD-ATL; Rivest, Mark A COL MIL USA OTJAG (b)(6)
Woodward, Noel L DLA CIV GENERAL COUNSEL
Subject: RE: Draft Proposed Rule, DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Thanks. I'll take care of it.

Regards,
Meredith

-----Original Message-----

From: Vogt, Robert
Sent: Tuesday, February 05, 2013 11:43 AM
To: Murphy, Meredith K Ms OSD ATL; Ross, Sandra, Ms, OSD-ATL; Rivest, Mark A COL MIL USA OTJAG
(b)(6)
Subject: RE: Draft Proposed Rule, DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Meredith,

On page 3 of the third attachment showing the draft proposed rule under "SUPPLEMENTARY INFORMATION:", I. Background, I recommend changing first sentence to read:

"DoD is proposing to revise the DFARS to implement a policy enhancing the whistleblower protections for contractor..."

Other than that, I concur with submission of the proposed rule for consideration by the DAR Council.

Thanks,

Bob Vogt
Associate Counsel
DCMA Contract Integrity Center (CIC)
Carson Office

(b)(6)

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ATTORNEY WORK PRODUCT/COMMUNICATION

—Original Message—

From: Murphy, Meredith K Ms OSD ATL

Sent: Friday, February 01, 2013 6:20 AM

To: Ross, Sandra, Ms, OSD-ATL; Vogt, Robert; Rivest, Mark A COL MIL USA OTJAG (b)(6)

(b)(6)

Subject: Draft Proposed Rule, DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Noel, you were not able to participate in the Committee telecom and haven't submitted comments on this case to date. Please let me know if you want your name listed as a participant on this case.

SUSPENSE: Tuesday, February 4, 2013, noon

Please review the attached materials and provide me with your comments or concurrence NLT than noon on Tuesday, 2/4.

There shouldn't be any surprises in the materials, but if there are, let me know because they were inadvertent.

Thanks again to all who participated in yesterday's telecom.

Regards,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Vogt, Robert
Sent: Tuesday, February 05, 2013 11:43 AM
To: Murphy, Meredith K Ms OSD ATL; Ross, Sandra, Ms, OSD-ATL; Rivest, Mark A COL MIL
(b)(6)
Subject: RE: Draft Proposed Rule, DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Meredith,

On page 3 of the third attachment showing the draft proposed rule under "SUPPLEMENTARY INFORMATION:", I. Background, I recommend changing first sentence to read:

"DoD is proposing to revise the DFARS to implement a policy enhancing the whistleblower protections for contractor..."

Other than that, I concur with submission of the proposed rule for consideration by the DAR Council.

Thanks,

Bob Vogt
Associate Counsel
DCMA Contract Integrity Center (CIC)
Carson Office

(b)(6)

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ATTORNEY WORK PRODUCT/COMMUNICATION

-----Original Message-----

From: Murphy, Meredith K Ms OSD ATL
Sent: Friday, February 01, 2013 6:20 AM
To: Ross, Sandra, Ms, OSD-ATL; Vogt, Robert; Rivest, Mark A COL MIL USA OTJAC (b)(6)
(b)(6)
Subject: Draft Proposed Rule, DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Noel, you were not able to participate in the Committee telecom and haven't submitted comments on this case to date. Please let me know if you want your name listed as a participant on this case.

SUSPENSE: Tuesday, February 4, 2013, noon

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There shouldn't be any surprises in the materials, but if there are, let me know because they were inadvertent.

Thanks again to all who participated in yesterday's telecom.

Regards,
Meredith

Murphy, Meredith K Ms OSD ATL

From: Rivest, Mark A CIV (US (b)(6))
Sent: Wednesday, January 30, 2013 4:14 PM
To: Murphy, Meredith K Ms OSD ATL
Subject: Accepted: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections (UNCLASSIFIED)

Murphy, Meredith K Ms OSD ATL

From: Vogt, Robert (b)(6)
Sent: Monday, January 28, 2013 7:04 PM
To: Murphy, Meredith K Ms OSD ATL
Subject: RE: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections

Meredith,

I noticed several revisions that you may wish to make to the final draft.

First, under the 5th attachment, entitled "DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections, Proposed Rule", on page 3 under subparagraph (1) below "203.905 Procedures for investigating complaints", I inserted a "," (comma) after word "frivolous" in second line and deleted the word "or" that is immediately after the word "frivolous".

Secondly, it looked like there was an extra space in the fourth line of this subparagraph between words "judicial" and "or". If so, you may wish to delete.

Third, at top of page 5 in this 5th attachment, it reads "(6) The legal burden of proof specified at 5 U.S.C. 1221(e)". I reviewed 5 U.S.C. 1221(e) but it is unclear as to what is meant by the term "legal burden of proof" and we may wish to clarify.

In the 6th attachment containing as the top line "(Billing Code 5001-08-P)", the letter "e" in the word "Enhancement" should be capitalized in the fifth line under the section entitled "I. Background".

Thanks,

Bob Vogt
Associate Counsel
DCMA Contract Integrity Center (CIC)
Carson Office

(b)(6)

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ATTORNEY WORK PRODUCT/COMMUNICATION

-----Original Message-----

From: Murphy, Meredith K Ms OSD ATL
Sent: Thursday, January 24, 2013 11:49 AM

To: Ross, Sandra, Ms, OSD-ATL; Vogt, Robert; [redacted] Rivest, Mark A COL
MIL USA OTJAC [redacted]
Subject: DFARS Case 2013-D010, Enhancement of Contractor Whistleblower Protections
Importance: High

You are the current members of the DFARS Debarment, Suspension, and Business Ethics Committee. We are working with the Navy and Air Force DARC members to replace the members from their Service who have recently left/retired.

In the meantime, the National Defense Authorization Act for Fiscal Year 2013, enacted January 2, 2013, as Public Law 112-239, included a section 827 entitled "Enhancement of Whistleblower Protections for Contractor Employees." Section 827 modified 10 U.S.C. 2409 and 10 U.S.C. 2324. I'm attaching copies of section 827 and marked-up copies of the two Title 10 provisions. Also referenced in section 827 is the legal burden of proof cited in 5 U.S.C. 1221(e), so that provision of the law is also attached.

As the default chair of the committee, I've tried to make your lives easier by drafting (with the help of Sandy Ross, DPAP/CPIC) DFARS text to implement section 827. I've created a cross-walk so that you can quickly see what from section 827 is covered where in the draft DFARS and the few sections of the new law that I think should go into the FAR (and where they should be placed). Nothing about this is sacred; it's just a draft to kick things off. Please review the attached materials and draft FRN in preparation for a conference call committee meeting next THURSDAY, JANUARY 31st.

Please let me know by return e-mail or telephone call whether you will be available for a conference call next Thursday and, if so, whether the morning or afternoon is preferred. Once I've heard back from you all, I'll set up a conference call number. Of course, you are always welcome to come in person to the DARS offices at the Mark Center in Alexandria (strangely, most people aren't keen on doing that).

Also, please send in any comments to all of the committee members to facilitate communication.

Thanks for your help on this important case.

Regards,
Meredith Murphy
OUSD/AT&L
DPAP/DARS
[redacted]

52.203-15 Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009.

As prescribed in [3.907-7](#), use the following clause:

WHISTLEBLOWER PROTECTIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009
(JUNE 2010)

(a) The Contractor shall post notice of employees rights and remedies for whistleblower protections provided under section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act).

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts that are funded in whole or in part with Recovery Act funds.

(End of clause)

SUBPART 203.9—WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES

(Added January 15, 2009)

203.900 Scope of subpart.

(a) This subpart implements 10 U.S.C. 2409 as amended by Section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) and Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417).

203.903 Policy.

The following policy applies to DoD instead of the policy at FAR 3.903:

(1) 10 U.S.C. 2409 prohibits contractors ^{or SubKrs} from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the following entities, information that the employee reasonably believes is evidence of gross mismanagement of a DoD contract, a gross waste of DoD funds, a substantial and specific danger to public health or safety, or a violation of law related to a DoD contract (including the competition for or negotiation of a contract):

- (i) A Member of Congress.
- (ii) A representative of a committee of Congress.
- (iii) An Inspector General ~~that receives funding from or has oversight over contracts awarded for or on behalf of DoD.~~
- (iv) The Government Accountability Office.
- (v) A DoD employee responsible for contract oversight or management.
- (vi) An authorized official ~~of an agency~~ or the Department of Justice ^{or other law enforcement agency}.

(2) A contracting officer who receives a complaint of reprisal of the type described in paragraph (1) of this section shall forward it to legal counsel or to the appropriate party in accordance with agency procedures.

203.904 Procedures for filing complaints.

(viii) A mgt official or other Eee of the Kr or subKr who has the respon, to investigate, discover, or address misconduct.

§ 827 of the NDAA FY 2013 (Pub. L. 112-KXX)

(b) This subpart does not apply to any element of the intelligence community, as defined in § 3(4) of the Nat'l Security Act of 1947 (50 U.S.C. 401 Ca X4). This subpart does not apply to any disclosure made by an Eee of a Kr or subKr of an element of the intelligence community if such disclosure--
(1) Relates to an activity or an element of intel, install, community, or
(2) Was discovered during K or subK sves provided to an element of the intel, community.

16 USC 2201(e)
50 USC 40101
50 USC 40102
50 USC 40103

In addition to the procedures at FAR 3.904, any contractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 203.903 may file a complaint with the DoD Inspector General.

203.905 Procedures for investigating complaints.

The following procedures apply to DoD instead of the procedures at FAR 3.905:

- is frivolous or*
- Unless complaint fails to allege a violation of the prohibition*
- (1) The DoD Inspector General will make a determination as to whether a complaint is frivolous or merits further investigation. *the complaint in 203.903(c) or has been previously addressed in another Fed'l or State judicial or admin. proceeding initiated by the complainant,*
- (2) If the DoD Inspector General determines that a complaint merits further investigation, the DoD Inspector General will—
- (i) Notify the complainant, the contractor alleged to have committed the violation, and the head of the agency;
 - (ii) Conduct an investigation; and
 - ✓ (iii) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the agency.
- (3) The DoD Inspector General—
- (i) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (2) of this section within 180 days after receiving the complaint; and
 - (ii) If unable to submit a report within 180 days, will submit the report within the additional time period to which the person submitting the complaint agrees. *^ up to 180 days,*

203.906 Remedies.

- (1) Not later than 30 days after receiving a DoD Inspector General report in accordance with 203.905, the head of the agency—
- (i) Shall determine whether sufficient basis exists to conclude that the contractor has subjected one of its employees to a reprisal as prohibited by 203.903; and
 - (ii) Shall issue an order denying relief or shall take one or more of the actions specified in FAR 3.906(a).

10 USC
2409 (b)

10 U.S.C.
2409 (c)

(2) If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 203.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(3) An Inspector General determination and an agency head order denying relief under paragraph (2) of this section shall be admissible in evidence in any de novo action at law or equity brought pursuant to 10 U.S.C. 2409(c).

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.