



DEPARTMENT OF THE NAVY
COMMANDER MILITARY SEALIFT COMMAND
914 CHARLES MORRIS CT SE
WASHINGTON NAVY YARD DC 20398-5540

REFER TO:

COMSCINST 4205.5A
N10/N2
15 October 2002

COMSC INSTRUCTION 4205.5A

Subj: LEGAL REVIEW OF PROCUREMENT DOCUMENTS

Ref: (a) SECNAVINST 5430.25D
(b) Navy Acquisition Procedures Supplement (NAPS) 5201.602-1

1. Purpose. To state which procurement documents require review by the Office of Counsel, Military Sealift Command (MSC), a component of the Office of the General Counsel of the Navy. This is a complete revision and should be read in its entirety.
2. Cancellation. COMSCINST 4205.5.
3. Applicability. This instruction applies to all MSC offices exercising procurement authority. This instruction does not apply to procurements for micropurchases or purchases using simplified acquisition procedures pursuant to FAR Part 13 (except for FAR 13.5, Test Program for Certain Commercial Items). However, Counsel should be consulted concerning any case involving the interpretation or application of statute, regulation or policy.
4. Policy
 - a. Responsibility for providing business and commercial legal services throughout the Department of the Navy is charged, by references (a) and (b), to the Office of General Counsel. In accordance with reference (b), contract documents shall be forwarded to the appropriate attorney or attorneys in the Office of General Counsel for review as to form and legality and any additional pertinent comment or advice. Directors of Contracts and Business Management (N10) at each MSC command and each Contracting Officer are responsible for the following:
 - (1) Ensuring that no contract is entered into unless all requirements of law, executive orders, regulations and all other applicable procedures, including clearances and approvals, have been met (see FAR 1.602-1(b));
 - (2) Ensuring that sufficient funds are available for obligation (see FAR 1.602-2(a));

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(3) Requesting a legal review of documents in a timely manner; and

(4) Ensuring that solicited advice and opinions of Counsel are considered before the execution of a procurement document.

b. Except when a matter is in litigation, advice and recommendations from Counsel are advisory only. The ultimate responsibility for the action to be taken in all other cases rests with the cognizant Contracting Officer. Prior to taking an action contrary to the advice of Counsel, a Contracting Officer shall refer the matter to the contracting level above him or her. If the matter is not resolved, the determination and the events and circumstances surrounding it must be thoroughly documented in the contract file.

c. All MSC personnel responsible for acquisition planning, establishing technical requirements and/or contracting shall be fully cognizant of legal review requirements and implement the policy contained in references (a) and (b).

d. Contract files must contain evidence of legal review. See FAR 4.803(a)(24).

5. Procedures

a. Contracting Officers shall forward the following procurement documents to Counsel for review prior to execution:

(1) Solicitations (see reference (a)).

(2) Amendments to solicitations (other than purely administrative amendments, e.g., change in date and time for receipt of proposals and correction of clerical mistakes) (see reference (a)).

(3) Contracts (prior to award) (see NAPS 5201.602-1 and FAR 4.803(a)(24)).

(4) Modifications of contracts (other than purely administrative modifications) (see reference (a), paragraph 9).

(5) Determinations and Findings (see FAR 1.7).

(6) Justifications and Approvals (see NAPS 5206.303-90).

(7) Source selection plans (see FAR 15.303).

(8) Determinations concerning mistakes in bid discovered before and after contract award (see FAR 14.407-3(f) and 14.407-4(d), respectively).

(9) Determinations concerning mistakes in proposals discovered before and after contract award (see FAR 14.407-4, 15.305 and 15.508).

(10) Ratification of unauthorized commitments (see FAR 1.602-3 and NAPS 5201.602-3(b)).

(11) Exercise of delegated authority for extraordinary contractual actions under DFARS 250.201 (see NAPS 5250.201-70).

(12) Novation and change of name agreements (see FAR 42.1203(f)).

(13) New, modified or other provisions or clauses not previously approved in accordance with NAPS 5201.304. (Note: It is the responsibility of Counsel to review provisions and clauses for legal sufficiency. Review for legal sufficiency does not constitute approval for inclusion in solicitations as required by the NAPS.)

(14) Contracting Officers' proposed settlements and final decisions on claims submitted under the Contract Disputes Act (see FAR 33.211(a)(2) and NAPS 5233.9001(b)).

(15) Termination documents (e.g., show cause letters, cure notices, settlement proposals, cancellations) (see FAR 49.402-3(a)) and proposed special purpose termination clauses (see FAR 49.5) and termination of contracts with suspended or debarred contractors (see FAR 9.405-1(a)).

(16) Contracting Officer determination of breach of implied warranties (see FAR 12.404).

(17) Acceptability of individual sureties (see FAR 28.203 through 28.203-5).

(18) Indemnification requests (see FAR 50.403-2(a)).

(19) Contracting Officer's reports on proposed suspensions and debarments (see NAPS 5209.406-3(a)(i)).

(20) Requests for deviations (see DFARS 201.402(2)(viii)).

(21) Voluntary refunds (see DFARS 242.71).

(22) State and local tax applicability to the Federal Government (see FAR 29.302 and 29.303).

(23) Doubtful cases of non-personal services determinations (see FAR 37.103).

(24) Determinations citing specific statutory authority for a personal service contract (see FAR 37.104(e)).

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(25) Proofs of claim or other documents relating to Federal bankruptcy or insolvency proceedings under state law (see FAR 42.902).

(26) Provisions, clauses, and other documents involving organizational and consultant conflicts of interest (see FAR 9.504(b)).

(27) Proposed decisions, responses, reports and other Contracting Officer generated documents concerning agency level and level above the Contracting Officer bid protests (see reference (a), paragraph 9b). (Note: GAO protests shall be referred to Counsel for appropriate action.)

(28) Any other document required by statute, regulation or policy to be reviewed by counsel. Reference (a), paragraph 9a, provides that contracts and amendments thereto, modifications thereof, and other documents pertaining to matters for which the General Counsel is assigned responsibility shall be submitted to the appropriate lawyers of the Office of General Counsel for an opinion as to form and legality and for any additional pertinent comment or advice prior to execution.

(29) Any matters or documents not specifically listed above may be referred to legal counsel at the discretion of the Contracting Officer.

b. Prior to execution of a document covered by this instruction, the cognizant Office of Counsel attorney shall review it and provide the following:

(1) An opinion (written and/or oral as dictated by time and circumstances) as to form and legality.

(2) Any additional pertinent comments or advice. Oral advice from Counsel shall be reduced to writing by Counsel as soon as possible after receipt.

6. Release of Counsel Opinions. Counsel's memoranda, e-mail and other communications generally are protected by the attorney-client and/or the attorney work product privilege. Both of these privileges limit the release of covered documents to the client only. Documents covered by this privilege shall be released only to Government personnel who have a need-to-know. In many cases, such documents also are exempt from release under the Freedom of Information Act as both attorney work product and intra-agency memoranda of a predecisional nature. Improper release of Counsel's memoranda, e-mails or other communications, particularly to contractors, waives the attorney-client privilege, inhibits the ability of Counsel and contracting personnel to deal candidly with legal matters and could

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result in compromise of the Government's position in solicitation discussions, contract negotiations, dispute resolution and litigation. Any release of Counsel's memoranda, e-mail or other communications, especially outside the Government, must be coordinated with the cognizant Office of General Counsel.

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Distribution:

COMSCINST 5215.5

List I (Case A, B, C)

SNDL 41B (MSC Area Commanders)