

U.S. ENVIRONMENTAL PROTECTION AGENCY
FAR CLASS DEVIATION
WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR EMPLOYEES

FINDINGS

1. Federal Acquisition Regulation (FAR) Case 2013-015 amended FAR 3.908 to implement a four-year pilot program to enhance the existing whistleblower protections for contractor employees. The pilot program took effect on July 1, 2013 and was effective through January 1, 2017.

The four-year pilot program was made permanent under 41 U.S.C. 4712 (as amended by Public Law 114-261). The FAR councils are in the process of developing new FAR Case 2017-005 to implement this change in the FAR.

Since FAR Case 2017-005 is not final and amending the FAR is a lengthy process, the Chairman of the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2017-02, *Class Deviation from the FAR to implement an Act to Enhance Whistleblower Protection for Employees*, authorizing agencies to deviate from the FAR until the FAR has officially been amended to incorporate the pilot program as permanent.

2. Consequently, this Determination and Findings implements Public Law 114-261 by authorizing a deviation to FAR 3.900(a)&(b), 3.908-9, 52.212-4(r), 52.212-5(b), and 52.3.

3. Agencies were given the authorization to issue a class deviation, in accordance with FAR 1.404, under CAAC Letter 2017-02. The CAAC Letter also constitutes consultation with the Chair of the CAAC required by FAR 1.404(a)(1).

DETERMINATION

1. Under the authority of FAR 1.404 and based upon the above findings, I grant a class deviation to FAR 3.900(a)&(b), 3.908-9, 52.212-4(r), 52.212-5(b), and 52.3 as detailed in the attached FAR deviation text. The deviations to the FAR text, attached hereto, are taken directly from CAAC Letter 2017-02.

2. This deviation is effective at the date of signature below, and shall remain in effect until incorporated into the FAR, superseded, or is otherwise rescinded.

/S/

December 1, 2017

Kimberly Y. Patrick, Director
Office of Acquisition Management

Date

Attachment

FAR DEVIATION TEXT

1. FAR 3.900 is revised to show that paragraph (a) is not in effect, and that paragraph (b) is in effect as follows:

FAR Subpart 3.9—Whistleblower Protections for Contractor Employees

FAR 3.900 Scope of subpart. (DEVIATION 2017-02)

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 implement 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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2. FAR 3.908-9 is revised to clarify the use of clause 52.203-17 as follows:

FAR 3.908 Pilot program for enhancement of contractor employee whistleblower protections.

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FAR 3.908-9 Contract clause. (DEVIATION 2017-02)

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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3. FAR 52.212-4(r) is revised to remove the whistleblower protections at 41 USC 4712 as follows:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

FAR 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 2017-02) (JUNE 2017)

* * * * *

(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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4. FAR 52.212-5 is revised to add clause 52.203-17 to paragraph (b) as follows:

FAR 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 2017-02) (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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5. FAR 52.3, Provision and Clause Matrix, is revised to change the use of clause 52.203-17 to “A” (required when applicable) in the Commercial Items (CI) column as follows:

FAR Subpart 52.3—Provision and Clause Matrix (DEVIATION 2017-02).

PROVISION OR CLAUSE	PRESCRIBED IN	(columns not shown) * * *	CI
52.203-17 Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights.	3.908-9		A

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