



June 5, 2014

The Honorable Eric Holder
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

The Project On Government Oversight (POGO) requests that the Department of Justice investigate federal fund recipients using confidentiality or non-disclosure agreements that infringe current and former employees' federal whistleblower rights in violation of the False Claims Act (31 U.S.C. §3730(h)), the Federal Acquisition Regulation (48 C.F.R. Subpart 3.9), and other federal whistleblower protection laws (*e.g.*, 10 U.S.C. §2409, 41 U.S.C. §4712). POGO is concerned that companies are using these agreements to hinder governmental investigations into criminal, civil, and administrative violations on federal contracts, grants, and other federally funded programs.

In February 2014, *The Washington Post* reported that Kellogg Brown & Root (KBR) requires employees who report misconduct to sign a confidentiality statement prohibiting them from discussing their allegations without first obtaining permission from KBR's lawyers.¹ Employees who violate the provision are subject to "disciplinary action up to and including termination of employment."²

In May 2014, *The Washington Post* profiled International Relief and Development (IRD), a nonprofit humanitarian organization that has received billions of dollars in federal grants and contracts for Iraq and Afghanistan reconstruction work.³ The article revealed that, before leaving IRD, some employees sign a confidentiality agreement forbidding them from making "derogatory, disparaging, negative, critical or defamatory statements" about IRD or any of its current or former employees "to anyone, including...funding agencies or...officials of any government."⁴ Violation of the agreement could result in legal action against the former employee and forfeiture of payments.

¹ Scott Higham, "Lawsuit brings to light secrecy statements required by KBR," *The Washington Post*, February 19, 2014. http://www.washingtonpost.com/world/national-security/lawsuit-brings-to-light-secrecy-statements-required-by-kbr/2014/02/19/6e2a8818-9998-11e3-b88d-f36c07223d88_story.html. (Downloaded May 27, 2014)

² The confidentiality statement is posted at <http://www.pogoarchives.org/m/co/KBR-nda-20140421.pdf>

³ Scott Higham, Jessica Schulberg, and Steven Rich, "Big budgets, little oversight in war zones," *Washington Post*, May 4, 2014. http://www.washingtonpost.com/investigations/doing-well-by-doing-good-the-high-price-of-working-in-war-zones/2014/05/04/2d5f7ca8-c715-11e3-9f37-7ce307c56815_story.html (Downloaded May 27, 2014)

⁴ The confidentiality agreement is posted at <http://apps.washingtonpost.com/g/page/world/ird-confidentiality-agreement-warns-against-making-negative-statements/997/>

Federal laws and regulations bar contractors and grantees from retaliating against whistleblowers who report allegations of fraud, waste, mismanagement, and other abuses to governmental authorities. Confidentiality agreements of the kind used by KBR and IRD might violate these provisions. In fact, IRD admitted to *The Washington Post* that it would revise its agreement “to ensure that our policies conform to the latest developments in employment law.”

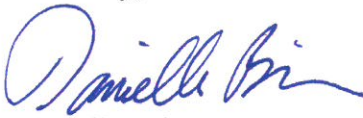
Such agreements could hinder the filing of False Claims Act or *qui tam* lawsuits by the government and private parties. They could also undermine the mandatory reporting provision in FAR Subpart 52.203-13(b)(3), which requires contractors to disclose to the government credible evidence of misconduct. Contractors have no incentive to identify, report, and remedy misconduct if they know that their employees are afraid to step forward and report their allegations to the government.

POGO is extremely concerned that other federal fund recipients are similarly infringing the whistleblower rights of current and former employees and thwarting governmental oversight. We respectfully ask the Department of Justice to investigate whether other federal contractors, grantees, and fund recipients use confidentiality or non-disclosure agreements that have a chilling effect on the whistleblower rights of current and former employees. We hope the Department of Justice will consider issuing guidance or proposing legislative or regulatory reforms regarding this practice. For example, it might be necessary to draft guidelines to ensure that confidentiality and non-disclosure agreements conform to whistleblower laws and are not used to impede government investigations.

Whistleblowers are the first and best line of defense against waste, fraud, and abuse in federal programs. The Department of Justice must ensure that whistleblowers are protected from retaliation and encouraged to speak out.

If you have any questions, please don't hesitate to contact me at (202) 347-1122.

Sincerely,



Danielle Brian
Executive Director