




September 12, 2017

TO: Heads of Contracting Activity

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

SUBJECT: The Department of Health and Human Services is taking the necessary steps which comply with Public Law Pub. L. 115-11 by issuing this Class Deviation from the Federal Acquisition Regulation (FAR) removing the Fair Pay and Safe Workplaces final rule (FAR Case 2014-025) in its entirety.

PURPOSE: The purpose of this FAR Class Deviation (2017-01) is to provide guidance on actions Contracting Officers shall take regarding the nullification of the Fair Pay and Safe Workplaces, Final Rule implemented through FAR Case 2014-025 (81 FR 58562).

BACKGROUND: Under the Congressional Review Act (5 U.S.C. Chapter 8); House Joint Resolution 37 (H.J. 37) was signed into law, Pub. L. 115-11, on March 27, 2017 to disapprove the FAR rule which implements Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces. This law states that the rule shall have no force or effect. On the same date, the President signed E.O. 13782, which revoked the E.O. underlying this rule.

The FAR Council opened a new FAR Case 2017-015, to formally remove the Fair Pay and Safe Workplace Rule from the FAR. In addition, the Office of Federal Procurement Policy (OFPP) has provided guidance that states agencies should not wait for formal rescission of the FAR rule and should take action to comply with Pub. L. 115-11.

Many sections of this rule were already enjoined by the United States District Court for the Eastern District of Texas through a Court Order issued October 24, 2016 (e.g. FAR 52.222-57, 52.222-58, 52.222-59, 52.222-61 and paragraphs of 52.222-61, and paragraph (s) of the provision at 52.212-3, that are already removed from HHS' Contract Writing Systems) In compliance with the Court Order, GSA' Integrated Acquisition Environment (IAE) halted actions to change the System for Award Management (SAM) and the Federal Awardee Performance and Integrity Information System (FAPIS) that would support these sections of this rule. However, the Court Order did not enjoin implementation of the paycheck transparency requirements in the FAR rule (e.g. FAR 52.222-60). The paycheck transparency coverage, which became effective for new solicitations issued on or after January 1, 2017, is now null and void. Therefore the clause, FAR 52.222-60, must be removed from all contracts and new solicitations issued after that date.

EFFECTIVE DATES: This 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.

REQUIREMENTS: Contracting officers who are working with applicable solicitations or contracts must ensure the below steps are followed.

- (a) Include the attached provision 52.212-3 Offeror Representations and Certifications-Commercial Items (JAN 2017) (DEVIATION 20 17-01) in all solicitations issued on or after the effective date of this FAR Deviation. (See Attachment 1)

If a solicitation has been issued with the provision at FAR 52.212-3 Offeror Representations and Certifications-Commercial Items (JAN 2017), amend those solicitations immediately to remove that provision and incorporate the attached provision 52.212-3 Offeror Representations and Certifications---Commercial Items (JAN 2017) (DEVIATION 2017-01). (See Attachment 1)

- (b) Ensure new solicitations and contracts do not include the clauses or provisions at FAR 52.222-57, 52.222-58, 52.222-59, 52.222-60 and 52.222-61. If solicitations have been issued amend those solicitations immediately to remove the clauses and provisions.

- (c) Existing contracts shall be modified immediately to remove any clauses incorporated as a result of FAR Case 2014-025, including FAR 52.222-59, 52.222-60, and 52.222-61. By statute, the FAR rule must be treated as if it had never taken effect.

Removal of existing Clauses from existing contracts must executed by a bilateral agreement between the Government and the Contractor.

The Contracting Officer must request consideration in writing from the Contractor and document the file with the outcome of that request. If consideration is not received that correspondence must also be documented in the contract file.

Point of Contact: Any questions regarding the content of this letter may be directed to Lori Sakalos, Senior Procurement Analyst, Office of Acquisition Policy, by phone at 202-751-5294 or by email at lori.sakalos@hhs.gov.

Attachments:

1. Provision - 52.212-3 Offeror Representations and Certifications-Commercial Items. (JAN 20 17) (DEVIATION 2017-0 1).
2. Provision/Clause - 52.2007 RESERVED (DEVIATION 2017-01), 52.222-60 RESERVED (DEVIATION 2017-01)