

AMS/FAST CHANGE REQUEST (CR) COVERSHEET

Change Request Number: 23-136

Date Received: September 20, 2023

Title: Procurement Guidance T1.15A - Legal Review Threshold

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Policy and Guidance: (Please check only one box)

- | | |
|---|--|
| ☐ Policy | ☐ Procurement Tools and Resources |
| ☒ Guidance | ☐ Real Property Templates and Samples |
| ☐ Procurement Samples | ☐ Procurement Clauses |
| ☐ Procurement Templates | ☐ Real Property Clauses |
| ☐ Procurement Forms | ☐ Other Tools and Resources |
| ☐ Procurement Checklists | |

Summary of Change:

1) In T1.15A4.b, the legal review threshold for competitive matters requiring legal coordination is increased from the AMS Risk Threshold (currently defined as \$250,000) to \$500,000. Under the change, service organizations must coordinate with agency counsel on competitive acquisitions with an estimated total value of greater than \$500,000.

2) In T1.15A6, the change administratively revises "Assistant Chief Counsel for Procurement" to "Assistant Chief Counsel for Acquisition and Fiscal Law (AGC-500)."

Reason for Change:

1) The Assistant Chief Counsel for Acquisition and Fiscal Law, under the authority of AMS Policy 1.2.14, issued a memorandum dated September 1, 2023 that raised the T1.15A4.b legal review threshold from \$250,000 to \$500,000. (see attached memorandum)

2) The September 1, 2023 memo, footnote1, noted that the role referenced in AMS Policy 1.2.14 as "Assistant Chief Counsel for Procurement" is "presently called the Assistant Chief Counsel for Acquisition and Fiscal Law (AGC-500)." This Guidance change is made for consistency.

Development, Review, and Concurrence: AAP-110, AGC-500

Target Audience: FAA Acquisition Workforce

Briefing Planned: No.

ASAG Responsibilities: None.

Section / Text Location:

Procurement Guidance Sections - T1.15A4.b - Legal Coordination Guidance - General Coordination Guidance for Acquisition Actions and T1.15A6 - Exceptions and Waivers Revised.

The redline version must be a comparison with the current published FAST version.

☒ I confirm I used the latest published version to create this change / redline

or

☐ This is new content

Links: <https://fast.faa.gov/docs/procurementGuidance/guidanceT1.15.pdf>

Attachments:

GuidanceT1.15 final

GuidanceT1.15 redline

Other Files: N/A.

Redline(s):

Section Revised: T1.15 – Legal Coordination Guidance

Procurement Guidance - (~~7/2023~~10/2023)

[T1.15 - Legal Coordination Guidance](#)

[A Legal Coordination Guidance](#)

[1 Introduction](#) Revised 9/2020

[2 Applicability](#)

[3 Definitions](#) Revised 9/2020

[4 Coordination Guidance](#) Revised ~~4/2023~~10/2023

[5 Representation](#)

[6 Exceptions and Waivers](#) Revised 9/202010/2023

[B Clauses](#)

[C Procurement Forms](#) Added 9/2021

[D Procurement Samples](#) Added 9/2021

[E Procurement Templates](#) Added 9/2021

[F Procurement Tools and Resources](#) Added 9/2021

FAST Version 10/2023

CR 23-136

p. 2

T1.15 - Legal Coordination Guidance

A Legal Coordination Guidance

1 Introduction Revised 9/2020

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 laws 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. Please refer to AMS Policy Appendix E for a list of all applicable laws and regulations.

b. Therefore, the service organization will coordinate acquisition actions with FAA counsel on an ongoing basis throughout the acquisition lifecycle. 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.

2 Applicability

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

3 Definitions Revised 9/2020

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, Acquisition and Fiscal Law Division,; 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, i.e., after providing agency counsel accurate and complete information in sufficient time for review and the provision and legal advice.

c. As used in this Guidance, the term "Service Organization (s)" means: plan and manage resources, as assigned, to deliver services within their area of responsibility. Within the FAA, service organizations include any service unit or team, program office, directorate, or other organizational entity engaged in the delivery and sustainment of air traffic services, safety, security, regulation, certification, operation, commercial space transportation, airport development, or administrative service assets.

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.

e. As used in this Guidance, the term "Contracting Officer (CO)" includes both warranted 1170 Series Contracting Officer and warranted 1102 Series Contracting Officer.

4 Coordination Guidance Revised 4/202310/2023

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 and provide a copy for counsel.

b. General Coordination Guidance for Acquisition Actions

The service organization will coordinate with agency counsel on acquisition actions (including supporting documents) with a total estimated potential value greater than ~~the AMS risk threshold.~~ \$500,000. This coordination guidance applies to acquisition actions including, as examples, but not limited to:

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

(2) Solicitations, including Screening Information Requests (SIRs), 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) Acquisitions of Interests in Space and/or Land;
- (9) Debriefings, including responses to inquiries regarding awards from parties other than the awardee;
- (10) Task and delivery orders issued under contracts over the dollar value threshold specified above;
- (11) Modifications under contracts, including leases, that affect rights and obligations of either the Government or the Contractor (e.g., expanded scope of work, increased contract duration, increased contract cost, etc.);
- (12) Option exercises;
- (13) Award fee determinations;
- (14) Determinations as to contract adjustments;
- (15) Contract terminations;
- (16) Settlement of contract claims;
- (17) Liquidated damages;
- (18) Interpretation and determination of legal rights under contracts, orders or agreements;
- (19) 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;
- (20) 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;
- (21) Debarments and suspensions, nondisclosure agreements, centers of excellence and

individuals hired by contractors who received a "buy-out."

(22) Solicitation and contract matters involving state and local laws;

(23) Software license agreements;

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

(25) Interagency agreements;

(26) Grants (except Airport Improvement Grants);

(27) Cooperative agreements;

(28) Memoranda of Agreement and Memoranda of Understanding (excluding no-Cost Land On-Airport Memoranda of Agreement unless they contain non-standard clause language);

(29) Franchises;

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

(31) Unsolicited proposals;

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

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

(34) 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

For all non-competitive actions greater than the micro-purchase threshold, not previously approved by a formal procurement plan or implementation planning strategy document, or subject to a direct award under AMS 3.6.1.3.5 or 3.6.1.3.6, or procurements under the Ability/One program or Randolph-Sheppard Act under AMS 3.8.4.2, the Service Organization must coordinate with agency counsel on any single source justification. The service organization must also coordinate with agency counsel on procurements greater than the micro-purchase threshold that require a brand name mandatory rational basis or a waiver from the Acquisition Management System's competition policy. Finally, the Service Organization must coordinate with agency counsel on any rational basis justification for noncompetitive awards above \$25 million to SEDB 8(a) firms.

d. Coordination Guidance for Emergency Actions

Legal coordination is not required in the event of an emergency as covered in AMS 3.2.2.4.1.1, Emergencies.

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

The service organization will coordinate with agency counsel on the following matters, regardless of competition or dollar value 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 Forced Arbitration Injustice Repeal (FAIR) Act/A-76;
- (3) All purchases of Real Property;
- (4) Quit Claim and Warranty Deeds for the procurement of land;
- (5) Unauthorized agency commitments;
- (6) Proposals for innovative financing, such as advance payments, shared costs, or user fees;
- (7) Personal services contracts;
- (8) Consulting and advisory services
- (9) Matters relating to export controls or non-U.S. citizens;
- (10) Matters involving information, personnel or physical security;
- (11) All condemnation/Eminent Domain actions (e.g., declaration of taking, straight taking, etc.);
- (12) Sufficiency of title in real estate acquisitions;
- (13) All disposal actions where the FAA will transfer real property interest to a non-governmental agency or transfer agent;
- (14) 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.
- (15) Policy memoranda, procedures, regulations, orders, and guidance concerning acquisition matters;
- (16) Proposed legislation and testimony for legislative hearings on acquisition matters;
- (17) 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;
- (18) Any proposed deviation from a required clause;
- (19) Any agreements for Real Property with foreign governments or entities; and

(20) Any new acquisition of Housing.

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 Revised 9/202010/2023

At Headquarters, the Assistant Chief Counsel for Procurement, Acquisition and Fiscal Law (AGC-500), and at Regions and Centers, the Region or Center Counsel, may make written exceptions to the Legal Coordination Policy described in Section 1.2.14, adjust dollar minimums, or in appropriate cases, waive the Coordination Policy.

B Clauses

[view contract clauses](#)

C Procurement Forms Added 9/2021

Document Name

D Procurement Samples Added 9/2021

Document Name

E Procurement Templates Added 9/2021

Document Name

F Procurement Tools and Resources Added 9/2021

Document Name
