



Homeland  
Security

DEC 31 2013

MEMORANDUM FOR: Ashley J. Lewis  
Head of the Contracting Activity  
United States Coast Guard

FROM: Daniel L. Clever   
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SUBJECT: Department of Homeland Security-United States Coast Guard  
Class Deviation Number 14-01 Deviation from Federal  
Acquisition Regulation 3.908, Pilot program for enhancement of  
contractor employee whistleblower protections

**Purpose:** This class deviation is issued in accordance with Federal Acquisition Regulation (FAR) 1.404 to cover the United States Coast Guard's (USCG) full implementation of the enhanced contractor employee whistleblower protections for contractor employees under FAR 3.908 while the Homeland Security Acquisition Regulation (HSAR) rule to implement section 827 of the Fiscal Year (FY) 2013 National Defense Authorization Act (NDAA) for the USCG is processed.

**Effective Date:** Immediately.

**Background:**

Section 828 of the NDAA for FY 2013, Pub. L. 112-239, dated January 2, 2013, enacted 41 U.S.C. § 4712. This statute resulted in the interim final rule at FAR 3.908, Pilot program for enhancement of contractor employee whistleblower protections. The interim rule creates a four-year pilot program to enhance the existing whistleblower protections for contractor employees.

However, Section 827 of the NDAA for FY 2013 enacted as 10 U.S.C. § 2409 excluded the Department of Defense (DoD), National Air and Space Administration (NASA), and the USCG, or any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. § 3003(4)). These agencies are covered by a different contractor whistleblower protection program under 10 U.S.C. § 2409, Contractor employees: protection from reprisal for disclosure of certain information. Under 10 U.S.C. § 2409, the USCG must provide a permanent contractor whistleblower protection program rather than a pilot whistleblower protection program. There are no other differences between the two whistleblower protection programs (It should be noted that 10 U.S.C. § 2409 does not specifically discuss the USCG).

However, the USCG falls within this Title 10 provision because Section 2409(c)(2) requires action on the part of the “head of an executive agency.” Section(g)(1) refers to agencies as defined in 10 U.S.C. § 2303 and Section 2303(a)(5) specifically names the USCG as one of those agencies. In addition, under 10 U.S.C. § 2302(1), the Secretary of Homeland Security is specifically named as an agency head.

On September 30, 2013, an interim final rule was published in the Federal Register implementing 41 U.S.C. § 4712 at FAR 3.908 for civilian agencies, except for NASA and the USCG. In order to comply with Section 827 of the NDAA for FY 2013, the USCG must institute a permanent whistleblower protection program in accordance with Title 10. DHS is processing a deviation from FAR 3.908 on USCG’s behalf to implement USCG’s permanent program. The actual change for the USCG will be minimal. The USCG will follow FAR 3.908 *in toto* except that all language referring to a *pilot program* will be deleted and all Title 41 references will be changed to cite the applicable Title 10 references.

Concurrent with the deviation, DHS is developing an HSAR rule that will add the USCG’s permanent whistleblower protection program to the HSAR. The deviation to the FAR clarifies the USCG requirement and ensures compliance with the permanent whistleblower protection program during this process. Attached is the DHS-USCG FAR deviation including a deviation to FAR clause 52.203-17 for immediate inclusion in all USCG solicitations and contracts above the simplified acquisition threshold (SAT).

**Deviation:** This deviation will facilitate the USCG’s full implementation of the enhanced contractor employee whistleblower protections while the HSAR rule to implement 10 U.S.C. § 2409 for the USCG is being processed.

USCG shall incorporate the attached deviation to FAR clause 52.203-17 into its contract writing systems for inclusion in all USCG solicitations and contracts above the SAT. Contracting officers and contract specialists shall also include FAR 52.252-6, Authorized Deviations in Clauses in all contracts above the SAT.

**Expiration Date:** This DHS-USCG FAR class deviation will remain in effect until the final HSAR rule to implement 10 U.S.C. § 2409 for the USCG is effective.

**Attachments:**

- DHS-USCG class deviation from FAR 3.908, Pilot program for enhancement of contractor employee whistleblower protections.
- FAR clause 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights (Sept 2013) (DHS-USCG Deviation 14-01).

**Additional Information:** Questions or comments about this class deviation may be directed to Linda Stivaletti-Petty at (202) 447-5639, or by email at [Linda.Stivaletti-Petty@dhs.gov](mailto:Linda.Stivaletti-Petty@dhs.gov).

### **3.908 Enhancement of contractor employee whistleblower protections. (DHS-USCG DEVIATION 14-01)**

#### **3.908-1 Scope of section. (DEVIATION)**

(a) This section implements 10 U.S.C. 2409.

(b) This section does not apply to—

(1) DoD and NASA; or

(2) Any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)). This section does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure-

(i) Relates to an activity of an element of the intelligence community; or

(ii) Was discovered during contract or subcontract services provided to an element of the intelligence community.

#### **3.908-2 Definitions.**

As used in this section—

“Abuse of authority” means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency.

“Inspector General” means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for, or on behalf of, the executive agency concerned.

#### **3.908-3 Policy.**

(a) Contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this subsection, information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract, a gross waste of Federal funds, an abuse of authority relating to a Federal contract, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract). A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Entities to whom disclosure may be made.

(1) A Member of Congress or a representative of a committee of Congress.

(2) An Inspector General.

(3) The Government Accountability Office.

(4) A Federal employee responsible for contract oversight or management at the relevant agency.

(5) An authorized official of the Department of Justice or other law enforcement agency.

(6) A court or grand jury.

(7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(c) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract shall be deemed to have made a disclosure.

### **3.908-4 Filing complaints. (DEVIATION)**

A contractor or subcontractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.908-3 of this section may submit a complaint with the Inspector General of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of Inspector General Hotline or Whistleblower Internet sites. A complaint by the employee may not be brought under 10 U.S.C. 2409 more than three years after the date on which the alleged reprisal took place.

### **3.908-5 Procedures for investigating complaints. (DEVIATION)**

Investigation of complaints by the Inspector General will be in accordance with 10 U.S.C. 2409.

### **3.908-6 Statutory remedies. (DEVIATION)**

(a) *Agency response to Inspector General report.* Not later than 30 days after receiving an Inspector General report in accordance with 10 U.S.C. 2409, the head of the agency shall—

(1) Determine whether sufficient basis exists to conclude that the contractor or subcontractor has subjected the employee who submitted the complaint to a reprisal as prohibited by 3.908-3; and

(2) Issue an order denying relief or take one or more of the following actions:

(i) Order the contractor to take affirmative action to abate the reprisal.

(ii) Order the contractor or subcontractor to reinstate the complainant-employee to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor or subcontractor to pay the complainant-employee an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(b) *Complainant's right to go to court.* If the head of the agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 10 U.S.C. 2409 for the submission of the Inspector General's report on the investigative findings of the complaint to the head of the agency, the contractor or subcontractor, and the complainant, and there is no showing that such delay is due to the bad faith of the complainant—

(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(2) The complainant may bring a *de novo* action at law or equity against the contractor or subcontractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(c) *Admissibility in evidence.* An Inspector General determination and an agency head order denying relief under this section shall be admissible in evidence in any *de novo* action at law or equity brought pursuant to 10 U.S.C. 2409.

(d) *No waiver.* The rights and remedies provided for in 10 U.S.C. 2409 may not be waived by any agreement, policy, form, or condition of employment.

### **3.908-7 Enforcement of orders. (DEVIATION)**

(a) Whenever a contractor or subcontractor fails to comply with an order issued under 3.908-6(a)(2) of this section, the head of the agency concerned shall file an action for enforcement of the order in the U.S. district court for a district in which the reprisal was found to have occurred. In any action brought pursuant to this authority, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant-employee upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(b) Any person adversely affected or aggrieved by an order issued under 3.908-6(a)(2) may obtain review of the order's conformance with 10 U.S.C. 2409 and its implementing regulations, in the U.S. court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

### **3.908-8 Classified information. (DEVIATION)**

10 U.S.C. 2409 does not provide any right to disclose classified information not otherwise provided by law.

**3.908-9 Contract clause. (DEVIATION)**

The contracting officer shall insert the clause at 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights (DHS-USCG Class Deviation 14-01), in all solicitations and contracts that exceed the simplified acquisition threshold.

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**52.203-17 Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights (Sept 2013) (DHS-USCG DEVIATION 14-01)**

(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies in the enhancement of whistleblower protections for Contractor employees established at 10 U.S.C. 2409 by section 827 of the NDAA for FY 2013 (Pub. L. 112-239) and FAR 3.908.

(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 10 U.S.C. 2409, as described in section 3.908 of the FAR.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts over the simplified acquisition threshold.

(End of clause)