

# H.R. 4310 (112th): National Defense Authorization Act for Fiscal Year 2013

112<sup>th</sup> Congress, 2011–2013. Text as of Jan 01, 2012 (Passed Congress/Enrolled Bill).

## SEC. 828. PILOT PROGRAM FOR ENHANCEMENT OF CONTRACTOR EMPLOYEE WHISTLEBLOWER PROTECTIONS.

### (a) WHISTLEBLOWER PROTECTIONS.—

(1) IN GENERAL.—Chapter 47 of title 41, United States Code, is amended by adding at the end the following new section:

“§ 4712. Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information

#### “(a) PROHIBITION OF REPRISALS.—

“(1) IN GENERAL.—An employee of a contractor, subcontractor, or grantee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, 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) or grant.

“(2) PERSONS AND BODIES COVERED.—The persons and bodies described in this paragraph are the persons and bodies as follows:

“(A) A Member of Congress or a representative of a committee of Congress.

“(B) An Inspector General.

“(C) The Government Accountability Office.

“(D) A Federal employee responsible for contract or grant oversight or management at the relevant agency.

“(E) An authorized official of the Department of Justice or other law enforcement agency.

“(F) A court or grand jury.

“(G) A management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

“(3) RULES OF CONSTRUCTION.—For the purposes of paragraph (1)—

“(A) an employee who initiates or provides evidence of contractor, subcontractor, or grantee misconduct in any

judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant shall be deemed to have made a disclosure covered by such paragraph; and

“(B) a reprisal described in paragraph (1) is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

“(b) INVESTIGATION OF COMPLAINTS.—

“(1) SUBMISSION OF COMPLAINT.—A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved. Unless the Inspector General determines that the complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor or grantee concerned, and the head of the agency.

“(2) INSPECTOR GENERAL ACTION.—

“(A) DETERMINATION OR SUBMISSION OF REPORT ON FINDINGS.—Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous, fails to allege a violation of the prohibition in subsection (a), or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant or submit a report under paragraph (1) within 180 days after receiving the complaint.

“(B) EXTENSION OF TIME.—If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time, up to 180 days, as shall be agreed upon between the Inspector General and the person submitting the complaint.

“(3) PROHIBITION ON DISCLOSURE.—The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is—

“(A) made with the consent of the person alleging the reprisal;

“(B) made in accordance with the provisions of section 552a of title 5 or as required by any other applicable Federal law; or

“(C) necessary to conduct an investigation of the alleged reprisal.

“(4) TIME LIMITATION.—A complaint may not be brought under this subsection more than three years after the date on which the alleged reprisal took place.

“(c) REMEDY AND ENFORCEMENT AUTHORITY.—

“(1) IN GENERAL.—Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the executive agency concerned shall determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:

“(A) Order the contractor or grantee to take affirmative action to abate the reprisal.

“(B) Order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

“(C) Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys’ fees and expert witnesses’ fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

“(2) EXHAUSTION OF REMEDIES.—If the head of an executive agency issues an order denying relief under paragraph (1) or has not issued an order within 210 days after the submission of a complaint under subsection (b), or in the case of an extension of time under paragraph (b)(2)(B), not later than 30 days after the expiration of the extension of time, and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request

of either party to the action, be tried by the court with a jury. An action under this paragraph may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

“(3) ADMISSIBILITY OF EVIDENCE.—An Inspector General determination and an agency head order denying relief under paragraph (2) shall be admissible in evidence in any de novo action at law or equity brought pursuant to this subsection.

“(4) ENFORCEMENT OF ORDERS.—Whenever a person fails to comply with an order issued under paragraph (1), the head of the executive agency concerned shall file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs.

The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the executive agency.

“(5) JUDICIAL REVIEW.—Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order’s conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the executive agency. Review shall conform to chapter 7 of title 5. Filing such an appeal shall not act to stay the enforcement of the order of the head of an executive agency, unless a stay is specifically entered by

“(6) BURDENS OF PROOF.—The legal burdens of proof specified in section 1221(e) of title 5 shall be controlling for the purposes of any investigation conducted by an Inspector General, decision by the head of an executive agency, or judicial or administrative proceeding to determine whether discrimination prohibited under this section has occurred.

“(7) RIGHTS AND REMEDIES NOT WAIVABLE.—The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.

“(d) NOTIFICATION OF EMPLOYEES.—The head of each executive agency shall ensure that contractors, subcontractors, and grantees of the agency inform their employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

“(e) CONSTRUCTION.—Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against

an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

“(f) EXCEPTIONS.—(1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

“(2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community if such disclosure—

“(A) relates to an activity of an element of the intelligence community; or

“(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

“(g) DEFINITIONS.—In this section:

“(1) The term ‘abuse of authority’ means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract or grant of such agency.

“(2) The term ‘Inspector General’ means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts or grants awarded for or on behalf of, the executive agency concerned.

“(h) CONSTRUCTION.—Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law.

“(i) DURATION OF SECTION.—This section shall be in effect for the four-year period beginning on the date of the enactment of this section.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

“4712. Pilot program for enhancement of contractor protection from reprisal for disclosure of certain information.”.

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by subsection (a) shall take effect on the date that is 180 days after the date of the enactment of this Act, and shall, during the period section 4712 of title 41, United States Code, as added by such subsection, is in effect, apply to—

(A) all contracts and grants awarded on or after such date;

(B) all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date;

and

(C) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments.

(2) REVISION OF FEDERAL ACQUISITION REGULATION.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to implement the requirements arising under the amendments made by this section.

(3) INCLUSION OF CONTRACT CLAUSE IN CONTRACTS AWARDED BEFORE EFFECTIVE DATE.—At the time of any major modification to a contract that was awarded before the date that is 180 days after the date of the enactment of this Act, the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section to the contract.

(c) SUSPENSION OF EFFECTIVENESS OF SECTION 4705 OF TITLE 41, UNITED STATES CODE, WHILE PILOT PROGRAM IS IN EFFECT.—Section 4705 of title 41, United States Code, is amended by adding at the end the following new subsection:

“(f) FOUR-YEAR SUSPENSION OF EFFECTIVENESS WHILE PILOT PROGRAM IS IN EFFECT.—While section 4712 of this title is in effect, this section shall not be in effect.”.

(d) ALLOWABILITY OF LEGAL FEES.—Section 4310 of title 41, United States Code, is amended—

(1) in subsection (b), by striking “commenced by the Federal Government or a State” and inserting “commenced by the Federal Government, by a State, or by a contractor or grantee employee submitting a complaint under section 4712 of this title”; and

(2) in subsection (c)(3), by striking “the imposition of a monetary penalty” and inserting “the imposition of a monetary penalty or an order to take corrective action under section 4712 of this title”.

(e) GOVERNMENT ACCOUNTABILITY OFFICE STUDY AND REPORT.—

(1) STUDY.—Not later than three years after the date of the enactment of this Act, the Comptroller General of the United States shall begin conducting a study to evaluate the implementation of section 4712 of title 41, United States Code, as added by subsection (a).

(2) REPORT.—Not later than four years after the date of the enactment of this Act, the Comptroller General shall submit to Congress a report on the results of the study required by paragraph (1), with such findings and recommendations as the Comptroller General considers appropriate.