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March 23, 2015

VIA REGULATORY PORTAL AND U.S. MAIL

U.S. Office of Special Counsel
Office of the General Counsel
Attn: Lisa V. Terry, General Counsel
1730 M. Street NW, Suite 218
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lterry@osc.gov

Re: U.S. Office of Special Counsel, Proposed Rule, Revision of Regulations to Allow Federal Contractors, Subcontractors, and Grantees to File Whistleblower Disclosures With the U.S. Office of Special Counsel, 80 Fed. Reg. 3182 (January 22, 2015)

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association (the "Section"), I am submitting comments on the above-referenced matter (the "Proposed Rule").¹ The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.²

I. BACKGROUND

The U.S. Office of Special Counsel's ("OSC") Proposed Rule is intended to provide a mechanism for contractors, subcontractors, grantees, and their employees to

¹ Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Anthony N. Palladino, member of the Section's Council, did not participate in the Section's consideration of these comments and abstained from the voting to approve and send this letter.

² This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic "Ethics and Compliance."

disclose to the OSC certain wrongdoing within the federal government. The OSC has jurisdiction to receive and assess reports from government employees under 5 U.S.C. § 1213. Such reports may include information that a government employee reasonably believes shows: (i) a violation of any law, rule, or regulation; (ii) gross mismanagement; (iii) a gross waste of funds; (iv) an abuse of authority; or (v) a substantial and specific danger to public health or safety.³ The OSC is proposing that contractors, subcontractors, grantees, and their employees also report such matters to the OSC.

II. COMMENTS

The Section strongly supports a clear policy promoting the disclosure of wrongdoing within the Government and protecting those who blow the whistle on such wrongdoing. We are concerned, however, about creating a duplicative reporting mechanism for contractors, subcontractors, grantees, and their employees that could undermine the important roles served by contracting officers and agencies' offices of inspector general ("OIGs"). The Section believes that the goals of promoting disclosures of government wrongdoing and protecting whistleblowers might be best served by withdrawing the Proposed Rule and instead reminding contractors and their employees to continue to report government wrongdoing through the existing channels, including the cognizant contracting officer and agency OIGs. The existing reporting mechanisms have proven quite effective in recent years. Accordingly, the Section offers the following comments.

A. The Proposed Rule is Unnecessary.

Contractors, subcontractors, grantees, and their employees already have a mechanism for reporting wrongdoing—including wrongdoing by government employees and officials—through the agency OIGs. Under the Inspector General Act of 1978,⁴ agency OIGs have broad authority to receive complaints from federal employees and other sources, protect individuals who submit disclosures, access records and materials available to the agency, issue subpoenas for non-government records, obtain assistance from other agencies, and report findings to the agency head. The Federal Acquisition Regulation ("FAR") includes a contract clause, FAR 52.203-14, Display of Hotline Poster(s), that requires that contractors to prominently display a poster in common work areas and on the company website advising how to report potential fraud. These posters generally direct employees to the relevant agency OIGs.⁵ Additionally, under the FAR's mandatory-disclosure program, contractors must report credible evidence of certain covered violations and "significant overpayments" that occur in connection with the award, performance, or closeout of a federal contract or

³ 5 U.S.C. § 1213(a).

⁴ Pub. L. No. 95-452, 92 Stat. 1101.

⁵ For example, the Department of Defense ("DoD") poster includes the hotline for the DoD OIG. *See* DoD OIG, DoD Hotline –Posters, <http://www.dodig.mil/Hotline/posters.cfm> (last visited Mar. 9, 2015).

subcontract.⁶ When a contractor or subcontractor is subject to FAR contract clause 52.203-13, it is *required* to disclose credible evidence of covered violations to the appropriate agency OIG (or OIGs).⁷ More than 1100 matters have been reported to agency OIGs since the mandatory disclosure program was implemented in late 2008. Under the program, now more than six year's old, both the contracting and government enforcement (OIG and Department of Justice) communities have come to understand their respective responsibilities under the program. Procuring agencies and OIGs have developed protocols and procedures regarding how contractors and their personnel can disclose wrong-doing and how they can expect the matters will be pursued within OIG and procurement channels. Contractors report that among the disclosures they submit are disclosures that involve possible wrong-doing by government employees, not just contractor or subcontractor employees.

The Section respectfully submits that agency OIGs are generally better positioned than the OSC to receive reports of wrongdoing from contractors, subcontractors, grantees, and their employees. The OSC's jurisdiction is different from and much more limited than that of agency OIGs. The OSC is primarily focused on personnel practices within the Executive Branch. Unlike an OIG, the OSC does not have authority to investigate potential wrongdoing that is the subject matter of a disclosure.⁸ In fact, under the Proposed Rule, if the OSC were to find that there is "substantial likelihood" of a violation based on a report from a contractor or contractor employee, the OSC would refer the matter to the relevant agency head. We believe that under such a regime, in many cases, the agency head would in turn refer the matter to the OIG for investigation. The OIG also periodically reports investigations to Congress, thus serving as a safeguard from an agency head potentially burying the matter. The OSC also most likely does not have adequate staff with security clearances to address classified contracts. The OIGs possess the necessary clearances to address matters related to classified contracts with their agency. The OIG's staff also has subject matter experts that can better address issues arising in the mandatory disclosure process.

⁶ Under the FAR's mandatory-disclosure rule, an agency can suspend or debar an entity and any employee in a supervisory position (or "principal" of the entity) on the grounds that they knowingly failed to timely disclose "credible evidence" held by a principal of (1) a violation of federal criminal law involving fraud, conflict of interest, bribery, or improper gratuity provisions in Title 18 of the U.S. Code; (2) a violation of the False Claims Act; or (3) a "significant overpayment" in connection with the award, performance, or closeout of a federal contract or subcontract. The obligation is "mandatory" in the sense that the contractor and principals face potential suspension or debarment if they fail to disclose a matter that is deemed to fall within the scope of the rule. *See* FAR 9.406-2, 9.407-2; Final Rule, FAR Case 2007-006, Contractor Business Ethics Compliance Program Disclosure Requirements, 73 Fed. Reg. 67,064 (Nov. 12, 2008). The FAR mandatory disclosure rule is also implemented through a standard contract clause, FAR 52.203-13, Contractor Code of Business Ethics and Conduct.

⁷ FAR 52.203-13 imposes a contractual obligation to disclose to the applicable agency OIG credible evidence of (1) an FCA violation; or (2) a violation of a crime codified in Title 18 that involves fraud, bribery, improper gratuities, or conflicts of interest in connection with the award, performance, or closeout of a government contract.

⁸ *See* 80 Fed. Reg. at 3183 (proposed § 1800.2(a)).

The commentary accompanying the Proposed Rule does not identify any perceived benefit to the Government or other stakeholders from directing contractors, subcontractors, grantees, and their employees to report issues to the OSC rather than to the appropriate agency OIGs. Indeed, such reporting might create confusion among potential whistleblowers as to where, and to whom, to report suspected wrongdoing. Having a clear path for disclosing such concerns—as currently accomplished through FAR 3.1003 and FAR clause 52.203-13—avoids the potential for ambiguity.

B. The Proposed Rule Does Not Appear to be Authorized by Congress.

The OSC has jurisdiction to accept reports of government wrongdoing from government employees under 5 U.S.C. § 1213, but neither that section nor any other law authorizes the OSC to accept reports about government wrongdoing, not involving government personnel, from contractors, subcontractors, grantees, and their employees.⁹ The OSC suggests that the Proposed Rule is consistent with 41 U.S.C. § 4712 (Section 4712), which Congress adopted as part of the National Defense Authorization Act for Fiscal Year 2013 to introduce a pilot program to enhance contractor protection from reprisal for disclosing potential government wrongdoing. Section 4712 states as follows:

An employee of a contractor, subcontractor, or grantee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, 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) or grant.

Paragraph 2 of Section 4712 indicates that disclosures to the following persons or bodies are covered:

- A Member of Congress or a representative of a committee of Congress;
- An Inspector General;
- The Government Accountability Office;
- A Federal employee responsible for contract or grant oversight or management at the relevant agency;
- An authorized official of the Department of Justice or other law enforcement agency;
- A court or grand jury; and

⁹ Pub. L. No. 101-12, 103 Stat. 17 (1989) (codified at 5 U.S.C. § 1201).

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

Thus, Section 4712 does not expressly contemplate disclosures to the OSC.

The commentary accompanying the Proposed Rule indicates that the OSC believes that it qualifies as a “law enforcement agency” under Section 4712.¹⁰ We are not aware of any authority, including any section of Title 5, indicating that the OSC qualifies as such. Moreover, even assuming the OSC is a law enforcement authority, its jurisdiction is focused on federal employees and applicants for federal employment. The OSC has investigative authority under Title 5, Part II, Civil Service Functions and Responsibilities. Part II is expressly for the purpose of addressing federal employment and related matters. It does not encompass federal contracting matters. Further, the OSC’s authority in 5 U.S.C. § 1213 to receive reports of wrongdoing contemplates OSC’s receiving reports only from federal employees and applicants for federal employment; it does not contemplate reports from contractors and contractor employees. The OSC serves a different role than the OIGs, and this is underscored by the mandate in 5 U.S.C. § 1213 that the OSC refer issues (within its jurisdiction) to the agency head. Finally, the FAR Council has already issued an interim rule to implement this pilot program. *See* 78 Fed. Reg. 60169 (Sept. 30, 2013).

C. The Proposed Rule is Counterproductive and May Undermine the Agency OIGs and Blur the Distinction Between Government Employees and Contractors.

The Section is concerned that creating multiple, overlapping reporting mechanisms could undermine the ultimate goal of promoting the disclosure of suspected government wrongdoing. Contractors and their employees recognize that agency OIGs are a proper channel for reporting wrongdoing in connection with federally funded contracts and grants. Indeed, existing regulations require that contractors post notices directing that employees report potential fraud, waste, and abuse to the agency OIGs and that contractors disclose credible evidence of certain violations and significant overpayments to the OIGs. The OIGs are entrenched as a proper channel through which contractors and their employees can report wrongdoing, including wrongdoing within the Government. The Proposed Rule could confuse contractors and their employees, possibly creating a chilling effect that would hinder, rather than encourage, disclosures. Implementation of the Proposed Rule might lead some to think that if they report a matter to OSC they are not required to report the matter to the cognizant OIG office, which would be incorrect. The Proposed Rule does not state that contractors who report matters to the OSC are relieved from their mandatory disclosure obligations. Implementation of the Proposed Rule would seem to

¹⁰ *See* 80 Fed. Reg. at 3182 (“As a law enforcement agency, and pursuant to its authority under 5 U.S.C. 1213, OSC may receive disclosures from employees of contractors who are covered by the [National Defense Authorization Act].”).

create a double reporting obligation under which contractors would report an item to the OSC, and also to the cognizant OIG office.

Finally, and quite significantly, the commentary accompanying the Proposed Rule conflates government employees with contractor employees.¹¹ There are critical differences between government employees and contractor employees. The fact that federal employees can report government wrongdoing to the OSC does not mean that contractors and their employees also can or should report through the OSC. In fact, there are benefits to having contractors and their employees report through a mechanism that is separate from the OSC, which is naturally associated with disclosures by government employees in light of its jurisdiction.

III. CONCLUSION

For the reasons stated above, we believe that it would be prudent to consider withdrawing the Proposed Rule or at least issuing another Federal Register notice explaining why the rule is necessary in light of the existing regime that directs—and in some cases requires—that contractors and contractor employees report fraud, waste, and abuse through the agency OIGs.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



Stuart B. Nibley
Chair, Section of Public Contract Law

cc:

David G. Ehrhart
James A. Hughes
Jeri Kaylene Somers
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Ethics, Compliance and Professional Responsibility Committee

¹¹ See 80 Fed. Reg. at 3182 (“In the modern workforce, employees of contractors, subcontractors, and grantees (collectively ‘contractors’) often work alongside Federal employees having similar if not identical duties. Thus contractors are similarly situated to observe or experience the same type of wrongdoing as are Federal employees. According contractors a safe channel to report wrongdoing within the government advances Congress’s purpose in enacting the [Civil Service Reform Act of 1978] and [Whistleblower Protection Act].”).

Lisa V. Terry, General Counsel
March 23, 2015
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