

the Contractor shall make the following certification in each request for performance-based payment:

I certify to the best of my knowledge and belief that—

(1) This request for performance-based payment is true and correct; this request (and attachments) has been prepared from the books and records of the Contractor, in accordance with the contract and the instructions of the Contracting Officer;

(2) (Except as reported in writing on _____), all payments to subcontractors and suppliers under this contract have been paid, or will be paid, currently, when due in the ordinary course of business;

(3) There are no encumbrances (except as reported in writing on _____) against the property acquired or produced for, and allocated or properly chargeable to, the contract which would affect or impair the Government's title;

(4) There has been no materially adverse change in the financial condition of the Contractor since the submission by the Contractor to the Government of the most recent written information dated _____; and

(5) After the making of this requested performance-based payment, the amount of all payments for each deliverable item for which performance-based payments have been requested will not exceed any limitation in the contract, and the amount of all payments under the contract will not exceed any limitation in the contract.

(End of clause)

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48 CFR Parts 1, 7, 9, 17, 37, 49, and 52

[FAC 90-33; FAR Case 94-710; Item II]

RIN 9000-AG32

Federal Acquisition Regulation; Special Contracting Methods

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

ACTION: Final rule.

SUMMARY: This final rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council is amending the Federal Acquisition Regulation (FAR) to implement Section 1074 on the Economy Act; Sections 1503, 1504, 1552, and 1553 on the delegation of procurement functions and determinations and decisions; Section 2454 on advisory and assistance services; and Section 6002 on contracting functions performed by Federal personnel. This regulatory action was subject to Office of

Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Ed McAndrew, Special Contracting Team Leader, at (202) 501-1474 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GSA Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-33, FAR case 94-710.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements.

This final rule implements sections 1074, 1503, 1504, 1552, 1553, 2454 and 6002 of the Act. Section 1074 concerns the Economy Act. Sections 1503, 1504, 1552, and 1553 deal with the delegation of procurement functions and determinations and decisions. Section 2454 concerns advisory and assistance services. Section 6002 concerns contracting functions performed by Federal personnel.

While the proposed rule included coverage implementing sections 1022 and 1072 dealing with multiyear contracting, that coverage has been removed from this final rule and will be issued separately.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule and a Final Regulatory Flexibility Analysis (FRFA) has been performed. A copy of the FRFA may be obtained from the FAR Secretariat, Room 4037, GS Building, 18th & F Streets, N.W., Washington, DC, 20405 (202) 501-4755.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Public Comments

On March 16, 1995, a proposed rule implementing these sections of the Act was published in the Federal Register (60 FR 14340). In response to the notice of proposed rulemaking, 25 comments were received. The comments of all

respondents were considered in developing this final rule.

While the proposed rule included coverage implementing sections 1022 and 1072 dealing with multiyear contracting, that coverage has been removed from this final rule and will be issued separately.

Sections 1074, 1503, 1504, 1552, and 1553 dealt with Federal agencies' purchasing of goods and services under contracts entered into or administrated by other agencies. Several comments related to this section were adopted, such as clarification of the text, ensuring that FAR payment and cost principles clauses are included in contracts issued by servicing agencies, and clarifying that the agency head's approval of Economy Act Determination and Findings may be delegated.

Section 2454, Codification of Accounting Requirement for Contracting Advisory and Assistance Services, redefined "advisory and assistance services". This was the most controversial issue faced by the team. The redefinition was so broad that the team had little latitude in deciding how to implement it. The team attempted to clarify the definition as much as possible; however, the definition contained in this final rule does not revise the definition to the extent recommended by commentators. Nonetheless, the team feels that it can go no further in revising the definition without violating the intent of the statute. The team has decided to adopt the recommendation to add the definition of Contract for Advisory and Assistance Services (CAAS) contained in OMB Circular A-11 for consistency between the procurement and accounting systems.

Section 6002 concerns the actions Federal agencies are required to take to determine whether expertise is readily available within the Federal Government before contracting for advisory and technical services to conduct acquisitions and the manner in which personnel with expertise may be shared with agencies needing expertise.

List of Subjects in 48 CFR Parts 1, 7, 9, 17, 37, 49, and 52

Government procurement.

Dated: September 20, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, 48 CFR Parts 1, 7, 9, 17, 37, 49, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 7, 9, 17, 37, 49, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 1.601 is revised to read as follows:

1.601 General.

(a) Unless specifically prohibited by another provision of law, authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue of their positions. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under 1.603.

(b) Agency heads may mutually agree to—

(1) Assign contracting functions and responsibilities from one agency to another; and

(2) Create joint or combined offices to exercise acquisition functions and responsibilities.

PART 7—ACQUISITION PLANNING

3. Section 7.103 is amended by adding paragraph (o) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(o) Making a determination, prior to issuance of a solicitation for advisory and assistance services involving the analysis and evaluation of proposals submitted in response to a solicitation, that a sufficient number of covered personnel with the training and capability to perform an evaluation and analysis of proposals submitted in response to a solicitation are not readily available within the agency or from another Federal agency in accordance with the guidelines at 37.204.

PART 9—CONTRACTOR QUALIFICATIONS

4. Section 9.507-1 is amended by revising paragraph (d)(1) to read as follows:

9.507-1 Solicitation provisions.

* * * * *

(d) * * *

(1) Services excluded in subpart 37.2;

* * * * *

PART 17—SPECIAL CONTRACTING METHODS

5. Subpart 17.5 is revised to read as follows:

Subpart 17.5—Interagency Acquisitions Under the Economy Act

Sec.

17.500 Scope of subpart.

17.501 Definition.

17.502 General.

17.503 Determinations and findings requirements.

17.504 Ordering procedures.

17.505 Payment.

Subpart 17.5—Interagency Acquisitions Under the Economy Act

17.500 Scope of subpart.

(a) This subpart prescribes policies and procedures applicable to interagency acquisitions under the Economy Act (31 U.S.C. 1535). The Economy Act also provides authority for placement of orders between major organizational units within an agency; procedures for such intra-agency transactions are addressed in agency regulations.

(b) The Economy Act applies when more specific statutory authority does not exist. Examples of interagency acquisitions to which the Economy Act does not apply include acquisitions from required sources of supplies prescribed in part 8, which have separate statutory authority.

17.501 Definition.

Interagency acquisition means a procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency).

17.502 General.

(a) The Economy Act authorizes agencies to enter into mutual agreements to obtain supplies or services by interagency acquisition.

(b) The Economy Act may not be used by an agency to circumvent conditions and limitations imposed on the use of funds.

(c) Acquisitions under the Economy Act are not exempt from the requirements of subpart 7.3, Contractor Versus Government Performance.

(d) The Economy Act may not be used to make acquisitions conflicting with any other agency's authority or responsibility (for example, that of the Administrator of General Services under the Federal Property and Administrative Services Act).

17.503 Determinations and findings requirements.

(a) Each Economy Act order shall be supported by a Determination and

Finding (D&F). The D&F shall state that—

(1) Use of an interagency acquisition is in the best interest of the Government; and

(2) The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source.

(b) If the Economy Act order requires contracting action by the servicing agency, the D&F shall also include a statement that at least one of the following circumstances is applicable—

(1) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services;

(2) The servicing agency has capabilities or expertise to enter into a contract for such supplies or services which is not available within the requesting agency; or

(3) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies.

(c) The D&F shall be approved by a contracting officer of the requesting agency with authority to contract for the supplies or services to be ordered, or by another official designated by the agency head, except that, if the servicing agency is not covered by the Federal Acquisition Regulation, approval of the D&F may not be delegated below the senior procurement executive of the requesting agency.

17.504 Ordering procedures.

(a) Before placing an Economy Act order for supplies or services with another Government agency, the requesting agency shall make the D&F required in 17.503. The servicing agency may require a copy of the D&F to be furnished with the order.

(b) The order may be placed on any form or document that is acceptable to both agencies. The order should include—

(1) A description of the supplies or services required;

(2) Delivery requirements;

(3) A funds citation;

(4) A payment provision (see 17.505); and

(5) Acquisition authority as may be appropriate (see 17.504(d)).

(c) The requesting and servicing agencies should agree to procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use of a third-party forum. If a third party is proposed, consent of the third party should be obtained in writing.

(d) When an interagency acquisition requires the servicing agency to award a contract, the following procedures also apply:

(1) If a justification and approval or a D&F (other than the requesting agency's D&F required in 17.503) is required by law or regulation, the servicing agency shall execute and issue the justification and approval or D&F. The requesting agency shall furnish the servicing agency any information needed to make the justification and approval or D&F.

(2) The requesting agency shall also be responsible for furnishing other assistance that may be necessary, such as providing information or special contract terms needed to comply with any condition or limitation applicable to the funds of the requesting agency.

(3) The servicing agency is responsible for compliance with all other legal or regulatory requirements applicable to the contract, including

(i) Having adequate statutory authority for the contractual action, and

(ii) Complying fully with the competition requirements of part 6 (see 6.002). However, if the servicing agency is not subject to the Federal Acquisition Regulation, the requesting agency shall verify that contracts utilized to meet its requirements contain provisions protecting the Government from inappropriate charges (for example, provisions mandated for FAR agencies by part 31), and that adequate contract administration will be provided.

(e) Nonsponsoring Federal agencies may use a Federally Funded Research and Development Center (FFRDC) only if the terms of the FFRDC's sponsoring agreement permit work from other than a sponsoring agency. Work placed with the FFRDC is subject to the acceptance by the sponsor and must fall within the purpose, mission, general scope of effort, or special competency of the FFRDC. (See 35.017; see also 6.302 for procedures to follow where using other than full and open competition.) The nonsponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with domestic private industry.

17.505 Payment.

(a) The servicing agency may ask the requesting agency, in writing, for advance payment for all or part of the estimated cost of furnishing the supplies or services. Adjustment on the basis of actual costs shall be made as agreed to by the agencies.

(b) If approved by the servicing agency, payment for actual costs may be made by the requesting agency after the

supplies or services have been furnished.

(c) Bills rendered or requests for advance payment shall not be subject to audit or certification in advance of payment.

(d) If the Economy Act order requires use of a contract by the servicing agency, then in no event shall the servicing agency require, or the requiring agency pay, any fee or charge in excess of the actual cost (or estimated cost if the actual cost is not known) of entering into and administering the contract or other agreement under which the order is filled.

PART 37—SERVICE CONTRACTING

6. Subpart 37.2 is revised to read as follows:

Subpart 37.2—Advisory and Assistance Services

Sec.

- 37.200 Scope of subpart.
- 37.201 Definitions.
- 37.202 Exclusions.
- 37.203 Policy.
- 37.204 Guidelines for determining availability of personnel.
- 37.205 Contracting officer responsibilities.

37.200 Scope of subpart.

This subpart prescribes policies and procedures for acquiring advisory and assistance services by contract. The subpart applies to contracts, whether made with individuals or organizations, that involve either personal or nonpersonal services.

37.201 Definitions.

Advisory and assistance services means those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training and the day-to-day aid of support personnel needed for the successful performance of ongoing Federal operations. All advisory and assistance services are to be classified in one of the following definitional subdivisions:

(a) Management and professional support services, *i.e.*, contractual services that provide assistance, advice

or training for the efficient and effective management and operation of organizations, activities (including management and support services for R&D activities), or systems. These services are normally closely related to the basic responsibilities and mission of the agency originating the requirement for the acquisition of services by contract. Included are efforts that support or contribute to improved organization of program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, performance auditing, and administrative/technical support for conferences and training programs;

(b) Studies, analyses and evaluations, *i.e.*, contracted services that provide organized, analytical assessments/evaluations in support of policy development, decision-making, management, or administration. Included are studies in support of R&D activities. Also included are acquisitions of models, methodologies, and related software supporting studies, analyses or evaluations; or

(c) Engineering and technical services, *i.e.*, contractual services used to support the program office during the acquisition cycle by providing such services as systems engineering and technical direction (see 9.505-1(b)) to ensure the effective operation and maintenance of a weapon system or major system as defined in OMB Circular No. A-109 or to provide direct support of a weapon system that is essential to research, development, production, operation or maintenance of the system.

Covered personnel, as used in this subpart, means—

(a) An officer or an individual who is appointed in the civil service by one of the following acting in an official capacity:

- (1) The President;
- (2) A Member of Congress;
- (3) A member of the uniformed services;
- (4) An individual who is an employee under 5 U.S.C. 2105;
- (5) The head of a Government-controlled corporation; or

(6) An adjutant general appointed by the Secretary concerned under 32 U.S.C. 709(c).

(b) A member of the Armed Services of the United States.

(c) A person assigned to a Federal agency who has been transferred to another position in the competitive service in another agency.

37.202 Exclusions.

The following activities and programs are excluded or exempted from the

definition of advisory or assistance services:

(a) Routine Federal information processing services unless they are an integral part of a contract for the acquisition of advisory and assistance services.

(b) Architectural and engineering services as defined in the Brooks Architect-Engineers Act (Section 901 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 541).

(c) Research on theoretical mathematics and basic research involving medical, biological, physical, social, psychological, or other phenomena.

37.203 Policy.

(a) The acquisition of advisory and assistance services is a legitimate way to improve Government services and operations. Accordingly, advisory and assistance services may be used at all organizational levels to help managers achieve maximum effectiveness or economy in their operations.

(b) Subject to 37.205, agencies may contract for advisory and assistance services, when essential to the agency's mission, to—

(1) Obtain outside points of view to avoid too limited judgment on critical issues;

(2) Obtain advice regarding developments in industry, university, or foundation research;

(3) Obtain the opinions, special knowledge, or skills of noted experts;

(4) Enhance the understanding of, and develop alternative solutions to, complex issues;

(5) Support and improve the operation of organizations; or

(6) Ensure the more efficient or effective operation of managerial or hardware systems.

(c) Advisory and assistance services shall not be—

(1) Used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;

(2) Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;

(3) Contracted for on a preferential basis to former Government employees;

(4) Used under any circumstances specifically to aid in influencing or enacting legislation; or

(5) Used to obtain professional or technical advice which is readily available within the agency or another Federal agency.

(d) *Limitation on payment for advisory and assistance services.*

Contractors may not be paid for services to conduct evaluations or analyses of

any aspect of a proposal submitted for an initial contract award unless—

(1) Neither covered personnel from the requesting agency, nor from another agency, with adequate training and capabilities to perform the required proposal evaluation, are readily available and a written determination is made in accordance with 37.204;

(2) The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in Section 23 of the Office of Federal Procurement Policy (OFPP) Act as amended (41 U.S.C. 419) and the work placed under the FFRDC's contract meets the criteria of 35.017-3; or

(3) Such functions are otherwise authorized by law.

37.204 Guidelines for determining availability of personnel.

(a) The head of an agency shall determine, for each evaluation or analysis of proposals, if sufficient personnel with the requisite training and capabilities are available within the agency to perform the evaluation or analysis of proposals submitted for the acquisition.

(b) If, for a specific evaluation or analysis, such personnel are not available within the agency, the head of the agency shall—

(1) Determine which Federal agencies may have personnel with the required training and capabilities; and

(2) Consider the administrative cost and time associated with conducting the search, the dollar value of the procurement, other costs, such as travel costs involved in the use of such personnel, and the needs of the Federal agencies to make management decisions on the best use of available personnel in performing the agency's mission.

(c) If the supporting agency agrees to make the required personnel available, the agencies shall execute an agreement for the detail of the supporting agency's personnel to the requesting agency.

(d) If the requesting agency, after reasonable attempts to obtain personnel with the required training and capabilities, is unable to identify such personnel, the head of the agency may make the determination required by 37.203.

(e) An agency may make a determination regarding the availability of covered personnel for a class of proposals for which evaluation and analysis would require expertise so unique or specialized that it is not reasonable to expect such personnel to be available.

37.205 Contracting officer responsibilities.

The contracting officer shall ensure that the determination required in

accordance with the guidelines at 37.204 has been made prior to issuing a solicitation.

PART 49—TERMINATION OF CONTRACTS

49.603-1 through 49.603-4 [Amended]

7. Sections 49.603-1(b)(7)(i), 49.603-2(b)(8)(i), 49.603-3(b)(7)(i), and 49.603-4(b)(4)(i) are amended by removing the phrase “, and regulations made implementing 10 U.S.C. 2382, as amended, and any other” and inserting “any” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 52.209-7 is amended by revising the date of the clause and paragraph (a)(1)(i) to read as follows:

52.209-7 Organizational Conflicts of Interest Certificate—Marketing Consultants.

* * * * *

Organizational Conflicts of Interest Certificate—Marketing Consultants (Oct 1995)

(a) * * *

(1) * * *

(i) Services excluded in subpart 37.2;

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48 CFR Parts 5, 6, 16 and 52

[FAC 90-33; FAR Case 94-711; Item III]

RIN 9000-AG50

Federal Acquisition Regulation; Task and Delivery Order Contracts

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

ACTION: Final and interim rules.

SUMMARY: This final rule along with an interim amendment is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council is amending the Federal Acquisition Regulation (FAR) to implement the statutory requirements of the Act with regard to task and delivery order contracts. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: *Effective Date:* October 1, 1995.

Comment Date: Comments on the interim rule addition of Section 16.500 should be submitted to the FAR Secretariat at the address shown below on or before November 27, 1995 to be