

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 1, 7, 17, 37, 49, and 52**

[FAR Case 94-710]

**Federal Acquisition Regulation;  
Special Contracting Methods**

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 (the Act), Sections 1022 and 1072 on multiyear contracting; Section 1074 on the Economy Act; Sections 1503, 1504, 1552, and 1553 on the delegation of procurement functions and determinations and decisions; and Section 6002 on contracting functions performed by Federal personnel. This regulatory action is subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**DATES:** Comments should be submitted on or before May 15, 1995 to be considered in the formulation of a final rule.

**ADDRESSES:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4037, Washington, DC 20405. Telephone: (202) 501-4755.

Please cite FAR case 94-710 in all correspondence related to this case.

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

**SUPPLEMENTARY INFORMATION:****A. Background**

The Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) (the Act) provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition,

Simplified Acquisition Procedures, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network (FACNET).

**FAR Case 94-710**

This notice announces FAR revisions developed under FAR case 94-710 which was based on provisions in the Act which provided for multiple awards under certain circumstances; permitted civilian agencies to enter into multiyear contracts under certain circumstances; and for agencies to use the Economy Act authority to acquire supplies and services from another agency. Other provisions of the statute were minor in nature and were not as important as the aforementioned provisions.

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the FAR Council is conducting a series of public meetings. However, the FAR Council has not scheduled a public meeting on this rule (FAR case 94-710) because of the clarifying and non-controversial nature of the rule. If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see **ADDRESSES** caption, above) on or before April 17, 1995. The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

**B. Regulatory Flexibility Act**

The proposed changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because promulgation of this policy is expected to improve access to the procurement process for small and disadvantaged businesses, and to broaden the scope of competitive acquisitions for which small businesses may be eligible. There is a potential negative impact resulting from consolidation of contract requirements under a multiyear contract; however, it is expected that this negative impact could be mitigated by an increase in the opportunities for small businesses to receive subcontracts. The rule will place no limit on small businesses' ability to participate. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. Comments from small entities concerning the affected FAR subpart

will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 94-710), in correspondence.

**C. Paperwork Reduction Act**

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

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

Government procurement.

Dated: March 9, 1995.

**Barry Cohen,**

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

Therefore, it is proposed that 48 CFR Parts 1, 7, 17, 37, 49 and 52 be amended as set forth below:

**PART 1—FEDERAL ACQUISITION  
REGULATIONS SYSTEM**

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

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

2. Section 1.601 is revised to read as follows:

**1.601 General.**

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

(b) The heads of two or more agencies may by agreement—

(1) Delegate acquisition functions and assign acquisition responsibilities from one agency to another of those agencies or to an officer or civilian employee of those agencies; or

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

## PART 7—ACQUISITION PLANNING

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

### 7.103 Agency-head responsibilities.

\* \* \* \* \*

(m) 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 48 CFR (FAR) 37.204. Covered personnel who may be paid for evaluation or analysis are:

(1) An employee means an officer or an individual who is appointed in the civil service by one of the following acting in an official capacity; (i) the President; (ii) a Member of Congress; (iii) a member of the uniformed services; (iv) an individual who is an employee; (v) the head of a government controlled corporation; or (vi) an adjutant general appointed by the Secretary concerned under the national guard (32 U.S.C. 709(c)).

(2) A member of the Armed Forces of the United States.

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

## PART 17—SPECIAL CONTRACTING METHODS

4. Subpart 17.1 is revised to read as follows:

### Subpart 17.1—Multiyear Contracting

Sec.

- 17.101 Authority.
- 17.102 Applicability.
- 17.103 Definitions.
- 17.104 General.
- 17.105 Policy.
- 17.105-1 Uses.
- 17.105-2 Objectives.
- 17.106 Procedures.
- 17.106-1 General.
- 17.106-2 Solicitations.
- 17.106-3 Special procedures applicable to DoD, NASA and the Coast Guard.
- 17.107 Options.
- 17.108 Congressional notification.
- 17.109 Contract clauses.

#### 17.101 Authority.

This subpart implements Section 304B of the Federal Property and

Administrative Services Act of 1949 (41 U.S.C. 254c) and 10 U.S.C. 2306b and provides policy and procedures for the use of multiyear contracting.

#### 17.102 Applicability.

For DoD, NASA, and the Coast Guard, the authorities cited in 17.101 do not apply to contracts for the purchase of supplies to which 40 U.S.C. 759 applies (information resource management supply contracts).

#### 17.103 Definitions.

*Annual funding* means appropriations of which Congress limits obligational availability to a single fiscal year.

*Cancellation* means the cancellation (within a contractually specified time) of the total requirements of all remaining program years. Cancellation results when the contracting officer (a) notifies the contractor of nonavailability of funds for contract performance for any subsequent program year, or (b) fails to notify the contractor that funds are available for performance of the succeeding program year requirement.

*Cancellation ceiling* means the maximum amount that the contractor can receive in the event that cancellation occurs.

*Cancellation charge* means the amount of unrecovered costs which would have been recouped through amortization over the full term of the contract, including the term cancelled.

*Multiple year contract*, as used in this subpart, means a contract having a term of more than one year regardless of the type of funding that applies.

*Multiyear contract* means a contract for the purchase of supplies or services for more than one, but not more than five, program years. A multiyear contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made.

*Multiyear funding* means appropriated funds covering more than 1 fiscal year.

*No-year funding* means funding available for new obligations without regard to fiscal year and until the appropriation is either exhausted or otherwise cancelled.

*Nonrecurring costs* means those production costs which are generally incurred on a one-time basis and include such costs as plant or equipment relocation, plant rearrangement, special tooling and special test equipment, preproduction

engineering, initial spoilage and rework, and specialized work force training.

*Recurring costs*, as used in this subpart, means production costs that vary with the quantity being produced such as labor and materials.

*Termination for convenience* means the procedure which may apply to any Government contract, including multiyear contracts. As contrasted with cancellation, termination can be effected at any time during the life of the contract (cancellation is effected between fiscal years) and can be for the total quantity or a partial quantity (whereas cancellation must be for all subsequent fiscal years' quantities).

#### 17.104 General.

(a) Multiyear contracting is a type of multiple year contract that employs special contracting methods to acquire known requirements in quantities and total cost not over planned requirements for up to 5 years unless otherwise authorized by statute, even though the total funds ultimately to be obligated may not be available at the time of contract award. This method may be used in sealed bidding or contracting by negotiation.

(b) Multiyear contracting is a flexible contracting method applicable to a wide range of acquisitions. The extent to which cancellation provisions are used in multiyear contracts will depend on the unique circumstances of each contracting action. Accordingly, for multiyear contracts, the agency head may authorize modification of the requirements of this subpart and the clauses at 48 CFR (FAR) 52.217-2, Cancellation Under Multiyear Contracts.

#### 17.105 Policy.

##### 17.105-1 Uses.

(a) The contracting officer may enter into a multiyear contract if—

(1) Funds are available and obligated for the contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with any necessary cancellation of the contract; and

(2) The head of the contracting agency determines that—

(i) The need for the supplies or services is reasonably firm and continuing over the period of the contract; and

(ii) A multiyear contract will serve the best interests of the United States by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency's programs, and

(3) If for DoD, NASA or the Coast Guard—

(i) The use of such a contract will result in substantial savings of the total estimated costs of carrying out the program through annual contracts;

(ii) With regard to paragraph (a)(2)(i) of this section, the minimum need to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities;

(iii) There is a stable design for the supplies to be acquired and the technical risks associated with such supplies are not excessive; and

(iv) That the estimates of both the cost of the contract and the estimated cost avoidance through the use of a multiyear contract are realistic.

(b) Multiyear contracting may be used when no-year, annual, multiple year or multiyear funding is available.

(c) The multiyear contracting method may be used for the acquisition of supplies or services.

(d) If funds are not appropriated to support the succeeding years' requirements, the agency must cancel the contract.

#### 17.105-2 Objectives.

Use of multiyear contracting is encouraged to take advantage of one or more of the following:

(a) Lower costs.

(b) Enhancement of standardization.

(c) Reduction of administrative burden in the placement and administration of contracts.

(d) Substantial continuity of production or performance, thus avoiding annual startup costs, preproduction testing costs, make ready expenses, and phaseout costs.

(e) Stabilization of contractor work forces.

(f) Avoidance of the need for establishing and "proving out" quality control techniques and procedures for a new contractor each year.

(g) Broadening the competitive base with opportunity for participation by firms not otherwise willing or able to compete for lesser quantities, particularly in cases involving high startup costs.

(h) Provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology.

#### 17.106 Procedures.

##### 17.106-1 General.

(a) *Method of contracting.* The nature of the requirement should govern the selection of the method of contracting, since the multiyear procedure is compatible with sealed bidding,

including two-step sealed bidding, and contract negotiation.

(b) *Type of contract.* Given the longer performance period associated with multiyear acquisition, consideration in pricing fixed-priced contracts should be given to the use of economic price adjustment terms, profit objectives comparable with contractor risk, financing arrangements and cash flow requirements.

(c) *Cancellation procedures.* (1) All program years except the first are subject to cancellation. For each program year subject to cancellation, the contracting officer shall establish a cancellation ceiling. Ceilings must exclude amounts for items included in prior program years. The contracting officer shall reduce the cancellation ceiling for each program year in direct proportion to the remaining requirements subject to cancellation. For example, consider that the total nonrecurring costs (see 48 CFR (FAR) 15.804-6) are estimated at ten percent of the total multiyear price, and the percentages for each of the program-year requirements for 5-years are (i) 30 in the first year, (ii) 30 in the second, (iii) 20 in the third, (iv) 10 in the fourth, and (v) 10 in the fifth. The cancellation percentages, after deducting three percent for the first program year, would be 7, 4, 2, and 1 percent of the total price applicable to the second, third, fourth, and fifth program years, respectively.

(2) In determining cancellation ceilings, the contracting officer must estimate reasonable preproduction or startup, labor learning, and other nonrecurring costs to be incurred by an "average" prime contractor or subcontractor, which would be applicable to, and which normally would be amortized over, the items or services to be furnished under the multiyear requirements. Nonrecurring costs include such costs, where applicable, as plant or equipment relocation or rearrangement, special tooling and special test equipment, preproduction engineering, initial rework, initial spoilage, pilot runs, allocable portions of the costs of facilities to be acquired or established for the conduct of the work, costs incurred for the assembly training and transportation of a specialized work force to and from the job site, and unrealized labor learning. Do not include any costs of labor or materials, or other expenses (except as indicated in this paragraph), which might be incurred for performance of subsequent program year requirements. The total estimate of the above costs must then be compared with the best estimate of the

contract cost to arrive at a reasonable percentage or dollar figure. To perform this calculation, the contracting officer shall obtain in-house engineering cost estimates identifying detailed recurring and nonrecurring costs, the effect of labor learning.

(3) The contracting officer shall establish cancellation dates for each program year's requirements regarding production lead time and the date by which funding for these requirements can reasonably be established. The contracting officer shall include these dates in the schedule, as appropriate.

(d) *Cancellation ceilings.* Cancellation ceilings and dates may be revised after issuing the solicitation if necessary. In sealed bidding, the contracting officer shall change the ceiling by amending the solicitation before bid opening. In two-step sealed bidding, discussions conducted during the first step may indicate the need for revised ceilings and dates which may be incorporated in step two. In a negotiated acquisition, negotiations with offerors may provide information requiring a change in cancellation ceilings and dates before final negotiation and contract award.

(e) *Funding/payment of cancellation charges.* If cancellation occurs, the contractor is entitled to payment (see the clause at 48 CFR (FAR) 52.217-2, Cancellation Under Multiyear Contracts).

(f) *Presolicitation or pre-bid conferences.* To ensure that all interested sources of supply are thoroughly aware of how multiyear contracting is accomplished, use of presolicitation or pre-bid conferences may be advisable.

(g) *Payment limit.* The contracting officer shall limit the Government's payment obligation to an amount available for contract performance. The contracting officer shall insert the amount for the first program year in the contract upon award and modify it for successive program years upon availability of funds.

(h) *Termination payment.* If the contract is terminated for the convenience of the Government in whole, including items subject to cancellation, the Government's obligation shall not exceed the amount specified in the schedule as available for contract performance, plus the cancellation ceiling.

##### 17.106-2 Solicitations.

Solicitations for multiyear contracts shall reflect all the factors to be considered for evaluation, specifically including the following—

(a) The requirements, by item of supply or service, for the—

(1) First program year; and  
 (2) Multiyear contract including the requirements for each program year.

(b) Criteria for comparing the lowest evaluated submission on the first program year's requirement to the lowest evaluated submission on the multiyear requirements.

(c) A provision that, if the Government determines before award that only the first program year requirements are needed, the Government may evaluate offers and make award solely on the basis of price, or estimated cost and fee, offered on that year's requirements.

(d) A provision specifying a separate cancellation ceiling (on a percentage or dollar basis) and dates applicable to each program year subject to a cancellation (see 17.106-1 (c) and (d)).

(e) A statement that award will not be made on less than the first program year requirements.

(f) Unless Government administrative costs incident to annual contracting and administration can be reasonably established, they shall not be used as a factor for evaluation. If so utilized, their monetary value shall be set forth in the solicitation.

(g) The cancellation ceiling shall not be an evaluation factor.

**17.106-3 Special procedures applicable to DoD, NASA and the Coast Guard.**

(a) *Participation by subcontractors, suppliers and vendors.* In order to broaden the defense industrial base, to the maximum extent practicable—

(1) Multiyear contracting shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors and suppliers; and

(2) Upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

(b) *Protection of existing authority.* To the extent practicable, multiyear contracting shall not be carried out in a manner to preclude or curtail the existing ability of the department or agency to—

(1) Provide for competition in the production of supplies to be delivered under such a contract; or

(2) Provide for termination of a prime contract the performance of which is deficient with respect to cost, quality or schedule.

(c) *Cancellation or termination for insufficient funding.* In the event funds are not made available for the

continuation of a multiyear contract awarded using the procedures in this section, the contract shall be cancelled or terminated and payment made from—

(1) Appropriations originally made available for the performance of the contract concerned;

(2) Appropriations currently available for procurement of the type of supplies concerned and not otherwise obligated; or

(3) Funds appropriated for these payments.

**17.107 Options.**

Benefits may accrue by including options in a multiyear contract. In that event, contracting officers must follow the requirements of subpart 17.2. Options should not include—

(a) Charges for plant and equipment already amortized, nor

(b) Other nonrecurring charges which were included in the basic contract.

**17.108 Congressional notification.**

(a) Except for DoD, NASA and the Coast Guard, a multiyear contract which includes a cancellation ceiling in excess of \$10 million may not be awarded until the head of the agency gives written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Congress. The contract may not be awarded until the thirty-first day after the date of notification.

(b) For DoD, NASA, and the Coast Guard, a multiyear contract which includes a cancellation ceiling in excess of \$100 million may not be awarded until the head of the agency gives written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives. The contract may not be awarded until the thirty-first day after the date of notification.

**17.109 Contract clauses.**

(a) The contracting officer shall insert the clause at 48 CFR (FAR) 52.217-2, Cancellation Under Multiyear Contracts, in solicitations and contracts when a multiyear contract is contemplated.

(b) *Economic price adjustment clauses.* Economic price adjustment clauses are adaptable to multiyear contracting needs. When the period of production is likely to warrant a labor and material costs contingency in the contract price, the contracting officer should normally use an economic price adjustment clause (see 48 CFR (FAR) 16.203). When contracting for services, the contracting officer—

(1) Shall add the clause at 48 CFR (FAR) 52.222-43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiyear and Option Contracts), when the contract includes the clause at 48 CFR (FAR) 52.222-41, Service Contract Act of 1965;

(2) May modify the clause at 48 CFR (FAR) 52.222-43 in overseas contracts when laws, regulations, or international agreements require contractors to pay higher wage rates; or

(3) May use an economic price adjustment clause authorized by 48 CFR (FAR) 16.203 when potential fluctuations require coverage, and are not included in cost contingencies provided for by the clause at 48 CFR (FAR) 52.222-43.

5. Subpart 17.5 is revised to read as follows:

**Subpart 17.5—Interagency Acquisitions Under the Economy Act**

Sec.

17.500 Scope of subpart.

17.501 Definition.

17.502 General.

17.503 Determination requirements.

17.504 Ordering procedures.

17.505 Payment.

**17.500 Scope of subpart.**

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

(b) The Economy Act applies when more specific statutory authority does not exist. Examples of interagency acquisitions to which the Economy Act does not apply include acquisitions from required sources of supplies prescribed in 48 CFR Part 8, which have separate statutory authority.

**17.501 Definition.**

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

**17.502 General.**

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

(b) Acquisitions under the Economy Act are not exempt from the requirements of 48 CFR (FAR) part 7, subpart 7.3, Contractor Versus Government Performance.

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

#### 17.503 Determination requirements.

(a) An agency may place orders with another agency for supplies or services that the servicing agency may be in a position or equipped to supply, render, or obtain by contract if it is determined by the head of the requesting agency that—

(1) It is in the Government's best interest to do so, and

(2) That the ordered supplies or services cannot be provided by contract as conveniently or cheaply by the requesting agency from a commercial enterprise.

(b) If the Economy Act order requires contracting action by the servicing agency, the determination shall include a finding that one or more of the following circumstances is applicable—

(1) The acquisition is appropriately made under an existing contract of the servicing agency to meet the requirements of the servicing agency for the same or similar goods or services;

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

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

(c) Determinations shall be approved either by the contracting officer of the requesting agency with authority to contract for the goods or services to be ordered, or by another official designated by agency regulation to do so, except that if the servicing agency is not covered by the Federal Acquisition Regulation, approval of the determination may not be delegated below the senior procurement executive of the requesting agency.

#### 17.504 Ordering procedures.

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

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

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

(2) Delivery requirements;

(3) A funds citation;

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

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

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

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

(1) If a justification and approval or a determination and findings (D&F) (other than the requesting agency's determination required in 17.502) is required by law or regulation, the servicing agency shall execute and issue the justification and approval or D&F. The requesting agency shall furnish the servicing agency any information needed to make the justification and approval and the D&F.

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

(3) The servicing agency is responsible for compliance with all other legal or regulatory requirements applicable to the contract, including (i) having adequate statutory authority for the contractual action, and (ii) complying fully with the competition requirements of 48 CFR part 6 (see 6.002).

(e) Nonsponsoring Federal agencies may use a Federally Funded Research and Development Center (FFRDC) only if the terms of the FFRDC's sponsoring agreement permit work from other than a sponsoring agency. Work placed with the FFRDC is subject to the acceptance by the sponsor and must fall within the purpose, mission, general scope of effort, or special competency of the FFRDC. (See 48 CFR (FAR) 35.017; see also 48 CFR (FAR) 6.302 for procedures to follow where using less than full and open competition). The nonsponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with domestic private industry.

#### 17.505 Payment.

(a) Under the Economy Act—

(1) The servicing agency may ask the requesting agency, in writing, for advance payment for all or part of the estimated cost of furnishing the supplies or services; or

(2) If approved by the servicing agency, payment for actual costs may be made by the requesting agency after the supplies or services have been furnished.

(b) If advance payment is made, adjustment on the basis of actual costs shall be made as agreed by the agencies.

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

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

## PART 37—SERVICE CONTRACTING

6. Subpart 37.2 is revised to read as follows:

### Subpart 37.2—Advisory and Assistance Services

Sec.

37.200 Scope of subpart.

37.201 Definition.

37.202 Exclusions.

37.203 Policy.

37.204 Guidelines for determining availability of personnel.

37.205 Contracting officer responsibilities.

#### 37.200 Scope of subpart.

This subpart prescribes policies and procedures for acquiring advisory and assistance services by contract. The subpart regulates these contracts with individuals and organizations for both personal and nonpersonal services.

#### 37.201 Definition.

*Advisory and assistance services* means the following services when provided by nongovernmental sources—

(a) Management and professional support services;

(b) Studies, analyses and evaluations; and

(c) Engineering and technical services.

#### 37.202 Exclusions.

The following activities and programs are excluded or exempted from the definition of advisory or assistance services:

(a) Routine automated data processing and telecommunications services unless such services are an integral part of a contract for the procurement of advisory and assistance services.

(b) Architectural and engineering services as defined in section 901 of the Brooks Architect-Engineers Act (40 U.S.C. 541).

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

### 37.203 Policy.

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

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

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

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

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

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

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

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

(c) Advisory and assistance services shall not be—

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

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

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

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

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

(d) *Limitation on payment for advisory and assistance services.* Except for Federally-Funded Research and Development Centers as provided by Section 23 of the Office of Federal Procurement Policy (OFPP) Act, (41 U.S.C. 419) as amended, contractors may be paid for services to conduct evaluations or analyses of any aspect of a proposal submitted for an acquisition only if—

(1) Neither agency personnel, nor personnel from another agency, with adequate training and capabilities to

perform the required proposal evaluation, are readily available, and;

(2) A written determination is made in accordance with 37.204.

### 37.204 Guidelines for determining availability of personnel.

(a) As required by 37.203 for each evaluation or analysis of proposals, the head of an agency shall determine if sufficient personnel with the requisite training and capabilities are available within the agency to perform evaluation or analysis of proposals submitted for acquisitions.

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

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

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

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

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

### 37.205 Contracting officer responsibilities.

The contracting officer shall ensure that the determination required in accordance with the guidelines at 37.104 is accomplished prior to issuing a solicitation.

## PART 49—TERMINATION OF CONTRACTS

### 49.603–1 through 49.603–4 [Amended]

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

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 52.217–1 [Reserved]

8. Section 52.217–1 is removed and reserved.

9. Section 52.217–2 is amended by revising the section heading, the introductory text, the clause heading, paragraphs (a), (d), (f)(1) and (4), (g)(1) and (3), (h), and (i), and by removing *Alternate I* to read as follows:

### 52.217–2 Cancellation Under Multiyear Contracts.

As prescribed in 17.109, insert the following clause.

#### CANCELLATION UNDER MULTIYEAR CONTRACTS (XXX 1995)

(a) *Cancellation*, as used in this clause, means that the Government is cancelling its requirements for all supplies or services in program years subsequent to that in which notice of cancellation is provided. Cancellation shall occur by the date or within the time period specified in the Schedule, unless a later date is agreed to, if the Contracting Officer (1) notifies the Contractor that funds are not available for contract performance for any subsequent program year, or (2) fails to notify the Contractor that funds are available for performance of the succeeding program year requirement.

\* \* \* \* \*

(d) The cancellation charge will cover only (1) costs (i) incurred by the prime Contractor and/or subcontractor, (ii) reasonably necessary for performance of the contract, and (iii) that would have been equitably amortized over the entire multiyear contract period but, because of the cancellation, are not so amortized, and (2) a reasonable profit or fee on the costs.

\* \* \* \* \*

(f) \* \* \*  
(i) Reasonable nonrecurring costs (see FAR subpart 15.8) which are applicable to and normally would have been amortized in all supplies or services which are multiyear requirements;

\* \* \* \* \*

(4) Costs not amortized solely because the cancellation had precluded anticipated benefits of Contractor or subcontractor learning.

(g) \* \* \*  
(1) Labor, material, or other expenses incurred by the Contractor or subcontractors for performance of the cancelled work;

\* \* \* \* \*

(3) Anticipated profit or unearned fee on the cancelled work; or

\* \* \* \* \*

(h) This contract may include an “Option” clause with the period for exercising the option limited to the date in the contract for notification that funds are available for the next succeeding program year. If so, the Contractor agrees not to include in option quantities any costs of a startup or nonrecurring nature, that have been fully set forth in the contract. The Contractor further agrees that the option quantities will reflect only those recurring costs, and a reasonable profit or fee necessary to furnish the additional option quantities.

(i) Quantities added to the original contract through the “Option” clause of this contract shall be included in the quantity cancelled

for the purpose of computing allowable cancellation charges.  
(End of clause)

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 6, 16 and 52

[FAR Case 94-711]

#### Federal Acquisition Regulation; Task and Delivery Order Contracts

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

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend Federal Acquisition Regulations (FAR) to implement the statutory requirements of the Federal Acquisition Streamlining Act with regard to task and delivery order contracts. This regulatory action is subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**DATES:** *Comment Due Date:* Comments should be submitted on or before May 15, 1995 to be considered in the formulation of a final rule.

*Public Meeting:* A public meeting will be held on April 13, 1995, at 1:00 p.m.

*Oral/Written Statements:* Views to be presented at the public meeting should be sent, in writing, to the FAR Secretariat, at the address given below, not later than April 10, 1995.

**ADDRESSES:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4037, Washington, DC 20405, Telephone: (202) 501-4755.

The public meeting will be held at: General Services Administration Auditorium, 18th & F Streets, NW, First Floor, Washington, DC 20405.

Please cite FAR case 94-711 in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ed McAndrew, Special Contracting Team Leader, at (202) 501-1474 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GSA Building,

Washington, DC 20405 (202) 501-4755. Please cite FAR case 94-711.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) (the Act) provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes can be expected in the acquisition process as a result of the Act's implementation.

##### FAR Case 94-711

This notice announces FAR revisions developed under FAR case 94-711 which implement the requirements of sections 1004 and 1054, of the Act. Both of these sections contain statutory requirements for the award of task and delivery order contracts, the issuance of orders under such contracts and the award of such contracts for advisory and assistance services.

*Public Meeting.* The FAR Council is interested in an exchange of ideas and opinions on this rule. For that reason, the FAR Council is conducting a series of public meetings. A public meeting will be held on April 13, 1995, to enable the public to present its views on this rule. This rule will only be discussed at the public meeting session. Any subsequent public meetings will be devoted to other revisions to the FAR. The public is encouraged to furnish its views; the Council anticipates that public comments will be very helpful in formulating final rules.

Persons or organizations wishing to make presentations will be allowed 10 minutes each, provided they notify the FAR Secretariat at (202) 501-4755 and submit written statements of the presentation by April 10, 1995. Persons or organizations with similar positions are encouraged to select a common spokesman for presentation of their views. This meeting, in conjunction with this **Federal Register** notice soliciting public comments on the rule, will be the only opportunity for the public to present its views.

##### B. Regulatory Flexibility Act

The proposed changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule may result in more opportunities for small businesses to compete for awards as a result of the multiple award preference. There is a potential negative impact resulting from consolidation of contract requirements under a task or delivery order contract; however, it is expected that this

negative impact could be mitigated by an increase in the opportunities for small businesses to receive subcontracts. Small businesses could also form joint ventures to bid on larger contract requirements. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 94-711), in correspondence.

##### C. Paperwork Reduction Act

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

##### List of Subjects in 48 CFR Parts 6, 16 and 52

Government procurement.

Dated: March 9, 1995.

##### Barry Cohen,

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

Therefore, it is proposed that 48 CFR Parts 6, 16 and 52 be amended as set forth below:

#### PART 6—COMPETITION REQUIREMENTS

1. The authority citation for 48 CFR Parts 6, 16 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).

2. Section 6.001 is amended by adding paragraph (f) to read as follows:

##### 6.001 Applicability.

\* \* \* \* \*

(f) Orders placed against task order and delivery order contracts entered into pursuant to 48 CFR (FAR) part 16, subpart 16.5.

#### PART 16—TYPES OF CONTRACTS

3. Section 16.500 is added to read as follows:

##### 16.500 Scope of subpart.

This subpart prescribes policies and procedures for making awards of indefinite delivery contracts and establishes a preference scheme for