PROJECT ON GOVERNMENT OVERSIGHT

Exposing Corruption. Exploring Solutions.

March 18, 2016

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street, NW, 2nd Floor
Washington, DC 20405-0001

Submitted via Regulations.gov

Subject: FAR Case 2015-012

Dear Ms. Flowers:

The Project On Government Oversight (POGO) provides the following public comment to FAR Case 2015-012, “Contractor Employee Internal Confidentiality Agreements” (81 Fed. Reg. 3763, January 22, 2016). POGO is an independent nonprofit organization committed to achieving a more accountable and transparent federal government. A large part of our work involves investigating, exposing, and proposing ways to eliminate waste and corruption in federal contracting.

The Department of Defense, General Services Administration, and National Aeronautics and Space Administration are issuing a proposed rule amending the Federal Acquisition Regulation (FAR) to implement section 743 of the Consolidated and Further Continuing Appropriations Act of 2015 (Pub. L. 113-235). This section prohibits agencies from awarding a contract, grant, or cooperative agreement to an entity that requires employees or subcontractors to sign a confidentiality agreement that restricts their ability to report waste, fraud, or abuse to a federal investigative or law enforcement authority. Additionally, the proposed rule requires entities, in order to be eligible for an award, to represent that they do not require employees or subcontractors to sign or comply with such agreements. The rule also requires contractors to notify employees that any such pre-existing confidentiality agreements are no longer in effect.

POGO supports the proposed rule. We recognize that companies have a legitimate interest in protecting genuine proprietary and confidential information. However, we are concerned that federal contractors and grantees have confidentiality policies that violate current and former

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employees' federal whistleblower rights[1] and suppress the reporting of wrongdoing and public health and safety issues.[2]

Events in recent years validate our concern. In May 2014, *The Washington Post* profiled International Relief and Development (IRD), a nonprofit humanitarian organization that has received billions of dollars in federal contracts and grants.[3] The article noted that some former IRD employees were reluctant to talk about the organization because, upon leaving IRD, they had to sign an agreement stating that making "derogatory, disparaging, negative, critical or defamatory statements" about IRD or any of its current or former officers and employees could subject them to forfeiture of severance pay and other legal consequences.[4] IRD admitted to the *Post* that this agreement "could violate federal protections afforded to whistleblowers."[5] A subsequent government review found that 48 of 81 separation agreements used by IRD since 2004 "contain unacceptable gag provisions that attempt to limit the whistleblower rights of former IRD employees."[6]

In March 2015, the State Department's Inspector General reported that at least thirteen of State's largest contractors had confidentiality agreements or policies that "may have a chilling effect on employees who wish to report fraud, waste, or abuse to a Federal official."[7] The following month, the Securities and Exchange Commission (SEC) fined federal contractor KBR $130,000 for using an "improperly restrictive" confidentiality agreement.[8] The SEC determined that the agreement, under which the employee could be fired for discussing misconduct allegations with outside parties without obtaining permission from company lawyers, had "a potential chilling effect on whistleblowers' willingness to report illegal conduct to the SEC."[9] The SEC is conducting a deeper investigation into this issue, requesting from "a number of companies" their

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[1] See for example 10 U.S.C. §2409, 31 U.S.C. §3730(h), 41 U.S.C. §4712, and 48 C.F.R. Subpart 3.9.
[2] Project On Government Oversight, "Flying the Whistleblower-Unfriendly Skies," April 8, 2015. http://www.pogo.org/blog/2015/04/20150408-flying-the-whistleblower-unfriendly-skies.html
[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 March 16, 2016) (Hereinafter "Big budgets, little oversight in war zones")
[4] The agreement is posted at http://apps.washingtonpost.com/g/page/world/ird-confidentiality-agreement-warns-against-making-negative-statements/997/ (Downloaded March 18, 2016)
[5] "Big budgets, little oversight in war zones"
[6] Letter from John F. Sopko, Special Inspector General for Afghanistan Reconstruction, to Dr. Arthur B. Keys, Jr., President and Chief Executive Officer of International Relief and Development, regarding IRD separation agreements, July 30, 2014, p. 1. https://www.sigar.mil/pdf/special%20projects/SIGAR-14-92-SP.pdf (Downloaded March 16, 2016)
[7] State Department Office of Inspector General, *Review of the Use of Confidentiality Agreements by Department of State Contractors*, ESP-15-03, March 2015, p. 6. https://oig.state.gov/system/files/esp-15-03.pdf (Downloaded March 16, 2016)
[8] Securities and Exchange Commission, "Companies Cannot Stifle Whistleblowers in Confidentiality Agreements; Agency Announces First Whistleblower Protection Case Involving Restrictive Language," April 1, 2015. http://www.sec.gov/news/pressrelease/2015-54.html#.VRxSdSPF-Sp (Downloaded March 16, 2016). The agreement is posted at http://www.pogoarchives.org/m/co/KBR-nda-20140421.pdf.
[9] Id.

confidentiality and severance agreements dating back to 2010, as well as documents relating to their confidentiality and whistleblowing policies.[10]

The Justice Department is also committed to addressing possible abuses of confidentiality agreements. In June 2014, POGO wrote to the Attorney General requesting an investigation into the use of

confidentiality agreements by federal fund recipients.[11] In response, then-Assistant Attorney General Stuart Delery assured POGO "we share your concerns about the potential of some confidentiality agreements to inhibit fraud reporting" and that his office would "continue to evaluate whether there are additional measures we can take to address it."[12]

We are pleased the proposed rule also applies to contracts and subcontracts for acquisitions in amounts not greater than the simplified acquisition threshold, and to contracts and subcontracts for the acquisition of commercial and commercially available off-the-shelf (COTS) items. The government conducts a substantial amount of business under these types of contracts. Including them in the rule will better protect whistleblowers and help reduce fraud, waste, and abuse in federal acquisitions.

However, POGO is concerned that the final rule will be deficient in three respects. First, it is unclear whether confidentiality agreements arising out of civil litigation are covered. Federal contractors and grantees can silence whistleblowers through settlement provisions that potentially may restrict an employee, former employee, subcontractor, or subgrantee from making a protected disclosure to the federal government. Second, the proposed rule is silent regarding confidentiality agreements contractor employees sign at the behest of a federal agency, such as the agreement Hanford nuclear facility contractor employees were asked to sign by the Department of Energy in 2012.[13] Similar to the whistleblower protections under 5 U.S.C. § 2302(b)(13), the final rule should specify that any confidentiality or nondisclosure agreement shall be accompanied with a statement that such a provision does not restrict lawfully reporting waste, fraud, or abuse to a designated investigative or law enforcement representative of a federal department or agency authorized to receive such information, or to Congress.

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[10] Rachel Louise Ensign, "SEC Probes Companies' Treatment of Whistleblowers; Agency Officials Concerned About Corporate Backlash Against Whistleblowers," *Wall Street Journal*, February 25, 2015. http://www.wsj.com/articles/sec-probes-companies-treatment-of-whistleblowers-1424916002 (Downloaded March 16, 2016)

[11] "POGO Asks Justice Dept. to Investigate Use of Confidentiality Agreements by Federal Fund Recipients," June 5, 2014. http://www.pogo.org/our-work/letters/2014/pogo-asks-justice-dept-to-investigate-use-fof-confidentiality-agreement.html

[12] Letter from Stuart F. Delery, Assistant Attorney General, to Danielle Brian, Executive Director of the Project On Government Oversight, September 3, 2014, p. 1. http://www.pogoarchives.org/m/co/DOJ-reply-to-pogo-20140903.pdf

[13] Scott Higham and Kaley Belval, "Workplace secrecy agreements appear to violate federal whistleblower laws," *Washington Post*, June 29, 2014. https://www.washingtonpost.com/investigations/workplace-secrecy-agreements-appear-to-violate-federal-whistleblower-laws/2014/06/29/d22c8f02-f7ba-11e3-8aa9-dad2ec039789_story.html (Downloaded March 16, 2016)

Third, and perhaps most importantly, the proposed rule does not apply to disclosures made to Congress. Whistleblower protections that exclude Congressional offices as a designated channel of disclosure are inadequate. Whistleblowers are crucial to Congress's ability to perform its oversight duties and to the effective operations of government. Therefore, the final rule should make clear that "designated investigative or law enforcement representative of a Federal department or agency authorized to receive [reports of waste, fraud, or abuse]" also includes the employees of a Congressional office.

We commend the government for taking this important step in eliminating improperly restrictive corporate confidentiality agreements. Whistleblowers are the best source of information about fraud, waste, and abuse in the public and private sectors, and they are critical to promoting institutional accountability, compliance, and safety and security.

If you have any questions, I can be reached at ngordon@pogo.org or (202) 347-1122.

Sincerely,

Neil Gordon
Investigator