



Homeland
Security

July 13, 2016

MEMORANDUM FOR: Heads of the Contracting Activities

FROM: Soraya Correa
Chief Procurement Officer 

SUBJECT: Federal Acquisition Regulation Class Deviation
(Number 16-02) - Implementation of an Appropriations
Provision Related to Internal Confidentiality Agreements and
the Reporting of Fraud, Waste, or Abuse

Purpose: This class deviation requires Department of Homeland Security (DHS) contracting officers and the DHS Office of the Chief Procurement Officer (OCPO) to take the actions identified below to ensure compliance with 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 fiscal year (FY) appropriations acts (and as extended in continuing resolutions) that prohibit the use of funds appropriated or otherwise made available by Division E or any other Act for a contract, grant, or cooperative agreement with an entity that requires employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

Effective Date: Immediately.

Background: Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 and Section 743 of Division E, Title VII, of the Consolidated Appropriations Act, 2016 prohibit the use of funds appropriated or otherwise made available by Division E or any other Act for a contract, grant, or cooperative agreement with an entity that requires employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

For FY 2015, the Chair of the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2015-02 (available at: https://www.acquisition.gov/?q=CAAC_Letters) encouraging agencies affected by this prohibition to issue a class deviation pending changes to the FAR (reference FAR Case 2015-012). The FAR has not yet been revised and the FY 2016 Appropriations Act contains the same prohibition. As a result, this deviation will apply to

FY 2015 and subsequent FY funds that are subject to the same prohibition on internal confidentiality agreements.

Deviation:

For Existing or New Solicitations:

- Include the attached provision and clause in all existing and planned solicitations, including solicitations for the acquisition of commercial items under FAR part 12.
- Include the attached clause in all resultant contracts.

For Existing Contract Actions:

- Include the attached clause in all existing contracts and orders when modifying the contract or order to obligate FY 2015 or subsequent FY funds that are subject to the same prohibition concerning the use of internal confidentiality agreements.

Applicability: This class deviation applies to all solicitations and contracts using FY 2015 or subsequent fiscal year funds for a contract with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

Expiration Date: This class deviation will remain in effect until incorporated into the FAR or is otherwise rescinded.

Attachments:

Attachment 1: Solicitation provision 52.203-98, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements-Representation (DEVIATION)

Attachment 2: Clause 52.203-99, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements (DEVIATION)

Additional Information: The enterprise-wide Purchase Request Information System (PRISM) instance will be updated by the Office of the Chief Procurement Officer-Acquisition Systems Branch to include the provision (Attachment 1) and clause (Attachment 2). DHS Component contracting activities not using the enterprise-wide PRISM instance should coordinate with appropriate personnel to update their contract writing systems with the Attachment 1 provision and Attachment 2 clause.

Questions or comments about this class deviation may be directed to Linda Stivaletti-Petty at (202) 447-5639 or email at Linda.Stivaletti@hq.dhs.gov.

52.203-98, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements—Representation (DEVIATION)

Insert the following provision in all solicitations (including solicitations for the acquisition of commercial items under FAR part 12) that will use Federal funds made available by Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), or subsequent FY funds that are subject to the same prohibition on internal confidentiality agreements.

PROHIBITION ON CONTRACTING WITH ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS— REPRESENTATION (JULY 2016)

(a) In accordance with 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), Government agencies are not permitted to use funds appropriated (or otherwise made available) for contracts with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The prohibition in paragraph (a) of this provision does not contravene requirements applicable to Standard Form 312, (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(c) *Representation.* By submission of its offer, the Offeror represents that it will not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the execution of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

(End of provision)

52.203-99, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements (DEVIATION)

Insert the following clause in all solicitations, contracts, and orders (including solicitations, contracts, and orders for the acquisition of commercial items under FAR part 12) that will use Federal funds made available by Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), or subsequent FY funds that are subject to the same prohibition on internal confidentiality agreements.

PROHIBITION ON CONTRACTING WITH ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS (JULY 2016)

- (a) The Contractor shall not require its employees or subcontractors seeking to report fraud, waste, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the execution of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).
- (b) The Contractor shall notify current employees and subcontractors that prohibitions and restrictions of any internal confidentiality agreements covered by this clause, to the extent that such prohibitions and restrictions are inconsistent with the prohibitions of this clause, are no longer in effect.
- (c) The prohibition in paragraph (a) of this clause does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.
- (d) In accordance with Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015, (Pub. L. 113-235) use of funds appropriated (or otherwise made available) under that or any other Act may be prohibited, if the Government determines that the Contractor is not in compliance with the provisions of this clause.
- (e) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts under such contracts.
- (f) The Government may seek any available remedies in the event the contractor fails to comply with the provisions of this clause.

(End of clause)

Federal Acquisition Regulation Class Deviation (Number 16-02) – Implementation of an Appropriations Provision Related to Internal Confidentiality Agreements and the Reporting of Fraud, Waste, or Abuse

Findings

On December 16, 2014, the President signed into law the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235). Section 743 of Division E, Title VII, of the Act prohibits the use of funds appropriated or otherwise made available by Division E or any other Act for a contract, grant, or cooperative agreement with any entity that requires employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting employees or contractors from lawfully reporting waste, fraud, or abuse to a designated investigative or law enforcement representatives of a Federal department or agency authorized to receive such information.

On February 27, 2015, the Civilian Agency Acquisition Council (CAAC) issued CAAC Letter 2015-02 (dated February 27, 2015) that states pending issuance of a rule, agencies may authorize a class deviation. FAR Case 2015-012, “Contractor Employee Internal Confidentiality Agreements,” was published as a proposed rule on January 22, 2016. The Federal Acquisition Regulation (FAR) has not yet been revised and Section 743 of the Consolidated Appropriations Act of 2016 includes the same prohibition on internal confidentiality agreements.

Determination

In accordance with FAR Part 1.404, I hereby issue a class deviation to implement procedures of the interim rule that address the prohibitions stipulated in Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015, and Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2016 (and to implement similar provisions in subsequent appropriations acts and as extended in continuing resolutions). This deviation applies to the following:

For Existing or New Solicitations:

- Include the attached provision and clause in all existing and planned solicitations, including solicitations for the acquisition of commercial items under FAR part 12.
- Include the attached clause in all resultant contracts.

For Existing Contract Actions:

- Include the attached clause in all existing contracts and orders when modifying the contract or order to obligate FY 2015 or subsequent FY funds that are subject to the same prohibition concerning the use of internal confidentiality agreements.

A proposed rule was published in the Federal Register on January 22, 2016, to implement 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)(i.e., Section 743 of Division E of Pub. L. 114-113).

A respondent from the public commented on the proposed rule and recommended that the representation be revised to provide for prospective applicability. The CAAC responded that retrospective representation would require offerors to locate and review all of its employee and subcontract agreements, which would be impracticable. The CAAC also stated that rule does not require retrospective representation. The CAAC revised the language in the draft final rule to read that the offeror “will not require its employees or subcontractors” to sign such internal confidentiality agreements or statements. For these same reasons, DHS is not requiring retrospective representation due to impracticability of this effort.

The Chair of the CAAC issued a memorandum dated February 27, 2015 that satisfies the consultation requirements of FAR Part 1.404. This deviation is in effect until rescinded or incorporated in the FAR.



Soraya Correa
Chief Procurement Officer
Department of Homeland Security

July 13, 2016

Date