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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 3 and 52**

**[FAC 2005-85; FAR Case 2013-015; Item IV; Docket 2013-0015, Sequence 1]**

**RIN 9000-AM56**

**Federal Acquisition Regulation; Pilot Program for Enhancement of Contractor Employee Whistleblower Protections**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a statutory pilot program enhancing whistleblower protections for contractor employees.

**DATES:** Effective: [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER.**]

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-85, FAR Case 2013-015.

**SUPPLEMENTARY INFORMATION:**

## **I. Background**

DoD, GSA, and NASA published an interim rule in the Federal Register at 78 FR 60169 on September 30, 2013, to implement a four-year pilot program to enhance the existing whistleblower protections for contractor employees at FAR subpart 3.9. The pilot program is mandated by section 828, entitled "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections," of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013).

Paragraph (a) of section 828 adds to title 41 a new section 4712 that contains the elements of the pilot program, which took effect by operation of law on July 1, 2013, and is effective through January 1, 2017. Paragraph (c) of section 828 suspends the pre-existing whistleblower protections in 41 U.S.C. 4705 "(w)hile section 4712 of this title is in effect..." (i.e., from July 1, 2013 through January 1, 2017). Accordingly, the interim rule created a new FAR section 3.908 to implement section 4712. The rule leaves intact FAR sections 3.901 through 3.906, which implement the pre-existing whistleblower protections in 41 U.S.C. 4705, but suspends their applicability during the period when the pilot is in effect. Absent Congressional action, these authorities will automatically be reinstated when the pilot authority sunsets.

The interim rule also clarified that the pilot authority applies to title 41 agencies and is inapplicable to DoD, NASA, and the Coast Guard. The latter three agencies are covered by 10 U.S.C. 2409, which was amended by section 827 of the NDAA to impose permanent requirements very similar to the temporary requirements of the pilot program established in title 41.

Section 4712 and its implementing regulations (1) protect contractor or subcontractor employees against reprisal for activities protected by FAR 3.908-3(a) and (2) do not change any right or remedy otherwise available to the employee.

FAR 3.907, which addresses whistleblower protections under the American Recovery and Reinvestment Act of 2009, was unaffected by this rule.

One respondent submitted comments on the interim rule.

## **II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) reviewed the response received in development of the final rule.

Only one response was received. A discussion of the response is provided as follows:

Comment: The respondent stated that FAR 3.908 “violates a core tenet of any legitimate law by failing to include any due process rights for the accused,” but notes

also that the statute contains no due process rights for the accused. The respondent urges revision of the interim rule to reactivate current FAR 3.905 during the pilot program.

Response: The interim rule provides at FAR 3.908-5 that investigation of complaints by the Inspector General will be in accordance with 41 U.S.C. 4712(b).

In general, FAR 3.905 is based on 41 U.S.C. 4705. Paragraph (c) of section 828 of the National Defense Authorization Act for Fiscal Year 2013, upon which this rule is based, suspends the pre-existing whistleblower protections in 41 U.S.C. 4705 "(w)hile section 4712 of this title is in effect ..." However, the additional due process rights in current FAR 3.905 (c), (d) and (e) were not based on 41 U.S.C. 4705, and have been incorporated in the final rule at 3.908-5(b), (c), and (d).

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory

action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **IV. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

The interim rule, upon which the final rule is issued with change, was initiated to amend the FAR to implement a four-year pilot program to enhance the existing whistleblower protections for contractor employees at FAR subpart 3.9. The pilot program is mandated by section 828, entitled "Pilot Program for Enhancement of Contractor Employee Whistleblower Protections," of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013). The law establishes a pilot program for the period ending on January 1, 2017. Based on a reading of 41 U.S.C. 3101(c) and sections 827 and 828 of the NDAA for FY 2013, the pilot program will apply to all Federal agencies except DoD, NASA, and the Coast Guard. Except for contracts funded under the American Recovery and Reinvestment Act of 2009 (see 3.907), the current protections for contractor whistleblowers are established in law at 41 U.S.C. 4705; paragraph (c) of section 828 suspends 41 U.S.C. 4705 "(w)hile section 4712 of this title is in effect..." Paragraph (a) of section 828 adds the new section 4712 to title 41 that contains the elements of the pilot program and is effective until January 1, 2017.

With the exception of DoD, NASA, and the Coast Guard, as well as any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401(a)(4)), the pilot program applies to the employees of Government contractors and their subcontractors. DoD, GSA, and NASA do not expect the pilot program, which applies to the majority of entities doing business with the Government regardless of business size, to have a significant economic impact specific to small entities. The following information is provided as a means of estimating the overall numbers of entities to which the rule will apply. Based on Federal Procurement Data System reporting data, in Fiscal Year 2012, a Government-wide total of 273,970 new awards that

exceeded the simplified acquisition threshold were made to small businesses and other than small businesses by agencies other than DoD, NASA, and the Coast Guard. Of that total, 95,436 new award actions were made to small business entities. The remaining 178,534 award actions were made to other than small businesses.

A new contract clause is provided for the pilot program, in accordance with paragraph (d) of section 4712. The clause informs offerors that employees working on any contract awarded are subject to the whistleblower rights and remedies of the pilot program and requires the contractor (and its subcontractors), regardless of business size, to inform their employees in writing of employee whistleblower rights and protections under 41 U.S.C. 4712.

There is no requirement for small entities to submit any information under this clause. The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

#### **V. Paperwork Reduction Act**

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**List of Subject in 48 CFR Parts 3 and 52**

Government procurement.

Dated: November 20, 2015.

William Clark,  
Director,  
Office of Government-wide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Government-wide Policy.

**INTERIM RULE ADOPTED AS FINAL WITH CHANGES**

Accordingly, the interim rule amending 48 CFR parts 3 and 52, which was published in the Federal Register at 78 FR 60169 on September 30, 2013, is adopted as final with the following changes:

**PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST**

1. The authority citation for 48 CFR part 3 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Revise section 3.908-5 to read as follows.

**3.908-5 Procedures for investigating complaints.**

(a) Investigation of complaints will be in accordance with 41 U.S.C. 4712(b).

(b) Upon completion of the investigation, the head of the agency or designee shall ensure that the Inspector General provides the report of findings to—

(1) The complainant and any person acting on the complainant's behalf;

(2) The contractor alleged to have committed the violation; and

(3) The head of the contracting activity.

(c) The complainant and contractor shall be afforded the opportunity to submit a written response to the report of findings within 30 days to the head of the agency or designee. Extensions of time to file a written response may be granted by the head of the agency or designee.

(d) At any time, the head of the agency or designee may request additional investigative work be done on the complaint.

3. Revise the section heading for section to read as follows:

**3.908-6 Remedies.**

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[BILLING CODE 6820-EP]

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