United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Principal Deputy Assistant Secretary for Policy, Management and Budget
Acting Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary for Land and Minerals Management
Acting Assistant Secretary for Indian Affairs
Director, Office of Acquisition and Property Management
Director, Office of Valuation Services
Heads of Contracting Activities

From: Solicitor

Subject: Partial Withdrawal of Solicitor's Opinion M-36974, *Inspector General's Report on Land Acquisitions*

This memorandum addresses the applicability of the Federal Acquisition Regulation (FAR), 48 C.F.R. ch. 1, to the purchase of real estate-related services. This issue was briefly addressed in Solicitor's Opinion M-36974, *Inspector General's Report on Land Acquisitions*, which generally responded to an Inspector General's report on the Department's real estate acquisition procedures.[1] While the M-Opinion advised correctly that real estate acquisitions are not subject to federal procurement regulations, it has been interpreted incorrectly to expand this exemption to include the acquisition of services *relating* to real estate acquisition.

Our review of the M-Opinion was prompted by procedural inconsistencies employed by various land acquisition bureaus and offices within the Department when contracting for real estate-related services. While some offices have adhered to the FAR requirements notwithstanding the M-Opinion, others have continued to structure acquisitions based on the M-Opinion's faulty expansion of the exemption to cover services related to real estate transactions, such as appraisals.

I. BACKGROUND

In May 1992, the United States Department of the Interior, Office of the Inspector General, issued an audit report addressing the Department's use of non-profit organizations in

[1] Thomas L. Sansonetti, Solicitor, U.S. Department of the Interior (1991 – 1993), *Inspector General's Report on Land Acquisitions*, Memorandum Opinion No. 36974 (1992).

acquiring land.[2] The report mainly focused upon the propriety of the Department's relationships with those organizations and whether the arrangements resulted in excessive land prices being paid by the Department. In response to a request from the Secretary, the Solicitor issued Opinion M-36974 on July 30, 1992. The M-Opinion supported the value of using non-profit organizations quickly to secure identified land and, as part of a multi-step analysis, also addressed the inapplicability of the various federal acquisition laws and regulations to real estate purchases. In so doing, the M-Opinion expanded upon the correct reading that the FAR does not apply to real estate acquisitions to include an exemption for services that *relate* to the acquisition of real estate such as title searches and appraisals.[3] Specifically, the M-Opinion stated that "[t]he federal procurement laws and regulations are not applicable to the purchase of real property or *services associated with such purchases.*"[4] The M-Opinion expanded upon this interpretation by further stating as follows:

> In the usual circumstance where the Government purchases the land directly from the seller without the involvement of a third party, the services related to that purchase (e.g., appraisal services, title searches) would be available for competition under the procurement regulations. While this is the common practice of the Department, *there is no legal obligation to use the procurement process in acquiring these services so long as they are considered to "relate to the acquisition of land."* 48 C.F.R. 2.101. As a legal matter, the Government is free to use the appraisal of the seller.[5]

The Twin Cities Field Solicitor interpreted this statement also to include land surveys (Twin Cities Opinion).[6] In apparent reliance on both the M-Opinion and the Twin Cities Opinion, the U.S. Fish and Wildlife Service issued a 2007 memorandum that stated that appraisals, special appraisals such as timber cruises and mineral appraisals, boundary surveys, title insurance, title abstracts, contaminant surveys, and archaeological surveys were exempt from the FAR.[7] These additional memoranda offered no independent analysis of the purported exemption, but simply expanded upon the scope of real estate-related services believed to be exempt under the M-Opinion. Guidance built upon the M-Opinion has solidified reliance upon the purported FAR exemption within certain offices while other offices have chosen to disregard the exemption in favor of FAR applicability. This dichotomy has resulted in land acquisition offices operating under conflicting practices with respect to the acquisition of real estate-related services.

II. ANALYSIS

In addressing whether competition requirements apply to the acquisition of real estate-related services, it is unclear whether the M-Opinion intended to draw a distinction between a

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[2] *Department of the Interior Land Acquisition Conducted with the Assistance of Nonprofit Organizations*, U.S. Department of the Interior, Office of the Inspector General, Audit Report No. 92-I-833 (1992).
[3] *Sansonetti, supra* at 9-10.
[4] *Id.* at 9 (emphasis added).
[5] *Id.* at 10 (emphasis added).
[6] Field Solicitor, U.S. Department of the Interior, *Applicability of Federal Procurement Regulations to Acquisition of Real Property*, Memorandum Opinion (Oct. 6, 1995).
[7] U.S. Fish and Wildlife Service, *Contracts for Professional Services Related to Land Acquisitions*, Policy Memorandum (Feb. 5, 2007).

circumstance in which the Government must, itself, acquire one or more real estate-related services and a circumstance where another party—the seller or a third party—acquires the real estate-related services in order to convey marketable title. In the latter case, the FAR would not apply because the Government would not directly be acquiring the services, but instead would be reimbursing the seller for certain allowed expenses that are incidental to the transfer of title.[8] Regardless of its intent, however, the M-Opinion purported directly to quote 48 C.F.R. § 2.101, *Definitions*, to support the position that real estate-related services acquired by the Government are FAR-exempt. It provided no more specific citation or further analysis. Our review of Section 2.101, both as presently enacted and historically, confirms that it contains no such text as purportedly quoted and nothing else that can be construed to support such a FAR exemption.[9]

Further review of the FAR supports the position that real estate-related services acquired by the Government are subject to the regulation. As defined by 48 C.F.R. § 37.101, both currently and historically, the term "service contract" means "a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis."[10] This definition has not changed since at least October 1, 1989. While not specifically listed among the examples of service contracts provided in Part 37, the broad range of examples provided (which includes "maintenance of real property" and "advisory and assistance services") supports that a "service contract" includes services related to the acquisition of land. Furthermore, certain services that relate to the acquisition of land are expressly subject to the Brooks Act[11] as implemented by the FAR.[12] For example, surveying services are "considered to be an architectural and engineering service and shall be procured pursuant to [FAR] section 36.601 from registered surveyors or architects and engineers."[13] Therefore, we must conclude that real estate services acquired by the Government are subject to the FAR.

Additionally, we can find no other authority generally to exempt this class of services from the FAR. When directly acquired by the Department, real estate-related services, like any other government-acquired service, are subject to federal acquisition requirements unless exempted by a specific legal authority. Neither the M-Opinion nor the references cited therein provide any such authority and therefore we conclude that there is no support for finding a broad exemption for real estate-related services under the FAR. Any other interpretation is inconsistent with the FAR and also inconsistent with the more broadly applicable statutory requirement to promote full and open competition in the award of government contracts.[14]

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[8] 42 U.S.C. § 4653 (2012) directs the head of the Federal Agency to reimburse the seller for "recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States."
[9] We have reviewed versions of the FAR *Definitions* section going back as far as 1981.
[10] 48 C.F.R. § 37.101 (2015).
[11] 40 U.S.C. §§ 1101 - 1104 (2012).
[12] 48 C.F.R. § 36.600 - 36.609-4 (2015).
[13] 48 C.F.R. § 36.601- 4(a)(4).
[14] 41 U.S.C § 3301 (2012); 48 C.F.R. § 6.101.

III. CONCLUSION

Based on the foregoing analysis, we withdraw the portions of Opinion M-36974 and the Twin Cities Opinion concluding that there is an unqualified FAR exemption for directly acquired real estate-related services. This partial withdrawal is based on the finding that the portions in question were then, and remain, wholly unsupported.

Accordingly, all departmental offices must cease in their reliance on said portion of Opinion M-36974 and any guidance based upon it to justify less than full compliance with the FAR when contracting for real estate-related services. Any necessary changes to acquisition procedures that previously relied upon Opinion M-36974 for a purported FAR exemption should be implemented as soon as practicable.

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