

Interim Rules Require Enhanced Whistleblower Protection and Limit the Allowability of Costs for Whistleblower Proceedings

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On September 30, 2013, the Federal Acquisition Regulation (FAR) Council and the U.S. Department of Defense (DOD) each issued interim rules that amend the FAR and the DFARS to provide enhanced whistleblower protections as mandated by Sections 827 and 828 of the National Defense Authorization Act (NDAA) for Fiscal Year 2013 (FY 13). See 78 Fed. Reg. 59851 (Sept. 30, 2013); 78 Fed. Reg. 60169 (Sept. 30, 2013). The two interim rules, which are effective immediately, are largely identical, except that the FAR rule is a four year pilot, while the changes made in the DFARS rule are permanent. In accordance with the changes mandated by Sections 827 and 828 of the FY13 NDAA, which we addressed in a previous Client Alert, these interim rules provide a number of additional protections for individuals who report suspected misconduct, including the following:

- The interim rules extend whistleblower protections to employees of subcontractors, whereas the whistleblower protections in the FAR and DFARS previously applied only to employees of prime contractors.
- In addition, the interim rules extend whistleblower protections to include disclosures made not only to government officials (e. g., a member of Congress, Inspector General, or the U.S. Department of Justice), but also *internal disclosures* made to "[a] management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct," as well as disclosures made to a court or grand jury or "in any judicial or administrative proceeding relating to waste, fraud, or abuse"

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- The interim rules also expand the *types of alleged* misconduct that can give rise to a protected disclosure, to include not only evidence of “gross mismanagement,” “gross waste,” or “violations of law,” but also to include disclosures regarding an alleged violation of “rule or regulation” or an “abuse of authority.”
- In addition to expanding the scope of protected disclosures, the interim rules clarify that reprisal against a whistleblower is prohibited “*even if it is undertaken at the request*” of a government official, unless the request is in the form of a “nondiscretionary directive” that is within the authority of the government official.
- The interim rules also allow contractor or subcontractor employees to recover “*compensatory damages*” (as opposed to “compensation” as called for under the current whistleblower protections in FAR 3.9), in the event that the agency head determines that the employee has suffered a reprisal.
- Finally, the interim rules include a requirement that contractors and subcontractors provide their employees with *written notification* of their rights and protections as whistleblowers, in the “predominant language of the workforce.”

In addition to these enhanced whistleblower protections, the FAR Council issued another interim rule that addresses the allowability of legal costs incurred by a contractor related to a whistleblower proceeding, as mandated by Sections 827 and 828 of the FY13 NDAA. See 78 Fed. Reg. 60173 (Sept. 30, 2013). This interim rule revises the cost principle at FAR 31.205-47, to make clear that costs related to legal proceedings are unallowable if the result of the proceeding is a finding of contractor liability, the imposition of a monetary penalty, or, significantly, an order by the agency head to the contractor or subcontractor to take corrective action. Consequently, legal costs incurred in connection with a whistleblower complaint are expressly unallowable if the agency head orders the contractor or subcontractor to take corrective action in accordance with the enhanced whistleblower rules discussed above.

Interested parties may provide comments on the interim rules by November 29, 2013. Wiley Rein will continue to monitor these and other whistleblower and cost issues.