

# **FEDERAL ACQUISITION CIRCULAR**

April 25, 2001

Number 97-27

Federal Acquisition Circular (FAC) 97-27 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

All Federal Acquisition Regulation (FAR) and other directive material contained in FAC 97-27 are effective June 25, 2001.



## FAC 97-27 SUMMARY

Federal Acquisition Circular (FAC) 97-27 amends the Federal Acquisition Regulation (FAR) as specified below:

### **Electronic and Information Technology Accessibility (FAR Case 1999-607)**

The final rule amends the FAR to implement Section 508 of the Rehabilitation Act of 1973. Subsection 508(a)(3) requires the FAR to be revised to incorporate standards developed by the Architectural and Transportation Barriers Compliance Board (also referred to as the Access Board).

The final rule amends the FAR by—

- Including the definition of the term "electronic and information technology", a term created by the statute;
- Incorporating the EIT Standards in acquisition planning, market research, and when describing agency needs; and
- Adding a new Subpart 39.2.

The requiring official must identify which standards would apply to the procurement, using the Access Board's EIT Accessibility Standards at 36 CFR part 1194. Then the requiring official must perform market research to determine the availability of compliant products and services; vendor websites and the GSA section 508 website would be helpful here. The requiring official must then identify which standards, if any, would not apply in this procurement because of, *e.g.*, nonavailability (39.203) or undue burden (39.204(e)). Technical specifications and minimum requirements would be developed based on the market research results and agency needs. This information would be submitted with the purchase request. The solicitation would then be drafted, or task order or delivery order would be placed. Proposal evaluation may yield additional information that could require reconsideration of the need for an exception.

Exception determinations are not required for award of underlying indefinite-quantity contracts, except for requirements that are to be satisfied by initial award. Accordingly, indefinite-quantity contracts may include noncompliant items; however, any task or delivery order issued for noncompliant items must meet an applicable exception.

**Replacement pages:** Structure v and vi; 2-3 thru 2-6; 7-1 and 7-2; 10-1 and 10-2; 11-1 and 11-2; 12-1 and 12-2; 39-1 thru 39-3 (39-4 added).



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(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the non-governmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (1), (2), (3), or (4) of this definition, and if the source of such services—

(i) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(ii) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

“Component” means any item supplied to the Government as part of an end item or of another component, except that for use in 52.225-9 and 52.225-11, see the definitions in 52.225-9(a) and 52.225-11(a).

“Computer software” means computer programs, computer data bases, and related documentation.

“Consent to subcontract” means the contracting officer’s written consent for the prime contractor to enter into a particular subcontract.

“Construction” means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms “buildings, structures, or other real property” include, but are not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property.

“Contract” means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see Part 16.

“Contract administration office” means an office that performs—

(1) Assigned postaward functions related to the administration of contracts; and

(2) Assigned preaward functions.

“Contract clause” or “clause” means a term or condition used in contracts or in both solicitations and contracts, and applying after contract award or both before and after award.

“Contract modification” means any written change in the terms of a contract (see 43.103).

“Contracting” means purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.

“Contracting activity” means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.

“Contracting office” means an office that awards or executes a contract for supplies or services and performs postaward functions not assigned to a contract administration office (except for use in Part 48, see also 48.001).

“Contracting officer” means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. “Administrative contracting officer (ACO)” refers to a contracting officer who is administering contracts. “Termination contracting officer (TCO)” refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. Reference in this regulation (48 CFR Chapter 1) to administrative contracting officer or termination contracting officer does not—

(1) Require that a duty be performed at a particular office or activity; or

(2) Restrict in any way a contracting officer in the performance of any duty properly assigned.

“Conviction” means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere. For use in Subpart 23.5, see the definition at 23.503.

“Cost or pricing data” (10 U.S.C. 2306a(h)(1) and 41 U.S.C. 254b) means all facts that, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are data requiring certification in accordance with 15.406-2. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor’s judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include such factors as—

(1) Vendor quotations;

(2) Nonrecurring costs;

(3) Information on changes in production methods and in production or purchasing volume;

(4) Data supporting projections of business prospects and objectives and related operations costs;

(5) Unit-cost trends such as those associated with labor efficiency;

(6) Make-or-buy decisions;

(7) Estimated resources to attain business goals; and

(8) Information on management decisions that could have a significant bearing on costs.

“Cost realism” means that the costs in an offeror’s proposal—

(1) Are realistic for the work to be performed;

(2) Reflect a clear understanding of the requirements; and

(3) Are consistent with the various elements of the offeror’s technical proposal.

“Cost sharing” means an explicit arrangement under which the contractor bears some of the burden of reasonable, allocable, and allowable contract cost.

“Day” means, unless otherwise specified, a calendar day.

“Debarment” means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor that is excluded is “debarred.”

“Delivery order” means an order for supplies placed against an established contract or with Government sources.

“Design-to-cost” means a concept that establishes cost elements as management goals to achieve the best balance between life-cycle cost, acceptable performance, and schedule. Under this concept, cost is a design constraint during the design and development phases and a management discipline throughout the acquisition and operation of the system or equipment.

“Drug-free workplace” means the site(s) for the performance of work done by the contractor in connection with a specific contract where employees of the contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

“Effective date of termination” means the date on which the notice of termination requires the contractor to stop performance under the contract. If the contractor receives the termination notice after the date fixed for termination, then the effective date of termination means the date the contractor receives the notice.

“Electronic and information technology (EIT)” has the same meaning as “information technology” except EIT also includes any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term EIT, includes, but is not limited to, telecommunication products (such as telephones), information kiosks and transaction machines, worldwide websites, multimedia, and office equipment (such as copiers and fax machines).

“Electronic commerce” means electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web technology, electronic

bulletin boards, purchase cards, electronic funds transfer, and electronic data interchange.

“Electronic data interchange (EDI)” means a technique for electronically transferring and storing formatted information between computers utilizing established and published formats and codes, as authorized by the applicable Federal Information Processing Standards.

“Electronic Funds Transfer (EFT)” means any transfer of funds, other than a transaction originated by cash, check, or similar paper instrument, that is initiated through an electronic terminal, telephone, computer, or magnetic tape, for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account. The term includes Automated Clearing House transfers, Fedwire transfers, and transfers made at automatic teller machines and point-of-sale terminals. For purposes of compliance with 31 U.S.C. 3332 and implementing regulations at 31 CFR part 208, the term “electronic funds transfer” includes a Governmentwide commercial purchase card transaction.

“End product” means supplies delivered under a line item of a Government contract.

“Energy-efficient product” means a product in the upper 25 percent of efficiency for all similar products or, if there are applicable Federal appliance or equipment efficiency standards, a product that is at least 10 percent more efficient than the minimum Federal standard.

“Environmentally preferable” means products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal of the product or service.

“Executive agency” means an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

“Facsimile” means electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a document; *e.g.*, facsimile bid, the term refers to a document (in the example given, a bid) that has been transmitted to and received by the Government via facsimile.

“Federal Acquisition Computer Network (FACNET) Architecture” is a Government system that provides user access, employs nationally and internationally recognized data formats, and allows the electronic data interchange of acquisition information between the private sector and the Federal Government.

“Federal agency” means any executive agency or any independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of

Representatives, the Architect of the Capitol, and any activities under the Architect’s direction).

“Federally Funded Research and Development Centers (FFRDC’s)” means activities that are sponsored under a broad charter by a Government agency (or agencies) for the purpose of performing, analyzing, integrating, supporting, and/or managing basic or applied research and/or development, and that receive 70 percent or more of their financial support from the Government; and—

(1) Along-term relationship is contemplated;

(2) Most or all of the facilities are owned or funded by the Government; and

(3) The FFRDC has access to Government and supplier data, employees, and facilities beyond that common in a normal contractual relationship.

“Final indirect cost rate” means the indirect cost rate established and agreed upon by the Government and the contractor as not subject to change. It is usually established after the close of the contractor’s fiscal year (unless the parties decide upon a different period) to which it applies. For cost-reimbursement research and development contracts with educational institutions, it may be predetermined; that is, established for a future period on the basis of cost experience with similar contracts, together with supporting data.

“First article” means a preproduction model, initial production sample, test sample, first lot, pilot lot, or pilot models.

“First article testing” means testing and evaluating the first article for conformance with specified contract requirements before or in the initial stage of production.

“F.o.b.” means free on board. This term is used in conjunction with a physical point to determine—

(1) The responsibility and basis for payment of freight charges; and

(2) Unless otherwise agreed, the point where title for goods passes to the buyer or consignee.

“F.o.b. destination” means free on board at destination; *i.e.*, the seller or consignor delivers the goods on seller’s or consignor’s conveyance at destination. Unless the contract provides otherwise, the seller or consignor is responsible for the cost of shipping and risk of loss. For use in the clause at 52.247-34, see the definition at 52.247-34(a).

“F.o.b. origin” means free on board at origin; *i.e.*, the seller or consignor places the goods on the conveyance. Unless the contract provides otherwise, the buyer or consignee is responsible for the cost of shipping and risk of loss. For use in the clause at 52.247-29, see the definition at 52.247-29(a).

“F.o.b.” ... (For other types of F.o.b., see 47.303).

“Forward pricing rate agreement” means a written agreement negotiated between a contractor and the Government to make certain rates available during a specified period for use in pricing contracts or modifications. These rates represent reasonable projections of specific costs that are not easily estimated for, identified with, or generated by a specific con-

tract, contract end item, or task. These projections may include rates for such things as labor, indirect costs, material obsolescence and usage, spare parts provisioning, and material handling.

“Forward pricing rate recommendation” means a rate set unilaterally by the administrative contracting officer for use by the Government in negotiations or other contract actions when forward pricing rate agreement negotiations have not been completed or when the contractor will not agree to a forward pricing rate agreement.

“Freight” means supplies, goods, and transportable property.

“Full and open competition,” when used with respect to a contract action, means that all responsible sources are permitted to compete.

“General and administrative (G&A) expense” means any management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general management and administration of the business unit as a whole. G&A expense does not include those management expenses whose beneficial or causal relationship to cost objectives can be more directly measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period.

“Governmentwide point of entry (GPE)” means the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. The GPE is located at <http://www.fedbizopps.gov>.

“Head of the agency” (see “agency head”).

“Head of the contracting activity” means the official who has overall responsibility for managing the contracting activity.

“Historically black college or university” means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. For the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, the term also includes any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

“HUBZone” means a historically underutilized business zone that is an area located within one or more qualified census tracts, qualified nonmetropolitan counties, or lands within the external boundaries of an Indian reservation.

“HUBZone small business concern” means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.

“In writing,” “writing,” or “written” means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

“Indirect cost” means any cost not directly identified with a single, final cost objective, but identified with two or more final cost objectives or an intermediate cost objective.

“Indirect cost rate” means the percentage or dollar factor that expresses the ratio of indirect expense incurred in a given period to direct labor cost, manufacturing cost, or another appropriate base for the same period (see also “final indirect cost rate”).

“Ineligible” means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation (48 CFR Chapter 1) and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

“Information other than cost or pricing data” means any type of information that is not required to be certified in accordance with 15.406-2 and is necessary to determine price reasonableness or cost realism. For example, such information may include pricing, sales, or cost information, and includes cost or pricing data for which certification is determined inapplicable after submission.

“Information technology” means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.

(1) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency that requires—

(i) Its use; or

(ii) To a significant extent, its use in the performance of a service or the furnishing of a product.

(2) The term “information technology” includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

(3) The term “information technology” does not include any equipment that—

(i) Is acquired by a contractor incidental to a contract; or

(ii) Contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and

## PART 7—ACQUISITION PLANNING

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This part prescribes policies and procedures for—

- (a) Developing acquisition plans;
- (b) Determining whether to use commercial or Government resources for acquisition of supplies or services;
- (c) Deciding whether it is more economical to lease equipment rather than purchase it; and

(d) Determining whether functions are inherently governmental.

### Subpart 7.1—Acquisition Plans

#### 7.101 Definitions.

As used in this subpart—

“Acquisition streamlining” means any effort that results in more efficient and effective use of resources to design and develop, or produce quality systems. This includes ensuring that only necessary and cost-effective requirements are included, at the most appropriate time in the acquisition cycle, in solicitations and resulting contracts for the design, development, and production of new systems, or for modifications to existing systems that involve redesign of systems or subsystems.

“Life-cycle cost” means the total cost to the Government of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired.

“Planner” means the designated person or office responsible for developing and maintaining a written plan, or for the planning function in those acquisitions not requiring a written plan.

#### 7.102 Policy.

(a) Agencies shall perform acquisition planning and conduct market research (see Part 10) for all acquisitions in order to promote and provide for—

(1) Acquisition of commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, to the maximum extent practicable (10 U.S.C. 2377 and 41 U.S.C. 251, *et seq.*); and

(2) Full and open competition (see Part 6) or, when full and open competition is not required in accordance with Part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1)).

(b) This planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. The purpose of this planning is to ensure that the Government meets its needs in the most effective, economical, and timely manner. Agencies that have a detailed acquisition planning system in place that generally meets the requirements of 7.104 and 7.105 need not revise their system to specifically meet all of these requirements.

#### 7.103 Agency-head responsibilities.

The agency head or a designee shall prescribe procedures for—

(a) Promoting and providing for full and open competition (see Part 6) or, when full and open competition is not

required in accordance with Part 6, for obtaining competition to the maximum extent practicable, with due regard to the nature of the supplies and services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1)).

(b) Encouraging offerors to supply commercial items, or to the extent that commercial items suitable to meet the agency needs are not available, nondevelopmental items in response to agency solicitations (10 U.S.C. 2377 and 41 U.S.C. 251, *et seq.*); and

(c) Ensuring that acquisition planners address the requirement to specify needs, develop specifications, and to solicit offers in such a manner to promote and provide for full and open competition with due regard to the nature of the supplies and services to be acquired (10 U.S.C. 2305(a)(1)(A) and 41 U.S.C. 253a(a)(1)). (See Part 6 and 10.002.)

(d) Establishing criteria and thresholds at which increasingly greater detail and formality in the planning process is required as the acquisition becomes more complex and costly, specifying those cases in which a written plan shall be prepared.

(e) Writing plans either on a system basis or on an individual contract basis, depending upon the acquisition.

(f) Ensuring that the principles of this subpart are used, as appropriate, for those acquisitions that do not require a written plan as well as for those that do.

(g) Designating planners for acquisitions.

(h) Reviewing and approving acquisition plans and revisions to these plans.

(i) Establishing criteria and thresholds at which design-to-cost and life-cycle-cost techniques will be used.

(j) Establishing standard acquisition plan formats, if desired, suitable to agency needs; and

(k) Waiving requirements of detail and formality, as necessary, in planning for acquisitions having compressed delivery or performance schedules because of the urgency of the need.

(l) Assuring that the contracting officer, prior to contracting, reviews:

(1) The acquisition history of the supplies and services; and

(2) A description of the supplies, including, when necessary for adequate description, a picture, drawing, diagram, or other graphic representation.

(m) Ensuring that agency planners include use of the metric system of measurement in proposed acquisitions in accordance with 15 U.S.C. 205b (see 11.002(b)) and agency metric plans and guidelines.

(n) Ensuring that agency planners—

(1) Specify needs for printing and writing paper consistent with the minimum content standards specified in

section 505 of Executive Order 13101 of September 14, 1998, Greening the Government through Waste Prevention, Recycling, and Federal Acquisition (see 11.303); and

(2) Comply with the policy in 11.002(d) regarding procurement of products containing recovered materials, and environmentally preferable and energy-efficient products and services.

(o) Ensuring that acquisition planners specify needs and develop plans, drawings, work statements, specifications, or other product descriptions that address Electronic and Information Technology Accessibility Standards (see 36 CFR part 1194) in proposed acquisitions (see 11.002(e)) and that these standards are included in requirements planning, as appropriate (see Subpart 39.2).

(p) 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.

(q) Ensuring that no purchase request is initiated or contract entered into that would result in the performance of an inherently governmental function by a contractor and that all contracts are adequately managed so as to ensure effective official control over contract performance.

(r) Ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based contracting methods and, therefore, fixed-price contracts (see 37.602-5) should occur for follow-on acquisitions.

(s) Ensuring that acquisition planners, to the maximum extent practicable—

(1) Structure contract requirements to facilitate competition by and among small business concerns; and

(2) Avoid unnecessary and unjustified bundling that precludes small business participation as contractors (see 7.107) (15 U.S.C. 631(j)).

#### **7.104 General procedures.**

(a) Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award is necessary. In developing the plan, the planner shall form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel. The planner should review previous plans for similar acquisitions and discuss them with the key personnel involved in those acquisitions. At key dates specified

PART 10—MARKET RESEARCH

Sec.

- 10.000 Scope of part.
- 10.001 Policy.
- 10.002 Procedures.

**10.000 Scope of part.**

This part prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services. This part implements requirements of 41 U.S.C. 253a(a)(1), 41 U.S.C 264b, and 10 U.S.C. 2377.

**10.001 Policy.**

(a) Agencies must—

(1) Ensure that legitimate needs are identified and trade-offs evaluated to acquire items that meet those needs;

(2) Conduct market research appropriate to the circumstances—

(i) Before developing new requirements documents for an acquisition by that agency;

(ii) Before soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold;

(iii) Before soliciting offers for acquisitions with an estimated value less than the simplified acquisition threshold when adequate information is not available and the circumstances justify its cost; and

(iv) Before soliciting offers for acquisitions that could lead to a bundled contract (15 U.S.C. 644(e)(2)(A)); and

(3) Use the results of market research to—

(i) Determine if sources capable of satisfying the agency's requirements exist;

(ii) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent;

(iii) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level;

(iv) Determine the practices of firms engaged in producing, distributing, and supporting commercial items, such as terms for warranties, buyer financing, maintenance and packaging, and marking;

(v) Ensure maximum practicable use of recovered materials (see Subpart 23.4) and promote energy conservation and efficiency; and

(vi) Determine whether bundling is necessary and justified (see 7.107) (15 U.S.C. 644(e)(2)(A)).

(vii) Assess the availability of electronic and information technology that meets all or part of the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR part 1194 (see Subpart 39.2).

(b) When conducting market research, agencies should not request potential sources to submit more than the minimum information necessary.

(c) If an agency contemplates awarding a bundled contract, the agency—

(1) When performing market research, should consult with the local Small Business Administration procurement center representative (PCR) or, if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the procuring activity is located; and

(2) At least 30 days before release of the solicitation—

(i) Must notify any affected incumbent small business concerns of the Government's intention to bundle the requirement; and

(ii) Should notify any affected incumbent small business concerns of how the concerns may contact the appropriate Small Business Administration representative.

**10.002 Procedures.**

(a) Acquisitions begin with a description of the Government's needs stated in terms sufficient to allow conduct of market research.

(b) Market research is then conducted to determine if commercial items or nondevelopmental items are available to meet the Government's needs or could be modified to meet the Government's needs.

(1) The extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience. Market research involves obtaining information specific to the item being acquired and should include—

(i) Whether the Government's needs can be met by—

(A) Items of a type customarily available in the commercial marketplace;

(B) Items of a type customarily available in the commercial marketplace with modifications; or

(C) Items used exclusively for governmental purposes;

(ii) Customary practices regarding customizing, modifying or tailoring of items to meet customer needs and associated costs;

(iii) Customary practices, including warranty, buyer financing, discounts, etc., under which commercial sales of the products are made;

(iv) The requirements of any laws and regulations unique to the item being acquired;

(v) The availability of items that contain recovered materials and items that are energy efficient;

(vi) The distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates; and

(vii) Size and status of potential sources (see Part 19).

(2) Techniques for conducting market research may include any or all of the following:

(i) Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements.

(ii) Reviewing the results of recent market research undertaken to meet similar or identical requirements.

(iii) Publishing formal requests for information in appropriate technical or scientific journals or business publications.

(iv) Querying Government data bases that provide information relevant to agency acquisitions.

(v) Participating in interactive, on-line communication among industry, acquisition personnel, and customers.

(vi) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources.

(vii) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line.

(viii) Conducting interchange meetings or holding presolicitation conferences to involve potential offerors early in the acquisition process.

(c) If market research indicates commercial or nondevelopmental items might not be available to satisfy agency needs, agencies shall reevaluate the need in accordance with 10.001(a)(3)(ii) and determine whether the need can be restated to permit commercial or nondevelopmental items to satisfy the agency's needs.

(d)(1) If market research establishes that the Government's need may be met by a type of item or service customarily available in the commercial marketplace that would meet the definition of a commercial item at Subpart 2.1, the contracting officer shall solicit and award any resultant contract using the policies and procedures in Part 12.

(2) If market research establishes that the Government's need cannot be met by a type of item or service customarily available in the marketplace, Part 12 shall not be used. When publication of the notice at 5.201 is required, the contracting officer shall include a notice to prospective offerors that the Government does not intend to use Part 12 for the acquisition (see 5.207(e)(4)).

(e) Agencies should document the results of market research in a manner appropriate to the size and complexity of the acquisition.

\* \* \* \* \*



## PART 11—DESCRIBING AGENCY NEEDS

Sec.

- 11.000 Scope of part.
- 11.001 Definitions.
- 11.002 Policy.

### Subpart 11.1—Selecting and Developing Requirements Documents

- 11.101 Order of precedence for requirements documents.
- 11.102 Standardization program.
- 11.103 Market acceptance.
- 11.104 Use of brand name or equal purchase descriptions.
- 11.105 Items peculiar to one manufacturer.
- 11.106 Purchase descriptions for service contracts.
- 11.107 Solicitation provision.

### Subpart 11.2—Using and Maintaining Requirements Documents

- 11.201 Identification and availability of specifications.
- 11.202 Maintenance of standardization documents.
- 11.203 Customer satisfaction.
- 11.204 Solicitation provisions and contract clauses.

### Subpart 11.3—Acceptable Material

- 11.301 Definitions.
- 11.302 Policy.
- 11.303 Special requirements for printing and writing paper.
- 11.304 Contract clause.

### Subpart 11.4—Delivery or Performance Schedules

- 11.401 General.
- 11.402 Factors to consider in establishing schedules.
- 11.403 Supplies or services.
- 11.404 Contract clauses.

### Subpart 11.5—Liquidated Damages

- 11.500 Scope.
- 11.501 Policy.
- 11.502 Procedures.
- 11.503 Contract clauses.

### Subpart 11.6—Priorities and Allocations

- 11.600 Scope of subpart.
- 11.601 Definitions.
- 11.602 General.
- 11.603 Procedures.
- 11.604 Solicitation provision and contract clause.

### Subpart 11.7—Variation in Quantity

- 11.701 Supply contracts.
- 11.702 Construction contracts.
- 11.703 Contract clauses.

### Subpart 11.8—Testing

- 11.801 Preaward in-use evaluation.

### 11.000 Scope of part.

This part prescribes policies and procedures for describing agency needs.

### 11.001 Definitions.

As used in this part—

“Reconditioned” means restored to the original normal operating condition by readjustments and material replacement.

“Remanufactured” means factory rebuilt to original specifications.

### 11.002 Policy.

(a) In fulfilling requirements of 10 U.S.C. 2305(a)(1), 10 U.S.C. 2377, 41 U.S.C. 253a(a), and 41 U.S.C. 264b, agencies shall—

(1) Specify needs using market research in a manner designed to—

(i) Promote full and open competition (see Part 6), or maximum practicable competition when using simplified acquisition procedures, with due regard to the nature of the supplies or services to be acquired; and

(ii) Only include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law.

(2) To the maximum extent practicable, ensure that acquisition officials—

(i) State requirements with respect to an acquisition of supplies or services in terms of—

(A) Functions to be performed;

(B) Performance required; or

(C) Essential physical characteristics;

(ii) Define requirements in terms that enable and encourage offerors to supply commercial items, or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, in response to the agency solicitations;

(iii) Provide offerors of commercial items and nondevelopmental items an opportunity to compete in any acquisition to fill such requirements;

(iv) Require prime contractors and subcontractors at all tiers under the agency contracts to incorporate commercial items or nondevelopmental items as components of items supplied to the agency; and

(v) Modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items.

(b) The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205a, *et seq.*), designates the metric system of measurement as the preferred system of weights and measures for United States trade and commerce, and it requires that each agency use the metric system of measurement in its

acquisitions, except to the extent that such use is impracticable or is likely to cause significant inefficiencies or loss of markets to United States firms. Requiring activities are responsible for establishing guidance implementing this policy in formulating their requirements for acquisitions.

(c) To the extent practicable and consistent with Subpart 9.5, potential offerors should be given an opportunity to comment on agency requirements or to recommend application and tailoring of requirements documents and alternative approaches. Requiring agencies should apply specifications, standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development process. Requiring agencies should not dictate detailed design solutions prematurely (see 7.101 and 7.105(a)(8)).

(d) The Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901, *et seq.*), Executive Order 12902 of March 8, 1994, Energy Efficiency and Water Conservation at Federal Facilities, and Executive Order 13101 of September 14, 1998, Greening the Government through Waste Prevention, Recycling, and Federal Acquisition, establish requirements for the procurement of products containing recovered materials, and environmentally preferable and energy-efficient products and services. Executive agencies must consider use of recovered materials, environmentally preferable purchasing criteria developed by the EPA, and environmental objectives (see 23.703(b)) when—

(1) Developing, reviewing, or revising Federal and military specifications, product descriptions (including commercial item descriptions), and standards;

(2) Describing Government requirements for supplies and services; and

(3) Developing source selection factors.

(e) Some or all of the performance levels or performance specifications in a solicitation may be identified as targets rather than as fixed or minimum requirements.

(f) In accordance with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), requiring activities must prepare requirements documents for electronic and information technology that comply with the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR part 1194 (see Subpart 39.2).

### Subpart 11.1—Selecting and Developing Requirements Documents

#### 11.101 Order of precedence for requirements documents.

(a) Agencies may select from existing requirements documents, modify or combine existing requirements documents,

or create new requirements documents to meet agency needs, consistent with the following order of precedence:

(1) Documents mandated for use by law.

(2) Performance-oriented documents.

(3) Detailed design-oriented documents.

(4) Standards, specifications and related publications issued by the Government outside the Defense or Federal series for the non-repetitive acquisition of items.

(b) Agencies should prepare product descriptions to achieve maximum practicable use of recovered material, other materials that are environmentally preferable, and products that are energy-efficient (see Subparts 23.4 and 23.7).

(c) In accordance with OMB Circular A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,” agencies must use voluntary consensus standards, when they exist, in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical. The private sector manages and administers voluntary consensus standards. Such standards are not mandated by law (*e.g.*, industry standards such as ISO 9000).

#### 11.102 Standardization program.

Agencies shall select existing requirements documents or develop new requirements documents that meet the needs of the agency in accordance with the guidance contained in the Federal Standardization Manual, FSPM-0001, and, for DoD components, DoD 4120.3-M, Defense Standardization Program Policies and Procedures. The Federal Standardization Manual may be obtained from the General Services Administration (see address in 11.201(d)(1)). DoD 4120.3-M may be obtained from DoD (see address in 11.201(d)(2)).

#### 11.103 Market acceptance.

(a) Section 8002(c) of Pub. L. 103-355 provides that, in accordance with agency procedures, the head of an agency may, under appropriate circumstances, require offerors to demonstrate that the items offered—

(1) Have either—

(i) Achieved commercial market acceptance; or

(ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and

(2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation.

(b) Appropriate circumstances may, for example, include situations where the agency’s minimum need is for an item that has a demonstrated reliability, performance or product

## PART 12—ACQUISITION OF COMMERCIAL ITEMS

Sec.

- 12.000 Scope of subpart.
- 12.001 Definition.

### Subpart 12.1—Acquisition of Commercial Items—General

- 12.101 Policy.
- 12.102 Applicability.

### Subpart 12.2—Special Requirements for the Acquisition of Commercial Items

- 12.201 General.
- 12.202 Market research and description of agency need.
- 12.203 Procedures for solicitation, evaluation, and award.
- 12.204 Solicitation/contract form.
- 12.205 Offers.
- 12.206 Use of past performance.
- 12.207 Contract type.
- 12.208 Contract quality assurance.
- 12.209 Determination of price reasonableness.
- 12.210 Contract financing.
- 12.211 Technical data.
- 12.212 Computer software.
- 12.213 Other commercial practices.
- 12.214 Cost Accounting Standards.

### Subpart 12.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

- 12.300 Scope of subpart.
- 12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.
- 12.302 Tailoring of provisions and clauses for the acquisition of commercial items.
- 12.303 Contract format.

### Subpart 12.4—Unique Requirements Regarding Terms and Conditions for Commercial Items

- 12.401 General.
- 12.402 Acceptance.
- 12.403 Termination.
- 12.404 Warranties.

### Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items

- 12.500 Scope of subpart.
- 12.501 Applicability.
- 12.502 Procedures.
- 12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.
- 12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

### Subpart 12.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Items

- 12.601 General.
- 12.602 Streamlined evaluation of offers.
- 12.603 Streamlined solicitation for commercial items.

### 12.000 Scope of part.

This part prescribes policies and procedures unique to the acquisition of commercial items. It implements the Federal Government's preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) by establishing acquisition policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial items and components.

### 12.001 Definition.

“Subcontract,” as used in this part, includes, but is not limited to, a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

## Subpart 12.1—Acquisition of Commercial Items—General

### 12.101 Policy.

Agencies shall—

- (a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements;
- (b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and
- (c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

### 12.102 Applicability.

(a) This part shall be used for the acquisition of supplies or services that meet the definition of commercial items at 2.101.

(b) Contracting officers shall use the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition.

(c) Contracts for the acquisition of commercial items are subject to the policies in other parts of this chapter. When a policy in another part of this chapter is inconsistent with a policy in this part, this Part 12 shall take precedence for the acquisition of commercial items.

(d) This part shall not apply to the acquisition of commercial items—

- (1) At or below the micro-purchase threshold;
- (2) Using the Standard Form 44 (see 13.306);
- (3) Using the imprest fund (see 13.305);

- (4) Using the Governmentwide commercial purchase card; or
- (5) Directly from another Federal agency.

### **Subpart 12.2—Special Requirements for the Acquisition of Commercial Items**

#### **12.201 General.**

Public Law 103-355 establishes special requirements for the acquisition of commercial items intended to more closely resemble those customarily used in the commercial marketplace. This subpart identifies those special requirements as well as other considerations necessary for proper planning, solicitation, evaluation and award of contracts for commercial items.

#### **12.202 Market research and description of agency need.**

(a) Market research (see 10.001) is an essential element of building an effective strategy for the acquisition of commercial items and establishes the foundation for the agency description of need (see Part 11), the solicitation, and resulting contract.

(b) The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services may be suitable. Generally, for acquisitions in excess of the simplified acquisition threshold, an agency's statement of need for a commercial item will describe the type of product or service to be acquired and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics. Describing the agency's needs in these terms allows offerors to propose methods that will best meet the needs of the Government.

(c) Follow the procedures in Subpart 11.2 regarding the identification and availability of specifications, standards and commercial item descriptions.

(d) Requirements documents for electronic and information technology must comply with the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR part 1194 (see Subpart 39.2).

#### **12.203 Procedures for solicitation, evaluation, and award.**

Contracting officers shall use the policies unique to the acquisition of commercial items prescribed in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition. The contracting officer may use the streamlined procedure for soliciting offers for commercial items prescribed in 12.603. For acquisitions of commercial items exceeding the simplified acquisition threshold but not

exceeding \$5,000,000, including options, contracting activities shall employ the simplified procedures authorized by Subpart 13.5 to the maximum extent practicable.

#### **12.204 Solicitation/contract form.**

(a) The contracting officer shall use the Standard Form 1449, Solicitation/Contract/Order for Commercial Items, if (1) the acquisition is expected to exceed the simplified acquisition threshold; (2) a paper solicitation or contract is being issued; and (3) procedures at 12.603 are not being used. Use of the SF 1449 is nonmandatory but encouraged for commercial acquisitions not exceeding the simplified acquisition threshold.

(b) Consistent with the requirements at 5.203(a) and (h), the contracting officer may allow fewer than 15 days before issuance of the solicitation.

#### **12.205 Offers.**

(a) Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, contracting officers shall request existing product literature from offerors of commercial items in lieu of unique technical proposals.

(b) Contracting officers should allow offerors to propose more than one product that will meet a Government need in response to solicitations for commercial items. The contracting officer shall evaluate each product as a separate offer.

(c) Consistent with the requirements at 5.203(b), the contracting officer may allow fewer than 30 days response time for receipt of offers for commercial items, unless the acquisition is subject to NAFTA or the Trade Agreements Act (see 5.203(h)).

#### **12.206 Use of past performance.**

Past performance should be an important element of every evaluation and contract award for commercial items. Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in Subpart 9.1, 13.106, or Subpart 15.3, as applicable.

#### **12.207 Contract type.**

Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited.

**PART 39—ACQUISITION OF INFORMATION TECHNOLOGY**

*Sec.*  
 39.000 Scope of part.  
 39.001 Applicability.  
 39.002 Definitions.

**Subpart 39.1—General**

39.101 Policy.  
 39.102 Management of risk.  
 39.103 Modular contracting.  
 39.104 Information technology services.  
 39.105 Privacy.  
 39.106 Year 2000 compliance.  
 39.107 Contract clause.

**Subpart 39.2—Electronic and Information Technology**

39.201 Scope of subpart.  
 39.202 Definition.  
 39.203 Applicability.  
 39.204 Exceptions.

**39.000 Scope of part.**

This part prescribes acquisition policies and procedures for use in acquiring—

- (a) Information technology, including financial management systems, consistent with other parts of this regulation, OMB Circular No. A-127, Financial Management Systems, and OMB Circular No. A-130, Management of Federal Information Resources; and
- (b) Electronic and information technology.

**39.001 Applicability.**

This part applies to the acquisition of information technology by or for the use of agencies except for acquisitions of information technology for national security systems. However, acquisitions of information technology for national security systems shall be conducted in accordance with 40 U.S.C. 1412 with regard to requirements for performance and results-based management; the role of the agency Chief Information Officer in acquisitions; and accountability. These requirements are addressed in OMB Circular No. A-130.

**39.002 Definitions.**

As used in this part—

“Modular contracting” means use of one or more contracts to acquire information technology systems in successive, interoperable increments.

“National security system” means any telecommunication or information system operated by the United States Government, the function, operation, or use of which—

- (1) Involves intelligence activities;
- (2) Involves cryptologic activities related to national security;

- (3) Involves command and control of military forces;
- (4) Involves equipment that is an integral part of a weapon or weapons system; or

(5) Is critical to the direct fulfillment of military or intelligence missions. This does not include a system that is to be used for routine administrative and business applications, such as payroll, finance, logistics, and personnel management applications.

“Year 2000 compliant,” with respect to information technology, means that the information technology accurately processes date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000 and leap year calculations, to the extent that other information technology, used in combination with the information technology being acquired, properly exchanges date/time data with it.

**Subpart 39.1—General**

**39.101 Policy.**

(a) Division A, Section 101(h), Title VI, Section 622 of the Omnibus Appropriations and Authorization Act for Fiscal Year 1999 (Pub. L. 105-277) requires that agencies may not use appropriated funds to acquire information technology that does not comply with 39.106, unless the agency’s Chief Information Officer determines that non-compliance with 39.106 is necessary to the function and operation of the agency or the acquisition is required by a contract in effect before October 21, 1998. The Chief Information Officer must send to the Office of Management and Budget a copy of all waivers for forwarding to Congress.

(b) In acquiring information technology, agencies shall identify their requirements pursuant to OMB Circular A-130, including consideration of security of resources, protection of privacy, national security and emergency preparedness, accommodations for individuals with disabilities, and energy efficiency. When developing an acquisition strategy, contracting officers should consider the rapidly changing nature of information technology through market research (see Part 10) and the application of technology refreshment techniques.

(c) Agencies must follow OMB Circular A-127, Financial Management Systems, when acquiring financial management systems. Agencies may acquire only core financial management software certified by the Joint Financial Management Improvement Program.

**39.102 Management of risk.**

(a) Prior to entering into a contract for information technology, an agency should analyze risks, benefits, and costs. (See Part 7 for additional information regarding require-

ments definition.) Reasonable risk taking is appropriate as long as risks are controlled and mitigated. Contracting and program office officials are jointly responsible for assessing, monitoring and controlling risk when selecting projects for investment and during program implementation.

(b) Types of risk may include schedule risk, risk of technical obsolescence, cost risk, risk implicit in a particular contract type, technical feasibility, dependencies between a new project and other projects or systems, the number of simultaneous high risk projects to be monitored, funding availability, and program management risk.

(c) Appropriate techniques should be applied to manage and mitigate risk during the acquisition of information technology. Techniques include, but are not limited to: prudent project management; use of modular contracting; thorough acquisition planning tied to budget planning by the program, finance and contracting offices; continuous collection and evaluation of risk-based assessment data; prototyping prior to implementation; post implementation reviews to determine actual project cost, benefits and returns; and focusing on risks and returns using quantifiable measures.

### **39.103 Modular contracting.**

(a) This section implements Section 5202, Incremental Acquisition of Information Technology, of the Clinger-Cohen Act of 1996 (Public Law 104-106). Modular contracting is intended to reduce program risk and to incentivize contractor performance while meeting the Government's need for timely access to rapidly changing technology. Consistent with the agency's information technology architecture, agencies should, to the maximum extent practicable, use modular contracting to acquire major systems (see 2.101) of information technology. Agencies may also use modular contracting to acquire non-major systems of information technology.

(b) When using modular contracting, an acquisition of a system of information technology may be divided into several smaller acquisition increments that—

(1) Are easier to manage individually than would be possible in one comprehensive acquisition;

(2) Address complex information technology objectives incrementally in order to enhance the likelihood of achieving workable systems or solutions for attainment of those objectives;

(3) Provide for delivery, implementation, and testing of workable systems or solutions in discrete increments, each of which comprises a system or solution that is not dependent on any subsequent increment in order to perform its principal functions;

(4) Provide an opportunity for subsequent increments to take advantage of any evolution in technology or needs that occur during implementation and use of the earlier increments; and

(5) Reduce risk of potential adverse consequences on the overall project by isolating and avoiding custom-designed components of the system.

(c) The characteristics of an increment may vary depending upon the type of information technology being acquired and the nature of the system being developed. The following factors may be considered:

(1) To promote compatibility, the information technology acquired through modular contracting for each increment should comply with common or commercially acceptable information technology standards when available and appropriate, and shall conform to the agency's master information technology architecture.

(2) The performance requirements of each increment should be consistent with the performance requirements of the completed, overall system within which the information technology will function and should address interface requirements with succeeding increments.

(d) For each increment, contracting officers shall choose an appropriate contracting technique that facilitates the acquisition of subsequent increments. Pursuant to Parts 16 and 17 of the Federal Acquisition Regulation, contracting officers shall select the contract type and method appropriate to the circumstances (*e.g.*, indefinite delivery, indefinite quantity contracts, single contract with options, successive contracts, multiple awards, task order contracts). Contract(s) shall be structured to ensure that the Government is not required to procure additional increments.

(e) To avoid obsolescence, a modular contract for information technology should, to the maximum extent practicable, be awarded within 180 days after the date on which the solicitation is issued. If award cannot be made within 180 days, agencies should consider cancellation of the solicitation in accordance with 14.209 or 15.206(e). To the maximum extent practicable, deliveries under the contract should be scheduled to occur within 18 months after issuance of the solicitation.

### **39.104 Information technology services.**

When acquiring information technology services, solicitations must not describe any minimum experience or educational requirement for proposed contractor personnel unless the contracting officer determines that the needs of the agency—

(a) Cannot be met without that requirement; or

(b) Require the use of other than a performance-based contract (see Subpart 37.6).

### **39.105 Privacy.**

Agencies shall ensure that contracts for information technology address protection of privacy in accordance with the Privacy Act (5 U.S.C. 552a) and Part 24. In addition, each

agency shall ensure that contracts for the design, development, or operation of a system of records using commercial information technology services or information technology support services include the following:

(a) Agency rules of conduct that the contractor and the contractor's employees shall be required to follow.

(b) A list of the anticipated threats and hazards that the contractor must guard against.

(c) A description of the safeguards that the contractor must specifically provide.

(d) Requirements for a program of Government inspection during performance of the contract that will ensure the continued efficacy and efficiency of safeguards and the discovery and countering of new threats and hazards.

### 39.106 Year 2000 compliance.

When acquiring information technology that will be required to perform date/time processing involving dates subsequent to December 31, 1999, agencies shall ensure that solicitations and contracts—

(a)(1) Require the information technology to be Year 2000 compliant; or

(2) Require that non-compliant information technology be upgraded to be Year 2000 compliant prior to the earlier of—

(i) The earliest date on which the information technology may be required to perform date/time processing involving dates later than December 31, 1999, or

(ii) December 31, 1999; and

(b) As appropriate, describe existing information technology that will be used with the information technology to be acquired and identify whether the existing information technology is Year 2000 compliant.

### 39.107 Contract clause.

The contracting officer shall insert a clause substantially the same as the clause at 52.239-1, Privacy or Security Safeguards, in solicitations and contracts for information technology which require security of information technology, and/or are for the design, development, or operation of a system of records using commercial information technology services or support services.

## Subpart 39.2—Electronic and Information Technology

### 39.201 Scope of subpart.

(a) This subpart implements Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards (36 CFR part 1194).

(b) Further information on Section 508 is available via the Internet at <http://www.section508.gov>.

(c) When acquiring EIT, agencies must ensure that—

(1) Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities; and

(2) Members of the public with disabilities seeking information or services from an agency have access to and use of information and data that is comparable to the access to and use of information and data by members of the public who are not individuals with disabilities.

### 39.202 Definition.

Undue burden, as used in this subpart, means a significant difficulty or expense.

### 39.203 Applicability.

(a) Unless an exception at 39.204 applies, acquisitions of EIT supplies and services must meet the applicable accessibility standards at 36 CFR part 1194.

(b)(1) Exception determinations are required prior to contract award, except for indefinite-quantity contracts (see paragraph (b)(2) of this section).

(2) Exception determinations are not required prior to award of indefinite-quantity contracts, except for requirements that are to be satisfied by initial award. Contracting offices that award indefinite-quantity contracts must indicate to requiring and ordering activities which supplies and services the contractor indicates as compliant, and show where full details of compliance can be found (*e.g.*, vendor's or other exact website location).

(3) Requiring and ordering activities must ensure supplies or services meet the applicable accessibility standards at 36 CFR part 1194, unless an exception applies, at the time of issuance of task or delivery orders. Accordingly, indefinite-quantity contracts may include noncompliant items; however, any task or delivery order issued for noncompliant items must meet an applicable exception.

(c)(1) When acquiring commercial items, an agency must comply with those accessibility standards that can be met with supplies or services that are available in the commercial marketplace in time to meet the agency's delivery requirements.

(2) The requiring official must document in writing the nonavailability, including a description of market research performed and which standards cannot be met, and provide documentation to the contracting officer for inclusion in the contract file.

**39.204 Exceptions.**

The requirements in 39.203 do not apply to EIT that—

- (a) Is purchased in accordance with Subpart 13.2 (micro-purchases) prior to January 1, 2003. However, for micro-purchases, contracting officers and other individuals designated in accordance with 1.603-3 are strongly encouraged to comply with the applicable accessibility standards to the maximum extent practicable;
- (b) Is for a national security system;
- (c) Is acquired by a contractor incidental to a contract;
- (d) Is located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment; or
- (e) Would impose an undue burden on the agency.

(1) *Basis.* In determining whether compliance with all or part of the applicable accessibility standards in 36

CFR part 1194 would be an undue burden, an agency must consider—

- (i) The difficulty or expense of compliance; and
  - (ii) Agency resources available to its program or component for which the supply or service is being acquired.
- (2) *Documentation.* (i) The requiring official must document in writing the basis for an undue burden decision and provide the documentation to the contracting officer for inclusion in the contract file.
- (ii) When acquiring commercial items, an undue burden determination is not required to address individual standards that cannot be met with supplies or service available in the commercial marketplace in time to meet the agency delivery requirements (see 39.203(c)(2) regarding documentation of nonavailability).

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