



Report to the Ranking Member,
Committee on Homeland Security and
Governmental Affairs, U.S. Senate

March 2018

NASA CONTRACTOR WHISTLEBLOWERS

Steps Taken to Implement Program but Improvements to Timeliness and Guidance Needed

GAO Highlights

Highlights of [GAO-18-262](#), a report to the Ranking Member, Committee on Homeland Security and Governmental Affairs, U. S. Senate

Why GAO Did This Study

NASA obligated over \$18 billion in contracts and more than \$1 billion in grants in fiscal year 2016, and it relies on a significant number of contractor and grantee employees to accomplish its work. These employees are legally protected from reprisal—such as demotion or firing—for whistleblowing.

GAO was asked to review NASA’s whistleblower reprisal protections for contractor and grantee employees. This report addresses, among other things, the extent to which (1) NASA’s Inspector General investigated contractor and grantee whistleblower reprisal complaints; (2) NASA’s Administrator reviewed reprisal complaints in a timely manner; and (3) NASA communicated the applicable whistleblower reprisal protections to contractors. GAO reviewed NASA and its Inspector General’s policies and guidance; reviewed a generalizable sample of 100 contracts from all NASA centers with contracts in fiscal year 2016; and interviewed relevant officials and contractors, grantees, and advocacy groups.

What GAO Recommends

GAO is making three recommendations to NASA, including evaluating the process for reviewing reprisal complaints to ensure it is meeting the required timeframe and clarifying guidance on when protections apply to contractor employees. NASA agreed with the recommendations and plans to develop a documented process to ensure it reviews reprisal complaints in a timely manner and clarify guidance as appropriate, among other things.

View [GAO-18-262](#). For more information, contact Shelby S. Oakley at (202) 512-4841 or oakleys@gao.gov.

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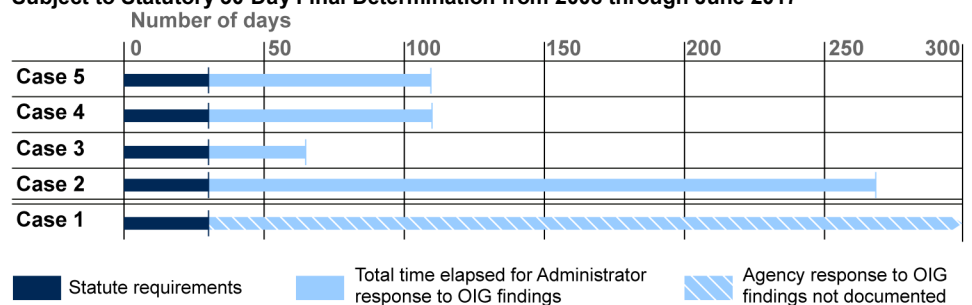
Steps Taken to Implement Program but Improvements to Timeliness and Guidance Needed

What GAO Found

From 2008 through June 2017, National Aeronautics and Space Administration (NASA) contractor and grantee employees submitted 48 reprisal complaints such as alleged firing or demotion for reporting fraud, waste, or abuse within the government. NASA’s Inspector General addressed all 48 complaints, completed investigations for 6 of those complaints, and forwarded investigation reports to the NASA Administrator, who is responsible for making a final determination of whether reprisal occurred. The Administrator determined that none of the complaints qualified for protection under the law.

Further, in 5 of the 6 cases forwarded by the OIG, the Administrator was required by statute to make a final determination of reprisal within 30 days. GAO found that the Administrator did not meet this required time frame for all 5 cases and had no documented response for one of them (see figure for all 5 cases). According to officials from NASA’s Office of General Counsel, each case must be handled on a case by case basis to ensure due process and 30 days is insufficient time to issue an order of final determination of reprisal. However, in order to ensure that whistleblower reprisal complaints are handled within required timeframes, NASA would have to monitor and evaluate its processes for making final determinations of reprisal, but it has not yet taken this step. Consequently, NASA does not know what changes may be needed to ensure that it is meeting the statutory 30-day requirement.

Figure: Timeline for NASA Administrator’s Response for 5 Investigated Reprisal Cases Subject to Statutory 30-Day Final Determination from 2008 through June 2017



Source: GAO analysis of documents provided by National Aeronautics and Space Administration Office of Inspector General (OIG) and Administrator. | [GAO-18-262](#)

NASA communicates whistleblower protections to contractors through inclusion of a required contract clause. For example, GAO found that almost all—98 percent—of contracts would be expected to include a whistleblower clause as required by statute. However, certain elements of NASA whistleblower protection guidance have contributed to a different understanding of reprisal protections among officials at headquarters, a NASA center, and the Inspector General. For example, a July 2014 procurement notice and contract clause language resulted in different interpretations about when the protections apply. Federal internal control standards require that an entity should communicate necessary quality information internally to meet the objectives of its mission. Without additional clarity in its guidance on when the protections apply, NASA centers and procurement officials will be at risk of inconsistent implementation of the law.

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Abbreviations

FAR	Federal Acquisition Regulation
FPDS-NG	Federal Procurement Data System - Next Generation
JSC	Johnson Space Center
NASA	National Aeronautics and Space Administration
NSSC	NASA Shared Services Center
NFS	NASA FAR Supplement
NFS clause	NFS 1852.203-71
OIG	Office of Inspector General

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March 8, 2018

The Honorable Claire McCaskill
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

Dear Senator McCaskill:

When contractor and grantee employees report fraud, waste, abuse, and mismanagement, agencies should ensure they are prepared to fully investigate reprisal complaints—such as demotion or firing—for whistleblowing. Agencies also need to make a formal determination on whether reprisal occurred. Employees of contractors and grantees conduct a significant amount of work for the National Aeronautics and Space Administration (NASA). Given the sometimes enormous safety risks involved in space exploration, having an established process in place to investigate reprisal claims helps ensure NASA is able to act quickly whenever a whistleblower reports experiencing reprisal. In fiscal year 2016, NASA obligated over \$18 billion in contracts to support acquisitions such as satellites and the construction of a solar plant; and more than \$1 billion in grants for things such as science, technology, engineering, and math education initiatives and a student stipend for space-related research.

Although some protections for contractor employee whistleblowers have existed for years, section 2409 of Title 10, U.S. code (the statute), was amended in 2008, 2013, and 2014 to give contractor and grantee employee whistleblowers at NASA enhanced protection from reprisal. The statute establishes that an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor may not be subject to reprisal for disclosing certain whistleblower complaints to certain authorities.¹

You asked us to evaluate NASA's implementation of whistleblower reprisal protections. This report addresses the extent to which (1) NASA's Inspector General has investigated contractor and grantee whistleblower

¹In this report, we use the term "contractors and grantee employees" to also include both subcontractors and subgrantees.

reprisal complaints, including meeting statutory timeliness requirements, and developed guidance for the investigations; (2) NASA's Administrator meets statutory timeliness requirements to review reprisal complaints; (3) NASA communicated externally and internally about the applicable contractor whistleblower reprisal protections; and (4) NASA communicated with grantees the applicable whistleblower reprisal protections.

To assess the extent to which NASA's Office of Inspector General (OIG) investigated reprisal complaints and developed guidance for the investigations, and the NASA Administrator met timeliness requirements, we obtained NASA guidance and relevant documentation. We conducted interviews with agency officials, including officials from the OIG and the Office of General Counsel on behalf of the Administrator about their processes and practices to conduct duties outlined in the statute. We reviewed data provided by the NASA OIG on the total number of whistleblower allegations of fraud, waste, abuse, misconduct, or mismanagement and reprisal complaints; the number of contractor and grantee employee whistleblower allegations and reprisal complaints; and the outcomes or decisions reached by the OIG of a reprisal complaint from fiscal years 2008, the year the enhanced protections were put in place, through 2017.² We assessed the reliability of these data by asking the NASA OIG to describe the source(s) of information used and steps taken to identify the numbers provided, and limitations and caveats that would affect our use of these data—such as the data being self-reported by the OIG and Administrator. Based on these steps, we determined the data to be sufficient for our purposes of determining the extent to which the complaints were addressed.

To assess the extent to which NASA communicates whistleblower protections externally, to contractors and grantees, we identified new fiscal year 2016 contract awards over \$300,000 as reported in the Federal Procurement Data System-Next Generation (FPDS-NG). We selected contracts that were not only over the simplified acquisition threshold (generally \$150,000), but were over \$300,000 to account for

²While OIG officials track whistleblower reprisal complaints, they do not specifically track disclosures as a separate category. The numbers are based on a search of their database using key terms such as "disclosure" or "contractor employee" in the complaint field. Officials pointed out that complaints made through the OIG hotline may qualify for whistleblower protections, but the complainant may not identify him or herself as a whistleblower or even want to be considered a whistleblower.

possible exceptions and to ensure that we were sampling contracts that would be required to include a whistleblower reprisal clause. To determine whether the required NASA Federal Acquisition Regulation (FAR) Supplement clause 1852.203-71 (NFS clause) or other potentially applicable clauses were included in NASA contracts, we selected for review a generalizable random sample of 100 contracts from a total of 270 contracts.³ The sample is projectable to NASA fiscal year 2016 contracts; however, making a legal determination of compliance would require a case by case review, which we did not do for contracts not in our sample. The 100 contracts consist of a random selection of 10 contracts from each NASA center that awarded new contracts in fiscal year 2016; for those centers that did not have 10 contracts, we selected all contracts.⁴ The remaining contracts were pulled from NASA Shared Services Center (NSSC), because that center does the most contracting. We estimated the percent of NASA contracts expected to include whistleblower clause(s) as the weighted average of results from the 10 contracting centers. Additionally, we selected a non-generalizable random sample of 10 grants awarded by NASA in fiscal year 2016 for review to determine whether NASA grants included a mechanism notifying grantee employees of their whistleblower rights and reprisal protections.⁵ For both the sample of contracts and grants, we conducted data reliability checks by comparing the data to the documentation and concluded the data were sufficiently reliable for our purposes to determine if relevant whistleblower reprisal protections information was communicated externally.

To assess internal communication about whistleblower protections, we reviewed relevant documentation, including guidance, and conducted interviews with procurement officials, NASA Headquarters, NASA's Office of General Counsel, and Chief Counsels at Johnson Space Center (JSC), NSSC, and Marshall Space Flight Center. We also conducted interviews with contractors, grantees, and whistleblower advocacy groups. For additional information on our scope and methodology, see appendix I.

We conducted this performance audit from March 2017 to March 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain

³FAR clauses 52.203-15, 52.203-17, and 52.212-4.

⁴NASA is comprised of 12 centers and 7 facilities located throughout the United States.

⁵We selected 10 random grants from 2016 with positive dollar values to avoid grants captured in FPDS-NG as negative numbers due to deobligations.

sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Disclosure: An allegation to certain bodies and individuals made by an employee who believes he or she has witnessed certain wrongdoing, such as gross mismanagement or gross waste.

Source: GAO analysis based on 10 U.S.C. § 2409(a) | GAO-18-262

Reprisal Complaint: Following a disclosure, a complaint that an employee has experienced reprisal as a result of the disclosure, such as demotion or discharge.

Source: GAO analysis based on 10 U.S.C. § 2409(b) | GAO-18-262

For contractor and grantee employees at NASA, whistleblower protections have changed over time. For example, by statute, in 2007, NASA contractor employees were protected against reprisal if they disclosed information relating to a substantial violation of law related to a contract. However, in 2008, amendments to the whistleblower statute provided protections only to those contractor employees at NASA who reported “a substantial and specific danger to public health or safety.” In 2013, the statute was amended again to include disclosures of gross mismanagement of a NASA contract or grant, a gross waste of Administration funds, and abuse of authority relating to a NASA contract or grant, or a violation of law, rule, or regulation related to a NASA contract or grant. In 2014, the statute was further amended with the only significant change to protect grantee and subgrantee employees. See table 1 for detailed description of the 2008, 2013, and 2014 amendments of the statute.

Table 1: Selected Summary of Amendments to the Whistleblower Reprisal Protections for NASA Contractor and Grantee Employees

10 U.S.C. § 2409	After fiscal year 2008 National Defense Authorization Act (NDAA) amendments ^a	After fiscal year 2013 NDAA amendments ^b	After fiscal year 2014 NDAA amendments ^c	Summary of selected changes
Employees covered	Contractor employees, same as previous.	Contractor and subcontractor employees.	Contractor, subcontractor, grantee, and subgrantee employees.	Expanded protections to subcontractor, grantee, and subgrantee employees.
Protected whistleblower disclosures	A substantial and specific danger to public health or safety.	Same as 2008, plus gross mismanagement of NASA contract or grant, a gross waste of Administration funds, an abuse of authority relating to an Administration contract or grant, or a violation of law, rule, or regulation related to an Administration contract (including the competition for or negotiation of a contract) or grant.	Same as previous	Extended protected disclosures to include gross mismanagement, waste, or abuse of funds, among other things for NASA contractor and grantee employees. ^d
Length of investigation	180 days/no limit Office of Inspector General (OIG) and complainant may agree to additional time to investigate.	180 days/360 maximum OIG may request up to an additional 180 days, with complainant approval.	Same as previous	Limited OIG to an extension up to 180 days in addition to the initial 180 day investigative time frame.
Agency head review	30 days	Same as previous	Same as previous	No change
Employee notification	No requirement for contractors to communicate whistleblower protections to their employees.	NASA must ensure that its contractors and subcontractors inform their employees in writing of the rights and remedies provided by the statute in the predominant language of the workplace. ^e	Same as previous Although grantees protections were added, no requirement to ensure grantees inform employees of rights and remedies provided by statute.	NASA now includes a NASA Federal Acquisition Regulation Supplement clause in contracts requiring that its contractors and subcontractors inform their employees of whistleblower protections.

Source: GAO analysis of amendments to 10 U.S.C. § 2409 | GAO-18-262

^aPub. L. No. 110-181, § 846 (enacted January 28, 2008). 10 U.S.C. § 2409 also applies to the Department of Defense and Coast Guard. For purposes of this table, we selected information specific to NASA.

^bPub. L. No. 112-239, § 827 (enacted January 2, 2013; amendments effective 180 days after enactment).

^cPub. L. No. 113-291, § 856(a) (enacted December 19, 2014).

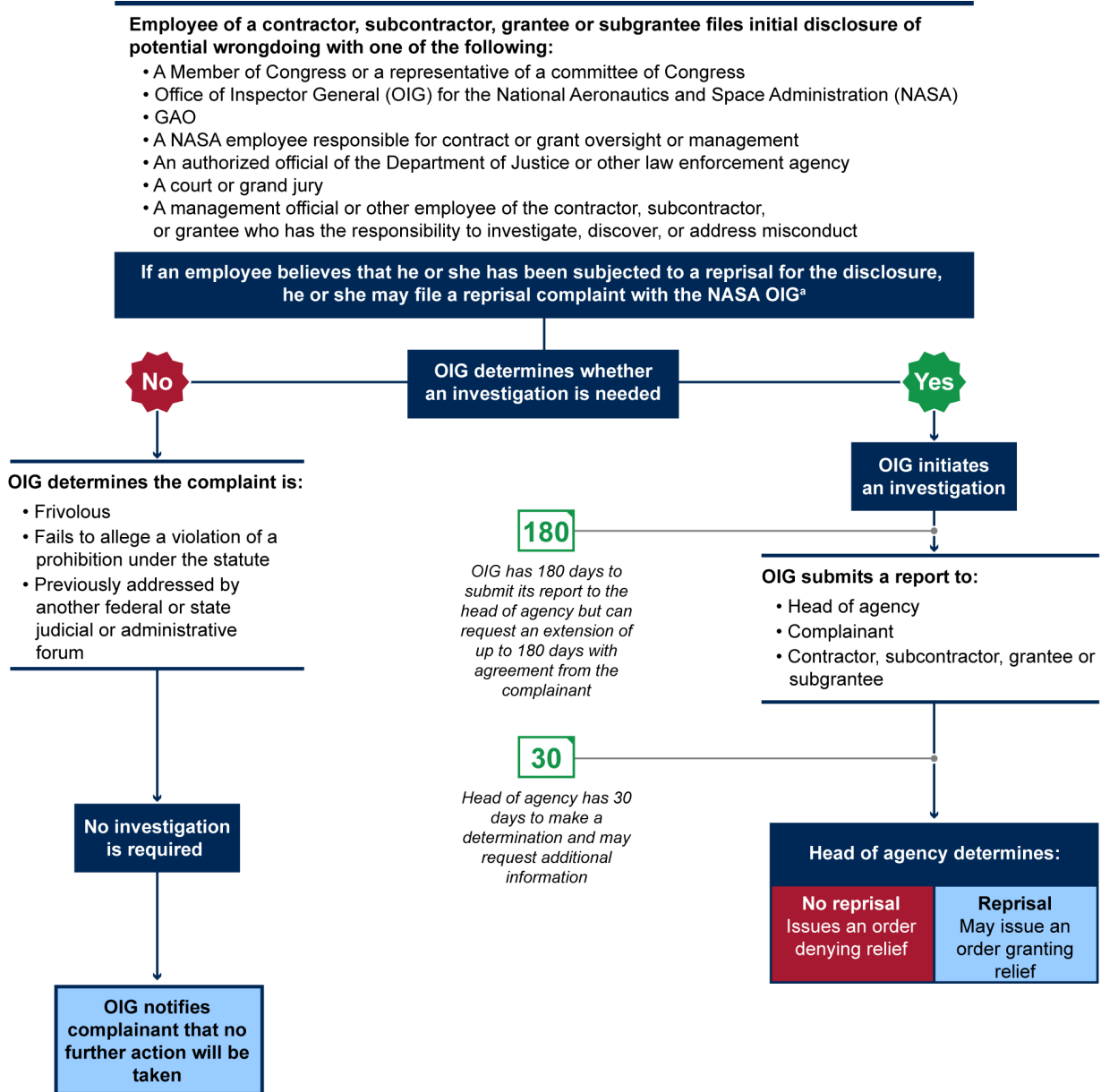
^dPrior to the 2008 amendments, NASA contractor employees were protected for disclosing information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract). 10 U.S.C. § 2409 (2007).

^eThe statute does not include a requirement to inform grantee and subgrantee employees of their whistleblower reprisal protections.

Requirements under the Current Statute

Under the current statute, the NASA Office of Inspector General and Administrator have different responsibilities. Since the 2014 amendments, contractor, subcontractor, grantee, and subgrantee employees are protected from reprisal if they disclose to certain persons or bodies information they reasonably believe 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. Additionally, contractor employees may make whistleblower disclosures to several entities, including a management official at the contractor. Figure 1 depicts the disclosure process and the complaint process.

Figure 1: Disclosure and Reprisal Complaint Investigation and Review Processes for NASA Contractor and Grantee Employees



Source: GAO analysis of 10 U.S.C. § 2409. | GAO-18-262

^aAn employee has three years from when the alleged reprisal took place to file a complaint.

NASA OIG Role: Upon receiving a reprisal complaint, the OIG must evaluate whether a reprisal complaint is covered under the statute. In addition to the steps described in figure 1 for investigating complaints, there are instances when the OIG does not investigate. The OIG might not investigate for a variety of reasons, such as in cases where the complaint is already under investigation by another authority such as another OIG, or otherwise does not allege a violation of the law, such as if whistleblower disclosure does not constitute gross fraud, waste, abuse or mismanagement. If the OIG determines the case is not covered under the statute, it may then notify the complainant that no further action will be taken on the reprisal complaint.

Administrator Role: Upon receipt of the NASA OIG investigation report, the NASA Administrator (the head of agency) has 30 days to determine whether the contractor made a prohibited reprisal and issue an order denying or granting relief. According to NASA officials, during the 30-day period after the agency head receives the OIG report, the agency practice has been to ask the OIG for any additional investigative work and also afford the complainant and the contractor an opportunity to submit a written response to the OIG report. Any person adversely affected or aggrieved by the administrator's order may, within 60 days of issuance, obtain a limited review by the U.S. circuit court of appeals.

Agency Procurement Official Role: Under the NFS regulations, NASA contracting officers are also responsible for inserting an NFS whistleblower clause into applicable contracts that requires contractors communicate to their employees their rights under the statute.⁶ The NFS whistleblower clause lays out the responsibility of contractors to communicate to their employees their rights under the statute, in writing and in their predominant native language. All contracts over the simplified acquisition threshold awarded on or after July 29, 2014, require a whistleblower clause. The statute also requires NASA to make best efforts to include a clause providing for the applicability of the 2013 amendments in contracts awarded before July 1, 2013—the effective date of the 2013 amendments—that have undergone major contract modifications. The terms “best efforts” and “major modifications” are not

⁶NFS 1852.203-71.

defined in the statute.⁷ Unlike provisions affecting contractors, the statute does not require NASA to ensure that grantees or subgrantees notify employees in writing of their rights under the statute.

NASA OIG Investigated Reprisal Complaints within Required Time Frames and Recently Updated Incomplete Guidance

From 2008 to June 2017, NASA OIG addressed whistleblower reprisal complaints within required time frames, according to OIG officials. At the time we initiated this review, the OIG's guidance for handling reprisal complaints had been updated to reflect most statutory changes; however, it did not include guidance regarding subgrantees. During the course of our review, the OIG updated the investigation guidance in October 2017 to include subgrantee employees.

NASA OIG Handled Reprisal Complaint Investigations within Required Time Frames

NASA OIG completed 6 reprisal investigations within required time frames.⁸ The OIG received 277 whistleblower disclosures leading to 48 reprisal complaints from 2008 through June 2017, and handled those complaints within required time frames, according OIG officials.⁹ For the 6 of those reprisal complaints that were investigated, the OIG used extensions. OIG officials said that extensions may be necessary for a number of reasons, including that the complaint may be highly technical in nature, requiring the OIG to find subject matter expertise to better understand the nature of the whistleblower complaint and whether it constitutes gross fraud, waste, abuse, or mismanagement.

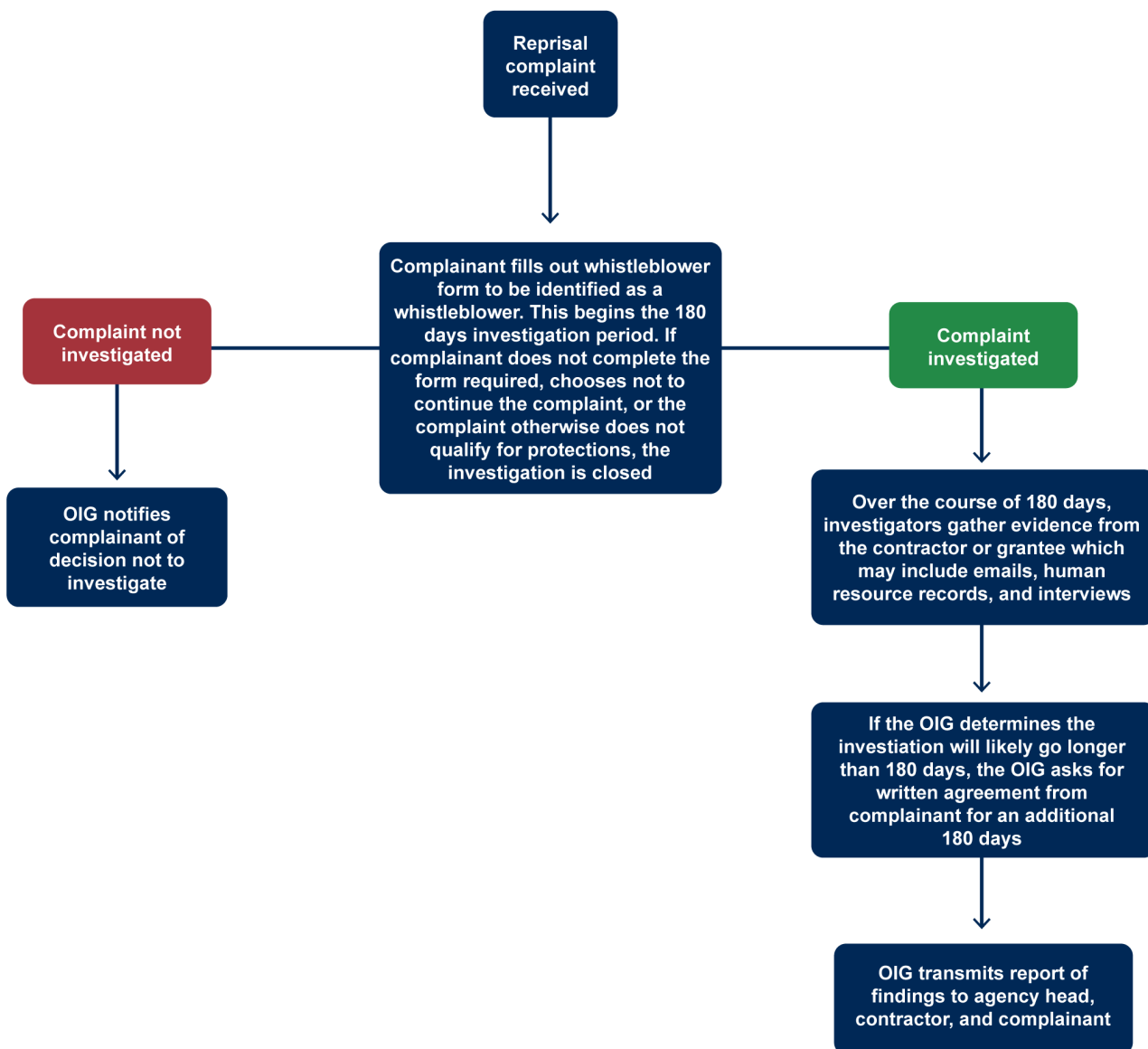
⁷Several different whistleblower protections exist in the FAR and agency supplements, with each applicable depending on considerations such as the agency in question, acquisition procedures, and source of funding. For some contracts, the FAR clause 52.203-17 is applicable. For all commercial item acquisitions, contracting officers must insert the FAR clause 52.212-4 that requires the contractor to comply with 10 U.S.C. § 2409. Contracts that obligate American Recovery and Reinvestment Act of 2009 funds require whistleblower protections unique to the Act found in FAR clause 52.203-15.

⁸For those reprisal complaints covered under the 2013 amendments, the investigations must be completed within the time frame of 180 days, and an allowable, mutually agreed upon, one-time extension of 180 days for a total of up to 360 days.

⁹Reprisal complaints included instances of firing and demotion for reporting fraud, waste, or abuse.

When the OIG receives a reprisal complaint, complainants are asked to fill out a whistleblower complaint form and an investigation is initiated. See figure 2 below for the process by which the OIG conducts its investigations.

Figure 2: NASA Office of Inspector General (OIG) Process for Investigating Reprisal Complaints

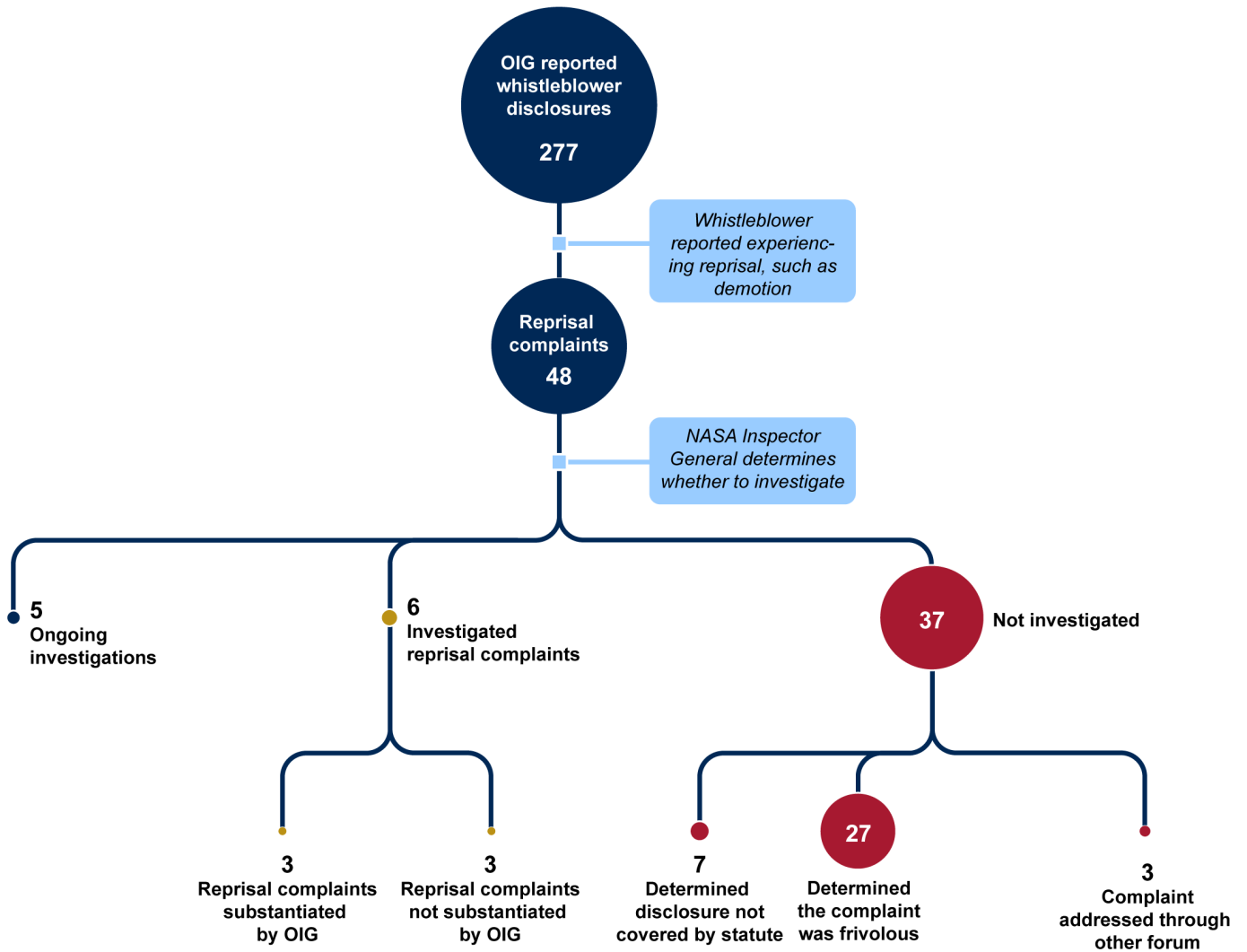


Source: GAO analysis of information and documentation received from National Aeronautics and Space Administration Office of Inspector General (OIG). | GAO-18-262

In addition, there were 5 complaints currently under investigation and 37 complaints during this time frame that the NASA OIG did not investigate because the OIG deemed them to be frivolous, determined they were not covered under the statute, or the complaint was handled in another forum, such as the court system or by another OIG.¹⁰ Complaints were deemed frivolous for several reasons, including if the complainant did not want to disclose his or her identity and proceed with the claim, or the whistleblower disclosure happened after the reprisal. OIG officials told us that when cases are disposed of without an investigation, the OIG notifies the complainant of the decision in writing. Figure 3 shows the disposition of the 48 reprisal complaints received from 2008 through June 2017.

¹⁰OIG officials said that all 37 complaints not investigated were closed before the 180 day time frame requirement for investigations.

Figure 3: Disposition of Reprisal Complaints Received by NASA’s Office of Inspector General (OIG) from 2008 through June 2017



Source: GAO analysis of National Aeronautics and Space Administration’s (NASA) Office of Inspector General (OIG) data. | GAO-18-262

Note: Of the 48 reprisal complaints received by the OIG, one was made by the employee of a grantee; the rest were made by employees of contractors.

The OIG Updated Investigation Guidance

The OIG has developed guidance for conducting investigations, which includes a chapter on contractor and grantee whistleblower reprisal complaints. Although most changes to the statute (such as to whom reprisal may be reported) had been incorporated into the investigation

guidance, the initial guidance provided to us by the OIG did not include a 2014 statutory requirement to extend protections to subgrantees. During the course of our review, in October 2017, the OIG updated its guidance for investigating reprisal complaints to include subgrantee employees. Because subgrantees are now protected by statute, including them in the investigation policy will help ensure they are consistently extended protections through OIG investigations.

In addition to its guidance, OIG officials said they have developed training specific to whistleblower investigations for new investigators, conducted internal training for investigators, and external training for contractor employees. Additionally, the OIG Investigators' Central Field Office conducts periodic training for investigators that includes any updates to whistleblower protections.¹¹ With regard to external training, the OIG officials said that investigators at some of the NASA centers—with the largest contract activity—have conducted on-site training for some contractors. This training is conducted as part of general fraud awareness training.

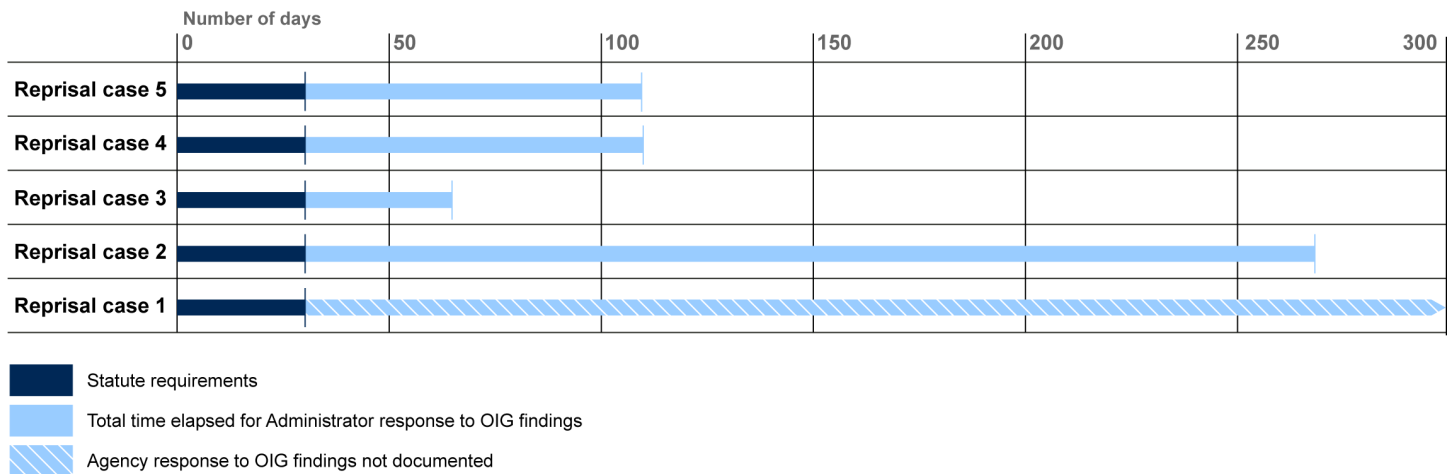
NASA Administrator Did Not Meet the Required Time Frames for Reprisal Complaint Review

The Administrator failed to meet the required review time frame and issue an order of final determination of reprisal for 5 completed investigations received from the OIG from 2008 through June 2017.¹² In all 5 cases, the Administrator took longer than the 30 days to issue an order. In one of those 5 complaints, an official from the Office of General Counsel was unable to provide us with the issued order and said he did not believe one was completed, and could not provide an explanation as to why an order was not completed. For the 5 reprisal complaints, figure 4 shows the number of days from when the Administrator received an OIG report of findings to the time when an order of final determination was documented.

¹¹The OIG Investigators' Central Field Office includes JSC, Marshall Space Flight Center, Kennedy Space Center, and Stennis Space Center.

¹²During this time period, the Administrator received 6 reports; however, only 5 were subject to the requirement that the Administrator make final determination of reprisal within 30 days. The sixth report of findings was based on a complaint made before the 2008 amendment to the statute was in effect; therefore, the 30-day requirement was not applicable.

Figure 4: Timeline for NASA Administrator’s Response for 5 Investigated Reprisal Cases Subject to Statutory 30-Day Final Determination from 2008 through June 2017



Source: GAO analysis of documents provided by National Aeronautics and Space Administration Office of Inspector General (OIG) and Administrator. | GAO-18-262

In addition to the 5 complaints mentioned above, there was another OIG investigation of a reprisal complaint that did not require response from the administrator within 30 days, but was finalized within our review time frame, for a total of 6 completed OIG investigations of reprisal complaints. For 3 of the 6 complaints, the OIG found that reprisal had occurred and reported those findings to the administrator for final determination of reprisal. The Administrator determined that none of these 3 complaints qualified for protection under the law. For 2 of these complaints, the Administrator found that they did not qualify for protections because they fell under the 2008 version of the statute and failed to allege a violation specific to public health and safety.¹³ In 2017, a court affirmed the Administrator’s position.¹⁴ For the third complaint, the Administrator

¹³After the 2008 amendments, 10 U.S.C. § 2409 provided protections to those contractor employees at NASA who disclosed “a substantial and specific danger to public health or safety.” Whistleblower complaints made about general fraud, waste, abuse, and mismanagement alone, but not related to a substantial and specific danger to public health or safety, were not protected disclosures under the statute at that time.

¹⁴*Javery v. Bolden*, No. 16-60221, 2017 WL 2703790 (5th Cir. June 21, 2017).

determined reprisal could not be substantiated due to the complainant not meeting the standards of evidence under the statute.¹⁵

Further, we found that NASA does not have a standard process in place for the Administrator to review cases that qualify for protections under the statute and issue an order of final determination. According to an official from the Office of General Counsel, the agency has no standard process to ensure the contractors are afforded due process, among other things. The official from Office of General Counsel said the Administrator may need to conduct an additional investigation in some cases.¹⁶ He said that each case is different and would have to be handled on a case by case basis. In addition, the official said the Administrator may need to conduct hearings, independent of the OIG. Moreover, the official from Office of General Counsel highlighted concern that the Administrator's office does not have the resources to conduct additional investigative work, which he said is a key contributor for the office's inability to meet the 30-day timeline to issue an order of final determination. Despite acknowledging these challenges, the Administrator does not have a formal process or criteria to monitor and evaluate the way the office handles issuing an order of final determination of reprisal to ensure that it meets the statutory time requirements.

Because the Administrator took longer than 30 days to respond to all reprisal complaints, including one where the Office of General Counsel failed to provide evidence that the Administrator responded at all, there may be the unintended consequence of disincentivizing future whistleblowers from making disclosures who fear their complaint will not be handled timely. Internal controls require that management should establish and operate monitoring activities to monitor the internal control

¹⁵The Administrator determined the OIG report of findings and subsequent responses did not contain sufficient grounds to clearly support a finding that the complainant had been reprimed against.

¹⁶NASA General Counsel explained that in its view there is not a one-size-fits-all answer to what process is due, because it is necessarily a fact-driven question. NASA General Counsel said its concerns stem from the Eighth Circuit's decision in *Business Communications, Inc. v. U.S. Dept. of Ed.*, 739 F.3d 374 (8th Cir. 2013). In that case, the Department of Education determined that a contractor had retaliated against a whistleblower in violation of section 1553 of the American Recovery and Reinvestment Act of 2009, which provides substantively similar whistleblower protections to the NASA Whistleblower statute. The contractor appealed. The court held that before the department could order relief for the whistleblower, it had to provide the contractor due process, including a hearing and the opportunity for the contractor organization to confront and cross examine adverse witnesses.

system, evaluate the results, and take appropriate action to address issues on a timely basis.¹⁷ Without monitoring, evaluating, and taking appropriate corrective action based on the way the Administrator or his or her designee makes a final determination of reprisal, there is no assurance that whistleblower reprisal complaints will be handled within required time frames in the future.

NASA Almost Always Communicates Whistleblower Protections to Contractors, but Internal Guidance Is Unclear

In almost all of the contracts we reviewed, NASA had met its obligation to ensure its contractors are communicating whistleblower protections to their employees through a whistleblower contract clause. We also found that NASA has put in place guidance to its contracting workforce on the protections, and guidance on when to include the whistleblower clause in contracts. However, we found that some NASA officials have interpreted this guidance differently. Further, NASA's guidance does not reflect an agency-wide policy on when to include the whistleblower clause when modifying a contract.

Whistleblower Clause Included in Almost All Contracts, but a Few Were Missing the Required Clause

In most cases, NASA included a clause regarding whistleblower reprisal protections in applicable contracts to ensure contractors communicate rights to its employees. But we found that the clause was not included in all relevant contracts in our review. Based on our review of a generalizable sample of contracts, we estimate that 98 percent of contracts would be expected to include a whistleblower clause at the time new contracts were awarded in applicable contracts in 2016, and 2 percent would not.¹⁸ Within our sample, 4 contracts did not have a

¹⁷GAO, *Standards for Internal Control in the Federal Government*, GAO 14 704G (Washington, D.C.: September 2014).

¹⁸To assess legal compliance we would have to make a determination on case by case basis, which we did not do.

whistleblower reprisal clause.¹⁹ After we shared our contract file review findings with NASA officials, they modified 3 of the 4 contracts to include the missing required whistleblower clause. For the remaining contract, the contractor performance was complete, the contract had been closed, and no further action will be taken.

According to NASA procurement officials, human error, combined with its former contract writing system, could explain why the contracts in our sample did not have the required clause. They explained that the former contracting writing system relied on templates and did not automatically include the NFS clause into all contracts. Under this system, contracting officers used templates that included a list of all potential or applicable NFS and FAR clauses, which are incorporated through a manual process. Officials said that if a clause were included in the templates, it is unlikely that it would be removed because doing so would require supervisory approval.

NASA procurement officials told us that the agency launched a new contract writing system in June 2017. They said that under the new contract writing system, contracting officers use a logic system that prepopulates each contract with required clauses. They said that the new automated system will likely lead to fewer human errors because inserting the clause will not be a manual process. Because the new system is still being implemented, we were unable to evaluate whether the risk of human error has been reduced or eliminated to ensure applicable contract awards have the clause.

Under the previous and current systems, NASA contracts are to undergo various levels of review prior to award—including attorney review—at the centers or headquarters based on risk level and dollar thresholds. For example, contracts awarded by JSC valued at over \$50 million are to be reviewed by headquarters. NASA procurement officials stated that they conduct procurement management reviews, and centers conduct annual

¹⁹Our review of a generalizable sample of 100 contracts found that 96 contracts in the sample included whistleblower language while 4 did not. The weighted estimate of the percentage of NASA contracts that would be expected to include whistleblower language is 97.7 percent, with a 95 percent confidence interval of 92.5 to 99.6 percent. The weighted estimate of the percentage of NASA contracts that would not be expected to include whistleblower language is 2.3 percent, with a 95 percent confidence interval of 0.4 to 7.5 percent. See Appendix I for more information on sampling error. Of the 96 contracts with a whistleblower clause, 84 had the NFS clause and 12 had an alternative whistleblower clause.

self-assessments; however, at one center, officials pointed out that these reviews have not previously included whether a whistleblower clause is included in new contracts or major modifications. They said this is because reviews typically focus on known issues or program risk, and inclusion of the whistleblower clause has not been previously identified as an issue or risk. Contractors we spoke with were generally aware of their responsibilities to communicate reprisal protections to their employees because their contracts with NASA included the required NFS whistleblower clause. In response to our review, NASA procurement officials said they plan to include a review of the inclusion of NFS whistleblower clause in future compliance reviews as an area of emphasis and will instruct centers to include whether the clause is included in applicable contracts as part of the centers' self-assessment process.

NASA's Guidance Contributes to Different Understanding of Reprisal Protections

Three elements of NASA's whistleblower reprisal protection guidance—its procurement notice, NFS clause, and definition of major modification—contribute to potential confusion or inconsistent application of whistleblower reprisal protections.

First, in July 2014, NASA notified its contracting officials of the changes to the NFS required by the 2013 amendments to section 2409 Title 10 of the U.S. code through a procurement notice 04-80, but this notice has been interpreted differently by officials in NASA Headquarters, a NASA center, and the OIG. Procurement notices are drafted by NASA Headquarters, reviewed and approved by NASA general counsel and NASA's Office of Procurement. The NASA centers, acting through their procurement offices and, as needed their legal counsel, review and implement the notices.

After the procurement notice was issued, some NASA officials interpreted it differently. For example, in one instance, a NASA center Chief Counsel's office attorney advised a center procurement official that reprisal protections found in the 2013 amendments extend to contractors' employees working on contracts awarded before the effective date of the amendments. This is true, he said, regardless of whether the contract contains any clause explicitly making the 2013 amendments applicable. However, both the OIG and the Administrator's counsel have expressed a different understanding of the statute conveyed in the notice, stating that a clause making the 2013 amendments applicable must be in a contract in order for the complainant to be protected under the statute. Later, the attorney from the center Chief Counsel's office revised his understanding

of the statute and concluded the procurement notice was not accurate as written.

Second, NASA personnel have different understandings about whether the NFS clause is sufficient for contractor employees to be covered by the statute. The NFS clause instructs contractors to inform their employees in writing of contractor whistleblower employee rights; but, unlike the FAR clause that is used to implement similar legislation for other agencies, the NFS clause does not state that employees working on the contract are subject to the whistleblower rights and remedies. The attorney from a NASA center said that the NFS clause is enough to ensure contractor employees are given rights under the statute. However, OIG officials have said that without including that element of the clause, employees working under NASA contracts awarded prior to the effective date of the 2013 amendments may not be covered by those amendments. See table 2 for description of the clauses and their differences.

Table 2: Description of Two Whistleblower Reprisal Protection Clauses

Federal Acquisition Regulation (FAR) Clause 52.203-17	NASA FAR Supplement Clause 1852.203-71	Difference
<p>Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights (Apr. 2014)</p> <p>(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies in the pilot program on Contractor employee whistleblower protections established at 41 U.S.C. 4712 by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and FAR 3.908.</p> <p>(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712, as described in section 3.908 of the Federal Acquisition Regulation.</p> <p>(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts over the simplified acquisition threshold.</p>	<p>Requirement To Inform Employees Of Whistleblower Rights (Aug. 2014)</p> <p>(a) The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of contractor employee whistleblower rights and protections under 10 U.S.C. 2409, as described in subpart 1803.9 of the NASA FAR Supplement.</p> <p>(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.</p>	<p>The NASA clause does not explicitly state that contractor employees will be subject to whistleblower remedies.</p>

Source: GAO analysis of Federal Acquisition Regulation and National Aeronautics and Space Administration (NASA) FAR Supplement whistleblower protection clauses. | GAO-18-262

Third, the lack of agency-wide guidance for when to include the clause in major modifications leads to different implementation of the requirement. The 2013 amendments require that NASA makes best efforts to include a whistleblower clause in contracts undergoing a major modification. NASA's July 2014 procurement notice also encourages contracting officers to include the NFS whistleblower clause when issuing major modifications to contracts awarded before July 29, 2014. However, it does not specify what a major modification is under this statute, and the statute itself does not define "major." According to NASA procurement officials at headquarters and at two NASA centers, it is at the discretion of the NASA Centers' offices of procurement and contracting officers to decide if a clause is inserted into modifications, and whether they are considered major. Procurement officials and the contracting officers we spoke with told us that there is no definition of major modifications in the law, regulation, or NASA Headquarters or Center policies or guidance. NASA procurement officials said this is because it could be different for each contract and the contracting officer makes the determination based upon the facts related to the situation. Nevertheless, without communicating the factors to consider when determining whether a modification is major and whether that contract should or should not include the clause, NASA and the Centers' procurement officials are at risk of potential inconsistent incorporation of the clause among applicable contracts.

One attorney in NASA's General Counsel's Office said there may be costs associated with asking a contractor to insert new clauses—such as the whistleblower clause—into an existing contract during a major modification because it would require a bilateral negotiation between the contractor and the agency. However, one contractor we spoke with said that there would be no cost to adding the clause and that doing so would not be an issue because the whistleblower clause is consistent with the internal whistleblower policies and practices of the institution. Further, he said that the institution he represents would be hesitant to argue against inclusion of the NFS clause in its contracts with NASA.

Internal control standards require that an entity should internally communicate necessary quality information in order to meet requirements of the mission. These 3 areas of potential confusion related to NASA's current guidance could result in different application of the law, unless they are clarified.

NASA Has Not Established a Mechanism to Communicate Whistleblower Protections to Grantees

Although whistleblower protections are now extended to grantee employees by statute, NASA does not have a mechanism in place to communicate the protections to grantees or subgrantee employees. Unlike the requirement for NASA to ensure contractors communicate whistleblower reprisal rights to their employees in writing and in the employees' predominant language, the statute does not prescribe a similar requirement for NASA to ensure that grantees communicate whistleblower reprisal rights to their employees. During the grant application process, NASA requires grantees to attest that they will not require grantee employees to sign confidentiality agreements that would prohibit them from reporting fraud, waste, and abuse.

NASA officials said that grant awards do not include a mechanism, such as a term or condition, to encourage NASA grantees to notify their employees of their whistleblower reprisal protections. In the 10 NASA grants from fiscal year 2016 that we reviewed, there was no requirement included for grantees to communicate these protections to employees. However, we found that all 10 grants included a statement that each award was subject to all applicable laws and regulations of the United States in effect on the date of award, including the Uniform Guidance. For federal grants in general, the Uniform Guidance provides a government-wide framework for grants management.²⁰ Within this guidance, there is a reference to the whistleblower protections in the statute; however, it does not explicitly describe the statute's requirements.²¹

The grant advocacy group and representatives of three NASA grantees we spoke with were aware that some protections exist and noted that many grantees have their own whistleblower policies, but were not aware of the specific protections provided by the statute, which indicates that opportunities exist for improving communications between NASA and its grantees about these protections. Further, representatives of the grant advocacy group noted that the whistleblower protections for grantee employees were not specifically mentioned at recent annual meetings where grantees and federal officials discuss issues that affect grantees. Internal controls require that management externally communicate the

²⁰Office of Management and Budget produces the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* also referred to as "Uniform Guidance."

²¹2 CFR § 200.300(b).

necessary quality information to achieve the entity's objectives. Without additional communication about the protections provided by the statute, grantees may not fully understand or appreciate the significance of the rights afforded to their employees, and grantee employees may not be aware of their whistleblower reprisal protections, which could hinder their willingness to report instances of fraud, waste, and abuse.

Conclusions

Because contractor and grantee employee whistleblowers risk reprisal after disclosing potential fraud, waste, abuse and mismanagement, ensuring they are protected from retaliation or adverse consequences is critical. Without monitoring and evaluating the timeliness of reviewing and responding to reprisal complaints, the Administrator may not be prepared to determine reprisal on future cases within the statutorily required 30 days.

Additionally, although NASA has developed guidance related to contractor protections, this guidance has led to inconsistent interpretation of the law and could potentially lead to inconsistent application of how contractor protections for employees are conveyed. More clear guidance would help contracting officers determine when to incorporate the NFS clause into major modifications to ensure consistency throughout the agency.

Finally, because unlike contracts, there is no similar clause for grants, NASA is in the position to help ensure grantees know their employees' rights against reprisal if they observe and disclose fraud, waste, abuse or mismanagement. However, NASA has not effectively communicated to grantees information about these provisions and as a result grantees and their employees may not be fully aware of these protections. Consequently, if they witness fraud, waste, abuse or mismanagement, they may not be willing to disclose those for fear of reprisal.

Recommendations for Executive Action:

We are making three recommendations to NASA:

The Administrator should monitor, evaluate, and make appropriate corrective actions, such as a documented process, to ensure it reviews reprisal complaints in a timely manner. (Recommendation 1)

The Administrator should review NASA's guidance or develop other guidance, including defining major modification, to clarify when whistleblower protections are conveyed. (Recommendation 2)

The Administrator should communicate whistleblower protections to grantees and subgrantees and their employees. (Recommendation 3)

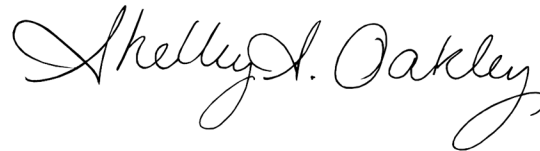
Agency Comments And Our Evaluation

We provided a draft of this product to NASA for review and comment. NASA provided written comments on a draft of this report. In its written comments, reprinted in appendix II, NASA concurred with all three recommendations. In its response to our recommendations NASA agreed to develop and document a process to ensure it reviews reprisal complaints in a timely manner to ensure all parties' due process rights are protected, review existing procurement policy and clarify guidance as appropriate, and update NASA grant guidance to communicate whistleblower protections to grantees, sub-grantees and their employees.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees and members. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-4841 or oakleys@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.

Sincerely yours,



Shelby S. Oakley
Director, Contracting and National Security Acquisitions

Appendix I: Objectives, Scope, and Methodology

To assess the extent to which National Aeronautics and Space Administration's (NASA) Office of Inspector General (OIG) has investigated contractor and grantee whistleblower reprisal complaints and developed guidance for the investigations, we reviewed data provided by the NASA OIG on the total number of whistleblower allegations of fraud, waste, abuse, misconduct, or mismanagement and reprisal claims. We also reviewed the number of contractor and grantee employee whistleblower allegations and reprisal complaints provided by the OIG and the outcomes or decisions reached by the OIG of a reprisal complaint from fiscal years 2008 through 2017.¹ We assessed the reliability of these data by asking the NASA OIG to describe the source(s) of information used and steps taken to identify the numbers provided, and limitations and caveats that would affect GAO's use of the data—such as the data being self-reported by the OIG and Office of General Counsel. Based on these steps, we determined the data to be sufficient for our purposes of determining how the complaints were addressed. Additionally, we reviewed relevant documentation to assess the extent to which the NASA OIG was conducting investigations and communicating findings to the NASA Administrator within required time frames. To determine the extent NASA OIG developed guidance, we interviewed or obtained written answers from OIG officials about their processes and practices for investigating whistleblower reprisal complaints. We reviewed the guidance and training and other materials that NASA OIG uses to implement whistleblower protection investigations. We also visited Johnson Space Center (JSC)—selected because it had the highest number of reprisal cases from 2008 through 2017—to discuss policies and procedures specific to that center with OIG investigators and the OIG program manager for whistleblower protections. Because they are also a part of the Investigators' Central Field Office, we also spoke with investigators at Marshall Space Flight Center and Kennedy Space Center.

To assess the extent to which NASA's Administrator meets the statutory timeliness requirements to review reprisal complaints, we reviewed the timeliness of the Administrator's final determination to ensure that NASA

¹ While OIG officials track whistleblower reprisal complaints, they do not specifically track disclosures as a separate category. The numbers are based on a search of their database using key terms such as "disclosure" or "contractor employee" in the complaint field. Officials pointed out that complaints made through the OIG's hotline may qualify for whistleblower protections, but the complainant may not identify him or herself as a whistleblower or even want to be considered a whistleblower.

was meeting statutory requirements. Specifically, we reviewed relevant documentation to assess the extent to which the Administrator was making final determination of reprisal in 30 days—the required review period specified by statute. We reviewed the Administrator’s documentation on the final disposition of reprisal investigations and compared the date of the Administrator’s final decision to the date of receipt of the reprisal investigations from the NASA OIG. We also conducted interviews with the Office of General Counsel, who spoke on behalf of the Administrator.

To assess the extent to which NASA communicated the applicable whistleblower reprisal protections externally with contractors, we reviewed a generalizable sample of NASA contracts to determine the extent a required whistleblower clause was included. We used the Federal Procurement Data System-Next Generation (FPDS-NG) to generate a sample of contract actions over \$300,000 that were awarded by NASA in fiscal year 2016. We selected contracts that were not only over the simplified acquisition threshold (generally \$150,000), but were over \$300,000 to account for possible exceptions and to ensure that we were sampling contracts that would be required to include a whistleblower reprisal clause. From the 270 contracts identified, for purposes of examining the inclusion of NASA Federal Acquisition Regulation Supplement (NFS) clause 1852.203-71 (or other potentially applicable clauses) in NASA contracts, a legal requirement, we selected a generalizable random sample of 100 contracts. The sample is projectable to NASA fiscal year 2016 contracts; however, we did not make a case by case legal determination for contracts not in our sample. We randomly selected 10 contracts from each center that awarded new contracts in 2016, and for those centers that did not have 10 contracts, we selected all contracts.² The remaining contracts were then pulled from the NASA Shared Services Center (NSSC) because that center does a majority of NASA’s contracting. We asked for contracts awarded in fiscal year 2016 to ensure we were sampling contracts that are required to have the clause and would be reasonably accessible by NASA. We excluded interagency contracts and task or delivery orders awarded using blanket purchase agreements to ensure we sampled base contracts awarded by NASA, not other agencies.

² NASA is comprised of 12 centers and 7 facilities located throughout the United States.

We estimated the percentage of NASA contracts expected to include whistleblower clause(s) as the weighted average of results from the 10 contracting centers. Because we followed a probability procedure based on random selections, our sample is only one of a large number of samples that could have been drawn. Because each sample could have provided different estimates, we express the uncertainty associated with any particular estimate as a 95 percent confidence interval. This is the interval that, with repeated sampling, would be expected to contain the actual population value for 95 percent of the samples we could have drawn. As a result, we are 95 percent confident that this confidence interval contains the true percentage of contracts expected to include whistleblower clause(s); however, to assess legal compliance we would have to make a case by case determination, which we did not do. We conducted data reliability checks on the FPDS-NG dataset by comparing it to contract documentation obtained from contract files and determined it was sufficiently reliable for our purposes. Additionally, we conducted interviews with NASA procurement officials and contracting officers at multiple locations including NASA Headquarters, NSSC and JSC to discuss any additional measures NASA takes to communicate whistleblower protections to its contractors and their contractor employees. To further assess internal communication, we reviewed relevant documentation, including guidance, and conducted interviews with procurement officials, NASA's Office of General Counsel, and Chief Counsels at JSC, NSSC, and Marshall Space Flight Center.

To assess the extent to which NASA communicated the applicable whistleblower reprisal protections with grantees, we reviewed a non-generalizable sample of grants awarded by NASA in fiscal year 2016 to determine whether NASA grants included a mechanism notifying grantees of their employees' whistleblower rights and reprisal protections. We used FPDS-NG to identify a non-generalizable random sample of 10 grants awarded by NASA in fiscal year 2016 for review to determine whether any of the selected grants included a mechanism to communicate whistleblower reprisal protections to grantee employees.³ We conducted data reliability checks on the FPDS-NG data by comparing it to grant documentation obtained from grant awards and determined it was sufficiently reliable for our purposes. Additionally, we conducted interviews with NASA grant making officials to discuss any additional

³ We selected 10 random grants from grants awarded in 2016, with positive dollar values to avoid grants captured in FPDS-NG as negative numbers due to deobligations.

measures NASA takes to communicate whistleblower reprisal protections to its grantees and their grantee employees.

Finally, in order to learn about contractor and grantee experiences during NASA's implementation of enhanced whistleblower protections, we conducted interviews with or received written answers to questions from a selected group of NASA contractors and grantees. Using FPDS-NG data, we selected institutions with the highest and lowest contracts (including small business contracts) and grants by obligations in 2016.⁴ Using these selection criteria, we selected three contractors and three grantees to meet with based on the amount of funds obligated in 2016. We ultimately interviewed or obtained written answers from all selected contractors and grantees. Additionally, we spoke with two advocacy groups, one about grants and one about contracts.

We conducted this performance audit from March 2017 to March 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁴ "Low" grant obligations starts at \$150,000. We selected a figure that is consistent with the simplified acquisition threshold. This number was also selected because it reflects an organization that still has some significant spending, and would therefore benefit more from being aware of these protections.

Appendix II: Comments from the National Aeronautics and Space Administration

National Aeronautics and Space Administration
Office of the Administrator
Washington, DC 20546-0001



February 13, 2018

Ms. Shelby S. Oakley
Director
Contracting and National Security Acquisitions
United States Government Accountability Office
Washington, DC 20548

Dear Ms. Oakley:

The National Aeronautics and Space Administration (NASA) appreciates the opportunity to review and comment on the Government Accountability Office (GAO) draft report entitled, "NASA Contractor Whistleblowers: Steps Taken to Implement Program but Improvements to Timeliness and Guidance Needed" (GAO-18-262), dated January 18, 2018.

In the draft report, GAO makes three recommendations to the NASA Administrator intended to improve NASA's implementation of its contractor and grantee employee whistleblower program. Specifically, GAO recommends the following:

Recommendation 1: The Administrator should monitor, evaluate, and make appropriate corrective actions, such as a documented process, to ensure it reviews reprisal complaints in a timely manner.

Management's Response: Concur. NASA will develop a documented process to ensure it reviews reprisal complaints in a timely manner that ensure all parties due process rights are protected.

Estimated Completion Date: March 31, 2019

Recommendation 2: The Administrator should review NASA's guidance or develop other guidance, including defining major modification, to clarify when whistleblower protections are conveyed.

Management's Response: Concur. NASA will review existing procurement policy relative to when whistleblower protections are conveyed and provide clarifying guidance as appropriate.

Estimated Completion Date: October 31, 2018

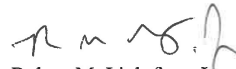
Recommendation 3: The Administrator should communicate whistleblower protections to grantees and sub-grantees and their employees.

Management's Response: Concur. NASA will update the NASA Grant and Cooperative Agreement Manual to communicate whistleblower protections to grantees and sub-grantees and their employees.

Estimated Completion Date: October 31, 2018

Once again, thank you for the opportunity to comment on the subject draft report. If you have any questions or require additional information, please contact Dave Barrett on (202) 358-2074.

Sincerely,



Robert M. Lightfoot, Jr.
Administrator (Acting)

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

Shelby S. Oakley, (202) 512-4841 or oakleys@gao.gov

Staff Acknowledgments

In addition to the contact named above, Penny Berrier (Assistant Director), Mary Diop, Lorraine Ettaro, Alexandra Gebhard, Kurt Gurka, Stephanie Gustafson, Julia Kennon, Jordan Kudrna, Kate Lenane, Roxanna Sun, and Khristi Wilkins made key contributions to this report.

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