



JUL 05 2017

CAAC LETTER 2017-02

MEMORANDUM FOR CIVILIAN AGENCIES

FROM: WILLIAM CLARK
CHAIR
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Class Deviation from the Federal Acquisition Regulation (FAR) to Implement an Act to Enhance Whistleblower Protection for Contractor Employees.

This CAAC letter implements 41 U.S.C. 4712 (as amended by Public Law 114-261) to make permanent the 4-year pilot program and clarifies the use of certain Whistleblower Protection clauses. This CAAC letter constitutes consultation with the Chair of the CAAC allowing agencies to authorize a class deviation.

I. Background.

The current coverage in the FAR states that when the 4-year pilot (41 U.S.C. 4712) expires, the previous whistleblower coverage is back in effect. However, this CAAC letter is issued to direct agencies to continue to use the pilot program coverage until the FAR is revised under FAR case 2017-005, Whistleblower Protection for Contractor Employees. This case will revise the FAR to make the 4-year pilot program permanent. The FAR case is not final and this CAAC letter is being issued to provide guidance until that revision occurs.

The previous statute implementation in the FAR. The FAR states at 3.900(a):

"(a) 41 U.S.C. 4705 (in effect before July 1, 2013 and on or after January 2, 2017). Sections 3.901 through 3.906 of the subpart implement 41 U.S.C. 4705, applicable to civilian agencies other than NASA and the Coast Guard, except as provided in paragraph (c) of this section. These FAR sections are not in effect for the duration of the pilot program described in paragraph (b) of this section."

The pilot program implementation. The FAR states at 3.900(b):

"(b) 41 U.S.C. 4712 (in effect on July 1, 2013 through January 1, 2017). Section 3.908 of this subpart implements the pilot program, applicable to civilian agencies other than NASA and the Coast Guard, except as provided in paragraph (c) of this section." The FAR does not correctly reflect the ending date of the pilot program, which by statute was extended another six months. However, before either ending date, Public Law 114-261, an act to enhance whistleblower protection for contractor and grantee employees, made the pilot program permanent on December 14, 2016.

II. Description of deviation.

Agencies shall use the text (including the revised clauses and the solicitations provisions/contract clauses matrix) provided in the Attachment making permanent the use of the pilot program, and the handling of the acquisition of commercial items.

FAR 3.900 in the attached deviation has been changed to show that paragraph (a) is not in effect, and that paragraph (b) is in effect.

GAO Report 17-227, Contractor Whistleblower Protections Pilot Program-Improvements Needed to Ensure Effective Implementation, noted confusion in the use of FAR clauses 52.203-17 (inserted in solicitations and contracts for noncommercial items) and 52.212-4(r) (inserted in solicitations and contracts for commercial items). Until FAR case 2017-005 is finalized, this CAAC Letter is providing clarification on the use of FAR clauses 52.203-17 and 52.212-4(r).

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.

The changes are as follows:

1. Remove the whistleblower protections of 41 U.S.C. 4712 listed in paragraph (r) of FAR clause 52.212-4. List the 52.203-17 clause in 52.212-5; and

2. Revise the FAR clause matrix to show an "A" ("required when applicable") for FAR 52.203-17 for commercial items.

Note: Coverage of 10 U.S.C. 2409 will remain in FAR clause 52.212-4(r) to cover DoD. Only 41 U.S.C. 4712 is being moved to 52.212-5 because it is associated with 52.203-17.

Modification of existing contracts. Public Law 114-261 requires that "At the time of any major modification to a contract that was awarded before the date of the enactment of this Act [December 14, 2016], the head of the contracting agency shall make best efforts to include in the contract a contract clause providing for the applicability of the amendments made by this section ..." Since coverage lapsed for noncommercial item contracts, agencies should revise existing solicitations and contracts for noncommercial items awarded since January 2, 2017 to include 52.203-17, if the contract is above the simplified acquisition threshold and has a year or more of performance left.

III. Instructions to agencies.

Pending issuance of FAR case 2017-005, agencies may authorize a class deviation, using the Attachment. This CAAC Letter constitutes consultation with the Chair of the CAAC required by FAR 1.404(a)(1). Effective immediately, agencies may authorize a class deviation, in accordance with FAR 1.404. Agencies are reminded that FAR 1.404 requires agencies to furnish a copy of each approved class deviation to the FAR Secretariat, General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW, 2nd Floor, ATTN: Joanne Sosa, Washington, DC 20405. Agencies may also email the deviation to GSARegSec@gsa.gov.

If you have any questions or require additional information concerning this letter, please contact Cecelia L. Davis on (202) 219-0202 or at cecelia.davis@gsa.gov.

Attachment

CAAC Letter 2017-02 Deviation-Whistleblower Protection for Contractor Employees

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

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Subpart 3.9—Whistleblower Protections for Contractor Employees

3.900 Scope of subpart.

This subpart implements various statutory whistleblower programs. This subpart does not implement 10 U.S.C. 2409, which is applicable only to DoD, NASA, and the Coast Guard.

(a) 41 U.S.C. 4705 (in effect before July 1, 2013). Sections 3.901 through 3.906 of this subpart implemented 41 U.S.C. 4705, applicable to civilian agencies other than NASA and the Coast Guard.

(b) 41 U.S.C. 4712 (in effect on and after July 1, 2013). Section 3.908 of this subpart implements the pilot program, applicable to civilian agencies other than NASA and the Coast Guard, except as provided in paragraph (d) of this section.

(c) 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), implemented in 3.909, applicable to all agencies.

(d) Contracts funded by the American Recovery and Reinvestment Act. Section 3.907 of this subpart implements section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), and applies to all contracts funded in whole or in part by that Act.

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3.908-9 Contract clause.

The contracting officer shall insert the clause at 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts that exceed the simplified acquisition threshold, for both commercial items and for other than commercial items.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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**52.212-4 Contract Terms and Conditions—Commercial Items
(Deviation 2017-02).**

As prescribed in 12.301(b)(3), insert the following clause:

CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (DEVIATION 2017-XX) (JUNE
2017)

(a) * * *

* * * * *

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards; 41 U.S.C. chapter 87, Kickbacks; 10 U.S.C. 2409 relating to whistleblower protections; 49 U.S.C. 40118, Fly American; and 41 U.S.C. chapter 21 relating to procurement integrity.

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**52.212-5 Contract Terms and Conditions Required To
Implement Statutes or Executive Orders—Commercial Items
(Deviation 2017-02).**

As prescribed in 12.301(b)(4), insert the following clause:

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE
ORDERS—COMMERCIAL ITEMS (DEVIATION 2017-XX) (JUNE 2017)

* * * * *

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

[Contracting Officer check as appropriate.]

___ (1) 52.203-6, Restrictions on Subcontractor Sales to the Government (Sept 2006), with Alternate I (Oct 1995) (41 U.S.C. 4704 and 10 U.S.C. 2402).

___ (2) 52.203-13, Contractor Code of Business Ethics and Conduct (Oct 2015) (41 U.S.C. 3509)).

___ (3) [52.203-15](#), Whistleblower Protections under the American Recovery and Reinvestment Act of 2009 (June 2010) (Section 1553 of Pub. L. 111-5). (Applies to contracts funded by the American Recovery and Reinvestment Act of 2009.)

___ (4) 52.203-17, Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights (April 2014) (41 U.S.C. 4712) relating to whistleblower protections).

The paragraphs below are renumbered

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52.301 Solicitation provisions and contract clauses (Matrix) .

PROVISION OR CLAUSE	PRESCRIBED IN		CI

52.203-17 Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights.	3.908-9	(columns not shown) * * *	A
