

Reproduced with permission from Federal Contracts Report, 103 FCR , 6/16/15. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

False Claims Act

BNA View From Wiley Rein: Are Your Policies Inadvertently Discouraging Reporting of Fraud, Waste, or Abuse?



By **KARA M. SACILOTTO** AND **TYLER E. ROBINSON**

For years, laws such as the False Claims Act have encouraged individuals to report fraud, waste, and abuse – or “blow the whistle” – and have protected individuals who do so. In just this decade, Congress passed both the Dodd-Frank Act, which included sections on “Whistleblower Protection” and the Whistleblower Protection Enhancement Act of 2012, which increased protection against retaliatory action for whistleblowers reporting instances of fraud, waste, and abuse. This upsurge of increased protection of whistleblowers is only getting stronger. For example,

- The Fiscal Year 2013 National Defense Authorization Act (NDAA) included enhanced whistleblower protections for contractor employees. Among other things, Section 827 of the NDAA extended protection to contractor and subcontractor employees who report “gross

Kara M. Sacilotto is a partner in Wiley Rein’s Government Contracts Practice. She has extensive experience in government contracting, has taught as an adjunct professor at George Mason University School of Law, has testified before Congress on procurement policy matters, and is active in the ABA Section of Public Contract Law. Tyler E. Robinson is an associate in Wiley Rein’s Government Contracts Practice.

mismanagement” of a Department of Defense (DoD) contract or grant, “gross waste” of DoD funds, an “abuse of authority” related to a DoD contract or grant, or a violation of laws, rules, or regulations relating to a DoD contract.

- In 2013, the FAR Council adopted a pilot program that tracks closely the FY2013 NDAA requirements and adopted another rule making certain legal costs related to whistleblower actions unallowable. The DFARS also was updated in 2014 to implement the NDAA requirements, and in March 2015, the National Aeronautics and Space Administration (NASA) followed suit and adopted whistleblower protection and unallowability rules.

- In January 2015, the U.S. Office of Special Counsel (OSC) proposed a rule change to encourage contractor employees to report misconduct that they observe within the federal agencies that they support. As explained by the OSC, “In the modern workforce, employees of contractors, subcontractors, and grantees often work alongside federal employees . . . [and thus] contractors are similarly situated to observe or experience the same type of wrongdoing as are federal employees.”

- In February 2015, DoD issued a class deviation declaring that no federal funds would be made available under any contract to an entity that requires its employees “to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such

employees or contractors from lawfully reporting . . . waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.”

Several events of the past few months make clear that these initiatives are more than just words on a page. At the end of March 2015, the U.S. Department of State (DoS) Office of Inspector General (OIG) released a report on its investigation of confidentiality and reporting policies of the 30 contractors with the largest dollar volumes of DoS contracts. The DoS OIG found that while all 30 contractors utilized confidentiality policies and all 30 contractors had policies on reporting fraud, 13 contractors had policies or agreements “that might have some chilling effect on employees who are considering whether to report fraud, waste, or abuse” to the Government.

In its report, the DoS OIG focused on two particular practices as potentially chilling reporting. First, the OIG flagged contractor policies that require employees to notify company officials if they are contacted by a government auditor or investigator. Although the OIG acknowledged that such policies “may have a legitimate justification, such as ensuring the company is able to raise any applicable privilege to a document request,” OIG still expressed concern that such policies “may have a chilling effect on employees” who might otherwise blow the whistle. Second, the OIG flagged non-disparagement agreements, although it did note that none of the examined provisions specifically precluded the reporting of waste, fraud, or abuse to a government agency. These two concerns aside, the OIG found that none of the contractor policies it examined was “overly restrictive” and that all 30 companies reported that they had never attempted to enforce provisions of a confidentiality agreement or taken disciplinary action against any current or former employees who reported or attempted to report fraud, waste, or abuse.

Unlike the DoS contractors, however, KBR, Inc. did not fare quite as well. Shortly after the DoS OIG released its report on confidentiality practices, the Securities and Exchange Commission (SEC) announced its first whistleblower action regarding a confidentiality provision. While performing base logistics support in Iraq, KBR began using a confidentiality agreement in conjunction with non-attorney led internal investigations that expressly prohibited employees from discussing the subject of an investigation with anybody without prior authorization from the KBR Law Department. The agreement stated that such “unauthorized disclosures” would be grounds for disciplinary actions up to and including termination.

KBR contended that its agreement was meant to preserve the attorney-client privilege, but the SEC found such an agreement to be in violation of SEC Rule 21F-17, which provides in part that no person “may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation.” As a result of the enforcement action, KBR agreed to amend its confidentiality agreement to state expressly that nothing in the confidentiality agreement prevented the employee from reporting possible violations of federal law or regulation to any governmental agency and that prior authorization from the Law Department was not required for such reports. KBR also agreed to pay a fine of \$130,000.

With these recent events in mind, it is critical that contractors review their internal policies, agreements, and *Upjohn* warnings to make sure that they do not overemphasize confidentiality to the point that they unduly discourage employees from reporting possible instances of fraud, waste, and abuse. As demonstrated above, while express prohibitions of reporting concerns to governmental agencies obviously are problematic, the Government is now also concerned about indirect or unintentional chilling of reporting. Based on the DoS OIG’s report, government officials appear to now be asking themselves not just “does this discourage reporting,” but also “could this discourage reporting.”

Admittedly, contractors have a fine line to walk. Contractors have a legitimate interest in protecting the attorney-client privilege and maintaining the confidentiality of proprietary company information. Weighing the DoS OIG report and SEC action together, contractors should consider whether equal emphasis is placed on both the company’s need to keep certain information confidential and on employees’ rights to report instances of waste, fraud, and abuse to governmental authorities. In its agreement with KBR, for example, the SEC did not require KBR to eliminate the confidentiality agreement altogether. Instead, the SEC accepted as appropriate remediation a revision to KBR’s confidentiality agreement to include express notice that the agreement did not prohibit reporting of possible waste, fraud, and abuse, and that authorization from the company was not required prior to making such a report. The SEC also accepted KBR undertaking the effort to inform employees who had signed the earlier agreement that KBR did not require Law Department preapproval before communicating with any governmental agency regarding possible violations of federal law or regulation.

The DoS OIG report laid out several “best practices” contractors can adopt to avoid accusations (or worse) of chilling employees’ reporting rights. According to the report, these best practices can “ensure that employees feel comfortable in reporting knowledge of wrongdoing and have appropriate avenues to do so without fear of retaliation.” Most are already familiar to government contractors:

- Establish an internal hotline that allows employees to anonymously or confidentially report fraud or violations of law or company policy;
- Display hotline posters that communicate the different ways by which the employees can report fraud;
- Incorporate the FAR anti-retaliation protections into the employee handbook or policies;
- Inform employees of their right to contact the Government directly with any concerns about fraud, waste, or abuse; and
- Incorporate an express corporate policy to cooperate with government audits and investigations directly into the company code of ethics or employee handbook.

We would add to this list a periodic review of non-competition or non-disparagement provisions, internal company policies (such as those relating to internal investigations, anti-retaliation and protection of company information) and confidentiality provisions to ensure that the correct balance is struck between preserving

recognized confidentiality interests and ensuring that employees are not chilled from reporting legitimate misconduct.

The penalties for getting this wrong can be serious. In addition to fines, such as those faced by KBR, companies may find themselves subject to employment-

related lawsuits, *qui tam* actions under the False Claims Act, or labor grievances. The heightened attention to expanding protection of whistleblowers counsels even large, sophisticated contractors to take a fresh look at their policies and practices to ensure that they conform to current guidelines and enforcement trends.