DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PR

11 July 2000

MEMORANDUM FOR ALL FORSCOM DOCS

SUBJECT: Contracting Information Letter (CIL) 00-34

1. This CIL contains information on the following subjects:

a. Energy Saving Performance Contracting (ESPC) and the Requirements of OMB Circular A-76

b. Class Deviation-Commercial Items Omnibus Clauses for Acquisitions Using the Standard Procurement System

2. Energy Saving Performance Contracting (ESPC) and the Requirements of OMB Circular A-76. At enclosure 1 is a legal opinion from Mr. Alfred Moreau, Army Labor Advisor, regarding the relationship between Energy Savings Performance Contracting (ESPC) and the requirements of OMB Circular A-76. The DAJA-KL End, 30 May 2000, subject: The Applicability of OMB Circular A-76 to Energy Savings Performance Contracting (ESPC), states that A-76 does not apply to the ESPC process and gives reasons for this opinion. Contact Ms. Henrietta White, DSN 3467-7140, for additional information. The new PARC staff action officer for ESPC issues is Mrs. Pat Boterweg, DSN 367-6207.

3. Energy Saving Performance Contracting (ESPC) and the Requirements of OMB Circular A-76. Reference memo, DP (DAR), 14 April 1999, SAB (encl 2). All DoD contracting activities may deviate from the requirements in FAR 12.301(b)(4), the clause at FAR 52.212-5, DFARS 212.301(f)(iii), and the clause at DFARS 252.212-7001, when using the Standard Procurement System (SPS) version 4.1.1, and subsequent versions to contract for commercial items under the procedures of FAR part 12 and DFARS Part 212. This class deviation is approved until 30 April 2001 or until the DFARS is revised.

Encl
as

CHARLES J. GUTA
Colonel, AC
Chief, Contracting Division, DCSLOG
Principal Assistant Responsible
for Contracting

DAJA-KL (DAIM- FD/10 APRIL 00) 27-1a Mr. Moreau/aem/588-6754
SUBJECT: The Applicability of OMB Circular A-76 to Energy Savings Performance Contracting (ESPC)

HQDA (DAJA-KL), Rosslyn, VA 22209 30 May 00

FOR: HQDA (DAIM-FD, Mr. Nerger), WASH DC 20310-0600

1. This office has been asked to provide a written opinion on the relationship between Energy Savings Performance Contracting (ESPC) authorized by 42 United States Code (USC) 8287, and the requirements of Office of Management & Budget (OMB) Circular A-76. Of particular interest is what requirements, if any, A-76 places on the Government when ESPC contracts result in displacement of current Federal employees. It is our opinion that A-76 does not apply at all to the ESPC process for the reasons stated below.

2. The most recent version of the statute authorizing ESPCs is 42 US Code 8287, which was revised in 1998. The relevant sections read as follows:

> "(a) In general.
>
> (1) The head of a Federal agency may enter into contracts under this title solely for the purpose of achieving energy savings and benefits ancillary to that purpose. Each such contract may, notwithstanding any other provision of law, be for a period not to exceed 25 years. Such contracts shall provide that the contractor shall incur costs of implementing energy savings measures, including at least the costs (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of the energy savings directly resulting from implementation of such measures during the term of the contract.
>
> (2) (A) Contracts under this title shall be energy savings performance contracts and shall require an annual energy audit and specify the terms and conditions of any Government payments and performance guarantees. Any such performance guarantee shall provide that the contractor is responsible for maintenance and repair services for any energy related equipment including computer software systems. ..."

3. The remaining sections of the statute discuss payments, obligation authority and implementation issues, which do not relate to the issue at hand. As we understand it, a question has arisen as to the obligation of the Government, when entering into an ESPC contract, to comply with the provisions of Office of Management and Budget (OMB) Circular A-76, particularly those portions of the Circular which mandate cost comparisons and certain protections for affected Government employees.

4. The latest version of OMB Circular A-76 was published in August 1983. The current version of the accompanying Supplemental Handbook was revised in March 1996. The Introduction to the Handbook describes its purpose as follows:

> " The August 1983 Office of Management and Budget (OMB) Circular No. A-76, *"Performance of Commercial Activities,"* established Federal policy for the performance of recurring commercial activities. This supplement replaces the Handbook issued with the 1983 Circular and provides updated guidance and procedures for determining whether recurring commercial activities should be operated under contract with commercial sources, in-house using Government facilities and personnel, or through interservice support agreements (ISSAs). The Revised Supplemental Handbook is an integral part of the 1983 Circular." (Introduction, page iii) (Emphasis added).

5. The Introduction to the 1996 Handbook also discusses the intended legal status of the 1983 Circular and the 1996 Supplemental Handbook, (which is also referred to as the "Supplement"):

> "The Circular and this Supplement are not intended and should not be construed to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. It should not be construed to create any substantive or procedural basis on which to challenge any agency action or inaction, except as set forth in Part I, Chapter 3, Paragraph K of this Supplement." (Introduction, page iii). [Paragraph K, Chapter 3 refers to "Appeals of Tentative Waiver and Cost Comparison Decisions"].

6. As we understand it, several Federal employee groups have asserted that A-76 procedures must be applied to the ESPC process, particularly in those instances when current Federal employees have the technical expertise to maintain and repair the energy savings equipment after it is purchased and installed by the contractor. It is our opinion that this assertion is not legally sound for the following reasons:

a. 42 US Code 8287 creates independent authority for ESPC contracting in order to achieve energy savings. Contracts must include the performance of an annual energy savings audit, and may include acquisition and installation of energy saving equipment, training of personnel in all aspects of saving energy, and the granting of a performance guarantee, which requires the contractor to be responsible for maintenance and repair of any energy related equipment. As we understand the concept, the contractor is responsible for all of the functions, and is paid a portion of the saved energy costs for a period of time, which may last up to 25 years.

b. Energy Savings Performance Contracts are not "Recurring Commercial Activities" within the meaning of the A-76 Supplemental Handbook.

c. Since A-76, by the terms of the Supplemental Handbook, creates "no substantive or procedural rights enforceable against the United States", it cannot be read as authority to challenge an action authorized by a Federal Statute.

7. It is our opinion that the passage of 42 USC 8287 is a clear indication that Congress did not intend to bring these projects under the purview of A-76. Since Congress would have no need to pass a new statute to merely authorize A-76 cost comparisons for energy savings projects, as the agencies already have such authority, the fact that such legislation was passed should be read as authorizing something beyond existing procedures. While it may be possible, in some cases, to argue that existing employees are capable of performing the maintenance function after any new energy savings equipment is installed by the contractor, the statute clearly contemplates a "package deal". Since the contractor is required to give a guarantee, and is responsible, by statute, for the maintenance and repair of the equipment, as his payment depends on compliance with the guarantee, there is no practical way to split this function and make current employees responsible for the maintenance function.

8. Another compelling rationale for concluding that ESPC contracts do not fall under A-76 is the fact that the energy savings projects performed under these contracts are not "Recurring Commercial Activities", which is what the Circular applies to, by its own terms (see paragraph 4). The Supplemental Handbook, at page 37, defines "recurring commercial activity" as:

"A recurring commercial activity is one that is required by the Government on a consistent and long-term basis. This definition does not imply an hourly, daily, monthly or annual requirement, but must, in a general sense, be repetitive in nature, wherein the expected workload can be reasonably estimated."

9. Clearly, energy savings projects performed under ESPCs are not recurring requirements. The energy savings measures or equipment are installed once, not repetitively. While there is a requirement for an annual measurement of the energy savings, to determine the costs the contractor has earned, this measurement function is not the primary purpose of the contract. Since ESPC projects are not recurring commercial activities, there is no obligation to follow any of the procedures in A-76.

10. Finally, it must be noted that by its own terms [See paragraph 6 (c)], the Handbook is not authority to challenge an action authorized by statute.

11. The Office of the Army General Counsel concurs in this opinion. Please feel free to call me at (703) 588-6754 if you wish to discuss this issue further.

ALFRED E. MOREAU
ATTORNEY-ADVISOR
Contract Law Division

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION AND TECHNOLOGY

April 14, 1999

DP(DAR)

In reply refer to
DAR Tracking Number: 98-00013

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT, ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
COMMANDER, DEFENSE CONTRACT MANAGEMENT COMMAND, DEFENSE LOGISTICS AGENCY

SUBJECT: Class Deviation—Commercial Item Omnibus Clauses for Acquisitions Using the Standard Procurement System

Effective immediately, all Department of Defense contracting activities may deviate from the requirements in Federal Acquisition Regulation (FAR) 12.301(b)(4), the clause at FAR 52.212-5, Defense FAR Supplement (DFARS) 212.301(f)(iii), and the clause at DFARS 252.212-7001, when using the Standard Procurement System (SPS) version 4.1.a, and subsequent versions, to contract for commercial items under the procedures of FAR Part 12 and DFARS Part 212.

FAR 12.301(b)(4) requires contracting officers to include the clause at 52.212-5 in solicitations and contracts for commercial items, and to identify any of the clauses listed in paragraph (b) or (c) that are applicable to the specific acquisition. DFARS 212.301(f)(iii) requires contracting officers to include the clause at 252.212-7001 in solicitations and contracts for commercial items, and to complete paragraph (b) to identify any applicable clauses.

Contracting officers may use SPS clause logic to select automatically the clauses in paragraph (a), and identify automatically any applicable clauses in paragraphs (b) and (c), of the clause at FAR 52.212-5. Further, contracting officers may use SPS clause logic to select automatically the clause in paragraph (a), and identify automatically any applicable clauses

in paragraph (b), of the clause at DFARS 252.212-7001. When using these procedures, contracting officers shall use the attached clauses, containing audit and subcontract clause requirements applicable to commercial items, in lieu of the clauses at FAR 52.212-5 and DFARS 252.212-7001.

This class deviation is approved until April 30, 2001, or until the DFARS is revised.

Eleanor Spector

Eleanor R. Spector
Director, Defense Procurement

Attachment:
As stated

cc: DSMC, Ft. Belvoir

FAR 52.212-5 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDER—COMMERCIAL ITEMS (XXX 1999) (DEVIATION)

(a) Comptroller General Examination of Record. The Contractor agrees to comply with the provisions of this paragraph (a) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records-Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times, the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(b) The Contractor is not required to include any FAR clause, other than those listed below (and as may be required by an addenda to this paragraph to establish the reasonableness of prices under Part 15), in a subcontract for commercial items or commercial components—

(1) 52.222-26, Equal Opportunity (E.O. 11246);

(2) 52.222-35, Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212);

(3) 52.222-36, Affirmative Action for Workers with Disabilities (29 U.S.C. 793); and

(4) 52.247-64, Preference for Privately-Owned U.S.-Flagged Commercial Vessels (46 U.S.C. 1241) (flow down not required for subcontracts awarded beginning May 1, 1996).

(End of clause)

DFARS 252.212-7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items (XXX 1999) (DEVIATION)

In addition to the clauses listed in paragraph (b) of the Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items (DEVIATION) clause of this contract, the Contractor shall include the terms of the following clause, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:

252.225-7014 Preference for Domestic Specialty Metals, Alternate I (10 U.S.C. 2241 note).

(End of clause)