

**U.S. DEPARTMENT OF COMMERCE
FAR CLASS DEVIATION
TO
IMPLEMENT AN ACT TO ENHANCE WHISTLEBLOWER
PROTECTION FOR CONTRACTOR EMPLOYEES (CAAC LETTER 2017-02)**

Reference FAR Part 3 and 52

Determination and Findings

The Department of Commerce (The Department or DOC) is authorizing a class deviation 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.

Findings

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 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*, <https://www.gao.gov/products/GAO-17-227>, 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, https://www.acquisition.gov/sites/default/files/page_file_uploads/CAAC%20Letter%202017-02.pdf, 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...”

In accordance with CAAC Letter 2017-02 and further described in Procurement Memorandum 2017-05, this deviation amends the FAR to: Revise FAR 3.900 to show that paragraph (a) is not in effect, and that paragraph (b) is in effect; revise 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; remove the whistleblower protections of 41 U.S.C. 4712 listed in

paragraph (r) of FAR clause 52.212-4; list the FAR clause 52.203-17 in FAR clause 52.212-5; and revise the FAR clause matrix to show an "A" ("required when applicable") for FAR clause 52.203-17 for commercial items. This deviation also directs Contracting officers to take immediate steps to: Use the text (including the revised FAR clauses and the FAR solicitations provisions/contract clauses matrix) provided as in Attachment A to Procurement Memorandum 2017-05; 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, and; as appropriate, 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.

Determination

In accordance with FAR 1.404 and CAAC Letter 2017-02, I hereby authorize this class deviation.

This deviation is effective immediately and in effect until superseded, incorporated in the FAR, or otherwise rescinded.

Signed

Barry E. Berkowitz *BE*
Senior Procurement Executive and
Director for Acquisition Management

9-12-17

Date