

Federal Housing Finance Agency
Office of Inspector General



**FHFA Did Not Follow its Interim
Directive on a Requirement to Use a
FAR Clause Intended to Protect
Whistleblower Rights of Contractor
Employees, But Has Since Taken
Corrective Action**

Audit Report • AUD-2021-015 • September 30, 2021



AUD-2021-015

September 30,
2021

Executive Summary

The Federal Housing Finance Agency (FHFA or Agency), an independent, non-appropriated federal agency, buys goods and services for its operations. Although not subject to the Federal Acquisition Regulation (FAR), FHFA maintains that it follows the FAR on a voluntary basis, except for flexibilities set forth in Agency policies and procedures.

Federal law provides whistleblower protections for contractor employees by prohibiting a federal contractor from discharging, demoting, or otherwise discriminating against a contract worker as a reprisal for disclosing information that the worker reasonably believes is evidence of gross waste, gross mismanagement, abuse of authority, or a violation of law, rule, or regulation related to a contract. The FAR prescribes mandatory clauses implementing the statute for commercial and noncommercial solicitations and awards that exceed the simplified acquisition threshold (SAT), with the clause for noncommercial items being more explicit in that it emphasizes certain provisions in the law. In July 2017, agencies were authorized to use the more explicit clause for solicitations and awards for commercial items as an interim measure until the FAR is updated to make the clause mandatory. In November 2017, FHFA's contracting officers were directed by the Agency's then-Senior Procurement Executive (SPE) to use the more explicit clause for all solicitations and awards exceeding the SAT.

On March 1, 2021, the Project On Government Oversight sent a letter to the Chair of the Council of the Inspectors General on Integrity and Efficiency encouraging all Inspectors General to conduct a review of contracts within their own agency to ensure that contractors were including mandatory whistleblower rights and protection clauses into employment agreements.

We performed this audit to determine whether FHFA included the internally directed FAR clause in its contracts related to whistleblower rights and protections for contractor employees. The scope of this audit was the universe of 26 contracts awarded by FHFA from October 1, 2018, to April 30, 2021 (review period), that exceeded the SAT. The total value of the 26 contracts was approximately \$780 million. Excluded from the scope of this audit were awards made by FHFA using governmentwide acquisition contracts (GWAC), which are administered by other agencies.

We found that FHFA did not include the (internally) required FAR clause for whistleblower rights and protections of contractor employees in most of the contracts awarded during the review period, but has since modified the contracts to include the clause and taken other corrective actions.



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We make one recommendation in this report. In a written management response, FHFA agreed with the recommendation.

This report was prepared by Heath Wolfe, Director of Audit Operations, with assistance from Abdil Salah, Assistant Inspector General for Audits; James Hodge, Deputy Assistant Inspector General for Audits; and Bob Taylor, Senior Advisor. We appreciate the cooperation of FHFA staff, as well as the assistance of those who contributed to the preparation of this report.

This report has been distributed to FHFA, Congress, the Office of Management and Budget, and others. It will be posted on our website, www.fhfaoig.gov and www.oversight.gov.

Marla A. Freedman, Senior Audit Executive /s/

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ABBREVIATIONS

APM	Acquisition Procedures Manual
CAAC	Civilian Agency Acquisition Council
CO	Contracting Officer
FAR	Federal Acquisition Regulation
FHFA or Agency	Federal Housing Finance Agency
FSS	General Services Administration's Federal Supply Schedule
GSA	General Services Administration
GWAC	Governmentwide Acquisition Contract
OBFM	Federal Housing Finance Agency Office of Budget and Financial Management
OIG	Federal Housing Finance Agency Office of Inspector General
SAT	Simplified Acquisition Threshold
SPE	Senior Procurement Executive

BACKGROUND

Federal Procurement Requirements for Contractor Employee Whistleblower Protection

The FAR¹ prescribes different contract clauses for commercial and noncommercial items:²

- For commercial items, FAR 12.301, Solicitation provisions and contract clauses for the acquisition of commercial items, requires COs to insert FAR clause 52.212-4, Contract Terms and Conditions-Commercial Items, with the specific subclause of the contract at 52-212.4(r) in all solicitations and contracts for commercial items.³ FAR subclause 52.212-4(r) requires contractors to comply with, among other things, the law related to whistleblower protections (41 U.S.C. § 4712).
- For noncommercial items, FAR 3.908, Pilot program for enhancement of contractor employee whistleblower protections, requires COs to insert FAR clause 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts that exceed the SAT of \$250,000.⁴ That FAR clause also requires compliance with 41 U.S.C. § 4712, but is more explicit in that it emphasizes the following provisions in the law: (1) the contractor is to inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections; and (2) the contractor is to insert the substance of the clause in all subcontracts over the SAT.

In July 2017, the Civilian Agency Acquisition Council (CAAC)⁵ authorized agencies to use FAR clause 52.203-17 for both commercial and noncommercial items until such time

¹ The FAR is the primary regulation used by all federal executive agencies in their acquisition of supplies and services with appropriated funds.

² The FAR does not define a noncommercial item, but instead operates on the premise that if the good or service does not fall under the definition of a commercial item then it is by default noncommercial.

³ The FAR defines a commercial item as an item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes. This includes items offered for or sold, leased, or licensed to the general public.

⁴ FHFA adopted the SAT of \$250,000 on August 31, 2020. Previously, the SAT in FHFA policy was \$150,000.

⁵ The CAAC is authorized under the FAR to, among other things, assist the Administrator of General Services in developing and maintaining the FAR by developing or reviewing all proposed changes to the FAR.

as the FAR is updated to make FAR clause 52.203-17 mandatory for both types of items.⁶

FHFA Procurement Governing Authorities and Process

FHFA, as an independent, non-appropriated agency, is not subject to the FAR. However, the Agency states in its Acquisition Policy (FHFA Policy No. 503) that it follows the FAR on a voluntary basis, except for flexibilities set forth in its *Acquisition Procedures Manual* (APM).⁷ The APM, along with other supplementary FHFA memoranda, implements the Agency's Acquisition Policy.

Designated by FHFA's Director, the Office of Budget and Financial Management's (OBFM) Manager of Contracting Operations serves as the Agency's SPE responsible for the management of the Agency's procurement system and all contracting activity.

On November 22, 2017, the Agency's then-SPE issued an electronic message to FHFA's COs directing them to include FAR clause 52.203-17 in all solicitations and awards that exceeded the SAT, as an interim measure until the FAR is updated.⁸

FHFA's Internal Procurement Peer Review Checklists Used for Providing Quality Assurance and Improving its Contracting Operations

On March 10, 2020, the Agency's then-SPE issued a memorandum to FHFA's COs regarding OBFM's peer review guidance for solicitations and awards executed by the Agency greater than \$500,000. The memorandum directs the COs to complete a checklist (one checklist is used for solicitations and another one is used for awards) as a way of providing quality assurance and as a way of improving the Agency's contracting operations. Among other things, the checklists include examples of potential required clauses that could be included in all solicitations and awards, if applicable, executed by the Agency greater than \$500,000.

⁶ General Services Administration (GSA), Memorandum for Civilian Agencies, *Class Deviation from the Federal Acquisition Regulation (FAR) to Implement an Act to Enhance Whistleblower Protection for Contractor Employees* (July 5, 2017) (CAAC Letter 2017-02).

⁷ Whistleblower protections for contractor employees are part of the FAR requirements that FHFA follows.

⁸ As of September 22, 2021, the FAR had not been updated to include FAR clause 52.203-17 as the required clause for commercial contracts.

FACTS AND ANALYSIS

Contrary to its Interim Directive, FHFA Did Not Include FAR Clause 52.203-17 in 24 of 26 Contracts (92%) Awarded during the Review Period, But Has Since Taken Corrective Actions to Address this Shortcoming

We found that all 26 contracts included FAR clause 52.212-4(r). However, we found that the Agency did not include FAR clause 52.203-17 in 24 of 26 contracts (92%), contrary to its then-SPE's November 2017 interim directive. According to the Agency's current SPE, this occurred because FHFA's COs did not follow the former SPE's November 2017 interim directive to include the FAR clause in the Agency's open market⁹ solicitations and awards above the SAT. The Agency's current SPE opined that the oversight occurred because OBFM's quality control checklists for the Agency's contracting operations did not include the clause as a required clause to be checked by the COs.¹⁰

After the audit was initiated, the SPE instructed the Agency's COs to modify the applicable contracts to include FAR clause 52.203-17. As of August 23, 2021, FHFA had modified 23 of the 24 contracts.¹¹

FHFA provided documentary evidence that the following actions were taken:

- All Agency COs were instructed in an email, dated August 9, 2021, to include FAR clause 52.203-17 in all open market solicitations and awards that exceed the SAT.
- The peer review checklists were updated to include a step to verify that FAR clause 52.203-17 is included in solicitations issued and contracts awarded by FHFA that exceed \$500,000, except for GWACs. The revised peer review checklists were issued to the COs on August 23, 2021.
- OBFM revised the APM to require COs to include FAR clause 52.203-17 in all open market solicitations and awards (both commercial and noncommercial) above the SAT. The revised APM was issued on August 23, 2021.

⁹ FAR 8.402(f) defines open market as items not in GSA's Federal Supply Schedule (FSS).

¹⁰ In a technical comment to this report, FHFA cited two additional reasons: (1) COs followed FAR 52.301-1 during clause selection for solicitations and awards, which did not require FAR clause 52.203-17 to be included in commercial contracts, and (2) COs were provided minimal direction to include the FAR clause 52.203-17 in commercial solicitations and awards above the SAT.

¹¹ In a technical comment to this report, FHFA stated that it had modified the remaining contract as of September 16, 2021.

FINDING

- Contrary to its interim directive, FHFA did not include FAR clause 52.203-17 in 24 of 26 contracts (92%) awarded during the review period, but has since taken corrective actions to address this shortcoming.

CONCLUSION

We found that contrary to its guidance, FHFA did not include FAR clause 52.203-17 in 92% of contracts awarded during the review period. Specifically, we found that 24 of the 26 contracts during the review period did not include FAR clause 52.203-17, but FHFA has since taken corrective actions to address this shortcoming.

RECOMMENDATION

We recommend that FHFA:

1. Reinforce to COs, through training and supervision, the requirement in the updated peer review checklists and in the revised APM to include FAR clause 52.203-17 in all open market solicitations and awards that exceed the SAT.

FHFA COMMENTS AND OIG RESPONSE

We provided FHFA an opportunity to respond to a draft of this audit report. The Agency provided technical comments on the draft report and those comments were considered in finalizing this report. FHFA also provided a management response, which is included as the Appendix to this report. In its response, the Agency agreed with our recommendation and stated that OBFM would discuss and review the established policy updates during its procurement staff meetings to reinforce the requirements to the COs by December 31, 2021. We consider FHFA's planned corrective action responsive to our recommendation.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of our audit was to determine whether FHFA included the mandatory FAR clause in its contracts related to whistleblower rights and protections for contractor employees. The scope of the audit was contracts awarded by FHFA from October 1, 2018, to April 30, 2021 (review period), that exceeded the SAT.¹²¹³ The total value of these 26 contracts was approximately \$780 million. Excluded from the scope of this audit were awards made by FHFA using GWACs, which are administered by other agencies.

To address our objective, we:

- Researched applicable laws, regulations, policies, and procedures applicable to FHFA’s contracting program.
- Reviewed the Government Accountability Office’s (GAO) *Standards for Internal Control in the Federal Government*, GAO-14-704G (September 2014), and determined that the control activities component of internal control was significant to this objective, along with the underlying principle, Principle 12, that management should implement control activities through policies. Additionally, we determined that the information and communication component of internal control was significant to the objective, along with the underlying Principle 15, that management communicates quality information externally through reporting lines so that external parties can help the entity achieve its objectives and address related risks.
- Determined the number of contracts awarded by FHFA that exceeded the SAT from October 1, 2018, to April 30, 2021, and excluded those contracts awarded by FHFA using GWACs.
- Interviewed staff from FHFA’s OBFM about (a) the nature and extent of monitoring they perform over the program and (b) whether and how management communicates to employees its views on the inclusion of FAR clause 52.203-17 in the Agency’s

¹² Contracts where OIG received goods and/or services were outside the scope of this audit.

¹³ During the review period, FHFA also awarded 36 task orders and delivery awards, and blanket purchase agreements using the GSA’s FSS contracts, and other federal government-managed GWACs. FSS contracts and GWACs are contracts in which multiple government agencies purchase products or services from centrally managed contracts with the goal of paying lower costs through economies of scale. The solicitations and awards for FSS contracts are managed by GSA, and GWACs are managed by GSA, the National Aeronautics and Space Administration, or the National Institutes of Health. FHFA is not involved in the issuance of solicitations and awards for FSS contracts and GWACs. Therefore, we did not include the Agency’s FSS contracts and GWACs in the scope of this audit.

contracts. We also interviewed staff from the Agency's Office of General Counsel about their advice and counsel on contract matters.

- Determined whether FHFA or a third-party service provider conducted any compliance testing of FHFA's contracting program regarding FAR clause 52.203-17.
- Reviewed GAO's reports on its audits of FHFA's financial statements for fiscal years 2020 and 2019, and inquired of its staff about the scope and results of any relevant testing it performed in support of those audits.
- For the contracts within scope, we tested for compliance with the Agency's Acquisition Policy and APMs as well as contracting staff guidance issued by FHFA's then-SPE regarding FAR clauses 52.212-4(r) and 52.203-17.
- Assessed the reliability of data received for this audit by (1) reviewing the data for obvious errors and incompleteness; (2) reviewing existing information about the data and the systems that produced them, and (3) interviewing Agency officials knowledgeable about the data. We determined that the data were sufficiently reliable for the purposes of this report.

We conducted this performance audit from April 2021 to September 2021 in accordance with generally accepted government auditing standards. Those standards require that audits be planned and performed to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions, based on our audit objective.

APPENDIX: FHFA MANAGEMENT RESPONSE.....



Federal Housing Finance Agency

MEMORANDUM

TO: Marla Freedman, Senior Audit Executive

FROM: Mark Kinsey, Chief Financial Officer **MARK KINSEY** Digitally signed by MARK KINSEY
Date: 2021.09.29
09:09:04 -04'00'

SUBJECT: Draft Audit Report: *FHFA Did Not Follow Its Interim Directive on a Requirement to Use a FAR Clause Intended to Protect Whistleblower Rights of Contractor Employees, But Has Since Taken Corrective Actions*

DATE: September 29, 2021

Thank you for the opportunity to respond to the Office of Inspector General's (OIG) draft audit report referenced above (Report). The Report presents the results of the OIG's audit to determine whether the Federal Housing Finance Agency (FHFA) contracting officers included Federal Acquisition Regulation (FAR) clauses related to whistleblower rights and protections for contractor employees in FHFA contracts as required by the FAR (i.e., FAR clause 52.212-4(r)) and as directed by the then-Senior Procurement Executive's (SPE) interim directive (i.e., FAR clause 52.203-17).

The audit found that all 26 open market, standalone contracts included FAR clause 52.212-4(r); however, 24 of the 26 contracts did not include FAR clause 52.203-17 contrary to FHFA's then-SPE's November 2017 interim directive. The 24 contracts that did not include FAR clause 52.203-17 have since been modified to include the clause. In addition, FHFA has taken other corrective actions to address the finding. The management response to the Report's one recommendation is below.

Recommendation: *Reinforce to COs, through training and supervision, the requirement in the updated peer review checklists and in the revised APM to include FAR clause 52.203-17 in all open market solicitations and awards that exceed the SAT.*

Management Response: FHFA agrees to the recommendation. The Office of Budget and Financial Management (OBFM) has taken proactive corrective actions prior to the completion of this audit and OBFM will continue to include FAR clause 52.203-17 in applicable contracts. By December 31, 2021, OBFM will discuss and review these established policy updates during the procurement staff meetings to reinforce the requirements to the COs.

I would like to acknowledge the dedicated OIG staff that worked with FHFA during this audit.

If you have any questions relating to our response, please do not hesitate to call me at (202) 649-3780.

ADDITIONAL INFORMATION AND COPIES.....

For additional copies of this report:

- Call: 202-730-0880
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- Write:

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Attn: Office of Investigations – Hotline
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Washington, DC 20219