

## **Procurement Advisory No. 128**

### **FAR Class Deviation to Implement an Act to Enhance Whistleblower Protection for Contractor Employees**

#### **1. PURPOSE**

This Advisory is issued in accordance with Federal Acquisition Regulation (FAR) 1.404 to implement 41 U.S.C. 4712 (as amended by Public Law 114-261) to make permanent the 4-year pilot program and to clarify the use of certain Whistleblower Protection clauses under FAR 3.908.

#### **2. BACKGROUND**

The current coverage in the FAR states that when the 4-year pilot (41 U.S.C. 4712) expires (January 2, 2017), the previous whistleblower coverage is back in effect. However, 41 U.S.C. 4712 (as amended by Public Law 114-261 dated December 14, 2016) made the permanent the 4-year pilot program, prior to its expiration.

In addition, [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). FAR case 2017-005, which will amend the FAR to make the 4-year pilot program permanent, is currently being processed.

The Chair of the Civilian Agency Acquisition Council (CAAC) issued [CAAC Letter 2017-02](#) authorizing civilian agencies to issue a class deviation pending amendment of the FAR. Additionally, 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...” Therefore, it has been determined that the issuance of this class deviation is authorized and the actions required herein are necessary to implement 41 U.S.C. 4712 (as amended by Public Law 114-261) to make permanent the 4-year pilot programs and to clarify the use of certain Whistleblower Protection clauses (see aforementioned GAO report).

#### **3. REFERENCES**

Title 48 (CFR), Federal Acquisition Regulation System, Chapter 1, Subpart 3.908  
41 U.S.C. 4712 (as amended by Public Law 114-261)  
CAAC Letter 2017-02

#### **4. DESCRIPTION of the DEVIATION**

The attached deviation amends the FAR as follows:

- a) Revises FAR 3.900 to show that paragraph (a) is not in effect, and that paragraph (b) is in effect.
- b) Revises FAR 3.908-9 to clarify that FAR clause 52.203-17 is to be included, as prescribed, in both noncommercial and commercial solicitations and resultant contracts.
- c) Removes the whistleblower protections of 41 U.S.C. 4712 listed in paragraph (r) of FAR clause 52.212-4.
- d) Lists the FAR clause 52.203-17 in FAR clause 52.212-5.
- e) Revises the FAR clause matrix to show an “A” (“required when applicable”) for FAR clause 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 FAR clause 52.212-5 because it is associated with FAR clause 52.203-17.

#### **5. REQUIRED ACTIONS**

Contracting officers **shall** take the following immediate steps:

- a) Use the text (including the revised FAR clauses and the FAR solicitations provisions/contract clauses matrix) provided in **Attachment A** of this advisory.
- b) Modify existing noncommercial contracts awarded since January 2, 2017, to include FAR clause 52.203-17, if the contract exceeds the simplified acquisition threshold and has a year or more of performance left.
- c) Amend solicitations for noncommercial items issued since January 2, 2017, for which an award has not yet been made to include FAR clause 52.203-17, if the resultant contract is anticipated to exceed the simplified acquisition threshold.

**6. EFFECTIVE DATE:** Upon issuance.

**7. EXPIRATION DATE:** Until superseded, incorporated in the FAR or otherwise rescinded.

**8. ADDITIONAL INFORMATION:** If you have any questions or comments regarding this advisory, please send an email to [procurement.policy@dm.usda.gov](mailto:procurement.policy@dm.usda.gov).

**Attachment A**  
**Procurement Advisory 128**  
**Class Deviation (Deviation No. 2017-1)**

**PART 3 - IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS  
OF INTEREST**

\* \* \* \* \*

**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 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**

\* \* \* \* \*

**52.212-4 Contract Terms and Conditions-Commercial Items (Deviation 2017-1).**

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

**CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS  
(DEVIATION 2017-1) (AUG 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 2017-1).**

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 2017-1)  
(AUG 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	<b>columns not shown</b>  * * * * *	A
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