United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

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Department of the Interior Guidance Release (DIG) 2014-05

Subject: **Pilot Program for Enhancement of Contractor and Financial Assistance Recipient Employee Whistleblower Protection**

References: 2013 National Defense Authorization Act, P.L. 112-239;
Federal False Claims Act, 31 U.S.C. § 3729-3733;
41 U.S.C. § 4705;
48 CFR § 3.908;
42 U.S.C. § 4712;
Federal Register Vol. 78, No. 189, issued September 30, 2013;
FAR Subpart 3.9, Sections 3.901 – 3.906; and
5 U.S.C. § 1213.

1. Purpose:

This DIG establishes a Department-wide requirement to include a whistleblower rights clause in the award terms for contracts, subcontracts, grants, cooperative agreements, and subaward agreements pursuant to the 2013 National Defense Authorization Act (2013 NDAA), P.L. 112-239.

2. Effective Date: Effective immediately upon issuance.

3. Background and Explanation:

The 2013 NDAA, signed by President Obama on January 2, 2013, significantly expanded whistleblower protections and extended the protections that applied previously only to government employees. The 2013 NDAA extends whistleblower protections to contractors, subcontractors, and financial assistance recipients and sub-recipients, and implements a new process for the submission and review of complaints. Federal agencies are required to inform their award recipients and contractors of their new rights under the "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections" (Pilot Program), applicable between July 1, 2013 and January 1, 2017.

The four-year Pilot Program enhances whistleblower protections for contractor employees and creates additional obligations for Federal agencies. Section 828 of the 2013 NDAA adds a new section 4712 to Title 41 of the U.S. Code, which contains the elements of the Pilot Program and

suspends the pre-existing whistleblower protections at 41 U.S.C. § 4705 for the duration of the Pilot Program. An interim rule released September 30, 2013, by the Department of Defense, General Services Administration, and National Aeronautics and Space Administration created a new Federal Acquisition Regulation (FAR) section at 48 CFR § 3.908 to implement 42 U.S.C. § 4712 (see Federal Register Vol. 78, No. 189, issued September 30, 2013). FAR sections 3.901 – 3.906 remain intact but are similarly suspended during the Pilot Program. These provisions will be reinstated at the close of the Pilot Program absent Congressional action.

Under the Pilot Program, an "employee of a contractor, subcontractor, or financial assistance awardee may not be discharged, demoted or otherwise discriminated against as a reprisal" for reporting certain specified information to specifically listed entities or individuals that an employee reasonably believes to be any of the following:

- Evidence of gross mismanagement of a Federal contract, grant or cooperative agreement;
- A gross waste of Federal funds;
- An abuse of authority relating to a Federal contract, grant or cooperative agreement (defined by 48 CFR § 3.908-2 as "an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency");
- A substantial and specific danger to public health or safety; or
- A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract), grant or cooperative agreement.

Contractors, subcontractors, or award recipients cannot be dismissed, demoted or discriminated against for reporting such issues, if disclosed to the following:

- A Member of Congress, or a representative of a Congressional committee;
- An Inspector General;
- The Government Accountability Office;
- A Federal employee responsible for contract or grant oversight or management at the relevant agency;
- An official from the Department of Justice, or other law enforcement agency;
- A court or grand jury; or
- A management official or other employee of the contractor, subcontractor, grantee, or sub-grantee who has the responsibility to investigate, discover or address misconduct.

The governing statute and regulations of the Pilot Program in 41 U.S.C. § 4712 outline the process for filing complaints to the Office of Inspector General (OIG), the procedure for investigating complaints, the statutory remedies and time frames for action, and procedures for enforcement of orders. A person who believes that the person has been subjected to a reprisal prohibited by 41 U.S.C. § 4712(a) may submit a complaint to the OIG. Unless the OIG 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 OIG shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation.

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

4. <u>Action Required</u>:

The Pilot Program requires contractors, subcontractors, and financial assistance award recipients and subrecipients to notify their employees in writing of the rights and remedies provided under the Pilot Program (see 41 U.S.C. § 4712(d)). The regulations further provide that Contracting Officers must insert the clause at FAR 52.203-17, *Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights*, in all solicitations and contracts that exceed the Simplified Acquisition Threshold. Grants Management Specialists must insert the following clause in all grants and cooperative agreements:

RECIPIENT EMPLOYEE WHISTLEBLOWER RIGHTS AND REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS (SEP 2013)

(a) This award and employees working on this financial assistance agreement will be subject to the whistleblower rights and remedies in the pilot program on Award Recipient employee whistleblower protections established at 41 U.S.C. 4712 by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub.L. 112-239).

(b) The Award Recipient shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712.

(c) The Award Recipient shall insert the substance of this clause, including this paragraph (c), in all subawards or subcontracts over the simplified acquisition threshold. 42 CFR § 52.203-17 (as referenced in 42 CFR § 3.908-9).

5. <u>Additional information</u>:

Contractors and award recipients may submit complaints through the following OIG hotline contact numbers:

Eastern Regional Office, Herndon, Virginia: 703-487-8057
Central Regional Office, Lakewood, Colorado: 303-236-8296
Western Regional Office, Sacramento, California: 916-978-5630
Toll Free: 800-424-5081

DOI employees may make reprisal complaints by contacting the OIG or the U.S. Office of Special Counsel (which under the Whistleblower Protection Act has sole authority to both investigate and prosecute complaints of reprisal from Federal employees) at (800) 572-2249 or online at https://www.osc.gov/oscefile/.

If you have questions regarding the implementation of expanded whistleblower protection policies for contractors, please contact Scott Curit, Senior Procurement Analyst, at (202) 513-0719 or by e-mail at Scott_Curit@ios.doi.gov. Financial Assistance inquiries may be directed to Anita Hairston, Financial Assistance Program Manager (202) 513-0871 or by e-mail at Anita_Hairston@ios.doi.gov.

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