

## Procurement Guidance - (1/2017)

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### T1.15 - Legal Coordination Guidance

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## **T1.15 - Legal Coordination Guidance**

### **A Legal Coordination Guidance**

#### **1 Introduction**

- a. FAA acquisition actions can raise significant legal issues. For example, although pursuant to 49 U.S.C. §40110, FAA is exempt from federal acquisition statutes and regulations, other statutes and court decisions require FAA to demonstrate a rational basis, supported by substantial evidence, for acquisition actions. In addition, many laws and regulations enacted for purposes other than procurement apply to FAA acquisitions.
- b. Therefore, the service organization will coordinate acquisition actions with FAA counsel on an ongoing basis throughout the acquisition lifecycle, as specified in Section 4. It is the responsibility of agency counsel to represent FAA's legal interests within the service organization and, exercising independent professional judgment, advise the service organization concerning legal issues, including, the legality and integrity of acquisition actions, and represent the service organization in litigation and other legal matters.
- c. This guidance establishes legal coordination as the agency practice for acquisition matters.

#### **2 Applicability**

This Guidance applies to all FAA acquisition matters, at all stages of the acquisition lifecycle.

#### **3 Definitions**

- a. As used in this Guidance, the term "agency counsel" means:
  - (1) for acquisition matters arising at, or referred to, Headquarters, the Assistant Chief Counsel, Procurement Law Division, AGC-500; and
  - (2) for acquisition matters arising at, or referred to, a Region or Center, the responsible Regional or Center Counsel.
- b. As used in this Guidance, the term "coordinate" means: soliciting the opinion and recommendations of agency legal counsel reasonably prior to taking acquisition actions, e.g., after providing agency counsel accurate and complete information in sufficient time for review and counsel.
- c. As used in this Guidance, the term "service organization" means: any organization that delivers a service, whether a business unit, project office, program directorate, or integrated product team, or whether engaged in air traffic services, security, regulation, certification, operations, commercial space transportation or airport development.

d. As used in this Guidance, the term "represent" means: recommending an appropriate legal position for the service organization regarding an acquisition matter, and, as appropriate, presenting this position to other parties, such as in administrative or judicial proceedings, or in communications, discussions, or negotiations with another party during a protest, dispute, or claim.

#### **4 Coordination Guidance Revised 10/2005**

##### *a. Coordination between the Service Organization and Agency Counsel*

(1) The service organization will coordinate acquisition actions with FAA counsel on an ongoing basis throughout the acquisition lifecycle. Agency counsel will timely respond to the service organization with accurate and effective legal advice that is consistent with legal mandates and relevant to the agency's business discretion. Agency counsel may, at his or her discretion, establish general time frames for such responses, which counsel will make every effort to meet, taking into account the agency counsel's workload and competing priorities. Counsel will describe and interpret legal issues involved in the matter; identify and assess the legal risk of a particular proposed decision; evaluate alternative courses of action; and identify potential illegal or improper actions.

(2) In case of a conflict between FAA's legal interests and those of a service organization, agency counsel's client is the FAA, and not the service organization. In addition, each agency counsel is bound by independent professional ethical obligations and responsibilities as a licensed attorney.

(3) The contracting officer will document the acquisition file with agency counsel's opinion and recommendations. The contracting officer will document the reasoning/decision process when choosing not to follow the agency counsel's recommendations.

##### *b. General Coordination Guidance for Acquisition Actions*

The service organization will coordinate with agency counsel on acquisition actions (including supporting documents) with an estimated total value greater than \$100,000. This coordination guidance applies to acquisition actions including, as examples, but not limited to:

(1) Required planning documents (e.g., acquisition strategy paper);

(2) Solicitations, including Screening Information Requests, amendments, and other public announcements, such as market surveys;

(3) Responses to market surveys, including capability statements;

- (4) Market analyses;
- (5) Evaluation of offers or proposals (including preparation and review of technical, cost, past performance, management and other evaluation plans and reports);
- (6) Communications with offerors on acquisition matters having legal implications;
- (7) Contract awards, regardless of contract type, over the dollar value threshold specified above;
- (8) Debriefings, including responses to inquiries regarding awards from parties other than the awardee;
- (9) Task and delivery orders issued under contracts over the dollar value threshold specified above;
- (10) Modifications under contracts that affect rights and obligations of either the Government or the contractor;
- (11) Option exercises;
- (12) Award fee determinations;
- (13) Determinations as to contract adjustments;
- (14) Contract terminations;
- (15) Settlement of contract claims;
- (16) Liquidated damages;
- (17) Interpretation and determination of legal rights under contracts, orders or agreements;
- (18) Communications with contractors, offerors, and other parties on acquisition matters having legal implications, including correspondence that might impact the rights and obligations of any party;
- (19) Solicitation and contract matters involving rights in technical data, computer software, patents, copyrights, trade secrets and other forms of intellectual property, real estate, fiscal law, labor, environmental law, bankruptcy, anti-trust law, mergers and other non-procurement areas of law, affecting acquisitions;
- (20) Debarments and suspensions, nondisclosure agreements, centers of excellence and individuals hired by contractors who received a "buy-out."

(21) Solicitation and contract matters involving state and local laws; (22) Software license agreements;

(23) Purchases from government-wide schedules or vehicles; (24) Interagency agreements;

(24) Grants (except Airport Improvement Grants; policy concerning legal review of AIP grants is or will be covered elsewhere);

(25) Cooperative agreements;

(26) Memoranda of agreement and memoranda of understanding;

(27) Franchises;

(28) Agreements made under "other transaction authority;"

(29) Unsolicited proposals;

(30) Determinations, findings, and justifications issued pursuant to the Acquisition Management System, or as required by statute or regulation;

(31) Proposed waivers and waivers of any portion of the Acquisition Management System;

(32) Any other matters that in the opinion of agency counsel has an impact on the legality of an acquisition or legal consequences.

*c. Coordination Guidance for Noncompetitive Procurements*

The service organization will coordinate with agency counsel on non-competitive procurements with an estimated total value greater than \$10,000, and on procurements with an estimated total value greater than \$10,000 under which a waiver is sought from the Acquisition Management System's competition policy.

*d. Coordination Guidance for Unauthorized Commitments, Personal Services, and Other Matters*

The service organization will coordinate with agency counsel on the following matters, without dollar limitation:

(1) Freedom of Information Act, Trade Secrets Acts, and Privacy Act concerns relating to proposed release(s) of acquisition information;

(2) Matters involving the FAIR Act/A-76;

(3) Unauthorized agency commitments;

- (4) Proposals for innovative financing, such as advance payments, shared costs, or user fees;
- (5) Personal services contracts;
- (6) Consulting and advisory services
- (7) Matters relating to export controls or non-U.S. citizens;
- (8) Matters involving information, personnel or physical security;
- (9) Condemnations;
- (10) Sufficiency of title in real estate acquisitions;
- (11) Matters raising ethical or Procurement Integrity Act issues, or concerning conflicts of interest (personal and organizational), federal and state fraud statutes, or other federal and state criminal statutes.
- (12) Policy memoranda, procedures, regulations, orders, and guidance concerning acquisition matters;
- (13) Proposed legislation and testimony for legislative hearings on acquisition matters;
- (14) Correspondence about acquisition matters with parties outside the agency, including Congress, the General Accounting Office, and other federal agencies, or correspondence under the signature of the Secretary, Deputy Secretary, Administrator, Deputy Administrator or Regional and Center Directors.

## **5 Representation**

- a. Agency counsel will represent the service organization in any protest of an award or other procurement action, and in contract claims, disputes, or controversies by and against the FAA, including all meetings, negotiations, discussions, or communications on the matter after an action has been filed in an administrative, judicial, or FAA forum.
- b. Agency counsel will represent the service organization on behalf of the FAA in communications, negotiations, and meetings with other parties touching upon the legal rights and obligations of the parties, or where another party, including a government party, is expected to be represented by legal counsel.

## **6 Exceptions and Waivers**

At Headquarters, the Assistant Chief Counsel for Procurement, and at Regions and Centers, the Region or Center Counsel, may make written exceptions to the Coordination Policy described in Section 1.15, adjust dollar minimums, or in appropriate cases, waive the Coordination Policy.

## **B Clauses**

[view contract clauses](#)

## **C Forms**

[view procurement forms](#)