

Contractor Legal Management Requirements



Guiding Principles:

Close collaboration between Department Counsel and Contracting Officers is required to ensure effective management of contractor legal costs.

Overview

This guide chapter deals with two aspects of the Department’s system of managing legal costs—ensuring our major contractors prudently hire and continue to retain as outside counsel only those law firms who have demonstrated reliable billing practices; and ensuring appropriate consideration of the contractor's exercise of prudent business judgment when determining the allowability of settlement costs.

Background

DOE has placed special emphasis on managing contractor litigation for over a decade. The first litigation management procedures, issued in March 1994, applied to virtually all cases where DOE might be contractually responsible for contractor litigation costs. They imposed substantive requirements on DOE field counsel, contractor counsel, and outside counsel to ensure that the public funds were not spent imprudently. Contractors’ non-compliance resulted in disallowance of costs. Since 1994 the procedures have undergone several revisions. The current version of the procedures, which became effective in April 2001, is found at 10 CFR Part 719, Contractor Legal Management Requirements.

The purpose of 10 CFR 719 is to “facilitate control of Department and contractor legal costs.” Its procedures require each contractor “to develop a procedure for retaining legal counsel, and to document the analysis used to decide when, where and who will be engaged as outside counsel and the terms of the engagement.” It subjects the Department’s reimbursement of the contractor’s legal costs to compliance with its requirements.

The Contractor Legal Management Requirements codified at 10 CFR Part 719 establish the Department counsel as the contracting officer’s representative and define Department counsel as

“the individual in the field office, or Headquarters office, designated as the contracting officer’s representative and point of contact for a contractor or Department retained legal counsel, for purposes of this part only, for submission and approval of the legal management plan, advance approval of certain costs, and submission of a staffing and resource plan, as addressed in this part.” A contractor’s request to deviate from 10 CFR 719 must be submitted to Department counsel and approved by the General Counsel. The Department counsel receives, reviews, and approves the contractor’s legal management plan (discussed in 10 CFR 719). Additionally, the contractor must submit an engagement letter to retained legal counsel and provide a copy of all correspondence relating to the letter to Department counsel. Department counsel must submit through the General Counsel reporting system all approved costs and status updates for all matters involving retained counsel, including contractor litigation. Department counsel must also coordinate with the Deputy General Counsel for Litigation before approving a contractor’s request to initiate or defend litigations, or to appeal an adverse decision, where significant issues are involved. The Contractor Legal Management Requirements explicitly state the General Counsel may by memorandum provide additional guidance to contractors.

Discussion

Two important aspects of the Department’s system of managing legal costs are: ensuring our major contractors hire and continue to retain as outside counsel law firms who have demonstrated reliable billing practices; and ensuring appropriate consideration is given to the contractor’s exercise of prudent business judgment in determining cost allowability of settlement costs.

Law firms who have demonstrated reliable billing practices

In order to avoid having or continuing a relationship with outside counsel that have not demonstrated sufficient discipline in adhering to the requirements, contracting officers should consult with Department counsel and ensure that contractors, while giving appropriate consideration to due process, are not hiring or continuing to retain law firms who have demonstrated continuous billing errors. If a law firm continues to bill for unallowable costs, in addition to not paying for these charges, the contractor should evaluate the continued use of the firm for that particular case as well as for other matters in light of the firm’s lack of adherence to the retention agreement and the requirements of 10 CFR Part 719.

Consideration of the contractor’s exercise of prudent business judgment

When a contractor proposes to settle a case, Department counsel will review the contractor’s justification for the settlement prior to agreeing to the settlement. The DOE Acquisition Regulation’s “Insurance-litigation and claims clause,” 48 CFR 970.5228-1, states DOE will not reimburse the costs of the contractor’s liability to third parties (including litigation costs, counsel fees, and settlements) if the costs result from the willful misconduct, lack of good faith, or failure

to exercise prudent business judgment by contractor managerial personnel. Contracting officers will consult with Department counsel and ensure appropriate consideration is given to the contractor's exercise of prudent business judgment when determining cost allowability under proposed settlements.