July 3, 2003

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES

FROM: Angela B. Styles (signed)
Administrator

SUBJECT: Applicability of FAR Part 12 to Construction Acquisitions

Questions periodically arise as to whether construction needs may be acquired using the policies of FAR Part 12, which addresses the acquisition of commercial items. For the reasons discussed below, Part 12, as currently promulgated, should rarely, if ever, be used for new construction acquisitions or non-routine alteration and repair services. In accordance with long-standing practice, agencies should apply the policies of FAR Part 36 to these acquisitions. Part 36 incorporates provisions and clauses that are generally consistent with customary commercial practices in the construction industry. Part 12 could be used in limited circumstances involving construction contracting -- primarily for routine alteration and repair services as well as for acquisitions of commercial construction materials and associated ancillary services.

The provisions and clauses in FAR Part 36 address all fundamental aspects of construction contracting. Part 36 applies well-established commercial principles that are designed to result in an equitable distribution of risk between the government and contractors. In doing so, Part 36 enables agencies to gain easy access to marketplace capabilities.

By contrast, FAR Part 12 lacks clauses for handling critical circumstances common to construction efforts, especially those involving new construction or non-routine alteration and repair services. Clauses that would typically be expected in these efforts include those addressing differing site conditions, change orders, and suspension of work. The gap in coverage reflects the fact that construction contracting was not generally contemplated when Part 12 was promulgated. New construction projects and complex alteration and repair, in particular, involve a high degree of variability, including innumerable combinations of site requirements, weather and physical conditions, labor availability, and schedules. The current coverage in Part 12 fails to allocate risk in a manner that takes into account the nature of these activities.

Contracting for new construction or complex alternations and repair work without the protections of the Part 36 provisions and clauses would likely force contractors to include contingencies in their offers that would unnecessarily drive up construction costs

borne by the taxpayer. Increased risk also could discourage contractors from bidding on federal projects. Small businesses, who may lack the financial ability to take on higher levels of risk, may find participation in federal construction contracting to be especially difficult which, in turn, could deprive agencies of the innovation and ingenuity that small businesses offer when given the chance to compete. Simply put, if Part 36 is not used, an agency may be hard pressed to obtain the marketplace competition needed to negotiate fair and reasonable prices on these construction projects.

This memorandum is not intended to limit the goal of FAR Part 12, which is to ensure agencies are effectively positioned to take full advantage of the commercial marketplace and the value and efficiencies the marketplace generates. In fact, Part 12 clauses generally are suited for certain types of construction activities that lack the level of variability found in new construction and complex alteration and repair. In particular, Part 12 generally may be suited for routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services, as well as for purchases of commercial construction material and associated ancillary services. Of course, as part of acquisition planning, contracting officers need to consider the particular circumstances of a given acquisition (e.g., the likelihood of a differing site condition) to determine if the current clauses in Part 12 properly allocate risk.

Agencies are reminded that when they proceed with a construction acquisition under *either* Part 36 or Part 12, they must adhere to the policies of FAR Subpart 22.4. This subpart addresses labor standards for contracts involving construction.

I appreciate your careful consideration of this memorandum and ask that you distribute the memorandum widely to contracting, program, legal, and other agency personnel responsible for construction contracting within your agency. I also ask that you promptly review any agency guidance on the applicability of FAR Part 12 to construction acquisitions and change or rescind agency guidance, as necessary, to ensure consistency with this memorandum. Questions regarding this memorandum may be referred to Mathew Blum of my staff at (202) 395-4953.