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
Senior Procurement Executive and
Director for Acquisition Management

Date

9-12-17