

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 203 and 252**

RIN 0750-AH97

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

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement statutory amendments to whistleblower protections for contractor and subcontractor employees.

DATES: *Effective date:* September 30, 2013. In accordance with FAR 1.108(d)(3), contracting officers are encouraged to include the changes in these rules in major modifications to contracts and orders awarded prior to the effective date of this interim rule.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before November 29, 2013, 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:

- *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.

- *Email:* dfars@osd.mil. Include DFARS Case 2013-D010 in the subject line of the message.

- *Fax:* 571-372-6094.

- *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 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**

This interim rule revises the DFARS to implement section 827 (except paragraph (g)) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013). Section 827 (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," is partially addressed under a separate 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 Federal Acquisition Regulation (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 U.S.C. 4712, respectively). See FAR Case 2013-017, entitled Allowability of Legal Costs for Whistleblower Proceedings.

II. Discussion and Analysis

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 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).

(a)(3)(B): Added prohibition against reprisal even if undertaken at the 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.

(c)(2): Created a two-year time limit 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.

(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. Changes to DFARS

The statutory changes to 10 U.S.C. 2409 made by section 827 are

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 interim rule amends DFARS 203.900, Scope of subpart, to add a reference to section 827 and implement the exclusion of the intelligence community from applicability of the subpart. The definition of “abuse of authority” is added to DFARS 203.901, Definition.

Amendments are made to DFARS 203.903, Policy. The applicability of the subpart is expanded to include violations of rule or regulation and abuse of authority relating to a DoD contract. The entities covered are expanded to include other law enforcement agencies, a court or grand jury, and certain contractor or subcontractor management officials or employees. In addition, the changes to this section 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. DFARS 203.905 is 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 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 is 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 interim rule amends 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 is 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 interim 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 only clarifies 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 amending the DFARS to implement changes 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, NASA, and the Coast Guard. Each agency will amend its Federal Acquisition Regulation supplement to incorporate these provisions. This Initial Regulatory Flexibility Analysis pertains only to this DFARS interim rule. This rule makes 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 applies 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 interim 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 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).

VI. Determination To Issue an Interim Rule

A determination has been made by the Secretary of Defense pursuant to 41 U.S.C. 1701(d) that urgent and compelling reasons exist to justify promulgating this rule on an interim basis without prior opportunity for public comment. This action is necessary for the following reasons: First, by operation of law, the revised statute became effective on July 1, 2013 (*i.e.*, Congress included language in section 827 specifically addressing the effective date of the changes to 10 U.S.C. 2409). Second, the revisions impose new responsibilities on agencies and create certain new rights for contractor

employees. Specifically, as of July 1, 2013:

- There are changes and additions in the list of entities to whom a whistleblower disclosure makes the whistleblower eligible for additional protections against reprisal;
- Agency heads have expanded responsibilities to take specific actions with regard to a DoD Inspector General finding of reprisal against a contractor whistleblower;
- The law requires that the written notice to employees of their whistleblower rights must be provided in the “predominant native language of the workforce;” and
- For the first time, contractors must flow down to subcontractors the requirement to provide written notice to subcontractor employees.

In addition, there is a new exemption for elements of the intelligence community that was not available under previous laws.

The most effective and efficient way to ensure awareness and compliance by agencies and contractors with all of these requirements is through immediate regulatory change. Delaying promulgation may delay the effective date of regulations but will not postpone when the law becomes applicable to contractors and subcontractors. Thus, ordinary notice and comment procedures would unnecessarily increase the risk of confusion and noncompliance, defeating the regulatory objective.

Moreover, there is little likelihood that the publication of this rule without prior comment will increase burden on contractors. This interim regulation qualifies as an interpretative rule, as it provides basic guidance that agencies and contractors need to comply with the statute. Indeed, this regulation prescribes little beyond that which is set forth clearly in the statute.

Nevertheless, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD will consider public comments received in response to this interim rule in the formation of the Department’s final rule.

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203 and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 203 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

- 2. Section 203.900 is revised to read as follows:

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), 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 50 U.S.C. 3003(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.

- 3. Section 203.901 is added to read as follows:

203.901 Definition.

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.

- 4. Section 203.903 is revised to read as follows:

203.903 Policy.

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

(iii) The Government Accountability Office.

(iv) A DoD employee 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.

(vii) 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.

(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.

- 5. Section 203.904 is revised to read as follows:

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.

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

(c) 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 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.

- 6. Section 203.905 is amended by—

- a. Removing the introductory text;
- b. Revising paragraphs (1) and (3); and
- c. Adding paragraphs (4) and (5).

The revision and addition read as follows:

203.905 Procedures for investigating complaints.

(1) Unless the DoD Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903, or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the DoD Inspector General will investigate the complaint.

* * * * *

(3) Upon completion of the investigation, the DoD Inspector General—

(i) Either will determine that the complaint is frivolous, fails to allege a violation of the prohibition in 203.903, or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, 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 to by the person submitting the complaint.

(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) 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 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.

■ 7. Section 203.906 is amended by—

■ a. Revising paragraph (1);

■ b. Amending paragraph (2)(ii) by adding a sentence at the end of the paragraph; and

■ c. By adding paragraphs (4), (5), and (6).

The revision and additions read as follows:

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 shall determine whether sufficient basis exists to conclude that the contractor has subjected the complainant 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.

(2) * * *

(ii) * * * 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.

* * * * *

(4) Whenever a contractor fails to comply with an order issued by the head of agency in accordance with 10 U.S.C. 2409, 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 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.

(5) Any person adversely affected or aggrieved by an order issued by the head of the agency in accordance with 10 U.S.C. 2409 may obtain judicial review of the order's conformance with the law, and the implementing regulation, 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, Unites States Code. Filing such an appeal shall

not act to stay the enforcement of the order by the head of an agency, unless a stay is specifically entered by the court.

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

■ 8. Section 203.907 is added to read as follows.

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.

252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Section 252.203–7002 is amended by—

■ a. Amending the clause date by removing “(JAN 2009)” and adding in its place “(SEP 2013)”;

■ b. Designating the clause text as paragraph (a);

■ c. Revising the newly designated paragraph (a); and

■ d. Adding a new paragraph (b).

The revision and addition read as follows:

252.203–7002 Requirement to Inform Employees of Whistleblower Rights.

* * * * *

(a) The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of contractor 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.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 206, 212, 225, and 252

RIN 0750–AH98

Defense Federal Acquisition Regulation Supplement: Acquisitions in Support of Operations in Afghanistan (DFARS Case 2013–D009)

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

ACTION: Interim rule.