

Date: July 26, 2017

From: Acting Deputy Senior Procurement Executive

Subj: Class Deviation from the Federal Acquisition Regulation (FAR) to Implement an Act to Enhance Whistleblower Protection for Contractor Employees; (VAIQ 7839263)

To: VA Heads of Contracting Activities

- 1. Purpose:** To issue a class deviation in accordance with FAR 1.404(a)(1) to implement 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.
- 2. FAR Sections Impacted:** This Class Deviation impacts FAR sections 3.9, 52.203-17, 52.212-4(r), and any associated provisions and clauses.
- 3. Effective Date/Expiration Date:** Effective immediately and expires when incorporated into the FAR or is otherwise rescinded.
- 4. Applicability:** This Class Deviation applies to all VA contracting activities.
- 5 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, the Civilian Agency Acquisition Council (CAAC) issued a letter 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.
- 6. Need for Deviation:** This deviation brings FAR into compliance with P.L. 114-261 and CAAC Letter 2017-02 by making the pilot program permanent.
- 7. Current and New Policy:** The following provides highlights of current and new policy for affected FAR subpart.

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a. Current Policy:

The previous statute implementation in the FAR states at 3.900(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's implementation is in FAR 3.900(b), which states; "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.

b. New Policy:

FAR 3.900 in the attached deviation has been changed to show that paragraph (a) is no 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.

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 U.S.C. 4712 listed in paragraph (r) of FAR clause 52.212-4. List the 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.

(See Attachment 2)

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8. Attachments: 1) Class Deviation Determination and Findings, and 2) New Policy.

9. Point of Contact: Please direct questions regarding this PPM to the Office of Acquisition and Logistics (003A), Procurement Policy and Warrant Management Service (003A2A), at (202) 632-5288, email: VA.Procurement.Policy@va.gov.

/s/

Thomas A. Burgess

Attachment 1

Determination and Findings

Class Deviation – Class Deviation from the Federal Acquisition regulation (FAR) to remove the Fair Pay and Safe Workplaces Final Rule (FAR Case 2014-025)

Findings

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, the Civilian Agency Acquisition Council (CAAC) issued a letter 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 CAAC guidance was issued to provide guidance until that revision occurs.

The FAR states at 3.900(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. The CAAC authorizes agencies to issue a class deviation to reflect this change.

Determination

In accordance with FAR 1.404 and CAAC Letter 2017-02, I hereby issue a class deviation to implement Pub. L. 114-261.

Attachment 2

New Policy: 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.

3.908-9 Contract Clauses.

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.

PART 52 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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.

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).