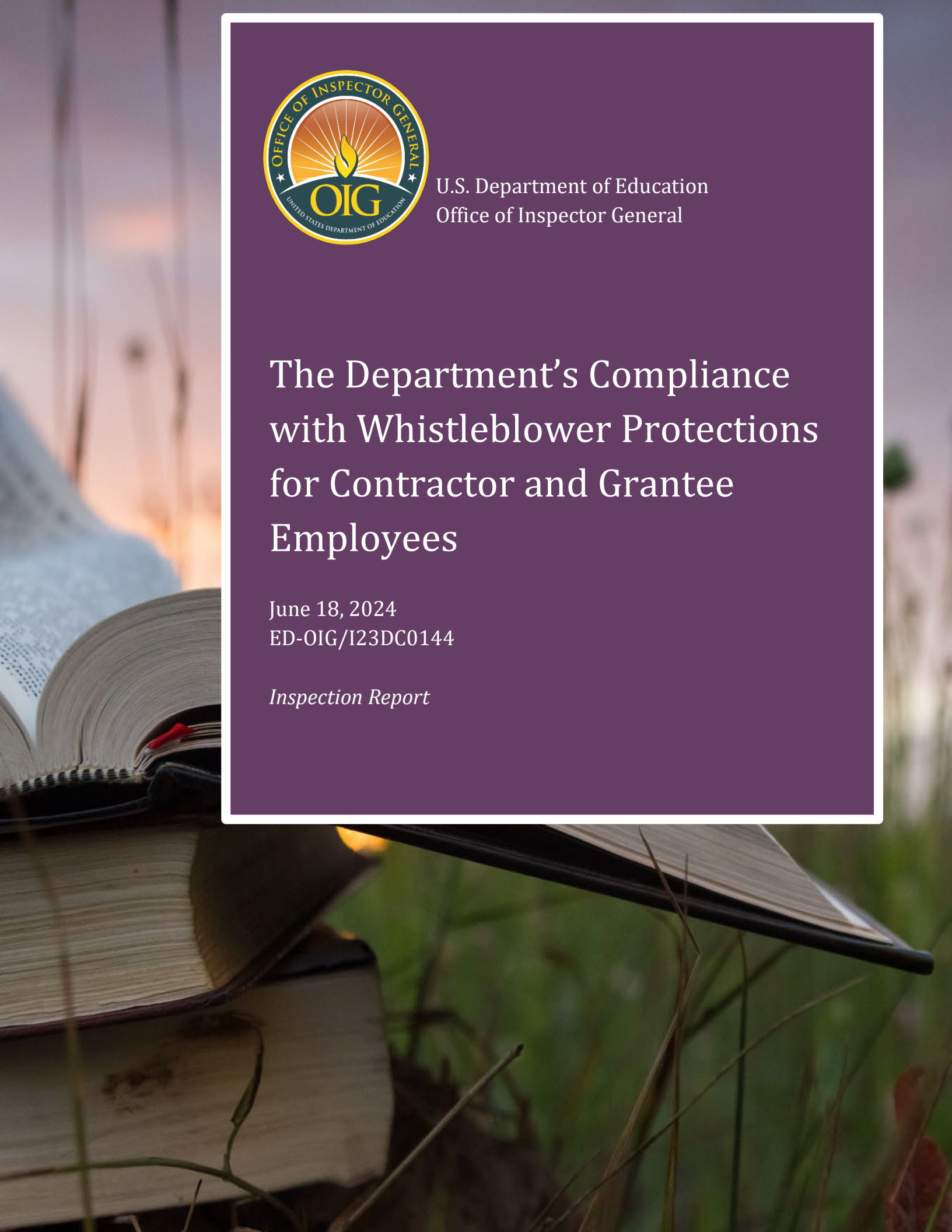

U.S. Department of Education
Office of Inspector General

The Department's Compliance with Whistleblower Protections for Contractor and Grantee Employees

June 18, 2024
ED-OIG/I23DC0144

Inspection Report

NOTICE

Statements that managerial practices need improvements, as well as other conclusions and recommendations in this report, represent the opinions of the Office of Inspector General. The appropriate Department of Education officials will determine what corrective actions should be taken.

In accordance with Freedom of Information Act (Title 5, United States Code, Section 552), reports that the Office of Inspector General issues are available to members of the press and general public to the extent information they contain is not subject to exemptions in the Act.

June 18, 2024

TO: Richard J. Lucas
Principal Deputy Assistant Secretary,
Delegated the Duties of the Assistant Secretary
Office of Finance and Operations

FROM: Sean Dawson /s/
Assistant Inspector General for Audit

SUBJECT: Final Inspection Report, "The Department's Compliance with Whistleblower Protections for Contractor and Grantee Employees," Control Number ED-OIG/I23DC0144

Attached is the subject final inspection report that consolidates the results of our review of the Department's compliance with whistleblower protections for contractor and grantee employees. We received your comments in response to our draft report.

U.S. Department of Education policy requires that you submit a corrective action plan within 30 days of the issuance of this report. The corrective action plan should set forth the specific action items and targeted completion dates necessary to implement final corrective actions on the findings and recommendations contained in this final report. Corrective actions that your office proposes and implements will be monitored and tracked through the Department's Audit Accountability and Resolution Tracking System.

In accordance with the Inspector General Act of 1978, as amended, the Office of Inspector General is required to report to Congress twice a year on recommendations that have not been completed after 6 months from the date of issuance.

We appreciate your cooperation during this inspection. If you have any questions, please contact Michele Weaver-Dugan at (202) 360-8454 or Michele.Weaver-Dugan@ed.gov.

Attachment

U.S. Department of Education, Office of Inspector General

Results in Brief

The Department's Compliance with Whistleblower Protections for Contractor and Grantee Employees

Why the OIG Performed this Inspection

Congress enacted a pilot program in January 2013 to provide whistleblower protections to Federal contractor, subcontractor, and grantee employees under 41 United States Code 4712 (Section 4712). In December 2016, the pilot program was made permanent and expanded to include employees of subgrantees and personal services contractors. These protections apply to all new solicitations, contracts, and grants awarded on or after July 1, 2013.

Whistleblower protection is essential to safeguarding the public interest and promoting a culture of accountability and integrity. However, potential whistleblowers may fear retaliation and therefore be reluctant to express legitimate concerns. Ensuring that employees understand the protections provided to them may play a significant role in fostering an environment where instances of improper behavior or actions can be raised for an appropriate and timely response.

We performed our inspection to determine whether the U.S. Department of Education (Department) ensured that contractors and grantees notified employees in writing of the whistleblower protections provided under Section 4712.

What did the OIG Find?

We found that the Department did not adequately ensure that contractors and grantees notified employees in writing of the protections provided under Section 4712. Specifically, we found that the Department did not always include the required contractor employee whistleblower protections clause in contract awards, did not include a sufficient reference to whistleblower protections in its Grant Award Notifications, and did not have a process in place to ensure that contractors and grantees actually notified their employees of the whistleblower protections.

What Is the Impact?

If employees of contractors and grantees are not informed of the Section 4712 provisions, they may not be aware that the law protects them from retaliation for disclosing wrongdoing, and they may not inform the Department or other authorities of a contractor's or grantee's misconduct, making it more likely that fraud, waste, and abuse relating to Department contracts and grants will go undetected.

What Are the Next Steps?

We made four recommendations to improve the Department's activities relating to its compliance with requirements relating to whistleblower protections for contractor and grantee employees. This included developing and implementing a process for ensuring that applicable employees receive written notification of their whistleblower protections and ensuring that Department acquisition staff are aware of applicable Department policies and Federal Acquisition Regulation requirements.

We provided a draft of this report to the Department for comment. The Department partially agreed with our findings, agreed with two recommendations, and partially agreed with two other recommendations. We summarize the Department's comments and provide the OIG's responses at the end of the finding. We also provide the full text of the comments at the end of the report (see OFO Comments).

ED-OIG/I23DC0144

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Introduction

Congress enacted a pilot program in January 2013 to provide whistleblower protections to Federal contractor, subcontractor, and grantee employees under 41 United States Code (U.S.C.) 4712 (Section 4712).[1] In December 2016, Congress made the pilot program permanent and expanded its protections to employees of subgrantees and personal services contractors. These protections apply to all new solicitations, contracts, and grants awarded on or after July 1, 2013.

Section 4712 prohibits a Federal contractor, subcontractor, grantee, subgrantee, or personal services contractor from retaliating against an employee for disclosing 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 or grant. The law enables employees to submit complaints of retaliation to the Office of Inspector General (OIG), authorizes the OIG to investigate, and empowers the head of the agency to order relief for any employees who have suffered reprisal for making disclosures of wrongdoing.

Section 4712 also requires the head of each executive agency to ensure that its contractors, subcontractors, grantees, subgrantees, and personal services contractors inform their employees in writing of their whistleblower protections in the predominant native language of the workforce.

An amendment to 48 Code of Federal Regulations (C.F.R.) chapter 1 "Federal Acquisition Regulation" (FAR) was made to implement Section 4712. The amendment, effective September 30, 2013, required contracting officers to insert the clause from 52.203-17, "Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights" in all solicitations and contracts that exceeded the simplified acquisition threshold.[2] For commercial item acquisitions, an already-required clause (52.212-4(r) "Contract Terms and Conditions—Commercial Products and Commercial

[1] The term "protections" here and throughout the report refers to the rights and remedies provided under Section 4712.

[2] The FAR defined the simplified acquisition threshold as $250,000 as of October 2020, and $150,000 prior to that date. A subsequent amendment to the FAR, effective November 6, 2023, removed this threshold and requires the clause to be inserted in all solicitations and contracts. This amendment to the FAR was issued in the Federal Register (88 FR 69517) on October 5, 2023.

Services") was updated to require contractors to comply with Section 4712. Agencies were encouraged to include the applicable contract clause at the time of any major modification to a contract that was awarded prior to September 30, 2013.

In July 2017, after the pilot program was made permanent, the Civilian Agency Acquisition Council issued a memorandum to agencies that provided guidance for implementing Section 4712 until the FAR was amended to reflect that it had been made permanent.[3] The memorandum required that the contractor employee whistleblower protections clause from FAR 52.203-17 be used for both commercial items and noncommercial items and noted that reference to Section 4712 was removed from FAR clause 52.212-4(r). The U.S. Department of Education (Department) issued an Acquisition Alert on September 11, 2017, authorizing immediate adherence to the Council's memorandum and referencing the applicable changes.

The C.F.R. was also amended to incorporate a provision regarding Section 4712 under 2 C.F.R. Part 200, subpart D, "Post Federal Award Requirements." Specifically, under 2 C.F.R. 200.300(b), a non-Federal entity receiving Federal grant funds is responsible for complying with all requirements of the Federal award, which includes complying with Section 4712.

The Office of Acquisition, Grants, and Risk Management within the Office of Finance and Operations is responsible for developing, managing, and providing policy guidance as well as oversight of the Department's acquisition, grants, and risk management activities and operations. Within the Office of Acquisition, Grants, and Risk Management, the Contracts and Acquisitions Management Division is responsible for contract execution (solicitation, award, administration, and closeout of all contracts) and other acquisition instruments for the Department, excluding Federal Student Aid (FSA). In April 2005, the Secretary of Education delegated to FSA's Chief Operating Officer the authority to procure property and services in the performance of functions managed by FSA as a performance-based organization; however, FSA is obligated to follow the Department's policies and procedures, in addition to its own FSA-specific policies and procedures.

The Grants Management Policy Division within the Office of Acquisition, Grants, and Risk Management oversees the Department's grant award and administration processes to ensure consistency, accountability, and effectiveness. The Grants Management Policy Division develops and disseminates the Department's grants management and administration policies, regulations, and procedures and provides leadership and

[3] These amendments to the FAR were issued in the Federal Register (88 FR 69517) on October 5, 2023.

support for reform, innovation, and improvement in the Department's grants management.

Finding. The Department did not Adequately Ensure that Contractors and Grantees Notified Employees in Writing of the Protections Provided Under Section 4712

We found that the Department did not adequately ensure that contractors and grantees (including any related subcontractors or subgrantees) notified employees in writing of the whistleblower protections provided under Section 4712. Specifically, we found that the Department did not always include the required contractor employee whistleblower protection clause from the FAR in contract awards, did not include a sufficient reference to whistleblower protections in its Grant Award Notifications, and did not have a process in place to ensure that contractors and grantees actually notified their employees of the whistleblower protections.

Whistleblower Protection Clause in Contract Award Documents

We found that the Contracts and Acquisitions Management Division and FSA did not always include the required whistleblower protection clause in contract awards. Specifically, we found that 24 of the 28 selected contracts (86 percent) included the required FAR clause at the time of award, or, if awarded prior to the requirement, were later modified to include the required FAR clause. FSA contracts undergo an internal contract review board examination and a peer review[4] to ensure that all required contract clauses are included in a contract prior to award. Contracts awarded by the Contracts and Acquisitions Management Division undergo a similar process, using a risk-based approach.

The 28 selected contracts included 15 active contracts awarded by FSA totaling $5.5 billion and 13 active contracts awarded by the Contracts and Acquisitions Management Division totaling $659 million. Of the 15 selected FSA contracts, 13 (87 percent) included the required FAR clause at the time of award or were modified to include the clause if awarded prior to the requirement. We found that the remaining two FSA contracts, awarded in July 2022 and December 2022, did not include a specific reference to the required contractor employee whistleblower protections clause (FAR 52.203-17). The Deputy Director of the Acquisition Policy, Workforce and Data Management Group for FSA stated that both contracts did include an appropriate clause. They stated that FAR 52.212-4 was incorporated into these two contracts and

[4] The Contract Review Board consists of contracts managers, policy experts, and others with a vested interest in the outcome of the procurement. The internal peer review is performed by an Executive Business Advisor with supervisory responsibility over the cognizant contracting officer.

noted that the reference to whistleblower protections included in that clause was not removed until November 2023, after the contracts were awarded. However, we note that FSA did not follow the Department's September 11, 2017, Acquisition Alert directing the Contracts and Acquisition Management Division and FSA to adhere to the Civilian Agency Acquisition Council memorandum, noting that FAR clause 52.212-4 had been changed to remove the whistleblower protections and would no longer be used, effective immediately. In addition, we note that the inclusion of FAR 52.203-17 would have provided more detailed information regarding the contractor's responsibilities under Section 4712.

We found that 11 of the 13 selected contracts awarded by the Contracts and Acquisitions Management Division (85 percent) included a reference to the required FAR clause at the time of award. The two remaining contracts did not. The two remaining contracts were awarded on September 29, 2013, one day prior to the requirement taking effect. The Contracting Officer for these two contracts stated that he inherited the contracts during the previous year and that it appeared that the whistleblower protection clause was not incorporated into the contracts. The Deputy Director for the Contracts and Acquisitions Management Division confirmed that modifications to incorporate the clause were not made to these contracts because the requirement was to include the FAR clause in new contracts awarded after the requirement took effect. However, as noted above, agencies were encouraged to include the applicable contract clause at the time of any major modification to a contract that was awarded prior to the requirement taking effect.

Whistleblower Protection Language in Grant Award Notifications

We found that the Department did not include a sufficient reference to whistleblower protections in its Grant Award Notifications. Specifically, while we found that all 29 of the grants selected for review included a reference to 2 C.F.R. Part 200, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards" (Uniform Guidance) as a whole, none of the selected grants included a specific reference to 2 C.F.R. 200.300, which requires awardees to comply with, among other things, Section 4712. According to the Director of the Grants Management Policy Division, Grant Award Notifications only refer to 2 C.F.R. Part 200, which includes 2 C.F.R. 200.300. However, we note that a reference to all the regulations does not bring to the grantees' attention the specific requirements for informing its employees of whistleblower protections as does the applicable FAR clause included in contract awards.

Employee Notification of Whistleblower Protections

We found that the Department does not ensure that contractors and grantees comply with the requirement to notify their employees in writing in the predominant native language of the workforce of their whistleblower protections and has no related policies or procedures. The Government Accountability Office's "Standards for Internal Control in the Federal Government," Overview Section 2.16, states that management sets objectives to meet the requirements of applicable laws and regulations. Further, Principle 10.02 states that "[m]anagement designs control activities in response to the entity's objectives … to achieve an effective internal control system. Control activities are the policies, procedures, techniques, and mechanisms that enforce management's directives to achieve the entity's objectives …." Without policies and procedures in place for ensuring that contractors and grantees are notifying their employees of whistleblower protections, the Department lacks effective controls for ensuring compliance with Section 4712.

According to the Director of Strategic Acquisition and Management Initiatives, the Department did not believe it was necessary to follow-up with contractors and grantees since the respective FAR clause or C.F.R. citation is included in its contracts and grants.

They also stated that the FAR does not explicitly state that the head of the agency must ensure that contractors notify their employees of whistleblower protections. However, we note that FAR 1.102(d) states

> [i]n exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive Order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.

Further, FAR 1.102-2(c) states that each member of the Acquisition Team "is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust."

The Director of Strategic Acquisition and Management Initiatives stated it should be the contractors' responsibility to ensure that their employees are notified of whistleblower protections and report back to the Department. They also took the position that the Department's interpretation and application of the requirements of Section 4712 is consistent with that of other agencies and that there is a disconnect between the law and the FAR requirements.

Similarly, the Director of the Grants Management Policy Division stated that grantee employee whistleblower protections are covered under 2 C.F.R. Part 200, which is referenced in the Department's Grant Award Notifications and is adequate to ensure that grantees notify employees in writing of the whistleblower protections provided under Section 4712. Additionally, due to the volume of grants awarded by the Department each fiscal year, they stated the Department is unable to monitor every grantee and ensure that they meet all applicable statutory and regulatory requirements.

Including FAR clauses and C.F.R. citations in award documentation is necessary but not sufficient to ensure that contractors and grantees are actually notifying their employees in writing of the whistleblower protections. Because a specific reference to Section 4712 was not always included in contracts through inclusion of the required clause or through a sufficient citation in grant award notifications, contractors and grantees may not be aware of the requirement to notify their employees of the whistleblower protections. The Government Accountability Office's *Standards for Internal Control in the Federal Government*, Principle 15, *s*tates that management should externally communicate the necessary information so that external parties can help the entity achieve its objectives and address related risks. Including applicable references in award documentation and subsequently following up with contractors and grantees would ensure that both groups are aware of and complying with the requirement and assist the Department in meeting its statutory responsibilities.

The Department can ensure contractor and grantee compliance through various means, similar to approaches reported by other agencies. For example, the Department of Justice OIG reported that its agency requires contractors to provide affirmative responses to the agency that notifications have been provided to employees.[5] The Department of Defense OIG reported that its agency is planning to direct its contracting personnel to apply a risk-based approach to verification of contractor compliance with the whistleblower notification requirements.[6] Verification could also occur as part of general monitoring activities including post-award conferences, site visits, monitoring calls, and desk reviews, among other methods determined appropriate by the Department.

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[5] "Management Advisory: Notification of Concerns Regarding the Department of Justice's Compliance with Laws, Regulations, and Policies Regarding Whistleblower Rights and Protections for Contract Workers Supporting Department of Justice Programs," Report No. 21-038, February 11, 2021.

[6] "Audit of [Department of Defense] Compliance with Whistleblower Protection Requirements in FY 2020 Contracts," Report No. DODIG-2023-101, July 28, 2023.

Whistleblowers play a critical role in helping our government remain efficient and accountable and they help ensure responsible stewardship of taxpayer dollars. Section 4712 protects employees who disclose contractor, subcontractor, grantee, or subgrantee wrongdoing related to Federal contract and grant waste, fraud, or abuse. If employees of contractors and grantees are not informed of the law's provisions, they may not be aware the law protects them from retaliation for disclosing wrongdoing, and they may not inform the Department or other authorities of a contractor or grantee's misconduct, making it more likely that fraud, waste, and abuse relating to Department contracts and grants will go undetected. Also, without documented policies and procedures, Department staff lack guidance for ensuring that contractor and grantee employees are informed of whistleblower protections.

Recommendations

We recommend that the Assistant Secretary for the Office of Finance and Operations—

1.1 Ensure that the Office of Acquisition, Grants, and Risk Management develops and implements a process for ensuring that contractor, subcontractor, grantee and subgrantee employees are notified in writing of their whistleblower protections in the predominant native language of the workforce.

1.2 Ensure that FSA and Contracts and Acquisition Management staff are aware of and adhere to applicable Department policy (e.g., Acquisition Alerts) and FAR requirements and that the Department's contract review processes are following current requirements and policy.

1.3 Include reference to 2 C.F.R. 200.300, which includes a specific reference to the Section 4712, or other language highlighting a grantee's responsibility to inform their employees of whistleblower protections, in new Grant Award Notifications, similar to the specific reference included in contract awards.

1.4 Ensure the contracts noted in the OIG's review that included the incorrect clause are updated.

OFO Comments

OFO agreed with Recommendations 1.2 and 1.3, and partially agreed with our finding and Recommendations 1.1 and 1.4.

For Recommendation 1.1, OFO stated that neither the FAR nor 2 C.F.R. Part 200 requires them to ensure that contractors, subcontractors, grantees or subgrantees notify their employees in writing of their whistleblower protections. They also stated that the FAR only requires contracting officers to insert clause 52.203-17 in certain solicitations and contracts, and that 2 C.F.R Part 200 only requires the awarding agency to communicate

to grantees all relevant public policy requirements and to determine whether to incorporate them directly or by reference. OFO stated that the requirement is in the underlying statute and the responsibility for the requirement is placed with the head of each executive agency. OFO added that this enforcement responsibility is not clearly a responsibility of OFO. OFO noted, however, that, it does have mechanisms in place to ensure that contractors and grantees provide this notice and that this responsibility flows down to subcontractors and subgrantees.

OFO agreed with Recommendation 1.2, noting that when the Acquisition Alert regarding whistleblower protections was issued in 2017, the acquisition policy office was undergoing a transition with a new Senior Procurement Executive and new staff. Since then, the acquisition policy office (renamed Strategic Acquisition Management Initiatives) has worked closely with policy leads in FSA and Contracts and Acquisition Management on Department-wide policy. OFO stated that because of this strengthened partnership and collaboration, knowledge of and adherence to Acquisition Alerts is no longer an area of weakness. OFO also agreed with Recommendation 1.3 and stated that it is considering ways to add standard language in the Grant Award Notification attachment to newly issued grant awards that includes the Section 4712 language.

Finally, OFO noted that it partially agreed with Recommendation 1.4, stating that the two contracts awarded by Contracts and Acquisition Management were awarded on September 29, 2013, prior to the requirement taking effect, and that both contracts are now expired. Therefore, no corrective action is required. OFO also stated that while FSA did not abide by the Acquisition Alert, the contractor was still required to comply with Section 4712 because pre-November 2023 versions of 52.212-4 were included in the contracts. OFO noted that the noncompliance with the Acquisition Alert is not a significant problem because agencies were given discretion regarding implementing the "clause deviation," and therefore, no corrective action regarding the two FSA contracts is required.

OIG Response

While the FAR and C.F.R. do not require OFO to ensure that contractors, subcontractors, grantees and subgrantees notify their employees in writing of their whistleblower protections, they also do not prohibit OFO from taking these steps. We disagree with OFO's statement that responsibility for enforcement of the statute is not clearly a responsibility of OFO. According to the Department's functional statements, OFO's Office of Acquisition, Grants, and Risk Management is responsible for developing, managing, and providing policy guidance and oversight of the Department's acquisitions, grants and risk management activities and operations. OFO's Strategic Acquisition Management Initiatives Division is responsible for building on Federal mandates and regulatory guidance to develop and manage acquisition and program

management policy for the Department. Additionally, 41 U.S.C. 1702(b)(3)(D) states that the functions of the Chief Acquisition Officer, a position delegated to OFO, include making acquisition decisions consistent with all applicable laws and establishing clear lines of authority, accountability, and responsibility for acquisition decision making within the executive agency. Finally, it is unclear what mechanisms OFO is referring to related to ensuring that contractors and grantees provide notice to employees of whistleblower protections. During our discussions with OFO officials, both the Director for the Strategic Acquisition Management Initiatives Division and the Director of the Grants Management Policy Division stated that they were not aware of any policy or guidance related to verification of contractor or grantee notification of whistleblower protections. No information was provided during our review to indicate that any such mechanisms existed and OFO did not provide any additional evidence in its comments to our draft report that caused us to change our conclusions or eliminate the finding or Recommendation 1.1.

Regarding the strengthened partnership and collaboration between the acquisition policy office and policy leads in FSA and Contracts and Acquisition Management, as well as OFO's efforts to add Section 4712 language to Grant Award Notifications, we consider these actions to be responsive to Recommendations 1.2 and 1.3, if implemented as described.

Regarding the missing and incorrect contract clauses, while we agree that two of the Contracts and Acquisition Management contracts were awarded 1 day prior to the FAR requirement taking effect, as noted in the finding, the whistleblower protections applied to all contracts and grants awarded on or after July 1, 2013, and agencies were encouraged to include the applicable contract clause at the time of any major modification to a contract that was awarded prior to the requirement taking effect. Because these contracts have recently expired, we agree that corrective action is no longer required. Recommendation 1.4 has been modified accordingly.

For the contracts that included the incorrect clause, we disagree with OFO's reasoning that noncompliance with the Acquisition Alert was not a problem. While agencies were given discretion regarding implementing the "clause deviation," we note that the Department exercised this discretion when, in issuing its Acquisition Alert memo, it authorized in the "Required Actions and Guidance" the immediate implementation of the updated clauses applicable to "all solicitations and resulting contract awards." For commercial contracts, this included the use of either 52.203-17 (the clause already required for use in noncommercial contracts), or 52.212-5, which was updated to incorporate reference to 52.203-17. The two contracts cited in the finding, both of which were commercial, incorporated neither of these clauses (52.203-17 or the updated version of 52.212-5) and were therefore in noncompliance.

Additionally, while we agree that reference to Section 4712 was still included in the clause used by FSA at the time of award of these two contracts since the FAR had not yet been updated, the inclusion of FAR 52.203-17, in accordance with the Acquisition Alert, would have provided more detailed information regarding the contractor's responsibilities under Section 4712.

Appendix A. Scope and Methodology

To answer our objective, we reviewed the laws, regulations, and guidance related to whistleblower protections for Federal contractor and grantee employees. We also reviewed prior Government Accountability Office and other Federal agencies' reports related to our objective. We held discussions with Department officials and staff to gain an understanding of its processes for including the required FAR clause in contracts and any similar processes in place related to inclusion of applicable whistleblower protection requirements in Grant Award Notifications. We also obtained an understanding of any processes the Department had in place for ensuring that contractors and grantees notify their employees in writing of whistleblower protections provided under the Section 4712.

We reviewed a nonstatistical, judgmental sample of Department contracts to determine whether the applicable FAR clause was included in the contracts at the time of award, if awarded on or after September 30, 2013, or through a subsequent modification if awarded before September 30, 2013.

We also reviewed a nonstatistical, judgmental sample of Department grant awards to determine whether a reference to the applicable whistleblower protection requirements was included in the Grant Award Notifications. We performed the work for this review from August 2023 through January 2024. We provided the results of our review to Office of Finance and Operations and FSA officials during an exit conference conducted on January 11, 2024.

Sampling Methodology

We identified a population of 499 active Department contracts over $100,000 as of the third quarter of fiscal year 2023 from the active contracts list posted on the Department's website. From this population, we selected a nonstatistical, judgmental sample of 28 active contracts. We selected the 10 contracts awarded by FSA with the highest current value and the 10 contracts awarded by the Contracts and Acquisitions Management Division with the highest current value. Additionally, we selected the three contracts most recently awarded by FSA and the three contracts most recently awarded by the Contracts and Acquisitions Management Division. Finally, we selected the two oldest active contracts regardless of awarding office.

Additionally, we identified a population of 79,560 open grants, including 71,518 formula grants and 8,042 discretionary grants, as of August 31, 2023. From this population, we selected a nonstatistical, judgmental sample of 29 open formula and discretionary grant awards. This included 12 formula grants selected from the four program offices with open awards. We selected the three largest grant awards from each office based upon

total obligation amount and unique grant program. It also included 17 discretionary grants selected from the 6 program offices with open awards. We selected the three largest discretionary grant awards from each office based upon total obligation amount and unique grant program.[7]

Since we selected these contracts and grant awards judgmentally, the results described in this report may not be representative of the populations and should not be projected.

Use of Computer-Processed Data

We relied upon computer-processed data from G5,[8] the Department's grants management system, to identify the population of grants for our sample and obtain related Grant Award Notifications. G5 is the official system of record for the Department's grants data and is widely used and relied on by Department officials. As a result, we considered it to be the best available data for the purpose of our review.

We also relied upon a list of active Department contracts posted on the Department's website to identify the population of contracts for our sample. We used this data for informational purposes only. We concluded that the computer-processed data were sufficiently reliable for the purpose of our review.

Compliance with Standards

We conducted our work in accordance with the Council of the Inspectors General on Integrity and Efficiency "Quality Standards for Inspection and Evaluation." Those standards require that we plan and perform our work to obtain sufficient and appropriate evidence to support our findings and provide a reasonable basis for our conclusions. We believe that the evidence obtained provides a reasonable basis for our conclusions.

[7] One program office had only two unique Department grant programs.

[8] The Department's G5 system began transitioning to the new G6 system on August 7, 2023.

Appendix B. Acronyms and Abbreviations

C.F.R.	Code of Federal Regulations
Department	U.S. Department of Education
FAR	48 C.F.R. chapter 1 "Federal Acquisition Regulation"
FSA	Federal Student Aid
OIG	Office of Inspector General
U.S.C.	United States Code
Section 4712	41 U.S.C. 4712

OFO Comments

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF FINANCE AND OPERATIONS

April 23, 2024

Sean Dawson
Inspector General for Audit

Dear Mr. Dawson:

I am writing on behalf of the U.S. Department of Education (Department) in response to the findings and recommendations made in the Office of Inspector General's (OIG) draft report, *The Department's Compliance with Whistleblower Protections for Contractor and Grantee Employees* (ED-OIG/I23DC0144). We appreciate the opportunity to respond.

We partially concur with your findings and recommendations. Please see our responses below.

*Recommendation 1.1 – Ensure that the Office of Acquisition, Grants, and Risk Management develops and implements a process for ensuring that contractor, subcontractor, grantee and subgrantee employees are notified in writing of their whistleblower protections in the predominant native language of the workforce***.**

OFO Response: We partially concur with this recommendation. As your report indicates, 41 U.S.C. § 4712 – Enhancement of contractor protection from reprisal for disclosure of certain information – protects an employee of a contractor, subcontractor, grantee, or personal services contractor from being discharged, demoted, or otherwise discriminated against a reprisal for disclosing certain information. These protections are reflected in Federal Acquisition Regulation (FAR) clause 52.203-17 for contracts and 2 C.F.R. 200 (Uniform Guidance) for grants. Neither regulation (the FAR or Uniform Guidance) requires the Office of Finance and Operations to *ensure* that contractors/subcontractors or grantees/subgrantees notify their employees in writing. The FAR in part 3.906 only requires the contracting officer to insert clause 52.203-17 in certain solicitations and contracts and, similar to contracts, the Uniform Guidance § 200.300 Statutory and national policy requirements, only requires the awarding agency to communicate to grantees all relevant public policy requirements, including general appropriation provisions and to determine whether to incorporate them directly or by reference in the terms and condition of the Federal award.

The requirement to *ensure* contractors, subcontractors, grantees, and subgrantees inform their employees in writing of their whistleblower protections is in the underlying statute (41 U.S.C. § 4712(d)) and the responsibility is placed with the "head of each executive agency." This enforcement responsibility is not clearly a responsibility of OFO. Nevertheless, we do have mechanisms in place in the acquisition and grants administrative process to ensure that contractors and grantees provide this notice and that this responsibility flows down to subcontractors and subgrantees.

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Recommendation 1.2 – Ensure that FSA and Contracts and Acquisition Management staff are aware of and adhere to applicable Department policy (e.g., Acquisition Alerts) and FAR requirements and that the Department's contract review processes are following current requirements and policy.

OFO Response: We concur with this recommendation, but note that this is no longer an issue. At the time the Acquisition Alert (AA) regarding whistleblower protections was issued in 2017, the acquisition policy office for the agency (known as Enterprise Procurement Initiatives) was undergoing a transition with a new Senior Procurement Executive and new staff. Since 2017, the acquisition policy office has been restructured, restaffed, and renamed (Strategic Acquisition Management Initiatives (SAMI)). SAMI works closely with the policy leads in FSA Acquisitions and Contracts and Acquisition Management (CAM) on Department-wide policy. Since 2020, before SAMI issues an AA, it sends a draft to FSA Acquisition, CAM, and OGC for review and comment. SAMI posts all AAs on ConnectED and disseminates the AAs to the Head of Contracting Activities, CAM and FSA Acquisition policy leads, and Executive Officers. While knowledge of and adherence to AAs may have been an issue in 2017, because of the strengthened partnership and collaboration between SAMI, CAM, and FSA Acquisitions, this is no longer an area of weakness.

Recommendation 1.3 – Include reference to 2 C.F.R. 200.300, which includes a specific reference to the Section 4712, or other language highlighting a grantee's responsibility to inform their employees of whistleblower protections, in new Grant Award Notifications, similar to the specific reference included in contract awards.

OFO Response: We concur with this recommendation and are considering ways to add standard language in the Grant Award Notification attachment to newly issued grant awards that include the Section 4712 language.

Recommendation 1.4 – Insert the clause required at FAR 3.906 (i.e., FAR 52.203-17 "Contractor Employee Whistleblower Rights") in the contracts noted in the OIG's review that did not include it and ensure the contracts that included the incorrect clause are updated.

OFO Response: We partially concur with this recommendation. The two contracts awarded by CAM that were indicated as not including the FAR clause were awarded on September 29, 2013, prior to the requirement taking effect. Both CAM contracts cited for non-compliance are expired; therefore, no corrective action is required.

Although FSA did not abide by Acquisition Alert 2017-04, the contractor was still required to comply with 41 U.S.C. 4712 because pre-November 2023 versions of 52.212-4 were in those contracts and paragraph (r) in those versions required compliance.

Evidence that there is not a significant problem with our noncompliance with the Acquisition Alert can be seen in the CAAC letter itself when it gives agencies discretion regarding implementing the clause deviations.

> "*Agencies have the discretion to change the handling of commercial items, to use FAR clause 52.203-17 for both commercial and noncommercial items. The inclusion of FAR clause 52.203-17 in acquisitions for noncommercial items will remain the same."* [CAAC Letter 2-17-02, page 2]

Both subject contracts, Chenega and Jazz Solutions, are commercial contracts; therefore, no corrective action is required.

Thank you for the opportunity to respond.

Sincerely,

Richard J Lucas

Richard J. Lucas
Principal Deputy Assistant Secretary
Office of Finance and Operations