

Proposed Rescission of Office of Federal Procurement Policy Policy Letters



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON D.C. 20503

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy

ACTION: Proposed rescission of Office of Federal Procurement Policy (OFPP) Policy Letters 77-2, 78-2, 78-3, 78-4, 79-1, 79-2, 80-3, 80-6, 80-8, 81-1, 81-2, 82-1, 83-1, 83-2, 83-3, 84-1, 85-1, 89-1, 91-2, 91-4, 92-5, and 95-1.

SUMMARY: OMB is undertaking a thorough review of its government-wide procurement issuances. Based on this review, OMB requests comments on the proposed rescission of the following Office of Federal Procurement Policy (OFPP) Policy Letters: 77-2, Section 502(c) of P.L. 95-89; 78-2, Preventing "Wage Busting" for Professionals: Procedures for Evaluating Contractor Proposals for Service Contracts; 78-3, Requests for Disclosure of Contractor-Supplied Information Obtained in the Course of a Procurement; 78-4, Field Contract Support Cross-Servicing Program; 79-1, Implementation of Section 15(k) of the Small Business Act, as amended: Office of Small and Disadvantaged Business Utilization; 79-2, Boards of Contract Appeals: Position Allocation Pursuant to Public Law 95-563; 80-3, Regulatory Guidance on P.L. 95-563, the Contract Disputes Act of 1978; 80-6, Regulatory Guidance on Section 221 of Public Law 95-507; 80-8, Establishment of Procurement Data Reporting Requirements to Comply with Public Law 96-39 (as amended by Transmittal Memoranda Nos. 1, 2, and 3); 81-1, Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases; 81-2, Policy Guidance for the Labor Surplus Area Programs; 82-1, Policy Guidance Concerning Government-wide Debarment, Suspension, and Ineligibility; 83-1, Withholding of Funds from Construction Contract Progress Payments; 83-2, Publicizing the Development of Procurement Policies and Regulations; 83-3, Procurement of Architect-Engineer Services, 84-1, Federally Funded Research and Development Centers; 85-1, Federal Acquisition Regulations System; 89-1, Conflict of Interest Policies Applicable to Consultants; 91-2, Service Contracting; 91-4, Use of Irrevocable Letters of Credit; 92-5, Past Performance Information; and 95-1, Subcontracting Plans for Companies Supplying Commercial Items.

There have been substantial changes to the body of acquisition law and regulations since many of these policy documents were issued. As indicated in the Supplementary Information below, the requirements and provisions of the OFPP Policy Letters listed above have been incorporated in the Federal Acquisition Regulation (FAR), 48 C.F.R. 1, or for other reasons have either been superseded or are no longer necessary.

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DATES: Persons who wish to comment on the proposed rescission of any of the OFPP Policy Letters should submit their comments no later than November 24, 1999.

ADDRESSES: Comments should be addressed to Michael Gerich, Office of Federal Procurement Policy, Room 9013 New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Michael Gerich, Office of Federal Procurement Policy, 202-395-3501. Copies of the OFPP Policy Letters can be obtained at the ARNet world wide website, http://www.arnet.gov/References/Fwd_Index.html.

SUPPLEMENTARY INFORMATION: OFPP has been a leader in overall acquisition reform. One theme of acquisition reform is less reliance on regulation and more reliance on streamlined, customer-oriented, acquisition practices to improve support for agency missions. In keeping with this overall theme, OFPP is reviewing all of its policy letters, memoranda, and other issuances with the intent to: rescind those that are essentially covered by other regulations or policy documents; issue new policy letters and similar documents sparingly and only when necessary; and issue "best practices" instead. There have been substantial changes to the body of acquisition law and regulations since many of these policy documents were issued.

OFPP has recently completed a review of all of its policy issuances for possible rescission, by comparing them with relevant statutory provisions and sections of the Federal Acquisition Regulation (FAR). The rescissions proposed in this notice reflect OFPP's preliminary conclusion that the FAR, as written, contains the current policy. Any policy embodied in the policy letters proposed for rescission by this notice that is not reflected in the current FAR has been either superseded by subsequent statutory changes or is otherwise no longer necessary. No substantive FAR change is required by this action.

Earlier this year, OFPP rescinded Policy Letter 79-4, Contracting for Motion Picture Productions and Videotape Productions. 64 FR 8631 (February 22, 1999). On April 2, 1999, OFPP published notice in the *Federal Register* requesting comments on two proposed policy letters: Policy Letter 99-X, Policy on Promoting Subcontracting Opportunities and Administering Subcontracting Plans (64 FR 16001); and Policy Letter 99-1, Government-Wide Small Business, HUBZone Small Business, Small Disadvantaged Business, and Women-Owned Small Business Goals for Procurement Contracts (64 FR 16003). Those

two proposed policy letters would supersede OFPP Policy Letters 80-1, 80-2, 80-4, and 91-1. In this notice, OFPP is proposing to rescind an additional 22 policy letters, for the reasons explained below.

OFPP Policy Letter 77-2, Section 502(c) of P.L. 95-89

Section 502(c) of Public Law 95-89 amended the Small Business Act (15 U.S.C. 631 et seq.) to allow certain nonprofit agencies employing people who are blind or severely disabled to compete for agency procurements conducted during fiscal year 1978 that would otherwise have been reserved exclusively for competition among small businesses. Policy Letter 77-2 implemented section 502(c). Similar statutory provisions were enacted in subsequent years. For example, section 133 of Public Law 100-590 (November 3, 1988) (102 Stat. 3005) authorized such nonprofit agencies to compete in procurements otherwise set aside for small businesses in fiscal years 1989 through 1993. Section 305 of Public Law 103-403, the Small Business Administration Reauthorization and Amendments Act of 1994, revived this authority to compete for fiscal year 1995. The statutory authority has expired.

OFPP Policy Letter 78-2, Preventing "Wage Busting" for Professionals: Procedures for Evaluating Contractor Proposals for Service Contracts

OFPP Policy Letter 78-2 addressed "wage busting" practices of government contractors who employ professional employees who traditionally have not been represented by union collective bargaining agreements. 78-2 required contracting agencies to evaluate applicable proposals from offerors by taking into account the cost realism of the contractor's proposed personnel compensation plan. Unrealistically low labor rates proposed for professional employees could indicate a lack of understanding of the resources required to perform high quality contract work on an uninterrupted basis. 78-2 was superseded, in purpose, by the provisions of 10 U.S.C. 2331 (Contracts for professional and technical services) which is implemented in FAR 37.115 (Uncompensated overtime) and FAR 52.237-10 (Identification of Uncompensated Overtime).

OFPP Policy Letter 78-3, Requests for Disclosure of Contractor-Supplied Information Obtained in the Course of a Procurement

OFPP Policy Letter 78-3 prescribed a uniform approach to handling requests filed under the Freedom of Information Act for information disclosed by government contractors and offerors. 78-3 was superseded, in purpose, by FAR Subpart 24.2, which implements statutory provisions at 10 U.S.C. 2305(g) and 41 U.S.C. 253b(m).

OFPP Policy Letter 78-4, Field Contract Support Cross-Servicing Program

Policy Letter 78-4 encouraged agencies that require contract support services (e.g., contract administration, audit services) from field offices to use cross-servicing arrangements with existing contract administration and contract audit organizations of other agencies. The Policy Letter was

intended to treat contractors more consistently and, where possible, preclude duplication of effort attributable to multiple agency reviews, inspections, and examination of contractor records. The provisions of the Policy Letter were incorporated in FAR Subpart 42.1.

OFPP Policy Letter 79-1, Implementation of Section 15(k) of the Small Business Act, as amended: Office of Small and Disadvantaged Business Utilization

Section 15(k) of the Small Business Act (15 U.S.C. 644(k)) established an Office of Small and Disadvantaged Business Utilization (OSDBU) in each contracting agency to implement and execute the functions and duties under sections 8 and 15 of the Small Business Act which relate to such agency. Policy Letter 79-1 provided guidance on the organization and function of the OSDBUs. The provisions of Policy Letter 79-1 were incorporated in FAR subsections 19.201(c) and (d).

OFPP Policy Letter 79-2, Boards of Contract Appeals: Position Allocation Pursuant to Public Law 95-563

Policy Letter 79-2 made an initial allocation of positions for agency boards of contract appeals pursuant to Public Law 95-563, the Contract Disputes Act of 1978. Section 8(a) of the Contract Disputes Act of 1978, as amended, (41 U.S.C. 607(a)) states that a board of contract appeals may be established within an executive agency, when the agency head, after consultation with the Administrator for Federal Procurement Policy, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board. Since issuance of Policy Letter 79-2 over 20 years ago, there has been little need for guidance in this area. OFPP will issue new guidance, if necessary.

OFPP Policy Letter 80-3, Regulatory Guidance on P.L. 95-563, the Contract Disputes Act of 1978

Policy Letter 80-3 provided guidance on developing regulations to implement provisions of the Contract Disputes Act of 1978, including resolution of contract claims, contractor certification requirements, payment of interest on contractor claims, and a contract disputes clause. The provisions of Policy Letter 80-3 were incorporated in FAR Subpart 33.2 and the contract disputes clause at FAR 52.233-1.

OFPP Policy Letter 80-6, Regulatory Guidance on Section 221 of Public Law 95-507

Policy Letter 80-6 provided regulatory guidance on section 15(j) of the Small Business Act (15 U.S.C. 644(j)), which set aside small purchase procurements for small businesses. Section 15(j) was amended to apply the set aside provisions to agency purchase of goods or services that have an anticipated value greater than \$2,500 but not greater than \$100,000. The regulatory guidance in Policy Letter 80-6, as amended by the statutory changes, is implemented by the provisions of FAR 19.502-2.

OFPP Policy Letter 80-8, Establishment of Procurement Data Reporting Requirements to Comply with Public Law 96-39 (as amended by Transmittal Memoranda Nos. 1, 2, and 3).

Policy Letter 80-8 established procurement data reporting requirements. Transmittal Memoranda Nos. 1, 2, and 3 amended those reporting requirements. The provisions of Policy Letter 80-8 and the Transmittal Memoranda are implemented in FAR Subpart 4.6 and the FPDS Reporting Manual described therein.

OFPP Policy Letter 81-1, Procurement Procedures, Advance Procurement Planning, and Review of End-of-Year Purchases

Policy Letter 81-1 required agencies to establish advance procurement planning procedures to allow sufficient lead time to prepare procurement solicitations, obtain and evaluate bids or proposals, audit, negotiate, and make contract awards in an orderly manner. The Policy Letter also required agencies to develop procedures for review of procurements, particularly major procurements, made in the last quarter to assure they are consistent with advance procurement plans. The provisions of Policy Letter 81-1 were essentially incorporated in FAR Part 7 and partially superseded by procedures found in Part 3 of OMB Circular A-11, Planning, Budgeting, and Acquisition of Capital Assets, and the Capital Programming Guide which further integrate the budget and procurement processes.

OFPP Policy Letter 81-2, Policy Guidance for the Labor Surplus Area Programs (as amended by Supplement No. 1)

Policy Letter 81-2, as amended by Supplement No. 1, provided guidance on implementing subsections 15(d), (e), and (f) of the Small Business Act (as amended and added by section 117 of Public Law 96-302, July 2, 1980) that gave priority in awarding contracts and subcontracts to firms performing in areas of unemployment or underemployment known as labor surplus areas. Subsection 7101(a) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, October 13, 1994) deleted subsections 15(e) and (f) from the Small Business Act, thus removing the labor surplus area set-aside and subcontracting programs. The statutory changes were implemented in FAR Part 19. For more information, see the final rule amendment to the FAR published in the *Federal Register* on September 18, 1995 (60 FR 48258).

OFPP Policy Letter 82-1, Policy Guidance Concerning Government-wide Debarment, Suspension, and Ineligibility

Policy Letter 82-1 established policies and procedures for debarment and suspension of persons from contracting with Federal Departments and agencies. The provisions of Policy Letter 82-1 are implemented in FAR Subpart 9.4.

OFPP Policy Letter 83-1, Withholding of Funds from Construction Contract Progress Payments

Policy Letter 83-1 provided guidance on retention or withholding of funds from progress payments made under Federal construction contracts. The provisions of the Policy Letter are implemented in FAR section 32.103.

OFPP Policy Letter 83-2, Publicizing the Development of Procurement Policies and Regulations

Policy Letter 83-2 established uniform criteria and procedures for soliciting the views of all interested parties in the development by executive Departments and agencies of procurement policies, regulations, procedures and forms. The provisions of Policy Letter 83-2 were codified in section 22 of the OFPP Act, as amended (41 U.S.C. 418b), and implemented in FAR Subpart 1.5.

OFPP Policy Letter 83-3, Procurement of Architect-Engineer Services

Policy Letter 83-3 provided guidance on procurement of architect-engineer services under the Brooks Architect-Engineers Act (Public Law 92-582, 40 U.S.C. 541 et seq.). The Policy Letter delineated the type of services to be procured using source selection procedures prescribed by the Brooks Architect-Engineers Act versus using standard source selection procedures. The provisions of Policy Letter 83-3 were implemented by FAR section 36.601.

OFPP Policy Letter 84-1, Federally Funded Research and Development Centers

Policy Letter 84-1 established policy for the establishment, use, periodic review, and termination of sponsorship of Federally Funded Research and Development Centers (FFRDCs). The provisions of Policy Letter 84-1 were implemented by FAR section 35.017.

OFPP Policy Letter 85-1, Federal Acquisition Regulations System

Policy Letter 85-1 implemented provisions of the OFPP Act (Public Law 93-400 as amended, 41 U.S.C. 401 et seq.) concerning the single system of simplified Government-wide procurement regulations now known as the Federal Acquisition Regulation (FAR) (48 C.F.R. 1). The Policy Letter covered establishment of the FAR System, FAR maintenance, and resolution of differences among executive agencies in development of FAR provisions. The provisions of Policy Letter 85-1 were codified in sections 6 and 25 of the OFPP Act (41 U.S.C. 405 and 41 U.S.C. 421, respectively) and incorporated in FAR Subparts 1.1, 1.2, and 1.3.

OFPP Policy Letter 89-1, Conflict of Interest Policies Applicable to Consultants

Policy Letter 89-1 established policy and procedures on applying conflict of interest standards to persons who provide consulting services to the government, pursuant to section 8141 of the 1989 Department of Defense Appropriations Act, Public Law 100-463, 102 Stat. 2270-47 (October 1, 1988). The provisions of Policy Letter 89-1 were incorporated in FAR Subpart 9.5.

OFPP Policy Letter 91-2, Service Contracting

OFPP Policy Letter 91-2 established policy for acquiring services by contract. It encouraged the use of "performance-based contracting," which uses standards to measure quality and timeliness of contractor performance and surveillance plans to assure that the standards are met. Policy Letter 91-2 is implemented in FAR Subpart 37.6. For more information on this subject, see OFPP's "A Guide to Best Practices for Performance-Based Service Contracting" (October 1998) at the ARNet world wide website, <http://www.arnet.gov/BestP/PPBSC/BestPPBSC.html>.

OFPP Policy Letter 91-4, Use of Irrevocable Letters of Credit

OFPP Policy Letter 91-4 established policy for use of irrevocable letters of credit in lieu of sureties for Federal construction contracts requiring Miller Act bonds. The Miller Act (40 U.S.C. 270a et seq.) requires the use of performance and payment bonds for Federal construction contracts in excess of \$25,000. Policy Letter 91-4 determined that: irrevocable letters of credit serve much of the same function and provide the same redeemable value as bonds, postal orders, and certified checks; Federal agencies are authorized to accept such letters; and their usage in lieu of sureties would help to achieve greater access by small and small disadvantaged businesses to Federal construction contracts. The Policy Letter permitted agencies to use irrevocable letters of credit in lieu of sureties for Federal construction contracts requiring Miller Act bonds. Policy Letter 91-4 is implemented in FAR section 28.204-3.

OFPP Policy Letter 92-5, Past Performance Information

Policy Letter 92-5 established requirements for evaluating contractor performance and for using past performance information in the contractor selection process. The provisions of Policy Letter 92-5 have been implemented in FAR Subpart 42.15 and FAR sections 15.304 and 15.305. For more information on this subject, see "A Guide to Best Practices for Past Performance" (May 1995) at the ARNet world wide website, <http://www.arnet.gov/BestP/BestPract.html>.

OFPP Policy Letter 95-1, Subcontracting Plans for Companies Supplying Commercial Items

Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires that each contract that exceeds \$500,000 (\$1 million in the case of construction) and that offers subcontracting opportunities include a requirement that the apparently successful offeror negotiate a subcontracting plan which shall become a material part of the contract. Policy Letter 95-1 revised the policy on subcontracting plans to reduce the burden of government-unique requirements on prime contractors and subcontractors that supply commercial items. The Policy Letter allows such contractors and subcontractors to meet the requirements of Section 8(a) of the Small Business Act by submitting an annual "commercial plan" rather than an individual contract-by-contract or subcontract-by-subcontract plan. A commercial plan is

a subcontracting plan that covers a contractor's or subcontractor's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line). The provisions of Policy Letter 95-1 were implemented in FAR sections 19.701, 19.704(d), and 19.705-7.

OFPP requests comments on these proposed rescissions.

Deidre A. Lee

Administrator