

GSA ORDER

SUBJECT: Office of General Counsel Legal Review

1. Purpose.

a. This order establishes minimum requirements for the Office of General Counsel (OGC) review of agency actions.

b. Heads of Services shall, as per par. 6.c. of this Order, establish supplemental legal review orders for their organizations. The OGC may establish supplemental legal review orders for different organizations or regions where necessary. Supplemental legal review orders may be used to specify additional actions or thresholds for legal services, but may not limit or reduce thresholds as provided in Appendix A to this Order.

2. Background. OGC, as defined in par. 3.d. of this Order, is the sole and exclusive authorized provider of legal services, review and advice to agency personnel in the course of agency operations, except for the Office of Inspector General (OIG), Civilian Board of Contract Appeals (BOCA), and as designated by the General Counsel or otherwise provided by statute. Agency officials may rely upon the advice of counsel on legal issues, but are responsible for other aspects of decisions, including the exercise of sound business and policy judgment.

3. Definitions.

a. "Legal review order" means this GSA Order together with all Appendices and modifications hereto.

b. "Legal services" means the process of providing legal advice and guidance to agency personnel, based on applicable laws, regulations, and policies, consistent with the best interests of the United States.

c. "Legal review" means a formal review by OGC legal counsel of a proposed action, evidenced in writing and as further described in paragraphs 6 and 7 of this Order. Any instructions in regulations or agency directives to obtain legal review,

advice, assistance, consultation, coordination, approval or concurrence regarding the legal sufficiency of a proposed action are deemed to be included within this definition.

d. "OGC" refers to the Office of General Counsel, its attorneys and staff employed in Central Office and in each regional office.

e. "Legal counsel" or "counsel" refers to the attorney(s) assigned by OGC to provide legal services, review and advice to the agency activity and/or personnel involved in a proposed action and/or matter.

4. Cancellation. GSA Order ADM 5000.4A, February 9, 1995, is cancelled.

5. Applicability. This Order applies to all GSA offices except the OIG and BOCA.

6. Legal Review.

a. Agency personnel are invited to seek the assistance of legal counsel for any matter, whether or not legal review is required by statute, regulation, or this Order. Early consultation with counsel is strongly encouraged in matters that may culminate in actions subject to legal review, matters expected to be contested, and/or where the exercise of sound business judgment suggests that consultation with counsel is appropriate.

b. Agency personnel are required to obtain legal review of all matters identified in Appendix A to this Order. These include, but are not limited to, matters where legal review is required by statute, regulation, Executive Order, Office of Management and Budget Circular, or GSA Orders or Directives.

c. Within ninety (90) calendar days of the effective date of this Order, the Public Buildings Service (PBS) and the Federal Acquisition Service (FAS) shall, with the guidance, assistance, and concurrence of OGC, create their own supplemental legal review orders as provided in par. 1.b. of this Order for each respective Service, to be attached hereto and identified as "PBS Appendix B" and "FAS Appendix C". Each said Appendix shall enumerate a listing of supplemental actions and/or activities to those identified in Appendix A which require legal review. PBS Appendix B shall be signed by the PBS Commissioner and General Counsel, and FAS Appendix C shall be signed by the FAS Commissioner and General Counsel. Said Appendices may be modified at any time by the mutual written agreement of the applicable Commissioner and General Counsel.

7. Time Period for Legal Review.

a. The legal review of routine matters submitted to OGC will be completed within three (3) business days, excluding the day of receipt. Counsel will notify the requester

within the 3-day period if further information is needed or if the 3-day period is insufficient under the circumstances to permit complete review.

b. Agency personnel are expected to include counsel early in matters which may culminate in actions requiring legal review, and provide realistic timeframes for counsel's participation in light of a specific transaction's complexity, legal issues, and the amount of documentation involved.

c. Agency personnel are responsible for providing the documents and information necessary for counsel to provide legal review under this Order. Counsel may request additional documents and information as they deem necessary and appropriate. Agency personnel are likewise responsible for being available to consult with counsel, respond to questions, and to otherwise facilitate OGC's review in order for the above time period to be met.

8. Waiver. Except for matters for which review is required by statute, regulation, Executive Order, Office of Management and Budget Circular, or GSA Orders and Directives, the General Counsel, Deputy General Counsel, appropriate Associate General Counsel or Regional Counsel may waive, in writing, legal review requirements on a case-by-case basis. Such a request for waiver must be made by the Head of Service or Staff Office (HSSO), Regional Administrator or Regional Commissioner, and may not be delegated. The General Counsel only, upon request of the HSSO only, may waive, in writing, legal review requirements on a class (more than one-time) basis. In either such event, waiver shall not constitute OGC approval or concurrence.

/S/
DAN TANGHERLINI
Administrator

Appendix A

Nonexclusive List of GSA Actions Required to Undergo Legal Review

As provided in par. 6.b. of this Order, legal review, approval, and/or concurrence shall be obtained for the following matters:

Contracting/Procurement Matters

1. Any acquisition action requiring the approval of the Head of the Contracting Activity (HCA) or higher, including but not limited to, justifications for other than full and open competition under FAR Part 6.
2. Acquisition Plans over \$20 million (GSAM 507.104(a)(8)).
3. Issuance of Acquisition Letters by the Senior Procurement Executive, HCAs, or their designees (GSAM 501.171-2(d)).
4. Contracts for personal services, including determinations whether a proposed service contract is for personal or non-personal services (FAR 37.103(a)(2)) and when specific statutory authority for a personal service contract is cited (FAR 37.104(e)).
5. Evaluating potential conflicts of interest in acquisitions (including organizational and consultant conflicts) and developing any necessary solicitation provisions and contract clauses (FAR 9.504(b)); development of courses of action for preventing potential personal conflicts of interest for contractor employees performing acquisition functions (FAR 3.1103(b)(3); FAR 3.1105).
6. Consideration, negotiation, and acceptance of unsolicited proposals.
7. Proposed contracting officer actions as a result of questioning a contractor's self-certification that it is not an inverted domestic corporation.
8. Review, acceptance, release or discharge of individual sureties, including the substitution of assets (FAR 28.203; FAR 28.203-1; FAR 28.203-3; FAR 28.203-4; FAR 28.203-5).
9. Determination whether the omission of certain clauses in patent and copyright contracts (including subcontracts) is consistent with commercial practice; proper handling of classified patent application materials; issues arising from notice requirements regarding patented technology under trade agreements; scope of licensing for copyrighted works (FAR 27).

10. Pre- or post-contract award mistakes in bids or offers (FAR 14.407-3(f); FAR 14.407-4(d)); review of written decisions regarding rescission or reformation of contracts due to mistakes (FAR 33.205(b)).
11. Contractual actions concerning defective certified cost or pricing data penalties (FAR 15.407-1(b)(7)).
12. All novations and change-of-name agreements (FAR 42.1203); changes of ownership, take-over agreements, and any request or attempt to assign a contract, claim, or award.
13. Ratification of unauthorized commitments (FAR 1.602-3; GSAM 501.602-3(e)).
14. Voiding and rescinding contracts, including those contracts tainted by misconduct or bribery (GSAM 503.705(a) and (b)).
15. Claims for breach of implied warranties (FAR 12.404(a)(3)).
16. Contract termination actions (both terminations for convenience and terminations for cause/default), including "no cost" terminations for convenience, terminations for cause of commercial item contracts (FAR 12.403(b)); determinations of which type of termination action is appropriate to take (i.e. default, convenience, or no cost-cancellation) (FAR 49.402-3(a)); actions involving seeking damages from contractors based on their default (FAR 49.402-7(b)); and solicitation for repurchase against a contractor's account after termination for default (GSAM 549.402-6(b)).
17. Suspension, debarment and related actions or recommendations regarding contractor integrity or responsibility (GSAM 509.406-3); continuation of contracts with debarred or suspended contractors (FAR 9.405-1).
18. Determinations of appropriate action when a contractor's certificate of final indirect costs is thought to be false (FAR 42.703-2(d)).
19. Determinations regarding the allowability of contractor costs in connection with settlements under the False Claims Act (FAR 31.205-47(c)(2)).
20. Processing of final payments in construction and building service contracts if a release of claims has not been received (GSAM 532.905-70); processing of progress payments where there is a concern about an encumbrance placed on government title (FAR 32.503-14(c); FAR 32.1009(c)).
21. Any actions affecting the rights or liabilities of contractors or other parties in bankruptcy proceedings (FAR 42.902).
22. Contracting Officer receipt of whistleblower complaints (FAR 3.907-3(c)).

23. Suspected violations and determinations of violations of the Gratuities clause (GSAM 503.2).
24. Granting relief from liability under a pre- or post-payment audit (41 C.F.R. § 102-118.370; 41 C.F.R. § 102-118.360).
25. Project Labor Agreements (GSAM 536.271(e)(3)).
26. Modification to the Examination of Records clause (GSAM 515.209-70(b)).
27. Acquiring utility services on a competitive basis including determinations regarding whether acquiring electric utility services on a competitive basis is consistent with state law governing the provision of electric utility service (FAR 41.201(e)).
28. Modification of construction contracts and determination of contractor liability due to design error or deficiencies in architect-engineer contracts (FAR 36.608).
29. Contractor labor relations matters (GSAM 522.101), including:
 - a) Withholding of payment and/or assessment of liquidated damages under the Contract Work Hours and Safety Standards Act (FAR 22.305, GSAM 522.302(a)(4));
 - b) Notifying or furnishing information to the Department of Labor pursuant to the Walsh-Healy Public Contracts Act (FAR 22.608, GSAM 522.608);
 - c) Questions regarding the applicability of the Equal Employment Opportunities clause (GSAM 522.803); and
 - d) Service Contract Act applicability (GSAM 522.1003-7), requests for hearings (GSAM 522.1021), and administrative limitations, variations, tolerances, and exemptions (GSAM 522.1003-4);

Claims and Litigation

30. Contracting officer final decisions under the Contract Disputes Act (FAR 33.211(a)(2)) and determinations of contracting officer authority to provide relief related to claims or other requests not within the Contract Disputes Act (FAR 33.205(a)).
31. Protests, disputes and appeals involving GSA, regardless of forum (FAR 33.1; GSAM 533.102; GSAM 533-103.2; GSAM 533-104; GSAM 212-1).
32. Matters relating to potential or pending litigation before Federal or State courts, the Civilian Board of Contract Appeals, any Administrative Law Judge or any other adjudicatory or dispute resolution forum, including any decision to initiate action as a plaintiff or petitioner, requests for Department of Justice

representation, or any settlements of any such matters, including tort claims (FAR 33.001; ADM P 5450.39D, Chapter 11 (Nov. 16, 2011)).

33. Any proposed disciplinary action or decision by an agency employee that informs a person or entity of a right of appeal or review of the decision by a judicial or quasi-judicial tribunal or another agency. This requirement does not apply to decisions to dismiss on procedural grounds an Equal Employment Opportunity complaint.
34. Requests (subpoenas) for the production of documents, testimony, or both, from current or former GSA employees (whether pursuant to GSA's "Touhy" regulations (41 C.F.R. § 105-60.604) or otherwise), as well as any other legal papers in which service is attempted on the agency or employees in their business capacity, whether or not the agency is named as a party to the proceedings (41 C.F.R. § 105-60.602(d)(3); ADM 5450.39D, Chapter 11 (November 16, 2011)).

Reporting and Non-Contract Document Review

35. Release of information to Members of Congress or their staffs regarding requests for classified material, confidential business information, contractor bid, proposal or source selection information, or information prejudicial to a competitive acquisition (GSAM 505.403).
36. Reports made to the President and Congress of Anti-Deficiency Act violations pursuant to 31 U.S.C. § 1351.
37. Controlled or legislative correspondence, or internal directives, requiring the signature of the Administrator, Deputy Administrator, HSSO or Regional Administrator.
38. All denials, partial denials, redactions of documents, or appeal decisions of Freedom of Information Act (FOIA) requests.
39. Any internal directive proposing to require legal review beyond that specified in this Order.
40. Any proposed, temporary, interim or final regulation, including the Federal Acquisition Regulation (FAR), the Federal Travel Regulation (FTR), the Federal Management Regulation (FMR), Federal Property Management Regulation (FPMR) and the General Services Administration Acquisition Manual (GSAM).
41. Releasing or withholding of audit reports (GSAM 542.7004).

Other

42. Acceptance of Non-Federal source travel and free attendance at widely-attended gatherings (PFM P 4290.1; 5 C.F.R. § 2635.204(g); ADM 5450.39D, Chapter 11 (November 16, 2011)).
43. Requests to the Department of Justice, Office of Legal Counsel or the Government Accountability Office (GAO) related to formal opinions on appropriation law or noncontract matters, except those made to the GAO by disbursing or certifying officials pursuant to 31 U.S.C. § 3529.
44. Any proposed collective bargaining agreement, memorandum of agreement and/or understanding with a union.
45. Certifying organizations and reviewing ethics and/or conflict of interest considerations for Intergovernmental Personnel Act (IPA) agreements (ADM 5450.39D, Chapter 11 (November 16, 2011)).
46. Federal Advisory Committee actions, including the closing of meetings (41 C.F.R. 102-3.155), decisions to provide less than 15 days notice for meetings (41 C.F.R. 105-54.301(j)), and reviewing and amending advisory committee charters (41 C.F.R. 105-54.306(c)).
47. Title approval before land acquisition (Regulations of the Attorney General Concerning Approval of the Title To Lands Acquired for and on Behalf of the United States and for Other Purposes (Oct. 2, 1970)).
48. Proposed agency actions in floodplains (ADM 1095.6 (Revalidated August 1, 2013)).
49. Any administrative (internal draft), Draft or Final Environmental Impact Statement (EIS) together with any proposed Record of Decision.
50. Action on indemnification requests regarding unusual hazardous or nuclear risks (FAR 50.104-3(b)).
51. All easements granted on GSA or government-retained real estate, real estate site acquisition purchase agreements, and real estate exchanges (ADM 5450.39D, Chapter 5 (November 16, 2011)).
52. All conveyance documents or proposed deed covenants or proposed Memorandums of Agreement for disposal or lease of properties eligible for listing on the National Register of Historic Places (ADM 1020.2 (October 19, 2003)).
53. Retention of proceeds from sale of property related to waste prevention and recycling programs (41 C.F.R. § 102-38.295(c)(5)).

54. Tax issues regarding Federal purchases (FAR 29; GSAM 529.101).

PBS Appendix B

This Appendix provides guidance on Public Buildings Service (PBS) matters required to undergo legal review and supersedes any prior issuances on the subject. These matters are in addition to those described elsewhere in this GSA Legal Review Order, including Appendix A, which are likewise subject to requirements for legal review.

Overview and Policy

Agency counsel in the Office of General Counsel (OGC) serve an important and valuable role in ensuring that PBS activities are conducted in a manner consistent with applicable law and regulation. Agency counsel also serve as trusted advisors whose advice and opinion on business, as well as legal, matters often contributes toward the accomplishment of PBS mission objectives.

The most effective way to ensure legal reviews are accomplished expeditiously is for agency counsel and PBS personnel to work together on a regular and continuous basis. Section 7 of the GSA Legal Review Order provides specific time periods for legal review of matters; generally three (3) business days, excluding the day of receipt, for routine matters. Alternative time periods for legal review, such as ones tied to milestones in a project schedule, may be used so long as such alternative time periods are agreed upon in advance of project launch by OGC project counsel and PBS.

In order to facilitate the timely and effective legal review of PBS matters, it is the policy of PBS that agency counsel be included as full and integral members of PBS project teams. This practice is mandated for all matters required by the GSA Legal Review Order, including this Appendix and Appendix A, to undergo legal review, and is strongly encouraged for other PBS matters which would benefit from the participation and inclusion of counsel.

PBS Matters Required to Undergo Legal Review

1. **Acquisition Plans**: Prior review of all such Plans where best value source selection procedures will be used, and the estimated total aggregate value of the contract(s) to be awarded is greater than \$10 million or, for leasing, the simplified lease acquisition threshold (SLAT).
2. **Source Selection Plans**: Pre-execution review of all such Plans, including amendments, where best value source selection procedures will be used, and the estimated total aggregate value of the contract(s) to be awarded is greater than \$10 million or, for leasing, the SLAT.
3. **Solicitations**:
 - a. Pre-issuance review of all solicitations where legal review of the Acquisition Plan and/or Source Selection Plan pertaining to the solicitation

- was required (excludes solicitations below the simplified acquisition threshold (SAT) or SLAT, and micropurchases).
- b. Pre-issuance review of all other solicitations (e.g. sealed bid solicitations; solicitations where award is to be made to the lowest priced, technically acceptable proposal; blanket purchase agreements (BPAs); and task or delivery orders placed under an existing contract) with an estimated total aggregate value of \$20 million or more.
 - c. Pre-issuance review of all construction, repair or alteration, or leasing solicitations for prospectus-level projects.
 - d. Amendments:
 - i. Pre-issuance review of all solicitation amendments where the underlying solicitation was not subject to legal review and the content of the proposed amendment, if included in the original solicitation, would have resulted in pre-issuance legal review.
 - ii. Pre-issuance review of all solicitation amendments proposing to cancel a procurement (excludes solicitations below the SAT, leases below the SLAT, and micropurchases).
 - iii. Pre-issuance review of all solicitation amendments where the underlying solicitation was the subject of pre-issuance legal review (including those covered by subparagraph 3(d)(i) above) and the proposed amendment:
 1. would be issued following the receipt of final proposal revisions (best and final offers);
 2. would make changes to minimum requirements of the solicitation, including the addition of scope; or
 3. would make other changes to the solicitation having a substantive impact on the competition, including the addition or deletion of, or changes to, evaluation factors or the basis for award.
4. Source Selection Reports: Pre-execution review of such Reports, including Source Selection Evaluation Board reports, Source Selection Authority decisions, Price Negotiation Memoranda, and Contracting Officer Findings and Determinations, where the underlying solicitation was the subject of legal review (including those covered by subparagraph 3(d)(i) above).
5. Awards: As noted above, agency counsel should be included as integral members of PBS project teams such that pre-award review of key documents would normally be accomplished as part of counsel's routine participation on the project team. Regardless, legal review is required for proposed contract awards (including BPA orders, multiple award schedule orders, and task/delivery orders):
- a. based on receipt of initial proposals where the contract value is greater than \$10 million or, for leasing, the SLAT;

- b. based on Justifications for Other Than Full and Open Competition for contracts (including exercise of contract options) above the SAT or leases above the SLAT;
- c. based on exemptions to "fair opportunity" requirements (FAR Part 16) for contracts above the SAT or leases above the SLAT;
- d. based on limited sources justifications (FAR Part 8) for contracts above the SAT or leases above the SLAT;
- e. involving energy savings performance contracts or utility energy service contracts (excludes awards for public utility services under 40 U.S.C. §501);
- f. involving architect/engineer selections under the Brooks Act for contracts above the SAT; and/or
- g. where the underlying solicitation was the subject of legal review (including those covered by subparagraph 3(d)(i) above), specifically including all lease awards above the SLAT where best value source selection procedures were used.

6. Contract Modifications: Pre-issuance review of proposed contract modifications:

- a. In general:
 - i. where the proposed modification includes any potential settlement of claims/disputes with the contractor; or
 - ii. where the proposed modification, if issued as a stand-alone solicitation/contract, would be subject to legal review as otherwise provided herein.
- b. For leases (and in addition to the matters described in subparagraph "a"):
 - i. for below-prospectus level leases, where proposed changes (e.g. increase in rent and/or amount of square footage) would potentially result in the lease exceeding the prospectus threshold;
 - ii. for prospectus level leases, increases in rent (excluding operating cost adjustments, tax escalations or other routine payments previously provided for under the lease), the amount of square footage, or lease term;
 - iii. all novations or assignments; and/or
 - iv. where a change to any of the standard General Clauses is proposed.

7. Other:

- a. All proposed denials of permits for use of space under the Cooperative Use Act;
- b. All conveyance instruments related to acquisitions, exchanges or disposals of property, including but not limited to deeds, easements, ground leases, licenses, and purchase and sale agreements (excluding

- no-cost "occasional use" licenses or permits issued under the Cooperative Use Act, and licenses or permits below the SAT);
- c. Interagency Agreements, including Reimbursable Work Agreements (RWAs) at dollar thresholds and other terms and conditions specified by PBS and/or agency policy;
 - d. Delegations of Authority to other Federal agencies;
 - e. Legislative proposals;
 - f. Financial reprogramming and fund transfer requests (Central Office only); and
 - g. Notices, demands, compliance orders or other requests from federal, state or local regulatory agencies.



Kfis E. Durmer
General Counsel

MARCH 12, 2015

Date



Norman Dong
Commissioner
Public Buildings Service

MARCH 10, 2015

Date

FAS Appendix C

This Appendix provides guidance on Federal Acquisition Service (FAS) matters required to undergo legal review and supersedes any prior issuances on the subject. These matters are in addition to those described elsewhere in this GSA Legal Review Order, including Appendix A, which are likewise subject to requirements for legal review.

1. Justifications for Other than Full and Open Competition (JOFOCs): All other than full and open competition acquisitions under FAR Part 6 or FAR Subpart 8.4 (Schedules) over \$650,000 for all Regions or over \$12.5M for Central Office. All exceptions to fair opportunity under FAR Subpart 16.5 which have a combined total aggregate value (including all option periods) exceeding \$5M.
2. Solicitations: Pre-issuance review of all transactions (contracts, Blanket Purchase Agreements (BPA) or Task or Delivery Orders placed under an existing contract) with an aggregate value (including all option periods) exceeding \$5M, excluding multiple award schedule solicitations.
3. Pre-Award Review: Pre-award review of all transactions (contracts or Task/Delivery Orders) with an aggregate award value (including all option periods) exceeding \$5M, excluding multiple award schedule contracts.
4. Blanket Purchase Agreements ("BPAs"): Regardless of dollar value all Government-wide BPA competitions and Federal Strategic Sourcing Initiative BPA competitions.
5. Modifications/Changes: All contract modifications/changes for which the value of the modification/change exceeds \$5M.
6. Statements of Work Involving Construction: Statements of work involving ancillary repair and alteration services.



Kris E. Durmer
General Counsel



Date



Thomas A. Sharpe
Commissioner
Federal Acquisition Service



Date