



SIGAR

Office of the Special Inspector General
for Afghanistan Reconstruction

John F. Sopko
Special Inspector General

May 5, 2014

The Honorable Dr. Rajiv Shah
Administrator
U.S. Agency for International Development

Dear Dr. Shah:

I write to call your attention to an article that appeared in yesterday's Washington Post that raises serious concerns regarding USAID's implementing partner International Relief & Development (IRD).¹ The article reports, among other things, that IRD has attempted to use confidentiality agreements as a way of prohibiting its employees from making critical statements about IRD to "funding agencies" or "officials of any government."²

Although the article notes that IRD may now be revising this policy, IRD's conduct raises troubling questions regarding its commitment to transparency and to government oversight of the hundreds of millions of dollars in U.S. taxpayer funds it receives from USAID. In particular, IRD's policy of prohibiting employees from informing government officials of critical information appears to violate the False Claims Act, 31 U.S.C. §§ 3729–3733, various federal whistleblower statutes, and the Federal Acquisition Regulation.

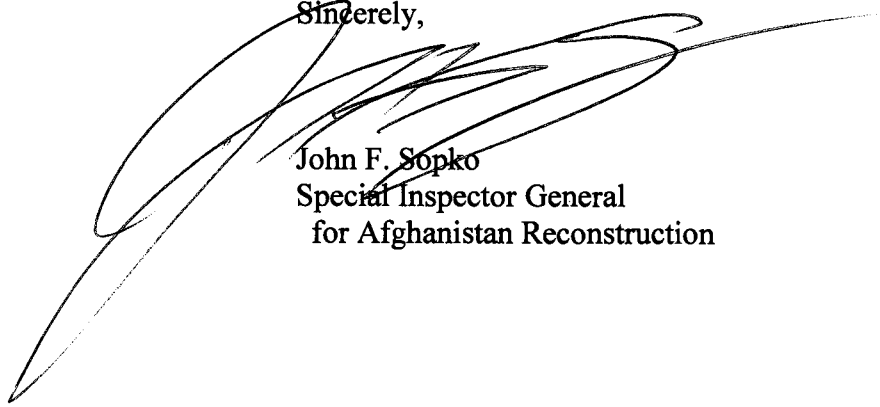
Given the troubling questions raised by IRD's policy, I am requesting that USAID consider notifying all of its contract, cooperative agreement, and grant agreement recipients in Afghanistan that similar efforts to restrict the rights of whistleblowers will not be tolerated. Moreover, I ask that USAID consider inserting a provision in all future contracts, cooperative agreements, and grant agreements for Afghanistan reconstruction that forbids the recipients of federal funds from using confidentiality agreements that prohibit their employees from talking to U.S. government officials. By taking these steps now, USAID may be able to prevent its other contractors and implementing partners from employing confidentiality agreements to prevent their current and former employees from reporting waste, fraud, and abuse of government funds.

¹ Scott Higham, Big budgets, little oversight in war zones, *The 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.

² IRD, Confidential Separation Agreement and General Release.
<http://apps.washingtonpost.com/g/page/world/ird-confidentiality-agreement-warns-against-making-negative-statements/997/>.

Should you have any questions about this request, please do not hesitate to let me know.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'John F. Sopko', written over the typed name and title.

John F. Sopko
Special Inspector General
for Afghanistan Reconstruction



USAID
FROM THE AMERICAN PEOPLE

The Honorable John F. Sopko
Special Inspector General
for Afghanistan Reconstruction
1550 Crystal Drive, 9th Floor
Arlington, Virginia 22202

MAY 13 2014

Dear Mr. Sopko:

Thank you for your letter of May 5, 2014, regarding concerns raised by the Washington Post article entitled “Big Budgets, Little Oversight in War Zones.” The article, and your letter, raised particular concerns regarding a contractor’s practice of prohibiting employees from informing government officials of critical information.

I assure you that USAID takes very seriously its role as a steward of taxpayer funds. I write to highlight some of the steps USAID has taken, and will be taking, to remove impediments to government oversight such as those described in the article.

As you may know, the Federal Acquisition Regulation (FAR) Part 3.9 prohibits federal contractors from retaliating against employees who blow the whistle on violations of law. USAID administers its contracts in accordance with the FAR, including this provision. Recently, efforts have been underway across the federal government to strengthen this prohibition by establishing a pilot program to expand whistleblower protections pursuant to 41 U.S.C. §4712. Last year, an interim rule was issued to include the clause at FAR 52.203-17 in contracts, which requires contractors to inform their employees of whistleblower rights. USAID notified its Contracting Officers of the interim rule and requested that they incorporate the clause into contracts.

To reinforce the Agency’s implementation of the pilot program, I have asked USAID’s Senior Procurement Executive to issue a bulletin reminding our Contracting Officers that the pilot program clause must be included in all contracts

over the simplified acquisition threshold issued between July 1, 2013 and January 1, 2017.

With regard to USAID's grants and cooperative agreements, separate efforts are underway to strengthen the whistleblower protections provided to employees of assistance recipients and sub-recipients. OMB's recently issued "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards" includes language at 2 CFR 200.300, that encompasses whistleblower protections. USAID is in the rulemaking process to issue Agency regulations implementing this guidance. The Agency will introduce a provision in our assistance agreements implementing the enhanced whistleblower protections afforded to assistance recipient employees as a matter of law. I have asked USAID's Senior Procurement Executive to notify all assistance recipients of their statutory obligations to notify and observe the legal protections afforded their employees. Additionally, our Agreement Officers will be amending all Agency assistance agreements, not just those in Afghanistan, to incorporate a provision requiring recipient organizations to comply with U.S. statutory and policy whistleblower protections.

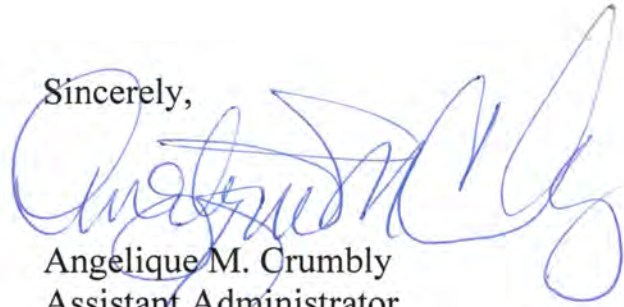
We believe that all of the above provisions provide important protections as conditions of USAID's awards. These provisions specifically prohibit contractors, subcontractors, recipients or subrecipients from attempting to abridge by agreement or condition of employment any of their employees' statutory protections for whistleblowing. Such prohibitions are vital to effective government oversight and accountable program implementation.

Since 2011, USAID staff have highlighted the importance of partners disclosing information to the government as a primary topic in our Compliance Workshop, which we created internally and have delivered to more than 2,000 individuals. These participants have included Agency and implementing partner staff, operating not only in Afghanistan, but around the world. We intend to continue to emphasize this message in our communications to Agency and partner staff alike. The message from the Agency's Senior Procurement Executive described above will present an unequivocal statement of USAID's commitment to whistleblower protections, and we intend to underscore the message in future meetings with partner advocacy groups.

USAID shares your commitment to preventing waste, fraud, and abuse of government funds, and is confident that the great majority of its implementing partners do, as well. We look forward to continuously improving the protections

afforded to whistleblowers under our programs, and the effective government oversight they permit.

Sincerely,



Angelique M. Crumbly
Assistant Administrator
Bureau for Management

Attachments:

- 1: USAID Procurement Executive Bulletin 2014-02
- 2: Senior Procurement Executive Letter to USAID Contractors and Recipients, "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections"



USAID
FROM THE AMERICAN PEOPLE

USAID PROCUREMENT EXECUTIVE

PROCUREMENT EXECUTIVE'S BULLETIN NO. 2014-02
SUBJECT: PILOT PROGRAM FOR ENHANCEMENT OF EMPLOYEE
WHISTLEBLOWER PROTECTIONS

1. Scope: This Bulletin applies to all USAID A&A staff.

2. Purpose: The purpose of the PEB is to remind A&A staff that the Whistleblower Protection requirements are applicable to all USAID contractors, recipients, subcontractors, and subrecipients.

3. Responsibilities and Requirements:

a. Acquisition: USAID COs are responsible for incorporating the required **FAR Clause 52.203-17** in all USAID solicitations and contracts that exceed the simplified acquisition threshold, as announced in FAC-Note 2005-70 (See, **FAR 3.908 Pilot program for enhancement of contractor employee whistleblower protections.**) FAR 3.907, which addresses whistleblower protections under the American Recovery and Reinvestment Act of 2009, is unaffected by this rule. Therefore, COs must also use the clause at 52.203-15, in all solicitations and contracts funded in whole or in part with Recovery Act funds.

b. Assistance: USAID AOs must remind recipients about their responsibility to inform their employees and sub-recipients, in writing, of their Whistleblower Protection rights as communicated by the Director, Office of Acquisition and Assistance, Bureau for Management, in his letter dated May 9, 2014.

4. Background: USAID takes whistleblower protection rights very seriously. Congress has enacted many whistleblower protection statutes to encourage employees to report fraud, waste, and abuse. The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013) mandates a pilot program titled "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections." It is codified at 41 U.S.C. §4712 and applies to all employees working for contractors, subcontractors, recipients and subrecipients on federal awards.

5. Discussion:

a. Acquisition: This PEB serves to remind COs to include the required FAR clause in current and future awards and become familiar with the **Pilot Program for Enhancement of Contractor Employee Whistleblower Protections**, published in [FAC Note 2005-70](#). This interim rule amended the FAR to implement a four-year pilot program to enhance the existing whistleblower protections for contractor employees at FAR [subpart 3.9](#). For more details, see <http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23703.htm>

b. **Assistance:** This PEB also serves to inform AOs that these whistleblower protection rights apply to assistance awards too, as communicated to USAID recipients in a letter dated May 9, 2014, from the Director, Office of Acquisition and Assistance, Bureau for Management. M/OAA/P is in the process of drafting a Standard Provision entitled "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections" which AOs will be required to incorporate in all assistance awards (grants and cooperative agreements) made on or after July 1, 2013. All assistance awards made through January 1, 2017, will be required to include this provision.

6. Inquiries. Questions may be addressed to Marcelle Wijesinghe, M/OAA/P at [REDACTED], or e-mail [REDACTED].

7. Effective Date. This Bulletin is effective immediately and shall remain in effect until cancelled by the Procurement Executive.

5/9/2014
Date


Aman S. Djahanbani
Procurement Executive



USAID
FROM THE AMERICAN PEOPLE

Date: May 9, 2014

TO: USAID Contractors and Recipients

SUBJECT: Pilot Program for Enhancement of Contractor Employee Whistleblower Protections

I am writing to ensure that you are aware of the whistleblower protections mandated by 41 U.S.C. §4712, which apply to all employees working for contractors, subcontractors, recipients and subrecipients on federal awards. The statute mandates a pilot program titled "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections." This program requires all contractors, subcontractors, recipients, and subrecipients under USAID awards to:

1. Inform their employees working on any Federal award that they are subject to the whistleblower rights and remedies of the pilot program;
2. Inform their employees in writing of employee whistleblower protections under 41 U.S.C. §4712 in the predominant native language of the workforce; and
3. Recipients must include such requirements in any agreement made with a subrecipient.
4. Contractor must include such requirements in any agreement made with a subcontractor.

The statute (41 U.S.C. §4712) states that an "employee of a contractor, subcontractor, grantee [or subgrantee] may not be discharged, demoted, or otherwise discriminated against as a reprisal for "whistleblowing." In addition, whistleblower protections cannot be waived by any agreement, policy, form or condition of employment.

Whistleblowing is defined as making a disclosure "that the employee reasonably believes" is evidence of any of the following:

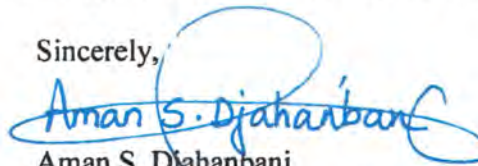
- Gross mismanagement of a Federal contract or grant;
- A gross waste of Federal funds;
- An abuse of authority relating to a Federal contract or grant;
- A substantial and specific danger to public health or safety; or,
- A violation of law, rule, or regulation related to a Federal contract or grant (including the competition for, or negotiation of, a contract or grant).

To qualify under the statute, the employee's disclosure must be made to:

- A Member of Congress, or a representative of a Congressional Committee;
- An Inspector General;
- The Government Accountability Office;
- A federal employee responsible for contract or grant oversight or management at the relevant agency;
- A court or grand jury; or,
- A management official or other employee of the contractor, subcontractor, grantee, or subgrantee who has the responsibility to investigate, discover or address misconduct.

The requirement to comply with, and inform all employees of, the "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections" is effective for all contracts, subcontracts, assistance awards and subawards issued **beginning July 1, 2013** through January 1, 2017. Contracting Officers and Agreement Officers will be modifying/amending awards as necessary to incorporate the relevant clauses and provisions into awards made during this period.

Sincerely,



Aman S. Djahanbani
Director, Office of Acquisition & Assistance
Bureau for Management