

Item X—Mentor Protégé Program (FAR Case 93-308)

This interim rule amends FAR 19.702, Statutory requirements, to allow mentor firms participating in the Department of Defense (DOD) Mentor-Protégé Program to be granted credit toward subcontracting goals under small business subcontracting plans entered into with any executive agency. FAR 52.244-5, Competition in Subcontracting, is amended to permit DOD mentor firms to award subcontracts on a noncompetitive basis to protégé firms under DOD and other contracts.

Item XI—Subcontracting Plans (FAR Case 92-019)

This final rule amends FAR 19.705-2(d) to expand the circumstances when subcontracting plans may be required from and negotiated with more than the apparently successful offeror. The clause prescription at 19.708(b)(1) and Alternate II for the clause at 52.219-9 are added for use when subcontracting plans are required with initial proposals.

Item XII—Insurance—Liability to Third Persons (under Cost Reimbursement Contracting) (FAR Case 92-014)

This final rule deletes the provision at FAR 52.228-6 and makes related changes at 28.311, 52.228-7, 52.245-7, and 52.245-10 to remove obsolete language pertaining to liability insurance under cost-reimbursement contracts.

Item XIII—Availability of Accounting Guide (FAR Case 94-002)

This final rule amends FAR Part 31 to add a new section 31.001 advising contractors on how to obtain a copy of an informational guide entitled "Guidance for New Contractors."

Item XIV—Nonallowability of Excise Taxes on Nondeductible Contributions to Deferred Compensation Plans (FAR Case 92-604)

This final rule amends FAR 31.205-41 to designate excise taxes at subtitle D, chapter 43 of the Internal Revenue Code, as unallowable costs.

Item XV—Contractors' Purchasing Systems Reviews and Subcontractor Consent (FAR Case 92-40)

This final rule amends FAR Parts 44 and 52 to increase the thresholds for Contractors' Purchasing Systems Reviews (CPSR's) and subcontract consent. The threshold at 44.302(a) for performing CPSR's is raised from \$10 million to \$25 million. The threshold at 52.244-2(a) for consent to subcontract

under cost-reimbursement and letter prime contracts for fabrication, purchase, rental, installation, or other acquisition for special test equipment is raised from \$10,000 to \$25,000. The threshold at 52.244-2(b)(1) requiring additional information on certain subcontracts is raised from \$10,000 to \$25,000.

Dated: January 11, 1996.

Edward C. Loeb,
Acting Director, Office of Federal Acquisition Policy.

**Federal Acquisition Circular
Number 90-37**

Federal Acquisition Circular (FAC) 90-37 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.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-37 is effective March 26, 1996, except for Item X which is effective January 26, 1996.

Dated: January 4, 1996.

Eleanor R. Spector,
Director, Defense Procurement.

Dated: January 17, 1996.

Ada M. Ustad,
Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: January 12, 1996.

Deidre A. Lee,
Associate Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 96-1014 Filed 1-25-96; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 7, 11, and 37**

[FAC 90-37; FAR Case 92-051 Item I]

RIN 9000-AF56

**Federal Acquisition Regulation;
Inherently Governmental Functions**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to revise the Federal Acquisition Regulation (FAR) to implement Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, Inherently Governmental Functions. This rule provides a definition of, and internal Government responsibilities and procedures relating to, inherently governmental functions. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: March 26, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Peter O'Such (202) 501-1759 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-37, FAR case 92-051.

SUPPLEMENTARY INFORMATION:**A. Background**

This final rule implements the requirements of the Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, Inherently Governmental Functions. The OFPP published its proposed policy letter for public comment in the Federal Register at 56 FR 65279, December 16, 1991. OFPP evaluated public comments and published the final policy letter in the Federal Register at 57 FR 45096, September 30, 1992.

A FAR proposed rule to implement the policy letter was published in the Federal Register at 59 FAR 29696, June 8, 1994. Thirteen sources submitted public comments. Minor revisions were made to the rule as a result of those comments.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule pertains to internal Government responsibilities and procedures relating to inherently governmental functions.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

List of Subjects in 48 CFR Part 7, 11, and 37

Government procurement.

Dated: January 11, 1996.

Edward C. Loeb,

Acting Director, Office of Federal Acquisition Policy.

Therefore, 49 CFR parts 7, 11, and 37 are amended as set forth below:

The authority citation for 48 CFR parts 7, 11, and 37 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 7—ACQUISITION PLANNING

2. Section 7.000 is amended in paragraph (b) by removing the word "and"; in paragraph (c) by removing the period at the end of the sentence and inserting in its place "; and"; and by adding paragraph (d) to read as follows:

§ 7.000 Scope of part.

* * * * *

(d) Determining whether functions are inherently governmental.

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

7.103 Agency-head responsibilities.

* * * * *

(p) 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.

4. Section 7.105 is amended by redesignating paragraphs (b)(9) through (b)(19) as (b)(10) through (b)(20) and adding a new (b)(9) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(9) *Inherently governmental functions.* Address the consideration given to OFPP Policy Letter 92-1 (see subpart 7.5).

5. Subpart 7.5 is added to read as follows:

Subpart 7.5—Inherently Governmental Functions

Sec.

7.500 Scope of subpart.

7.501 Definition.

7.502 Applicability.

7.503 Policy.

Subpart 7.5—Inherently Governmental Functions

7.500 Scope of subpart.

The purpose of this subpart is to prescribe policies and procedures to ensure that inherently governmental functions are not performed by contractors. It implements the policies of Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, *Inherently Governmental Functions.*

7.501 Definition.

Inherently governmental function means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, *i.e.*, the discretionary exercise of Government authority, and monetary transactions and entitlements.

(a) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to—

(1) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(2) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(3) Significantly affect the life, liberty, or property of private persons;

(4) Commission, appoint, direct, or control officers or employees of the United States; or

(5) Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of Federal funds.

(b) Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical

services. The list of commercial activities included in the attachment to Office of Management and Budget (OMB) Circular No. A-76 is an authoritative, nonexclusive list of functions which are not inherently governmental functions.

7.502 Applicability.

The requirements of this subpart apply to all contracts for services. This subpart does not apply to services obtained through either personnel appointments, advisory committees, or personal services contracts issued under statutory authority.

7.503 Policy.

(a) Contracts shall not be used for the performance of inherently governmental functions.

(b) Agency decisions which determine whether a function is or is not an inherently governmental function may be reviewed and modified by appropriate Office of Management and Budget officials.

(c) The following is a list of examples of functions considered to be inherently governmental functions or which shall be treated as such. This list is not all inclusive:

(1) The direct conduct of criminal investigations.

(2) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.

(3) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.

(4) The conduct of foreign relations and the determination of foreign policy.

(5) The determination of agency policy, such as determining the content and application of regulations, among other things.

(6) The determination of Federal program priorities for budget requests.

(7) The direction and control of Federal employees.

(8) The direction and control of intelligence and counter-intelligence operations.

(9) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.

(10) The approval of position descriptions and performance standards for Federal employees.

(11) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within

specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

(12) In Federal procurement activities with respect to prime contracts—

(i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(ii) Participating as a voting member on any source selection boards;

(iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;

(iv) Awarding contracts;

(v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

(vi) Terminating contracts;

(vii) Determining whether contract costs are reasonable, allocable, and allowable; and

(viii) Participating as a voting member on performance evaluation boards.

(13) The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

(14) The conduct of Administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.

(15) The approval of Federal licensing actions and inspections.

(16) The determination of budget policy, guidance, and strategy.

(17) The collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and 31 U.S.C. 3718 (relating to private attorney collection services), but not including—

(i) Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or

predetermined and the funds collected can be easily controlled using standard case management techniques; and

(ii) Routine voucher and invoice examination.

(18) The control of the treasury accounts.

(19) The administration of public trusts.

(20) The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the General Accounting Office, or other Federal audit entity.

(d) The following is a list of examples of functions generally not considered to be inherently governmental functions. However, certain services and actions that are not considered to be inherently governmental functions may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. This list is not all inclusive:

(1) Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.

(2) Services that involve or relate to reorganization and planning activities.

(3) Services that involve or relate to analysis, feasibility studies, and strategy options to be used by agency personnel in developing policy.

(4) Services that involve or relate to the development of regulations.

(5) Services that involve or relate to the evaluation of another contractor's performance.

(6) Services in support of acquisition planning.

(7) Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).

(8) Contractors providing technical evaluation of contract proposals.

(9) Contractors providing assistance in the development of statements of work.

(10) Contractors providing support in preparing responses to Freedom of Information Act requests.

(11) Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the Defense Industrial Security Program described in 4.402(b)).

(12) Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations

campaigns, or conducting agency training courses.

(13) Contractors participating in any situation where it might be assumed that they are agency employees or representatives.

(14) Contractors participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

(15) Contractors serving as arbitrators or providing alternative methods of dispute resolution.

(16) Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

(17) Contractors providing inspection services.

(18) Contractors providing legal advice and interpretations of regulations and statutes to Government officials.

(19) Contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

(e) Agency implementation shall include procedures requiring the agency head or designated requirements official to provide the contracting officer, concurrent with transmittal of the statement of work (or any modification thereof), a written determination that none of the functions to be performed are inherently governmental. This assessment should place emphasis on the degree to which conditions and facts restrict the discretionary authority, decision-making responsibility, or accountability of Government officials using contractor services or work products. Disagreements regarding the determination will be resolved in accordance with agency procedures before issuance of a solicitation.

PART 11—DESCRIBING AGENCY NEEDS

6. Section 11.105 is added to read as follows:

11.105 Purchase descriptions for service contracts.

In drafting purchase descriptions for service contracts, agency requiring activities shall ensure that inherently governmental functions (see subpart 7.5) are not assigned to a contractor. These purchase descriptions shall

(a) Reserve final determination for Government officials;

(b) Require proper identification of contractor personnel who attend meetings, answer Government telephones, or work in situations where

their actions could be construed as acts of Government officials unless, in the judgment of the agency, no harm can come from failing to identify themselves; and

(c) Require suitable marking of all documents or reports produced by contractors.

PART 37—SERVICE CONTRACTING

7. Section 37.102 is revised to read as follows:

37.102 Policy.

(a) Agencies shall generally rely on the private sector for commercial services (see OMB Circular No. A-76, Performance of Commercial Activities and subpart 7.3).

(b) Agencies shall not award a contract for the performance of an inherently governmental function (see subpart 7.5).

(c) Non-personal service contracts are proper under general contracting authority.

8. Section 37.114 is added to read as follows:

37.114 Special acquisition requirements.

Contracts for services which require the contractor to provide advice, opinions, recommendations, ideas, reports, analyses, or other work products have the potential for influencing the authority, accountability, and responsibilities of Government officials. These contracts require special management attention to ensure that they do not result in performance of inherently governmental functions by the contractor and that Government officials properly exercise their authority. Agencies must ensure that—

(a) A sufficient number of qualified Government employees are assigned to oversee contractor activities, especially those that involve support of government policy or decision making. During performance of service contracts, the functions being performed shall not be changed or expanded to become inherently governmental.

(b) A greater scrutiny and an appropriate enhanced degree of management oversight is exercised when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see 7.503(c)).

(c) All contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public or

Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. They must also ensure that all documents or reports produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 51, and 52

[FAC 90-37; FAR Case 91-108; Item II]

RIN 9000-AF71

Federal Acquisition Regulation; Javits-Wagner-O'Day Program (JWOD)

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify that the Government's obligation to purchase items from statutorily mandated sources of supply also applies when contractors purchase items for Government use. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: March 26, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-37, FAR case 91-108.Q02

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule was published in the Federal Register at 59 FR 14454, March 28, 1994. The rule amended FAR Parts 8, 51, and 52 to clarify that the statutory obligation for Government agencies to purchase certain items from the Committee for Purchase from People Who are Blind or Severely Disabled also

applies when contractors purchase items for Government use.

Five substantive comments from three sources were received during the public comment period. Clarifying revisions have been made to §§ 51.101(c) and 52.208-9 of the rule as a result of the public comments.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it merely clarifies that contractors must purchase certain items from the same statutorily mandated sources that Government agencies are required to use, when a contractor is performing an agency's supply function.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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 OMB under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 8, 51, and 52

Government procurement.

Dated: January 11, 1996.

Edward C. Loeb,

Acting Director, Office of Federal Acquisition Policy.

Therefore, 48 CFR parts 8, 51, and 52 are amended as set forth below:

1. The authority citation for 48 CFR parts 8, 51, 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 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Section 8.001 is amended by revising paragraphs (a)(2) (ii) and (iii) and adding paragraph (c) to read as follows:

8.001 Priorities for use of Government supply sources.

(a) * * *

(2) * * *

(ii) Mandatory Federal Supply Schedules (see subpart 8.4);

(iii) Optional use Federal Supply Schedules (see subpart 8.4); and

* * * * *

(c) The statutory obligation for Government agencies to satisfy their