




July 2, 2009

Acquisition Policy Memorandum 2009-04

To: Heads of Contracting Activity
Chief Financial Officers

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Subject: Multi-agency Contracting

Effective Date: October 1, 2009

1. **Purpose:** This memorandum promulgates interim HHS Acquisition Regulation (HHSAR) coverage on both multi- and intra-agency contracting, attached¹.”

2. **Background:** Conventionally, HHS' contracting officers award contracts to satisfy HHS' requirements for goods and services. But when HHS' contracting officers are overloaded or when another agency has special expertise, using another Federal agency's contract or even paying another Federal agency to contract on behalf of HHS can be an efficient and effective way to acquire goods and services. In fact, HHS OPDIVs transfer more than \$400M per year to contracting organizations outside HHS to conduct procurements on HHS' behalf. Until now, assisted contracts (other than Economy Act contracts) have by-passed assigned contracting offices, where most of HHS' acquisition expertise resides. But, as the Government Accountability Office (GAO) explains [“High Risk Series, An Update,” (GAO-05-207), January 2005], these multi-agency contracts, which GAO and OFPP call “interagency acquisitions,” are riskier than conventional contracts².

¹ See “Interagency Acquisitions,” OFPP Memorandum, June 2008, at http://www.whitehouse.gov/omb/assets/omb/procurement/interagency_acq/iac_revised.pdf. To avoid confusion over the terms “interagency acquisition” and “interagency agreements,” this memorandum and the associated HHSAR guidance use “multi-agency contracting” and “multi-agency contracts” instead. This guidance is limited to acquisitions and Interagency Agreements supporting acquisitions. It does not cover other Interagency Agreements; Memoranda of Understanding, Intra-Departmental Delegations of Authority, Service and Supply Fund transactions, etc.

² Among the risks that the GAO associates with multi-agency contracting are the potential for misuse of funds, out-of-scope orders, and contract management uncertainties. These risks increase when an agency has limited experience with multi-agency contracting. After the GAO defined this common contracting method as high-risk, the Office of Federal Procurement Policy (OFPP) formed an interagency working group to study and issue guidance on multi-agency contracting.

3. Definitions: When the GAO described the comparative risk of multi-agency contracting, it combined direct ordering with assisted contracting.

a. Direct ordering describes the relatively simple and safe procedure wherein a requiring agency's contracting/ordering officer satisfies the agency's requirement by issuing an order under another Federal agency's ordering contract/agreement. The most common example is an order under a GSA schedule. Some GWACs and Multiple Agency Contracts (MACs) also permit other Federal agencies to issue orders. Direct ordering uses an in-house contracting officer and does not require transfer of funds to another Federal agency.

b. Assisted contracting is a subset of multi-agency/intra-agency contracting in which a servicing contracting office (other than the requesting organization's assigned contracting office) contracts on behalf of the requesting organization. Because of the number of personnel, policies, and procedures involved from two (or more) federal organizations, the possibility of confusion, misunderstanding, and conflict is great. Assisted contracting is considerably more complicated and risky than direct ordering.

4. Current Guidance:

a. Federal Acquisition Regulation (FAR) Parts 8 and 16 offer considerable guidance on direct ordering.

b. The FAR addresses multi-agency contracting under the authority of the Economy Act but is silent on non-Economy Act contracting.

i. FAR 17.5, Interagency Acquisitions Under the Economy Act, covers only assisted contracting conducted under the authority of the Economy Act of 1932, as amended (31 USC 1535). FAR 17.5 stipulates that assisted contracting, conducted pursuant to the Economy Act, must be supported by a Determination and Findings (D&F) approved by a contracting officer of the requesting agency. The servicing agency may charge only actual or estimated costs³ for awarding and administering an Economy Act contract or order.

ii. Federal agencies commonly base their multi-agency contracting on authorities other than the Economy Act. For example, Section 5112(e) of the Clinger-Cohen Act (40 USC 1412(e)) authorizes ordering under Government-wide Acquisition Contracts (GWACs); Section 632 of the Government Management Reform Act (P.L. 103-356) authorizes the use of franchise fund service organizations; and many revolving funds (also known as working capital funds) operate under special authorities. The FAR offers no guidance for such non-Economy Act contracts.

³ In contrast, contracting offices which award non-Economy Act contracts and orders on behalf of other Federal agencies commonly charge fees, covering salaries of contracting and management personnel and other overhead expenses.

5. New Guidance on Assisted Contracting:

a. **Planning for Assisted Contracts:** The ideal time to discuss proposed assisted contracts is during preparation of Annual Acquisition Plans (HHSAR 307.104) at or before the beginning of each fiscal year. Starting discussions about proposed assisted contracts early gives all parties time to consider and justify their use. Except for assisted contracts under the authority of the Economy Act, agreement on the Annual Acquisition Plan is sufficient justification for proposed assisted acquisitions. Economy Act-based assisted contracts still require D&Fs signed by a contracting officer in accordance with FAR 17.5.

b. **Justifying Assisted Contracts:** Proposed assisted contracts which were not approved as part of the Annual Acquisition Plan, including updates, require written justification in the form of an Assisted Contracting D&F. This Assisted Contracting D&F, prepared by a project officer or other requiring official, shall be similar to the D&Fs required in FAR 17.503, augmented with the information required in (new) HHSAR 317.503. Without this written justification, documentation and funding for the proposed assisted contract shall not be transferred. During a declared (Presidential or HHS Secretarial) emergency, funding and requirements documentation may be transferred to a servicing organization without an Assisted Contracting D&F. The Project Officer shall document his/her file, explaining the exigent circumstances.

i. Assisted Contracting D&Fs justifying proposed assisted contracts must be signed by a contracting officer from the assigned contracting office.

ii. Heads of Contracting Activity may delegate approval of Assisted Contracting D&Fs for proposed assisted contracts less than \$500,000 to project officers or other requiring officials. The \$500,000 threshold includes the value of the base contract and all options and, for indefinite delivery vehicles, the value of the vehicle and all potential orders.

c. **Interagency Agreements Supporting Assisted Contracting:** Hereafter, program/project offices or other requiring activities must prepare an interagency agreement in accordance with OFPP's "Interagency Acquisitions," dated June 2008, memorandum before forwarding requirements documentation and funding for a proposed assisted contract to another Federal agency. OFPP's guidance encourages discussion and resolution of issues affecting assisted contracts. Interagency agreements document the results of these discussions and solutions. Without the discussions and resulting agreement, issues such as statutory limits on the use of funds (e.g., Recovery Act funding), responsibility for administration of contracts or orders and regulatory compliance may not be resolved before requirements documents and funding are transferred, resulting in a frustrating business relationship and a dissatisfied customer.

6. Guidance on Intra-agency Contracting: Before executing an assisted contract or order involving two or more HHS components (OpDivs or StaffDivs), both components must consider the business issues identified in the checklists (Appendix 1) in OFPP's "Interagency Acquisitions" memorandum to Chief Acquisition Officers and Senior Procurement Executives, dated June 2008. See (new) HHSAR 307, Acquisition Planning, and new HHSAR 317.70, Multi-agency and Intra-Agency Contracting, for advance acquisition planning and market research requirements⁴.

7. Guidance Affected: The new regulatory language affects HHSAR Part 307, Acquisition Planning; HHSAR 317.503, Determination and Findings requirements; and HHSAR 317.70, Multi-agency and Intra-Agency Contracting.

Attachment

⁴ This guidance does not apply when one HHS component is the assigned contracting office of another HHS component. For example, the assigned contracting office for the Administration for Children and Families and the Administration on Aging is the Program Support Center.

Attachment: Interim HHSAR Coverage on Multi- and Intra-agency Contracting

[Changes to 307.104 are underlined. All of 317.503 and 317.70 are new.]

307.104 Annual Acquisition Plan/General procedures.

(a) Each contracting activity shall prepare an Annual Acquisition Plan (AAP) as far in advance of each fiscal year as possible, in accordance with the following:

(1) The AAP shall contain all anticipated acquisition actions for the coming fiscal year that exceed the simplified acquisition threshold, including new acquisitions and contract/order modifications. The AAP must include:

- (i) the aggregate dollars planned for simplified acquisitions by quarter,
- (ii) any long lead-time acquisitions that will be awarded in future fiscal years (see paragraph (c) below), and
- (iii) proposed multi-agency and intra-agency contracts.

(2) The Head of the Contracting Activity (HCA) or the Chief of the Contracting Office (CCO), as appropriate, shall prepare the AAP and obtain the information needed for its preparation from the responsible program planning/budget office and/or the program offices.

(3) The AAP shall be used for reporting purposes and workload scheduling and monitoring.

(4) The HCA/CCO and Small Business Specialist (SBS) shall review the AAP at least quarterly, with input from the cognizant program office, and modify it, as appropriate, during the fiscal year, with updated information, particularly regarding the specific acquisition methods to be used.

(5) HHS requires use of a standard format for an AAP, available at:

<http://www.hhs.gov/oamp/policies/aaptemplate.pdf>. For the data elements specified in the AAP format, the HCA/CCO may include information in addition to that required by the standard instructions accompanying the format.

(b) As early as possible following completion of the AAP, the Contracting Officer (CO)/Contract Specialist (CS) shall initiate discussions with the assigned Project Officer (PO), in consultation with the OSDDBU Small Business Specialist for each action that exceeds the simplified acquisition threshold. The discussions should include the following, as appropriate:

- (1) Determining the intended acquisition strategy and contract/order type, including the use of options;
- (2) Reviewing the statement of work/specification, if available, for adequacy and ensuring that a performance work statement is used for services, where practicable;
- (3) Evaluating the potential for, and maximizing the use of, competitive procedures;
- (4) Performing market research, identifying potential sources, and determining set-aside potential and small business subcontracting opportunities;
- (5) Assessing the availability of commercial items;
- (6) Determining required clearances/approvals and supporting documentation;
- (7) Preparing an acquisition milestone schedule; and
- (8) Determining the best multi-or intra-agency contracting activity to assist in awarding a contract on the requiring organization's behalf, if applicable.

The remainder of HHSAR 307.104 is unchanged.

Part 317, Special Contracting Methods

Subpart 317.503 Determination and findings requirements.

(a) In addition to the D&F contents specified in FAR 17.503(a)(1) and (2), each Assisted Contracting D&F shall address:

(3) The servicing organization(s) contemplated (the assigned HHS contracting office shall be one of the servicing organizations contemplated);

(4) For each organization and alternative approach contemplated, the anticipated benefits to the OPDIV; the anticipated costs, including associated fees or other compensation; and the contract/order placement timeframe;

(5) The tradeoffs (cost, schedule, performance) among the approaches considered;

(6) The recommended multi-agency or intra-agency contracting approach;

(7) The conclusion that the contract to be awarded by the selected servicing organization is the most advantageous alternative to the Government, notwithstanding fees and the increased risk associated with assisted contracting.

[new] Subpart 317.70, Multi-agency and Intra-Agency Contracts

317.7001 Scope of subpart.

(a) This subpart prescribes policies for HHS' use of intra-agency and multi-agency contracting under all authorities. It does not apply when HHS transfers funds to another agency under an interagency agreement whose primary purpose is other than contracting on HHS' behalf.

(b) For multi-agency contracts under the authority of the Economy Act, see FAR Subpart 17.5 and HHSAR 317.503.

(c) Multi-agency contracting authorities other than the Economy Act include but are not limited to the Clinger-Cohen Act (40 USC 11302(e)), the Government Management Reform Act (P.L. 103-356), Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, et seq), and 40 U.S.C. 501, Services for Executive Agencies.

317.7002 Definitions.

As used in this subpart:

“Multi-agency contracting” describes a procedure in which a federal agency needing supplies or

services obtains them using another federal agency's contract (direct ordering), the contracting assistance of another federal agency (assisted contracting), or both. In some cases, more than one servicing organization may be involved in assisted contracting.

“Intra-agency contracting” describes a procedure in which an HHS OpDiv or StaffDiv needing supplies or services obtains them by: issuing an order under another HHS OpDiv's or StaffDiv's contract or agreement, e.g., BPA (direct ordering); or using the contracting assistance of another OpDiv or StaffDiv (assisted contracting); or both.

“Assisted contracting” is a subset of multi-agency/intra-agency contracting in which a servicing contracting office other than the requesting organization's assigned contracting office contracts on behalf of the requesting organization.

“Direct ordering” is a subset of multi-/intra-agency contracting in which a contracting or ordering officer issues an order under another OpDiv's or federal agency's indefinite delivery vehicle, e.g., a GSA schedule or a Government-wide Acquisition Contract (GWAC).

“Requesting organization” refers to the organization with the requirement for a multi- or intra-agency contract.

“Servicing organization” refers to an organization that assists a requesting organization by awarding a contract or order on its behalf. In the context of multi-agency contracting, the servicing organization and requesting organization must be in different Federal agencies. For intra-agency contracting, the servicing and requesting organizations must both be HHS organizations.

317.7003 Potential multi-agency and intra-agency sources.

(a) Prior to deciding to use multi-agency or intra-agency contracting, the requesting organization must perform sufficient market research to consider the relative merits and costs of available contracts and contracting offices for meeting the requesting organization's need.

(b) Direct ordering conducted by HHS contracting officers using GSA vehicles, GWACs, and vehicles established under the Federal Strategic Sourcing Initiative does not require justification. HHS contracting officers should be cautious about using unfamiliar contract vehicles. When using vehicles other than those listed above, the contracting officer shall include in the contract file a D&F, which is prepared in consultation with the Small Business Specialist, and which concludes that the chosen vehicle is the best way to obtain the required product or service.

(c) Proposed assisted contracts approved as part of an annual or updated acquisition plan require no additional documentation or approvals.

(d) For proposed assisted contracts *not* approved as part of an annual or updated acquisition plan, the requiring organization shall: (1) identify the potential servicing organization(s), (2)

summarize the services each source provides, and (3) describe the compensation arrangement(s). The assigned contracting office shall be one of the alternatives considered. For multi-agency contract actions, this information shall be included in the Assisted Contracting D&F required in 317.7004(b).

317.7004 Documentation for Multi-agency Contracts.

(a) In the case of proposed direct ordering using vehicles other than those listed in 317.7003(b), the HHS contracting officer shall comply with the D&F requirement in 317.7003(b).

(b) If a proposed assisted contract, using a servicing organization outside HHS, was not approved during preparation and review of the annual acquisition plan, including updates; then the program/project office or other requiring activity shall prepare an Assisted Contracting D&F, similar to the D&F specified in FAR 17.503, but augmented with the information specified in HHSAR 317.503. The Project Officer or other requiring official shall be responsible for preparing and staffing this Assisted Contracting D&F.

(1) For assisted contracts greater than or equal to \$500,000 (including the value of the base contract and all options and, for indefinite delivery vehicles, the value of the vehicle and all potential orders), the assigned HHS contracting officer shall review and approve or reject the Assisted Contracting D&F, annotated with the Small Business Specialist's recommendation. The contracting officer's signature on the Assisted Contracting D&F signifies his/her concurrence that assisted contracting through the proposed servicing contracting office is in the best interest of the government. The Project Officer must retain a copy of the approved Assisted Contracting D&F.

(2) For assisted contracts less than \$500,000, the Head of the Contracting Activity may delegate authority to the project officer or other requiring official to approve the required Assisted Contracting D&F. The \$500,000 threshold includes the value of the base contract and all options and, for indefinite delivery vehicles, the value of the vehicle and all potential orders.

(3) During a declared (Presidential or HHS Secretarial) emergency, funding and requirements documentation may be transferred to a servicing organization without an Assisted Contracting D&F. The Project Officer shall document his/her file, explaining the exigent circumstances.

(c) Assisted contracts require supporting interagency agreements, as described in OFPP's memorandum, "Interagency Acquisitions," dated June 2008. Note that Part A of an Interagency Agreement can support multiple assisted contracts. Each interagency agreement shall address all the elements identified in OFPP's model interagency agreement (Appendix 2 of OFPP's "Interagency Acquisitions"). The level of detail in HHS interagency agreements should be commensurate with the dollar value and complexity of the assisted contract. HHS requesting

organizations shall not forward funding or requirements documentation outside HHS without a properly executed interagency agreement; and servicing activities within HHS, e.g., PSC, the NIH Information Technology Acquisition and Assessment Center, shall not contract on behalf of non-HHS requesting organizations without properly executed interagency agreements.

317.7005 Documentation for Intra-agency Contracts.

(a) In the case of proposed direct ordering, using vehicles other than those listed in 317.7003(b), the HHS contracting officer shall comply with the D&F requirement in 317.7003(b).

(b) Proposed assisted contracts approved as part of an annual or updated acquisition plan require no additional documentation or approvals.

(c) For proposed assisted contracts *not* approved as part of an annual or updated acquisition plan, the requiring organization shall: (1) identify the potential servicing organization(s), (2) summarize the services the source(s) provide(s) and (3) describe the compensation arrangement(s). The assigned contracting office shall be one of the alternatives considered.