



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Washington, D.C. 20201

February 8, 2018

MEMORANDUM FOR: Heads of Contracting Activity

FROM: Andrea Brandon, Deputy Assistant Secretary for Office of Grants and Acquisition Policy and Accountability and Senior Procurement Executive

A handwritten signature in blue ink, appearing to read "Andrea Brandon", is written over the "FROM:" line.

SUBJECT: Federal Acquisition Regulation Class Deviation Number 18-01, to implement an Act to Enhance Whistleblower Protection for Contractor Employees

PURPOSE: This class deviation is issued to require HHS contracting activities to continue using a whistleblower protection pilot program that was made permanent by 41 USC 4712, as amended by Public Law 114-261.

Effective Date: Immediately.

Background: The Civilian Agency Acquisition Council (CAAC) has issued a memorandum 17-02 allowing agencies to authorize a class deviation from the Federal Acquisition Regulation (FAR) to enable them to continue using a whistleblower protection pilot program that was made permanent by 41 USC 4712, as amended by Public Law 114-261. The law, signed December 14, 2016, expands whistleblower protections to federal grantees, subgrantees, contractors, subcontractors, and personal services contractors who report waste, fraud, or abuse involving federal funds. Agencies should continue to use pilot program coverage pending a revision to the FAR under case 2017-005.

Deviation: This class deviation requires contracting officers to continue the whistleblower protection pilot program in all solicitations and contracts. Please use the deviated clauses and provisions as stated in HHS' FAR Class Deviation 18-01 (attachment 01)

Applicability: This class deviation applies to all solicitations and contracts.

Expiration Date: This FAR class deviation is effective upon signature and remains in effect until it is incorporated in the FAR or is otherwise rescinded.

CAAC Consultation: The attached memorandum from the Chairman of the Civilian Agency Acquisition Council constitutes the consultation required by FAR 1.404 for class deviations.

Questions or comments about this class deviation may be directed to Lori Sakalos, Office of Acquisition Policy at (202) 751-5294 or Lori.Sakalos@hhs.gov

Attachment 01: HHS FAR Deviation 18-01

Attachment 02: CAAC Letter 17-02

Attachment-01

FAR Class Deviation 18-01 -Whistleblower Protection for Contractor Employees

PART 3-IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

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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.

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.

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.

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.

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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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

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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) * * *

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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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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)

* * * * *

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.]

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)).

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.)

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).

(Please see the attached CAAC Letter 17-02)