

March 2015

OFFICE OF EVALUATIONS AND SPECIAL PROJECTS



# OIG HIGHLIGHTS

View Report [ESP-15-03](#)

## Review of the Use of Confidentiality Agreements by Department of State Contractors

### What OIG Found

All of the 30 contractors with the largest dollar volume of Department of State contracts used some variation of a confidentiality agreement or confidentiality policy. Some of the 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, such as non-disparagement clauses or provisions requiring notice to the company after receiving an inquiry from a government official. However, none of the companies reported that they had ever enforced any of these provisions against an employee or former employee who disclosed wrongdoing to the government. All 30 contractors also reported that they had a policy in place that encourages the reporting of fraud or legal and ethical violations and provides one or more ways for employees to do so.

From its review of the contractor responses and relevant legal and social science literature, OIG found that several practices are useful in encouraging employees to report fraud, waste, or abuse. These include use of an internal hotline with anonymous option; display of hotline posters in the workplace; a policy that advises employees of their right to contact the government directly if they have knowledge of fraud, waste, or abuse; notification to employees of the statutory protections against retaliation; and a corporate policy that endorses cooperation with a government audit or investigation.

### What OIG Reviewed

The Office of Inspector General (OIG) initiated an inquiry into the use of confidentiality and non-disparagement agreements by 30 companies with the largest dollar amount of Department of State (Department) contract awards in 2012. All 30 contractors responded to OIG's inquiry and provided various company policies and handbooks.

This report analyzes responses received as a result of the inquiry and describes best practices to ensure that contractor employees are not constrained in their ability to report fraud, waste, or abuse regarding a Federal contract.

### What OIG Recommends

OIG made three recommendations to the Department's Bureau of Administration (A).

OIG recommended that A instruct all contracting officers for the Department:

- a) send a copy of the list of best practices published in this report to all companies holding a contract with the Department;
- b) send a copy of the OIG hotline poster to all companies holding a contract with the Department with instructions to display it in common areas within business segments performing work for the Department; and,
- c) send a link to the OIG video on whistleblowing to all companies holding a contract with the Department with instructions to share the video with employees.



OIG

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ESP-15-03

Office of Evaluations and Special Projects

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# CONTENTS

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OBJECTIVE.....	1
BACKGROUND .....	1
Legal Background.....	3
EVALUATION RESULTS.....	5
All 30 Contractors Have Confidentiality Policies, but None Are Overly Restrictive.....	5
Some Contractors Have Polices that May Inhibit Reporting of Fraud, Waste, and Abuse.....	6
All 30 Contractors Reported Having Policies on Reporting Fraud, Waste, and Abuse .....	7
27 Contractors Reported Having Anti-Retaliation Policies.....	7
Best Practices for Encouraging the Reporting of Fraud, Waste, or Abuse.....	8
Internal Hotline with Anonymous Option .....	9
Display of Hotline Posters .....	10
Notification of FAR Anti-Retaliation Protections.....	11
Notification of Right to Contact the Government Directly.....	11
Instruction to Cooperate with Government Audits or Investigations.....	11
CONCLUSION .....	12
RECOMMENDATIONS .....	13
APPENDIX A: CONTRACTORS CONTACTED BY OIG.....	15
APPENDIX B: MANAGEMENT RESPONSE .....	16
ABBREVIATIONS .....	19
MAJOR CONTRIBUTORS .....	20

## OBJECTIVE

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After the publication of several media reports regarding the use of confidentiality agreements by Federal contractors, OIG initiated an inquiry into the use of such agreements by the 30 contractors with the largest dollar amount of Department of State contracts, as well as their company policies regarding non-retaliation and the reporting of fraud, waste, and abuse. This report analyzes the responses received from the 30 contractors. OIG also reviewed relevant social science literature and identified five best practices that encourage the reporting of fraud, waste, and abuse. Finally, OIG analyzed the contractors' responses and identified which contractors follow each of the best practices.

## BACKGROUND

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In 2014, a series of newspaper articles reported on the use of confidentiality and non-disclosure agreements by government contractors and grantees.<sup>1</sup> These agreements, which took several forms, restricted the ability of the employees of these companies from contacting government agencies to report fraud, waste, or abuse. For example, one company required employees who were interviewed following a report of a violation of the company's Code of Business Conduct to sign an agreement that prohibited them from "discussing any particulars regarding this interview and the subject matter discussed during the interview, without the specific advance authorization of counsel."<sup>2</sup> The agreement also noted that "the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment."

As a result of the issues highlighted by the articles, the Special Inspector General for Afghanistan Reconstruction (SIGAR) initiated an inquiry into the use of confidential agreements by International Relief and Development (IRD), an organization that received funding from the U.S. Agency for International Development (USAID).<sup>3</sup> In response to SIGAR's inquiry, IRD stated that since 2004 it had entered into 49 separation agreements with departing employees that contained non-disparagement and confidentiality provisions.<sup>4</sup> The non-disparagement agreements prohibited the employees from making "any derogatory, disparaging, negative,

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<sup>1</sup> Scott Higham, *KBR Accused of Reining in Whistleblowers*, The Washington Post, Feb. 20, 2014; Scott Higham, *KBR Faces SEC Investigation over Whistleblower Rules, Attorney Says*, The Washington Post, March 11, 2014; Scott Higham, Jessica Schulberg, and Steven Rich, *Big budgets, little oversight in war zones*, The Washington Post, May 5, 2014; Scott Higham and Kaley Belval, *Gags on Whistleblowing Are Rising, Lawyers Say*, The Washington Post, June 30, 2014.

<sup>2</sup> *United States ex rel Barko v. Halliburton Co.*, No. 1: 05-CV-1276, 2014 U.S. Dist. LEXIS 36490, at \*10 n. 33 (D.D.C. March 6, 2014).

<sup>3</sup> Letter from John F. Sopko, Special Inspector General for Afghanistan Reconstruction, to Dr. Arthur B. Keys, Jr., President and Chief Executive Officer, International Relief and Development, May 5, 2014.

<sup>4</sup> Letter from Jason Matechak, Senior Vice President and General Counsel, International Relief and Development, to Jack Mitchell, Director of the Office of Special Projects, Special Inspector General for Afghanistan Reconstruction, May 19, 2014.

critical, or defamatory statements” to a number of parties including “funding agencies” and “officials of any government.”<sup>5</sup> IRD informed SIGAR that it had revised the language in the separation agreement and e-mailed the former employees “to clarify that the confidentiality provisions in the separation agreement are not meant to preclude former employees from participating in a government audit, review, or investigation.”<sup>6</sup>

On August 7, 2014, the Office of Inspector General (OIG) initiated its own inquiry into the use of such agreements by the 30 companies with the largest dollar amount of Department of State (Department) contract awards in 2012. See Appendix 1 for a listing of all 30 contractors with type of contract and amount of award. Specifically, OIG asked the following five questions regarding the contactors’ confidentiality and non-retaliation policies:

- (1) Has any employee or outside consultant or advisor acting on behalf of your company asked any current or former employees who perform or performed work under any State Department contract, cooperative agreement, grant, or other instrument to sign any agreement that could be interpreted to limit or prohibit their ability to report fraud, waste, or abuse to Federal officials or that requires an employee with knowledge of fraud, waste, or abuse to first contact company officials or representatives?
- (2) If so, please provide a copy of all such agreements and the number of current and former employees who have signed such agreements. Please indicate the contract(s), cooperative agreement(s), grant(s), or other instruments under which each employee performed work.
- (3) Has your company ever attempted to enforce provisions of such agreements or taken disciplinary or other adverse action against any current or former employees who reported or attempted to report fraud, waste, or abuse to a Federal official?
- (4) Does your company utilize a standard employee or consultant contract or an employee handbook? If so, please provide a copy of the current version(s) and any version(s) used over the past two years.
- (5) Does your company have a corporate policy that encourages employees to report knowledge of fraud, waste, or abuse; provides appropriate avenues to report such knowledge; and prohibits retaliation against any employee who does so? If so, please provide documentation of such policies, when they were enacted, and if they have been changed during the past two years.

All 30 contractors responded to OIG’s inquiry and provided various company policies and handbooks. This report analyzes those responses and describes some best practices to ensure that contractor employees are not constrained in their ability to report fraud, waste, or abuse regarding a Federal contract.

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<sup>5</sup> International Relief and Development, Confidential Separation Agreement and General Release.

<sup>6</sup> Letters from Jason Matechak, Senior Vice President and General Counsel, International Relief and Development, to Jack Mitchell, Director of the Office of Special Projects, Special Inspector General for Afghanistan Reconstruction, May 15, 2014, and May 19, 2014.

## Legal Background

Various provisions of Federal statutory law and the Federal Acquisition Regulation (FAR) encourage the disclosure of fraud, waste, and abuse involving Federal contracts and prohibit retaliation against contractor employees who disclose fraud. An employee of a Federal contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing a violation of law involving a Federal contract to an authorized agency official, such as an Inspector General, the Department of Justice, or a Member of Congress.<sup>7</sup>

The National Defense Authorization Act for Fiscal Year 2013 broadened these protections and instituted a four-year pilot program that prohibits retaliation against an employee of a Federal contractor, subcontractor, or grantee who discloses information that the employee reasonably believes is evidence of: (1) gross mismanagement of a Federal contract; (2) a gross waste of Federal funds; (3) an abuse of authority relating to a Federal contract; (4) a substantial and specific danger to public health or safety; or (5) a violation of law, rule, or regulation related to a Federal contract.<sup>8</sup> The disclosure may be made to: (1) a Member of Congress or a representative of a Committee of Congress; (2) an Inspector General; (3) the Government Accountability Office; (4) a Federal employee responsible for contract oversight or management at the relevant agency; (5) an authorized official of the Department of Justice or other law enforcement agency; (6) a court or grand jury; or (7) a management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

An employee who believes he or she has suffered reprisal because of such a disclosure may file a complaint with the Inspector General of the agency concerned, and the Inspector General must investigate the complaint and report its findings to the agency, which may order the contractor or grantee to abate and/or remedy the reprisal.<sup>9</sup>

The FAR requires that all contractors conduct themselves with the highest degree of integrity and honesty and recommends that they have a written code of business ethics and conduct with an employee business ethics and compliance training program and an internal control system.<sup>10</sup> For contracts with a value expected to exceed \$5 million, a written code of business ethics is mandatory.<sup>11</sup> In addition, such contractors must prominently display a Federal agency fraud hotline poster in common work areas within business segments performing work under the contract and at contract work sites and on their websites during contract performance in the United States.<sup>12</sup> These contractors are also required by the FAR to establish an internal control

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<sup>7</sup> 41 U.S.C. §§ 4705, 4712; Federal Acquisition Regulation §§ 3.903, 3.907-2.

<sup>8</sup> Pub. L. No. 112-239, div. A, tit. VIII, §828 (Jan. 2, 2013); 41 U.S.C. § 4712.

<sup>9</sup> 41 U.S.C. § 4712(c); Federal Acquisition Regulation § 3.908-6.

<sup>10</sup> Federal Acquisition Regulation § 3.1002.

<sup>11</sup> Federal Acquisition Regulation § 3.1003. This requirement only applies if the contract involves a performance period of 120 days or more.

<sup>12</sup> Federal Acquisition Regulation §§ 3.1003, 3.1004. This requirement does not apply if the contract is for acquisition of a commercial item or if performance takes place outside of the United States.

system that provides for “full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.”<sup>13</sup> Finally, such contractors must timely disclose, in writing, to the relevant Inspector General, with a copy to the contracting officer, whenever it has credible evidence that a principal, employee, agent, or subcontractor of the contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, or bribery, or a violation of the civil False Claims Act.<sup>14</sup> The False Claims Act also contains an anti-retaliation provision that allows a contractor employee to file a civil suit if he or she is discharged, demoted, suspended, threatened, harassed, or discriminated against in the terms and conditions of employment because of actions taken to stop a violation of the Act.<sup>15</sup>

In December, Congress included a provision in the Consolidated and Further Continuing Appropriations Act for fiscal year 2015 that prohibited any funds appropriated by the Act or any other act for any contract, grant, or cooperative agreement with an entity that requires its employees or contractors to sign internal confidentiality agreements or statements prohibiting or otherwise restricting them from reporting waste, fraud, or abuse to a Federal investigative or law enforcement agency.<sup>16</sup>

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<sup>13</sup> Federal Acquisition Regulation § 52.203-13(c)(2)(ii)(G). This requirement does not apply if the contractor is a small business or if the contract is for acquisition of a commercial item.

<sup>14</sup> Federal Acquisition Regulation § 52.203-13(b)(3)(i).

<sup>15</sup> 31 U.S.C. § 3730(h).

<sup>16</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. E, tit. VII, § 743 (Dec. 16, 2014).

## EVALUATION RESULTS

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### All 30 Contractors Have Confidentiality Policies, but None Are Overly Restrictive

All of the contractors used some form of confidentiality agreement in either an employee or consultant contract or had a confidentiality policy in its employee manual, policies, or code of business conduct. Unlike the agreement that triggered the SIGAR inquiry, none of these policies specifically preclude disclosures to government agencies or officials. Most of the provisions simply note a duty to keep company information confidential and do not define company information to include evidence of fraud, waste, or abuse. For example:

- One contractor's code of conduct states that "Employees must observe obligations of confidentiality and nondisclosure of proprietary and confidential information, intellectual property, and trade secrets...proprietary and confidential information includes financial, personnel, technical, or business information...that has not been authorized for public release."
- One contractor includes an agreement with offer letters to new employees that has a provision agreeing not to "disclose to any other person or company without permission of Company, nor use for any unauthorized purpose, any confidential or proprietary information, including technical and business information."
- One contractor requires employees to sign a confidentiality agreement that defines confidential information as "all customer information, customer listing, mailing lists, or financial information as well as the records, files, memoranda, reports, listings, or other information (including customer lists, financial information, marketing strategies, or pending projects and proposals)."
- One contractor's business ethics guidelines state that "the internal business affairs of the organization, particularly confidential information and trade secrets, represent Company assets that each employee has a continuing obligation to protect."
- One contractor uses an employment agreement that states: "During the term of this Agreement, including any renewal thereof, and for five (5) years thereafter, the services performed hereunder and the results thereof shall be considered as confidential and proprietary to the Employer. The Employee shall not, without the prior written consent of the Employer, use, publish, or otherwise divulge, except for the Employer's benefit in the performance of service under this or a future agreement, any information, including but not limited to technical, financial or business information, developed by, for or at the expense of the Employer, or assigned or entrusted to the Employee by the Employer, or otherwise learned by the Employee in any manner arising out of the performance of this Agreement, unless such information is generally known outside of the Employer. The Employee shall not discuss the nature of his/her activities in connection with the Employer with anyone except authorized representative of the Employer."

Further, all of the 30 contractors stated that they had never attempted to enforce provisions of a confidentiality agreement or taken disciplinary or other adverse action against any current or former employees who reported or attempted to report fraud, waste, or abuse to a Federal official. However, OIG did not independently verify these assertions.

### **Some Contractors Have Policies that May Inhibit Reporting of Fraud, Waste, and Abuse**

OIG identified at least 13 contractors with a provision in their employee handbook, code of ethics, and/or consultant agreements that required employees to notify company officials if they are contacted by a government auditor or investigator. While some of these provisions may have a legitimate justification, such as ensuring the company is able to raise any applicable privilege to a document request, they still may have a chilling effect on employees who wish to report fraud, waste, or abuse to a Federal official. For example:

- The standards of ethics and business conduct of one contractor provide detailed instructions as to what to do when an employee is contacted by a government auditor or investigator. It instructs the employee to “politely explain the Company’s policy...to cooperate but that it will be necessary to consult with the Legal Department before answering questions or turning over any requested documents.”
- The code of ethics of one contractor requires employees to “inform their supervisor or Company management of discussions with government officials conducting such inquiries so that the Company is prepared to support and/or respond to such inquiries.”
- The code of business conduct of one contractor states that if a government official “seeks copies of documents or access to files,” the request must be referred to the Corporate Compliance Office and the company’s attorneys.
- The consulting services agreement used by one contractor states that if the consultant receives “a subpoena or other validly issued administrative or judicial demand” for confidential information, the consultant shall provide “prompt written notice...of such demand” in order to permit the contractor to seek a protective order.

OIG also identified at least five contractors that use a non-disparagement agreement or policy, although none of these provisions specifically precludes reporting fraud, waste or abuse to a government agency. Two of these provisions were in a separation agreement; three were in consulting or employment agreements. For example:

- One separation agreement requires the former employee to agree to “not in any way disparage [the company], including, but not limited to, its current and former owners, officers, directors and employees, or make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental to the good name or business reputation” of the company.
- One employment agreement states that the employee “will not make any public statement, or engage in any conduct, that is disparaging to the Company ... including,

but not limited to, any statement that disparages the products, services, finances, financial condition, capabilities or other aspect of the business of the Company.”

- One contractor uses an employee confidentiality agreement that states: “During the course of Employee’s employment with the Company and following termination of his or her services with the Company, Employee also warrants that he or she will not disparage or comment negatively about the Company or its employees, officers, directors, shareholders, investors and agents, or assist others in such disparagement.”

## **All 30 Contractors Reported Having Policies on Reporting Fraud, Waste, and Abuse**

All 30 contractors stated that they had policies in place to encourage the reporting of fraud or legal and ethical violations and provided documentation to OIG. However, these policies varied widely, with some providing specific instructions as to how to report fraud, waste, or abuse, while others did not even mention fraud, waste, or abuse. While OIG did not evaluate which contractors complied with the FAR requirement to institute a written code of business ethics and conduct, 26 of the 30 contractors provided us copies of their standards of business ethics and conduct.

OIG received information from 25 contractors that they have an internal hotline that allows employees to confidentially report fraud or violations of law or company policy. Many of these hotlines are operated by a third-party company and/or allow for anonymous reporting, which could alleviate some employees’ fears of retaliation. Companies that did not have an internal hotline reported that they had other means available to allow employees to report wrongdoing, such as displaying Federal agency hotline posters and encouraging employees to contact human resources and/or the company president.

## **27 Contractors Reported Having Anti-Retaliation Policies**

Federal law requires that the head of each executive agency to ensure that contractors inform their employees of the protections against retaliation if they report wrongdoing and their right to file a complaint with the relevant Office of Inspector General.<sup>17</sup> However, the majority of the contractors that OIG contacted also had their own internal anti-retaliation policy. Of the 30 contractors OIG reviewed, 27 provided OIG with a copy of their anti-retaliation policies. For example:

- One contractor’s code of ethics prohibits “retaliation against any individual for: (1) reporting a matter internally or externally that the employee, in good faith, believes to be a violation of [the company code of ethics] or any law, rule, or regulation; (2) cooperating with an internal investigation; or (3) cooperating with an external or government led investigation.”

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<sup>17</sup> 41 U.S.C. § 4712(d).

- One contractor’s employee handbook states that “every employee is encouraged to be proactive in the reporting of suspected violations” of the company’s policies and that “any form of retaliation against any employee who reports a violation of applicable law, rule or regulation arising in the conduct of the company’s business or occurring on the company’s property” will not be allowed or tolerated.
- One contractor has a specific whistleblower policy that states it will not “discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a Member of Congress, or an authorized official of an agency or of the Department of Justice or a court or grand jury, that the employee reasonably believes is evidence of abuse of authority relating to a Federal contract, 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).”

### Best Practices for Encouraging the Reporting of Fraud, Waste, or Abuse

After reviewing the contractor responses to its inquiry, as well as relevant legal and social science literature, OIG found that several practices are useful in encouraging employees to report fraud, waste, or abuse. While not exhaustive, these practices help to ensure that employees feel comfortable in reporting knowledge of wrongdoing and have appropriate avenues to do so without fear of retaliation. Table 1 indicates which of the 30 contractors have adopted each of the practices, based on their reply to OIG’s inquiry; more detailed information on each practice follows the table.

**Table 1: Contractors’ Use of Best Practices**

Contractor	Internal Hotline	Display of Posters	Incorporation of FAR Provisions	Right to Contact Government	Instruction to Cooperate with Government Investigation
DynCorp International	X	X			
Caddell Construction Co., Inc.	X	X	X		
PAE Holding Corp.	X		X		
B.L. Harbert Holdings L.L.C.	X	X		X	X
SAIC, Inc.	X			X	
International Development Solutions, L.L.C./ACADEMI	X	X			X
CGI Technologies & Solutions, Inc.	X				X
Aegis Group Holdings	X	X		X	
General Dynamics Corp.	X	X			
Computer Sciences Corporation	X	X			X
Triple Canopy, Inc.	X	X			X
American International Contractors, Inc.					X
Aecom Technology Corporation	X	X			X
Contracting, Consulting, Engineering, Inc.					

Contractor	Internal Hotline	Display of Posters	Incorporation of FAR Provisions	Right to Contact Government	Instruction to Cooperate with Government Investigation
Afognak Native Corp./Alutiiq	X				X
Olgoonik Corp.	X	X			
Deco, Inc.	X				
Inter-Con Security Systems, Inc.	X				X
Xator Corp.		X			
Desbuild Inc.					
Day & Zimmerman Group/SOC, L.L.C.	X	X	X	X	
Creative Information Technology, Inc.	X				
Akal Security	X				
CDW Holdings Inc.	X				
Safran	X	X	X	X	
Serco Group	X				X
Enviro-Management & Research		X			
Pernix-Serca L.P.	X			X	
Furniture Brands/Heritage Home Group	X				
STG, Inc.	X				

**Source:** OIG analysis of contractor responses.

### Internal Hotline with Anonymous Option

As shown in the table, 25 contractors reported to OIG that they have an internal hotline that allows employees to anonymously or confidentially report fraud or violations of law or company policy. The ability to report fraud, waste, or abuse to an internal hotline is an important component of an effective fraud reporting system. A 2010 study by the National Whistleblower Center found that close to 90 percent of employees who filed a qui tam lawsuit against their employer initially reported their complaints internally.<sup>18</sup> The study demonstrated the importance of an internal reporting system as the first step for most employees who wanted to disclose wrongdoing, despite the fact that they were potentially eligible for a large reward. Similarly, a study of whistleblowers in the pharmaceutical industry found that nearly all of them had first reported the activity through internal channels.<sup>19</sup>

A hotline should have multiple ways by which employees can contact it (telephone, email, etc.) and should allow for anonymous, or at least confidential, reporting. An Association of Certified Fraud Examiners report found that anonymous reporting mechanisms showed the greatest

<sup>18</sup> National Whistleblower Center, *Impact of Qui Tam Laws on Internal Compliance: A Report to the Securities and Exchange Commission* (Dec. 17, 2010), at 4.

<sup>19</sup> Aaron S. Kesselheim, David M. Studdert, and Michelle M. Mello, *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 362 *New Eng. J. Med.* 1832, 1834 (May 13, 2010).

impact on fraud losses among anti-fraud measures examined.<sup>20</sup> In fact, organizations that did not have anonymous reporting mechanisms suffered median losses from fraud that were over twice as high as organizations where such mechanisms had been established. Another study of workplace fraud reached the same conclusion. The study found that 80 percent of employees were willing to report fraud internally and that making an anonymous phone call ranked highest (30 percent) as the best means, with reporting to a confidential hotline managed by a third party as a close second (27 percent).<sup>21</sup> For companies subject to the Securities Exchange Act of 1934, the establishment of a confidential and anonymous hotline is a statutory requirement.<sup>22</sup>

## Display of Hotline Posters

Another important component of an effective fraud reporting system is communicating to employees the ways in which they can report fraud. Several whistleblower experts recommend that posters with the hotline contact information and the company's anti-retaliation policy be placed in high-traffic areas like break rooms and on the company's intranet.<sup>23</sup> For certain contracts worth more than \$5 million and for non-commercial items, the FAR requires the contractor to prominently display a Federal agency fraud hotline poster in common work areas within business segments performing work under the contract and at contract work sites and on their websites.<sup>24</sup> However, several of the contractors exceeded this requirement by developing a hotline poster for their internal hotline. As noted in the table, 14 contractors reported to OIG that they display either their own hotline poster or the hotline poster of a Federal agency, such as the Department of State (Department) or the Department of Defense (DoD), or both an internal and a Federal agency poster. In conjunction with its poster, OIG has developed a video to educate Department employees and contractor employees on avenues to report wrongdoing and on the prohibition against retaliation.

Beyond how to contact the hotline, these posters can provide important information to employees. For example:

- One contractor's internal poster urges employees to call its Business Ethics Helpline if they "don't feel comfortable reporting problems internally."
- One contractor's internal poster states that: "There will be no retributions or reprisals for reporting a suspected violation in good faith" and that "You have the option of making your report anonymously."

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<sup>20</sup> Association of Certified Fraud Examiners, Report to the Nation on Occupational Fraud and Abuse (2004), at 26.

<sup>21</sup> Ernst & Young, LLP, *American Workers: Employers Lose 20 Percent of Every Dollar to Workplace Fraud* (Aug. 5, 2002).

<sup>22</sup> 15 USCS § 78j-1(m)(4)(B).

<sup>23</sup> Dave Slovin, *The Case for Anonymous Hotlines: using hotlines can help insurers stem the tide of organizational fraud, which costs the insurance industry hundreds of millions of dollars every year*, Risk & Insurance (April 15, 2007); Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. Colo. L. Rev. 975, 1032 (2008).

<sup>24</sup> Federal Acquisition Regulation §§ 3.1003, 3.1004. OIG did not have copies of the contracts awarded to the thirty contractors, so it did not evaluate whether this provision applied to each contractor and whether each contractor met this requirement.

## Notification of FAR Anti-Retaliation Protections

As previously noted, Federal law requires the head of each executive agency to ensure that contractors inform their employees of the protections against retaliation if they report wrongdoing and their right to file a complaint with the relevant Office of Inspector General.<sup>25</sup> Section 3.9 of the FAR implements these protections. Four contractors incorporated this section of the FAR into their employee handbook or policies, which not only helps to educate employees about these protections, but also serves as a way to memorialize them in a place where employees can readily access them.

## Notification of Right to Contact the Government Directly

Federal law protects contractor employees who report wrongdoing, regardless if they do so internally or externally.<sup>26</sup> In its report to the Securities and Exchange Commission (SEC), the National Whistleblower Center endorsed requiring regulated companies to inform their employees of their right to contact the SEC or any other Federal law enforcement agency directly.<sup>27</sup> The Nuclear Regulatory Commission (NRC) adopted a similar approach, requiring its licensees to post a notice that states: "You may report violations or safety concerns directly to the NRC."<sup>28</sup> Similarly, Federal contractors can enhance their reporting mechanisms by informing employees of their right to contact the government directly if they have concerns about fraud, waste, or abuse.

Six contractors provided OIG with policies that notify employees of their right to contact the government directly. For example, after mentioning internal reporting channels, one contractor's code of conduct notes: "In addition to the above reporting channels, employees always have the right to report any suspected wrongdoing on Federal Contracts to various government officials, including but not limited [to], a member of Congress, the applicable agency Inspector Generals, The Government Accountability Office, Contracting Officers, or any authorized law enforcement agency or the U.S. Department of Justice." Another contractor states in its Whistleblowing Policy: "However, in very serious circumstances, or following an internal report which has not addressed the cause, we recognise that it may be appropriate for you to report your concerns to an external body, such as a regulator." Such policies are useful in educating employees as to how to report fraud, waste, or abuse.

## Instruction to Cooperate with Government Audits or Investigations

In its guide to managing the business risk of fraud, the Association of Certified Fraud Examiners recommends that companies should require all staff, including management, to cooperate in

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<sup>25</sup> 41 U.S.C. § 4712.

<sup>26</sup> 41 U.S.C. § 4712(a)(2).

<sup>27</sup> National Whistleblower Center, *Impact of Qui Tam Laws on Internal Compliance: A Report to the Securities and Exchange Commission* (Dec. 17, 2010), at 18.

<sup>28</sup> 10 C.F.R. § 50.7(e)(1); NRC Form 3, *Notice to Employees*.

investigations.<sup>29</sup> For certain large contracts, contractors are required by the FAR to establish an internal control system that provides for “full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.”<sup>30</sup> Beyond the internal control system, incorporating a statement into a code of ethics or an employee handbook that it is corporate policy to cooperate with government audits and investigations is another important way to communicate to employees that they should feel comfortable in reporting fraud, waste, or abuse. It may also be useful in creating an ethical tone at the top, which plays an important role in creating an ethical workplace.<sup>31</sup> OIG found that 10 contractors included a statement in their code of ethics or employee policies that the corporation and its employees must cooperate with government audits or investigations.

## CONCLUSION

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All of the 30 contractors with the largest dollar volume of Department of State contracts used some variation of a confidentiality agreement or confidentiality policy. However, none of them were similar to the provisions at issue in the SIGAR inquiry or the *qui tam* lawsuit, because they did not specifically mention disclosures to a government agency nor were they specifically tied to an investigation of fraud or a violation of the company’s code of business ethics. Some of the 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, such as non-disparagement clauses or provisions requiring notice to the company after receiving an inquiry from a government official. However, none of the companies reported that they had ever enforced any of these provisions against an employee or former employee who disclosed wrongdoing to the government. All 30 contractors also reported that they had a policy in place that encourages the reporting of fraud or legal and ethical violations and provides one or more ways for employees to do so.

From its review of the contractor responses and relevant legal and social science literature, OIG found that several practices are useful in encouraging employees to report fraud, waste, or abuse. These include use of an internal hotline with anonymous option; display of hotline posters in the workplace; a policy that advises employees of their right to contact the government directly if they have knowledge of fraud, waste, or abuse; notification to employees of the statutory protections against retaliation; and a corporate policy that endorses cooperation with a government audit or investigation. Of course, retaliation against whistleblowers can still occur even in a company that has adopted all of these best practices. But whistleblower studies demonstrate that an ethical tone at the top and a strong corporate code of ethics encourages employees to uphold integrity and to report wrongdoing if it does occur.

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<sup>29</sup> Association of Certified Fraud Examiners, *Managing the Business Risk of Fraud: A Practical Guide* (2008), at 14-15.

<sup>30</sup> Federal Acquisition Regulation § 52.203-13(c)(2)(ii)(G). This requirement does not apply if the contractor is a small business or if the contract is for acquisition of a commercial item or if the contract is under \$5 million or has a performance period of less than 120 days.

<sup>31</sup> Association of Certified Fraud Examiners, *Tone at the Top: How Management Can Prevent Fraud in the Workplace*, at 1.

## RECOMMENDATIONS

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To ensure that contractor employees are informed of appropriate avenues to report waste, fraud, or abuse and of the protections against retaliation for doing so, OIG has issued the following recommendations to the Bureau of Administration (A), whose response is reproduced in Appendix B:

**Recommendation 1:** OIG recommends that the Bureau of Administration, Office of the Procurement Executive, instruct all contracting officers for the Department of State to send a copy of the list of best practices published in this report to all companies holding a contract with the Department.

**Management Response:** In its March 10, 2015, response, the Bureau of Administration partially concurred and suggested "that the distribution of best practices be accomplished through a link to the OIG website." A/OPE "will advise Contracting Officers of the link in a Procurement Information Bulletin (PIB) after receipt of the link location from OIG."

**OIG Reply:** OIG considers the recommendation resolved. OIG will create such a link on its website and provide it to A/OPE. The recommendation can be closed when OIG receives and accepts documentation showing that A/OPE has distributed the Procurement Information Bulletin with the link.

**Recommendation 2:** OIG recommends that the Bureau of Administration, Office of the Procurement Executive, instruct all contracting officers for the Department of State to send a copy of the OIG hotline poster to all companies holding a contract with the Department with instructions to display it in common areas within business segments performing work for the Department.

**Management Response:** In its March 10, 2015, response, the Bureau of Administration partially concurred and suggested that the poster be included in OIG's internet link. A/OPE stated that it will "require contracting officers to advise contractors of this link on future contracts over \$5M requiring the Display of Hotline Poster clause."

**OIG Reply:** OIG considers the recommendation resolved. OIG has published the poster on its website and provide the link to A/OPE. The recommendation can be closed when OIG receives and accepts documentation showing that A/OPE has distributed the Procurement Information Bulletin with the link.

**Recommendation 3:** OIG recommends that the Bureau of Administration, Office of the Procurement Executive, instruct all contracting officers for the Department of State to send a link to the OIG video on whistleblowing to all companies holding a contract with the Department with instructions to share the video with employees.

**Management Response:** In its March 10, 2015, response, the Bureau of Administration partially concurred and suggested that the video also be included in OIG's internet link.

**OIG Reply:** OIG considers the recommendation resolved. OIG has published the video on its website and will provide the link to A/OPE. The recommendation can be closed when OIG receives and accepts documentation showing that A/OPE has distributed the Procurement Information Bulletin with the link.

## APPENDIX A: CONTRACTORS CONTACTED BY OIG

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Contractor	Primary Category of Contracts	Dollars Obligated
DynCorp International <sup>a</sup>	Aviation	\$557,919,126
Caddell Construction Co., Inc.	Construction	\$441,149,340
PAE Holding Corp.	Operations and Maintenance	\$372,249,769
B.L. Harbert Holdings L.L.C.	Construction	\$249,781,830
SAIC, Inc.	Information Technology	\$242,844,583
International Development Solutions, L.L.C./ACADEMI	Security	\$214,013,829
CGI Technologies & Solutions Inc.	Information Technology	\$207,933,998
Aegis Group Holdings	Security	\$197,271,998
General Dynamics Corp.	Logistics Support	\$139,567,358
Computer Sciences Corporation	Information Technology	\$124,985,246
Triple Canopy, Inc.	Security	\$123,118,369
American International Contractors, Inc.	Construction	\$122,386,280
Aecom Technology Corporation	Logistics	\$97,647,852
Contracting, Consulting, Engineering, Inc.	Construction	\$96,840,498
Afognak Native Corp./Alutiiq	Construction	\$89,604,485
Olgoonik Corp.	Security	\$78,117,934
Deco, Inc.	Construction	\$69,972,401
Inter-Con Security Systems, Inc.	Security	\$67,685,224
Xator Corp.	Engineering	\$63,099,383
Desbuild Inc.	Construction	\$56,904,539
Day & Zimmerman Group/SOC, L.L.C.	Security	\$56,250,001
Creative Information Technology, Inc.	Information Technology	\$50,893,868
Akal Security	Security	\$49,863,340
CDW Holdings Inc.	Information Technology	\$48,036,928
Safran <sup>b</sup>	Security	\$47,513,542
Serco Group	Management Support	\$47,476,502
Enviro-Management & Research	Construction	\$47,304,946
Pernix-Serca L.P.	Construction	\$45,768,870
Furniture Brands/Heritage Home Group <sup>c</sup>	Furniture	\$44,730,169
STG, Inc.	Information Technology	\$44,343,025

<sup>a</sup> Federal Procurement Data System (FPDS) actually lists Veritas Capital Fund, which previously owned DynCorp International. DynCorp is now independently owned, so OIG sent the inquiry directly to DynCorp.

<sup>b</sup> OIG received two separate responses from Safran subsidiaries, MorphoTrust USA, L.L.C. and Morpho Detection, L.L.C., which Safran reported were its only two business units with Department of State contracts.

<sup>c</sup> FPDS lists Furniture Brands, which has since declared bankruptcy and was partially acquired by Heritage Home Group, who provided a response.

**Source:** Federal Procurement Data System report from July 7, 2014, based on contractors with the largest dollar amount of Department of State contracts in 2012. Because Federal agencies have five years from the date that an appropriation expires to adjust an obligation, the list above only represents dollars obligated as of July 7, 2014.

## APPENDIX B: MANAGEMENT RESPONSE

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United States Department of State  
Washington, D.C. 20520

March 10, 2015

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### MEMORANDUM

TO:           OIG - Emilia DiSanto, Deputy Inspector General

FROM:        A - Joyce A. Barr 

SUBJECT:    Comments on Evaluation Report "Review of Use of Confidentiality Agreements by Department of State Contractors" (ESP-15-03) dated February 2015

Thank you for the opportunity to review and comment on the subject evaluation report. The point of contact is Eric N. Moore in A/OPE, who can be reached at 703-875- ([@state.gov](mailto:eric.moore@state.gov)).

The 30 contractors OIG reviewed represent the highest dollar value contractors of our more than 2,000 current Department contractors, those that have seemingly been the most concern to the OIG, and therefore those at the most risk.

It is encouraging that your review of the Department's 30 largest dollar volume contractors confirmed all using some variation of a confidentiality agreement or confidentiality policy; also, that all 30 contractors reported having a policy in place that encourages the reporting of fraud or legal and ethical violations and provides one or more ways for employees to do so.

**Recommendation 1:** OIG recommends that the Bureau of Administration, Office of the Procurement Executive, instruct all contracting officers for the Department of State to send a copy of the list of best practices published in this report to all companies holding a contract with the Department.

**Management Response:** The Bureau of Administration, Office of the Procurement Executive (A/OPE) partially concurs. The Federal Acquisition

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-2-

Regulation (FAR) (3.1003, 3.1004) requires that contractors with contracts with a value expected to exceed \$5M must prominently display a Federal Agency fraud hotline poster in common work areas within business segments performing work under the contract and at contract work sites and on their websites during contract performance in the United States. This requirement does not apply if the contract is for the acquisition of a commercial item or if performance takes place outside of the United States. The requirement is instituted through the inclusion of the FAR clause 52.203-14 "Display of Hotline Poster(s)" in the affected contract.

A/OPE suggests that the distribution of best practices be accomplished through a link to the OIG website. This would allow for the OIG to update the information and would also make the information available to other agencies across government. The OIG link would be mentioned in the "Display of Hotline Poster(s)" clause. This would balance effort and risk by focusing on programs over \$5M. A/OPE will advise Contracting Officers of the link in a Procurement Information Bulletin (PIB) after receipt of the link location from OIG.

OIG could also distribute copies of the OIG evaluation including the best practices to the 30 contractors who were reviewed. These contractors represent the highest dollar value contractors in the Department, those of most concern to the OIG, and therefore those at most risk and with the greatest impact.

Requiring that all contracting officers provide a copy of the list of best practices published in the report to all companies holding a contract with the Department regardless of contract value would be a significant effort that would also open these contracts to contractor claims for equitable adjustment. Focusing on new contracts and the contractors reviewed by OIG strikes an effective balance between risk and resources.

**Recommendation 2:** OIG recommends that the Bureau of Administration, Office of the Procurement Executive, instruct all contracting officers for the Department of State to send a copy of the OIG hotline poster to all companies holding a contract with the Department with instructions to display it in common areas within business segments performing work for the Department.

**Management Response:** A/OPE partially concurs. The FAR (3.1003, 3.1004) requires that contractors with a contract value expected to exceed \$5M must prominently display a Federal Agency fraud hotline poster in common work areas within business segments performing work under the contract and at contract work

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-3-

sites and on their websites during contract performance in the United States. This requirement does not apply if the contract is for the acquisition of a commercial item or if performance takes place outside of the United States. The requirement is instituted through the inclusion of the FAR clause 52.203-14 "Display of Hotline Poster(s)" in the affected contract.

Applying the poster requirement retroactively would require significant effort and would require modifications to contracts which would provide the contractor an opportunity for an equitable adjustment for cost impact.

We suggest that contractors be provided a link to the OIG internet site that would contain the hotline poster, best practices and other OIG educational materials. A/OPE will require contracting officers to advise contractors of this link on future contracts over \$5M requiring the Display of Hotline Poster clause.

**Recommendation 3:** OIG recommends that the Bureau of Administration, Office of the Procurement Executive, instruct all contracting officers for the Department of State to send a link to the OIG video on whistleblowing to all companies holding a contract with the Department with instructions to share the video with employees.

**Management Response:** A/OPE partially concurs. We recommend that the video be under the same link as other OIG material discussed above and that the link be provided under the "Display of Hotline Poster" clause for future procurements when that clause is required. Application to existing contracts would require a significant effort and would provide contractors with an opportunity to submit claims for equitable adjustments.

We suggest that the OIG provide the link to the OIG video in the evaluation report and provide a copy of the report to the 30 contractors reviewed. This will focus on those contractors identified by OIG as those with the highest level of risk.

We look forward to working with the OIG to strengthen contractor disclosure of fraud, waste and abuse.

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## ABBREVIATIONS

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A	Bureau of Administration
Department	Department of State
DoD	Department of Defense
FAR	Federal Acquisition Regulation
IRD	International Relief and Development
NRC	Nuclear Regulatory Commission
OIG	Office of Inspector General
SEC	Securities and Exchange Commission
SIGAR	Special Inspector General for Afghanistan Reconstruction
USAID	U.S. Agency for International Development

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