



UNITED STATES DEPARTMENT OF COMMERCE

Office of the General Counsel

OFFICE OF THE ASSISTANT GENERAL COUNSEL
FOR FINANCE AND LITIGATION
Washington, D.C. 20230

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MEMORANDUM FOR: Interagency Agreement Coordinators and Contacts

FROM: Mark Langstein
Chief, Contract Law Division 

SUBJECT: **CLD Guidance Memorandum No. 001:**
*Obtaining Contract Law Division's Legal Review of
Interagency Agreements for Assisted Acquisitions, issued
20120917*

This memorandum provides guidance to all Commerce Bureaus regarding the process for initiating and obtaining Contract Law Division's (CLD's) review of interagency agreements involving "Assisted Acquisitions." CLD review of such Assisted Acquisition agreements is required but has to date not been consistently sought. Therefore, while the requirement for obtaining CLD review has been long-standing, many line offices are unaware of the scope, nature and timing of such a review. The following guidance poses and answers the most frequent questions regarding CLD review of Assisted Acquisition agreements.

If you have additional questions, please do not hesitate to contact me.

WHAT IS AN ASSISTED ACQUISITION?

The Commerce Acquisition Manual (CAM) identifies an "Assisted Acquisition" as "a type of interagency acquisition where the parties enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on the requesting agency's behalf, such as awarding a contract, task order, delivery order, or blanket purchase agreement." CAM § 1.4.2.¹ Thus, Assisted Acquisition agreements are interagency agreements where the servicing agency will either award a contract or issue a task, delivery order or modification against a servicing agency existing contract in order to fulfill the Commerce component need.

Instances where the contract services are incidental to meeting the requirement are not considered to be Assisted Acquisitions. These may include contract awards as well as task and delivery orders against existing contracts. For example, where the servicing agency is using its own in-house staff to fulfill the Department's need, but some of the servicing agency clerical staff are contractor employees, these

¹ All references to CAM Sections are to CAM 1317.570, a copy of which is attached.

contracted-for services would be considered incidental to the agreement and it would not be considered as an Assisted Acquisition. However, if the servicing agency is using contractor staff—even if already in place—such as engineers, IT professionals or other contractor technical personnel to actually perform the requirement, the interagency agreement should be considered as an Assisted Acquisition and sent to CLD for review. When in doubt, feel free to contact the Division at 202.482.1122 to request assistance or advice.

WHICH TYPES OF ASSISTED ACQUISITION AGREEMENTS DOES CLD REVIEW?

The CAM requires CLD to provide “preliminary review and advice” of interagency agreements for Assisted Acquisitions when DOC is the requesting agency. CAM §§ 1.7.6 & 3.6.2. CLD must review all Assisted Acquisition agreements involving contract awards, modifications to existing contracts as well as award of task and delivery orders against existing contracts.

WHICH TYPES OF ASSISTED ACQUISITION AGREEMENTS DOES CLD NOT REVIEW?

If the Interagency Agreement is either merely exercising an option or adding money to an existing Interagency Agreement ***that has previously been reviewed by the Contract Law Division and is not changing or adding to the work to be accomplished***, it does not have to be reviewed.

For example, if the Statement of Work previously reviewed by CLD provided for the servicing agency to conceptualize and develop a system for the Department, but the initial interagency agreement only obligated money and authorized the concept activity, a subsequent interagency agreement obligating additional money and authorizing development of the system does not require review by the Division. However, if the scope of the initial interagency agreement was limited to conceptualization, then a subsequent interagency agreement, or amendment of the initial agreement providing for the development effort needs to be reviewed by CLD

WHY DO I HAVE TO HAVE MY ASSISTED ACQUISITION REVIEWED BY VARIOUS OGC OFFICES?

The General Law Division of the Office of General Counsel reviews all interagency agreements in the Department including those involving Assisted Acquisitions. Unlike CLD’s review, which focuses on the business and business legal aspects of the Assisted Acquisition, the General Law Division looks at Assisted Acquisition MOUs the same way they look at other MOUs, for general Administrative law issues such as appropriations law restrictions and requirements of the statutes governing the MOU. That Division’s review is distinct from CLD’s review. Your MOUs may also be subject to review by your Office of Chief Counsel who will ensure that it meets your agency specific statutory requirements.

WHAT IS THE PURPOSE AND TIMING OF CLD'S REVIEW?

The purpose of CLD's review is "to determine appropriate use and identify contractual issues" therefore, the review should occur "as soon as the requirement is identified as an assisted acquisition." CAM § 3.6.2.

CLD recognizes that, in most cases, Bureaus must meet schedule and time constraints in order to meet mission-critical goals and that Assisted Acquisition agreements may be a viable tool to meet those goals. Because CLD's review encompasses a determination regarding whether the Assisted Acquisition agreement is an appropriate vehicle for the proposed mission, early engagement with CLD is critical to ensure the Bureau meets its schedule constraints. Therefore, we encourage engagement and collaboration with CLD staff at the acquisition-planning phase to ensure smooth sailing.

WHAT DOCUMENTS MUST I SUBMIT FOR REVIEW?

Bureaus seeking CLD review of Assisted Acquisition agreements should submit, at a minimum, the following information in order to initiate the review:

- all parts of the Interagency Agreement, including the General Terms and Conditions section and the Requirements and Funding section, and the Roles and Responsibilities provisions, *ie* both Part A and Part B (CLD will not re-review a previously reviewed Part A, but may request the document for contextual purposes);
- the relevant specifications and statements of work;
- the Independent Government Cost Estimate
- the Contracting Officer's Determinations and Findings (D&F);
- sole source justifications (JOFOCs) if applicable
- draft evaluation criteria and other unique solicitation provisions

CLD recognizes that Bureaus may also engage CLD early in the acquisition-planning phase to determine whether the Assisted Acquisition is appropriate under specific circumstances; many or most of the documents identified immediately above would likely not be available at that point. Non-availability of any identified document should not deter the Bureau from seeking early engagement with CLD.

The D&F must be more than a mere checklist. There must be accompanying narrative explaining the circumstances either necessitating the Assisted Acquisition or why the services or supplies cannot be obtained as economically or conveniently by using the Department's in-house resources or existing contracting capability ***and*** why the use of an Assisted Acquisition is in the best interests of the Government.

A JOFOC is required in all instances where the servicing agency is not conducting a new full-and-open competition, or a task or delivery order competition among multiple award contract holders to meet the requesting component's needs. For example;

- (i) if the servicing agency is proposing to meet the requirement by issuing a modification to one of its existing contracts, and that contract was awarded using less than full-and-open competition, then a justification is required as to why only that source will meet the requestor's needs.
- (ii) If the servicing agency is proposing to meet the requirement by issuing a modification to an existing contract that was awarded under full-and-open competition, a justification is also required as to why it is important or beneficial to use that source, but it need not justify as to why only that particular source will meet the requestor's needs.
- (iii) If the servicing agency is proposing to meet the requirement through a task or delivery order competition among multiple award contract holders, no justification is required.

The file documentation should support all instances where no JOFOC is required. Requesting activities may feel free to request CLD's assistance or advice as to whether or not a JOFOC is required and in drafting one if needed. Please call CLD at 202.482.4732 to request advice or assistance.

WHAT CONTRACTUAL ISSUES DOES CLD CONSIDER DURING ITS REVIEW?

The following non-exhaustive list provides examples of issues CLD considers in its review:

- Is the proposed contractual arrangement appropriate to accomplish the need?
- Does the agreement include appropriate provision for data rights?
- Is all Government-furnished property identified and its control and disposition addressed?
- Do the solicitation documents pose legal risk for the Bureau, *e.g.*, are requirements stated unambiguously, are evaluation criteria clear, is there risk of protest?
- Does the Assisted Acquisition agreement provide adequate terms to permit the Bureau to ensure it has the business and financial information to maintain accountability for its funds and mission?
- Does the agreement include terms that provide for Bureau insight and oversight, if appropriate, over award decisions, protests, disputes, claims, settlements with contractors, contract changes, organizational conflicts of interest and any other terms needed by the Bureau to maintain accountability over its funds and mission?

Anecdotally, many Assisted Acquisition agreements submitted for review lack a "Roles and Responsibilities" section in the Requirements and Funding part of the

agreement that delineates many of the items identified above. Therefore, Bureaus are advised that a “Roles and Responsibilities” section should be included in the agreement that provides the Bureau with terms of assurance sufficient to maintain accountability over the Bureau’s funds and mission. See Office of Federal Procurement Policy Memorandum dated June 2008 advising agencies to delineate terms outlining the respective roles and responsibilities of the requesting and servicing agencies. The OFPP Memorandum includes an example of a division of roles and responsibilities that may not be sufficient to assure the Bureau adequate insight and oversight to assure mission and financial responsibility.

TO WHOM SHOULD I POSE MY REQUEST FOR CLD REVIEW?

All requests for CLD review of Assisted Acquisition agreements should be submitted to: contractlaw_assistedacq@doc.gov. You will receive a reply email, normally by the next business day indicating to whom the agreement has been assigned.

HOW LONG DOES CLD’S REVIEW TAKE?

CLD review of an Assisted Acquisition agreement generally takes seven to twelve business days. Requesting activities should take this into account in determining their need date.

WHAT HAPPENS NEXT?

The CLD review will indicate whether the interagency agreement is “cleared” or needs to be sent back to respond to issues identified during its review. Once all issues have been resolved satisfactorily, the interagency agreement can proceed to the next step in the clearance process, which is normally submission to the General Law Division. Because different Bureaus utilize different processes to track and clear interagency agreements, it is up to the Bureau submitter to make sure that the agreement proceeds appropriately.

Attachments: Commerce Acquisition Manual 1317.570
Office of Federal Procurement Policy dated June 2008