

## Federal Acquisition Regulation

## 41.202

the funds appropriated by that Act or any other Act with respect to any fiscal year by any department, agency, or instrumentality of the United States, may be used for the purchase of electricity by the Government in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements.

(2) The Act does not preclude—

(i) The head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287 (which pertains to the subject of shared energy savings including cogeneration);

(ii) The Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 (which pertains to contracts for energy or fuel for military installations including the provision and operation of energy production facilities); or

(iii) The Secretary of a military department from purchasing electricity from any provider when the utility or utilities having applicable state-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

(3) Additionally, the head of a Federal agency may—

(i) Consistent with applicable state law, enter into contracts for the purchase or transfer of electricity to the agency by a non-utility, including a qualifying facility under the Public Utility Regulatory Policies Act of 1978;

(ii) Enter into an interagency agreement, pursuant to 41.206 and 17.5, with a Federal power marketing agency or the Tennessee Valley Authority for the transfer of electric power to the agency; and

(iii) Enter into a contract with an electric utility under the authority or tariffs of the Federal Energy Regulatory Commission.

(e) Prior to acquiring electric utility services on a competitive basis, the contracting officer shall determine, with the advice of legal counsel, by a

market survey or any other appropriate means, e.g. consultation with the state agency responsible for regulating public utilities, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements. Proposals from alternative electric suppliers shall provide a representation that service can be provided in a manner consistent with section 8093 of Public Law 100-202 (see 41.201(d)).

[59 FR 67018, Dec. 28, 1994, as amended at 60 FR 34759, July 3, 1995; 61 FR 39190, July 26, 1996; 64 FR 10533, Mar. 4, 1999]

### 41.202 Procedures.

(a) Prior to executing a utility service contract, the contracting officer shall comply with parts 6 and 7 and 41.201 (d) and (e). In accordance with parts 6 and 7, agencies shall conduct market surveys and perform acquisition planning in order to promote and provide for full and open competition provided that the contracting officer determines that any resultant contract would not be inconsistent with applicable state law governing the provision of electric utility services. If competition for an entire utility service is not available, the market survey may be used to determine the availability of competitive sources for certain portions of the requirement. The scope of the term “entire utility service” includes the provision of the utility service capacity, energy, water, sewage, transportation, standby or back-up service, transmission and/or distribution service, quality assurance, system reliability, system operation and maintenance, metering, and billing.

(b) In performing a market survey (see 7.101), the contracting officer shall consider, in addition to alternative competitive sources, use of the following:

(1) GSA areawide contracts (see 41.204);

(2) Separate contracts (see 41.205); and

(3) Interagency agreements (see 41.206).

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(c) When a utility supplier refuses to execute a tendered contract as outlined in 41.201(b), the agency shall obtain a written definite and final refusal signed by a corporate officer or other responsible official of the supplier (or if unobtainable, document any unwritten refusal), and transmit this document, along with statements of the reasons for the refusal and the record of negotiations, to GSA at the address specified at 41.301(a). Unless urgent and compelling circumstances exist, the contracting officer shall notify GSA prior to acquiring utility services without executing a tendered contract. After such notification, the agency may proceed with the acquisition and pay for the utility service under the provisions of 31 U.S.C. 1501(a)(8)—

(1) By issuing a purchase order in accordance with 13.302; or

(2) By ordering the necessary utility service and paying for it upon the presentation of an invoice, provided that a determination is approved by the head of the contracting activity that a written contract cannot be obtained and that the issuance of a purchase order is not feasible.

(d) When obtaining service without a bilateral written contract, the contracting officer shall establish a utility history file on each acquisition of utility service provided by a contractor. This utility history file shall contain, in addition to applicable documents in 4.803, the following information:

(1) The unsigned, tendered contract and any related letter of transmittal.

(2) The reasons stated by the utility supplier for not executing the tendered contract, the record of negotiations, and a written definite and final refusal by a corporate officer or other responsible official of the supplier (or if unobtainable, documentation of unwritten refusal).

(3) Services to be furnished and the estimated annual cost.

(4) Historical record of any applicable connection charges.

(5) Historical record of any applicable ongoing capital credits.

(6) A copy of the applicable rate schedule.

(e) If the Government obtains utility service pursuant to paragraph (c) of this section, the contracting officer

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shall, on an annual basis beginning from the date of final refusal, take action to execute a bilateral written contract. The contracting officer shall document the utility history file with the efforts made and the agency shall notify GSA, in writing, if the utility continues to refuse to execute a bilateral contract.

[59 FR 67018, Dec. 28, 1994, as amended at 62 FR 64926, Dec. 9, 1997]

#### 41.203 GSA assistance.

(a) GSA will, upon request, provide technical and acquisition assistance, or will delegate its contracting authority for the furnishing of the services described in this part for any Federal agency, mixed-ownership Government corporation, the District of Columbia, the Senate, the House of Representatives, or the Architect of the Capitol and any activity under the Architect's direction.

(b) Agencies seeking assistance shall provide, upon request by GSA, the information listed in 41.301.

#### 41.204 GSA areawide contracts.

(a) *Purpose.* GSA enters into areawide contracts (see 41.101) for use by Federal agencies. Areawide contracts provide a pre-established contractual vehicle for ordering utility services under the conditions in paragraph (c)(1) of this section.

(b) *Features.* (1) Areawide contracts generally provide for ordering utility service at rates approved and/or established by a regulatory body and published in a tariff or rate schedule. However, agencies are permitted to negotiate other rates and terms and conditions of service with the supplier (see paragraph (c) of this section). Rates other than those published may require the approval of the regulatory body.

(2) Areawide contracts are negotiated with utility service suppliers for the provision of service within the supplier's franchise territory or service area.

(3) Due to the regulated nature of the utility industry, as well as statutory restrictions associated with the procurement of electricity (see 41.201(d)), competition is typically not available within the entire geographical area