

The Downside of Confidentiality Agreements

Written by Nick Sanders

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Recently we [discussed](#) the use of employee confidentiality agreements in internal investigations of wrongdoing. In that article we cited a Washington Times story about KBR (who is certainly no stranger to employee wrongdoing, whistleblowers, or government-initiated litigation). According to that story, KBR was requiring employees “to get prior approval from a corporate lawyer before reporting wrongdoing.” In other words, as part of their participation in internal investigations, KBR employees were required to sign a confidentiality agreement (signed and witnessed by two other individuals). According to the story, lawmakers were concerned that this tactic could have a chilling effect on the ability and/or willingness of whistleblowers to report waste, fraud, and abuse.

We opined that KBR may have gone a bit too far. Well, we don’t know about that. But what we do know is that the DoD just issued a [Class Deviation](#) that prohibits contracting with entities that use confidentiality agreements to restrict the ability of employees to report waste, fraud, or abuse to the Federal government.

To that end, Contracting Officers are now required to incorporate solicitation provision 252.203-7998 (“Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements – Representation”). That provision states –

By submission of its offer, the Offeror represents that it does not require employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

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In addition, there is now a similar contract clause that is required to be inserted in contracts of all sizes and types that will use FY 2015 funds (including Part 12 acquisitions). The new clause states (in part) –

The Contractor shall not require employees or subcontractors seeking to report fraud, waste, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

The Contractor shall notify employees that the prohibitions and restrictions of any internal confidentiality agreements covered by this clause are no longer in effect.

We believe that the requirements imposed by this Class Deviation effectively end KBR's reported practices in this area. We'll see if any contractor wants to contest it.