

FAR Confidentiality Rule Doesn't Authorize Employee Theft

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The Federal Acquisition Regulation does not permit employees of government contractors to take documents and other information to give to a governmental agency or investigative body. The prohibitions on contractor confidentiality agreements at Federal Acquisition Regulation 3.909 and the related contract clauses at FAR 52.203-18 and -19, which became effective in January 2017, do not sanction employee theft. Instead, they prohibit overly broad confidentiality agreements that prevent or discourage employees from communicating with the government about alleged unlawful conduct. They do not require contractors to adopt policies or procedures that affirmatively permit employees to take confidential information and provide it to the government. Nor do the rules require contractors to be silent if an employee steals confidential or proprietary business information. Contractors satisfy their obligations under the referenced FAR provisions by not restricting employees from communicating with the government about alleged waste, fraud, or abuse. The rules are no broader.

The argument that theft of company information is authorized by the FAR is potentially dangerous, especially in this era of heightened information security and cybersecurity awareness. Government contractors have duties to safeguard sensitive information, including keeping the information safe from an employee who claims to be taking it for the benefit of an enforcement inquiry. The FAR expressly contemplates that government contractors may “defend a proceeding or dispute ... related to a potential or disclosed violation.” FAR 52.203-13(a)(3). And “[f]ull cooperation” with a government investigation is reactive, requiring “timely and complete response[s] to Government auditors’ and investigators’ request[s] for documents and access to employees with information.” FAR 52.203-13(a). Nothing here requires contractors to permit employees to walk out the door with confidential contractor information (or government information entrusted to the contractor for purposes of completing a government contract) regardless of whether the purpose is to provide that information to a regulator.

Instead, FAR 3.909-1(a) provides the following:

The Government is prohibited from using fiscal year 2015 and subsequent fiscal year funds for a contract with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a



David Robbins



Trina Fairley Barlow

Federal department or agency authorized to receive such information. See section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions.)

The FAR also requires contractors to certify that employees are not prohibited by operation of internal confidentiality agreement from lawfully reporting waste, fraud or abuse. FAR 3.909-2. The operative contract language is:

By submission of its offer, the Offeror represents that it will not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General.)

FAR 52.203-18(d). Again, there is nothing in the FAR that requires companies to allow employees to abscond with information and give it to a governmental investigative body. Instead, the FAR requires reporting to be accomplished lawfully. Theft of company information is not lawful. And theft for the purposes of providing the information to an office of inspector general or other enforcement or oversight body does not automatically transform the theft of company information into a lawful action.

So what should government contractors do when an employee leaves with confidential company information and claims they are doing so to further a procurement fraud investigation or otherwise support a whistleblower claim? At a minimum, the contractor should demand return of the information and if warranted take legal action to secure the return of the information, by seeking injunctive relief and, in appropriate circumstances, contacting law enforcement to report the theft. Contractors should be prepared to demonstrate on the facts of each case why the employee's alleged whistleblowing activities do not justify theft of confidential company information.

Additionally, contractors should implement appropriate policies and procedures for protecting confidential information during all phases of the employment relationship. When on-boarding new employees, contractors should still require employees to sign carefully crafted confidentiality agreements that strike an appropriate and lawful balance between complying with the FAR's requirements and protecting the theft of the company's confidential and proprietary documents. Companies who have not recently reviewed their confidentiality agreements to ensure compliance with the FAR requirements should do so.

Contractors should also work with their information technology professionals to proactively monitor current employees to detect any unusual, suspicious or nonbusiness-related downloading, forwarding or other distribution of confidential and proprietary documents. Finally, contractors should include in the termination and exit interview processes a checklist item that requires employees to return company documents in their possession, and any severance payments paid to employees should be conditioned upon their written certification that they have returned all company documents in his or her possession, custody or control.

—By David Robbins and Trina Fairley Barlow, Crowell & Moring LLP

David Robbins is a partner in Crowell & Moring's Washington, D.C., office and a member of the firm's

government contracts group. He is a former suspending and debarring official.

Trina Fairley Barlow is a partner in the firm's labor and employment and government contracts groups in Washington.

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