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COMMERCE ACQUISITION MANUAL
1301.71

DEPARTMENT OF COMMERCE

LEGAL REVIEW OF ACQUISITION-RELATED ACTIONS

COMMERCE ACQUISITION MANUAL 1301.71

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LEGAL REVIEW OF ACQUISITION-RELATED ACTIONS

SECTION 1 – OVERVIEW

1.1 Background

The Office of the General Counsel provides legal services for the Secretary of Commerce and all of the Department's Operating Units. Department Organizational Order (DOO) 10-6, *Office of the General Counsel*, dated September 18, 2015, prescribes the authority and functions of the Office of the General Counsel of the Department, which includes among other things: (1) the preparation or examination for legal form and effect, of all legal instruments, such as contracts, cooperative agreements, leases, licenses, bonds, and settlement agreements resolving litigation or claims against the Department, entered into by the Department; and (2) the appearance on behalf of the Secretary or Department, or any officer or Operating Unit thereof before tribunals and courts, the preparation or review of pleadings, briefs, memoranda, and other legal documents necessary in proceedings involving the Department, or requested by any other Government agency for use in proceedings.

The Office of the General Counsel, Assistant General Counsel for Administration and Transactions, Contract Law Division plays a prominent role in the acquisition function as a member of the acquisition team by assisting in developing appropriate acquisition strategy; participating in the Department's review of major acquisitions; reviewing acquisition plans, statements of work, and solicitations; examining limits on competition, advising source selection boards; participating in discussions with and debriefings of offerors; reviewing contract modifications; advising on contract interpretation; reviewing interagency agreements for assisted acquisitions; defending protests before the Government Accountability Office; defending the Department in contract disputes before the U.S. Civilian Board of Contract Appeals; and assisting the Department of Justice's defense of procurement actions filed in the United States Court of Federal Claims. The Contract Law Division also advises the Office of Acquisition Management in devising departmental acquisition policy.

The growing dollar value and complexity of departmental acquisitions increases the importance of close coordination with the Contract Law Division as an important administrative control. Legal reviews of contractual actions may preclude costly disputes and delays as well as strengthen and improve departmental acquisition execution.

1.2 Purpose

The purpose of this Commerce Acquisition Manual (CAM) chapter is to provide policy and guidance on obtaining legal services for acquisition-related matters.

1.3 Applicability

The requirements of this chapter are applicable to all contractual actions within the Department of Commerce.

1.4 Policy

The Contract Law Division shall serve as an advisor to the acquisition team and provide legal review of contractual actions prior to execution and/or issuance as provided herein. The Contracting Officer should solicit legal support early in the acquisition cycle, typically during the planning phase and continue to engage the Contract Law Division through subsequent stages of the acquisition process.

1.5 Scope¹

The policy and guidance provided in this CAM Chapter is specific to the legal review of Department contractual actions performed by the Contract Law Division.

¹ This policy does not affect the ability of the Inspector General to seek legal advice from the Office of Counsel to the Inspector General.

END OF SECTION 1

SECTION 2 – Roles and Responsibilities

2.1 Senior Procurement Executive (SPE)

The Senior Procurement Executive has the responsibility to develop, implement and oversee through normal oversight and review, departmental policy and guidance regarding legal review of contractual actions.

2.2 Senior Bureau Procurement Official (BPO)

The Senior Bureau Procurement Official shall ensure that the legal review policy is effectively implemented and used within their Operating Unit.

2.3 Contracting Officer (CO)

The Contracting Officer has the following responsibilities when an action requires legal review:

- a. Managing the contracting process and ensuring all legal and regulatory requirements are satisfied;
- b. Engaging the Contract Law Division to serve as advisors to the acquisition team;
- c. Providing sufficient information, and additional documentation when requested, to the Contract Law Division to facilitate legal reviews of contractual actions;
- d. Ensuring that documents submitted for legal review have been reviewed within the contracting office for quality, accuracy, and clarity.
- e. Assisting legal counsel in litigation arising out of acquisition matters; and
- f. Documenting the contract file of any decision not to proceed with a legal recommendation, (as applicable).

2.4 Office of the General Counsel, Assistant General Counsel for Administration and Transactions, Contract Law Division

The Contract Law Division's responsibilities include, but are not limited to:

- a. Serving as legal advisors to the acquisition team;
- b. Providing timely written legal reviews and advice;
- c. Representing the Department in any bid protests or disputes litigation including participating in all meetings, negotiations, discussions, or communications on the matter after an action has been filed; and
- d. Providing advice regarding the interpretation of contractual terms and conditions.

END OF SECTION 2

SECTION 3 – LEGAL REVIEW THRESHOLDS

3.1 General

The Contract Law Division will provide written review of contract actions from a legal perspective to, among other things, assess risk and determine whether the proposed action is legally permissible. The requirements for legal review set forth in this section do not affect the right and responsibility of contracting officials to submit other actions for legal review or to consult with the Contract Law Division on *any* acquisition-related matter, regardless of its amount or type that presents risk to the program, including risk of litigation or unsuccessful contract performance.

3.2 Legal Review Thresholds

Bureau Procurement Officials shall ensure the following actions are submitted to the Contract Law Division for legal review prior to being finalized or issued, as applicable:

<u>Contract Action</u>	<u>Estimated Value including all options</u>
a. Formal Acquisition Plans	> \$10 million
b. Formal Source Selection Plans	≥ \$10 million
c. Draft solicitations, including Requests for Quotations (RFQs) for task orders and Blanket Purchase Agreements (BPAs) against Federal Supply Schedule (FSS) contracts and Government-Wide Acquisition Contracts (GWACs) and Federal Acquisition Regulation (FAR) Part 36 Notices of Opportunity, to be released publicly, e.g., via e-Buy or FedBizOpps, for comment	> \$1 million
d. Solicitations, including RFQs for task orders and BPAs against FSS contracts and GWACs, FAR Part 36 Notices of Opportunity, and requests for task order proposals against Department multiple-award indefinite-delivery, indefinite-quantity (ID/IQ) contracts. This does not include solicitations for: direct 8(a) awards, which do not require legal review or RFQs against single award IDIQs or BPAs.	> \$1 million
e. Amendments to solicitations reviewed under Section 3.2.d other than those limited to administrative changes	All
f. Competitive range determinations, notifications, discussion letters, and pre-negotiation memoranda. NOTE: Contracting officers are encouraged to consult with legal on all competitive range determinations and discussions.	> \$1 million
g. Award documentation, including consensus technical evaluation, cost/price evaluation, final proposal revision evaluation, best value determination, and draft contract/task order (both competitive and noncompetitive actions)	> \$1 million
h. Debriefing materials (before release of written debriefing; talking points for oral debriefing)	All
i. Justifications for other than full and open competition required by FAR Part 6, 8, 13, and 16 and associated FedBizOpps notices	> Simplified Acquisition Threshold
j. Contract modifications that materially change the characteristics of the supplies or services being procured, significantly extend the period of performance, or increase the contract amount by more than 25% (except for ID/IQ contracts where all proposed increases to the maximum contract amount require review). Note: Modifications to exercise options that were evaluated at time of award do not require legal review.	All
k. Undefined contract actions, letter contracts, and resultant definitized actions and contracts	All
l. Award fee determinations (plans and reports)	All

m. Settlement agreements	All
n. Suspension of work and stop work orders, show cause letters, cure notices, and termination notices	All
o. Contracting Officer's final decisions, including decisions to assess liquidated damages, and responses to requests for equitable adjustment	All
p. Agency protest decisions	All
q. Novations, changes-of-name, and assignments	All
r. Ratifications of unauthorized commitments	All
s. Actions expressly requiring legal review pursuant to statute, regulation, Executive policy, or Department of Commerce orders	All
t. Responses to congressional inquiries related to contract matters	All
u. Determinations of potential and/or actual personal or organizational conflicts of interest	All
v. Procurement Integrity Act complaints	All

3.3 Other Actions for Legal Review²

Contracting officials shall submit other actions for legal review or consult with the Contract Law Division on any contract action regardless of its amount or type, when they deem review or advice is advisable. Contracting officials are strongly encouraged to engage the Contract Law Division regarding:

- a. Market research
- b. Pre-proposal conferences and site visits
- c. Evaluator training
- d. Consensus evaluation meetings
- e. Source Selection Official briefings
- f. Contract kick-off meetings
- g. Communications with contractors regarding performance issues
- h. Acceptance testing
- i. Design and other technical reviews
- j. Engineering change proposals

END OF SECTION 3

² Interagency agreements for assisted acquisitions are not covered by this policy and should be submitted to the General Law Division, as would any other agreement package.

SECTION 4 – LEGAL REVIEW PROCESS

4.1 Requesting Legal Review

The Contracting Officer shall submit all legal review requests to the Contract Law Division in writing with sufficient information and supporting documentation to enable the assigned attorney to provide comprehensive advice. Legal review is not a substitute for internal quality control reviews, therefore, Contracting Officers shall ensure that documents submitted for legal review have been reviewed internally for quality, accuracy, and clarity.

The Contracting Officer shall include the Contract Law Division's written review in the contract file. Contracting Officers shall document the file if they do not proceed with the Contract Law Division's recommendation, in whole or in part, or if there are major differences between the assigned attorney's recommendations and their final actions.

Recommendations received from the Contract Law Division are advisory in nature and the final authoritative decision rests with the Contracting Officer, unless specific concurrence or approval is required by the Federal Acquisition Regulation, Commerce Acquisition Regulation, or other statute or regulation (i.e. FAR 1.602, Ratification of Unauthorized Commitments; FAR 42.12, Novation and Change-of-Name Agreements; and FAR 37.104, Personal Services Contracts) that requires legal approval or concurrence.

4.2 Legal Review Timeframe

Each contractual action submitted to the Contract Law Division for legal review shall be reviewed timely. Upon receipt of a written legal review request, the assigned attorney will acknowledge receipt within two (2) business days. The assigned attorney may request additional information or supporting documentation to enable him or her to provide comprehensive advice. Additional information requested by the assigned attorney should be provided in a timely manner in order to facilitate the review process. The Contract Law Division will normally provide legal review within ten (10) business days of receipt of the request and Contracting Officers should allot at least that much time in their acquisition schedule. If additional time to conduct the legal review is needed, the assigned attorney will notify the requester prior to the end of the review period to indicate that additional time is required and specify the date on which the legal review will be complete.

If the Contract Law Division does not provide a review within ten days and the Contracting Officer determines it is not in the program's best interest to wait for legal review, the Contracting Officer shall annotate in the contract file accordingly and continue the procurement process. However, subsequent legal review may necessitate amendment/modification of the contractual action.

**END OF SECTION 4
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