Part 39 - Acquisition of Information Technology

Parent topic: Federal Acquisition Regulation

39.000 Scope of part.

This part prescribes *acquisition* policies and procedures for use in acquiring—

(a) *Information technology*, including financial management systems, consistent with other parts of this regulation, OMB Circular No.A-127, Financial Management Systems and OMB Circular No.A-130, Management of Federal Information Resources.

(b) *Information and communication technology* (see 2.101(b)).

39.001 Applicability.

This part applies to the *acquisition* of—

(a)*Information technology* by or for the use of agencies except for *acquisitions* of *information technology* for *national security systems*. However, *acquisitions* of *information technology* for *national security systems shall* be conducted in accordance with 40 U.S.C. 11302 with regard to requirements for performance and results-based management; the role of the agency Chief Information Officer in *acquisitions*; and accountability. These requirements are addressed in OMB Circular No. A-130; and

(b)*Information and communication technology* by or for the use of agencies or for the use of the public, unless an exception (see 39.204) or an exemption (see 39.205) applies. See 36 CFR 1194.1.

39.002 Definitions.

As used in this part-

Modular contracting means use of one or more contracts to acquire *information technology* systems in successive, interoperable increments.

National security system means any telecommunications or information system operated by the *United States* Government, the function, operation, or use of which-

(1) Involves intelligence activities;

(2) Involves cryptologic activities related to national security;

(3) Involves command and control of military forces;

(4) Involves equipment that is an integral part of a weapon or weapons system; or

(5) Is critical to the direct fulfillment of military or intelligence missions. This does not include a system that is to be used for routine administrative and business applications, such as payroll, finance, logistics, and personnel management applications.

Subpart 39.1 - General

39.101 Policy.

(a)

(1) In acquiring *information technology*, agencies *shall* identify their requirements pursuant to-

(i) OMB Circular A-130, including consideration of security of resources, protection of privacy, national security and *emergency* preparedness, accessibility for individuals with disabilities, and

energy efficiency;

(ii) Electronic Product Environmental Assessment Tool (EPEAT®) standards (see 23.704);

(iii) Policies to enable power management, double-sided printing, and other energy-efficient or *environmentally preferable* features on all agency electronic *products*; and

(iv) Best management practices for energy-efficient management of servers and Federal data centers.

(2) When developing an *acquisition* strategy, *contracting officers should* consider the rapidly changing nature of *information technology* through *market research* (see part 10) and the application of technology refreshment techniques.

(b) Agencies *must* follow OMB Circular A-127, Financial Management Systems, when acquiring financial management systems. Agencies *may* acquire only core financial management software certified by the Joint Financial Management Improvement Program.

(c) In acquiring *information technology*, agencies *shall* include the appropriate *information technology* security policies and requirements, including use of common security configurations available from the National Institute of Standards and Technology's website at http://checklists.nist.gov. Agency *contracting officers should* consult with the requiring official to ensure the appropriate standards are incorporated.

(d) When acquiring *information technology* using Internet Protocol, agencies *must* include the appropriate Internet Protocol compliance requirements in accordance with 11.002(g).

(e) *Contracting officers shall* not purchase any hardware, software, or services developed or provided by Kaspersky Lab that the Government will use on or after October 1, 2018. (See 4.2002.)

(f)

(1) On or after August 13, 2019, *contracting officers shall* not procure or obtain, or extend or renew a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential *component* of any system, or as critical technology as part of any system on or after August 13, 2019, unless an exception applies or a waiver is granted. (See subpart 4.21.)

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential *component* of any system, or as critical technology as part of any system, unless an exception applies or a waiver is granted (see subpart 4.21). This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

(g) See the prohibition in 4.2202 on the presence or use of a covered application ("TikTok").

(h) *Executive agencies* are prohibited from procuring or obtaining, or extending or renewing a contract to procure or obtain, any covered article, or any *products* or services produced or provided by a source, including contractor use of covered articles or sources, if prohibited from doing so by an applicable FASCSA order issued by the Director of National Intelligence, Secretary of Defense, or Secretary of Homeland Security (see 4.2303).

39.102 Management of risk.

(a) Prior to entering into a contract for *information technology*, an agency *should* analyze risks, benefits, and costs. (See part 7 for additional information regarding requirements definition.) Reasonable risk taking is appropriate as long as risks are controlled and mitigated. *Contracting* and program office officials are jointly responsible for assessing, monitoring and controlling risk when selecting projects for investment and during program implementation.

(b) Types of risk *may* include schedule risk, risk of technical obsolescence, cost risk, risk implicit in a particular contract type, technical feasibility, dependencies between a new project and other projects or systems, the number of simultaneous high risk projects to be monitored, funding availability, and program management risk.

(c) Appropriate techniques *should* be applied to manage and mitigate risk during the *acquisition* of *information technology*. Techniques include, but are not limited to: prudent project management; use of *modular contracting*; thorough *acquisition planning* tied to budget planning by the program, finance and *contracting offices*; continuous collection and evaluation of risk-based assessment data; prototyping prior to implementation; post implementation reviews to determine actual project cost, benefits and returns; and focusing on risks and returns using quantifiable measures.

39.103 Modular contracting.

(a) This section implements 41 U.S.C. 2308. *Modular contracting* is intended to reduce program risk and to incentivize contractor performance while meeting the Government's need for timely access to rapidly changing technology. Consistent with the agency's *information technology* architecture, agencies *should*, to the maximum extent practicable, use *modular contracting* to acquire *major systems* (see 2.101) of *information technology*. Agencies *may* also use *modular contracting* to acquire non-*major systems* of *information technology*.

(b) When using *modular contracting*, an *acquisition* of a system of *information technology may* be divided into several smaller *acquisition* increments that-

(1) Are easier to manage individually than would be possible in one comprehensive *acquisition*;

(2) Address complex *information technology* objectives incrementally in order to enhance the likelihood of achieving workable systems or solutions for attainment of those objectives;

(3) Provide for delivery, implementation, and testing of workable systems or solutions in discrete increments, each of which comprises a system or solution that is not dependent on any subsequent increment in order to perform its principal functions;

(4) Provide an opportunity for subsequent increments to take advantage of any evolution in technology or needs that occur during implementation and use of the earlier increments; and

(5) Reduce risk of potential adverse consequences on the overall project by isolating and avoiding custom-designed *components* of the system.

(c) The characteristics of an increment *may* vary depending upon the type of *information technology* being acquired and the nature of the system being developed. The following factors *may* be considered:

(1) To promote compatibility, the *information technology* acquired through *modular contracting* for each increment *should* comply with common or commercially acceptable *information technology* standards when available and appropriate, and *shall* conform to the agency's master *information technology* architecture.

(2) The performance requirements of each increment *should* be consistent with the performance requirements of the completed, overall system within which the *information technology* will function and *should* address interface requirements with succeeding increments.

(d) For each increment, *contracting officers shall* choose an appropriate *contracting* technique that facilitates the *acquisition* of subsequent increments. Pursuant to parts 16 and 17 of the Federal *Acquisition* Regulation, *contracting officers shall* select the contract type and method appropriate to the circumstances (*e.g.,* indefinite delivery, indefinite quantity contracts, single contract with *options*, successive contracts, multiple awards, *task order* contracts). Contract(s) *shall* be structured to ensure that the Government is not required to procure additional increments.

(e) To avoid obsolescence, a modular contract for *information technology should*, to the maximum extent practicable, be awarded within 180 days after the date on which the *solicitation* is issued. If award cannot be made within 180 days, agencies *should* consider cancellation of the *solicitation* in accordance with 14.209 or 15.206(e). To the maximum extent practicable, deliveries under the contract *should* be scheduled to occur within 18 months after issuance of the *solicitation*.

39.104 Information technology services.

When acquiring *information technology* services, *solicitations must* not describe any minimum experience or educational requirement for proposed contractor personnel unless the *contracting officer* determines that the needs of the agency-

(a) Cannot be met without that requirement; or

(b) Require the use of other than a *performance-based acquisition* (see subpart 37.6).

39.105 Privacy.

Agencies *shall* ensure that contracts for *information technology* address protection of privacy in accordance with the Privacy Act (5 U.S.C.552a) and part 24. In addition, each agency *shall* ensure that contracts for the design, development, or operation of a system of records using commercial *information technology* services or *information technology* support services include the following:

(a) Agency rules of conduct that the contractor and the contractor's employees *shall* be required to follow.

(b) A list of the anticipated threats and hazards that the contractor *must* guard against.

(c) A description of the safeguards that the contractor *must* specifically provide.

(d) Requirements for a program of Government *inspection* during performance of the contract that will ensure the continued efficacy and efficiency of safeguards and the discovery and countering of new threats and hazards.

39.106 Contract clause.

The *contracting officer shall* insert a clause substantially the same as the clause at 52.239-1, Privacy or Security Safeguards, in *solicitations* and contracts for *information technology* which require security of *information technology*, and/or are for the design, development, or operation of a system of records using commercial *information technology* services or support services.

Subpart 39.2 - Information and Communication Technology

39.201 Scope of subpart.

(a) This subpart implements section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), and the Architectural and Transportation Barriers Compliance Board's (U.S. Access Board) *information and communication technology (ICT*) accessibility standards at 36 CFR 1194.1.

(b) Further information on Section 508 is available via the Internet at http://www.section508.gov.

(c) When acquiring ICT, agencies *must* ensure that—

(1) Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities; and

(2) Members of the public with disabilities seeking information or services from an agency have access to and use of information and data that is comparable to the access to and use of information and data by members of the public who are not individuals with disabilities.

39.202 Definition.

Undue burden, as used in this subpart, means a significant difficulty or expense.

39.203 Applicability.

(a) *General*. Unless an exception at 39.204 or an exemption at 39.205 applies, *acquisitions* for ICT *supplies* and services *shall* meet the applicable ICT accessibility standards at 36 CFR 1194.1.

(b) *Indefinite-quantity contracts.* Confirmation of an exception or a determination of an exemption is not required prior to award of an indefinite-quantity contract, except for requirements that are to be satisfied by initial award. The contract *must* identify which *supplies* and services the contractor indicates as compliant and show where full details of compliance can be found (*e.g.*, vendor's or other exact website location).

(c) *Task order or delivery order.* At the time of issuance of a *task order* or *delivery order* under an indefinite-quantity contract, the requiring and ordering activities *shall* ensure compliance with the ICT accessibility standards and document an exception or exemption if applicable. Any *task order* or *delivery order*, or portion thereof, issued for a noncompliant ICT item *shall* be supported by the

appropriate exception or exemption documented by the requiring activity.

(d) *Commercial products and commercial services.* When acquiring *commercial products* and *commercial services*, an agency *must* comply with those ICT accessibility standards that can be met with *supplies* or services that are available in the commercial marketplace and that best address the agency's needs, but see 39.205(a)(3).

(e) *Legacy ICT.* Any *component* or portion of existing ICT (*i.e.*, ICT that was procured, maintained, or used on or before January 18, 2018) is not required to comply with the current ICT accessibility standards if it—

(1)Complies with an earlier standard issued pursuant to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), which is set forth in Appendix D to 36 CFR 1194.1); and

(2)Has not been altered (*i.e.*, a change that affects interoperability, the user interface, or access to information or data) after January 18, 2018.

(f) *Alterations of legacy ICT.* When altering any *component* or portion of existing ICT, after January 18, 2018, the *component* or portion *must* be modified to conform to the current ICT accessibility standards in 36 CFR 1194.1.

39.204 Exceptions.

(a) The requirements in 39.203 do not apply to *acquisitions* for—

(1) *National security systems.* ICT operated by agencies as part of a *national security system*, as defined by 40 U.S.C 11103(a);

(2)I*ncidental contract items.* ICT acquired by a contractor incidental to a contract, *i.e.*, for in-house use by the contractor to perform the contract; or

(3) *Maintenance or monitoring spaces.* The portions of ICT that are operable parts (*i.e.*, hardware-based user controls for activating, deactivating, or adjusting ICT) or status indicators, and that are located in spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment.

(b) The *contracting officer shall* receive, as a part of the requirements documentation, written confirmation from the requiring activity that an exception, in accordance with paragraph (a)(1), (2), or (3) of this section, applies to the ICT supply or service (see 7.105(b)(5)(iv)). This documentation *shall* be maintained in the contract file.

39.205 Exemptions.

(a) *Allowable exemptions.* An agency *may* grant an exemption for the following:

(1) *Undue burden.* When an agency determines the *acquisition* of ICT conforming with all the applicable ICT accessibility standards would impose an undue burden on the agency, compliance with the ICT accessibility standards is only required to the extent that it would not impose an undue burden. In determining whether conformance to one or more ICT accessibility standards would impose an undue burden, an agency *shall* consider the extent to which conformance would impose

significant difficulty or expense considering the agency resources available to the program or *component* for which the ICT supply or service is being procured.

(2) *Fundamental alteration.* When an agency determines that *acquisition* of ICT that conforms with all applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT, such *acquisition* is required to conform only to the extent that conformance will not result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial products and commercial services.* Where there are no *commercial products* and *commercial services* that fully conform to the ICT accessibility standards, the agency *shall* procure the *supplies* or service available in the commercial marketplace that best meets the ICT accessibility standards consistent with the agency's needs.

(b) *Alternative means of access.*An agency *shall* provide individuals with disabilities access to and use of information and data by an alternative means to meet the identified needs when an exemption in paragraphs (a)(1), (2), or (3) of this section applies.

(c) *Documentation.* When an exemption applies, the *contracting officer shall* obtain, as part of the requirements documentation, a written determination from the requiring activity explaining the basis for the exemption in paragraphs (a)(1), (2) or (3) of this section. This documentation *shall* be maintained in the contract file.

(1) *Undue burden.* A determination of undue burden *shall* address why and to what extent compliance with applicable ICT accessibility standards constitutes an undue burden.

(2) *Fundamental alteration.* A determination of fundamental alteration *shall* address the extent to which compliance with the applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial products and commercial services.* A determination of *commercial products* and *commercial services* nonavailability *shall* include—

(i)A description of the *market research* performed;

(ii)A listing of the requirements that cannot be met; and

(iii)The rationale for determining that the ICT to be procured best meets the ICT accessibility standards in 36 CFR 1194.1, consistent with the agency's needs.