KING & SPALDING

Client Alert

Litigation—Government Investigations Practice Group

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DOD Updates Contractor Whistleblower Regulations—Increased Enforcement and Litigation on the Horizon

On September 30, 2013, the Department of Defense (DOD) published a potentially significant **Interim Rule** to amend the Defense Federal Acquisition Regulations (DFARS)—DFARS Case 2013-D010.[1] This rulemaking brings DOD regulations into line with Congress' recent expansion of whistleblower protections in the National Defense Authorization Act (NDAA). Effective July 1, 2013, that statutory expansion of whistleblower protections: (i) covered, for the first time, employees of subcontractors; (ii) expanded both the scope of alleged violations that a whistleblower could report and the reporting mechanisms; and (iii) clarified the applicable burden of proof.

In terms of client actions, the Interim Rule is effective immediately, and stakeholders may wish to submit formal comments, which are due on or before November 29, 2013. Additionally, stakeholders should be alert to ensure that their internal procedures are sufficient to comply with the new Interim Rule.

Recent Statutory Expansion of Whistleblower Rights Implemented Though an Interim Rule

In January 2013, President Obama signed the 2013 NDAA into law, significantly expanding existing whistleblower protections applicable to DOD and NASA contracts or grants.[2] According to the DOD Inspector General's most recent semiannual report to Congress,[3] Section 827 of the 2013 NDAA extends coverage and protection to cases involving:

- Employees of subcontractors rather than just employees of contractors;
- Reports of abuses of authority that undermine performance of a contract;
- Reprisal actions taken at the request of contracting agency;
- Reports of a violation of a law, rule or regulation [not merely a violation of the law] related to a DOD contract or grant.

Section 827 also expands the persons or entities to whom a protected disclosure may be made to now include: (i) a Member of Congress or a representative of a Committee of Congress; (ii) an Inspector General, (iii) the GAO; (iv) an employee of DOD or NASA responsible for contract oversight or management; (v) an authorized official of the Department of Justice or other law enforcement agency; (vi) a court or grand jury; or (vii) a management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

Section 827 additionally revises the burden of proof in investigations, adopting the burden found in the Whistleblower Protection Act. Section 827 also adds a

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requirement that contractors and subcontractors provide written notification to their employees of their whistleblower rights and remedies. Under Section 827, whistleblower rights may not be waived by any agreement, policy, or condition of employment, including non-disclosure agreements. It also establishes a three-year statute of limitations for filing complaints.

Notably, Section 827 does not apply to any element of the Intelligence Community. It likewise does not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the Intelligence Community if the disclosure relates to an activity of an element of the Intelligence Community or was discovered during the services provided to an element of the Intelligence Community. We note, however, that many defense contractors provide goods and services to both DOD and elements of the Intelligence Community, which may allow the defense industrial base to tailor its procedures accordingly. Finally, the Conference Report clarifies that "whistleblower complaints related to commercial aviation safety issues are uniquely within the expertise of the Federal Aviation Administration (FAA), and should be investigated through FAA whistleblower procedures" under Title 49 to the maximum extent practicable and that the DOD IG must work with FAA to address any commercial aviation safety issues.[4]

The Interim Rule, published September 30, 2013, takes effect immediately. It now brings DOD's regulations into conformity with the updated statutory requirements in Section 827. The amendments take effect beginning with all contracts awarded on or after July 1, 2013, all task orders entered on or after July 1, 2013, regardless of when the contract was awarded, and contracting officials are directed to make best efforts to include a contract clause applying the amendments to pre-July 1, 2013 that are subsequently modified. Comments on the Interim Rule are due by sixty days after its publication.

Recommendations

Stakeholders should take notice of the Interim Rule. As an initial matter, on the regulatory side, comments on the Interim Rule are due on or before November 29, 2013, and stakeholders may wish to provide their input, especially in the area of contractor liability for the actions of a subcontractor or its employees, or vice versa.

Separate from a regulatory response, to ensure that the changes catch no one by surprise, in-house attorneys for defense contractors and subcontractors may wish to consider and reassess the adequacy of their companies' internal whistleblower procedures and guidelines, as well as their relationships with other industry partners.

The expansion of whistleblower protections will likely result in increased enforcement efforts and, potentially, litigation. There are already indications of this. For example, the Senate Report accompanying many of these expanded protections noted that between 2009 and 2011, there were "163 complaints filed under section 2409." But "only 5 of these complaints were investigated by the Department of Defense Inspector General." The reason enforcement was limited to this number, according to a representative of the Inspector General, was that many of the 163 "complaints were outside the scope of the statute because the alleged wrongdoing was reported by subcontractor employees or was reported to company management."[5] Because the Interim Rule expands the scope of whistleblower protections, that limitation is no longer operative. Further, also on September 30, 2013, DOD published a companion **Interim Rule** (DFARS Case 2013-D022) to implement NDAA changes that allow whistleblowers to recover the legal fees and costs of retaliation suits against contractors and subcontractors.[6] The companion rule may provide a spur to litigation because it narrows the financial risk of potential claimants.

This Interim Rule (and its companion rule) arguably raises more questions than it answers. Because employees of subcontractors are now covered by whistleblower protections, both prime contractors and subcontractors on DOD contracts must understand their counterparties' whistleblower procedures and training regimes. One looming question is to what extent prime contractors will be held responsible should employees of subcontractors file whistleblower complaints or provide reports or complaints to the employees of the prime contractor. Prime contractors may now need to consider whether to

engage in additional in-house training or due diligence and/or require additional procedures and training at the subcontractor level. Indeed, the 2013 NDAA clarified that DOD may seek company's internal audit reports and use those reports to understand the efficiency of a contractor's internal controls. DOD issued updated audit guidance on this topic in April 2013.[7]

In light of the expansion of the whistleblower protections discussed above, we encourage you to re-examine your internal whistleblower procedures and whether those procedures need to be updated to reflect the new regulatory regime. Moreover, given that the employees of subcontractors are now explicitly covered by the new regulations, current and potential contracting partners should proactively consider, among other things: (i) notifications related to whistleblower complaints between contracting parties; (ii) access to employees of contracting parties during investigations and litigation; and (iii) privilege issues. Addressing these matters in advance of a whistleblower complaint will allow greater transparency and certainty during any investigation or litigation resulting from a whistleblower complaint.

King & Spalding is particularly well-equipped to assist clients in the defense, intelligence, and national security arenas. Our team includes lawyers with years of experience handling highly sensitive, and often classified, national security issues, at very senior levels, in both government and the private sector. The firm's government investigations practice, for example, includes a former Deputy Attorney General, a former Department of Defense Inspector General, other senior Department of Justice and SEC officials, numerous former federal prosecutors, and the Staff Director of the House and Senate Intelligence Committees' Joint Inquiry on the September 11th Attacks. Both the firm's government investigations and government relations practices are consistently recognized by Chambers USA as among the best in the United States.

In short, King & Spalding lawyers have represented and assisted major defense contractors in numerous areas, including internal investigations; Justice Department, Inspector General, and Congressional investigations; compliance matters, including best practices reviews; regulatory advice; and crisis management planning and response. Of particular relevance, the government investigations practice has a well-earned reputation for strategically guiding clients through False Claims Act and whistleblower investigations and litigation.

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[1] **78 Fed. Reg. 59851-59854** (Sept. 30, 2013).
[2] NDAA, § 827, Pub. L. 112-239 (Jan. 2, 2013). The Conference Report clarifies that these whistleblower protections "fully covers the contractors of [NASA], as well as DOD." H.R. Conf. Rep. No. 112-705, at 805 (2012).
[3] Semiannual Report to the Congress (October 1, 2012 to March 31, 2013), Inspector General, United States Department of Defense, at 10, *available at* **http://www.dodig.mil/pubs/sar/SAR_MAR_2013%20Book-06102013-small.pdf** (last visited Sept. 30, 2013).
[4] H.R. Conf. Rep. No. 112-705, at 805 (2012).
[5] S. Rep. No. 112-173, at 146 (2012).
[6] **78 Fed. Reg. 59859-59861** (Sept. 30, 2013).

[7] *See* NDAA, § 832, Pub. L. 112-239 (Jan. 2, 2013). *See also* April 23, 2013 Defense Contract Audit Agency Memorandum, *Updated Audit Guidance on Access to Contractor Internal Audit Reports*, *available at*: **http://www.dcaa.mil/mmr/13-PPS-007.pdf** (last visited Sept. 30, 2013).