

USDA



AGRICULTURE ACQUISITION CIRCULAR

May 15, 1998

AAC 96-01

Agriculture Acquisition Circular (AAC) 96-01 is issued under the authority of the Senior Procurement Executive. The policies, provisions, and clauses of this Circular are effective for all solicitations issued after July 14, 1998.

List of Subjects

<u>Item</u>	<u>Title</u>
I	Preference for Selected Biobased Products
II	Miscellaneous Amendments

Issued by: Office of the Assistant Secretary for Administration
Office of Procurement and Property Management
Procurement Policy Division

AAC 96-01 Filing Instructions

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AAC 96-01 ITEM SUMMARY

Item I---Preference for Selected Biobased Products

This final rule adds AGAR Part 426 and amends AGAR Part 452 to establish acquisition preferences for selected biobased products; i.e., nonfood, nonfeed products made from agricultural and forestry materials and animal by-products.

Replacement pages: Part 426 Table of Contents (TOC); 426-1 through 426-3; Part 452 TOC; and 452-9 through 452-10.2.

Item II---Miscellaneous Amendments

This final rule amends AGAR Parts 401, 402, 403, 407, 409, 411, 416, 419, 422, 424, 425, 432, 434, 436, and 452 to reflect changes in the Federal Acquisition Regulation through Federal Acquisition Circular 97-01 and to correct minor errors and omissions in the AGAR. The following changes have been made to the AGAR:

1. AGAR 401.170 is added to inform users about the USDA Departmental Administration Procurement Homepage.

Replacement pages: Part 401 TOC; 401-1 through 401-2.1

2. AGAR 402.101 is amended by revising “Director, Procurement and Property Management, Policy Analysis and Coordination Center” to read, “Director, Office of Procurement and Property Management”.

Replacement pages: 402-1

3. AGAR 403.104-5 has been removed and AGAR 403.104-11 has been redesignated 403.104-10 to reflect amendments to the FAR.

Replacement pages: Part 403 TOC; 403-1 and 403-2

4. AGAR 407.503 is amended in paragraph (b)(4) by revising “activity” to read “activity’s”.

Replacement pages: 407-1

5. The definition of "debaring official" in AGAR 409.403 is amended to clarify the authority of the Executive Vice President, Commodity Credit Corporation (CCC) to conduct suspension or debarment actions related to CCC commodity contracts.

Replacement pages: 409-1 through 409-3

6. AGAR 411.171 and 411.404 have been revised to reflect changes to the numbering of six clauses referenced in these sections.

Replacement pages: 411-1 and 411-2

7. AGAR 416.404, 416.404-2, and 416.405 have been redesignated 416.405, 416.405-2, and 416.406, respectively, to reflect amendments to the FAR.

Replacement pages: Part 416 TOC; 416-1 and 416-2

8. The schedule for submission of subcontract award data to the Office of Small and Disadvantaged Business Utilization by USDA agencies has been changed, and AGAR 419.201-73 is amended accordingly.

Replacement pages: 419-1 through 419-3

9. AGAR 419.602-3 has been revised to reflect an amendment to FAR 19.602-3 which updated the titles of SBA offices involved in processing Certificates of Competency.

Replacement pages: 419-3

10. AGAR 422.608 and 422.608-4 have been removed to reflect amendments to the FAR.

Replacement pages: Part 422 TOC; 422-1 and 422-2

11. AGAR part 424 is revised to redesignate 424.202 as 424.203 to reflect an amendment to the FAR.

Replacement pages: Part 424 TOC; 424-1

12. AGAR 425.202 has been revised, and AGAR 425.203 and 425.204 have been removed, to reflect amendments to the FAR.

Replacement pages: Part 425 TOC; 425-1 and 425-2

13. AGAR 432.111 has been revised to reflect the redesignation of AGAR clause 452.232-1 as AGAR clause 452.232-70.

Replacement pages: 432-3 and 432-4

14. The citation to the definition of "major system" in the FAR is corrected to

conform to an amendment to the FAR. AGAR 434.001 is revised to cite the definition at FAR 2.101.

Replacement pages: 434-1 and 434-2

15. AGAR part 436 is revised to remove subpart 436.3 and to redesignate 436.302 as 436.213-2 to reflect an amendment to the FAR.

Replacement pages: Part 436 TOC; 436-1 and 436-2

16. AGAR 436.575, Maximum workweek - construction schedule, is revised to add a reference to FAR clause 52.236-15, Schedules for Construction Contracts.

Replacement pages: 436-3 and 436-4

17. Clauses 452.211-1 through 452.211-6 are redesignated 452.211-70 through 452.211-75, respectively, to conform to the numbering scheme established by FAR 1.303. Clause 452.232-1 likewise is redesignated 452.232-70 to conform to this numbering system.

Replacement pages: Part 452 TOC; 452-1 through 452-4; 452-10.2

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Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

PART 401
AGRICULTURE ACQUISITION
REGULATION SYSTEM

401.000 Scope of Part.

This part presents basic policies and general information about the Department of Agriculture's (USDA) Acquisition Regulation, subsequently referred to as the AGAR. The AGAR is an integral part of the Federal Acquisition Regulations System.

SUBPART 401.1--PURPOSE,
AUTHORITY, ISSUANCE

401.101 Purpose.

(a) The AGAR provides for the codification and publication of uniform policies and procedures for acquisitions by contracting activities within USDA.

(b) The purpose of the AGAR is to implement the Federal Acquisition Regulation (FAR), where further implementation is needed, and to supplement the FAR when coverage is needed for subject matter not covered in the FAR. The AGAR is not by itself a complete document, as it must be used in conjunction with the FAR.

401.103 Authority.

The AGAR and amendments thereto are issued under 5 U.S.C. 301 and 40 U.S.C. 486(c). The Senior

Procurement Executive (SPE) has the delegated authority to promulgate Departmental acquisition regulations.

401.104 Applicability.

The FAR and AGAR apply to all USDA acquisitions of supplies and services (including construction) which obligate appropriated funds, unless otherwise specified in this chapter or excepted by law.

401.105 Issuance.

401.105-1 Publication and code arrangement.

(a) The AGAR is codified in the Code of Federal Regulations (CFR) as Chapter 4 of Title 48, Federal Acquisition Regulations System, to implement and supplement Chapter 1 which constitutes the FAR. Parts 400 through 499 have been assigned to USDA by the Office of the Federal Register.

(b) The AGAR and its subsequent changes are published in: (1) daily issues of the Federal Register, (2) cumulative form in the CFR, and (3) loose-leaf form for distribution within USDA.

(c) Section 553(a)(2) of the Administrative Procedure Act, 5 U.S.C. 553, provides an exception from the standard public rulemaking procedures to the extent that the rule involves a matter relating to agency management or personnel or to public

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401.105-2 **AGRICULTURE ACQUISITION REGULATION (AGAR)**

<p>property, loans, grants, benefits, or contracts. OFPP Policy Letter 83-2 requires rulemaking for substantive acquisition rules but allows discretion in the matter for other than significant issues meeting the stated criteria. The AGAR has been promulgated and may be revised from time to time in accordance with the rulemaking procedures of the Administrative Procedure Act and OFPP Policy Letter 83-2.</p>	<p>AGAR segment</p> <p>411.170</p> <p>415.4</p> <p>436.575</p> <p>437.110</p>	<p>OMB Control Number</p> <p>0505-0014</p> <p>0505-0013</p> <p>0505-0011</p> <p>0505-0015</p>
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401.105-2 Arrangement of regulations.

<p>AGAR coverage parallels the FAR in format, arrangement, and numbering system. However, subdivisions below the section and subsection levels may not always correlate directly to FAR designated paragraphs and subparagraphs.</p>	<p>437.270</p> <p>452.211-1</p> <p>452.215-71</p> <p>452.236-75</p>	<p>0505-0016</p> <p>0505-0014</p> <p>0505-0013</p> <p>0505-0011</p>
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401.105-3 Copies.

<p>Copies of the AGAR published in CFR form may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. Requests should reference Chapter 4 of Title 48 CFR.</p>	<p>452.237-74</p> <p>452.237-76</p>	<p>0505-0015</p> <p>0505-0016</p>
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401.106 OMB approval under the Paperwork Reduction Act.

The following OMB control numbers apply to USDA solicitations and specified information collections within the AGAR:

401.170 Electronic access to regulatory information.

The USDA Departmental Administration Procurement Homepage provides access to the AGAR, AGAR amendments (circulars), AGAR Advisories, and other USDA procurement policy and guidance in electronic form. The Internet address for the

Procurement Homepage is URL
<http://www.usda.gov/da/procure.html>.

Civilian Agency Acquisition Council is designated by the SPE.

**SUBPART 401.2--
ADMINISTRATION**

(b) The Procurement Policy Division will coordinate proposed FAR revisions with interested contracting activities.

401.201 Maintenance of the FAR.

**SUBPART 401.3--AGENCY
ACQUISITION REGULATIONS**

401.201-1 The two councils.

(a) USDA's representative on the

[The next page is 401-3.]

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PART 402

**DEFINITIONS OF WORDS AND
TERMS**

12931. The Director, Office of
Procurement and Property Management,
has been designated as the USDA SPE.

402.000 Scope of part.

As used throughout this chapter, the following words and terms are used as defined in this subpart unless the context in which they are used clearly requires a different meaning, or a different definition is prescribed for a particular part or portion of a part.

SUBPART 402.1--DEFINITIONS

402.101 Definitions.

"Agency head" or "Head of the Agency" means the Secretary of Agriculture, Deputy Secretary, or the Assistant Secretary for Administration.

"Acquisition official" means an individual who has been delegated authority to manage or to exercise acquisition functions and responsibilities.

"Head of the contracting activity" (HCA) means the official who has overall responsibility for managing the contracting activity (i.e., Chief, Forest Service; Administrator, Agricultural Research Service; etc.), or the individual designated by such an official to carry out the functions of the HCA.

"Senior Procurement Executive" (SPE) means the agency official appointed as such by the head of the agency pursuant to Executive Order

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Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

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PART 403

**IMPROPER BUSINESS
PRACTICES AND PERSONAL
CONFLICTS OF INTEREST**

SUBPART 403.1--SAFEGUARDS

403.101 Standards of Conduct

403.101-3 Agency Regulations.

(a) The standards of conduct for USDA procurement officials are the uniform standards established by the Office of Government Ethics in 5 CFR Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch, and FAR 3.104, Procurement Integrity.

(b) Procurement officials and other employees who require advice concerning the application of standards of conduct to any acquisition issue shall obtain ethics advisory opinions from ethics advisory officials in their agency personnel offices.

403.104 Procurement integrity.

403.104-5 [Reserved]

403.104-10 Violations or possible violations.

(a) The contracting officer shall forward information concerning any violation or possible violation of the

Procurement Integrity Act (41 U.S.C. 423) to the chief of the contracting office.

(b) Heads of contracting activities (HCA's) or their designees who receive information concerning any violation or possible violation of the Act shall take action in accordance with FAR 3.104-10(b).

**SUBPART 403.2--CONTRACTOR
GRATUITIES TO GOVERNMENT
PERSONNEL**

**403.203 Reporting suspected
violations of the gratuities clause.**

A suspected violation of the contract clause, FAR 52.203-3, Gratuities, shall be reported immediately to the cognizant contracting officer in writing, stating the circumstances surrounding the incident(s), the date(s), and names of all parties involved. The contracting officer shall review the report for completeness, add any additional information deemed necessary and a recommendation for action, and submit the report to the HCA.

403.204 Treatment of violations.

The HCA shall review the report and consult with the Offices of General Counsel and Inspector General to determine whether further action should be pursued. If it is found that the facts and circumstances warrant further action, the HCA shall give the contractor

a formal written notice which summarizes the reported violation and affords the contractor the opportunity to make a written or oral response within a reasonable, specified period after receipt of the notice. The notice shall be sent by certified mail with return receipt requested. Oral presentations shall follow the procedures outlined in FAR 3.204(b). The HCA shall furnish copies of any adverse determination to the contracting officer and the Department Debarring Officer for their subsequent considerations under FAR 3.204(c)(1) and (2), respectively.

**SUBPART 403.3--REPORTS OF
SUSPECTED ANTITRUST
VIOLATIONS**

403.303 Reporting suspected antitrust violations.

Contracting officers shall report the circumstances of suspected violations of antitrust laws to the Office of Inspector General in accordance with procedures in Departmental Regulations (1700 series).

**SUBPART 403.4--CONTINGENT
FEES**

403.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) A suspected misrepresentation or violation of the Covenant Against Contingent Fees shall be documented in writing by the contracting officer and

reported immediately to the chief of the contracting office. The chief of the contracting office shall determine if a violation has occurred and report any violation to the Office of Inspector General. The chief of the contracting office shall take action in accordance with FAR 3.409(b).

(b) If the chief of the contracting office decides to refer the case to the Department of Justice, it should be referred through the Office of Inspector General with a copy of the report and referral submitted through the HCA to the Senior Procurement Executive.

**SUBPART 403.5--OTHER
IMPROPER BUSINESS
PRACTICES**

403.502 Subcontractor kickbacks.

Contracting officers shall report the circumstances of suspected violations of the Anti-Kickback Act (41 U.S.C. 51-54) to the Office of Inspector General in accordance with procedures in Departmental Regulations (1700 series).

**SUBPART 403.6--CONTRACTS
WITH GOVERNMENT
EMPLOYEES OR
ORGANIZATIONS OWNED OR
CONTROLLED BY THEM**

403.602 Exceptions.

The HCA is authorized to except a contract from the policy in FAR 3.601.

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PART 407

ACQUISITION PLANNING

**SUBPART 407.1--ACQUISITION
PLANS**

407.103 Agency-head responsibilities.

Heads of Contracting Activities (HCA's) shall develop procedures to comply with FAR 7.103.

407.170 Advance acquisition plans.

Each HCA shall implement an advance acquisition planning system in accordance with procedures in Departmental Directives (5000 series).

**SUBPART 407.3--CONTRACTOR
VERSUS GOVERNMENT
PERFORMANCE**

407.302 General.

The requirements of FAR Subpart 7.3 and OMB Circular A-76 are implemented by Departmental Directives (2100 series).

**SUBPART 407.5--INHERENTLY
GOVERNMENTAL FUNCTIONS**

407.503 Policy.

(a) HCA's shall establish procedures to ensure that requesting activities provide the written determination required by FAR 7.503(e), when submitting requests for procurement of services.

(b) In the event of a disagreement as to whether the functions to be performed are inherently governmental, the HCA may refer the matter to the Senior Procurement Executive (SPE) for resolution. When submitting disagreements to the SPE for resolution the HCA shall provide a summary of the areas of disagreement, supported by the following:

(1) the HCA's assessment of whether the services are "inherently governmental";

(2) the basis for that assessment (include references to the definition and policy in FAR subpart 7.5 and/or Office of Federal Procurement Policy letter 92-1);

(3) a copy of the statement of work; and,

(4) the requesting activity's written determination in accordance with FAR 7.503(e).

(c) Such disagreements shall be resolved prior to issuance of the solicitation.

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PART 409

CONTRACTOR QUALIFICATIONS

**SUBPART 409.4--DEBARMENT,
SUSPENSION AND INELIGIBILITY**

409.403 Definitions.

"Debaring official." Pursuant to the Secretary's delegations of authority in 7 CFR 2.24, the Senior Procurement Executive (SPE) is designated as the debaring official (Department Debaring Officer) with the following exceptions:

(a) for commodity contracts awarded on behalf of the Commodity Credit Corporation (CCC), the Executive Vice President, CCC, or his designee is designated as the debaring official pursuant to 7 CFR part 1407.

(b) for contracts awarded under the School Lunch and Surplus Removal Programs (42 U.S.C. 1755 and 7 U.S.C. 612c), the Department Debaring Officer has delegated debaring authority to the Agricultural Marketing Service (AMS).

409.404 List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

The Department Debaring Officer is USDA's single point of contact with GSA for debarment and suspension actions taken under this subpart. The

debaring official for AMS shall notify the Department Debaring Officer of each debarment and suspension action by promptly submitting a copy of the debarment or suspension notice and any later changes to the debarment or suspension status. The Department Debaring Officer will forward a copy of each notice to GSA for inclusion in the Government-wide list.

409.405 Effect of listing.

Compelling reasons are considered to be present where failure to contract with the debarred or suspended contractor would seriously harm the agency's programs and prevent accomplishment of mission requirements. The SPE is authorized to make the determinations under FAR 9.405. Requests for such determinations shall be submitted through the head of the contracting activity (HCA) to the SPE.

409.405-1 Continuation of current contracts.

The HCA is authorized to make the determinations under FAR 9.405-1.

409.405-2 Restrictions on subcontracting.

The HCA is authorized to approve subcontracts with debarred or suspended subcontractors under FAR 9.405-2.

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409.406

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409.406 Debarment.

409.406-3 Procedures.

(a) Investigation and referral. When a contracting officer becomes aware of possible irregularities or any information which may be sufficient cause for debarment, the case shall be immediately referred through the HCA to the debarring official. The case must be accompanied by a complete statement of the facts (including a copy of any criminal indictments, if applicable) along with a recommendation for action. Where the statement of facts indicates the irregularities to be possible criminal offenses, or for any other reason further investigation is considered necessary, the matter shall be referred to the HCA who should consult with the Office of Inspector General to determine if further investigation is required prior to referring to the debarring official.

(b) Decision-making process. If, after reviewing the recommendations and consulting with the Office of Inspector General and Office of the General Counsel, as appropriate, the debarring official determines debarment is justified, the debarring official shall initiate the proposed debarment in accordance with FAR 9.406-3(c) and notify the HCA of the action taken.

(c) Fact-finding proceeding. For actions listed under FAR 9.406-3(b)(2), the contractor shall be given the opportunity to appear at an informal

hearing. The hearing should be held at a location and time that is convenient to the parties concerned, if at all possible. The contractor and any specifically named affiliates may be represented by counsel or any duly authorized representative. Witnesses may be called by either party. The proceedings shall be conducted expeditiously and in such a manner that each party will have an opportunity to present all information considered pertinent to the proposed debarment. The contractor shall be provided a copy of a transcript of the proceedings under the conditions established in FAR 9.406-3(b)(2)(ii).

409.407 Suspension.

409.407-3 Procedures.

(a) Investigation and referral. When a contracting officer becomes aware of possible irregularities or any information which may be sufficient cause for suspension, the case shall be immediately referred through the HCA to the debarring official. The case must be accompanied by a complete statement of the facts along with a recommendation for action. Where the statement of facts indicates the irregularities to be possible criminal offenses, or for any other reason further investigation is considered necessary, the matter shall be referred to the HCA who should consult with the Office of Inspector General to determine if further investigation is required prior to referring it to the debarring official.

(b) Decision-making process.

If, after reviewing the recommendations and consulting with the Office of Inspector General and Office of the General Counsel, as appropriate, the debarring official determines suspension is justified, the debarring official shall initiate the proposed suspension in accordance with FAR 9.407-3(c) and notify the HCA of the action taken.

(c) Fact-finding proceedings.

For actions listed under FAR 9.407-3(b)(2), the contractor shall be given the opportunity to appear at an informal hearing, similar in nature to the hearing for debarments as discussed in 409.406-3(c).

409.470 Appeals.

A debarred or suspended contractor may appeal the debarring official's decision by mailing or otherwise furnishing a written notice within 90 days from the date of the decision to the U.S. Department of Agriculture Board of Contract Appeals, Washington, D.C. 20250. A copy of the notice of appeal shall be furnished to the debarring officer from whose decision the appeal is taken. Appeals under Subpart 409.4 shall be governed by the rules and procedures of the U.S. Department of Agriculture Board of Contract Appeals set forth in 7 CFR, Part 24.

409.503 Waiver.

(a) The HCA, on a non-delegable basis, is authorized to waive any general rule or procedure in FAR 9.5 when in the Government's interest.

(b) Each request for waiver shall include:

- (1) The general rule or procedure proposed to be waived;
- (2) An analysis of the potential conflict, including the benefits and detriments to the Government and prospective contractors;
- (3) A discussion of why the conflict cannot be avoided, neutralized, or mitigated; and
- (4) Advice of counsel obtained under FAR 9.504(b).

**SUBPART 409.5--
ORGANIZATIONAL AND
CONSULTANT CONFLICTS OF
INTEREST**

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PART 411

DESCRIBING AGENCY NEEDS

SUBPART 411.1--SELECTING AND DEVELOPING REQUIREMENTS DOCUMENTS

411.103 Market acceptance.

(a) The head of the contracting activity (HCA) may determine that offerors must demonstrate, in accordance with FAR 11.103(a), the market acceptability of their items to be offered.

(b) The contracting officer shall place a copy of this determination, signed by the HCA, in the solicitation file.

411.105 Purchase descriptions for service contracts.

When contract personnel are to be used, the requiring official shall record on the requisition his or her determination whether harm to the Government might occur should contractor personnel fail to identify themselves as non-Government officials.

411.170 Brand name or equal.

(a) A "brand name or equal" purchase description shall include the following type of information:

(i) Identification of the item by generic description.

(ii) Make, model number, catalog designation, or other

description, and identification of a commercial catalog where it is listed.

(iii) Name of manufacturer, producer, or distributor of the item and complete address.

(iv) All salient characteristics of the "brand name or equal" product or products which have been determined by the requisitioner to be essential to the Government's minimum requirements.

411.171 Solicitation provisions and contract clauses.

(a) Contracting officers shall insert the provision at 452.211-70, Brand Name or Equal, in solicitations, other than those for construction, where "brand name or equal" purchase descriptions are used.

(b) Contracting officers shall insert the clause at 452.211-71, Equal Products Offered, in solicitations, other than those for construction, where the provision at 452.211-70 is included.

(c) Contracting officers shall insert the clause at 452.211-72, Statement of Work/Specifications, when the description (statement of work) or specification(s) is included in Section J of the solicitation.

(d) Contracting officers shall insert the clause at 452.211-73, Attachment to Statement of Work/Specifications, when there are

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attachments to the description
(statement of work) or specifications.

**SUBPART 411.2---USING AND
MAINTAINING REQUIREMENTS
DOCUMENTS**

**411.202 Maintenance of
standardization documents.**

Recommendations for changes to
standardization documents are to be
submitted through the Senior
Procurement Executive, who will
coordinate the submission of these
recommendations to the cognizant
preparing activity.

**SUBPART 411.4---DELIVERY OR
PERFORMANCE SCHEDULES**

411.404 Contract Clauses.

(a) The contracting officer shall
|insert the clause at 452.211-74, Period of |
Performance, when it is necessary to
specify a period of performance,
beginning on the date of award, date of
receipt of notice of award, or a specified
date.

(b) The contracting officer shall
|insert the clause at 452.211-75, Effective |
Period of the Contract, when it is
necessary to specify the effective period
of the contract.

**SUBPART 411.6---PRIORITIES AND
ALLOCATIONS**

411.600 Scope of subpart.

The Defense Priorities and Allocation
System (DPAS) excludes USDA activities
(see 15 CFR
700.18(b)). USDA Contracting Officers
are not authorized to place rated orders
under DPAS.

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PART 416--TYPES OF CONTRACTS

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416.702 Basic agreements.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

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PART 416

TYPES OF CONTRACTS

416.000 Scope of part.

Heads of contracting activities (HCA's) are authorized to establish written procedures allowing the use of any contract type described in FAR part 16 for acquisitions made under simplified acquisition procedures in FAR part 13.

SUBPART 416.2--FIXED-PRICE CONTRACTS

416.203 Fixed-price contracts with economic price adjustment.

416.203-4 Contract clauses.

An economic price adjustment clause based on cost indexes of labor or material may be used under the conditions listed in FAR 16.203-4(d) after approval by the HCA and consultation with the Office of the General Counsel.

SUBPART 416.4--INCENTIVE CONTRACTS

416.405 Cost-reimbursement incentive contracts.

416.405-2 Cost-plus-award-fee contracts.

The HCA may designate an acquisition official other than the contracting officer as the fee determination official (FDO) to make the

final determination of the award fee. The designated official must have warranted contracting authority at the same level as the contracting officer or higher, and shall not have participated in preparing the contractor performance evaluation. If the HCA does not designate an FDO, the chief of the contracting office shall act as the FDO.

416.406 Contract clauses.

The contracting officer shall insert a clause substantially the same as the clause at 452.216-70, Award Fee, in solicitations and contracts which contemplate the award of cost-plus-award-fee contracts.

416.470 Solicitation provision.

The contracting officer shall insert the provision at 452.216-71, Base Fee and Award Fee Proposal, in solicitations which contemplate the award of a cost-plus-award-fee contract.

SUBPART 416.5--INDEFINITE DELIVERY CONTRACTS

416.505 Ordering.

(a) The Chief, Procurement Policy Division, Procurement and Property Management, Policy Analysis and Coordination Center, has been designated as the Departmental Task Order Ombudsman.

(b) The Departmental Task Order Ombudsman shall designate a task order ombudsman for each contracting activity. Contracting activity

ombudsmen shall review and resolve complaints from contractors concerning task or delivery orders placed by the contracting activity.

(c) Any contractor who is not satisfied with the resolution of a complaint by a contracting activity ombudsman may request the Departmental Task Order Ombudsman to review the complaint.

416.506 Solicitation provision and contract clauses.

(a) The contracting officer shall insert a provision substantially the same as the provision at 452.216-72, Evaluation Quantities-Indefinite-Delivery Contract, in solicitations which contemplate the award of indefinite-quantity or requirements contracts to establish the basis on which offers will be evaluated.

(b) The contracting officer shall insert the clause at 452.216-73, Minimum and Maximum Contract Amounts, in indefinite-delivery, indefinite-quantity contracts when the clause at FAR 52.216-18 is used.

SUBPART 416.6--TIME-AND-MATERIALS, LABOR-HOUR, AND LETTER CONTRACTS

416.603 Letter contracts.

416.603-2 Application.

The HCA is authorized to extend the period for defining a letter contract required by FAR 16.603-2(c) in extreme cases where it is determined in writing that such action is in the best interest of the Government.

416.603-4 Contract clauses.

The contracting officer shall insert the clause at 452.216-75, Letter Contract, in a definitive contract superseding a letter contract.

416.670 Contract Clauses.

The contracting officer shall limit the Government's obligation under a time-and-materials or labor-hour contract by inserting the clause at 452.216-74, Ceiling Price.

SUBPART 416.7--AGREEMENTS

416.702 Basic Agreements.

Promptly after execution by the Government, the HCA shall furnish to the Senior Procurement Executive a copy of each basic agreement negotiated with contractors in accordance with FAR 16.702.

PART 419

SMALL BUSINESS PROGRAMS

SUBPART 419.2--POLICIES

419.201 General Policy.

It is the policy of USDA to provide a fair portion of its contracting and subcontracting opportunities to small, disadvantaged, minority, and women-owned businesses.

419.201-70 Office of Small and Disadvantaged Business Utilization (OSDBU).

The Office of Small and Disadvantaged Business Utilization (OSDBU) develops rules, policy, procedures and guidelines for the effective administration of USDA's small and disadvantaged business procurement preference program to include minority and women-owned business.

419.201-71 Small Business Coordinators.

The head of the contracting activity (HCA) or a representative of the HCA shall designate in writing a small business coordinator in each contracting office. Supervisors of small business coordinators are encouraged to provide sufficient time for the coordinators to carry out their small business program duties. Coordinators' duties shall include, but not be limited to, the following:

(a) Review each proposed acquisition expected to exceed the simplified acquisition threshold prior to its solicitation. The coordinator shall:

(1) Recommend section 8(a) action and identify potential contractors, or

(2) Identify available minority and women-owned businesses to be solicited by competitive procedures. Coordinators shall document the contract file with recommendations made and actions taken.

(b) Participate in goal-setting procedures and planning activities and establish aggressive minority and women-owned business goals based on the annual review of advance acquisition plans.

(c) Participate in the review of those contracts which require the successful offeror to submit written plans for the utilization of small and small disadvantaged businesses as subcontractors.

(d) Ensure that purchases exceeding \$2,500 and not exceeding the simplified acquisition threshold are reserved exclusively for small businesses, including minority and women-owned businesses. This policy shall be implemented unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased.

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(e) Maintain comprehensive source listings of small businesses.

(f) Upon written request, provide small, minority and women-owned businesses the bidders mailing lists of individuals receiving solicitations which will contain the subcontracting clause entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns." These lists may be limited to those supplies or services of major interest to the requesting firms.

(g) Develop a program of contacts with local, small, minority, and women-owned trade, business, and professional associations and organizations and Indian tribal councils to apprise them of USDA's program needs and recurring contract requirements.

(h) Periodically meet with program managers to discuss requirements of the small business preference program, explore the feasibility of breaking large complex requirements into smaller lots suitable for participation by small firms, and encourage program managers to meet with these firms so that their capabilities can be demonstrated.

(i) Establish internal operating procedures which implement the requirements of the regulations as set forth in this Part 419. Compile data and prepare all reports pertaining to the small, minority and women-owned business activities. Ensure that these reports are accurate, complete and up-to-

date.

(j) Assist and counsel small business firms and especially those found to be nonresponsive or nonresponsible to help qualify them for future awards.

(k) Review proposed large contract requirements to determine the potential for breaking out components suitable for purchase from small business firms.

(l) Ensure that the SBA Resident Procurement Center Representative (PCR) is provided an opportunity and reasonable time to review any solicitation that meets the dollar threshold for small business and small disadvantaged business subcontracting plans.

419.201-73 Reports.

(a) The Director, OSDBU, shall be responsible for submitting reports concerning USDA's progress and achievements in the procurement preference program.

(b) The following dates must be adhered to in regard to the reporting of subcontract award data:

SF-294 Reports

Frequency:	Twice a Year
Cut-off date (Reporting period ending):	March 31
Date due at Contracting Activity:	April 30

Cut-off date (Reporting period ending):	September 30
Date due at Contracting Activity:	October 30
SF-295 Reports	
Frequency:	Once A Year
Cut-off date (12 month period ending):	September 30
Date due at OSDDBU:	October 30

419.602-3 Resolving differences between the agency and the Small Business Administration.

The HCA is authorized to appeal the issuance of a COC to SBA Headquarters as provided by FAR 19.602-3(a).

SUBPART 419.5--SET-ASIDES FOR SMALL BUSINESS

419.508 Solicitation provisions.

The contracting officer shall insert the provision at 452.219-70, Size Standard and SIC Code Information, in solicitations that are set aside for small businesses.

SUBPART 419.6--CERTIFICATES OF COMPETENCY AND DETERMINATIONS OF ELIGIBILITY

419.602 Procedures.

419.602-1 Referral.

Contracting officers shall refer determinations of non-responsibility regarding small businesses directly to the SBA Regional Office servicing the location where the contractor's office (home) is located.

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SUBPART 422.14--EMPLOYMENT OF THE HANDICAPPED

- 422.1403 Waivers.
- 422.1406 Complaint procedures.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

PART 422

**APPLICATION OF LABOR LAWS
TO GOVERNMENT
ACQUISITIONS**

**SUBPART 422.1--BASIC LABOR
POLICIES**

422.103 Overtime.

422.103-4 Approvals.

Requests for the use of overtime shall be approved by an acquisition official at a level above the contracting officer in accordance with the procedures in FAR 22.103-4(a) and (b).

**SUBPART 422.3--CONTRACT
WORK HOURS AND SAFETY
STANDARDS ACT**

**422.302 Liquidated damages and
overtime pay.**

Heads of contracting activities (HCA's) are authorized to review determinations of liquidated damages due under section 104(c) of the Contract Work Hours and Safety Standards Act, and to take remedial action, if appropriate, in accordance with FAR 22.302(c). Contractors or subcontractors may request review of administrative determinations of liquidated damages by written notice to the contracting officer. The contracting officer shall promptly forward appeals of liquidated damages determinations to the HCA.

**SUBPART 422.4--LABOR
STANDARDS FOR CONTRACTS
INVOLVING CONSTRUCTION**

**422.404 Davis-Bacon Act wage
determinations.**

**422.404-6 Modifications of wage
determinations.**

HCA's are authorized to request extension of the 90 day period for award after bid opening as provided in FAR 22.404-6(b)(6).

**422.406 Administration and
enforcement.**

422.406-8 Investigations.

Reports of violations shall be forwarded to the HCA, who shall process such reports in accordance with FAR 22.406-8(d).

**SUBPART 422.6--WALSH-HEALEY
PUBLIC CONTRACTS ACT**

422.604 Exemptions.

422.604-2 Regulatory exemptions.

The Assistant Secretary for Administration can request the Secretary of Labor to exempt contracts from the Walsh-Healey Public Contracts Act pursuant to FAR 22.604-2(c). A written finding justifying the request for exemption shall be prepared for the Assistant Secretary's signature and submitted by the HCA to the Senior

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422.803 AGRICULTURE ACQUISITION REGULATION (AGAR)

Procurement Executive (SPE) for referral to the Assistant Secretary.

422.608 [Reserved]

**SUBPART 422.8--EQUAL
EMPLOYMENT OPPORTUNITY**

422.803 Responsibilities.

The contracting office shall submit questions involving the applicability of Executive Order 11246 and FAR subpart 22.8 through the HCA to the SPE for resolution.

422.804 Affirmative action programs.

422.804-2 Construction.

The HCA shall ensure that each contracting office, awarding nonexempt construction contracts, maintains a current listing of covered geographical areas subject to affirmative action requirements specifying goals for minorities and women in covered construction trades.

422.807 Exemptions.

(a) The Assistant Secretary for Administration is authorized to make the determination in FAR 22.807(a)(1) that a contract is essential to the national security.

(b) The contracting officer shall submit requests for exemptions under FAR 22.807(a)(1), (a)(2), and (b)(5) through the HCA to the SPE for determination by the Assistant Secretary for Administration or referral to the Director, Office of Federal Contract Compliance Programs (OFCCP), as appropriate.

**SUBPART 422.13--SPECIAL
DISABLED AND VIETNAM ERA
VETERANS**

422.1303 Waivers.

(a) The Assistant Secretary for Administration is authorized to make the waiver determinations under FAR 22.1303(a) and (b) with concurrence of the Director, OFCCP.

(b) The contracting office shall submit requests for waivers through the HCA to the SPE for determination by the Assistant Secretary for Administration.

422.1306 Complaint procedures.

The contracting officer shall forward complaints received about the administration of the Vietnam Era Veterans Readjustment Assistance Act directly to the Department of Labor (DoL) as prescribed in FAR 22.1306.

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Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

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PART 424

**PROTECTION OF PRIVACY AND
FREEDOM OF INFORMATION**

development, or operation of a system of records on individuals to accomplish agency functions.

**SUBPART 424.1--PROTECTION OF
INDIVIDUAL PRIVACY**

424.103 Procedures.

USDA regulations implementing the Privacy Act are found in 7 CFR, Subtitle A, Part 1, Subpart G. Contracting officers shall follow these regulations when responding to requests for information or awarding contracts that will involve the design, development, or operation of a system of records on individuals to accomplish agency functions.

424.104 Contract clauses.

When applicable, the contracting officer shall insert the clause at 452.224-70, Confidentiality of Information, in contracts involving confidential information.

**SUBPART 424.2--FREEDOM OF
INFORMATION ACT**

424.203 Policy.

USDA regulations implementing the Freedom of Information Act are found in 7 CFR, Subtitle A, Part 1, Subpart A. Contracting officers shall follow these regulations when responding to requests for information or awarding contracts that will involve the design,

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- 425.1002 Trade sanctions.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

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PART 425

425.202 Policy.

FOREIGN ACQUISITION

**SUBPART 425.1--BUY AMERICAN
ACT--SUPPLIES**

425.102 Policy.

The Senior Procurement Executive (SPE) shall make the determination prescribed in FAR 25.102(a)(3).

425.105 Evaluating offers.

The SPE shall make the determinations prescribed in FAR 25.105. Requests for SPE approval shall be submitted by the HCA, in writing, and shall provide a detailed justification supporting why the proposed award is in the best interest of the Government.

**425.108 Excepted articles, materials,
and supplies.**

(a) Copies of determinations of nonavailability in accordance with FAR 25.102(a)(4) or 25.202(a)(3), for articles, material or supplies not listed in FAR 25.108, shall be submitted to the SPE for submission to the FAR Council.

(b) Information required by FAR 25.108(c) shall be submitted to the SPE for submission to the FAR Council.

**SUBPART 425.2--BUY AMERICAN
ACT--CONSTRUCTION
MATERIALS**

(a) The SPE shall make the determination prescribed in FAR 25.202(a)(3).

(b) If a contracting officer proposes that the use of a particular domestic construction material should be waived for a contract on the grounds that its use would be impracticable, the contracting officer shall submit a proposed determination with supporting information through the HCA to the SPE for approval or disapproval.

425.203 [Reserved]

425.204 [Reserved]

**SUBPART 425.3--BALANCE OF
PAYMENTS PROGRAM**

425.302 Policy.

The HCA shall make the determinations prescribed in FAR 25.302(b)(2) and (3) and may authorize differentials greater than 50 percent as prescribed in FAR 25.302(c).

**425.304 Excess and near-excess
foreign currencies.**

HCA's shall make the determinations as to the feasibility of using excess or near-excess currency.

**SUBPART 425.4--TRADE
AGREEMENTS**

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425.402 AGRICULTURE ACQUISITION REGULATION (AGAR)

425.402 Policy.

Whenever the U.S. Trade Representative publishes a redetermination of the dollar threshold at which the Trade Agreements Act applies, that dollar threshold will be published in a Departmental Notice, 5025 series.

**SUBPART 425.9--ADDITIONAL
FOREIGN ACQUISITION
CLAUSES**

425.901 Omission of Audit Clause.

The SPE shall make the determination under FAR 25.901(c)(1).

**SUBPART 425.10--
IMPLEMENTATION OF
SANCTIONS AGAINST
COUNTRIES THAT
DISCRIMINATE AGAINST UNITED
STATES PRODUCTS OR
SERVICES IN GOVERNMENT
PROCUREMENT**

425.1002 Trade Sanctions.

The Secretary, without power of redelegation, has the authority to make the necessary determination(s) and authorize award(s) of contract(s) in accordance with FAR 25.1002(c).

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426.7008	Identification of preferred products.
426.7009	Contract provisions.

Authority: 5 U.S.C. 301; 7 U.S.C. 5909; 40 U.S.C. 486(c).

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PART 426

OTHER SOCIOECONOMIC PROGRAMS

SUBPART 426.70--PREFERENCE FOR SELECTED BIOBASED PRODUCTS

426.7000 Scope of subpart.

This subpart supplements the FAR to implement the set-asides and preferences described in section 1665 of the Food, Agriculture, Conservation and Trade Act of 1990 (7 U.S.C. 5909).

426.7001 Applicability.

This subpart applies to USDA and all of its components, including corporations.

426.7002 Authority.

Section 1665 of the Food, Agriculture, Conservation and Trade Act of 1990 (7 U.S.C. 5909) authorizes USDA to establish set-asides and other preferences for products that have been assisted by the Alternative Agricultural Research and Commercialization Corporation (AARCC).

426.7003 Policy.

(a) AARCC provides financial assistance to private companies and other parties to commercialize nonfood, nonfeed products made from agricultural and forestry materials and animal by-

products (biobased products). Biobased products by their nature are environmentally friendly, and, in many instances, use agricultural material that otherwise would be waste. It is the policy of USDA to acquire AARCC products to the maximum extent practicable. This policy applies to all acquisitions of products regardless of dollar value.

(b) USDA shall satisfy its requirements for products the same or essentially the same as AARCC products by applying the preferences or set-asides described by this subpart.

426.7004 Definitions.

As used in this subpart---

"AARCC products" are products developed with assistance provided by AARCC as authorized by 7 U.S.C. 5905.

"Acquisitions of products" means an acquisition of one or more products for the use of the Government.

"Acquisitions involving the use of products" means an acquisition in which a Government contractor uses products in contract performance.

"Price preference" means an amount, expressed as a percentage, to be used in the evaluation of offers in an acquisition of products.

"Set-aside" means a requirement that vendors responding to a solicitation offer

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AARCC products.

“Solicitation” includes actions taken under Parts 12, 13, 14, 15, and 36 of the Federal Acquisition Regulation.

“Technical evaluation preference” means the use of an award factor or subfactor in which the Government expresses its preference for AARCC products.

426.7005 Preference list.

(a) The Office of Procurement and Policy Management (OPPM) and AARCC jointly shall establish and maintain a Preference List for AARCC products.

(b) The Preference List shall contain the list of preferred products, source information for these products, the type(s) of preference to be applied, the beginning and ending dates for the use of preferences, and other terms established to define the preference given to a product.

(c) The Preference List will be publicized within USDA by means of AGAR Advisories (see 401.371). Copies of the Preference List may be obtained from OPPM. The Preference List will also be posted on the World Wide Web at the USDA Procurement Home Page.

426.7006 Use of a set-aside or a price preference.

Acquisitions for products the same or

essentially the same as those products appearing on the Preference List shall either be set-aside exclusively or shall include a price preference for those products shown on the Preference List. The actual price preference to be used shall be determined by the requiring office but may not exceed the percentage shown on the Preference List.

426.7007 Use of a technical evaluation preference.

Acquisitions involving the use of products the same or essentially the same as those products appearing on the Preference List shall include a technical evaluation preference, if authorized in the Preference List. The technical evaluation preference may be determined by the contracting officer specifically for each acquisition.

426.7008 Identification of preferred products.

(a) Products subject to a set-aside or technical preference shall be separately listed in the schedule, specification, or performance work statement.

(b) Products subject to a price preference shall be separately listed in the schedule.

426.7009 Contract provisions.

(a) Each solicitation containing a price or technical preference under this

subpart shall contain the provision
452.226-70, Preferred Products.

(b) Each solicitation for products
subject to a set-aside shall include the
provision 452.226-71, Set-Aside For
Mandatory Products.

(c) Each solicitation for products
subject to a price preference shall include
the provision 452.226-72, Price
Preference for Award.

(d) Solicitations for products may
contain both the provision in 452.226-71
and the provision found in 452.226-72.

(e) The provisions prescribed above are
not required for acquisitions
accomplished using the purchase card as
a stand alone tool.

for construction, alteration or repair, and shipbuilding and conversion. Such payments also are authorized for service contracts, if the contracting officer determines that progress payments based on costs are not practicable and adequate safeguards are provided to administer progress payments based on a percentage or stage of completion. For all other contracts, progress payment provisions shall be based on costs except that the HCA may authorize progress payments based on a percentage or stage of completion on a case-by-case basis. Each authorization by the HCA shall include a determination and finding that progress payments based on costs cannot be employed practically and that there are adequate safeguards provided for the administration of progress payments based on a percentage or stage of completion.

432.103 Progress payments under construction contracts.

(a) When approving a progress payment under a construction contract, the contracting officer shall indicate the amount to be paid by the payment office and include in the contract file the rationale in support of the payment.

(b) When a retainage is made on a progress payment under a construction contract, the contracting officer shall place in the contract file a written determination stating the reason(s) for the retainage.

(c) When a progress payment under

a construction contract has been approved, the amount to be paid, the amount of any retainage withheld, and the reason(s) for the retainage shall be provided to the contractor by the contracting officer in writing before the payment due date.

(d) When the contractor, under a fixed-price construction contract, furnishes evidence to the contracting officer that the surety has been paid in full for bond premiums and requests reimbursement, the first subsequent progress payment shall include the total amount attributable to such bond premiums and the Government shall pay that amount in full. This amount paid for the bond premiums is not an amount in addition to the stated contract price.

432.111 Contract clauses for non-commercial purchases.

The contracting officer shall insert the clause at 452.232-70, Reimbursement for Bond Premiums - Fixed Price Construction Contracts, whenever the clause at FAR 52.232-5, Payments under Fixed-Price Construction Contracts, is used in a contract.

432.113 Customary contract financing.

The contracting officer may determine the necessity for customary contract financing. The determination and finding that customary contract financing is needed shall be placed in the contract file.

432.114 Unusual contract financing.

The HCA is authorized to approve unusual contract financing. The signed determination and finding supporting this approval shall be included in the contract file.

**SUBPART 432.2--COMMERCIAL
ITEM PURCHASE FINANCING****432.202 General.****432.202-1 Policy.**

In the case of unusual contract financing, the approval by the HCA shall be recorded in a determination and finding and maintained in the contract file.

**432.202-4 Security for Government
financing.**

Prior to determining that an offeror's financial condition is adequate security, the contracting officer must obtain the concurrence of the funding activity in the proposed determination.

**432.206 Solicitation provisions and
contract clauses.**

The responsibility for administration of the liquidation provisions of a contract may not be transferred from the contracting officer.

**432.207 Administration and payment
of commercial financing payments.**

The responsibility for receiving, reviewing, and approval of contract financing requests may not be transferred from the contracting officer.

**SUBPART 432.3--LOAN
GUARANTEES FOR DEFENSE
PRODUCTION****432.301 Definitions.**

Within this subpart, the "agency" or "guaranteeing agency" is the "head of the contracting activity" (HCA) and may not be redelegated.

**SUBPART 432.4--ADVANCE
PAYMENTS FOR NON-
COMMERCIAL ITEMS****432.402 General.**

The HCA is designated as the individual responsible for making the findings and determination, and for approval of the contract terms concerning advance payments.

432.406 Letters of credit.

The HCA is designated as the individual responsible for coordination with the Department of Treasury concerning letters of credit.

432.407 Interest.

(a) The HCA is designated as the individual who may authorize, on a case by case basis, advance payments without interest for the contract types described

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PART 434

MAJOR SYSTEM ACQUISITION

SUBPART 434.0--GENERAL

434.001 Definitions.

Pursuant to OMB Circular No. A-109 (A-109) and the definition at FAR 2.101, within USDA, a system shall be considered a major system if:

(a) The total acquisition costs with private industry are estimated to be \$50 million or more, or

(b) The system has been specifically designated to be a major system by the USDA Acquisition Executive, even if the acquisition costs are not expected to exceed \$50 million.

434.002 Policy.

In addition to the policy guidance at FAR 34.002, the policies outlined in paragraph 6 of A-109 should serve as guidelines for all contracting activities in planning and developing systems, major or otherwise.

434.003 Responsibilities.

(a) The Secretary of Agriculture or other designated USDA key executive is responsible for making four key decisions in each major system acquisition process. These are listed in paragraph 9 of A-109 and elaborated on in paragraphs 10 through 13. The key executives of USDA (Secretary, Deputy Secretary, Under Secretaries and

Assistant Secretaries) individually or as a group will participate in this decision making process.

(b) The Assistant Secretary for Administration (ASA) is the USDA Acquisition Executive. The ASA will ensure that A-109 is implemented in USDA and that the management objectives of the Circular are realized. The ASA is responsible for designating the program manager for each major system acquisition, designating an acquisition to be a major system acquisition, and approving the written charter and project control system for each major system acquisition.

(c) The Procurement and Property Management staff is responsible for assisting the ASA in carrying out the above responsibilities.

(d) Heads of contracting activities must:

(1) Ensure compliance with the requirements of A-109, FAR Part 34 and AGAR 434.

(2) Ensure that potential major system acquisitions are brought to the attention of the USDA Acquisition Executive.

(3) Recommend qualified candidates for designation as program managers for each major system acquisition within their jurisdiction.

(4) Ensure that program managers fulfill their responsibilities and discharge their duties.

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(5) Cooperate with the ASA in implementing the requirements of A-109.

the specific program is the agency head for the purposes of FAR 34.005-6.

(e) The program manager is responsible for planning and executing the major system acquisition, ensuring appropriate coordination with the USDA Acquisition Executive and other key USDA executives.

434.004 Acquisition strategy.

(a) The program manager will develop, in coordination with the Acquisition Executive, a written charter outlining the authority, responsibility, accountability, and budget for accomplishing the proposed objective.

(b) The program manager will develop, subject to the approval of the Acquisition Executive, a project control system to schedule, monitor, and regularly report on all aspects of the project. The control system shall establish reporting periods and milestones consistent with the key decisions listed in paragraph 9 of A-109.

(c) Upon initiation of the project, the program manager will report regularly to the Acquisition Executive.

434.005 General Requirements.**434.005-6 Full Production.**

The Secretary or the USDA key executive designated by the Secretary for

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Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

PART 436

**CONSTRUCTION AND
ARCHITECT-ENGINEER
CONTRACTS**

**SUBPART 436.2--SPECIAL
ASPECTS OF CONTRACTING FOR
CONSTRUCTION**

**436.201 Evaluation of contractor
performance.**

Preparation of performance evaluation reports. In addition to the requirements of FAR 36.201, performance evaluation reports shall be prepared for indefinite-delivery type contracts when either the contract maximum or the contracting activity's reasonable estimate of services to be ordered exceeds \$500,000.00. For these contracts, performance evaluation reports shall be prepared for each order at the time of final acceptance of the work under the order.

**436.203 Government estimate of
construction costs.**

For acquisitions using sealed bid procedures, the contracting officer may disclose the overall amount of the Government's estimate of construction costs following identification of the responsive bid most advantageous to the Government; verification of that bid's price reasonableness; and verification of the bidder's responsibility. For acquisitions using other than sealed bid procedures (e.g., negotiation), the contracting officer may disclose the

overall amount of the estimate after contract award.

**436.204 Disclosure of the magnitude
of construction projects.**

In the case of indefinite-delivery type contracts, the reasonable estimate of work to be done or the maximum in the solicitation, both including all options, is to be used to select the price range. Contracting officers may elect to use both a price range for the base period of services and the total, inclusive of options, to best describe the magnitude of the solicitation.

436.205 Statutory cost limitations.

(a) When it appears that funds available for a project may be insufficient for all the desired features of construction, the contracting officer may provide in the solicitation for a base bid item covering the work generally as specified and for one or more additive or deductive bid items which progressively add or omit specified features of the work in a stated order of priority. In this case, the contracting officer shall insert the provision at 452.236-70, Additive or Deductive Items, in solicitations for construction.

(b) In the alternative to the process in paragraph (a) of this section, the contracting officer may use the policies and procedures found in FAR 17.2.

**436.209 Construction contracts with
architect-engineer firms.**

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436.213 AGRICULTURE ACQUISITION REGULATION (AGAR)

The head of the contracting activity (HCA) is authorized to approve the award of a contract to construct a project, in whole or in part, to the firm (inclusive of its subsidiaries or affiliates) that designed the project.

436.213 Special procedures for sealed bidding in construction contracting.

436.213-2 Presolicitation notices.

The authority to waive a presolicitation notice is restricted to the HCA.

SUBPART 436.3 [RESERVED]

SUBPART 436.5--CONTRACT CLAUSES

436.500 Scope of subpart.

This subpart prescribes clauses for insertion in USDA solicitations and contracts for construction and for dismantling, demolition, or removal of improvements or structures. The contracting officer shall use the clauses as prescribed, in contracts that exceed the simplified acquisition threshold. The contracting officer may use the clauses if the contract amount is expected to be within the simplified acquisition threshold.

436.571 Prohibition against the use of lead-based paint.

The contracting officer shall insert the clause at 452.236-71, Prohibition

Against the Use of Lead-Based Paint, in solicitations and contracts, if the work involves construction or rehabilitation (including dismantling, demolition, or removal) of residential structures. This clause may be used in contracts for other than residential structures.

436.572 Use of premises.

The contracting officer shall insert the clause at 452.236-72, Use of Premises, if the contractor will be permitted to use land or premises administered by USDA.

436.573 Archeological or historic sites.

The contracting officer shall insert the clause at 452.236-73, Archeological or Historic Sites, if the contractor will be working in an area where such sites may be found. Use of the clause is optional in service contracts for on-the-ground work, e.g. reforestation, silvicultural, land stabilization, or other agricultural-related projects.

436.574 Control of erosion, sedimentation, and pollution.

The contracting officer shall insert the clause at 452.236-74, Control of Erosion, Sedimentation and Pollution, if there is a need for applying environmental controls in the performance of work. Use of the clause is optional in service contracts for on-the-ground e.g., reforestation, silvicultural, land stabilization, or other agricultural-related projects.

436.575 Maximum workweek-construction schedule.

The contracting officer shall insert the clause at 452.236-75, Maximum Workweek-Construction Schedule, if the clause at FAR 52.236-15 is used and the contractor's work schedule is restricted by access to the facility or must be coordinated with the schedule of contract administration personnel.

436.576 Samples and certificates.

The contracting officer shall insert the clause at 452.236-76, Samples and Certificates, in all contracts.

436.577 Emergency response.

The contracting officer may insert the clause at 452.236-77, Emergency Response, in construction contracts awarded for the Forest Service.

436.578 Standard specifications for construction of roads and bridges.

The contracting officer shall insert the clause at 452.236-78, Forest Service Standard Specifications for Construction of Roads and Bridges, in construction contracts that incorporate the standard specifications.

436.579 Opted timber sale road requirements.

The contracting officer shall insert the clause at 452.236-79, Opted Timber Sale Road Requirements, in road

construction contracts resulting from a timber sale turnback.

SUBPART 436.6--ARCHITECT-ENGINEER SERVICES

436.601 Policy.

436.601-3 Applicable contracting procedures.

The technical official's listing of areas where recovered materials cannot be used shall be referred to the contracting activity's official designated in accordance with FAR 23.404. A copy of the listing and of any approval or disapproval by that official is to be retained in the solicitation file.

436.602 Selection of firms for architect-engineer contracts.

436.602-1 Selection criteria.

The HCA is authorized to approve the use of design competition under the conditions in FAR 36.602-1(b).

436.602-2 Evaluation boards.

HCA's shall establish written procedures for providing permanent or ad hoc architect-engineer evaluation boards as prescribed in FAR 36.602-2. The procedures may provide for the appointment of private practitioners of architecture, engineering, or related professions when such action is determined by the HCA to be essential to meet the Government's minimum needs.

436.602-3 Evaluation board functions.

The selection report required in FAR 36.602-3(d) shall be prepared for the approval of the HCA. The HCA may authorize an acquisition official above the level of the contracting officer to execute the required approval.

436.602-4 Selection authority.

(a) The HCA shall serve as the selection authority in accordance with FAR 36.602-4. The HCA may authorize an acquisition official above the level of the contracting officer to serve as the selection authority.

(b) A copy of the final selection, inclusive of the supporting documents, shall be provided to the contracting officer and maintained in the solicitation file.

436.602-5 Short selection process for contracts not to exceed the simplified acquisition threshold.

The HCA may include either or both procedures in FAR 36.602-5 in the procedures for evaluation boards.

436.603 Collecting data on and appraising firms' qualifications.

(a) HCA's which require architect-engineer services shall establish procedures to comply with the requirements of FAR 36.603.

(b) The procedures shall include a list of names, addresses, and phone numbers of offices or boards assigned to maintain architect-engineer qualification data files. The list shall be updated annually.

436.604 Performance evaluation.

Preparation of performance evaluation reports. (a) In addition to the requirements of FAR 36.604, performance evaluation reports shall be prepared for indefinite-delivery type contracts when either the contract maximum or the contracting activities reasonable estimate of services to be ordered exceeds \$25,000.00. For these contracts, performance evaluation reports shall be prepared for each order at the time of final acceptance of the work under the order. (b) The contracting officer may require a performance evaluation report on the work done by the architect-engineer after the completion of or during the construction of the designed project.

436.605 Government cost estimate for architect-engineer work.

The contracting officer may release the Government's total cost estimate in accordance with FAR 36.605(b).

436.609 Contract clauses.**436.609-1 Design within funding limitations.**

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SUBCHAPTER H--CLAUSES AND FORMS

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Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

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PART 452

**SOLICITATION PROVISIONS AND
CONTRACT CLAUSES**

**SUBPART 452.2--TEXTS OF
PROVISIONS AND CLAUSES**

452.204-70 Inquiries.

As prescribed in 404.7001, insert the following provision:

INQUIRIES (FEB 1988)

Inquiries and all correspondence concerning this solicitation should be submitted in writing to the Contracting Officer. Offerors should contact only the Contracting Officer issuing the solicitation about any aspect of this requirement prior to contract award.

(End of provision)

452.211-70 Brand Name or Equal.

As prescribed in 411.171, insert the following provision:

**BRAND NAME OR EQUAL
(NOV 1996)**

(As used in this provision, the term "brand name" includes identification of products by make and model.)

(a) If items called for by this solicitation have been identified by a "brand name or equal" description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of

products that will be satisfactory. Offers of "equal" products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the offer (see clause 452.211-2) and are determined by the Contracting Officer to meet fully the salient characteristics requirements listed in the solicitation.

(b) Unless the offeror clearly indicates in its offer that it is offering an "equal" product, the offeror shall be considered as offering the brand name product(s) referenced in the solicitation.

(c)(1) If the offeror proposes to furnish an "equal" product or products, the brand name(s), if any, and any other required information about the product(s) to be furnished shall be inserted in the space provided in the solicitation. The evaluation of offers and the determination as to the equality of the product(s) offered shall be the responsibility of the Government and will be based on information furnished by the offeror or identified in its offer as well as other information reasonably available to the contracting activity. Caution to offerors: The contracting activity is not responsible for locating or securing any information which is not identified in the offer and is not reasonably available to the contracting activity. Accordingly, to assure that sufficient information is available, the offeror must furnish as a part of its offer all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the contracting activity to (i) determine whether the

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product offered meets the salient characteristics requirement of the solicitation, and (ii) establish exactly what the offeror proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific reference to information previously furnished or to information otherwise available to the contracting activity.

(2) If an offeror proposes to modify a product so as to make it conform to the requirements of the solicitation, the offer shall include (i) a clear description of such proposed modifications and (ii) clearly marked descriptive material to show the proposed modifications.

(End of Provision)

452.211-71 Equal Products Offered.

As prescribed in 411.171, insert the following or substantially the same clause in solicitations seeking offers on a "brand name or equal" basis to allow offerors the opportunity to clearly identify the "equal" item being offered, and to illustrate how that item meets the salient characteristics requirements of the Government.

**EQUAL PRODUCTS OFFERED
(NOV 1996)**

(a) Offerors proposing to furnish an "equal" product, in accordance with the "Brand Name or Equal" provision of this solicitation, shall provide the following

information for each offered "equal" product:

Contract Line Item Number (if any):

Brand Name or Equal Product identified by the Government in this solicitation: _____

Offered Product Name: _____

Catalog Description or part number: _____

Manufacturer's Name: _____

Manufacturer's Address: _____

(b) Offerors are responsible for submitting all additional information on the above product necessary for the Contracting Officer to determine whether the product offered meets the "brand name or equal" product's salient characteristics listed in the solicitation.

(End of Clause)

452.211-72 Statement of Work/Specifications.

As prescribed in 411.171, insert the following clause:

**STATEMENT OF WORK/
SPECIFICATIONS (FEB 1988)**

The Contractor shall furnish

the necessary personnel, material, equipment, services and facilities (except as otherwise specified), to perform the Statement of Work/Specifications referenced in Section J.

(End of Clause)

452.211-73 Attachments to Statements of Work/Specifications.

As prescribed in 411.171, insert the following clause:

ATTACHMENTS TO STATEMENT OF WORK/SPECIFICATIONS (FEB 1988)

The attachments to the Statement of Work/Specifications listed in Section J are hereby made part of this solicitation and any resultant contract.

(End of Clause)

452.211-74 Period of Performance.

As prescribed in 411.404(a), insert the following clause:

PERIOD OF PERFORMANCE (FEB 1988)

The period of performance of this contract is from __*__ through __*__.

(End of Clause)

*Contracting Officer shall insert the appropriate dates.

452.211-75 Effective Period of the Contract.

As prescribed in 411.404(b), insert the following clause:

EFFECTIVE PERIOD OF THE CONTRACT (FEB 1988)

The effective period of this contract is from __*__ through __*__.

(End of Clause)

*Contracting Officer shall insert the appropriate dates.

452.214-70 Award by Lot.

As prescribed in 414.201-6, insert a provision substantially as follows:

AWARD BY LOT (NOV 1996)

Subject to the Section L provision FAR 52.214-10, "Contract Award-- Sealed Bidding," award will generally be made to a single bidder on each entire lot. However, the Government reserves the right to award by item within any lot when the contracting officer determines that it is advantageous to the Government.

(End of Provision)

452.215-71 Instructions for the Preparation of Technical and Business Proposals.

As prescribed in 415.407(a), insert a

provision substantially as follows:

**INSTRUCTIONS FOR THE
PREPARATION OF
TECHNICAL AND BUSINESS
PROPOSALS
(NOV 1996)**

(a) General Instructions. Proposals submitted in response to this solicitation shall be furnished in the following format with the numbers of copies as specified below.

(1) The proposal must include a technical proposal and business proposal. Each of the parts shall be separate and complete so that evaluation of one may be accomplished independently from evaluation of the other. The technical proposal must not contain reference to cost; however, resource information (such as data concerning labor hours and categories, materials, subcontracts, etc.) must be contained in the technical proposal so that the contractor's understanding of the statement of work may be evaluated.

(2) Offerors may, at their discretion, submit alternate proposals or proposals which deviate from the requirement; provided, that an offeror also submit a proposal for performance of the work as specified in the statement of work. Any "alternate" proposal may be considered if overall performance would be improved or not compromised, and if it is in the best interest of the Government. Alternate proposals, or

deviations from any requirement of this RFP, must be clearly identified.

(3) The Government will evaluate proposals in accordance with the evaluation criteria set forth in Section M of this RFP.

(4) Offerors shall submit their proposal(s) in the following format and the quantities specified:

- (a) * copies of the completed, signed offer (Sections A through K of the solicitation package)
- (b) * copies of the technical proposal
- (c) * copies of the business/cost proposal

(b) Technical Proposal Instructions. The technical proposal will be used to make an evaluation and arrive at a determination as to whether the proposal will meet the requirements of the Government. Therefore, the technical proposal must present sufficient information to reflect a thorough understanding of the requirements and a detailed, description of the techniques, procedures and program for achieving the objectives of the specifications/ statement of work. Proposals which merely paraphrase the requirements of the Government's specifications/ statement of work, or use such phrases as "will comply" or "standard techniques will be employed" will be considered unacceptable and will not be considered further. As a minimum, the proposal must clearly provide the following:

contract is subject to the Privacy Act, the Contractor will follow the rules and procedures of disclosure set forth in the Privacy Act of 1974, 5 U.S.C. 552a, and implementing regulations and policies, with respect to systems of records determined to be subject to the Privacy Act.

(e) Confidential information, as defined in (a)(1) and (2) above, shall not be disclosed without the prior written consent of the individual, institution or organization.

(f) Written advance notice of at least 45 days will be provided to the Contracting Officer of the Contractor's intent to release findings of studies or research, which have the possibility of adverse effects on the public or the Federal agency, as described in (b) above. If the Contracting Officer does not pose any objections in writing within the 45 day period, the contractor may proceed with disclosure. Disagreements not resolved by the Contractor and Contracting Officer will be settled pursuant to the "Disputes" clause.

(g) Whenever the Contractor is uncertain with regard to the proper handling of material under the contract, or if the material in question is subject to the Privacy Act or is confidential information subject to the provisions of this clause, the Contractor shall obtain a written determination from the Contracting Officer prior to any release, disclosure, dissemination, or publication.

(h) The provisions of paragraph (e) of this clause shall not apply when the information is subject to conflicting or overlapping provisions in other Federal, State or local laws.

(End of Clause)

452.226-70 Preferred Products.

As prescribed in 426.7009(a), include the following provision:

**PREFERRED PRODUCTS
(MAY 1998)**

Specific products required by this solicitation and resulting contract, are subject to a price or a technical preference. A list of these products, the specific preference, and the manufacturer or producer is included below.

Contract Line Item (or other location in this solicitation):

_____	*
Product:_____	*
Manufacturer/Producer:_____	*

Preference:_____	*

(End of provision)

* For each line item to which a

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preference applies, Contracting officer shall insert appropriate information.

452.226-71 Set-aside for Mandatory Products.

As prescribed in 426.7009(b), include the following provision:

SET-ASIDE FOR MANDATORY PRODUCTS (MAY 1998)

Specific products are set-aside as mandatory products. These are separately listed in the schedule, specifications, or performance work statement. Specific terms governing the set-aside, and source information for the products are shown below.

Contract Line Item (or other location in this solicitation):

_____ *

Product:

_____ *

Manufacturer/Producer:

_____ *

Set-Aside Terms:

_____ *

(End of provision)

* For each line item to which a set-aside applies, Contracting officer shall insert appropriate information.

452.226-72 Price Preference for Award.

As prescribed in 426.7009(c), include the following provision:

PRICE PREFERENCE FOR AWARD (MAY 1998)

Certain products listed in the schedule of this solicitation are subject to a price preference. A list of these products, the amount of the preference, and source information is included in provision 452.226-70, Preferred Products. For purposes of evaluation of offers only, the offered prices for these products will be reduced by the price preference listed in the solicitation.

(End of provision)

452.228-70 Alternative Forms of Security.

As prescribed in 428.204-2, insert the following provision:

ALTERNATIVE FORMS OF SECURITY (NOV 1996)

If furnished as security, money orders, drafts, cashiers checks, or certified checks shall be drawn payable to: __*__.

(End of Provision)

*Contracting Officer shall insert the name of the USDA contracting activity.

452.228-71 Insurance Coverage.

As prescribed in 428.310, insert the following clause:

**INSURANCE COVERAGE
(NOV 1996)**

Pursuant to FAR clause 52.228-5, Insurance-Work on a Government Installation, the Contractor will be required to present evidence to show, as a minimum, the amounts of insurance coverage indicated below:

(a) Workers Compensation and Employer's Liability. The Contractor is required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer's liability section of the insurance policy, except when contract operations are so commingled with a Contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least \$100,000 shall be required, except in States with exclusive or monopolistic funds that do not permit worker's compensation to be written by private carriers.

(b) General Liability. The Contractor shall have bodily injury liability insurance coverage written on a comprehensive form of policy of at least \$500,000 per occurrence.

(c) Automobile Liability. The Contractor shall have automobile liability insurance written on a comprehensive form of policy. The policy shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States shall provide coverage of at least \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage or loss.

(d) Aircraft Public and Passenger Liability. When aircraft are used in connection with performing the contract, the Contractor shall have aircraft public and passenger liability insurance. Coverage shall be at least \$200,000 per person and \$500,000 per occurrence for bodily injury, other than passenger injury. Coverage for passenger injury shall be at least \$200,000 multiplied by the number of seats or passengers, whichever is greater.

(End of Clause)

Alternate I (NOV 1996). As prescribed in 428.310, substitute the following paragraph (b), when additionally the contractor must have property damage liability coverage:

(b) General Liability. (1) The Contractor shall have bodily injury liability coverage written on a comprehensive form of policy of at least \$500,000 per occurrence.

(2) The Contractor shall have property damage liability insurance shall be

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required in the amount of ____* ____ per
occurrence.

*Contracting Officer shall insert amount
required.

**452.232-70 Reimbursement for Bond
Premiums--Fixed-Price Construction
Contracts.**

As prescribed in 432.111, insert the
following clause:

[The next page is 452-11.]