

Congress of the United States
Washington, DC 20510

September 18, 2014

The Honorable Jon T. Rymer
Inspector General
Office of the Inspector General
U.S. Department of Defense
4800 Mark Center Drive
Alexandria, VA 22350-1500

Dear Mr. Rymer:

As you know, whistleblowers serve an important role in government oversight. Over the past several years we have endeavored to increase protections for whistleblowers, and have entrusted Inspectors General with the responsibility to investigate claims of whistleblower retaliation.

One area of whistleblower protections that we have particularly focused on are protections for employees of contractors and subcontractors. Given the billions of dollars that the government spends on contracting every year, it is critical that subcontractor and contractor employees are protected against retaliation when they expose waste, fraud and abuse. In both 2008 and 2013, the National Defense Authorization Act included provisions which expanded protections for Department of Defense contractor and subcontractor employees.¹

We have learned that your office is interpreting these protections so narrowly that it disregards both the plain language and the spirit of the legislation and has the potential to preclude meritorious claims of retaliation. Specifically, we were informed that your office has an extremely limited definition of Department of Defense personnel to whom contractor and subcontractor employees may make protected disclosures.² At issue is the language in 10 U.S.C. § 2409(a) which provides that employees of contractors and subcontractors may not be discharged, demoted or otherwise discriminated against as a reprisal for disclosing evidence of fraud, waste or abuse to “[a]n employee of the Department of Defense...responsible for contract

¹ See National Defense Authorization Act for FY 2008, Pub. L. No. 110-181 (110th Cong. 2008) and National Defense Authorization Act for FY 2013, Pub. L. No. 112-239 (112th Cong. 2013).

² Office of Inspector General, U.S. Department of Defense, Meeting with Subcommittee on Financial and Contracting Oversight Majority Staff (July 2, 2014).

oversight or management.”³ Your staff have interpreted this to mean that disclosures may only be made to a contracting officer, a contracting officer’s technical representative (COTR) or the Defense Contract Management Agency (DCMA). This interpretation is not based on any case law or analysis of legislative history.⁴

We wish to inform you that we strongly disagree with this interpretation. Our intention was for the phrase “responsible for contract oversight or management” to be interpreted broadly. A review of the evolution of protections for contractor and subcontractor employee whistleblowers will show that we have only increased and expanded these protections. In fact, in 2008 Congress significantly expanded the list of personnel to whom contractor employee whistleblowers could disclose to and we expanded it again in 2013.⁵ There is no rational basis which supports the view that an “employee responsible for contract management or oversight” is limited to only two people on any given contract and DCMA.

We would expect that as an agency with significant oversight responsibilities it would be in the interest of the Office of Inspector General to be more generous, not less, in its interpretation of who is responsible for contract oversight at the Department of Defense. Indeed, we should adopt an approach that responsible and empowered employees at the Department should be safe harbors for whistleblowers with knowledge of waste, fraud or abuse of taxpayer dollars. Contracts are overseen by numerous people, not only the contracting officer and the COTR who have management roles related to the contract, but by program staff that interact with contractors every day and have substantial knowledge and oversight of the contract’s implementation on the ground.

We therefore respectfully ask that you review your office’s interpretation and implementation of all versions of 10 U.S.C. § 2409 to ensure that it is consistent with protecting contractor and subcontractor employees from retaliation. We further request that you report your findings to our Committees. Additionally, we ask that your office reconsider its findings in individual cases of retaliation brought by contractor and subcontractor employees, if they were analyzed under an improper interpretation of the law, and ask that you report on whether any findings have been reversed. We ask that you provide your report to our Committees as soon as possible, but no later than **October 17, 2014**.

³ The 2013 amendment to 10 U.S.C. § 2409 expanded protections to subcontractor employees, increased the types of applicable protected disclosures, and expanded the list of persons to whom protected disclosures may be made. However, the language at issue regarding Department of Defense personnel responsible for contract management or oversight has remained consistent since 2008.

⁴ Office of Inspector General, U.S. Department of Defense, Meeting with Subcommittee on Financial and Contracting Oversight Majority Staff (July 2, 2014).

⁵ Prior to 2008, 10 U.S.C. § 2409 provided that a contractor employee could disclose to a Member of Congress or an authorized official of an agency or the Department of Justice.

We thank you for your cooperation and look forward to working with you in the future. Please contact Sarah Garcia with Chairman McCaskill's Subcommittee staff at (202) 224-5602 with any questions. Please send any official correspondence relating to this request to Kelsey_Stroud@hsgac.senate.gov.

Sincerely,



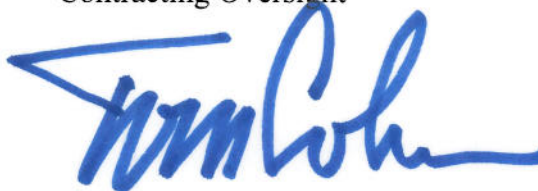
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Ron Johnson
Ranking Member
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Government Reform