

## Federal Acquisition Regulation

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to identify themselves. They must also ensure that all documents or reports produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed.

[61 FR 2630, Jan. 26, 1996]

### 37.115 Uncompensated overtime.

#### 37.115-1 Scope.

The policies in this section are based on Section 834 of Public Law 101-510 (10 U.S.C. 2331).

[62 FR 44815, Aug. 22, 1997]

#### 37.115-2 General policy.

(a) Use of uncompensated overtime is not encouraged.

(b) When professional or technical services are acquired on the basis of the number of hours to be provided, rather than on the task to be performed, the solicitation shall require offerors to identify uncompensated overtime hours and the uncompensated overtime rate for direct charge Fair Labor Standards Act—exempt personnel included in their proposals and subcontractor proposals. This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.

(c) Contracting officers must ensure that the use of uncompensated overtime in contracts to acquire services on the basis of the number of hours provided will not degrade the level of technical expertise required to fulfill the Government's requirements (see 15.305 for competitive negotiations and 15.404-1(d) for cost realism analysis). When acquiring these services, contracting officers must conduct a risk assessment and evaluate, for award on that basis, any proposals received that reflect factors such as:

(1) Unrealistically low labor rates or other costs that may result in quality or service shortfalls; and

(2) Unbalanced distribution of uncompensated overtime among skill levels and its use in key technical positions.

[62 FR 44815, Aug. 22, 1997, as amended at 64 FR 51842, Sept. 24, 1999]

### 37.115-3 Solicitation provision.

The contracting officer shall insert the provision at 52.237-10, Identification of Uncompensated Overtime, in all solicitations valued above the simplified acquisition threshold, for professional or technical services to be acquired on the basis of the number of hours to be provided.

[62 FR 44815, Aug. 22, 1997]

## Subpart 37.2—Advisory and Assistance Services

SOURCE: 60 FR 49722, Sept. 26, 1995, unless otherwise noted.

### 37.200 Scope of subpart.

This subpart prescribes policies and procedures for acquiring advisory and assistance services by contract. The subpart applies to contracts, whether made with individuals or organizations, that involve either personal or nonpersonal services.

#### 37.201 Definition.

*Covered personnel* means—

(1) 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 under 5 U.S.C. 2105;

(v) The head of a Government-controlled corporation; or

(vi) An adjutant general appointed by the Secretary concerned under 32 U.S.C. 709(c).

(2) A member of the Armed Services 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.

[60 FR 49722, Sept. 26, 1995, as amended at 65 FR 24320, Apr. 25, 2000; 66 FR 2133, Jan. 10, 2001]

#### 37.202 Exclusions.

The following activities and programs are excluded or exempted from

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the definition of advisory or assistance services:

(a) Routine information technology services unless they are an integral part of a contract for the acquisition of advisory and assistance services.

(b) Architectural and engineering services as defined in the Brooks Architect-Engineers Act (Section 901 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 541).

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

[60 FR 49722, Sept. 26, 1995, as amended at 61 FR 41470, Aug. 8, 1996]

#### 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, decision-making, 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;

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(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.* Contractors may not be paid for services to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless—

(1) Neither covered personnel from the requesting agency, nor from another agency, with adequate training and capabilities to perform the required proposal evaluation, are readily available and a written determination is made in accordance with 37.204;

(2) The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in Section 23 of the Office of Federal Procurement Policy (OFPP) Act as amended (41 U.S.C. 419) and the work placed under the FFRDCOs contract meets the criteria of 35.017-3; or

(3) Such functions are otherwise authorized by law.

#### 37.204 Guidelines for determining availability of personnel.

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

(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,