

**CLASS DEVIATION  
FINDINGS AND DETERMINATION  
TO IMPLEMENT AN ACT TO ENHANCE WHISTLEBLOWER PROTECTIONS FOR  
CONTRACTOR EMPLOYEES**

1. FAR 3.900(b) and 3.908 implemented a 4-year pilot program for the enhancement of whistleblower protections for contractor employees authorized by 41 U.S.C § 4712 from July 1, 2013 to January 2, 2017. Public Law 113-66 subsequently extended the pilot program end date by six months. Prior to expiring, the pilot program at 41 U.S.C. § 4712 was made permanent by Public Law 114-261 on December 14, 2016.
2. The Civilian Agency Acquisition Council (CAAC) is processing FAR Case 2017-005, Whistleblower Protection for Contractor Employees, to revise the FAR to make the pilot program permanent. The case will be finalized at some undetermined point in the future. In the interim, CAAC Letter 2017-02 authorizes agencies to issue deviations to continue the pilot program coverage and address potential confusion in the use of clauses in commercial contracts implementing the program as identified in GAO report 17-277.
3. FAR 3.900(a) reverted to previous whistleblower coverage upon expiration of the 4-year pilot and requires updating to bring it into compliance with current statute.
4. FAR clause 52.212-4<sup>1</sup> paragraph (r) contains the general requirement for contractors to comply with the whistleblower protections of 41 U.S.C. § 4712. This may have caused confusion among contracting officers on whether to include FAR clause 52.203-17<sup>2</sup> which implements the contractor requirements of 41 U.S.C. § 4712, in all contracts above the Simplified Acquisition Threshold in accordance with its prescription. Additional confusion may have resulted from the prescription not specifying whether the clause was to be included in commercial contracts. Finally, the FAR clause matrix does not indicate in the Commercial Item column that 52.203-17 should be included in commercial contracts as applicable.
5. FAR clause 52.212-5<sup>3</sup> paragraph (b) would be the appropriate place to include 52.203-17 as the paragraph lists similar clauses implementing statutes in commercial contracts.
- 6.. CAAC Letter 2017-02 serves as the CAAC Chair consult required of the agency official approving the class deviation in accordance with FAR 1.404(a)(1).

**Determination**

It is hereby determined that a class deviation is appropriate to implement the whistleblower protections at 41 U.S.C. § 4712. Accordingly, the attached deviation:

- (a) Revises FAR 3.900 to show that paragraph (a) is not in effect, and that paragraph (b) is in effect;
- (b) Revises the prescription for 52.203-17 to include commercial items;

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<sup>1</sup> 52.212-4, Contract Terms and Conditions -- Commercial Items

<sup>2</sup> 52.203-17 Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights

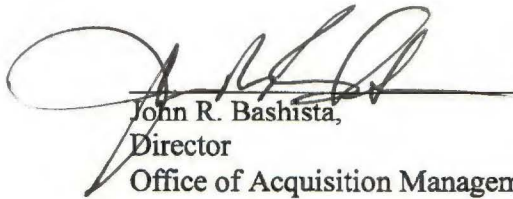
<sup>3</sup> 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders -- Commercial Items

(c) Revises the FAR clause matrix to show an "A" ("required when applicable") for 52.203-17 for commercial items;

(d) Removes the whistleblower protections of 41 U.S.C. § 4712 listed in paragraph (r) of 52.212-4; and

(e) Adds 52.203-17 to the list of clauses in paragraph (b) of 52.212-5 that a contracting officer indicates are incorporated by reference into a contract.

Contracting officers shall use the attached deviated provision and clauses in contracts for commercial items as applicable. This class deviation is effective upon the date of signature and will remain in effect until cancelled or its subject matter is incorporated into the FAR.



John R. Bashista,  
Director  
Office of Acquisition Management,  
Department of Energy



Joseph Waddell,  
Deputy Associate Administrator,  
Acquisition and Project Management,  
National Nuclear Security Administration

10/5/2017  
Effective Date

Attachment:  
Deviated FAR text, provisions and clauses

## **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.

(a) 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.

(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.

\* \* \* \* \*

#### **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) (OCT 2017)**

As prescribed in 12.301 (b)(3), insert the following clause:

#### **CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (DEVIATION 2017-02) (OCT 2017)**

(a) \* \* \*

\* \* \* \* \*

(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.

\* \* \* \* \*

### **52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items (Deviation 2017-02) (OCT 2017)**

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) (OCT 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.**

\* \* \* \* \*

**52.301 Solicitation provisions and contract clauses (Matrix).**

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