

# PART 401 - AGRICULTURE ACQUISITION REGULATION SYSTEM

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

Source: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

## 401.000 Scope of part.

### Subpart 401.1 - Purpose, Authority, Issuance

#### 401.101 Purpose.

#### 401.103 Authority.

#### 401.104 Applicability.

#### 401.105 Issuance.

#### 401.105-1 Publication and code arrangement.

#### 401.105-2 Arrangement of regulations.

#### 401.105-3 Copies.

#### 401.106 OMB approval under the Paperwork Reduction Act.

#### 401.170 Electronic access to regulatory information.

### Subpart 401.2 - Administration

#### 401.201 Maintenance of the FAR.

#### 401.201-1 The two councils.

### Subpart 401.3 - Agency Acquisition Regulations

#### 401.301 Policy.

#### 401.304 Agency control and compliance procedures.

#### 401.370 Exclusions.

#### 401.371 AGAR Advisories.

#### 401.372 Departmental directives.

### Subpart 401.4 - Deviations From the FAR and AGAR

#### 401.402 Policy.

#### 401.403 Individual deviations.

401.404 Class deviations.

## Subpart 401.6 - Contracting Authority and Responsibilities

401.601 General.

401.602 Contracting officers.

401.602-3 Ratification of unauthorized commitments.

401.603 Selection, appointment, and termination of appointment.

401.603-1 General.

**Parent topic:** SUBCHAPTER A - GENERAL

## **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) Electronic form on the USDA Departmental Administration Procurement Homepage (see 401.170).

(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 property, loans, grants, benefits, or contracts. In 1971, Secretary of Agriculture Hardin announced a voluntary partial waiver from the Administrative Procedure Act exception, and USDA agencies generally are required to provide notice and an opportunity for public comment on proposed rules (36 FR 13804, July 24, 1971). The AGAR has been promulgated and may be revised from time to time in accordance with the rulemaking procedures of the Administrative Procedure Act. The USDA also is required to publish for public comment procurement regulations in the Federal Register, pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 418b), and FAR 1.301.

### **401.105-2 Arrangement of regulations.**

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.

### **401.105-3 Copies.**

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.

## **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:

<b>AGAR segment</b>	<b>OMB Control No.</b>
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411.170	0505-0014
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<u>415.2</u>	0505-0013
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436.575	0505-0011
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437.110	0505-0015
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437.270	0505-0016
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452.211-1	0505-0014
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452.215-71	0505-0013
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452.236-75	0505-0011
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452.237-74	0505-0015
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452.237-76	0505-0016
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## **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/procurement/>.

## **Subpart 401.2 - Administration**

### **401.201 Maintenance of the FAR.**

#### **401.201-1 The two councils.**

(a) USDA's representative on the Civilian Agency Acquisition Council is designated by the SPE.

(b) The Procurement Policy Division will coordinate proposed FAR revisions within USDA.

## **Subpart 401.3 - Agency Acquisition Regulations**

### **401.301 Policy.**

(a) The SPE, subject to the authorities in 401.103 and FAR 1.301, may issue and publish Departmental regulations, that together with the FAR, constitute Department-wide policies, procedures, solicitation provisions, and contract clauses governing the contracting process or otherwise controlling the relationship between USDA (including any of its contracting activities) and contractors or prospective contractors.

(b) Each designated head of a contracting activity (HCA) is authorized to issue or authorize the issuance of, at any organizational level, internal guidance which does not have a significant effect beyond the internal operating procedures of the activity, or a significant cost or administrative impact on offerors or contractors. Internal guidance issued by contracting activities will not be published in the Federal Register. HCA's shall ensure that the guidance, procedures, or instructions issued -

- (1) Are consistent with the policies and procedures contained in this chapter;
- (2) Follow the format, arrangement, and numbering system of this chapter to the extent practicable;
- (3) Contain no material which duplicates, paraphrases, or is inconsistent with this chapter; and
- (4) Are numbered and identified by use of alphabetical suffixes to the chapter number as follows:

4A [Reserved]

4B Agricultural Research Service.

4C Farm Service Agency.

4D Rural Development (mission area).

4E Food Safety and Inspection Service.

4F [Reserved]

4G Forest Service.

4H [Reserved]

4I Natural Resources Conservation Service.

4J [Reserved]

4K Food and Nutrition Service.

4L Animal and Plant Health Inspection Service.

4M [Reserved]

4N Departmental Administration.

4O-4P [Reserved]

4R Office of Inspector General.

4S [Reserved]

#### **401.304 Agency control and compliance procedures.**

- (a) The AGAR System is under the direct oversight and control of the SPE, who is responsible for review and issuance of all Department-wide acquisition regulations published in the Federal Register to assure compliance with FAR part 1.
- (b) The SPE is also responsible for review and issuance of unpublished, Department-wide internal guidance under the AGAR System.
- (c) HCA's are responsible for establishment and implementation of formal procedures for oversight and control of unpublished internal guidance issued within the contracting activity to implement FAR or AGAR requirements. These procedures shall be subject to the review and approval by the SPE.
- (d) The SPE is responsible for evaluating coverage under the AGAR System to determine applicability to other agencies and for recommending coverage to the FAR Secretariat for inclusion in the FAR.
- (e) Recommendations for revision of existing FAR coverage or new FAR coverage shall be submitted by the HCA to the SPE for further action.

#### **401.370 Exclusions.**

Subject to the policies of FAR subpart 1.3, certain USDA acquisition policies and procedures may be excluded from the AGAR under appropriately justified circumstances, such as:

- (a) Subject matter which is effective for a period less than 12 months.
- (b) Subject matter which is instituted on an experimental basis for a reasonable period.
- (c) Acquisition procedures instituted on an interim basis to comply with the requirements of statute, regulation, Executive Order, OMB Circular, or OFPP Policy Letter.

#### **401.371 AGAR Advisories.**

The SPE may issue AGAR Advisories, consistent with the policies of the FAR and the AGAR, for the following purposes:

- (a) To communicate Department-wide policy and/or procedural guidance to contracting activities;
- (b) To delegate to procurement officials authority to make determinations or to take action to implement the policies of the FAR or the AGAR; and,

(c) To establish internal policy and procedures on an interim basis, prior to incorporation in the AGAR or in a Departmental Directive.

(d) AGAR Advisories are only available in electronic format on the USDA Procurement Web site at <http://www.usda.gov/procurement/>.

#### **401.372 Departmental directives.**

Subject to the policies of FAR 1.3, USDA from time to time may issue internal directives to establish procedures, standards, guidance, or methods of performing duties, functions, or operations. Such directives include Departmental Regulations (DR's), Departmental Notices, and Secretary's Memoranda.

### **Subpart 401.4 - Deviations From the FAR and AGAR**

#### **401.402 Policy.**

Requests for authority to deviate from the provisions of the FAR or the AGAR shall be submitted in writing as far in advance as the exigencies of the situation will permit. Each request for deviation shall contain the following:

- (a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the FAR and AGAR;
- (b) The reason why the deviation is considered necessary or would be in the best interest of the Government;
- (c) If applicable, the name of the contractor and identification of the contract affected;
- (d) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;
- (e) A description of the intended effect of the deviation;
- (f) A statement of the period of time for which the deviation is needed; and
- (g) Any pertinent background information which will contribute to a full understanding of the desired deviation.

#### **401.403 Individual deviations.**

In individual cases, deviations from either the FAR or the AGAR will be authorized only when essential to effect a necessary acquisition or where special circumstances make such deviations clearly in the best interest of the Government. Except for cost principles, HCA's may approve individual deviations from the AGAR, after coordinating with the General Counsel and the SPE. No deviations from the FAR or AGAR may be authorized at the contracting office level. A copy of each deviation and its supporting documentation shall be provided to the SPE. Deviations from the FAR

shall not be made unless such action is authorized by the SPE after consultation with the Office of the General Counsel and any other appropriate office, on the basis of a written justification stating clearly the special circumstances involved.

#### **401.404 Class deviations.**

Where deviations from the FAR or AGAR are considered necessary for classes of contracts, requests for authority to deviate shall be submitted in writing to the SPE for approval. The SPE may authorize class deviations from the FAR without consulting the Chairperson of the Civilian Agency Acquisition Council where urgency precludes consultation. The SPE shall subsequently inform the Chairperson of the Civilian Agency Acquisition Council of the deviation including the circumstances under which it was required.

### **Subpart 401.6 - Contracting Authority and Responsibilities**

#### **401.601 General.**

(a) The authority and responsibility vested in the Secretary to manage USDA's acquisition function is delegated through the Assistant Secretary for Administration to the SPE. This broad authority includes, but is not limited to, the following responsibilities:

- (1) Prescribing and publishing Departmental acquisition policies, regulations, and procedures.
  - (2) Taking any necessary actions consistent with policies, regulations, and procedures with respect to purchases, contracts, leases, and other transactions.
  - (3) Designating contracting officers.
  - (4) Establishing clear lines of contracting authority.
  - (5) Evaluating and monitoring the performance of USDA's acquisition system.
  - (6) Managing and enhancing career development of the contracting work force.
  - (7) Participating in the development of Government-wide acquisition policies, regulations, and standards; and determining specific areas where government-wide performance standards should be established and applied.
  - (8) Determining areas of Department-unique standards and developing unique Department-wide standards.
  - (9) Certifying to the Secretary that the acquisition system meets approved standards.
- (b) The SPE may delegate contracting authority to the Heads of Contracting Activities (HCA's) and the responsibility to manage their acquisition function.

(c) Unless prohibited by the FAR, the AGAR, or by other applicable statutes and regulations, the SPE may redelegate to HCA's the authority to make determinations as the agency head in order to implement the policies and procedures of the FAR. Such delegations shall be in writing, but need not



be published.

(d) Unless prohibited by the FAR, the AGAR, or by other applicable statutes or regulations, each HCA may designate one individual from the contracting activity to carry out the functions of the HCA (HCAD). The HCAD may exercise all authority delegated to the HCA.

## **401.602 Contracting officers.**

### **401.602-3 Ratification of unauthorized commitments.**

(a) *Definitions. Ratification*, as used in this section, means the signed, documented action taken by an authorized official to approve and sanction a previously unauthorized commitment.

*Unauthorized commitment*, as used in this section, means an agreement made by a Government representative who lacked the authority to enter into a contract on behalf of the Government.

(b) *Policy*. The HCA may delegate ratification authority to the chief of the contracting office.

(c) *Procedure*. Whenever an official of the cognizant contracting activity who is authorized to ratify unauthorized commitments learns that a person or firm has assumed work as a result of an unauthorized commitment, that official shall take the following actions:

(1) Immediately inform any person who is performing work as a result of an unauthorized commitment that the work is being performed at that person's risk;

(2) Inform the individual who made the unauthorized commitment of the seriousness of the act and the possible consequences;

(3) Ensure that the individual who made the unauthorized commitment furnishes all records and documents concerning the commitment and a complete, written statement of facts, including, but not limited to: a statement as to why a contracting officer was not used; why the vendor was selected and a list of sources considered; a description of work to be performed or products to be furnished; the estimated or agreed price; whether an appropriation is available for the work; and whether performance has begun. Under exceptional circumstances, such as when the individual who made the unauthorized commitment is no longer available to attest to the circumstances of the unauthorized commitment, the ratifying official may waive these requirements; and

(4) Decide whether ratification is proper and proceed as follows:

(i) If ratification is not justifiable, provide the cognizant program office, contracting office, and the unauthorized contractor with an explanation of the decision not to ratify.

(ii) If ratification appears adequately justified, ratify the action and retain or assign the contract to a successor contracting officer if necessary.

(iii) Maintain related approval, decisional, and background documents in the contract file for audit purposes.

(iv) Notify the cognizant program supervisor or line officer about the final disposition of the case; the notification may include a recommendation that the unauthorized commitment should be further considered a violation of USDA's employee conduct regulations.

## **401.603 Selection, appointment, and termination of appointment.**

### **401.603-1 General.**

An HCA may delegate contracting authority to the extent authorized by the SPE in a general delegation of acquisition authority, by appointing qualified individuals as contracting officers, in accordance with the USDA Contracting Officer Warrant System, Departmental Regulation 5001-1.