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2005-02	Federal Acquisition Circulars (FAC) 2001-25, Final and Interim Rules Amending the FAR	10/13/04	D. Wright
2005-03	Benefits of DOE Strategic Sourcing Available to all DOE Contracting Activities and Major Site and Facility Contractors	10/8/04	R. Langston
2005-04	Contractor Performance System+	10/26/04	R. Langston
2005-05	Revision to M&O Contractor Model Subcontract entitled "Standard Research Subcontract (Educational Institution Nonprofit Organization)"	10/27/04	T. Wood
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2005-25	DOD Memo and Financial Assistance Guide	3/22/05	J. Kniskern
2005-26	Purchase Card Policy and Operating Procedures	3/26/05	R. Langston
2005-27	Acquisition and the Environment Home Page	4/4/05	R. Langston
2005-28	Section 508 Micro-purchase Applicability **PURCHASE CARD USER REMINDER**	4/19/05	D. Wright/ R. Langston

SEE BOOK II

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2005-51	New Subcontracting Plan Requirement	9/8/05	S. Zvolensky
2005-52	Hurricane Katrina Emergency Contracting Authorities	9/9/05	J. Kniskern
2005-53	E-Government Initiative – Federal Technical Data Solution (FedTeds), October 1, 2005 Implementation	9/29/05	D. Wright
2005-54	Acquisition Letter 2005-13, Performance-Based Service Acquisition	9/30/05	M. Righi
2005-55	Acquisition Letter 2005-14, Competition Requirements for Management and Operating Contracts under Section 995 of the Energy Policy Act	9/30/05	R. Langston
2005-56	Hurricane Katrina Emergency Contracting Authorities	10/4/05	J. Kniskern
2005-57	Implementation of the Price-Anderson Amendments Act of 2005	10/5/05	R. Webb
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HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-01

DATE: October 08, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Independent Peer Review Program for Contractors' Purchasing Systems**

SUMMARY: Effective in Fiscal Year 2005, the Department of Energy, the National Nuclear Security Administration, their respective Management and Operating (M&O) and major site and facility contractors will implement a new peer review program for reviewing contractors' purchasing systems.

The DOE and NNSA Senior Procurement Executives have chartered the Procurement Evaluation & Reengineering Team (PERT), comprised of federal and contractor representatives, to conduct these reviews. The PERT is in the process of developing a schedule for Fiscal Year 2005.

If you wish to volunteer to participate in these reviews, please contact either Irma Brown, of the Office of Contract Management, at (202) 587-1374 or Irma.Brown@hq.doe.gov, or Stephen Law, National Nuclear Security Administration (NNSA), Office of Acquisition and Supply Management, at (202) 586-4321 or Steve.Law@nnsa.doe.gov.

The Office of Procurement and Assistance Management looks forward to working with you as we implement this new initiative. Questions may be referred to Irma Brown.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachment

cc:
PPAG Members

Department of Energy
Acquisition Regulation

No. AL 2005-03
Date 10/08/04

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: **Independent Peer Review Program for Contractors' Purchasing Systems**

References: FAR 44.3, Contractors' Purchasing Systems Reviews
DEAR Subpart 970.44 — Management and Operating Contractor Purchasing
DOE Acquisition Guide, Chapter 1.2, Balanced Scorecard Performance Assessment Program (DOE only)
DOE Acquisition Guide, Chapter 70.7, Contract Administration, Reference Book for Contract Administrators, Chapter 10 (DOE only)

When is this Acquisition Letter (AL) effective?

This AL is effective 10 business days from the date of issuance.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Whom do you Contact for More Information?

Contact Irma Brown of the Department of Energy (DOE) Office of Contract Management at (202) 287-1374, or Irma.Brown@hq.doe.gov or Steve Law, National Nuclear Security Administration (NNSA) Office of Acquisition and Supply Management at (202) 586-4321, or Steve.Law@nnsa.doe.gov .

What is the Purpose of this AL?

The purpose of this AL is to disseminate guidance on the new approach for conducting contractor purchasing system reviews.

What is the Background Information You Need to Know?

Recently, the Procurement Evaluation and Reengineering Team (PERT) examined the current Peer Review Program to add more objectivity into the process of reviewing contractors' purchasing systems. Individuals from contractor and federal offices were brought in to discuss a variety of perspectives and to establish an approach to be used to ensure objectivity and reasonable independence in reviewing contractors' purchasing systems.

What is the Guontained in this AL?

The Independenview Program for Contractors' Purchasing Systems will apply to all Management anng (M&O) Contracts and Major Site and Facility Contracts. The use of the PERT for co peer reviews of contractors' purchasing systems is required unless the contracting officts an alternative approach to the DOE or NNSA Senior Procurement Executive for coe. Contracting Officers must ensure that contractors comport with this new approach.

The following d describing the approach for conducting these peer reviews may be found at http://pals.pr.doe.gov, under Performance Management or by using the following hotlinndent Peer Review Program .

(1) Indepeer Review Program for Contractors' Purchasing Systems,
(2) Contrchasing System Assurance Criteria,
(3) Final ormat, and
(4) Contrchasing System Approval Dates.

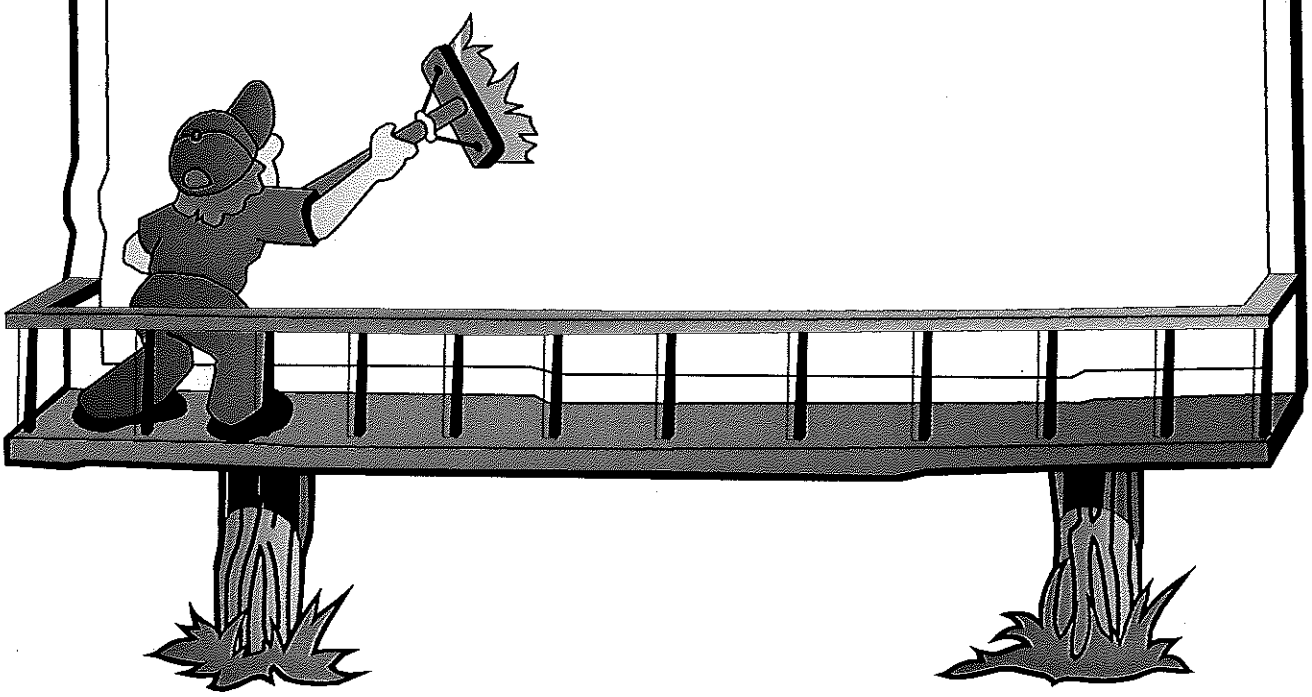
The new approaes for the partnering of federal and contractor personnel in conducting peer reviews for rs' purchasing systems. This introduces a benefit to the participants of gaining valuable rking information on ways to improve processes as well as acquiring valuable experie peer review process.

Headquarters Policy Flash

FLASH 2005-02

DATE: October 13, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management
SUBJECT: **Federal Acquisition Circulars (FAC) 2001-25, Final and Interim Rules Amending the FAR**

SUMMARY: This Policy Flash transmits summary information regarding the revisions to the FAR resulting from FAC 2001-25, published in the Federal Register at 69 FR 59698 (October 5, 2004). The following item is available via the internet at http://www.acqnet.gov/far/FAC/fac2001-25.pdf



FLASH 2005-02
October 13, 2004

Federal Acquisition Circular (FAC) 2001-25

1. Elimination of the Standard Form 1417 (Final) (FAR Case 2002-017)

Effective Date: November 4, 2004

What is the purpose of this FAR Case?

This final rule amends the FAR to eliminate the use of Standard Form 1417, Pre-Solicitation Notice (Construction Contracts). The use of the form is overcome by the reliance on electronic procedures within the acquisition process, such as, Governmentwide Point of Entry (GPE). The GPE electronically provides access of pre-solicitation notices via the internet, pursuant to FAR 5.204. Contracting Officers can satisfy the requirement to issue a pre-solicitation notice via the GPE.

How will this affect work processes?

- ✓ Eliminates the use of a paper based form in contracts for construction, alteration or repair, dismantling, demolition, or removal of improvements.
- ✓ Provides access to pre-solicitation notices through the GPE.
- ✓ Enables contracting officers to more efficiently satisfy the requirements of 5.204.

2. Free Trade Agreements-Chile and Singapore, and Trade Agreements Thresholds (Final) (FAR Case 2003-016)

Effective Date: October 5, 2004

What is the purpose of this FAR Case?

This final rule amends the FAR by converting an interim rule, with changes, to implement free trade agreements with Chile and Singapore as well as apply new dollar thresholds for the application of trade agreements. The FAR Parts affected by this amendment are FAR Part 5, Publicizing Contract Actions; Part 12, Acquisition of Commercial Items; Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; Part 17, Special Contracting Methods; Part 19, Small Business Programs; Part 22, Application of Labor Laws to Government Acquisitions; Part 25, Foreign Acquisitions; Part 33, Protests, Disputes and Appeals; and Part 52, Solicitation Provisions and Contract Clauses.

How will this affect work processes?

- ✓ Waives Buy America Act applicability for some foreign supplies and construction materials from Chile and Singapore.
- ✓ Requires the use of specific procurement procedures to implement the acquisition of supplies and services.
- ✓ Ensures contracts applicable to these provisions are covered by the clause at FAR 52.233-4, which does not flow down to subcontracts. However, prime contractors, particularly M&O contractors, should specify the U.S. state law that would govern any dispute under a subcontract.

3. **Telecommuting for Federal Contractors (Interim) (FAR Case 2003-025)**

Effective Date: October 5, 2004

What is the purpose of this FAR Case?

This interim rule implements Section 1428 of the Services Acquisition Reform Act (SARA) which provides for the authority to permit telecommuting by employees of Federal Government contractors in the performance of work under contracts entered into by executive agencies. This case effects FAR Part 7, Acquisition Planning, Part 11, Describing Agency, Part 13, Simplified Acquisition Procedures, and Part 15, Contracting by Negotiation.

How will this affect work processes?

- ✓ Generally, requires that the Federal Government not discourage contractors from allowing their employees to telecommute.
- ✓ Requires a written determination by the contracting officer when the requirements of the agency will be adversely affected by the contractor's telecommuting employee(s) under a specific contract.
- ✓ Requires that the contracting officer specify in the solicitation a prohibition against contractor employees' telecommuting, if applicable.
- ✓ Provides that an offeror's proposal not be unfavorably evaluated when telecommuting is permitted, if all other solicitation requirements are met.
- ✓

4. **Section 508 Micropurchase Exemption (Interim) (FAR Case 2004-020)**

Effective Date: October 5, 2004

What is the purpose of this FAR Case?

This interim rule amends FAR Part 39, Acquisition of Information Technology, to extend the micropurchase exemption for purchasing electronic and information technology (EIT) from October 1, 2004 to April 1, 2005.

How will this affect work processes?

- ✓ Ensure that EIT purchases are consistent with law and regulation governing this process (see Acquisition Letter 2001-04).
- ✓ Provides DOE time to update its purchase card training program with respect to Section 508 requirements.

5. **Technical Amendments**

The amendment makes editorial changes to FAR 14.403, 52.212-5, 52.215-15, 52.217-5, and 52.219-4.

Written comments to the interim rulemaking are due in this office on or before October 21, 2004. This will allow time to prepare a consolidated response to the General Services Administration, as necessary.

Questions concerning this Flash should be directed to Denise P. Wright on (202) 287-1340 or via e-mail at Denise.Wright@hq.doe.gov

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

cc:
PPAG Members

Federal Register

Tuesday,
October 5, 2004

Part III

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1 et al.
Federal Acquisition Circular 2001–25;
Introduction; Final and Interim Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Circular 2001–25; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final and interim rules, and technical amendments and corrections.

SUMMARY: This document summarizes the Federal Acquisition regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–25. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.acqnet.gov/far.*

DATES: For effective dates and comment dates, see separate documents which follow.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–25 and specific FAR case number(s). Interested parties may also visit our Web site at *http://www.acqnet.gov/far.*

Item	Subject	FAR case	Analyst
I	Elimination of the Standard Form 1417	2002–017	Davis.
II	Free Trade Agreements—Chile and Singapore, and Trade Agreements Thresholds	2003–016	Davis.
III	Telecommuting for Federal Contractors (Interim)	2003–035	Zaffos.
IV	Section 508 Micropurchase Exemption (Interim)	2004–020	Nelson.
V	Technical Amendments.		

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001–25 amends the FAR as specified below:

Item I—Elimination of the Standard Form 1417 (FAR Case 2002–017)

This final rule eliminates the use of the Standard Form 1417, Pre-Solicitation Notice (Construction Contract), in contracts for construction, alteration or repair, dismantling, demolition, or removal of improvements. The use of this form has become unnecessary because contracting officers provide access to presolicitation notices through the Governmentwide point of entry (GPE) via the Internet at *http://www.fedbizopps.gov* pursuant to FAR 5.204. Elimination of the form increases reliance on electronic business practices and reduces the estimated information collection requirement burden hours imposed on offerors.

Item II—Free Trade Agreements—Chile and Singapore, and Trade Agreements Thresholds (FAR Case 2003–016)

The interim rule to implement new Free Trade Agreements with Chile and Singapore, published in the **Federal Register** at 69 FR 1050, January 7, 2004, is converted to a final rule with changes. The interim rule included in each Trade Agreements clause the statement that United States law will apply to resolve any claim of breach of contract. At the request of the Department of Justice, the final rule relocates this statement into a separate clause to be included in all contracts. All contracting officers must be aware of this new requirement.

Item III—Telecommuting for Federal Contractors (FAR Case 2003–025) (Interim)

This interim rule addresses telecommuting by employees of Federal contractors. This rule implements Section 1428 of the Services Acquisition Reform Act of 2003 (Title XIV of Public Law 108–136), which prohibits agencies from including a requirement in a solicitation that precludes an offeror from permitting its employees to telecommute or, when telecommuting is not precluded, from unfavorably evaluating an offeror's proposal that includes telecommuting unless it would adversely affect agency requirements, such as security. Contracting officers awarding service contracts should familiarize themselves with this rule.

Item IV—Section 508 Micropurchase Exemption (FAR Case 2004–020) (Interim)

This interim rule extends from October 1, 2004, to April 1, 2005, the micropurchase exception from the requirement to purchase electronic and information technology that provides individuals with disabilities better access to and use of information and data, as required by Section 508 of the Rehabilitation Act of 1973. The extension will provide agencies time to update their purchase card training modules on the 508 requirements and train their personnel. This rule is of special interest to contracting officers who purchase electronic and information technology.

Item V—Technical Amendments

Editorial changes are made at FAR 14.403(c), 52.212–5(b)(34)(ii), 52.215–15(b)(2), 52.217–5, and 52.219–4(d)(3) to update various references.

Dated: September 28, 2004.

Ralph J. De Stefano,

Acting Director, Contract Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001–25 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–25 is effective October 5, 2004, except for Item I, which is effective November 4, 2004.

Dated: September 22, 2004.

Vincent J. Feck,

Lt Col USAF, Acting Director, Defense Procurement and Acquisition Policy.

Dated: September 8, 2004.

David A. Drabkin,

Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

Dated: September 7, 2004.

Tom Luedtke,

Deputy Chief Acquisition Officer, National Aeronautics and Space Administration.

[FR Doc. 04–22243 Filed 10–4–04; 8:45 am]

BILLING CODE 6820–EP–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 13, 19, 36 and 53

[FAC 2001–25; FAR Case 2002–017; Item I]

RIN 9000–AJ73

Federal Acquisition Regulation; Elimination of Standard Form 1417

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to eliminate the use of the Standard Form (SF) 1417, Pre–Solicitation Notice (Construction Contract).

DATES: *Effective Date:* November 4, 2004.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2001–25, FAR case 2002–017.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR parts 1, 13, 19, 36, and 53, deleting the prescription for the use of the SF 1417. This final rule eliminates the use of this form in contracts for construction, alteration or repair, dismantling, demolition, or removal of improvements. The use of the form has become unnecessary because contracting officers are required to provide access to presolicitation notices through the Governmentwide point of entry (GPE) via the Internet at *http://www.fedbizopps.gov* pursuant to FAR 5.204. This FAR change to eliminate the SF 1417 complements the efforts to increase reliance on electronic business practices in procurement in furtherance of the Administration's commitment to create a citizen–centric E–Government, as outlined in the President's Management Agenda. DOD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 54294, September 16, 2003. No public comments were received. The Councils agree to convert this proposed rule to a final rule with technical editorial changes.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the changes are not imposing any additional burden on small business. Small businesses are already aware of the publicizing medium the Government uses via the Internet and have made the necessary adaptation to keep abreast of business opportunities disseminated therein.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0037. This change has reduced the paperwork burden and no additional approval from OMB is required. The collection will be revised to reflect this reduction.

This final rule eliminates the use of Standard Form 1417 in contracts for construction, alteration or repair, dismantling, demolition, or removal of improvements but not the requirement for contracting officers to provide access to presolicitation notices through the Governmentwide point of entry via the Internet at *http://www.fedbizopps.gov*.

Requester may obtain a copy of the information collection from the General Services Administration, FAR Secretariat (V), Room 4035, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 9000–0037, Presolicitation Notice and Response, Standard Form 1417, in all correspondence.

List of Subjects in 48 CFR Parts 1, 13, 19, 36 and 53

Government procurement.

Dated: September 28, 2004.

Ralph J. De Stefano,

Acting Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 13, 19, 36, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 13, 19, 36, and 53 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 in the table following the introductory paragraph by removing FAR segment "36.701" and its corresponding OMB Control Number "9000–0037" removing FAR segment "53.236–1(a)" and its corresponding OMB Control Number "9000–0037"; and removing FAR segment "SF 1417" and its corresponding OMB Control Number "9000–0037".

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.003 [Amended]

■ 3. Amend section 13.003 in paragraph (g)(1) by removing "36.701(b)" and adding "36.701(a)" in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.811–1 [Amended]

■ 4. Amend section 19.811–1 in the last sentence of paragraph (a) by removing "36.701(b)" and adding "36.701(a)" in its place.

PART 36—CONSTRUCTION AND ARCHITECT ENGINEER CONTRACTS

36.213–2 [Amended]

■ 5. Amend section 36.213–2—

■ a. In the first sentence of paragraph (a) by removing "send" and adding "issue" in its place; and removing "to prospective bidders";

■ b. By removing paragraph (b)(6) and redesignating paragraphs (b)(7), (b)(8), and (b)(9) as (b)(6), (b)(7), and (b)(8), respectively.

36.701 [Amended]

■ 6. Amend section 36.701 by removing paragraph (a) and redesignating paragraphs (b), (c), (d), and (e) as (a), (b), (c), and (d), respectively.

PART 53—FORMS

53.213 [Amended]

■ 7. Amend section 53.213 in paragraph (f)(4) by removing "36.701(c)" and adding "36.701(b)" in its place.

53.236–1 [Amended]

■ 8. Amend section 53.236–1 by removing paragraph (a) and redesignating paragraphs (b), (c), (d), (e), (f), and (g) as (a), (b), (c), (d), (e), and (f), respectively; in newly redesignated paragraph (a) by removing "36.701(e)" and adding "36.701(d)" in its place; in newly redesignated paragraph (d)(2) by removing "36.701(b)" and adding "36.701(a)" in its place; in newly redesignated paragraph (e)(2) by removing "36.701(c)" and adding "36.701(b)" in its place; and in newly redesignated paragraph (f) by removing "36.701(d)" and adding "36.701(c)" in its place.

53.301–1417 [Removed]

■ 9. Remove section 53.301–1417.

[FR Doc. 04–22244 Filed 10–4–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 12, 13, 14, 17, 19, 22, 25, 33, and 52

[FAC 2001–25; FAR Case 2003–016; Item II]

RIN 9000–AJ87

Federal Acquisition Regulation; Free Trade Agreements-Chile and Singapore, and Trade Agreements Thresholds

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to convert to a final rule, with changes, an interim rule amending the Federal Acquisition Regulation (FAR). The interim rule implemented new Free Trade Agreements with Chile and Singapore, as approved by Congress (Public Laws 108–77 and 108–78). The interim rule also implemented new dollar thresholds for application of trade agreements.

DATES: *Effective Date:* October 5, 2004.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2001–25, FAR case 2003–016.

SUPPLEMENTARY INFORMATION:

A. Background

The Free Trade Agreements with Chile and Singapore waive the applicability of the Buy American Act for some foreign supplies and construction materials from Chile and Singapore, and specify procurement procedures designed to ensure fairness, applicable to the acquisition of supplies and services (see the Government Procurement provisions at Chapters 9 and 13, respectively, of the trade agreements). The interim rule was published in the **Federal Register** at 69 FR 1050, January 7, 2004. One public comment was received. To implement Section 106 of the authorizing acts, the interim rule added the statement "United States law will apply to resolve any claim of breach of contract." to the Buy American Act/Trade Agreements clauses at FAR 52.225–3, 52.225–5, and 52.225–11. The Department of Justice noted that Section 106 of each authorizing act applies to all contracts entered into by any agency of the United States. Therefore, the Department of Justice recommended that the statement be a separate clause, included in every contract. The Councils concur. The final rule removes the statement of applicability of U.S. law from FAR clauses 52.225–3, 52.225–5, and 52.225–11, and creates a new clause at FAR 52.233–4, Applicable Law for Breach of Contract Claim, to include the statement of applicability of U.S. law in every contract subject to the FAR.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Although the interim rule opened up Government procurement to the products of Chile, there will not be any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at DFARS 225.401–70, and acquisitions under $100,000 that are set aside for small businesses are exempt. We did not receive any comments on this issue from small business concerns or other interested parties.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000–0130, 9000–0025, and 9000–0141, respectively.

List of Subjects in 48 CFR Parts 5, 12, 13, 14, 17, 19, 22, 25, 33, and 52

Government procurement.

Dated: September 28, 2004.

Ralph J. De Stefano,

Acting Director, Contract Policy Division.

Interim Rule Adopted as Final with Changes

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 5, 12, 13, 14, 17, 19, 22, 25, and 52, which was published in the **Federal Register** at 69 FR 1050, January 7, 2004, as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 5, 12, 13, 14, 17, 19, 22, 25, 33, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 33—PROTESTS, DISPUTES, AND APPEALS

■ 2. Revise the section heading and text of section 33.215 to read as follows:

33.215 Contract clauses.

(a) Insert the clause at 52.233–1, Disputes, in solicitations and contracts, unless the conditions in 33.203(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its Alternate I.

(b) Insert the clause at 52.233–4 in all solicitations and contracts.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.212–5 by-

■ a. Revising the date of the clause and paragraph (a); and

■ b. Removing "(Jan 2004)" from paragraph (b)(23)(i) of the clause and adding "(OCT 2004)" in its place; and removing "(June 2004)" from paragraph (b)(24) of the clause and adding "(OCT 2004)" in its place. The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS-COMMERCIAL ITEMS (OCT 2004)

(a) The Contractor shall comply with the following Federal Acquisition Regulation (FAR) clauses, which are incorporated in this contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

(1) 52.233–3, Protest After Award (AUG 1996) (31 U.S.C. 3553).

(2) 52.233–4, Applicable Law for Breach of Contract Claim (OCT 2004) (Pub. L. 108–77, 108–78).

* * * * *

■ 4. Amend section 52.213–4 by revising the date of the clause; and by adding paragraph (a)(1)(vi) to read as follows:

52.213–4 Terms and Conditions-Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS-SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) (OCT 2004)

(a) * * *

(1) * * *

(vi) 52.233–4, Applicable Law for Breach of Contract Claim (OCT 2004) (Pub. L. 108–77, 108–78).

* * * * *

52.225–3 [Amended]

■ 5. Amend section 52.225–3 by revising the date of the clause to read "(OCT 2004)"; and removing paragraph (d) of the clause.

52.225–5 [Amended]

■ 6. Amend section 52.225–5 by revising the date of the clause to read "(OCT 2004)"; and removing paragraph (c) of the clause.

52.225–11 [Amended]

■ 7. Amend section 52.225–11 by revising the date of the clause to read "(OCT 2004)"; and removing paragraph (e) of the clause.

■ 8. Add section 52.233–4 to read as follows:

52.233–4 Applicable Law for Breach of Contract Claim.

As prescribed in 33.215(b), insert the following clause:

APPLICABLE LAW FOR BREACH OF CONTRACT CLAIM (OCT 2004)

United States law will apply to resolve any claim of breach of this contract.

(End of clause)

[FR Doc. 04–22245 Filed 10–4–04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 7, 11, 13, 15

[FAC 2001–25; FAR Case 2003–025; Item III]

RIN 9000—AK03

Federal Acquisition Regulation; Telecommuting for Federal Contractors

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 1428 of the Services Acquisition Reform Act of 2003, Title XIV of Public Law 108–136, Authorization of Telecommuting for Federal Contractors.

DATES: *Effective Date*: October 5, 2004.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before December 6, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2001–25, FAR case 2003–025, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR Case number to submit comments.
- E-mail: *farcase.2003–025@gsa.gov*. Include FAC 2001–25, FAR case 2003–025, in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (V), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2001–25, FAR case 2003–025, in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208–6091. Please cite FAC 2001–25, FAR case 2003–025.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements Section 1428 of the Services Acquisition Reform Act of 2003 (Title XIV of Public Law 108–136). Section 1428 requires the amendment of the FAR to permit telecommuting by employees of Federal Government contractors in the performance of contracts entered into with executive agencies. Specifically, Section 1428 states that solicitations for the acquisition of property or services may not include any requirement or evaluation criteria that would render an offeror ineligible to enter into a contract because it proposes to permit its employees to telecommute, unless the contracting officer determines that the requirements of the agency, including security requirements, cannot be met if telecommuting is permitted. The contracting officer must document in writing the basis for the determination. Also, the solicitation cannot contain any evaluation criteria that would reduce the scoring of an offer because the offeror proposes to permit its employees to telecommute, unless the contracting officer determines that the requirements of the agency, including security requirements, would be adversely impacted if telecommuting is allowed. The contracting officer must document in writing the basis for this determination as well.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because by not automatically prohibiting telecommuting, the Government will be making it easier for small businesses to recruit and maintain employees for work on Government contracts. Until now, there has been no Governmentwide policy or practice concerning contractor employee telecommuting. This rule will not be a major change, but instead a small

positive benefit to small businesses. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 7, 11, 13, and 15 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2001–25, FAR case 2003–025), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this statute requires that the FAR be amended no later than 180 days after enactment. The statute was enacted on November 24, 2003, which required amending the FAR by May 22, 2004. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 7, 11, 13, and 15

Government procurement.

Dated: September 28, 2004.

Ralph J. De Stefano,

Acting Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 7, 11, 13, and 15 as set forth below:

■ 1. The authority citation for 48 CFR parts 7, 11, 13, and 15 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 7—ACQUISITION PLANNING

■ 2. Add section 7.108 to read as follows:

7.108 Additional requirements for telecommuting.

In accordance with section 1428 of Public Law 108–136, an agency shall generally not discourage a contractor from allowing its employees to telecommute in the performance of Government contracts. Therefore, agencies shall not—

(a) Include in a solicitation a requirement that prohibits an offeror from permitting its employees to telecommute unless the contracting officer first determines that the requirements of the agency, including security requirements, cannot be met if telecommuting is permitted. The contracting officer shall document the basis for the determination in writing and specify the prohibition in the solicitation; or

(b) When telecommuting is not prohibited, unfavorably evaluate an offer because it includes telecommuting, unless the contracting officer first determines that the requirements of the agency, including security requirements, would be adversely impacted if telecommuting is permitted. The contracting officer shall document the basis for the determination in writing and address the evaluation procedures in the solicitation.

PART 11—DESCRIBING AGENCY NEEDS

■ 3. Amend section 11.002 by adding paragraph (g) to read as follows:

11.002 Policy.

* * * * *

(g) Agencies shall not include in a solicitation a requirement that prohibits an offeror from permitting its employees to telecommute unless the contracting officer executes a written determination in accordance with FAR 7.108(a).

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Amend section 13.106–2 by redesignating paragraphs (b)(2) and (b)(3) as (b)(3) and (b)(4), respectively, and adding a new paragraph (b)(2) to read as follows:

13.106–2 Evaluation of quotations or offers.

* * * * *

(b) * * *

(2) If telecommuting is not prohibited, agencies shall not unfavorably evaluate an offer because it includes telecommuting unless the contracting officer executes a written determination in accordance with FAR 7.108(b).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 5. Amend section 15.304 by adding paragraph (c)(6) to read as follows:

15.304 Evaluation factors and significant subfactors.

* * * * *

(c) * * *

(6) If telecommuting is not prohibited, agencies shall not unfavorably evaluate an offer that includes telecommuting unless the contracting officer executes a written determination in accordance with FAR 7.108(b).

* * * * *

[FR Doc. 04–22246 Filed 10–4–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 39

[FAC 2001–25; FAR Case 2004–020; Item IV]

RIN 9000–AK05

Federal Acquisition Regulations; Section 508 Micropurchase Exemption

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to extend the micro-purchase exemption for purchasing electronic and information technology (EIT) that conforms to the requirements of Section 508 of the Rehabilitation Act of 1973 from October 1, 2004, to April 1, 2005. No further extensions will be granted. The extension until April 1, 2005, will provide agencies time to update their purchase card training modules on the 508 requirements and train their personnel.

DATES: *Effective Date:* October 5, 2004.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before December 6, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2001–25, FAR case 2004–020 by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

• Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.

• E-mail: *farcase.2004-020@gsa.gov*. Include FAC 2001–25, FAR case 2004–020 in the subject line of the message.

• Fax: 202–501–4067.

• Mail: General Services Administration, Regulatory Secretariat (V), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2001–25, FAR case 2004–020, in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAC 2001–25, FAR case 2004–020.

SUPPLEMENTARY INFORMATION:

A. Background

Section 508 of the Rehabilitation Act of 1973 requires that the Electronic and Information Technology (EIT) developed, procured, maintained, or used by the Federal Government provide individuals with disabilities access to and use of information and data that is comparable to the access and use of information and data by individuals without disabilities. The law was implemented first through standards developed by the Architectural and Transportation Barriers Compliance Board, ("Access Board") and then incorporated into the FAR.

Initially, the FAR exempted micropurchases from the 508 requirements until January 1, 2003. (See FAR Case 1999–607, 66 FR 20894, April 25, 2001.) The rule's preamble gave notice that the Government would revisit the issue prior to the sunset date. This deadline was extended (FAR Case 2002–012, 67 FR 80321, December 31, 2002 and 68 FR 43872, July 24, 2003) and is due to expire October 1, 2004.

The FAR Council is extending the micropurchase exception from October 1, 2004, to April 1, 2005, and no additional extensions will be granted. Agencies have had three years of experience with Section 508, and industry continues to make investments in accessible technology to support the requirements. The extension until April 1, 2005, will provide agencies time to update their purchase card training modules on the 508 requirements and train their personnel. Free, online training developed by GSA, in collaboration with the Section 508 Executive Steering Committee, is available at *http://www.section508.gov*.

The FAR Council received public comments on the first extension to October 1, 2004. None of the comments received took issue with extending the micropurchase exception. Extending the micropurchase exemption will not cause a significant impact on the disability community or industry.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the proposed rule continues the status quo for another six months. When the FAR Council last extended the exception through October 1, 2004, none of the comments received took issue with extending the micropurchase exception. Also, extending the micropurchase exception will not cause a significant impact on the disability community or industry.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Part 39 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2001–25, FAR case 2004–020), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the rule extends an exception that would otherwise impose training burdens that the acquisition community may be challenged to meet by October 1, 2004. The extension until April 1, 2005, will provide agencies time to update their purchase card training modules on the 508 requirements and train their personnel. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 39

Government procurement.

Dated: September 28, 2004.

Ralph J. De Stefano,

Acting Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 39 as set forth below:

PART 39—ACQUISTION OF INFORMATION TECHNOLOGY

■ 1. The authority citation for 48 CFR part 39 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

39.204 [Amended]

■ 2. Amend section 39.204 in the first sentence of paragraph (a) by removing "October 1, 2004" and adding "April 1, 2005 "in its place.

[FR Doc. 04–22247 Filed 10–4–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14 and 52

[FAC 2001-25; Item V]

Federal Acquisition Regulation; Technical Amendments

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make editorial changes.

DATES: *Effective Date:* October 5, 2004.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2001-25, Technical Amendments.

List of Subjects in 48 CFR Parts 14 and 52

Government procurement.

Dated: September 28, 2004.

Ralph J. De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 14 and 52 as set forth below:

■ 1. The authority citations for 48 CFR parts 14 and 52 are revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 14—SEALED BIDDING

■ 2. In section 14.403, revise paragraph (c) to read as follows:

14.403 Recording of Bids.

* * * * *

(c) The forms identified in paragraph (a) of this section need not be used by the Defense Energy Support Center for acquisitions of coal or petroleum products or by the Defense Supply Center Philadelphia for perishable subsistence items.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-5 [Amended]

■ 3. Amend section 52.212-5 in paragraph (b)(34)(ii) by removing "(Apr 1984)" and adding "(Apr 2003)" in its place.

52.215-15 [Amended]

■ 4. Amend section 52.215-15 by revising the date of the clause to read "(OCT 2004)".

52.217-5 [Amended]

■ 5. Amend section 52.217-5 in the introductory paragraph by removing "17.208(c)(1)" and adding "17.208(c)" in its place.

52.219-4 [Amended]

■ 6. Amend section 52.219-4 by revising the date of the clause to read "(OCT 2004)"; and removing "will be will be" from paragraph (d)(3) of the clause and adding "will be" in its place.

[FR Doc. 04–22248 Filed 10–4–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This Small Entity Compliance Guide has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001–25 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2001–25 which precedes this document. These documents are also available via the Internet at *http://www.acqnet.gov/far.*

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001–25

Item	Subject	FAR case	Analyst
I	Elimination of the Standard Form 1417	2002–017	Davis.
II	Free Trade Agreements—Chile and Singapore, and Trade Agreements Thresholds	2003–016	Davis.
III	Telecommuting for Federal Contractors (Interim)	2003–025	Zaffos.
IV	Section 508 Micropurchase Exemption (Interim)	2004–020	Nelson.
V	Technical Amendments.		

Item I—Elimination of the Standard Form 1417 (FAR Case 2002–017)

This final rule eliminates the use of the Standard Form 1417, Pre-Solicitation Notice (Construction Contract), in contracts for construction, alteration or repair, dismantling, demolition, or removal of improvements. The use of this form has become unnecessary because contracting officers provide access to presolicitation notices through the Governmentwide point of entry (GPE) via the Internet at *http://www.fedbizopps.gov* pursuant to FAR 5.204. Elimination of the form increases reliance on electronic business practices and reduces the estimated information collection requirement burden hours imposed on offerors.

Item II—Free Trade Agreements—Chile and Singapore, and Trade Agreements Thresholds (FAR Case 2003–016)

The interim rule to implement new Free Trade Agreements with Chile and Singapore, published in the **Federal Register** at 69 FR 1050, January 7, 2004, is converted to a final rule with changes. The interim rule included in each Trade Agreements clause the statement that United States law will apply to resolve any claim of breach of contract. At the request of the Department of Justice, the final rule relocates this statement into a separate clause to be included in all contracts. All contracting officers must be aware of this new requirement.

Item III—Telecommuting for Federal Contractors (FAR Case 2003–025) (Interim)

This interim rule addresses telecommuting by employees of Federal contractors. This rule implements Section 1428 of the Services Acquisition Reform Act of 2003 (Title XIV of Public Law 108–136), which prohibits agencies from including a requirement in a solicitation that precludes an offeror from permitting its employees to telecommute or, when telecommuting is not precluded, from unfavorably evaluating an offeror's proposal that includes telecommuting unless it would adversely affect agency requirements, such as security. Contracting officers awarding service contracts should familiarize themselves with this rule.

Item IV—Section 508 Micropurchase Exemption (FAR Case 2004–020) (Interim)

This interim rule extends from October 1, 2004, to April 1, 2005, the micropurchase exception from the requirement to purchase electronic and information technology that provides individuals with disabilities better access to and use of information and data, as required by Section 508 of the Rehabilitation Act of 1973. The extension will provide agencies time to update their purchase card training modules on the 508 requirements and train their personnel. This rule is of special interest to contracting officers who purchase electronic and information technology.

Item V—Technical Amendments

Editorial changes are made at FAR 14.403(c), 52.212–5(b)(34)(ii), 52.215–15(b)(2), 52.217–5, and 52.219–4(d)(3) to update various references.

Dated: September 28, 2004.

Ralph J. De Stefano,

Acting Director, Contract Policy Division.

[FR Doc. 04–22249 Filed 10–4–04; 8:45 am]

BILLING CODE 6820–EP–S

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-3

DATE: October 8, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Benefits of DOE Strategic Sourcing Available to all DOE Contracting Activities and Major Site and Facility Contractors**

SUMMARY: In Fiscal Year 2004, the Office of Procurement and Assistance Management launched a Critical Management Initiative to strategically align the acquisition of commonly used products and services across the

Department of Energy complex. This initiative places greater emphasis upon the development of business process relationships that simplify customer access to products and services through strategic sourcing and offer opportunities to optimize overall return on investment.

To improve cost efficiency and service to customers by leveraging the Department's economies of volume purchasing and electronic commerce, the Office of Procurement and Assistance Management has established the "Complex-Wide Strategic Sourcing Opportunities" website on its homepage. The website contains postings of acquisition vehicles that may be used by all DOE contracting activities as well as the Department's major site and facility management contractors. The website can be accessed by going to the E-Center homepage www.pr.doe.gov clicking on the "Professionals Homepage" link, then clicking on the link for "Complex-Wide Strategic Sourcing Opportunities" website. Please forward this Policy Flash to your management and operating and major site and facility management contractors.

To learn more about these agreements, visit the website. You can also contact any of the contract specialists listed below. The entire contract, ordering procedures, and prices, are posted to the website for each award. Hyper-text links are provided to allow for examination of each instrument and the schedule to determine what is available and at what price. Orders may be easily placed by following the Ordering Procedures linked under each instrument.

The use of these instruments by DOE contracting offices as well as DOE's major contractors is strongly encouraged as a way to leverage DOE's buying power as well as improve efficiency of operations. Contracting offices and major contractors are encouraged to contact John Bashista, Director, Office of Headquarters Procurement Services, to coordinate other strategic sourcing opportunities that may be likely candidates for placement and incorporation into the new website inventory.

The current listing of strategic sourcing opportunities is as follows:

- **IT/telecommunications hardware and software; Microsoft enterprise licenses**
  Source: ARSC Airfield and Range
  Contract Specialist: Tova Stein – **8(a) Tribal contract**
  Telephone Number: (202) 287-1515
  Discount: **2%** below GSA schedule prices

- **Telecommunications equipment and services**
  Source: ASRC Aerospace Corp
  Contract Specialist: Patrick Thornton
  Telephone Number: (202) 287-1532
  Discount: **2%** below GSA schedule prices

- **Oracle proprietary software licenses**
  Source: Oracle Corporation
  Contract Specialist: Patrick Thornton
  Telephone Number: (202) 287-1532
  Discount: **20%** below GSA schedule prices

- **Opsware proprietary software licenses**
  Source: Opsware, Inc.
  Contract Specialist: Patrick Thornton
  Telephone Number: (202) 287-1532
  Discount: **21%-24%** below GSA schedule prices

- **Actuarial Services**
  Source: AON Consulting
  Contract Specialist: Annette Brown
  Telephone Number: (202) 287-1418
  Discount: N/A

- **Employee Relocation Services**
  Source: Prudential Relocation, Inc.
  Contract Specialist: Annette Brown
  Telephone Number: (202) 287-1418
  Discount: N/A

- **DOE and M&O contractor employee transition**
  Source: Nethot
  Contract Specialist: Debra Draper
  Telephone Number: (202) 287-1437
  Discount: **9.5%-16.7%** below GSA schedule prices

- **Professional and technical skills training**
  Source: Colleague Consulting
  Contract Specialist: Tim Jackson
  Telephone Number: (202) 287-1472
  Discount: N/A

- **Copier products, maintenance and services**
  Source: Xerox Corporation
  Contract Specialist: Debra Draper
  Telephone Number: (202) 287-1437
  Discount: **6%-20%** below GSA schedule prices

- **Copier products, maintenance and services**
  Source: Ricoh
  Contract Specialist: Debra Draper
  Telephone Number: (202) 287-1437
  Discount: **10%-20%** below GSA schedule prices

- **Hewlett-Packard printers**
  Source: PCMall Gov, Inc.
  Contract Specialist: Peggy Fuller
  Telephone Number: (202) 287-1464
  Discount: **7.83%-18.01%** below GSA schedule prices

- **Fax Equipment**
  Source: Four Points Technology, LLC – **Service Disabled Veteran-Owned firm**
  Contract Specialist: Peggy Fuller
  Telephone Number: (202) 287-1464
  Discount: **2%-5%** below GSA schedule prices

The Office of Procurement and Assistance Management look forward to working with you in the near future to advance the establishment of a department-wide strategic focus for the acquisition of goods and services.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

cc:
PPAG Members

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-04

DATE: October 26, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Contractor Performance System**

SUMMARY: You may have heard that there was consideration of discontinuing the Contractor Performance System maintained by the National Institutes of Health. That system is used as a tool by contracting activities when they

must evaluate a contractor's past performance. The attached communication has been received from the National Institutes of Health advising that the Contractor Performance System will remain in operation in Fiscal Year 2005. They advise that they are instituting no changes and that they will continue to post completed evaluations to the Past Performance Information Retrieval System. They have planned a user group teleconference, to take place in January, to discuss developments.

Questions may be referred to Judith Oxman at (202) 287-1388 or judith.oxman@hq.doe.gov .

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachment

cc:
PPAG Members

Attachment NIH Note

From: Smith, Paulette M. (NIH/OD)
Sent: Friday, October 15, 2004 2:35 PM
To: CPS-ORG-ADM@LIST.NIH.GOV
Subject: Contractor Performance System Available for FY 2005
Importance: High

This is a follow-up to an email we sent out to you September 24, 2004 (see attached) concerning the Contractor Performance System and FY 2004 Funding.

This is to let you know that the Contractor Performance System is available for your use for FY 2005. There are no changes to the current process, i.e., business as usual. Also, we will continue to send finalized/completed evaluations to the Past Performance Information Retrieval System, PPIRS.

Please forward a copy of this email to your Senior Procurement Executives and their colleagues.

We will be scheduling a User's Group meeting early January to discuss the CPS, funding, enhancements, etc.

Thank you for your support,

-CPS Staff

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005 - 05

DATE: October 27, 2004
TO: DOE/NNSA and M&O Contractor Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Revision to M&O Contractor Model Subcontract entitled "Standard Research Subcontract (Educational Institution or Nonprofit Organization)"**

SUMMARY: This Policy Flash disseminates a minor revision to the M&O Contractor Model Subcontract, which was issued by Policy Flash 2003-03 and last revised by Policy Flash 2004-10.

POLICY FLASH
2005 - 05

This Policy Flash disseminates an errata sheet, a strike and add version, and a revised version of the M&O contractor model subcontract entitled, "Standard Research Subcontract (Educational Institution or Nonprofit Organization)" which was disseminated by Policy Flash 2003-03 on January 14, 2003 and last revised on March 20, 2004. This revision changes Article 6, Contractor-Furnished and Subcontract-Acquired Property, and revises the dates on three FAR clauses and one DEAR clause. A word file of the revised subcontract is available on the DOE Professionals web site at http://professionals.pr.doe.gov. Click on "M&O Contractor Standard Research Subcontract" under the Procurement heading.

DOE and NNSA continue to encourage M&O contractors to use this model subcontract for unclassified research and development work, not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material.

If you have questions regarding this revision, contact Trudy Wood at 202 287-1336 or by e-mail at trudy.wood@hq.doe.gov.

Michael P. Fischetti

Michael Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachments

cc:
PPAG Members

October 27, 2004

ERRATA SHEET
STANDARD RESEARCH SUBCONTRACT (EDUCATIONAL INSTITUTION OR NONPROFIT ORGANIZATION)

SCHEDULE OF ARTICLES
Article 6. Contractor-Furnished and Subcontract-Acquired Property, paragraph d: 1. Change the first paragraph to read as follows: "If the Contractor provides the Subcontractor property that is marked as 'high risk property' for use under this award, the Subcontractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of this property in accordance with the policies, practices and procedures for property management contained in the DOE Property Management regulations (41 CFR 109-1.53). Title to all property marked as "high risk property" vests in the Government." 2. Delete the second paragraph.
GENERAL PROVISIONS
CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.225-13 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES: Change "JAN 2004" to "DEC 2003."
CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.227-9 REFUND OF ROYALTIES: Change "MAR" to "FEB."
CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.245-5 GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIALS, OR LABOR-HOUR CONTRACTS: 1. Change "JUNE 2003" to "MAY 2004." 2. Add "(JUNE 2003)" after "Alternate I.
CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS $100,000, FAR 52.219-8 UTILIZATION OF SMALL BUSINESS CONCERS: Change "OCT 2000" to "MAY 2004."

STANDARD RESEARCH SUBCONTRACT (EDUCATIONAL INSTITUTION or NONPROFIT ORGANIZATION) [FOR UNCLASSIFIED WORK] NO. _____	(DEPARTMENT OF ENERGY M&O CONTRACTOR) _____ NAME ADDRESS
Subcontractor: Attention: Address City, State, Zip Phone: Fax: E-Mail:	**Contractor's Procurement Representative [Contract Administrator]:** Proc. Rep Title: _____ Phone #: (Fax #: (E-Mail:

Introduction

This is a cost-reimbursement, no-fee, standard subcontract for unclassified research and development work, not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material. This Subcontract is between **[Insert contractor's name]**, (hereinafter "Contractor") and **[Insert subcontractor's name]** (hereinafter "Subcontractor"). The Subcontract is issued under Prime Contract No. **[Insert contract no.]** between the Contractor and the United States Department of Energy (hereinafter "DOE") **[include the following phrase in weapons lab contracts--** and the National Nuclear Security Administration (hereinafter "NNSA")] for the management and operation of **[insert name of the DOE/NNSA facility]** (hereinafter "DOE **[or** NNSA] Facility").

Agreement

The parties agree to perform their respective obligations in accordance with the terms and conditions of the Schedule and the General Provisions and other documents attached or incorporated by reference, which together constitute the entire Subcontract and supercede all prior discussions, negotiations, representations, and agreements.

[SUBCONTRACTOR NAME]	**[M&O CONTRACTOR NAME]**
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

SCHEDULE OF ARTICLES

1. Statement of Work

The Subcontractor shall perform certain research and development work identified as **[insert brief title or statement of research]** and more fully described in the *Statement of Work* Attachment to this Subcontract. **[or Appendix I.]**

The Subcontactor's Principal Investigator assigned to this work is **[insert Principal Investigator's name]**. The Principal Investigator shall not be replaced or reassigned without the advance written approval of the Contractor's Procurement Representative **[or** Contract Administrator].

The Subcontractor shall submit three copies of the final and any intermediate reports to the Contractor's Procurement Representative **[or** Contract Administrator**,** Contractor's Technical Representative, **or** named individual**]** upon completion of the work and, when the Subcontract contains milestone requirements, on the indicated milestone dates. When requested by the Contractor's Technical Representative, the Subcontractor shall submit a draft copy of the final report for review prior to finalization. The Contractor's Technical Representative need not approve the Subcontractor's reported conclusions of the research.

2. Report Preparation Requirements

a. These instructions apply to all formal reports, including the final report, required by the Subcontract. It does not apply to letter reports or reports specifically identified as Milestones in *Article* 3. *Period of Performance* in this Subcontract as informal reports.

b. The final report shall contain a comprehensive summary of all work results and conclusions. All reports shall fairly and completely describe the efforts applied to and the results obtained toward achievement of objectives of the subcontract work. If an objective is not accomplished, such failure shall be fully documented and explained in the report.

c. Reports shall include the following elements: (a) a brief abstract of the report which describes the overall objectives and results; (b) a full statement of each objective and description of the effort performed and the accomplishments achieved; (c) a list of any publication or information release made of material developed or maintained through the performance of the subcontract; and (d) any other relevant information.

3. Period of Performance

The work described in Article 1, Statement of Work, shall commence upon signature of this Subcontract by both parties and shall be completed on or before **(insert end date)**

[OR, if there is a milestone schedule, add: in accordance with the following milestones:

Milestone **Completion Date]**

Any notices and approvals required by this Subcontract from the Contractor to the Subcontractor shall be issued by the Procurement Representative **[OR** Contract Administrator].

b. The Contractor's Technical Representative for this Subcontract is **[insert name]**. The Technical Representative is the person designated to monitor the Subcontract work and to interpret and clarify the technical requirements of the *Statement of Work*. The Technical Representative is not authorized to make changes to the work or modify this Subcontract.

8. Travel Requirements

a. All travel not included in the Subcontractor's cost proposal must be approved in advance by the Contractor.

b. All foreign travel must be approved in advance by the Contractor, even if the cost is included in the Subcontractor's cost proposal for this Subcontract.

9. Performance of Work

The Subcontractor will perform the work at a location other than a DOE/NNSA Facility.

10. Incorporated Documents

The following documents are hereby incorporated as Attachments **[OR Appendices]** to the Schedule of Articles of this Subcontract:

General Provisions for Standard Research Subcontracts, dated _____
Statement of Work dated _____ **[OR Appendix I]**
Subcontractor's Cost Proposal dated _____ (if applicable) **[OR Appendix II]**
Contractor-Furnished Government Property dated _____ **[OR Appendix III]**
[List others if applicable.]

e. The Contractor will use its best efforts to process invoices for payment within 30 days of receipt; provided, however, that payments made more than 30 days after receipt of an invoice shall not be subject to penalty, interest, or late charges.

f. Invoices, which include the cost of property acquired by the Subcontractor at a cost of $5,000 or more, shall include a description of the property and shall identify the assigned property number; the manufacturer; the Serial number and model number; the acquisition date; the unit price, quantity, and total cost of the property; and the location of the property.

6. Contractor-Furnished and Subcontract-Acquired Property

a. The Contractor shall furnish the Subcontractor the materials, equipment, and supplies listed in *Contractor-Furnished Government Property* **[OR** Appendix III] to this Subcontract.

b. Purchase of equipment or other tangible personal property, which is not identified in the Subcontractor's cost proposal for this Subcontract and for which the Subcontractor is entitled to be reimbursed as a direct item of cost under this Subcontract, shall be approved in advance by the Contractor's Procurement Representative **[OR** Contract Administrator].

c. All property furnished by the Contractor or acquired by the Subcontractor, as a direct cost under the Subcontract, title to which vests in the Government, shall be identified, controlled, and protected as required by the *Government Property* clause of the General Provisions of this Subcontract. Disposition of such property upon completion of this Subcontract shall be as directed by the Contractor's Procurement Representative **[OR** Contract Administrator].

d. If the Contractor provides the Subcontractor property that is marked as "high risk property" for use under this award, the Subcontractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of this property in accordance with the policies, practices and procedures for property management contained in the DOE Property Management regulations (41 CFR 109-1.53). Title to all property marked as "high risk property" vests in the Government.

7. Subcontract Administration

a. The Contractor's Procurement Representative **[OR** Contract Administrator] for this Subcontract is **[insert name of PR/CA]**. The Procurement Representative **[OR** Contract Administrator] is the only person authorized to make changes in the requirements of this Subcontract or make modifications to this Subcontract, including changes or modifications to the Statement of Work and the Schedule. The Subcontractor shall direct all notices and requests for approval required by this Subcontract to the Procurement Representative **[OR** Contract Administrator] at the following address:

[Insert address]

4. Costs and Payments

a. The estimated cost of the work called for in this Subcontract is $_____, and is based upon the following estimated levels of effort necessary to perform the Subcontract work:

Category	No. of Staff	No. of Months

[OR:] is based on the Subcontractor's Cost Proposal Attachment **[or Appendix II]** to this Subcontract.

b. **[Check provision below that applies OR include only applicable provision]**

_____ This Subcontract is fully-funded and is subject to the *Limitation of Costs* clause of the General Provisions.

_____ This Subcontract is incrementally funded and is subject to the *Limitation of Funds* clause of the General Provisions. The funding amount currently allotted to this Subcontract is $ _____ and covers **[describe what work the incremental funding covers.]**

c. The Contractor will pay the Subcontractor for performance of this Subcontract, unless excluded or limited by other provisions of this Subcontract, the allowable direct costs incident to performance, plus the allocable portion of the allowable indirect costs of the Subcontractor. Allowable and allocable costs shall be determined in accordance with the cost principles of the Allowable Cost and Payment clause of the General Provisions.

5. Invoices for Payment

a. Payments for Subcontract work shall be made monthly based on invoices submitted by the Subcontractor for work performed. Invoices shall bear the following certification signed by a responsible official of the Subcontractor:

"The undersigned certifies that the information set forth herein is true and correct and may be used as a basis for payment for work."

b. Invoices must identify the subcontract number, the period covered, and the total expenditures claimed for each of the following categories: salaries, fringe benefits, travel, materials and supplies, equipment, subcontracts/consultants, other direct costs such as rent, when applicable, and indirect or Facility and Administration costs.

c. Invoices shall be mailed to: **(Insert address)**

d. Payments shall be mailed to: **(Insert address)**

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GENERAL PROVISIONS

CLAUSE 1 - PUBLICATIONS

A. The Subcontractor shall closely coordinate with the Contractor's Technical Representative regarding any proposed scientific, technical or professional publication of the results of the work performed or any data developed under this Subcontract. The Subcontractor shall provide the Contractor an opportunity to review any proposed manuscripts describing, in whole or in part, the results of the work performed or any data developed under this Subcontract at least forty-five (45) days prior to their submission for publication. The Contractor will review the proposed publication and provide comments. A response shall be provided to the Subcontractor within forty-five (45) days; otherwise, the Subcontractor may assume that the Contractor has no comments. Subject to the requirements of Clause 9, the Subcontractor agrees to address any concerns or issues identified by the Contractor prior to submission for publication.

B. Subcontractor may acknowledge the Contractor and Government sponsorship of the work as appropriate.

CLAUSE 2 – NOTICES

A. The Subcontractor shall immediately notify the Contractor's Procurement Representative **[OR** Contract Administrator] in writing of: (1) any action, including any proceeding before an administrative agency, filed against the Subcontractor arising out of the performance of this Subcontract; and (2) any claim against the Subcontractor, the cost and expense of which is allowable under the terms of this Subcontract.

B. If, at any time during the performance of this Subcontract, the Subcontractor becomes aware of any circumstances which may jeopardize its performance of all or any portion of the Subcontract, it shall immediately notify the Contractor's Procurement Representative **[OR** Contract Administrator] in writing of such circumstances, and the Subcontractor shall take whatever action is necessary to cure such defect within the shortest possible time.

CLAUSE 3 – ASSIGNMENTS

The Contractor may assign this Subcontractor to the Government or its designee(s). Except as to assignment of payment due, the Subcontractor shall have no right to assign or mortgage this Subcontract or any part of it without the prior written approval of the Contractor's Procurement Representative **[OR** Contract Administrator], except for subcontracts already identified in the Subcontractor's proposal.

CLAUSE 4 – DISPUTES

A. Informal Resolution

1. The parties to a dispute shall attempt to resolve it in good faith, by direct, informal negotiations. All negotiations shall be confidential. Pending resolution of the dispute, the Subcontractor shall proceed diligently with the performance of this Subcontract, in accordance with its terms and conditions.

2. The parties, upon mutual agreement, may seek the assistance of a neutral third party at any time, but they must seek such assistance no later than 120 days after the date of the Contractor's receipt of a claim. The requirement to seek the assistance of a neutral third party may be waived or modified only with the consent of all parties. The parties may request the assistance of an established Ombuds Program, where available, or hire a mutually agreeable mediator, or ask the DOE Office of Dispute Resolution to assist them in selecting a mutually agreeable mediator. The cost of mediation shall be shared equally by both parties. If requested by both parties, the neutral third party may offer a non-binding opinion as to a possible settlement. All discussions with the neutral third party shall be confidential.

3. In the event the parties are unable to resolve the dispute by using a neutral third party or waive the requirement to seek such assistance, the Contractor will issue a written decision on the claim.

B. Formal Resolution

1. If a dispute has not been resolved by informal resolution, it may be submitted to binding arbitration upon agreement of both parties, by and in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA). If arbitration is agreed to by both parties, such decision is irrevocable and the outcome of the arbitration shall be binding on all parties.

2. Each party to the arbitration shall pay its pro rata share of the arbitration fees, not including counsel fees or witness fees or other expenses incurred by the party for its own benefit.

3. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction.

C. Litigation

If arbitration is declined for such disputes, the parties may pursue litigation in any court of competent jurisdiction.

D. Governing Law

This Subcontract shall be interpreted and governed in accordance with all applicable federal and state

laws and all applicable federal rules and regulations.

CLAUSE 5 - RESPONSIBILITY FOR TECHNOLOGY EXPORT CONTROL

The parties understand that materials and information resulting from the performance of this Subcontract may be subject to export control laws and that each party is responsible for its own compliance with such laws.

CLAUSE 6 – COST ACCOUNTING STANDARDS (CAS) LIABILITY

[Applicable to Subcontracts exceeding $500,000]

Clause 10 below incorporates into these GENERAL PROVISIONS clauses entitled, "*COST ACCOUNTING STANDARDS" and "ADMINISTRATION OF COST ACCOUNTING STANDARDS."* Notwithstanding the provisions of these clauses, or of any other provision of the Subcontract, the Subcontractor shall be liable to the Government for any increased costs, or interest thereon, resulting from any failure of the Subcontractor, with respect to activities carried on at the site of the work, or of a subcontractor, to comply with applicable cost accounting standards or to follow any practices disclosed pursuant to the requirements of such clause.

CLAUSE 7 - DISCLOSURE AND USE RESTRICTIONS FOR LIMITED RIGHTS DATA

Generally, delivery of Limited Rights Data (or Restricted Computer Software) should not be necessary. However, only if Limited Rights Data will be used in meeting the delivery requirements of the subcontract, the following disclosure and use restrictions shall apply to and shall be inserted in, any FAR 52.227-14 Limited Rights Notice on any Limited Rights Data furnished or delivered by the Subcontractor or a lower-tier subcontractor:

A. These "Limited Rights Data" may be disclosed for evaluation purposes under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed;

B. These "Limited Rights Data" may be disclosed to other contractors participating in the Government's program of which this Subcontract is a part for information or use in connection with the work performed under their contracts and under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed; and

C. These "Limited Rights Data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed.

CLAUSE 8 - ORDER OF PRECEDENCE

Any inconsistencies in the documents comprising this Subcontract shall be resolved by giving precedence in the following order: (a) the SCHEDULE OF ARTICLES and this Subcontract Signature Page; (b) these GENERAL PROVISIONS; (c) other referenced documents, exhibits, and attachments; and (d) any referenced specification or *Statement of Work.*

CLAUSE 9 – SECURITY REQUIREMENTS

A. This Subcontract is intended for unclassified, publicly releasable research or development work. The Contractor does not expect that results of the research project will involve classified information or Unclassified Controlled Nuclear Information (UCNI) (See 10 CFR part 1017). However, the Contractor may review the research work generated under this Subcontract at any time to determine if it requires classification or control as UCNI.

B. If, subsequent to the date of this Subcontract, a review of the information reveals that classified information or UCNI is being generated under this Subcontract, then the security requirements of this Subcontract must be changed. If such changes cause an increase or decrease in costs or otherwise affect any other term or condition of this Subcontract, the Subcontract shall be subject to an equitable adjustment as if the changes were directed under the Changes clause of this Subcontract.

C. If the security requirements are changed, the Subcontractor shall exert every reasonable effort compatible with its established policies to continue the performance of work under the Subcontract in compliance with the change in the security requirements. If the Subcontractor determines that continuation of the work under this Subcontract is not practicable because of the change in security requirements, the Subcontractor shall notify the Contractor's Procurement Representative in writing. Until the Contractor's Procurement Representative provides direction, the Subcontractor shall protect the material as directed by the Contractor.

D. After receiving the written notification, the Contractor's Procurement Representative shall explore the circumstances surrounding the proposed change in security requirements and shall endeavor to work out a mutually satisfactory method to allow the Subcontractor to continue performance of work under this Subcontract.

E. Within 15 days of receiving the written notification of the Subcontractor's stated inability to proceed, the Contractor's Procurement Representative must determine whether (1) these security requirements do not apply to this contract or (2) a mutually satisfactory method for continuing performance of work under this Subcontract can be agreed upon. If this determination is not made, the Subcontractor may request the Contractor's Procurement Representative to terminate the Subcontract in whole or in part. The Contractor's Procurement Representative shall terminate the Subcontract in whole or in part, as may be appropriate, and the termination shall be deemed a termination under the terms of the Termination for the Convenience of the Government clause.

CLAUSE 10 - CLAUSES INCORPORATED BY REFERENCE

The FEDERAL ACQUISITION REGULATION (FAR) and the U.S. DEPARTMENT OF ENERGY ACQUISITION REGULATION (DEAR) clauses listed below, which are located in Chapters 1 and 9, respectively, of Title 48 of the Code of Federal Regulations, are incorporated by this reference as a part of these GENERAL PROVISIONS with the same force and effect as if they were given in full text, as prescribed below.

The full text of the clauses may be accessed electronically at http://www.arnet.gov/far/ (FAR) and http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation (DEAR).

As used in the clauses, the term "contract" shall mean this Subcontract; the term "Contractor" shall mean the Subcontractor; the term "subcontractor" shall mean the Subcontractor's subcontractor, and the terms "Government" and "Contracting Officer" shall mean the Contractor, except in FAR clause 52.227-14, and DEAR clauses 970.5227-4, 952.227-11, 970.5232-3 and 52.245-5 Alternate I, in which clauses "Government" shall mean the United States Government and "Contracting Officer" shall mean the DOE/NNSA Contracting Officer for Prime Contract DE-_____ with the Contractor. As used in DEAR clauses 952.204-72 and 952.227-9, the term "DOE" shall mean DOE/NNSA or the Contractor.

The modifications of these clause terms are intended to appropriately identify the parties and establish their contractual and administrative reporting relationship, and shall not apply to the extent they would affect the U.S. Government's rights. The Subcontractor shall include the listed clauses in its subcontracts at any tier, to the extent applicable.

APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:

DEAR 952.204-71	SENSITIVE FOREIGN NATIONS CONTROLS (APR 1994). Applies if the Subcontract is for unclassified research involving nuclear technology.
FAR 52.216-7	ALLOWABLE COST AND PAYMENT (DEC 2002). Substitute 31.3 in subcontracts with educational institutions and 31.7 in subcontracts with nonprofit organizations for 31.2 in paragraph (a).
FAR 52.216-15	PREDETERMINED INDIRECT COSTS RATES APR 1998).
FAR 52.222-21	PROHIBITION OF SEGREGATED FACILITIES (FEB 1999).
FAR 52.222-26	EQUAL OPPORTUNITY (APR 2002).
FAR 52.223-3	HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA SHEETS (JAN 1997) AND ALTERNATE I. Applies only if Subcontract involves delivery of hazardous materials.
FAR 52.225-13	RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (DEC 2003).
DEAR 970.5227-4	AUTHORIZATION AND CONSENT (AUG 2002), Paragraph (a).
DEAR 952.227-9	REFUND OF ROYALTIES (FEB 1995). Applies if "royalties" of more than $250 are paid by a subcontractor at any tier.
DEAR 952.227-11	PATENT RIGHTS - RETENTION BY THE CONTRACTOR (SHORT FORM) (FEB 1995). (Applies only if Subcontractor is a nonprofit organization as set forth in 48 CFR 27.301. If Subcontractor does not qualify in accordance with 48 CFR 27.301, it may request a patent waiver pursuant to 10 CFR 784.)
FAR 52.227-14	[Check provision below that applies OR include only applicable provision]. _____ RIGHTS IN DATA-GENERAL (JUN 1987) with ALTERNATE V and DEAR 927.409 Paragraphs (a) and (d)(3). Applies if the Subcontract is for development work, or for basic and applied research where computer software is specified as a Deliverable in the Statement of Work or other special circumstances apply as specified in the agreement. _____ RIGHTS IN DATA-GENERAL (JUN 1987) with ALTERNATE IV, subparagraph (c)(1) and DEAR 927.409, subparagraph (a) Definitions. Applies if the Subcontract is for basic or applied research and computer software is not specified as a Deliverable in the Statement of Work, and no other special circumstances apply per DEAR 927.409.
FAR 52.227-23	RIGHTS TO PROPOSAL DATA (TECHNICAL) (JUNE 1987). Applies if the Subcontract is based upon a technical proposal.
FAR 52.229-10	STATE OF NEW MEXICO GROSS RECEIPTS AND COMPENSATING TAX (APR 2003). Applies if any part of this Subcontract is to be performed in the State of New Mexico.
FAR 52.232-20	LIMITATION OF COST (APR 1984). Applies if the Subcontract is fully funded.
FAR 52.232-22	LIMITATION OF FUNDS (APR 1984). Applies if the Subcontract is incrementally funded.

FAR 52.242-15	STOP-WORK ORDER (AUG 1989) with ALTERNATE I (APR 1984).
FAR 52.243-2	CHANGES – COST-REIMBURSEMENT (AUG 1987), WITH ALTERNATE V
FAR 52.244-2	SUBCONTRACTS (AUG 1998) with ALTERNATE II. Insert in Paragraph (e): "Any subcontract or purchase order for other than "commercial items" exceeding the simplified acquisition threshold. ("Commercial item" has the meaning contained in FAR 52.202-1, Definitions.)"
FAR 52.245-5	GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIALS, OR LABOR-HOUR CONTRACTS (MAY 2004) with Alternate I (JUNE 2003). (Paragraphs (e)(1) and (e)(2) insert, "and DOE Acquisition Regulations Subpart 945.5," after the reference to FAR Subpart 45.5).
FAR 52.246-9	INSPECTION OF RESEARCH AND DEVELOPMENT (SHORT FORM) (APR 1984).
FAR 52.247-63	PREFERENCE FOR U. S. FLAG AIR CARRIERS (JUNE 2003). Applies if the Subcontract involves international air transportation.
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DEAR 952.247-70	FOREIGN TRAVEL (DEC 2000).
FAR 52.249-5	TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (EDUCATIONAL AND OTHER NONPROFIT INSTITUTIONS) (SEP 1996).
DEAR 952.217-70	ACQUISTION OF REAL PROPERTY (APR 1984). Applies if the Subcontract involves leased space that is reimbursed.
DEAR 970.5232-3	ACCOUNTS, RECORDS, AND INSPECTION (DEC 2000)

APPLICABLE IF THE SUBCONTRACT IS FOR $10,000 OR MORE:

FAR 52.222-35	EQUAL OPPORTUNITY FOR SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).
FAR 52.222-36	AFFIRMATIVE ACTION FOR WORKERS WITH DISABILITIES (JUNE 1998).
FAR 52.222-37	EMPLOYMENT REPORTS ON SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).

APPLICABLE IF THE SUBCONTRACT EXCEEDS $100,000:

FAR 52.203-5	COVENANT AGAINST CONTINGENT FEES (APR 1984)
FAR 52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (JULY 1995).

FAR 52.203-7	ANTI-KICKBACK PROCEDURES (JULY 1995), excluding Paragraph (c)(1).
FAR 52.203-10	PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY (JAN 1997).
FAR 52.203-12	LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (JUNE 2003).
FAR 52.219-8	UTILIZATION OF SMALL BUSINESS CONCERNS (MAY 2004).
FAR 52.222-04	CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION (SEP 2000).
DEAR 970.5227-5	NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (AUG 2002).

APPLICABLE IF THE SUBCONTRACT EXCEEDS $500,000:

FAR 52.215-10	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (OCT 1997) if subcontract exceeds $550,000.
FAR 52.215-11	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS (OCT 1997) not used when 52.215-10 is included. In subcontracts greater than $550,000.
FAR 52.215-12	SUBCONTRACTOR COST OR PRICING DATA (OCT 1997). Applies if 52.215-10 applies.
FAR 52.215-13	SUBCONTRACTOR COST OR PRICING DATA-MODIFICATIONS (OCT 1997). Applies if 52.215-11 applies.
FAR 52.219-9	SMALL BUSINESS SUBCONTRACTING PLAN (JAN 2002). Applies unless there are no subcontracting possibilities.
FAR 52.227-16	ADDITIONAL DATA REQUIREMENTS (JUNE 1987).
FAR 52.230-2	COST ACCOUNTING STANDARDS (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to full CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).
FAR 52.230-3	DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to modified CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).
FAR 52.230-5	COST ACCOUNTING STANDARDS – EDUCATIONAL INSTITUTION (APR 1998), excluding paragraph (b).
FAR 52.230-6	ADMINISTRATION OF COST ACCOUNTING STANDARDS (NOV 1999).

(END OF GENERAL PROVISIONS)

STANDARD RESEARCH SUBCONTRACT (EDUCATIONAL INSTITUTION or NONPROFIT ORGANIZATION) [FOR UNCLASSIFIED WORK] NO. _____	(DEPARTMENT OF ENERGY M&O CONTRACTOR) _____ NAME ADDRESS
Subcontractor: Attention: Address City, State, Zip Phone: Fax: E-Mail:	**Contractor's Procurement Representative [Contract Administrator]:** Proc. Rep Title: _____ Phone #: (Fax #: (E-Mail:

Introduction

This is a cost-reimbursement, no-fee, standard subcontract for unclassified research and development work, not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material. This Subcontract is between **[Insert contractor's name]**, (hereinafter "Contractor") and **[Insert subcontractor's name]** (hereinafter "Subcontractor"). The Subcontract is issued under Prime Contract No. **[Insert contract no.]** between the Contractor and the United States Department of Energy (hereinafter "DOE") **[include the following phrase in weapons lab contracts--** and the National Nuclear Security Administration (hereinafter "NNSA")] for the management and operation of **[insert name of the DOE/NNSA facility]** (hereinafter "DOE **[or** NNSA] Facility").

Agreement

The parties agree to perform their respective obligations in accordance with the terms and conditions of the Schedule and the General Provisions and other documents attached or incorporated by reference, which together constitute the entire Subcontract and supercede all prior discussions, negotiations, representations, and agreements.

[SUBCONTRACTOR NAME]	[M&O CONTRACTOR NAME]
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

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SCHEDULE OF ARTICLES

1. Statement of Work

The Subcontractor shall perform certain research and development work identified as **[insert brief title or statement of research]** and more fully described in the *Statement of Work* Attachment to this Subcontract. **[or Appendix I.]**

The Subcontactor's Principal Investigator assigned to this work is **[insert Principal Investigator's name]**. The Principal Investigator shall not be replaced or reassigned without the advance written approval of the Contractor's Procurement Representative **[or** Contract Administrator**]**.

The Subcontractor shall submit three copies of the final and any intermediate reports to the Contractor's Procurement Representative **[or** Contract Administrator, Contractor's Technical Representative, **or** named individual**]** upon completion of the work and, when the Subcontract contains milestone requirements, on the indicated milestone dates. When requested by the Contractor's Technical Representative, the Subcontractor shall submit a draft copy of the final report for review prior to finalization. The Contractor's Technical Representative need not approve the Subcontractor's reported conclusions of the research.

2. Report Preparation Requirements

a. These instructions apply to all formal reports, including the final report, required by the Subcontract. It does not apply to letter reports or reports specifically identified as Milestones in *Article* 3. *Period of Performance* in this Subcontract as informal reports.

b. The final report shall contain a comprehensive summary of all work results and conclusions. All reports shall fairly and completely describe the efforts applied to and the results obtained toward achievement of objectives of the subcontract work. If an objective is not accomplished, such failure shall be fully documented and explained in the report.

c. Reports shall include the following elements: (a) a brief abstract of the report which describes the overall objectives and results; (b) a full statement of each objective and description of the effort performed and the accomplishments achieved; (c) a list of any publication or information release made of material developed or maintained through the performance of the subcontract; and (d) any other relevant information.

3. Period of Performance

The work described in Article 1, Statement of Work, shall commence upon signature of this Subcontract by both parties and shall be completed on or before **(insert end date)**

[OR, if there is a milestone schedule, add: in accordance with the following milestones:

Milestone	**Completion Date]**

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4. Costs and Payments

a. The estimated cost of the work called for in this Subcontract is $_____, and is based upon the following estimated levels of effort necessary to perform the Subcontract work:

Category	No. of Staff	No. of Months

[OR:] is based on the Subcontractor's Cost Proposal Attachment **[or Appendix II]** to this Subcontract.

b. **[Check provision below that applies OR include only applicable provision]**

_____ This Subcontract is fully-funded and is subject to the *Limitation of Costs* clause of the General Provisions.

_____ This Subcontract is incrementally funded and is subject to the *Limitation of Funds* clause of the General Provisions. The funding amount currently allotted to this Subcontract is $ _____ and covers **[describe what work the incremental funding covers.]**

c. The Contractor will pay the Subcontractor for performance of this Subcontract, unless excluded or limited by other provisions of this Subcontract, the allowable direct costs incident to performance, plus the allocable portion of the allowable indirect costs of the Subcontractor. Allowable and allocable costs shall be determined in accordance with the cost principles of the Allowable Cost and Payment clause of the General Provisions.

5. Invoices for Payment

a. Payments for Subcontract work shall be made monthly based on invoices submitted by the Subcontractor for work performed. Invoices shall bear the following certification signed by a responsible official of the Subcontractor:

> "The undersigned certifies that the information set forth herein is true and correct and may be used as a basis for payment for work."

b. Invoices must identify the subcontract number, the period covered, and the total expenditures claimed for each of the following categories: salaries, fringe benefits, travel, materials and supplies, equipment, subcontracts/consultants, other direct costs such as rent, when applicable, and indirect or Facility and Administration costs.

c. Invoices shall be mailed to: **(Insert address)**

d. Payments shall be mailed to: **(Insert address)**

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e. The Contractor will use its best efforts to process invoices for payment within 30 days of receipt; provided, however, that payments made more than 30 days after receipt of an invoice shall not be subject to penalty, interest, or late charges.

f. Invoices, which include the cost of property acquired by the Subcontractor at a cost of $5,000 or more, shall include a description of the property and shall identify the assigned property number; the manufacturer; the Serial number and model number; the acquisition date; the unit price, quantity, and total cost of the property; and the location of the property.

6. Contractor-Furnished and Subcontract-Acquired Property

a. The Contractor shall furnish the Subcontractor the materials, equipment, and supplies listed in *Contractor-Furnished Government Property* **[OR** Appendix III**]** to this Subcontract.

b. Purchase of equipment or other tangible personal property, which is not identified in the Subcontractor's cost proposal for this Subcontract and for which the Subcontractor is entitled to be reimbursed as a direct item of cost under this Subcontract, shall be approved in advance by the Contractor's Procurement Representative **[OR** Contract Administrator**]**.

c. All property furnished by the Contractor or acquired by the Subcontractor, as a direct cost under the Subcontract, title to which vests in the Government, shall be identified, controlled, and protected as required by the *Government Property* clause of the General Provisions of this Subcontract. Disposition of such property upon completion of this Subcontract shall be as directed by the Contractor's Procurement Representative **[OR** Contract Administrator**]**.

d. If the Contractor provides the Subcontractor property that is marked as "high risk property" for use under this award, the Subcontractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of this property in accordance with the policies, practices and procedures for property management contained in the DOE Property Management regulations (41 CFR 109-1.53). Title to all property marked as "high risk property" vests in the Government.

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Deleted: High-risk property is defined in 41 CFR 109-1.100-51, and includes proliferation sensitive, nuclear related dual use, export controlled, chemically or radioactively contaminated, hazardous, and specially designed and prepared property, including property on the militarily critical technologies list. The loss, destruction, damage to, or the unintended or premature transfer of such property could pose risks to the public, the environment, or the national security interests of the United States.¶

7. Subcontract Administration

a. The Contractor's Procurement Representative **[OR** Contract Administrator**]** for this Subcontract is **[insert name of PR/CA]**. The Procurement Representative **[OR** Contract Administrator**]** is the only person authorized to make changes in the requirements of this Subcontract or make modifications to this Subcontract, including changes or modifications to the Statement of Work and the Schedule. The Subcontractor shall direct all notices and requests for approval required by this Subcontract to the Procurement

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Representative [OR Contract Administrator] at the following address:

[Insert address]

Any notices and approvals required by this Subcontract from the Contractor to the Subcontractor shall be issued by the Procurement Representative [OR Contract Administrator].

b. The Contractor's Technical Representative for this Subcontract is **[insert name]**. The Technical Representative is the person designated to monitor the Subcontract work and to interpret and clarify the technical requirements of the *Statement of Work*. The Technical Representative is not authorized to make changes to the work or modify this Subcontract.

8. Travel Requirements

a. All travel not included in the Subcontractor's cost proposal must be approved in advance by the Contractor.

b. All foreign travel must be approved in advance by the Contractor, even if the cost is included in the Subcontractor's cost proposal for this Subcontract.

9. Performance of Work

The Subcontractor will perform the work at a location other than a DOE/NNSA Facility.

10. Incorporated Documents

The following documents are hereby incorporated as Attachments **[OR Appendices]** to the Schedule of Articles of this Subcontract:

General Provisions for Standard Research Subcontracts, dated _____
Statement of Work dated _____ **[OR Appendix I]**
Subcontractor's Cost Proposal dated _____ (if applicable) **[OR Appendix II]**
Contractor-Furnished Government Property dated _____ **[OR Appendix III]**
[List others if applicable.]

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GENERAL PROVISIONS

CLAUSE 1 - PUBLICATIONS

A. The Subcontractor shall closely coordinate with the Contractor's Technical Representative regarding any proposed scientific, technical or professional publication of the results of the work performed or any data developed under this Subcontract. The Subcontractor shall provide the Contractor an opportunity to review any proposed manuscripts describing, in whole or in part, the results of the work performed or any data developed under this Subcontract at least forty-five (45) days prior to their submission for publication. The Contractor will review the proposed publication and provide comments. A response shall be provided to the Subcontractor within forty-five (45) days; otherwise, the Subcontractor may assume that the Contractor has no comments. Subject to the requirements of Clause 9, the Subcontractor agrees to address any concerns or issues identified by the Contractor prior to submission for publication.

B. Subcontractor may acknowledge the Contractor and Government sponsorship of the work as appropriate.

CLAUSE 2 – NOTICES

A. The Subcontractor shall immediately notify the Contractor's Procurement Representative [OR Contract Administrator] in writing of: (1) any action, including any proceeding before an administrative agency, filed against the Subcontractor arising out of the performance of this Subcontract; and (2) any claim against the Subcontractor, the cost and expense of which is allowable under the terms of this Subcontract.

B. If, at any time during the performance of this Subcontract, the Subcontractor becomes aware of any circumstances which may jeopardize its performance of all or any portion of the Subcontract, it shall immediately notify the Contractor's Procurement Representative [OR Contract Administrator] in writing of such circumstances, and the Subcontractor shall take whatever action is necessary to cure such defect within the shortest possible time.

CLAUSE 3 – ASSIGNMENTS

The Contractor may assign this Subcontractor to the Government or its designee(s). Except as to assignment of payment due, the Subcontractor shall have no right to assign or mortgage this Subcontract or any part of it without the prior written approval of the Contractor's Procurement Representative [OR Contract Administrator], except for subcontracts already identified in the Subcontractor's proposal.

CLAUSE 4 – DISPUTES

A. Informal Resolution

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1. The parties to a dispute shall attempt to resolve it in good faith, by direct, informal negotiations. All negotiations shall be confidential. Pending resolution of the dispute, the Subcontractor shall proceed diligently with the performance of this Subcontract, in accordance with its terms and conditions.

2. The parties, upon mutual agreement, may seek the assistance of a neutral third party at any time, but they must seek such assistance no later than 120 days after the date of the Contractor's receipt of a claim. The requirement to seek the assistance of a neutral third party may be waived or modified only with the consent of all parties. The parties may request the assistance of an established Ombuds Program, where available, or hire a mutually agreeable mediator, or ask the DOE Office of Dispute Resolution to assist them in selecting a mutually agreeable mediator. The cost of mediation shall be shared equally by both parties. If requested by both parties, the neutral third party may offer a non-binding opinion as to a possible settlement. All discussions with the neutral third party shall be confidential.

3. In the event the parties are unable to resolve the dispute by using a neutral third party or waive the requirement to seek such assistance, the Contractor will issue a written decision on the claim.

B. Formal Resolution

1. If a dispute has not been resolved by informal resolution, it may be submitted to binding arbitration upon agreement of both parties, by and in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA). If arbitration is agreed to by both parties, such decision is irrevocable and the outcome of the arbitration shall be binding on all parties.

2. Each party to the arbitration shall pay its pro rata share of the arbitration fees, not including counsel fees or witness fees or other expenses incurred by the party for its own benefit.

3. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction.

C. Litigation

If arbitration is declined for such disputes, the parties may pursue litigation in any court of competent jurisdiction.

D. Governing Law

This Subcontract shall be interpreted and governed in accordance with all applicable federal and state

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laws and all applicable federal rules and regulations.

CLAUSE 5 - RESPONSIBILITY FOR TECHNOLOGY EXPORT CONTROL

The parties understand that materials and information resulting from the performance of this Subcontract may be subject to export control laws and that each party is responsible for its own compliance with such laws.

CLAUSE 6 – COST ACCOUNTING STANDARDS (CAS) LIABILITY

[Applicable to Subcontracts exceeding $500,000]

Clause 10 below incorporates into these GENERAL PROVISIONS clauses entitled, "*COST ACCOUNTING STANDARDS*" *and* "*ADMINISTRATION OF COST ACCOUNTING STANDARDS.*" Notwithstanding the provisions of these clauses, or of any other provision of the Subcontract, the Subcontractor shall be liable to the Government for any increased costs, or interest thereon, resulting from any failure of the Subcontractor, with respect to activities carried on at the site of the work, or of a subcontractor, to comply with applicable cost accounting standards or to follow any practices disclosed pursuant to the requirements of such clause.

CLAUSE 7 - DISCLOSURE AND USE RESTRICTIONS FOR LIMITED RIGHTS DATA

Generally, delivery of Limited Rights Data (or Restricted Computer Software) should not be necessary. However, only if Limited Rights Data will be used in meeting the delivery requirements of the subcontract, the following disclosure and use restrictions shall apply to and shall be inserted in, any FAR 52.227-14 Limited Rights Notice on any Limited Rights Data furnished or delivered by the Subcontractor or a lower-tier subcontractor:

A. These "Limited Rights Data" may be disclosed for evaluation purposes under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed;

B. These "Limited Rights Data" may be disclosed to other contractors participating in the Government's program of which this Subcontract is a part for information or use in connection with the work performed under their contracts and under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed; and

C. These "Limited Rights Data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed.

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CLAUSE 8 - ORDER OF PRECEDENCE

Any inconsistencies in the documents comprising this Subcontract shall be resolved by giving precedence in the following order: (a) the SCHEDULE OF ARTICLES and this Subcontract Signature Page; (b) these GENERAL PROVISIONS; (c) other referenced documents, exhibits, and attachments; and (d) any referenced specification or *Statement of Work*.

CLAUSE 9 – SECURITY REQUIREMENTS

A. This Subcontract is intended for unclassified, publicly releasable research or development work. The Contractor does not expect that results of the research project will involve classified information or Unclassified Controlled Nuclear Information (UCNI) (See 10 CFR part 1017). However, the Contractor may review the research work generated under this Subcontract at any time to determine if it requires classification or control as UCNI.

B. If, subsequent to the date of this Subcontract, a review of the information reveals that classified information or UCNI is being generated under this Subcontract, then the security requirements of this Subcontract must be changed. If such changes cause an increase or decrease in costs or otherwise affect any other term or condition of this Subcontract, the Subcontract shall be subject to an equitable adjustment as if the changes were directed under the Changes clause of this Subcontract.

C. If the security requirements are changed, the Subcontractor shall exert every reasonable effort compatible with its established policies to continue the performance of work under the Subcontract in compliance with the change in the security requirements. If the Subcontractor determines that continuation of the work under this Subcontract is not practicable because of the change in security requirements, the Subcontractor shall notify the Contractor's Procurement Representative in writing. Until the Contractor's Procurement Representative provides direction, the Subcontractor shall protect the material as directed by the Contractor.

D. After receiving the written notification, the Contractor's Procurement Representative shall explore the circumstances surrounding the proposed change in security requirements and shall endeavor to work out a mutually satisfactory method to allow the Subcontractor to continue performance of work under this Subcontract.

E. Within 15 days of receiving the written notification of the Subcontractor's stated inability to proceed, the Contractor's Procurement Representative must determine whether (1) these security requirements do not apply to this contract or (2) a mutually satisfactory method for continuing performance of work under this Subcontract can be agreed upon. If this determination is not made, the Subcontractor may request the Contractor's Procurement Representative to terminate the Subcontract in whole or in part. The Contractor's Procurement Representative shall terminate the Subcontract in whole or in part, as may be appropriate, and the termination shall be deemed a termination under the terms of the Termination for the Convenience of the Government clause.

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CLAUSE 10 - CLAUSES INCORPORATED BY REFERENCE

The FEDERAL ACQUISITION REGULATION (FAR) and the U.S. DEPARTMENT OF ENERGY ACQUISITION REGULATION (DEAR) clauses listed below, which are located in Chapters 1 and 9, respectively, of Title 48 of the Code of Federal Regulations, are incorporated by this reference as a part of these GENERAL PROVISIONS with the same force and effect as if they were given in full text, as prescribed below.

The full text of the clauses may be accessed electronically at http://www.arnet.gov/far/ (FAR) and http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation (DEAR).

As used in the clauses, the term "contract" shall mean this Subcontract; the term "Contractor" shall mean the Subcontractor; the term "subcontractor" shall mean the Subcontractor's subcontractor, and the terms "Government" and "Contracting Officer" shall mean the Contractor, except in FAR clause 52.227-14, and DEAR clauses 970.5227-4, 952.227-11, 970.5232-3 and 52.245-5 Alternate I, in which clauses "Government" shall mean the United States Government and "Contracting Officer" shall mean the DOE/NNSA Contracting Officer for Prime Contract DE-_____ with the Contractor. As used in DEAR clauses 952.204-72 and 952.227-9, the term "DOE" shall mean DOE/NNSA or the Contractor.

The modifications of these clause terms are intended to appropriately identify the parties and establish their contractual and administrative reporting relationship, and shall not apply to the extent they would affect the U.S. Government's rights. The Subcontractor shall include the listed clauses in its subcontracts at any tier, to the extent applicable.

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APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:

DEAR 952.204-71	SENSITIVE FOREIGN NATIONS CONTROLS (APR 1994). Applies if the Subcontract is for unclassified research involving nuclear technology.
FAR 52.216-7	ALLOWABLE COST AND PAYMENT (DEC 2002). Substitute 31.3 in subcontracts with educational institutions and 31.7 in subcontracts with nonprofit organizations for 31.2 in paragraph (a).
FAR 52.216-15	PREDETERMINED INDIRECT COSTS RATES APR 1998).
FAR 52.222-21	PROHIBITION OF SEGREGATED FACILITIES (FEB 1999).
FAR 52.222-26	EQUAL OPPORTUNITY (APR 2002).
FAR 52.223-3	HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA SHEETS (JAN 1997) AND ALTERNATE I. Applies only if Subcontract involves delivery of hazardous materials.
FAR 52.225-13	RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (DEC 2003).
DEAR 970.5227-4	AUTHORIZATION AND CONSENT (AUG 2002), Paragraph (a).
DEAR 952.227-9	REFUND OF ROYALTIES (FEB 1995). Applies if "royalties" of more than $250 are paid by a subcontractor at any tier.
DEAR 952.227-11	PATENT RIGHTS - RETENTION BY THE CONTRACTOR (SHORT FORM) (FEB 1995). (Applies only if Subcontractor is a nonprofit organization as set forth in 48 CFR 27.301. If Subcontractor does not qualify in accordance with 48 CFR 27.301, it may request a patent waiver pursuant to 10 CFR 784.)
FAR 52.227-14	[Check provision below that applies OR include only applicable provision]. _____ RIGHTS IN DATA-GENERAL (JUN 1987) with ALTERNATE V and DEAR 927.409 Paragraphs (a) and (d)(3). Applies if the Subcontract is for development work, or for basic and applied research where computer software is specified as a Deliverable in the Statement of Work or other special circumstances apply as specified in the agreement. _____ RIGHTS IN DATA-GENERAL (JUN 1987) with ALTERNATE IV, subparagraph (c)(1) and DEAR 927.409, subparagraph (a) Definitions. Applies if the Subcontract is for basic or applied research and computer software is not specified as a Deliverable in the Statement of Work, and no other special circumstances apply per DEAR 927.409.
FAR 52.227-23	RIGHTS TO PROPOSAL DATA (TECHNICAL) (JUNE 1987). Applies if the Subcontract is based upon a technical proposal.
FAR 52.229-10	STATE OF NEW MEXICO GROSS RECEIPTS AND COMPENSATING TAX (APR 2003). Applies if any part of this Subcontract is to be performed in the State of New Mexico.
FAR 52.232-20	LIMITATION OF COST (APR 1984). Applies if the Subcontract is fully funded.
FAR 52.232-22	LIMITATION OF FUNDS (APR 1984). Applies if the Subcontract is incrementally funded.

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FAR 52.242-15	STOP-WORK ORDER (AUG 1989) with ALTERNATE I (APR 1984).
FAR 52.243-2	CHANGES – COST-REIMBURSEMENT (AUG 1987), WITH ALTERNATE V
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FAR 52.222-36	AFFIRMATIVE ACTION FOR WORKERS WITH DISABILITIES (JUNE 1998).
FAR 52.222-37	EMPLOYMENT REPORTS ON SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).

APPLICABLE IF THE SUBCONTRACT EXCEEDS $100,000:

FAR 52.203-5	COVENANT AGAINST CONTINGENT FEES (APR 1984)
FAR 52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (JULY 1995).

Deleted: *3/20/04*

FAR 52.203-7	ANTI-KICKBACK PROCEDURES (JULY 1995), excluding Paragraph (c)(1).
FAR 52.203-10	PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY (JAN 1997).
FAR 52.203-12	LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (JUNE 2003).
FAR 52.219-8	UTILIZATION OF SMALL BUSINESS CONCERNS (MAY 2004).
FAR 52.222-04	CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION (SEP 2000).
DEAR 970.5227-5	NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (AUG 2002).

Deleted: OCT 2000

APPLICABLE IF THE SUBCONTRACT EXCEEDS $500,000:

FAR 52.215-10	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (OCT 1997) if subcontract exceeds $550,000.
FAR 52.215-11	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS (OCT 1997) not used when 52.215-10 is included. In subcontracts greater than $550,000.
FAR 52.215-12	SUBCONTRACTOR COST OR PRICING DATA (OCT 1997). Applies if 52.215-10 applies.
FAR 52.215-13	SUBCONTRACTOR COST OR PRICING DATA-MODIFICATIONS (OCT 1997). Applies if 52.215-11 applies.
FAR 52.219-9	SMALL BUSINESS SUBCONTRACTING PLAN (JAN 2002). Applies unless there are no subcontracting possibilities.
FAR 52.227-16	ADDITIONAL DATA REQUIREMENTS (JUNE 1987).
FAR 52.230-2	COST ACCOUNTING STANDARDS (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to full CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).
FAR 52.230-3	DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to modified CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).
FAR 52.230-5	COST ACCOUNTING STANDARDS – EDUCATIONAL INSTITUTION (APR 1998), excluding paragraph (b).
FAR 52.230-6	ADMINISTRATION OF COST ACCOUNTING STANDARDS (NOV 1999).

(END OF GENERAL PROVISIONS)

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005 - 06

DATE: October 28, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Implementation of the Electronic Subcontracting Reporting System**

SUMMARY The Office of Federal Procurement Policy (OFPP) recently issued a memorandum regarding the implementation of the new electronic Subcontracting Reporting System (eSRS). OFPP has extended the submission of all FY 2004 Standard Forms 294 & 295 until February 28, 2005, when the eSRS will be operational. Contracting Officers should immediately notify contractors of this change.

POLICY FLASH
2005 – 06

On October 18th, the Office of Federal Procurement Policy (OFPP) issued the attached memorandum regarding the implementation of the new electronic Subcontracting Reporting System (eSRS):

While FAR 52.219-9(j)(1) & (2) identifies requirements for the submittal of the SF 294 (*Subcontracting Report for Individual Contracts)* or SF 295 (*Summary Subcontract Report)*, OFPP has extended the submission due date of all FY 2004 reports until February 28, 2005. The Government will not accept any paper forms submitted after September 30, 2004. OFPP has requested that we notify contractors immediately that they should not submit the paper forms.

Please issue an administrative change, including a copy of the OFPP memorandum, for each of your contracts which contain the clause at FAR 52.219-9, Small Business Subcontracting Plan. OFPP is developing government/industry training to be presented in the first quarter of FY 2005.

If you have any questions in regards to this Flash, please contact Steve Zvolensky of our staff at (202) 287-1307 or steven.zvolensky@hq.doe.gov .

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment

cc:
PPAG Members

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

October 18, 2004

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES
DIRECTORS, OFFICES OF SMALL AND
DISADVANTAGED BUSINESS UTILIZATION

FROM: Robert A. Burton
Associate Administrator

SUBJECT: Implementation Plan for the Electronic Subcontracting Reporting System

The contract for the Electronic Subcontracting Reporting System (eSRS) will be awarded October 2004. The eSRS will replace the paper Standard Form-294 (SF-294), *Subcontracting Report for Individual Contracts*, and Standard Form-295 (SF-295), *Summary Subcontract Report.*

Historically, government contractors submitted the SF-295 to the procuring agency, in most cases to the Offices of Small and Disadvantaged Business Utilization, which in turn provided the data to the Federal Procurement Data System (FPDS). Government contractors submitted the SF-294 for *specific contracts to the contracting office* and the data from those submittals was never consolidated government-wide. The eSRS, which is part of the integrated acquisition environment, will provide a paperless system allowing contractors to enter both of these reports into a web site (http://www.srs.gov). All contractors required to file both types of subcontracting reports will do so using the eSRS.

Since the original FPDS has been replaced by FPDS-Next Generation, which does not include subcontracting data, we want to make use of the improved functionality of eSRS for fiscal year (FY) 2004 subcontracting reports. Accordingly, we are extending the deadline for submission of all FY 2004 reports to February 28, 2005. This will allow the Small Business Administration to receive subcontracting data for FY 2004 in March 2005, several months earlier than they received the data from the FPDS.

Please notify contractors of this change immediately, so they do not begin preparing paper SF-294s and SF-295s. All contractors will be required to enter the data into the eSRS, and the government will not accept paper reports for the period ending September 30, 2004.

Training on the use of the eSRS will be provided to both government employees and industry representatives during the first quarter of FY 2005. In addition, the eSRS will provide on-line help tools and a fully staffed help desk. An application interface will be available so that contractors with their own automated system can download their data, in most cases, with little difficulty.

The eSRS will benefit us in many ways. In addition to eliminating tens of thousands of semi-annual paper reports, the eSRS will provide access to subcontracting data not previously available, including standard reports for determining contractor achievement of socio-economic goals and other analytical tools. The system will automatically generate delinquent notices to contractors that have not submitted timely reports and identify contractors who are delinquent on specific reports. The numerous other advantages and features will be demonstrated during the training sessions mentioned above.

Please direct any questions to Julie Basile of the Office of Federal Procurement Policy, jbasile@omb.eop.gov, or at (202) 395-4821.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-07

DATE: November 2, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Cooperative Audit Strategy**

SUMMARY: This Flash transmits revised Acquisition Guide Chapter 70.4 – Cooperative Audit Strategy and Acquisition Letter AL-2005-04, which provides an associated class deviation directing the use of the revised version of the clauses at 970.5203-1, Management Controls and 970.5237-3, Accounts, Records, and Inspection.

1. Revised Guide Chapter 70.4, Cooperative Audit Strategy:

    a. Establishes a requirement for the contractor to provide an Internal Audit Design for each 5-year period of a contract. The design is to consist of:

        (1) Organizational placement of the internal audit function to assure functional independence;
        (2) Size, experience, and educational requirements of audit staff;
        (3) Audit standards to be applied;
        (4) Plan for internal audit function over 5-year period;
        (5) Plan for audit of allowable costs;
        (6) Use of DCAA for supplementing audit of prime or subcontract allowable costs; and
        (7) Schedule for peer review.

    b. Provides detailed standards for the Annual Audit Plan.

    c. Provides detailed standards for the Annual Audit Report.

2. AL 2005-04, Class Deviation to Reflect Changes to the Cooperative Audit Strategy, provides the class deviation signed by the Director, Office of Procurement and Assistance Management and Director, Office of Procurement and Assistance Management (NNSA), requiring the use of and expanding coverage in contract clauses to reflect critical aspects of the Cooperative Audit Strategy:

    a. With regard to the clause at 970.5203-1, Management Controls (DEC 2000) (Deviation), submission of copies of reports reflecting the status of recommendations that result from business, financial, or management controls audits of the contractor.

    b. With regard to the clause at 970.5232-3, Accounts, Records, and Inspection (DEC 2000) (Deviation):
        (1) Timing of deliverables, *i.e*, 5-year audit design, and annual audit plan, annual audit report;
        (2) Express discussion of Statement of Costs Incurred and Claimed; and
        (3) Remedies if the contractor should fail to maintain business/financial systems sufficient to maintain DOE confidence, *e.g.*, impose conditions upon the contractor's use of the special financial institution account,

require the contractor to pay an amount equal to the unallowable costs or payments improperly made, or take any other action or combination of actions allowed by the contract, at law, or in equity.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachments
Acquisition Letter 2005-04
Acquisition Guide Chapter 70.4

cc:
PPAG Members

Department of Energy
Acquisition Regulation

No. AL-2005-04
Date 11/2/2004

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA

Subject: CLASS DEVIATION TO REFLECT CHANGES TO THE COOPERATIVE AUDIT STRATEGY

References:

DEAR 970.5203-1 Management Controls
DEAR 970.5232-3 Accounts, Records, and Inspection
DOE Acquisition Guide Chapter 70.4 Cooperative Audit Strategy

When is this Acquisition Letter (AL) Effective?

This AL is effective upon issuance. The use of the clauses authorized by the attached class deviation shall be used in all solicitations and contracts in place of the parallel clauses currently contained in the DEAR.

When Does This AL Expire?

This AL remains in effect until superseded by the publication of a final rule incorporating the clauses that are the subject of the class deviation into the DEAR.

Who is the Point of Contact?

Contact Robert Webb of the Office of Procurement and Assistance Policy at (202) 287-1338 or by email at Robert.Webb@hq.doe.gov .

Visit our website at www.pr.doe.gov for additional information on Acquisition Letters and other policy issues.

AL-2005-07 (11/2/04)

What is the Purpose of this Acquisition Letter?

The purpose of this Acquisition Letter (AL) is to provide a class deviation that incorporates changes that support DOE's Cooperative Audit Strategy into the Management Controls clause at 970.5203-1 and the Accounts, Records, and Inspection clause at 970.5232-3.

What is the Background?

The DOE Inspector General (IG), in consultation with the Chief Financial Officer (CFO), and the Office of Procurement and Assistance Management (OPAM), and the Contractor Internal Audit Council, developed and implemented the Cooperative Audit Strategy in October 1992 to maximize the overall audit coverage at management and operating contractors and fulfill its responsibility for auditing the costs incurred by DOE's major facilities contractors. The Cooperative Audit Strategy enhances DOE's efficient use of available audit resources by allowing the IG to rely on the work of Contractor internal audit activities. The success of the Cooperative Audit Strategy depends on the IG and Contractor Internal Auditors working closely with the CFO, DOE's and NNSA's OPAM, Departmental Contracting Officers, and related Departmental program functions.

The class deviation transmitted by this Acquisition Letter modifies the Management Controls clause at DEAR 970.5203-1 and Accounts, Records, and Inspection clause at DEAR 970.5231-3 to enhance contract coverage of the Cooperative Audit Strategy. The revised versions of the two clauses are attached to the deviation determination.

Contracting Officers shall incorporate the two modified clauses into solicitations for management and operating contracts and awards. Additionally, Contracting Officers shall attempt to negotiate these clauses in existing M&O contracts at the next annual negotiation.

Attachment:
Class Deviation to Reflect Changes to the Cooperative Audit Strategy

CLASS DEVIATION TO REFLECT CHANGES TO THE COOPERATIVE AUDIT STRATEGY

BACKGROUND

DOE's Office of Inspector General (IG) is statutorily responsible for the audit of DOE's management and operating contracts (M&Os). Those contracts have two significant financial characteristics in common: (1) the use of special bank accounts for payment of contract costs and (2) the annual reconciliation of contract costs through the use of a Statement of Costs Incurred and Claimed. These two characteristics operate in tandem, replacing a system of vouchers to reimburse incurred costs normally used on government cost type contracts. M&O contracts incur costs of several hundreds of millions of dollars to more than $1 billion.

The IG has designed a Cooperative Audit Strategy to fulfill its M&O audit responsibilities. That strategy consists of reliance on the contractor's creating an internal audit function as a first line of audit, used to identify unallowable costs and weaknesses in financial control systems.

For the Cooperative Audit Strategy to fulfill its objective, it depends not only on the active involvement of the Inspector General but on the active involvement of the Chief Financial Officer (CFO) and the Contracting Officer.

Currently, the only coverage in DOE M&O contracts reflecting the Cooperative Audit Strategy is Alternate II to the clause at 970.5232-3, Accounts, Records, and Inspection, which states in part:

> (i) *Internal audit.* The contractor agrees to conduct an internal audit and examination satisfactory to DOE of the records, operations, expenses, and the transactions with respect to costs claimed to be allowable under this contract annually and at such other times as may be mutually agreed upon. The results of such audit, including the working papers, shall be submitted or made available to the contracting officer.

The IG provides guidance to its auditors on this subject, the Chief Financial Officer provides guidance on the Statement of Costs Incurred and Claimed in the Accounting Handbook, and the Acquisition Guide provides guidance to contracting officers in Chapter 70.4.

The IG, CFO, and the Office of Procurement and Assistance Management have cooperated to revise the Acquisition Guide chapter. In doing so, those offices have made important revisions to the Cooperative Audit Strategy, adding a requirement for the contractor to establish an internal audit design to describe its plan for audit during contract performance, adding depth to the discussion of the responsibilities of the three participating DOE functions, and expanding the contract coverage. The guide chapter is being coordinated for issuance. A proposed rule reflecting the alterations to the contractual coverage is being prepared.

DESCRIPTION OF THE DEVIATIONS

The Department's interests would be well served by the authorization of the proposed clause changes for use in M&O contracts that are currently being competed or extended, rather than waiting for the promulgation of the changes by final rule.

The proposed changes are reflected by the emboldened test in the attached clauses. The changed contractual coverage consists of the addition of one sentence to paragraph (a)(4) of the Management Controls clause at 970.5203-1, revised paragraphs (i) and (j) to the Accounts, Records, and Inspection clause at 970.5232-3, and the deletion of Alternate II to that clause.

The revision to the Management Controls clause would direct the contractor to provide the contracting officer the contractor's reports showing the status of implementation of audit recommendations.

The new paragraph (i) of the Accounts, Records, and Inspection clause would require the contractor to provide the contracting officer with an internal audit design upon the award and any extension of the contract. It would describe the size, placement, and audit standards for the contractor's internal audit function. Additionally, the contractor is required to supply an annual audit report to summarize the activities of the contractor's internal audit function during the prior contract year and an annual audit plan to describe the audit activities of the internal audit function planned for the next contract year.

The new paragraph (j) of the Accounts, Records, and Inspection clause would provide a sample list of remedies available to the contracting officer should DOE lose confidence in the contractor's internal audit function or the contractor's system of controls. The proposed changes would render Alternate II unnecessary.

RECOMMENDATION

It is recommended that the proposed deviations to the Management Controls clause, 970.5203-1, and Accounts, Records, and Inspection clause, 970.5242-3, be authorized for use in the class of M&O contracts that will be competed or extended prior to their promulgation into the DEAR through the rulemaking process. Contracting officers will also be authorized to negotiate this clause into existing M&O contracts at the next annual fee negotiation. This deviation will be effective through the promulgation of the final rule.

✓ APPROVED
__ NOT APPROVED

Richard H. Hopf, Director
Office of Procurement and
Assistance Management
DEAR 970.5203-1 Management controls.

✓ APPROVED
__ NOT APPROVED

Robert C. Braden, Jr., Director
Office of Procurement and
Assistance Management (NNSA)

DEAR 970.5203-1 Management controls.

As prescribed in 48 CFR 970.0370-2(a) and 48 CFR 970.3270(a)(4), insert the following clause:

970.5203-1 MANAGEMENT CONTROLS (DEC 2000)(DEVIATION)

(a)(1) The contractor shall be responsible for maintaining, as an integral part of its organization, effective systems of management controls for both administrative and programmatic activities. Management controls comprise the plan of organization, methods, and procedures adopted by management to reasonably ensure that: the mission and activities assigned to the contractor are properly executed; efficient and effective operations are promoted; resources are safeguarded against waste, loss, mismanagement, unauthorized use, or misappropriation; all encumbrances and costs that are incurred under the contract and fees that are earned are in compliance with applicable clauses and other current terms, conditions, and intended purposes; all collections accruing to the contractor in connection with the work under this contract, expenditures, and all other transactions and assets are properly recorded, managed, and reported; and financial, statistical, and other reports necessary to maintain accountability and managerial control are accurate, reliable, and timely.

(2) The systems of controls employed by the contractor shall be documented and satisfactory to DOE.

(3) Such systems shall be an integral part of the contractor's management activities, including defining specific roles and responsibilities for each level of management, and holding employees accountable for the adequacy of the management systems and controls in their areas of assigned responsibility.

(4) The contractor shall, as part of the internal audit program required elsewhere in this contract, periodically review the management systems and controls employed in programs and administrative areas to ensure that they are adequate to provide reasonable assurance that the objectives of the systems are being accomplished and that these systems and controls are working effectively. **Annually, or at other intervals directed by the contracting officer, the contractor shall supply to the contracting officer copies of the reports reflecting the status of recommendations that result from audits of business, financial, or management controls performed by its internal audit activity and any other audit activity.**

(b) The contractor shall be responsible for maintaining, as a part of its operational responsibilities, a baseline quality assurance program that implements documented performance, quality standards, and control and assessment techniques.

DEAR 970.5232-3 Accounts, records, and inspection.

As prescribed in 48 CFR 970.3270(a)(2), insert the following clause:

970.5232-3 ACCOUNTS, RECORDS, AND INSPECTION (DEC 2000)(DEVIATION)

(a) *Accounts.* The contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting: all allowable costs incurred; collections accruing to the contractor in connection with the work under this contract, other applicable credits, negotiated fixed amounts, and fee accruals under this contract; and the receipt, use, and disposition of all Government property coming into the possession of the contractor under this contract. The system of accounts employed by the contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

(b) *Inspection and audit of accounts and records.* All books of account and records relating to this contract shall be subject to inspection and audit by DOE or its designees in accordance with the provisions of Clause _____, Access to and ownership of records, at all reasonable times, before and during the period of retention provided for in paragraph (d) of this clause, and the contractor shall afford DOE proper facilities for such inspection and audit.

(c) *Audit of subcontractors' records.* The contractor also agrees, with respect to any subcontracts (including fixed-price or unit-price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the contracting officer.

(d) *Disposition of records.* Except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of this contract and final audit of accounts hereunder. Except as otherwise provided in this contract, including provisions of Clause_____, Access to and ownership of records, all other records in the possession of the contractor relating to this contract shall be preserved by the contractor for a period of three years after final payment under this contract or otherwise disposed of in such manner as may be agreed upon by the Government and the contractor.

(e) *Reports.* The contractor shall furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this contract as the contracting officer may from time to time require.

(f) *Inspections.* The DOE shall have the right to inspect the work and activities of the contractor under this contract at such time and in such manner as it shall deem appropriate.

(g) *Subcontracts.* The contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through (g) and paragraph (h) of this clause in all subcontracts (including fixed-price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

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

(2) This paragraph may not be construed to require the contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(3) Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

(i) Internal audit. **The contractor agrees to establish and maintain an internal audit activity and provide the following reports:**

(1) Internal Audit Implementation Design. Within thirty (30) days of contract award and each 5th year of contract performance or upon the exercise of any contract option or the extension of the contract, the contractor shall submit to the contracting officer an Internal Audit Implementation Design to include the overall strategy for the audit activity. The Implementation Design will describe (i) the audit activity's placement within the contractor's organization including reporting requirements; (ii) its size and the experience and educational standards of the audit staff; (iii) its relationship to the corporate parent(s) of the contractor; (iv) the standards used to audit; (v) an overall audit strategy for relevant performance period of this contract, considering particularly the method of auditing costs incurred in the performance of the contract; (vi) the intended use of external audit resources; (vii) the plan for audit, both pre-award and post- award of subcontracts; and (viii) the schedule of peer review of the internal audit activity by other DOE contractor internal audit activities.

(2) Annual Audit Report. By each January 31 of the contract performance period, the contractor shall submit an annual audit report, providing a summary of the audit activities undertaken during the previous fiscal year and their results.

(3) Annual Audit Plan. By each June 30 of the contract performance period, the contractor shall submit to the contracting officer an annual audit plan that reflects the activities to be undertaken during the next fiscal year. The contractor shall design the Annual Audit Plan to test the costs incurred and contractor management systems described in the internal audit design.

(4) Contracting officer's satisfaction. The design of the internal audit activity submitted under subparagraph (1), the annual report submitted under subparagraph (2), and the annual audit plan submitted under subparagraph (3) shall be satisfactory to the contracting officer.

(j) *Statement of Costs Incurred and Claimed.* At any time during contract performance, should the contracting officer determine that the costs incurred are unallowable to an extent to cause him or her to lose confidence in the contractor's management controls or the contractor's management systems that validate the costs incurred and claimed, the contracting officer may, in his or her sole discretion, impose conditions upon the contractor's use of the special financial institution account or use of the Statement of Costs Incurred and Claimed in whole or in part, including direction that specific types of costs be claimed by periodic vouchering. This action shall not relieve the contractor from any obligation to perform its obligations under this contract. In addition, the contracting officer may direct the contractor to pay the Government an amount equal to the unallowable costs or payments improperly made and take any other action or combination of actions provided in this contract, at law, or in equity.

(End of Clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.3270(a)(2)(i), if the contract includes the clause at 48 CFR 52.215-11, Price Reduction for Defective Cost or Pricing Data, the basic clause shall be modified as follows:

(a) Paragraph (a) of the basic clause shall be modified by adding the words "or anticipated to be incurred" after the words "allowable costs incurred."

(b) Paragraph (g) of the basic clause shall be modified by adding the following:

The contractor further agrees to include an "Audit" clause, the substance of which is the "Audit" clause set forth at 48 CFR 52.215-2, in each subcontract which does not include provisions similar to those in paragraph (a) through paragraph (g) and paragraph (h) of this clause, but which contains a "defective cost or pricing data" clause.

Cooperative Audit Strategy

Guiding Principle - The creation and maintenance of rigorous business, financial, and accounting systems by the Contractor are crucial to ensuring the integrity and reliability of the cost data used by the Department of Energy's CFO, IG, and CO. To ensure the reliability of these systems, the Department requires that Contractors maintain an internal audit activity that is responsible for
i) performing operational and financial audits (including incurred cost audits) and
ii) assessing the adequacy of management control systems to support the IG as part of the Cooperative Audit Strategy.

Reference: DEAR 970.5203-1, entitled, Management Controls; DEAR 970.5232-3, entitled, Accounts, Records and Inspection; Chapter 4 of the Accounting Handbook, and Chapter 18 of the Inspector General Audit Manual.

Overview

This chapter provides guidance to contracting officers (CO) in their review of (1) INTERNAL AUDIT IMPLEMENTATION DESIGN, submitted within 30 days of contract award and at each 5th year of contract performance or upon the exercise of an option or any contract extension; (2) the ANNUAL AUDIT PLAN, the plan for audit activities during the next fiscal year; (3) the ANNUAL AUDIT REPORT, a summary of the audit activities undertaken during the previous fiscal year, and the plans for resolution of audit findings; and (4) the annual submission of the STATEMENT OF COSTS INCURRED AND CLAIMED (SCIC). The contractor is required to provide these documents and perform supporting activities pursuant to DEAR 970.5232-3, Accounts, Records, and Inspection and 970.5203-1, Management Controls.

This chapter also explains the responsibilities and interactions of the cognizant CO, the Office of the Inspector General (IG), and the cognizant Chief Financial Officer (CFO) in the operation of the cooperative audit strategy.

Background

The IG, in consultation with the CFO, the Office of Procurement and Assistance Management (OPAM), and the Contractor Internal Audit Council, developed and implemented the Cooperative Audit Strategy in October 1992 to maximize the overall audit coverage at management and operating (M&O) contractors and fulfill its responsibility for auditing the costs incurred by the Department's major facilities contractors. The Cooperative Audit Strategy enhances the Department's efficient use of available audit resources by allowing the Department to rely on the work of Contractor internal audit activities. The IG has implemented the Cooperative Audit Strategy at most major contractor locations.

The success of the Cooperative Audit Strategy depends on the IG and Contractor Internal Auditors working closely with the CFO, OPAM and NNSA's Office of Acquisition and Supply Management (OASM), the Department's Contracting Officers, and related the Department's cognizant program personnel. The IG, Contractor Internal Auditors, and the Department's officials have established a Steering Committee for Quality Auditing to address current issues and implement on-going improvements.

Definitions

ANNUAL AUDIT PLAN is a plan submitted by the INTERNAL AUDIT ACTIVITY by June 30 of each year of contract performance. This document identifies the planned internal audit activities for the next fiscal year. In preparing the plan, contractors consider the results of prior year audits as presented in the ANNUAL AUDIT REPORT, the status of audit activities for the current year until the issuance of the ANNUAL AUDIT PLAN, and other factors such as risk assessments and emerging audit issues.

ANNUAL AUDIT REPORT of Internal Audit Activity is a report submitted by the INTERNAL AUDIT ACTIVITY by January 31 of each year of contract performance. This report summarizes audit activities undertaken during the previous fiscal year

INTERNAL AUDIT ACTIVITY means an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps its corporate organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and corporate governing processes. Its duties include (1) conducting independent and objective reviews of the SCIC to assess the allowability of incurred contract costs in accordance with the applicable cost principles of the contract and (2) evaluating the efficiency and effectiveness of the contractor's system of controls and operations using standards promulgated by the Institute of Internal Auditors (IIA).

INTERNAL AUDIT IMPLEMENTATION DESIGN means a plan provided by the Contractor

either upon (1) contract award and (2) at each 5th year of contract performance or upon (3) the exercise of an option or (4) any contract extension to describe or design the overall INTERNAL AUDIT ACTIVITY's goals, reporting structure within the Contractor and parent organization, audit strategies, staffing requirements, use of government and external auditors, and other pertinent information to provide the Department assurance of independence, objectivity, and comprehensive audit coverage during the contract performance.

STATEMENT OF COSTS INCURRED AND CLAIMED (SCIC) means the statement that reconciles contract costs incurred under the contract for the prior 12 month period. Contractors operating under an integrated accounting are required to prepare and submit the SCIC to the CO annually. The Contracting Officer is responsible for coordinating the review of the SCIC with the IG and the CFO. Submission and processing of the SCIC is discussed in Section 2d(2) of Chapter 4 of the DOE Accounting Handbook and attachment 4-1, http://www.cfo.gov/policy/actindex/index.html-ssi.

CHIEF AUDIT EXECUTIVE (CAE) means the senior position within the contractor's INTERNAL AUDIT ACTIVITY. The CAE must possess relevant education and experience qualifications. The CAE is responsible for reporting internal audit activities to and follow-up of audit results with the Contractor's senior management and the board of directors, audit committee, or an equivalent corporate independent board. In managing the INTERNAL AUDIT ACTIVITY, the CAE can employ an external service provider, a person or firm, independent of the contractor's organization that has special knowledge, skill, and experience in a particular discipline, necessary to assist the internal audit activities. External service providers may include, among others, actuaries, accountants, appraisers, environmental specialists, fraud investigators, lawyers, engineers, geologists, security specialists, statisticians, information technology specialists, external auditors, and other auditing organizations. In any event, the CAE is responsible for the accuracy and adequacy of the services provided.

Responsibilities

Contracting Officer (CO): The CO, in conjunction with the IG and the CFO, is responsible for reviewing and for approving (1) the INTERNAL AUDIT IMPLEMENTATION DESIGN; (2) the ANNUAL AUDIT PLAN; (3) the ANNUAL AUDIT REPORT; and (4) the STATEMENT OF COSTS INCURRED AND CLAIMED. The CO shall provide comments to the Contractor for suggested or required revision. Most importantly, where the INTERNAL AUDIT IMPLEMENTATION DESIGN or any ANNUAL AUDIT PLAN fails to provide a sufficient basis for reliance on the SCIC as to costs incurred or management controls, the CO shall require the Contractor to correct identified deficiencies. The CO shall use the ANNUAL AUDIT PLAN, the ANNUAL AUDIT REPORT, and the copies of responses to audit reports and any other information in the administration of the contract and provide relevant information, as requested, to the Head of Contracting Activity (HCA) or site manager to aid in the oversight of the instant contract or other contracts. Should any of the parties who are signatories refuse to sign the

SCIC, the CO shall undertake an effort to reconcile all parties. If the refusal to sign indicates a failure of Contractor management systems, the CO shall take corrective actions appropriate to the circumstances that protect the Government's interest.

The Inspector General (IG): The Office of Inspector General develops audit policy for the Department's programs and operations. In that capacity, the IG is the cognizant Auditor for the Department's major facilities contractors. The IG relies upon the contractors' INTERNAL AUDIT ACTIVITIES to support the Cooperative Audit Strategy. The IG provides guidance to cognizant COs, HCAs, Department site or office managers, and cognizant CFOs on the sufficiency of the design and operation of INTERNAL AUDIT ACTIVITIES, particularly as they support the SCIC.

Representatives of the IG periodically evaluate the actions of the contractors' INTERNAL AUDIT ACTIVITIES and audits using the American Institute of Certified Public Accountants' Statement on Auditing Standard No. 65 or its successor. The IG will coordinate these evaluations and audits with the cognizant COs, HCAs, and CFOs in order to avoid duplication of effort and ensure that all issues are addressed.

The Cognizant Chief Financial Officer (CFO): The cognizant CFO offers expert counsel and guidance to cognizant COs, HCAs, and Department site or office managers on the adequacy of the Contractor's financial management system to provide proper accounting in accordance with the Department requirements. In this capacity, the cognizant CFO assists the CO in the review of the (1) INTERNAL AUDIT IMPLEMENTATION DESIGN; (2) the ANNUAL AUDIT REPORT; (3) the ANNUAL AUDIT PLAN; and (4) the STATEMENT OF COSTS INCURRED AND CLAIMED. The CFO approves plans for new financial management systems and/or subsystems and major enhancements and/or upgrades to the currently existing financial systems and/or subsystems and planned implementation of any substantial deviation.

Preparation and Submission of Documents by Internal Audit Activity.

1. **INTERNAL AUDIT IMPLEMENTATION DESIGN.**

DEAR 970.5232-3 requires, among other things, that the Contractor organize and maintain an internal audit activity. This requirement is manifested by the obligation of the Contractor to submit the INTERNAL AUDIT IMPLEMENTATION DESIGN that is satisfactory to the CO, within 30 days of contract award and at each 5th year of contract performance, or upon the exercise of an option or any contract extension.

The INTERNAL AUDIT IMPLEMENTATION DESIGN should include (1) the INTERNAL AUDIT ACTIVITY's placement within the contractor's organization including reporting requirements; (2) its size and the experience and educational standards of the audit staff; (3) its relationship to the corporate parent(s) of the contractor; (4) the audit standards to

be used; (5) an overall audit strategy for relevant performance period of this contract, considering particularly the method of auditing costs incurred in the performance of the contract; (6) the intended use of external audit resources; (7) the plan for pre-award and post-award audit of subcontracts; and (8) the schedule of peer review of the INTERNAL AUDIT ACTIVITY.

To be acceptable, the Contractor's INTERNAL AUDIT IMPLEMENTATION DESIGN must provide assurance of independence, objectivity, and of systematic organizational resolution of issues that result from internal audits. The INTERNAL AUDIT IMPLEMENTATION DESIGN must also provide assurance of sufficient internal audit personnel and other resources to validate cost allowability and validate those management systems that underlie SCICs. The INTERNAL AUDIT IMPLEMENTATION DESIGN must be comprehensive and have adequate evidence of discipline with professional standards. The INTERNAL AUDIT IMPLEMENTATION DESIGN must discuss such matters as how the Contractor will ensure that incurred contract costs are allowable under the cost principles of the contract, plans for peer review of the Contractor's internal audit activity, the universe of payments by the Contractor, areas of high risk, the use of the Defense Contract Audit Agency (DCAA), and the process for auditing subcontracts.

a. Organizational Independence and Objectivity.

The Contractor's INTERNAL AUDIT ACTIVITY should be structured organizationally to be sufficiently independent so as to remove any impairment to fair and objective reporting.

- ☐ This includes the ability to make impartial and unbiased judgments concerning the conduct of audits without fear of management reprisal.
- ☐ The CAE should report functionally to the Board of Directors, audit committee, or equivalent corporate independent governing body(ies).

The INTERNAL AUDIT ACTIVITY's unhindered access to and regular direct communication with the corporate governing authority is critical to its independence. Direct communication entails such things as (1) regular attendance and participation in corporate meetings which relate to the CAE's oversight responsibilities for auditing, financial reporting, corporate governing, and control; and (2) reporting privately (at least annually) to the corporate board or the committee to discuss audit related topics including status of that year's audit plan and management's corrective actions.

This direct communication should ensure that audit resources are appropriate, sufficient, and effectively deployed to achieve the approved plan. Such reporting includes review and approval of the annual risk assessment and audit plan, as well as any significant changes thereto; and providing input to (1) the appointment or removal of the CAE; (2) the CAE's performance appraisal; (3) staff size; and (4) budget.

In fulfilling the Contractor's internal audit responsibilities, the CAE is responsible to assure that the INTERNAL AUDIT ACTIVITY performs its work objectively and is not impaired in accomplishment of its charter.

In this context, objectivity means a mental attitude that allows an individual internal auditor to perform each audit assignment free from bias or impairment. Objectivity requires that internal auditors do not subordinate their personal judgment on audit matters to that of others, including the corporate entity of which they are a part.

In this context, impairment means any circumstance that would have a negative effect on a person's or organization's ability to render a fully informed and objective analysis of the audit assignment. The term includes, among other considerations, personal conflicts of interest; inappropriate limitations on the scope of an audit; restrictions on access to records, personnel, and properties; or resource limitations (funding), intentional or unintentional, which has a negative impact on the work product of an internal audit or the internal audit activity.

b. Size, Experience, and Educational Requirements.

The contractor's INTERNAL AUDIT ACTIVITY must be of appropriate size and include trained professional auditors who meet standards established by the Institute of Internal Auditors (IIA). Auditors should receive at least 80 hours of continuing professional training every two years. To enhance the level of professionalism, certifications in internal audit, accounting, and other business-related areas should be encouraged for the internal audit staff and the CAE. Appropriate staff size is dependent on numerous factors, including but not limited to:

- The mission of the contractor.
- The magnitude of the contract and the size and complexity of the contractor's organization.
- The extent to which non-audit work is requested of internal audit staff.

c. Audit Standards.

The INTERNAL AUDIT ACTIVITY performs financial, financial-related, performance, and specific audits requested by the contractor's board or management or by the CO. Those audits must, at a minimum, meet the audit standards prescribed by the IIA.

d. Audit of Allowable Costs.

The contractor's INTERNAL AUDIT ACTIVITY should perform an audit of allowability of costs as claimed on the SCIC at least once a year unless the CO specifically approves

otherwise. The risk assessment to determine the scope of the audit should cover all contractor incurred costs for the year. The audit should be comprehensive and performed in accordance with the audit program approved by the IG. A sample audit program is included in the OIG Audit Manual Chapter 18 along with additional guidance for contractor internal audit departments and can be accessed at http://www.ig.doe.gov/audits/am18.doc.

Deviations from the IG audit program must be approved by the CO after consultation with the IG and the CFO. The Contractor's INTERNAL AUDIT ACTIVITY should report any questioned costs, including those identified through other performance or compliance audits, to the CO, and those costs should be excluded from the SCIC and described in the ANNUAL AUDIT REPORT.

The SCIC is the document used to validate the allowability and allocability of the contractor's costs in performance of each contract year. This document is not a voucher. It is a statement of annual costs that the contractor certifies, to the best of its knowledge and belief, are allowable under the terms of the contract. It must be countersigned by the cognizant CFO or other cognizant financial management official, the field Director of Procurement, the cognizant IG, the CO, and the cognizant HCA. Each of these signatures is made in reliance upon a system of audit that begins with the INTERNAL AUDIT ACTIVITY of the Contractor and other appropriate criteria. Should any of the parties who are signatories refuse to sign the SCIC, the CO shall undertake an effort to reconcile all DOE parties. If the refusal to sign indicates a failure of Contractor management systems, the CO shall decide corrective actions appropriate to the circumstances that protect the Government's interest.

Certain major contractors may no longer file the SCIC. Where that is the case, Department field offices receive support from the DCAA for the audit of contract costs.

e. Audit of Subcontracts.

The INTERNAL AUDIT IMPLEMENTATION DESIGN should indicate the process for pre-award and post-award audit of subcontractors. To accomplish the audits, the contractor may (1) use its internal auditors or contract auditors, or (2) request through the CO for DCAA assistance.

f. Peer Review.

The purposes of peer review is to (1) evaluate the INTERNAL AUDIT ACTIVITY's compliance with the *Standards for the Professional Practice of Internal Auditing*, (2) to appraise the quality of the INTERNAL AUDIT ACTIVITY, and (3) make recommendations for improvement. Secondarily, peer reviews serve as a factor in the IG's determination as to the degree of reliance on the work done by the INTERNAL AUDIT ACTIVITY.

Peer reviews are conducted every five years by a team that is led by (1) the CAE of a non-affiliated contractor and staffed with internal auditors from other DOE Contractor INTERNAL AUDIT ACTIVITIES or (2) independent external reviewers. A Steering Committee of DOE Contactor Internal Audit Directors oversees the process.

Peer reviews are not intended to duplicate or eliminate the need for DOE evaluations of the contractor INTERNAL AUDIT ACTIVITIES. However, the IG and Department field elements should consider the outcome of a peer review in evaluating the efficiency and effectiveness of a Contractor's INTERNAL AUDIT ACTIVITY.

2. ANNUAL AUDIT PLAN.

DEAR 970.5232-3, as revised and attached, requires that by each June 30 of the contract performance period, the contractor shall submit to the contracting officer an ANNUAL AUDIT PLAN that reflects the activities to be undertaken during the next fiscal year. This plan should generally be consistent with the INTERNAL AUDIT IMPLEMENTATION DESIGN, but must be updated annually to reflect identified high-risk areas such as findings by the General Accounting Office or the DOE IG or other developments that have occurred since the previous plan. The ANNUAL AUDIT PLAN should also consider high risk issues specified in the IG Annual Audit Guidance Memorandum provided by February 1st of each year. The ANNUAL AUDIT PLAN will be evaluated by the cognizant IG office, the cognizant CFO, and the CO to establish that results of prior audits are used to determine the need for additional audits in specific areas, or continue audit activities in areas of ongoing high risk. The CO shall coordinate review of the ANNUAL AUDIT PLAN with the CFO and the IG by July 15th of each year.

The ANNUAL AUDIT PLAN must include programs that sufficiently test the contractor's internal controls over costs to ensure that costs incurred in operation of the Department's facilities are allowable under the terms of the contract and applicable acquisition regulations. The Plan should be coordinated with the IG to avoid duplication of planned DOE IG and other audits of the Contractor's financial and management functions by Government activities. Furthermore, annual audits of incurred costs and other audits conducted during the year must establish the sufficiency of the contractor's SCIC, representing the allowability of costs incurred under the contract. The audit program must describe the statistical sampling methodology that will be employed to evaluate incurred costs for allowability.

3. ANNUAL AUDIT REPORT.

The contractor's INTERNAL AUDIT ACTIVITY is required to submit an ANNUAL AUDIT REPORT by January 31st which describes and summarizes the results of the activities undertaken pursuant to the previous fiscal year's ANNUAL AUDIT PLAN. The ANNUAL PLAN should include the Contractor's plans for addressing the findings disclosed during the

fiscal year and summaries of specific contractor practices, which resulted in unallowable costs. It should describe the allowability of costs audit methodology. The ANNUAL PLAN is distributed to the CO and the HCA with a copy to the cognizant IG office. The ANNUAL AUDIT REPORT should include the dollar value of the cost element or audit population, the dollar value of the sample, and the dollar value of the projected questioned costs.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-08

DATE: November 3, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Financial Assistance Letter Number 2004-06 - Award Terms**

SUMMARY: This Policy Flash distributes Financial Assistance Letter (FAL) No. 2004-06, Award Terms.

POLICY FLASH
2005-08

This FAL provides Contracting Officers and other grants personnel guidance relating to standard award terms and reporting requirements for financial assistance awards. The FAL includes the following four attachments:

1. Notice of Financial Assistance Award, DOE F 4600.1 (11/04)
2. Special Terms and Conditions for Use in Most Grants and Cooperative Agreements
3. National Policy Assurances to Be Incorporated as Award Terms (OCT 2004)
4. Federal Assistance Reporting Checklist and Instructions.

Questions concerning this Flash should be directed to Trudy Wood at (202) 287-1336.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachments

cc:
FAAC

Department of Energy
Financial Assistance Regulation

No. 2004-06
Date 11/02/04

FINANCIAL ASSISTANCE LETTER

Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

SUBJECT: AWARD TERMS

What is the Purpose of this Financial Assistance Letter (FAL)?

This FAL provides Contracting Officers and other grants personnel guidance relating to standard award terms and reporting requirements for financial assistance awards.

How will this Change My Work Processes?

There is no major change to your work processes. Currently, each awarding activity has a set of special terms and conditions for financial assistance awards. The Contracting Officer uses this set to select the terms that are appropriate for a specific award and includes these terms in the award document. In the future, Contracting Officers will use the standard set of special terms and conditions, instead of using their office set. Contracting Officers will continue to determine which terms and conditions are appropriate for inclusion in a particular award and to negotiate additional terms if needed to address unique circumstances. In addition, Contracting Officers will use the revised Notice of Financial Assistance Award (10/04) and the revised Federal Assistance Reporting Checklist and Instructions (10/04), unless there is a program rule that specifies other reporting requirements.

When is this FAL Effective?

This FAL is effective on the date of issuance. This FAL supersedes and cancels the reporting requirements for cooperative agreements contained in Attachment B of FAL 2001-04.

When does this FAL Expire?

This FAL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Trudy Wood of the Office of Procurement and Assistance Policy by telephone at (202) 287-1336 or by email at trudy.wood@hq.doe.gov.

What is the Background?

For several years DOE has been actively engaged in the Government-wide efforts to streamline and simplify Federal financial assistance programs and its own internal processes as required by the Federal Financial Assistance Management Improvement Act of 1999, Public Law 106-107. While DOE and NNSA awarding offices include special terms and conditions and reporting requirements in most financial assistance awards, they use different language to state the same requirements and organize the content differently. In addition, most offices do not include national policy requirements as award terms. National policy requirements arise from Federal statutes, Presidential executive orders, or regulations with government-wide effect (e.g., prohibitions against discrimination, harming the environment, and mistreating live organisms). DOE and NNSA have decided to include these requirements as award terms to assist recipients in identifying regulatory requirements and thereby help ensure post-award compliance.

In order to promote more uniformity in DOE and NNSA financial assistance awards and ensure that awards include appropriate award terms and reporting requirements, the Office of Procurement and Assistance Policy and the major grant-making offices developed standard Special Terms and Conditions for Use in Most Grants and Cooperative Agreements, National Policy Assurances to Be Incorporated as Award Terms, and standard reporting instructions.

In addition, the Notice of Financial Assistance Award has been updated and revised to include the new National Policy Assurances to Be Incorporated as Award Terms. The Federal Assistance Reporting Checklist has also been updated and revised to include reporting instructions.

Guidance Included in this Financial Assistance Letter

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I. What are the responsibilities of the Contracting Officer? 3

II. Where are the standard award terms and financial assistance forms located? 3

I. What are the responsibilities of the Contracting Officer?

Contracting Officers should implement the following requirements as soon as practicable, but they must:

A. Use the Notice of Financial Assistance Award, DOE F 4600.1, dated 11/04, for awards issued on or after January 1, 2005.

B. Ensure that the National Policy Assurances To Be Incorporated As Award Terms are incorporated by reference in financial assistance awards to domestic organizations issued on or after January 1, 2005. Contracting Officers, with the assistance of their legal counsel, may modify the national policy terms, if an award is made to a foreign entity.

C. Ensure that the appropriate standard special terms and conditions are included in financial assistance awards issued on or after January 1, 2005.

D. Negotiate additional special award terms if necessary to satisfy the mission requirements of a particular program or to address responsibility concerns (e.g., a recipient is not financially stable, has a history of poor performance, has a management system that does not meet the standards prescribed, or is not otherwise responsible).

E. Ensure that the Federal Assistance Reporting Checklist and Instructions are included in financial assistance awards issued on or after January 1, 2005, unless there is a program rule that specifies other reporting requirements or there are no reporting requirements. Contracting Officers may add additional reporting requirements and instructions if necessary to satisfy specific program requirements or to address responsibility concerns.

II. Where are the standard award terms and financial assistance forms located?

A. The Notice of Financial Assistance Award DOE 4600.1 (11/04) is located on the Professionals Homepage at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument.

B. The standard Special Terms and Conditions for Use in Most Grants and Cooperative Agreements and the National Policy Assurances To Be Incorporated As Award Terms are located on the Department's Grants Website at http://grants.pr.doe.gov. Program Announcements of funding opportunities must reference these documents in Part VI.B, "Administrative and National Policy Requirements." A set of the Special Terms and Conditions with a self generating table of content is located on the Professionals Homepage at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument. Contracting

Officers should tailor these provisions for each specific award and include them in the award document (See NFAA, Block 18.a. Special Terms and Conditions).

C. The Federal Assistance Reporting Checklist and Instructions is located on the Professionals Homepage at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument.

ATTACHMENTS:

1. Notice of Financial Assistance Award, DOE F 4600.1 (11/04)
2. Special Terms and Conditions for Use in Most Grants and Cooperative Agreements
3. National Policy Assurances to Be Incorporated as Award Terms (OCT 2004)
4. Federal Assistance Reporting Checklist and Instructions

Attachment 1

U.S. DEPARTMENT OF ENERGY

NOTICE OF FINANCIAL ASSISTANCE AWARD

E F 4600.1#
04)

der the authority of Public Law _____

1. PROJECT TITLE	2. INSTRUMENT TYPE ☐ GRANT ☐ COOPERATIVE AGREEMENT
ECIPIENT (Name, address, zip code)	4. INSTRUMENT NO. / 5. AMENDMENT NO. 6. BUDGET PERIOD FROM: THRU: / 7. PROJECT PERIOD FROM: THRU:
8. RECIPIENT PROJECT DIRECTOR (Name, phone and E-mail)	10. TYPE OF AWARD ☐ NEW ☐ CONTINUATION ☐ RENEWAL ☐ REVISION ☐ INCREMENTAL FUNDING
9. RECIPIENT BUSINESS OFFICER (Name, phone and E-mail)	
11. DOE PROJECT OFFICER (Name, address, phone and E-mail)	12. DOE AWARD ADMINISTRATOR (Name, address, phone and E-mail)

13. RECIPIENT TYPE

☐ STATE GOV'T ☐ INDIAN TRIBAL GOV'T ☐ HOSPITAL ☐ FOR PROFIT ORGANIZATION ☐ INDIVIDUAL

☐ LOCAL GOV'T ☐ INSTITUTION OF HIGHER EDUCATION ☐ OTHER NONPROFIT ORGANIZATION ☐ C ☐ P ☐ SP ☐ OTHER (Specify) _____

14. ACCOUNTING AND APPROPRIATIONS DATA:

›ropriation Symbol	b. B&R Number	c. FT/AFP/OC	d. CFA Number

15. EMPLOYER I.D.
a. TIN:
b. DUNS:

16. BUDGET AND FUNDING INFORMATION

a. CURRENT BUDGET PERIOD INFORMATION		b. CUMULATIVE DOE OBLIGATIONS	
(1) DOE Funds Obligated This Action	$_____	(1) This Budget Period *[Total of lines a.(1) and a.(3)]*	$_____
(2) DOE Funds Authorized for Carry Over	$_____		
(3) DOE Funds Previously Obligated in this Budget Period	$_____	(2) Prior Budget Periods	$_____
(4) DOE Share of Total Approved Budget	$_____		
(5) Recipient Share of Total Approved Budget	$_____	(3) Project Period to Date *[Total of lines b.(1) and b.(2)]*	$_____
(6) Total Approved Budget	$_____		

17. TOTAL ESTIMATED COST OF PROJECT, INCLUDING DOE FUNDS TO FFRDC: $_____
(This is the current estimated cost of the project. It is not a promise to award nor an authorization to expend funds in this amount.)

18. AWARD AGREEMENT TERMS AND CONDITIONS
This award/agreement consists of this form plus the following:
a. Special terms and conditions.
b. Applicable program regulations *(specify)* _____ *(Date)* _____.
c. DOE Assistance Regulations, 10 CFR Part 600at http://ecfr.gpoaccess.gov or, if the award is a grant to a Federal Demonstration Partnership (FDP) institution, the FDP Terms & Conditions and the DOE FDP Agency Specific Requirements at http://www.nsf.gov.
d. Application/proposal as approved by DOE.
e. National Policy Assurances to Be Incorporated as Award Terms at http://grants.pr.doe.gov.

19. REMARKS

20. EVIDENCE OF RECIPIENT ACCEPTANCE

_____ *(Signature of Authorized Recipient Official)* *(Date)*

_____ *(Name)*

_____ *(Title)*

21. AWARDED BY

_____ *(Signature)* *(Date)*

_____ *(Name)*

_____ *(Title)*

income, rebates, refunds, contract settlements, audit recoveries, credits, discounts, and interest earned on any of those funds before requesting additional cash payments from DOE/NNSA.

e. Payments. The DOE approving official will approve the invoice as soon as practicable but not later than 30 days after your request is received, unless the billing is improper. Upon receipt of an invoice payment authorization from the DOE approving official, the ORFSC will disburse payment to you. You may check the status of your payments at the VIPER web site. All payments are made by electronic funds transfer to the bank account identified on the ACH Vendor/Miscellaneous Payment Enrollment Form (SF 3881) that you filed.

Alternate 4

PAYMENT PROCEDURES - REIMBURSEMENT THROUGH THE AUTOMATED CLEARING HOUSE (ACH) (OCT 2004) [Alternate ACH method of payment. May be used if recipient cannot access VIPERS.]

a. Method of Payment. Payment will be made by reimbursement through ACH.

b. Requesting Reimbursement. For non-construction awards, you must submit a Standard Form (SF) 270, "Request for Advance or Reimbursement" and appropriate supporting documentation to the address listed below. The supporting documentation must show the total federal share claimed on the SF 270, the non-federal share claimed for the billing period if cost sharing is required, and cumulative expenditures to date (both Federal and non-Federal) for each of the following categories: salaries/wages and fringe benefits; equipment; travel; participant/training support costs, if any; other direct costs, including subawards/contracts; and indirect costs. For construction awards, you must submit a SF 271, "Outlay Report and Request for Reimbursement for Construction Programs," to:

U.S. Department of Energy
Oak Ridge Financial Service Center
P.O. Box (TBD)
Oak Ridge, TN 37831

c. Timing of submittals. Submittal of the SF 270 or SF 271 should coincide with your normal billing pattern, but not more frequently than every two weeks. Requests for reimbursement must be limited to the amount of disbursements made during the billing period for the federal share of direct project costs and the proportionate share of any allowable indirect costs incurred during that billing period.

d. Adjusting payment requests for available cash. You must disburse any funds that are available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries, credits, discounts, and interest earned on any of those funds before requesting additional cash payments from DOE/NNSA.

e. Payments. The DOE approving official will approve the invoice as soon as practicable but not later than 30 days after your request is received, unless the billing is improper. Upon receipt of an invoice payment authorization from the DOE approving official, the DOE Oak Ridge Financial Service Center (ORFSC) will disburse payments to you. All payments are made by electronic funds transfer to the bank account

identified on the ACH Vendor/Miscellaneous Payment Enrollment Form (SF 3881) that you filed.

Alternate 1

COST SHARING (OCT 2004) [Applies if cost sharing is required.]

a. Notwithstanding the recipient's cost share described below in paragraph b, you must cost share a minimum of _____ percent of the total allowable Project Costs (Total allowable Project Costs are the sum of the Government share and the Recipient share of allowable project costs). Your cost share must come from non-Federal sources. By accepting federal funds under this award, you agree that you are liable for your percentage share of the total allowable Project Costs incurred even if the project is terminated early or is not funded to its completion.

b. Total Estimated Project Cost is the sum of the Government share and Recipient share of the estimated project costs. This cost is shared as follows:

Budget Period No.	Budget Period Start Date	Government Share $ / %	Recipient Share $ / %	Total Estimated Cost
1				
2				
3				
*				
Total Project:				

c. If you discover that you may be unable to provide cost sharing of at least the amount identified in paragraph b of this article, you should immediately provide written notification to the DOE Award Administrator identified in Block 12 of the Notice of Financial Assistance Award indicating whether you will continue or phase out the project. If you plan to continue the project, the notification must describe how replacement cost sharing will be secured.

d. You must maintain records of all project costs that you claim as cost sharing, including in-kind costs, as well as records of costs to be paid by DOE/NNSA. Such records are subject to audit.

e. Failure to provide the cost sharing required in paragraphs a and b may result in the subsequent recovery by DOE/NNSA of some or all the funds provided under the award.

Alternate 2

COST SHARING, WHEN DOE PAYS FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER (FFRDC) CONTRACTOR'S COSTS DIRECTLY TO FFRDC (OCT 2004) [Applies if a DOE FFRDC contractor participates in the project and DOE pays the FFRDC costs directly]

a. Notwithstanding the recipient's cost share described below in paragraph b, you must cost share a minimum of _____% of the total allowable Project Costs (Total

allowable Project Costs are the sum of the Government share, including FFRDC contractor costs, and the Recipient share of allowable project costs). Your cost share must come from non-Federal sources. By accepting federal funds under this award, you agree that you are liable for your percentage share of the total allowable Project Costs incurred even if the project is terminated early or is not funded to its completion.

b. The DOE/NNSA FFRDC contractor cost is not included in the total Approved Budget for this award, because DOE/NNSA will pay the DOE/NNSA FFRDC contractor portion of the effort under an existing DOE/NNSA contract. Total Estimated Project Cost is the sum of the Government share, including FFRDC contractor costs, and the Recipient share of estimated project costs. This cost is shared as follows:

Budget Period No.	Budget Period Start Date	Government Share, including FFRDC Cost $ / %	Recipient Share $ / %	Total Estimated Cost
1				
2				
3				
*				
Total Project:				

c. If you discover that you may be unable to provide cost sharing of at least the amount identified in paragraph b of this article, you should immediately provide written notification to the DOE Award Administrator identified in Block 12 of the Notice of Financial Assistance Award indicating whether you will continue or phase out the project. If you plan to continue the project, the notification must describe how replacement cost sharing will be secured.

d. You must maintain records of all project costs that you claim as cost sharing, including in-kind costs, as well as records of costs to be paid by DOE/NNSA. Such records are subject to audit.

e. Failure to provide the cost sharing required in paragraphs a and b may result in the subsequent recovery by DOE/NNSA of some or all the funds provided under the award.

INCREMENTAL FUNDING (OCT 2004) [Applies if budget period is not fully funded]

This budget period is funded on an incremental basis. The maximum obligation of the DOE/NNSA is limited to the amount shown in Block 16.b.(3) " CUMULATIVE DOE OBLIGATIONS Project Period to Date" on the Notice of Financial Assistance Award. You are not obligated to continue performance of the project beyond the total amount shown in Block 16.b.(3) and your pro rata share of the project costs, if cost sharing is required. Subject to the availability of additional funds, DOE anticipates obligating the total amount shown in Block 16.a.(4) for the current budget period.

PRE-AWARD COSTS (OCT 2004) [Applies if the Contracting Officer approves pre-award costs for a period greater than the 90 calendar day period immediately preceding the date of the award.]

You are entitled to reimbursement for costs incurred on or after (insert month, day, year), as authorized by the pre-award costs letter dated (insert date of approval letter), if such costs are reimbursable under this agreement if incurred after the agreement is awarded.

USE OF PROGRAM INCOME (OCT 2004) [Three alternates. Generally, Alternate 1 applies to awards supporting research and Alternate 3 applies to other discretionary awards.]

Alternate 1 (Addition)

If you earn program income during the project period as a result of this award, you may add the program income to the funds committed to the award and use it to further eligible project objectives.

Alternate 2 (Cost Sharing)

If you earn program income during the project period as a result of this award, you may use the program income to meet your cost sharing requirement.

Alternate 3 (Deduction)

If you earn program income during the project period as a result of this award, you must deduct the program income from the total allowable project costs to determine the net allowable costs on which the Federal share is based.

STATEMENT OF FEDERAL STEWARDSHIP (OCT 2004)

DOE/NNSA will exercise normal Federal stewardship in overseeing the project activities performed under this award. Stewardship activities include, but are not limited to, conducting site visits; reviewing performance and financial reports; providing technical assistance and/or temporary intervention in unusual circumstances to correct deficiencies which develop during the project; assuring compliance with terms and conditions; and reviewing technical performance after project completion to insure that the award objectives have been accomplished.

STATEMENT OF SUBSTANTIAL INVOLVEMENT [Applies to cooperative agreements only]

[The program announcement may include a Statement of Substantial Involvement that will be included in cooperative agreements awarded under that announcement. If the announcement does not include such a statement, the Contracting Officer and DOE/NNSA Project Director will negotiate a specific Statement of Substantial Involvement for each cooperative agreement prior to award.]

SITE VISITS (OCT 2004)

DOE/NNSA's authorized representatives have the right to make site visits at reasonable times to review project accomplishments and management control systems and to provide technical assistance, if required. You must provide and must require your subawardees to provide reasonable facilities and assistance for the safety and convenience of the government representatives in the performance of their duties. All site visits and evaluations must be performed in a manner that does not unduly interfere with or delay the work.

REPORTING REQUIREMENTS (OCT 2004)

a. Requirements. The reporting requirements for this award are identified on the Federal Assistance Reporting Checklist, DOE F 4600.2, attached to this award. Failure to comply with these reporting requirements is considered a material noncompliance with the terms of the award. Noncompliance may result in withholding of future payments, suspension or termination of the current award, and withholding of future awards. A willful failure to perform, a history of failure to perform, or unsatisfactory performance of this and/or other financial assistance awards, may also result in a debarment action to preclude future awards by Federal agencies.

b. Dissemination of scientific/technical reports. Scientific/technical reports submitted under this award will be disseminated on the Internet via the DOE Information Bridge (www.osti.gov/bridge), unless the report contains patentable material, protected data or SBIR/STTR data. In addition, these reports must not contain any limited rights data (proprietary data), classified information, information subject to export control classification, or other information not subject to release. Citations for journal articles produced under the award will appear on the DOE Energy Citations Database (www.osti.gov/ecd).

PUBLICATIONS (OCT 2004)

a. You are encouraged to publish or otherwise make publicly available the results of the work conducted under the award.

b. An acknowledgment of Federal support and a disclaimer must appear in the publication of any material, whether copyrighted or not, based on or developed under this project, as follows:

> *Acknowledgment*: "This material is based upon work supported by the Department of Energy [National Nuclear Security Administration] [add name(s) of other agencies, if applicable] under Award Number(s) [enter the award number(s)]."
>
> *Disclaimer*: "This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof."

FEDERAL, STATE, AND MUNICIPAL REQUIREMENTS (OCT 2004)

You must obtain any required permits and comply with applicable federal, state, and municipal laws, codes, and regulations for work performed under this award.

INTELLECTUAL PROPERTY PROVISIONS (OCT 2004) [The standard DOE financial assistance intellectual property provisions applicable to the various types of recipients are located at http://www.gc.doe.gov/techtrans/sipp_matrix.html. Click here for provisions.]

The intellectual property provisions applicable to this award are provided as an attachment to this award or are referenced in Block 19 of the Notice of Financial Assistance Award.

NATIONAL SECURITY: CLASSIFIABLE RESULTS ORIGINATING UNDER AN AWARD (OCT 2004) [Applies if the award is for research]

a. This award is intended for unclassified, publicly releasable research. You will not be granted access to classified information. DOE/NNSA does not expect that the results of the research project will involve classified information. Under certain circumstances, however, a classification review of information originated under the award may be required. The Department may review research work generated under this award at any time to determine if it requires classification.

b. Executive Order 12958 (60 Fed. Reg. 19,825 (1995)) states that basic scientific research information not clearly related to the national security shall not be classified. Nevertheless, some information concerning (among other things) scientific, technological, or economic matters relating to national security or cryptology may require classification. If you originate information during the course of this award that you believe requires classification under this Executive order, you must promptly:

1. Notify the DOE Project Officer identified in Block 11 and the DOE Award Administrator identified in Block 12 of the Notice of Financial Assistance Award;

2. Submit the information by registered mail directly to the Director, Office of Classification and Information Control, SO-10.2; U.S. Department of Energy; P.O. Box A; Germantown, MD 20875-0963, for classification review.

3. Restrict access to the information to the maximum extent possible until you are informed that the information is not classified, but no longer than 30 days after receipt by the Director, Office of Classification and Information Control

c. If you originate information concerning the production or utilization of special nuclear material (i.e., plutonium, uranium enriched in the isotope 233 or 235, and any other material so determined under section 51 of the Atomic Energy Act) or nuclear energy, you must:

1. Notify the DOE Project Officer identified in Block 11 and the DOE Award Administrator identified in Block 12 of the Notice of Financial Assistance Award.

2. Submit the information by registered mail directly to the Director, Office of Classification and Information Control, SO-10.2; U.S. Department of Energy; P. O. Box A; Germantown, MD 20875-0963 for classification review within 180 days of the date the recipient first discovers or first has reason to believe that the information is useful in such production or utilization.

not preclude you from [*Insert activities that can be performed before the NEPA clearance or decision is completed*].

[Add following paragraph to construction awards.]
You must submit an environmental evaluation report/evaluation notification form addressing NEPA issues prior to DOE/NNSA initiating the NEPA process.

LOBBYING RESTRICTIONS (OCT 2004)
[This paragraph applies if funds made available under the Interior Acts are obligated to the award].
By accepting funds under this award, you agree that none of the funds obligated on the award shall be made available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete. This restriction is in addition to those prescribed elsewhere in statute and regulation.

[This paragraph applies if funds made available under Energy and Water Acts are obligated to the award.].
By accepting funds under this award, you agree that none of the funds obligated on the award shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.

NOTICE REGARDING THE PURCHASE OF AMERICAN-MADE EQUIPMENT AND PRODUCTS -- SENSE OF CONGRESS (OCT 2004)

It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this award should be American-made.

COMPLIANCE WITH BUY AMERICAN ACT (OCT 2004) [Applies if funds made available under the Interior and Related Agencies Act are obligated the award.]

By accepting funds under this award, you agree to comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a - 10c, popularly known as the "Buy American Act"). You should review the provisions of the Act to ensure that expenditures made under this award are in accordance with it.

ANNUAL INDIRECT COST PROPOSAL AND RECONCILIATION (OCT 2004)

a. In accordance with the applicable cost principles, you must submit an annual indirect cost proposal, reconciled to your financial statements, within six months after the close of each fiscal year, unless you have negotiated a predetermined or fixed indirect rate(s), or fixed amount for indirect or facilities and administration (F&A) costs.

b. You should submit your annual indirect cost proposal directly to the cognizant agency for negotiating and approving indirect costs. If DOE is the cognizant agency, send your proposal to the Cognizant Department of Energy Office (CDO). If you do not have a cognizant agency or if you do not know your DOE CDO, contact the DOE Award Administrator identified in Block 12 of the Notice of Financial Assistance Award.

DOE F 4600.2
(11/04)
All Other Editions Are Obsolete

U.S. Department of Energy
FEDERAL ASSISTANCE REPORTING CHECKLIST AND INSTRUCTIONS

Attachment 4

1. Identification Number:	2. Program/Project Title:

3. Recipient:

4. Reporting Requirements:	Frequency	No. of Copies	Addressees
MANAGEMENT REPORTING			
☐ Progress Report			
☐ Special Status Report			
SCIENTIFIC/TECHNICAL REPORTING			
(Reports/Products must be submitted with appropriate DOE F 241. The 241 forms are available at www.osti.gov/elink.)			
Report/Product — Form			
☐ Final Scientific/Technical Report — DOE F 241.3			
☐ Conference papers/proceedings* — DOE F 241.3			
☐ Software/Manual — DOE F 241.4			
☐ Other (see special instructions) — DOE F 241.3			
** Scientific and technical conferences only*			
FINANCIAL REPORTING			
☐ SF-269, Financial Status Report			
☐ SF-269A, Financial Status Report (Short Form)			
☐ SF-272, Federal Cash Transactions Report			
CLOSEOUT REPORTING			
☐ Patent Certification			
☐ Property Certification			
☐ Other (see Special Instructions)			
OTHER REPORTING			
☐ Other (see Special Instructions)			

FREQUENCY CODES AND DUE DATES:

- A - Within 5 calendar days after events or as specified.
- F - Final; 90 calendar days after expiration or termination of the award.
- Y - Yearly; 90 days after the end of the reporting period.
- S - Semiannually; within 30 days after end of reporting period.
- Q - Quarterly; within 30 days after end of the reporting period.

5. Special Instructions:

Federal Assistance Reporting Instructions (11/04)

I. MANAGEMENT REPORTING

Progress Report

The Progress Report must provide a concise narrative assessment of the status of work and include the following information and any other information identified under Special Instructions on the Federal Assistance Reporting Checklist:

1. The DOE award number and name of the recipient.

2. The project title and name of the project director/principal investigator.

3. Date of report and period covered by the report.

4. A comparison of the actual accomplishments with the goals and objectives established for the period and reasons why the established goals were not met.

5. A discussion of what was accomplished under these goals during this reporting period, including major activities, significant results, major findings or conclusions, key outcomes or other achievements. This section should not contain any proprietary data or other information not subject to public release. If such information is important to reporting progress, do not include the information, but include a note in the report advising the reader to contact the Principal Investigator or the Project Director for further information.

6. Cost Status. Show approved budget by budget period and actual costs incurred. If cost sharing is required break out by DOE share, recipient share, and total costs.

7. Schedule Status. List milestones, anticipated completion dates and actual completion dates. If you submitted a project management plan with your application, you must use this plan to report schedule and budget variance. You may use your own project management system to provide this information.

8. Any changes in approach or aims and reasons for change. Remember significant changes to the objectives and scope require prior approval by the contracting officer.

9. Actual or anticipated problems or delays and actions taken or planned to resolve them.

10. Any absence or changes of key personnel or changes in consortium/teaming arrangement.

11. A description of any product produced or technology transfer activities accomplished during this reporting period, such as:

    A. Publications (list journal name, volume, issue); conference papers; or other public releases of results. Attach or send copies of public releases to the DOE Project Officer identified in Block 11 of the Notice of Financial Assistance Award.

    B. Web site or other Internet sites that reflect the results of this project.

C. Networks or collaborations fostered.

D. Technologies/Techniques.

E. Inventions/Patent Applications

F. Other products, such as data or databases, physical collections, audio or video, software or netware, models, educational aid or curricula, instruments or equipment.

Special Status Report

The recipient must report the following events by e-mail as soon as possible after they occur:

1. Developments that have a significant favorable impact on the project.

2. Problems, delays, or adverse conditions which materially impair the recipient's ability to meet the objectives of the award or which may require DOE to respond to questions relating to such events from the public. For example, the recipient must report any of the following incidents and include the anticipated impact and remedial action to be taken to correct or resolve the problem/condition:

   a. Any single fatality or injuries requiring hospitalization of five or more individuals.

   b. Any significant environmental permit violation.

   c. Any verbal or written Notice of Violation of any Environmental, Safety, and Health statutes or regulations.

   d. Any incident which causes a significant process or hazard control system failure.

   e. Any event which is anticipated to cause a significant schedule slippage or cost increase.

   f. Any damage to Government-owned equipment in excess of $50,000.

   g. Any other incident that has the potential for high visibility in the media.

II. SCIENTIFIC/TECHNICAL REPORTS

Final Scientific/Technical Report

Content. The final scientific/technical report must include the following information and any other information identified under Special Instructions on the Federal Assistance Reporting Checklist:

1. Identify the DOE award number; name of recipient; project title; name of project director/principal investigator; and consortium/teaming members.

2. Display prominently on the cover of the report any authorized distribution limitation notices, such as patentable material or protected data. Reports delivered without such notices may be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use or reproduction of such reports.

3. Provide an executive summary, which includes a discussion of 1) how the research adds to the understanding of the area investigated; 2) the technical effectiveness and economic feasibility of the methods or techniques investigated or demonstrated; or 3) how the project is otherwise of benefit to the public. The discussion should be a minimum of one paragraph and written in terms understandable by an educated layman.

4. Provide a comparison of the actual accomplishments with the goals and objectives of the project.

5. Summarize project activities for the entire period of funding, including original hypotheses, approaches used, problems encountered and departure from planned methodology, and an assessment of their impact on the project results. Include, if applicable, facts, figures, analyses, and assumptions used during the life of the project to support the conclusions.

6. Identify products developed under the award and technology transfer activities, such as:

   a. Publications (list journal name, volume, issue), conference papers, or other public releases of results. If not provided previously, attach or send copies of any public releases to the DOE Project Officer identified in Block 11 of the Notice of Financial Assistance Award;

   b. Web site or other Internet sites that reflect the results of this project;

   c. Networks or collaborations fostered;

   d. Technologies/Techniques;

   e. Inventions/Patent Applications, licensing agreements; and

   f. Other products, such as data or databases, physical collections, audio or video, software or netware, models, educational aid or curricula, instruments or equipment.

7. For projects involving computer modeling, provide the following information with the final report:

   a. Model description, key assumptions, version, source and intended use;

   b. Performance criteria for the model related to the intended use;

   c. Test results to demonstrate the model performance criteria were met (e.g., code verification/validation, sensitivity analyses, history matching with lab or field data, as appropriate);

   d. Theory behind the model, expressed in non-mathematical terms;

   e. Mathematics to be used, including formulas and calculation methods;

f. Whether or not the theory and mathematical algorithms were peer reviewed, and, if so, include a summary of theoretical strengths and weaknesses;

g. Hardware requirements; and

h. Documentation (e.g., users guide, model code).

Electronic Submission. The final scientific/technical report must be submitted electronically via the DOE Energy Link System (E-Link) at http://www.osti.gov/elink-2413.

Electronic Format. Reports must be submitted in the ADOBE PORTABLE DOCUMENT FORMAT (PDF) and be one integrated PDF file that contains all text, tables, diagrams, photographs, schematic, graphs, and charts. Materials, such as prints, videos, and books, that are essential to the report but cannot be submitted electronically, should be sent to the DOE Award Administrator at the address listed in Block 12 of the Notice of Financial Assistance Award.

Submittal Form. The report must be accompanied by a completed electronic version of DOE Form 241.3, "U.S. Department of Energy (DOE), Announcement of Scientific and Technical Information (STI)." You can complete, upload, and submit the DOE F.241.3 online via E-Link. You are encouraged not to submit patentable material or protected data in these reports, but if there is such material or data in the report, you must: (1) clearly identify patentable or protected data on each page of the report; (2) identify such material on the cover of the report; and (3) mark the appropriate block in Section K of the DOE F 241.3. Reports must not contain any limited rights data (proprietary data), classified information, information subject to export control classification, or other information not subject to release. Protected data is specific technical data, first produced in the performance of the award that is protected from public release for a period of time by the terms of the award agreement.

Conference Papers/Proceedings

Content: The recipient must submit a copy of any conference papers/proceedings, with the following information: (1) Name of conference; (2) Location of conference; (3) Date of conference; and (4) Conference sponsor.

Electronic Submission. Scientific/technical conference paper/proceedings must be submitted electronically-via the DOE Energy Link System (E-Link) at http://www.osti.gov/elink-2413. Non-scientific/technical conference papers/proceedings must be sent to the URL listed on the Reporting Checklist.

Electronic Format. Conference papers/proceedings must be submitted in the ADOBE PORTABLE DOCUMENT FORMAT (PDF) and be one integrated PDF file that contains all text, tables, diagrams, photographs, schematic, graphs, and charts. If the proceedings cannot be submitted electronically, they should be sent to the DOE Award Administrator at the address listed in Block 12 of the Notice of Financial Assistance Award.

Submittal Form. Scientific/technical conference papers/proceedings must be accompanied by a completed DOE Form 241.3. The form and instructions are available on E-Link at http://www.osti.gov/elink-2413. This form is not required for non-scientific or non-technical conference papers or proceedings.

Software/Manual

Content. Unless otherwise specified in the award, the following must be delivered: source code, the executable object code and the minimum support documentation needed by a competent user to understand and use the software and to be able to modify the software in subsequent development efforts.

Electronic Submission. Submissions must be submitted electronically via the DOE Energy Link System (E-Link) at http://www.osti.gov/elink-2413.

Submittal Form. Each software deliverable and its manual must be accompanied by a completed DOE Form 241.4 "Announcement of U.S. Department of Energy Computer Software." The form and instructions are available on E-Link at http://www.osti.gov/elink-241.

III. FINANCIAL REPORTING

Recipients must complete the financial reports identified on the Reporting Checklist in accordance with the report instructions. These standard forms are available at http://www.whitehouse.gov/omb/grants/index.html. Fillable forms are available at http://grants.pr.doe.gov.

IV. CLOSEOUT REPORTS

Final Invention and Patent Report

The recipient must provide a DOE Form 2050.11, "PATENT CERTIFICATION." This form is available at http://www.directives.doe.gov/pdfs/forms/2050-11.pdf and www.grants.pr.doe.gov.

Property Certification

The recipient must provide the Property Certification, including the required inventories of non-exempt property, located at www.grants.pr.doe.gov.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005 - 09

DATE: November 17, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Updated Guidance on Project Management and the Earned Value Management System**

SUMMARY: Recently, increased emphasis has been placed on the effective management of projects across the Federal Government and at DOE in particular. The the project management tools currently contained in DOE O 413.3, "Program and Project Management for the Acquisition of Capital Assets"

provide an excellent means to ensure that DOE contracts and projects are properly managed.

This Policy Flash transmits summary information regarding revisions to the DOE Acquisition Guide on project management requirements including the Earned Value Management System.

a. Chapter 1, "Project Management," of the Reference Book for Contract Administrators has been updated in its entirety to include recent guidance on Project Management and on the Earned Value Management System (EVMS) in particular. The Reference Book for Contract Administrators is attached to Chapter 70.7, Contract Administration," of the DOE Acquisition Guide.

b. Chapter 42.5, "Contract Management Planning," of the DOE Acquisition Guide has been revised to update guidance on the project management requirements of DOE Order 413.3 and to provide additional guidance in the use of EVMS in Contract Management Plans.

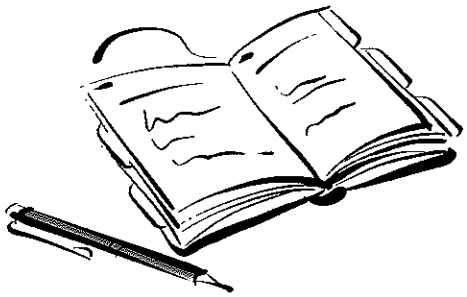
Additionally, overview training on EVMS and its impact on procurement processes will be provided during the next fiscal quarter.

Questions concerning the guidance changes in this Flash should be directed to Ms. Irma Brown, of the Contract Administration Division (ME-622), on (202) 287-1374.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

cc:
PPAG Members

CONTRACT MANAGEMENT PLANNING



Guiding Principle:

✓ Sound planning for the management of DOE's contracting is essential to the success of the Department's missions.

Applicability:

This section is applicable to elements of the Department of Energy but not to the National Nuclear Security Administration (NNSA). NNSA guidance is contained in a separate "Guide to Creating a Contract Management Plan," March 2002.

References:

- FAR 37.602-2, "Quality Assurance"
- DEAR 970.1100-1, "Performance-based Contracting"
- OFPP Memorandum of August 8, 1997, "PBSC Checklist"
- DOE Acquisition Guide, Chapter 7.1, "Acquisition Planning"
- DOE Acquisition Guide, Chapter 37, "Service Contracting"
- DOE Acquisition Guide, Chapter 71.1, "Headquarters Review of Contract and Financial Assistance Actions"

What Is the Purpose of this Section?

The purpose of this section is to set forth guidance on proper contract administration planning under applicable DOE contracts.

What is the Background Information You Need to Know?

In October 1994, the Office of Federal Procurement Policy (OFPP) published the "Guide to Best Practices for Contract Administration." The OFPP guide considered the use of contract administration plans to be a best practice. DOE has broadened the

term to Contract Management Plan (CMP) to indicate the importance of managing our contracts as they evolve into more complex performance-based instruments. Because performance-based contracting necessitates our telling contractors "what" to perform (through the contract and through other communications) but not "how" to accomplish it, the art of contract management is becoming a more refined and complex discipline.

The purpose of a CMP is to assist sites in developing an appropriate level of planning for contract management commensurate with the level of complexity and involvement by members of the contract management team (project managers, program managers, attorneys, and financial and procurement officials) throughout the term of the contract. Contracts typically place many duties and responsibilities on both the contractor and Government. Identifying these roles and responsibilities early on as well as applying the appropriate level of surveillance and risk mitigation is critical to the success of these contracts. The level of detail may vary, depending on the complexity of the contract and/or its project(s). The attached Guide is provided to assist the Department in formulating a structured and integrated systematic approach for performing contract management planning.

What is the Guidance Contained in this Section?

Contract Management Plans, in accordance with the attachment to this section, shall be prepared and utilized for:

- Management & Operating (M&O) contracts;
- Major site and facility contracts for performance of work at current or former M&O contract sites and facilities;
- Contracts subject to the requirements of DOE O 413.3, "Program and Project Management for the Acquisition of Capital Assets," and any successor directives; and,
- Procurement Directors should consider the use of a contract management plan for other service contracts where one or more of the following elements are present:
  (1) The dollar value of the contract is significant;
  (2) Contract administration is of a sufficiently complex nature to require a CMP because of unique contract terms and conditions (including contract type);
  (3) The contracting office has little or no historical familiarity with the contract requirements;
  (4) The number of contracting officer's representatives requires a greater degree of coordination; or,
  (5) Any other factor which the Contracting Officer (CO) believes warrants an enhanced level of contract administration.

A key component of effective contract management is the use of an integrated team to ensure that the individuals involved in contract management function together as a real team dedicated to the common goal of successful performance of the contract. The need to establish a contract management team is important even when a formal CMP is not used. A good practice is to plan for the contract management and administration of the contract prior to the award. Teaming early on reduces risk both to the Government and the contractor by leveraging resources and technology to meet customer and contractor expectations alike.

The following factors should be considered when creating a Contract Management Plan and at other times when building an integrated approach to contract management:

✓ The Contract Management Team (CMT) should be created during the formation of the acquisition strategy phase and should continue as a functioning team through contract award and until all requirements under the contract are satisfied and the contract is closed. See DOE Acquisition Guide, Chapter 7 for addressing contract management issues and risks during the acquisition planning phase. The CMT may consist of the same membership as the Integrated Project Team (IPT) required by DOE O 413.3. In parallel to creating the acquisition strategy and the acquisition planning documents, the participating contracting officer and IPT should:

(1) Form very clear criteria for measuring contract success,
(2) Develop a strategy for meeting project objectives, and
(3) Draft a strategy for managing unique terms and conditions (i.e., Government furnished materials or information).

✓ The criteria for success are pivotal when determining the contractor's incentive award. Upon contract award, the designated contracting officer has the lead in coordinating and finalizing the CMP. The key word here is "coordinating" because the entire CMT should be involved in ensuring that the CMP covers all significant contract management issues and forms a cohesive and coherent plan for successfully managing the contract. For contracts that have been awarded, the CMT should begin by implementing an effective team approach to managing the contract by emphasizing effective communications and coordination among all members of the team on all issues pertaining to contract performance.

✓ With the early involvement of the CMT, the team will be able to appropriately merge the key objectives of the contract into the Contract Management Plan (CMP) and fully integrate all necessary contract management functions including project management, financial management, and contract management by forming a clear and deliberate process for managing the contract.

✓ The membership of the CMT by necessity should include representatives from the program officials, project officials, Contracting Officer, financial officials, legal

counsel, Environmental Safety and Health (ES&H) officials, federal safeguards and security officials, and the designated Contracting Officer's Representative (COR) (if different than the Project Manager), technical monitors, and contractor delegates (when appropriate).

✓ The roles and responsibilities of the CMT should evolve to those of measurement, evaluation and management with clear lines of responsibility and accountability to promote a forum in which all the parties conducting contractor oversight have a well defined and integrated strategy for managing the contract.

✓ DOE Field Offices should confirm that those performing the duties of contractor oversight are adequately trained and appropriately placed within the organization to meet the challenges of performance measurement and evaluation of the contractor. This includes providing adequate training on the unique aspects of performance-based contracting, measuring predetermined work scope validation and performing earned value analysis as appropriate to uncover potential risk areas and in preparing more accurate forecasts of completion costs as well as understanding all aspects of the contract.

✓ The formal designation of a Contracting Officer's Representative (COR) is essential to streamlining and integrating all technical aspects of contractor oversight. In cases where it is necessary to designate multiple COR(s) because of the complexity of the contract, it becomes vital to ensure all parties communicate and work in concert with each other. Regular meetings and coordination are necessary to eliminate and/or mitigate issues as well as to develop a more disciplined approach to providing technical direction to the contractor.

✓ To streamline communications and minimize unnecessary interface with the contractor, individuals subordinate to the COR who are subject matter experts and perform day-to-day operational awareness, should receive appropriate training for performing contractor oversight and should be formally designated as "Technical Monitors" with responsibilities confined to monitoring and reporting the contractor's performance and providing immediate feedback to the COR and/or CO.

✓ Organizationally, when a COR manages and/or supervises a CO, there is a potential for a conflict of interest. This may be especially problematic when the COR does not have training in contracting and procurement issues. This conflict of interest may arise when a CO makes a decision on a contractual issue and the COR supervisor elects to overturn that CO decision for technical or other business reasons while unaware of the contractual ramifications of such an action. Early and frequent communication to ensure that all parties understand both the technical and contractual issues is paramount to avoiding or mitigating such situations. This will merge considerations for any of the COR's technical/business concerns and the CO's

contractual concerns into the final decision. The parties should establish cooperative ways to resolve any disagreements that may arise during contract performance.

What are the Review Requirements for CMPs?

When CMPs are required, they are to be submitted to the Office of Contract Management in accordance with Chapter 71.1, Headquarters Review of Contract Actions.

DEPARTMENT OF ENERGY

A GUIDE FOR

CONTRACT MANAGEMENT PLANNING

November 2004

U. S. Department of Energy
Office of Procurement and Assistance Management
Washington, D.C. 20585

ATTACHMENT 3

NATIONAL POLICY ASSURANCES TO BE INCORPORATED AS AWARD TERMS (OCT 2004)

To the extent that a term does not apply to a particular type of activity or award, it is self-deleting.

n Act

The recipient agrees to comply with the Hatch Act (5 U.S.C. 1501-1508 and 7324-7328), as implemented by the Office of Personnel Management at 5 CFR part 151, which limits political activity of employees or officers of State or local governments whose employment is connected to an activity financed in whole or part with Federal funds.

Environmental Standards

By signing this agreement or accepting funds under this agreement, the recipient assures that it will:

a. Comply with applicable provisions of the Clean Air Act (42 U.S.C. 7401, et. seq.) and Clean Water Act (33 U.S.C. 1251, et. seq.), as implemented by Executive Order 11738 [3 CFR, 1971-1975 Comp., p. 799] and Environmental Protection Agency (EPA) rules at Subpart J of 40 CFR part 32.

b. Identify to the awarding agency any impact this award may have on:

1. The quality of the human environment, and provide help the agency may need to comply with the National Environmental Policy Act (NEPA, at 42 U.S.C. 4321, et. seq.) and to prepare Environmental Impact Statements or other required environmental documentation. In such cases, the recipient agrees to take no action that will have an adverse environmental impact (e.g., physical disturbance of a site such as breaking of ground) until the agency provides written notification of compliance with the environmental impact analysis process, as implemented by DOE at 10 CFR part 1021.

2. Flood-prone areas, and provide help the agency may need to comply with the National Flood Insurance Act of 1968 and Flood Disaster Protection Act of 1973 (42 U.S.C. 4001, et. seq.), which require flood insurance, when available, for Federally assisted construction or acquisition in flood-prone areas, as implemented by DOE at 10 CFR part 1022.

Coastal zones, and provide help the agency may need to comply with the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et. Seq.), concerning protection of U.S. coastal resources.

4. Coastal barriers, and provide help the agency may need to comply with the Coastal Barriers Resource Act (16 U.S.C. 3501, et. seq.), concerning preservation of barrier resources.

5. Any existing or proposed component of the National Wild and Scenic Rivers system, and provide help the agency may need to comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271, et seq.).

6. Underground sources of drinking water in areas that have an aquifer that is the sole or principal drinking water source, and provide help the agency may need to comply with the Safe Drinking Water Act (42 U.S.C. 300h-3).

Drug-Free Workplace

The recipient agrees to comply with the requirements regarding drug-free workplace requirements in Subpart B (or Subpart C, if the recipient is an individual) of 10 CFR part 607, which implements sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701, et seq.).

National Historic Preservation

The recipient agrees to identify to the awarding agency any property listed or eligible for listing on the National Register of Historic Places that will be affected by this award, and to provide any help the awarding agency may need, with respect to this award, to comply with Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470, et seq.), as implemented by the Advisory Council on Historic Preservation regulations at 36 C.F.R. part 800 and Executive Order 11593 [3 CFR, 1971-1975 Comp., p. 559].

ATTACHMENT 3

NATIONAL POLICY ASSURANCES TO BE INCORPORATED AS AWARD TERMS (OCT 2004)

To the extent that a term does not apply to a particular type of activity or award, it is self-deleting.

Nondiscrimination

By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following, national policies prohibiting discrimination:

a. On the basis of race, color, or national origin, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, et seq.), as implemented by DOE regulations at 10 CFR part 1040.

b. On the basis of race, color, religion, sex, or national origin, in Executive Order 11246 [3 CFR, 1964-1965 Comp., p. 339], as implemented by Department of Labor regulations at 41 CFR part 60.

c. On the basis of sex or blindness, in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.), as implemented by DOE regulations at 10 CFR parts 1041 and 1042.

d. On the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.), as implemented by Department of Health and Human Services regulations at 45 CFR part 90 and DOE at 10 CFR part 1040.

e. On the basis of handicap, in:

1. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DOE regulations at 10 CFR part 1041.

The Architectural Barriers Act of 1968 (42 U.S.C. 4151, et seq.).

Live Organisms

By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following national policies concerning live organisms:

a. For human subjects, the Common Federal Policy for the Protection of Human Subjects, codified by the Department of Health and Human Services at 45 CFR part 46 and implemented by DOE at 10 CFR part 745.

b. For animals:

1. Rules on animal acquisition, transport, care, handling, and use in 9 CFR parts 1-4, Department of Agriculture rules implementing the Laboratory Animal Welfare Act of 1966 (7 U.S.C. 2131-2156) , and guidelines in the National Academy of Sciences (NAS) "Guide for the Care and Use of Laboratory Animals" (1996), including the Public Health Service Policy and Government Principles Regarding the Care and Use of Animals in Appendix D to the guide.

2. Rules of the Departments of Interior (50 CFR parts 10-24) and Commerce (50 CFR parts 217-227) implementing laws and conventions on the taking, possession, transport, purchase, sale, export, or import of wildlife and plants, including the: Endangered Species Act of 1973 (16 U.S.C. 1531-1543); Marine Mammal Protection Act (16 U.S.C. 1361-1384); Lacey Act (18 U.S.C. 42); and Convention on International Trade in Endangered Species of Wild Fauna and Flora.

Debarment and Suspension

The recipient agrees to comply with the requirements regarding debarment and suspension in Subpart C of 10 CFR part 606, which implements E.O. 12549 [3 CFR, 1986 Comp., p. 189]; E.O. 12689 [3 CFR, 1989 Comp., p. 235]; and Sec. 2455 of Federal Acquisition and Streamlining Act of 1994 (Pub. L. 103-355). The recipient also agrees to communicate the requirement to comply with Subpart C to persons at the next lower tier with whom the recipient enters into transactions that are "covered transactions" under Subpart B of 10 CFR part 606.

PRESERVATION OF OPEN COMPETITION AND GOVERNMENT NEUTRALITY TOWARDS CONTRACTORS' LABOR RELATIONS ON FEDERALLY FUNDED CONSTRUCTION PROJECTS (OCT 2004) [Applicable if the objective of the award is to construct, rehabilitate, alter, convert, extend, or repair buildings, highways, or make other improvements to real property.]

a. Unless in conflict with State or local laws, you must ensure that bid specifications, project agreement, or other controlling documents in construction contracts awarded pursuant to this agreement, or pursuant to a subaward to this agreement, do not:

1. Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s); or

2. Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

b. The term "construction contract" as used in this provision means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

c. Nothing in this provision prohibits bidders, offerors, contractors or subcontractors from voluntarily entering into agreements with labor organizations.

Officials Not to Benefit

ember of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this agreement, or y benefit arising from it, in accordance with 41 U.S.C. 22.

Preference for U.S. Flag Carriers

Travel supported by U.S. Government funds under this agreement shall use U.S.-flag air carriers (air carriers holding certificates under 49 U.S.C. 41102) for international air transportation of people and property to the extent that such service is available, in accordance with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118) and the interpretative guidelines issued by the Comptroller General of the United States in the March 31, 1981, amendment to Comptroller General Decision B-138942.

Cargo Preference

The recipient agrees that it will comply with the Cargo Preference Act of 1954 (46 U.S.C. 1241), as implemented by Department of Transportation regulations at 46 CFR 381.7, which require that at least 50 percent of equipment, materials or commodities procured or otherwise obtained with U.S. Government funds under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned U.S.-flag commercial vessels, if available.

Relocation and Real Property Acquisition

The recipient assures that it will comply with 49 CFR part 24, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601, et seq.) and provides for fair and equitable treatment of persons displaced by Federally assisted programs or persons whose property is acquired as a result of such programs.

Lobbying

The recipient assures that it is not an organization described in section 501(c)(4) that has engaged in any lobbying activities ibed in the Lobbying Disclosure Act of 1995 (2 U.S.C. 1611). Recipients that are 501(c)(4) organizations further agree that will not engage in such lobbying activities during the term of this award.

Native American Graves Protection and Repatriation Act of 1990

The recipient, if it is an organization which controls or possesses Native American remains and associated funerary objects and receives Federal funding even for a purpose unrelated to the Act, agrees to comply with the requirements of 43 CFR part 10, which implements the provisions of 25 U.S.C. 3001 et seq.

Contract Management Planning

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BACKGROUND

Contract "administration" has been in the lexicon for quite some time and is used in the regulations governing Government procurement. The reason for using the word "management" rather than "administration" is to convey the broader context in which the administration and management of the contract occurs. "Contract management" includes a broader multi-disciplinary approach to contractor oversight. It encompasses the technical and administrative responsibilities in managing the contractor's performance.

To deliver on how the Department of Energy (DOE) will successfully manage its contracts, the Contracting Officer (CO) should work closely with all necessary disciplines during the early development of the acquisition strategy and project execution planning to more fully integrate the project objectives with contract management planning. Through early integration and strategic planning, project objectives are preserved and made part of the Contract Management Plan (CMP).

Contract management involves those activities performed by the entire Contract Management Team (CMT) (project/program management, technical, legal, contracting and financial officials, federal safeguards and security directors, etc.) after a contract has been awarded to determine how well the Government and the contractor perform to the requirements of the contract. It encompasses the management of all dealings between the Government and the contractor from the time the contract is awarded until the work has been completed and accepted or the contract is terminated, payment has been made, and disputes have been resolved. As such, contract management constitutes that primary part of the acquisition process that assures the Government gets what it pays for.

The CMP should blend technical, financial, and business aspects of the performing contractor as well as combining the Governmental responsibilities of reducing risk, managing performance-based incentives, conducting quality assurance, and adjusting to changing priorities. Good planning builds effective partnerships between both parties, open communications, clear expectations, and defines roles and responsibilities for getting the job done.

With the Department spending a majority of its budget on contracted services and products, contract management should be a core competency of the organization. To achieve core competency, an organization should ensure that those performing the duties of contractor oversight are adequately trained and appropriately placed within the organization to meet the challenges of performance measurement and management of the contractor.

This Guide is provided to assist the Department in formulating a structured and integrated systematic approach for performing contract management planning.

WHAT IS THE PURPOSE OF A CONTRACT MANAGEMENT PLAN?

The purpose of a CMP is to assist sites in developing an appropriate level of planning commensurate with the level of complexity and involvement by project managers, program managers, and financial and procurement officials throughout the contract term. Contracts typically place many duties and responsibilities on both the contractor and Government side. Identifying these roles and responsibilities early on as well as applying the appropriate level of surveillance and risk mitigation is critical to the success of these contracts. The level of detail may vary depending on the complexity of the contract and/or its project(s).

Contract management should focus on obtaining supplies and services of requisite quality, on time, and within cost. While the legal requirements of the contract are determinative of the proper course of action of Government officials in administering a contract, the exercise of skill and judgment is required in order to protect the public's interest.

Factors influencing the degree of contract management include the nature of the work, the type of contract, and the experience and commitment of the personnel involved. The CMP should adequately specify:

- ✓ the performance requirements of the statement of work;
- ✓ the method for conducting quality inspections, assessments, evaluations, etc.;
- ✓ individuals and their major roles, responsibilities, authorities, and limitations,
- ✓ Governmental milestones; and
- ✓ level and types of surveillance, roles and responsibilities of key participants (management, project manager, contracting officer, etc.) to ensure those performing the oversight have a clear understanding of the objectives.

WHEN IS A CONTRACT MANAGEMENT PLAN NECESSARY?

A specific challenge facing most sites that have historically managed major site facility contracts such as, management and operating (M&O) contracts, is the Department's implementation of performance-based contracts and more recently the use of cost plus incentive fee contracts. These new methods have presented interesting challenges to the way we do business. We must now look at ways to enhance our infrastructure to accommodate these new contract mechanisms. A CMP can help bring about a cultural change by identifying a new behavior in managing these performance-based contracts (a behavior that focuses more on performance measurement).

Regardless of contract type, a CMP helps to fuse human resources and activities into one corporate business oversight strategy. This should be a strategy that best describes the Government's approach in managing its contracts from the point of award through completion.

Ideally, a strategy for the CMP should be prepared during the acquisition strategy phase of the procurement cycle. Immediately after contract award, the CO should coordinate and finalize the CMP to reflect the Government's "game plan" for ensuring contract success.

WHAT IS THE LINK BETWEEN THE PERFORMANCE EVALUATION MEASUREMENT PLAN (PEMP) AND THE CONTRACT MANAGEMENT PLAN?

To more effectively manage performance in mission critical areas, the Department develops a PEMP or similar document that incorporates performance objectives, measures and expectations allocated to the performance of specific tasks reflecting their priority and value to the Government. Much of the remaining work, i.e., work that is not mission critical, may not have fee directly associated with it, but may have fee paid contingent upon it being performed at a satisfactory level and within schedule. This approach encourages the contractor to meet the requirements of the PEMP as well as all other contractual requirements.

The PEMP is a tool for managing a contract and is viewed as a function within contract management. It is designed to measure contractor performance against specific performance objectives and measures and not the entire environment within which the contracted effort is proceeding.

Although business and financial areas connected to the performance measures are tracked and monitored as necessary, other areas do not receive the same level of analysis. A well-developed CMP would identify these gaps and would ensure that all areas are monitored to ensure compliance with the contract terms and conditions.

WHAT ARE SOME KEY COMPONENTS OF A CONTRACT MANAGEMENT PLAN?

The following is a sampling of key components that should be considered when drafting a CMP. This list is not meant to be all-inclusive.

Also, not all areas may apply to your contract; therefore, you should select only the ones that apply. If there are other areas pertinent to your contract, please include.

Remember, the goal of the CMP is to identify the activities to be performed by Government officials in managing and administering the contract, particularly the measuring and monitoring of the contractor's performance. Many of the documents (QAP, PEMP, Risk Management Plans, etc.) mentioned herein may already exist separately and therefore should be included as attachments or references within the CMP. The goal is not to duplicate what is contained within these documents but to tie these documents into a cohesive management strategy.

1. A brief introduction and background on the scope of work, place of performance and goals of the contract.

2. The identification of key contract management team members, including authorities and limitations, of the CO, Contracting Officer Representative (COR), Technical Monitors (TM), quality assurance monitors, facilities representatives, program officials, contractor human resource management specialists, or other Program Office Security Officials, etc. to further clarify the Government's roles and responsibilities.

3. Contractor name, contract type and number, key contractor personnel, performance period and total contract value.

4. A method for developing, negotiating, approving, and monitoring performance-based objectives, measures, expectations, and incentive fee arrangements. Include roles and responsibilities of those organizational elements (program and project management, financial management, and procurement) that have a direct role.

5. A listing of key contract vulnerabilities or performance risk areas that are inherent in the contract and describe the provisions for dealing with these, including, but not limited to the following:

   - ✓ Both the tangible and intangible realms of agency reputation, safeguards and security, operations interruption, third party liability, environmental liability, pollution, diverse operating risk factors and program liability.

   - ✓ Uncertainty in the future outcome of a specific task, contract milestone or deliverable.

   - ✓ The coordination with other sites as necessary to ensure timely agreements, shipments, receiverships, and any other support necessary to ensure the unencumbered success of the contract.

   - ✓ Achieving completion of one or more critical milestones that could impact the next phase of performance (preliminary designs, design and build, procurement of long-lead items, regulatory approvals, Environmental Protection Agency milestones, etc.).

   - ✓ Major performance areas (waste management, science, safety, safeguards and security, Environment, Safety and Health (ES&H), operations, environmental clean up, project management, cost controls, etc.) that may have a level of risk or uncertainty to successfully achieving performance.

   - ✓ The delivery of Government provided information, data, and equipment that if not delivered timely may have an impact on performance, cost and/or schedule.

   - ✓ A formal Risk Management Plan, to the extent required by DOE O 413.3, must be integrated into the CMP. Participants' roles and responsibilities in both Plans should be clearly established.

6. A listing of Post-Contract Liabilities that are the sum total of liabilities for contractor employees and their beneficiaries, including a strategy for dealing with these liabilities.

7. A strategy that provides for the inspection and acceptance process that conforms to quality assurance requirements and provides risk identification through inspection and data verification.

8. Key performance metrics for determining contractor progress, quality of performance, and cost expenditures, etc.

9. Contract transition planning from an incumbent contractor to a new contractor and/or contract type; include transition strategies, schedules and list parties responsible for facilitating a smooth transformation.

10. A strategy to monitor and ensure that the Contractor conducts expedient reporting and processing of employee compensation claims and develops a proactive approach to settling or closing open claims to reduce the length of time a worker's compensation insurance policy or contract remains open.

11. An effective strategy for cost reduction by removing non-value added directives/requirements.

12. A listing of major contractor milestones, performance incentives, and reporting requirements along with the names of those individuals responsible for review and approval.

13. The structure for managing the change control process to scope, cost and schedule as well as mitigating variances to approved scope, cost or schedule. Identify individuals responsible for the review and approval of these baseline change proposals and variances.

14. Voucher processing or reviewing cost reports are an important aspect of contract management. Payment to the contractor for supplies and services rendered is the Government's obligation under the contract. A plan or process for quickly and efficiently meeting this obligation is essential.

15. A strategy for managing any unique terms and conditions of the contract (i.e., Government-furnished property, information, receiverships, etc.). Simply listing the contract terms and conditions may not be sufficient. Certain terms and conditions may represent significant risks or management issues. Just for one example, the terms and conditions associated with the provision of Government furnished services, information, etc., may be associated with risks or management challenges so critical to the successful management of the contract requirements as to necessitate addressing in the CMP. In such cases, identifying the responsible individual(s) and addressing the management strategy and processes may be appropriate. However, as mentioned elsewhere in this guidance, there is no intention of making the CMP redundant to other existing documents such as risk mitigation plans, etc. To the extent that such documents may exist, it

may be sufficient to reference the individual responsible and the pertinent documents in the CMP.

16. A contractor litigation management outline listing what litigation is outstanding, approximate value, responsible parties and duration is a good way to track for budgeting purposes and general awareness when undergoing contract transition.

17. Partnering agreements with the state, community or other entities that are critical to the success of the contract should be referenced and parties responsible for nurturing these agreements should be identified.

18. A strategy for what records will be transferred to the new contract or maintained with the expired contract is necessary to ensure that the Government is protected and that there is a good records management program.

19. A strategy to ensure the contractor submits a proposed settlement of costs for Post Contract Liabilities that includes adequate documentation that is supported by a reasonable audit trail as to measurement, composition, cost methods and actuarial assumptions.

20. A contract closeout strategy, as necessary, when the contract is physically complete.

ARE THERE ANY OTHER SPECIAL EMPHASIS AREAS?

Yes, there are several special emphasis areas that should be included when designing a CMP. Each office is encouraged to include emphasis areas specific to the circumstances of the contract as well as the areas provided herein.

Post Award Conference:

Good contract management starts with a post award conference, either by conference, letter, or some other form of communication. This communication process can be a useful tool that helps the Government and contractor achieve a clear and mutual understanding of the contract requirements. It also helps the contractor understand the roles and responsibilities of the Government officials who will manage the contract.

A pre-meeting with applicable project, program, and contracting officials prior to the post award conference ensures a continued focus on project objectives and anticipated outcomes. Consistent with project objectives, the program office should describe their desired characteristics of contract success. The team should address how to facilitate communications both between and within the Government and contractor organizations.

Topics for the post-award conference include identifying the roles and responsibilities of government personnel managing the contract, quality control and testing, specific contract deliverable

requirements, special contract provisions and conditions, surveillance requirements and responsibilities, voucher review and approval process, etc..

It is also a good idea to solicit from the contractor its approach to contract execution. For example, how will it manage the performance incentives, work prioritization, quality control, risk reduction, internal and external relations, scheduling conflicts, and critical path and project management?

With the exchange of approaches to contract management and execution, both parties start off with a clear understanding of each other's intent.

Project Management:

Whenever the contract to be administered contains the requirements of DOE O 413.3, *Program and Project Management for Acquisition of Capital Assets*, the CO should ensure that program and project management requirements are integrated into the CMP as appropriate. Recently, the Office of Management and Budget and the Government Accountability Office have placed increased emphasis on the effective management of projects across the Federal Government and at the DOE in particular. Project management tools currently contained in DOE O 413.3, "Program and Project Management for the Acquisition of Capital Assets," provide excellent means to ensure that DOE contracts and projects are properly managed. Integral to the effective management of the contract under the requirements of DOE O 413.3 is the monitoring of schedule and cost performance through the ANSI Standard 748 compliant Earned Value Management System (EVMS). To the extent that contracts contain a requirement for DOE O 413.3, CMPs should address the application of the Order and the use of EVMS in particular. The roles of the Contracting Officer, Project Director and other key individuals and their responsibilities relating to DOE O 413.3 and EVMS should be discussed in the CMP.

Quality Assurance Surveillance Plan:

If a contract is a performance based service contract, then it must have a Quality Assurance Surveillance Plan (QASP).

The Office of Federal Procurement Policy in "A Guide to Best Practices for Performance-Based Service Contracting" (October 1998) recommends writing the Performance Work Statement (PWS) and Quality Assurance Plan (QAP) simultaneously for ease of both the contractor and quality inspector. Since the QAP is intended to measure performance against standards in the PWS, these interdependent documents should be linked. It should be noted that the QAP discussed in the previously mentioned OFPP policy guidance and the QASP discussed at FAR 37.602-2 refer to the same document.

The QAP should be systematic and sufficient to fairly evaluate the contractor's total performance throughout the performance period and provide a structured approach for individuals performing quality inspections and surveillance of contractor generated outputs.

The QAP establishes how resources will be used to ensure the Government receives what it is paying for. The detail in the QAP regarding a certain task should be consistent with the importance of the task. The QAP should focus on the quality and timeliness, etc., of the performance outcomes to be achieved by the contractor, and not on the steps required or procedures used to provide the product or service.

Another tool in monitoring is reviewing the contractor reporting requirements such as progress reports, shop plans, and blueprints which often can uncover potential cost overruns, late deliveries, and poor contractor performance. The extent of surveillance is determined by the surveillance schedule established in the QAP.

When performance is deficient, the COR should advise the CO and promptly notify the contractor to implement a corrective action plan to correct the deficiencies and track contractor performance. The Government should be proactive in its approach to improving contractor performance and be attentive to the terms and conditions of the contract which offer potential remedies to induce performance improvement.

At the same time, when surveillance results show good performance consistently, the amount of surveillance should be adjusted accordingly. This saves the Government money, reduces oversight burdens on the contractor, and recognizes the contractor's achievement of performance.

Written and Oral Direction:

The CO, in coordination with the COR and the program office, should strive to provide a structured and integrated approach for coordinating written and oral direction to a contractor on technical and contractual matters. The CMP should identify who is authorized to give direction to the contractor both orally and in writing. Normally, oral and written direction is limited to the CO and the COR (with limitations). However, when it is necessary to give oral directions to the contractor, it should always be followed up in writing.

The Role of the Contract Management Team:

The Contract Management Team (CMT) consists of all participants in Government acquisition, including not only representatives of the technical and procurement communities, but also the customers they serve, and the contractors who provide the products and services. The primary team members are the CO, COR, TM(s), Project Director, etc. The CMT may be augmented with other subject matter experts (local federal safeguards and security director, ES&H, as well as other critical functional areas) as necessary. The Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and openness require open communications among team members, internal and external customers, and the public.

As referenced in FAR subpart 1.602-2, CO's are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States. CO's are challenged to take the lead in encouraging business process innovations and ensuring that business decisions are sound. This new mind-set opens the door for Contracting Officers to be business managers and strategists.

The COR plays a critical role in affecting the outcome of the contract management process. It is absolutely necessary that those entrusted with the duty to ensure that the government gets all that it has bargained for be competent in the practices of contract management and aware of and faithful to the contents and limits of their delegation of authority.

Within the Department, most CORs are Senior Managers with direct Contractor oversight performed by subordinates. These subordinates are usually subject matter experts that provide specialized monitoring of the contractor in Program and Project areas, such as Quality Assurance, Safeguards and Security, and ES& H. To formalize this practice, these individuals should be formally designated as TM(s) for the COR and should therefore be trained in contract management.

The TM does not usually have specific delegations of authority to act as a designated COR and therefore cannot direct the contractor, redirect scope, or impact the contract in any way. However, the TM plays a vital role in providing day-to-day oversight of the contractor's performance and in communicating results to the CO and COR.

Project Directors are responsible, in part, for successfully developing, executing, and managing projects within the approved Performance Baseline in accordance with DOE O 413.3. They are responsible for project management activities for discrete projects under their cognizance. They are accountable for planning, implementing, and completing a project using a systems engineering approach. They serve as the Contracting Officer's Technical Representative, as appointed. The CMP should discuss the responsibilities of the Project Director under the contract. Also, the CMP should discuss the certification the Project Director in accordance in DOE O 361.1A. If the Project Director does not have the required certification level, the CMP should discuss the steps being taken to obtain the required level of certification.

In order to promote a corporate oversight strategy, the Team should convene regular meetings with top-level contractors, procurement, and program officials to discuss the contractor's performance, delivery schedules, quality of services, safeguards and security issues, risk issues, cost and any other contractual matters. To promote continued communications, regularly scheduled meetings between the CO and COR should be conducted.

It is essential that only the members of the Team with the appropriately delegated authorities give direction. These individuals should be identified in writing to the contractor along with any limitations on authorities. The identification of these individuals at the time of contract award streamlines the process and eliminates and/or minimizes interruptions, schedule delays,

unnecessary cost impacts, and false starts. This is especially necessary when there are multiple COR(s) monitoring and directing contractor performance within their functional areas.

WHAT ARE SOME SAMPLE TASKS PERFORMED BY THE GOVERNMENT PERSONNEL?

- ✓ Monitoring contractor's quality assurance program;
- ✓ Furnishing government resources, information, data or equipment;
- ✓ Reviewing and responding to contractor reports/requests;
- ✓ Owner in-process inspection, assessment, acceptance, deliverable review, etc.;
- ✓ Certifying costs incurred or physical progress for cost reimbursement and fee payment purposes;
- ✓ Assessing/validating performance in the manner required by the contract (Earned Value Management System, etc.);
- ✓ Developing/submitting annual budget plans;
- ✓ A general awareness of personnel/labor;
- ✓ Assessing regulatory compliance;
- ✓ Data verification;
- ✓ Evaluating cost reports;
- ✓ Reviewing potential problem or risk areas;
- ✓ Developing milestones for reports from government team members;
- ✓ Monitoring compliance with subcontracting plans;
- ✓ Assessment validation;
- ✓ Peer reviews; and
- ✓ Lab appraisals.

HOW CAN I USE THE CONTRACT MANAGEMENT PLAN TO ENSURE SUCCESSFUL CONTRACT PERFORMANCE?

- ✓ By coordinating and soliciting input from all Government staff that play an active role in contract management and contractor oversight;
- ✓ By disseminating the CMP for all parties to become familiar with and refer to on a daily basis;
- ✓ By conducting a special session with the contractor on the goals and objectives of the CMP as well as identifying the individuals with key roles and responsibilities;
- ✓ By meeting regularly with all parties performing contractor oversight to share contractor status on all technical, financial, business areas, discuss any key contract vulnerabilities or performance risk areas, decide on any course of action, and determine any future activities;
- ✓ By tracking and reporting on milestones from the CMT, contractor deliverables and identifying and taking immediate action on any risk areas that may develop during contractor performance; and,
- ✓ Finally, as the contract progresses, you may find it necessary to shift responsibilities or add tasks that could not have been anticipated at the time of award. Therefore, over the life of the contract, you will need to update your plan to reflect these developments.

Your goal is to identify what must be done, when it must take place, who must do it and as necessary, how and where it is to be accomplished.

CHAPTER 1
PROJECT MANAGEMENT

WHAT ARE THE BASIC PRINCIPLES AND OBJECTIVES OF PROJECT MANAGEMENT?

1. Use Project Management fundamentals as part of our broader management agenda with:
   - -Line management accountability;
   - -Effective up-front planning;
   - -Accurate performance measurement;
   - -Management of risk; and
   - -Communication with stakeholders.

2. Provide effective program and project acquisition systems such that Department of Energy (DOE) projects are delivered on time, within budget, and fully capable of mission performance.

Although the Department depends upon outstanding companies, universities and other partners for the day-to-day project execution and management, the overall execution, management and performance of DOE's mission remain the ultimate responsibility of the Federal officials of this Department. We must continually improve our methods, processes and management to mitigate risks, better control costs and achieve better performance.

WHY IS PROJECT MANAGEMENT IMPORTANT?

While DOE has successfully delivered the vast majority of its projects, we must increase our success rate and continually improve our management of all of our projects. Companies in the business of project management, such as the engineering and construction industry and the aerospace and defense industries, tell us that achieving project management success is a very difficult and a never ending challenge for them. We should not expect to spend any less effort on this than the best of our private sector peers do. Further, what makes DOE's projects among the most exciting in the world is that they are frequently one of a kind using complex systems and technologies in a first time application. Obviously, this requires even more planning and expectations management at the inception of a project and skillful management of its delivery.

The Department has billions of dollars invested in projects, which are planned or under construction. To complete these projects successfully, safely and within budget, the Department has significantly revised its project management policies and practices to increase accountability,

require effective up-front planning, improve performance measurement, and manage risk within the Department's acquisition management system.

WHAT IS THE DEPARTMENT DOING ABOUT PROJECT MANAGEMENT?

On June 25, 1999, the Deputy Secretary announced by memorandum the beginning of a DOE-wide initiative to reform the way the Department manages projects by strengthening accountability for project performance, and thereby, improving project performance. As DOE's Chief Operating Officer and Acquisition Executive, the Deputy Secretary directed actions be taken in the following seven areas. The following areas summarize several aggressive and comprehensive actions the Department has taken since 1999 to achieve strong project management capabilities.

1. Establish a Strong Corporate Project Management Organization in the Office of Management, Budget and Evaluation/ Chief Financial Officer to strengthen project management direction and oversight.

The Office of Engineering and Construction Management (OECM) was established and is responsible for driving change in the Department's project management system and supporting the Department's project managers. This organization is closely aligned with contract reform initiatives and improvements in our financial reporting and budget control systems, crucial to overall Departmental success. DOE O 413.3 and DOE M 413.3-1 were issued to provide DOE project management direction.

OECM serves as Secretariat for the Energy Systems Acquisition Advisory Board (ESAAB) and provides analytical support and recommendations to that board. The ESAAB advises the Secretarial Acquisition Executive on key critical decision points, (e.g., approving a baseline, initiating construction), related to major system projects with total project costs over $400 million. The Office also provides assistance to the Program Offices in establishing their decision processes on smaller projects.

2. Establish Project Management, Tracking, and Control Systems.

The OECM established the Project Assessment and Reporting System (PARS). PARS provides a web-based system for Programs to report project status and corrective actions. Starting at Critical Decision – 0, project status is reported monthly utilizing the PARS, and the Acquisition Executive begins conducting quarterly progress reviews. OECM is invited to all quarterly reviews.

3. Establish the Chief Operations Officer's (COO's) Watch List for projects with significant issues or emerging problems.

The COO Watch List report has now been replaced with OECM's Monthly Project Status Report of all open projects to the Deputy Secretary. This report presents the project status data collected in PARS; earned value codes of red, yellow, or green; and other items of interest. For projects where corrective actions are not being made in a timely fashion, the Department may withhold, redirect, or withdraw funding, or initiate other contractual actions which may include key personnel changes, fee reductions, and/or contract scope reductions.

4. Strengthen line management accountability for project management results.

Program Secretarial Officers (PSOs) have established project management offices within their organizations reporting directly to them that include the roles and responsibilities listed in DOE M 413.3-1. Each office should be staffed by appropriately skilled personnel who will keep the PSO fully informed on project management performance, including implementation of corrective actions. The Program Project Management offices will coordinate with the OECM to ensure effective and consistent development and implementation of Department policies throughout the line.

The PSOs have line accountability for applicable program and project execution. Successful performance of DOE projects depends on professional and effective project management by the Federal Project Directors as well as the Contractor Projector Managers. Key roles and responsibilities of line managers are defined in DOE M 413.3-1. Line managers, extending from the Secretary to the PSO, the Field Manager and contractor executives, are the individuals held responsible and accountable for successfully developing, executing, and managing our projects within cost, schedule, and scope commitments. They are also expected to ensure that project management will incorporate integrated safety management principles and functions. The initiatives were intended to strengthen the PSO ability to manage projects without calling into question either their authority or ultimate responsibility.

In coordination with its project management office, each PSO will provide an assessment of the organization's project management system, along with their plan to correct identified deficiencies or establish management improvements, as appropriate. These assessments and action plans will be compiled and evaluated in the context of a working management system for the Department by the OECM. This system will incorporate reviews of project management issues and the status of corrective action plans, to ensure that accountability is being maintained.

5. Establish greater contractor accountability for project management.

The Department will assess issues involved in contractor project management and steps required to improve performance in acquisition and contracting. Contractor performance measures and incentives must be enhanced to focus on key project success factors, not the process itself. Roles

and responsibilities of the DOE project management team and the contractor project management team are defined in DOE M 413.3-1.

6. Revise the criteria and funding processes related to a DOE project.

Budgeting for the acquisition of capital assets is an integral part of DOE's Planning, Programming, Budgeting, and Evaluation (PPBE) Process. The PPBE Process provides a systematic framework for prioritizing program needs, allocating resources, measuring performance and delivering results. OECM plays an integral role during the budget cycle in reviewing Project Data Sheets against reported project status, baseline validations and project plans.

The Department implemented use of Project Engineering and Design (PED) funds in FY 2003. Once Critical Decision – 1 is obtained, PED funds become available for use on preliminary design and final design, baseline development, and/or a statement of work/request for proposal for a design/build project. PED funds are requested using a Project Data Sheet. PED funds are not to be used for construction, long-lead procurement, or major equipment items.

OECM will continue to work with OMB and Congressional Committees to find ways to improve budgeting and funding processes as related to project management.

7. Develop a longer term program for institutional capacity building.

OECM has overall responsibility for developing and overseeing the Project Management Career Development Program (PMCDP). This is a Department-wide program establishing criteria and standards for developing and certifying DOE's Federal Project Directors. The mandatory facets of the PMCDP are institutionalized in DOE O 361.1, Attachment 4 Project Management Career Development Program Module.

The DOE Project Management Manual and Order are building blocks on our way to improved project and general management. The Department's broader management agenda will not be complete without adequate organizational and training implementation, attention to other key management issues such as safety, and many other features of our management systems.

WHAT IS A GENERAL DESCRIPTION OF THE PROCESSES UNDER PROJECT MANAGEMENT?

What is DOE's Acquisition Management System?

DOE's Acquisition Management System establishes a management process to translate user needs and technological opportunities into reliable and sustainable facilities, systems, and assets that provide the required mission capability. The system is organized by phases and Critical

Decisions. The phases represent a logical maturing of broadly stated mission needs into well-defined technical, system, safety, and quality requirements and ultimately into operationally effective, suitable and affordable facilities, systems, and other end products. The Acquisition Management System supports the PPBE process by providing project planning, budget justification, and project performance information. Figure 1 illustrates the overall Acquisition Management System.

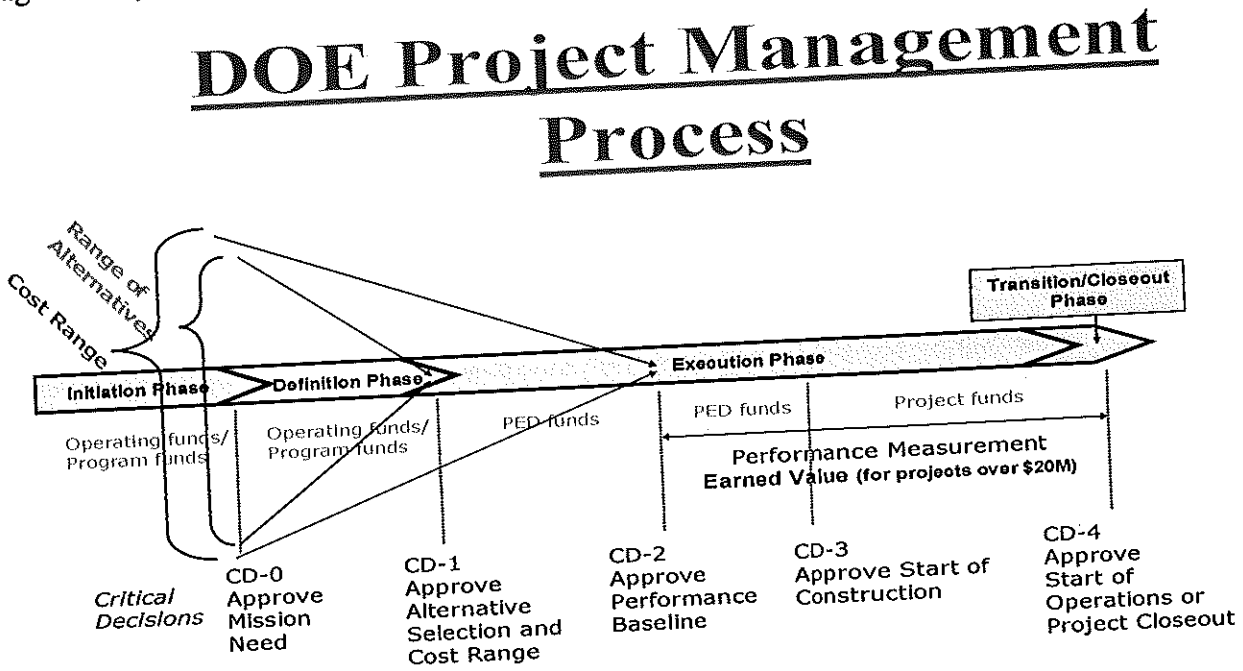

Figure 1.

Roles, responsibilities, and authorities drive the implementation of the Acquisition Management System. The authority to make decisions and the responsibilities for executing the decisions are aligned according to the complexity, criticality and cost parameters for all projects. This authority is by appointment and is designated or delegated as directed in DOE M 413.3-1. DOE M 413.3-1 emphasizes three themes regarding roles and responsibilities that are necessary to consistently achieve defined project objectives:

-Strengthening line management accountability for project management results;

-Clearly defining the roles and responsibilities of the Federal project management team relative to the contractor project management team; and

-Developing effective Integrated Project Teams to assist the Federal Project Director in planning, programming, budgeting and acquisition of capital assets.

What are the requirements that form the framework?

The Acquisition Management System uses a cascaded set of requirements, direction, guidance, and practices that minimize mandatory requirements and provide balance and effectiveness while protecting the public trust. Identification, implementation, and compliance with requirements other than DOE O 413.3 and DOE M 413.3-1 are the responsibility of line management, including the Federal Project Director and the Integrated Project Team (IPT). Key requirements include:

-Critical Decisions including approval of Mission Need, Alternative Selection and Cost Range, Performance Baseline, Start of Construction, Start of Operations;
-Acquisition Strategy;
-Risk Management with analysis, forward-looking, structured, informative and continuous;
-Project Changes identified, controlled and managed through a traceable, documented process;
-Performance Baseline deviations managed with appropriate approval authority;
-Tailoring of requirements in consideration of the complexity, cost, and risks of each project;
-Validations and independent reviews; and
-Federal Project Directors that are certified appropriate with the complexity of the project.

What is the Integrated Project Team?

The IPT is an essential element of the Department's acquisition process and will be utilized during all phases of a project life cycle. The IPT is a team of professionals representing diverse disciplines with the specific knowledge, skills, and abilities necessary to support the successful execution of projects. The Federal Project Director is the IPT lead. As the project progresses from Initiation to Transition/Closeout, the IPT membership will change to incorporate the necessary skills and expertise required.

What is the Earned Value Management System (EVMS)?

Recently, the Office of Management and Budget (OMB) and the Government Accountability Office have placed increased emphasis on the effective management of projects across the Federal Government and at the DOE in particular. Project management tools currently contained in DOE O 413.3, "Program and Project Management for the Acquisition of Capital Assets," provide excellent means to ensure that DOE contracts and projects are properly managed. Integral to the effective management of the contract under the requirements of DOE O 413.3 is

the monitoring of schedule and cost performance through the ANSI Standard 748 compliant Earned Value Management System (EVMS).

1. What is the objective of an EVMS?

The objective of EVMS is to design and implement integrated management processes to achieve effective project oversight, facilitate DOE performance reporting, and to recognize early warning signals in project performance. This should be accomplished in a common, well-understood framework that facilitates communicating progress and performance as well as support course correction when a project goes off the path. The responsibility for developing and complying with the standard resides with the performing organization whether it is a contractor or a Government entity.

Industry has long recognized the importance of earned value in program and project management, and the industry-developed American National Standards Institute (ANSI)/Electronic Industries Alliance (EIA) Standard - 748-A-1998, Earned Value Management Systems (EVMS) approved May 19, 1998, reaffirmed August 28, 2002, defines 32 criteria for implementing earned value management. A copy of Standard 748 is available from Global Engineering Documents (1-800-854-7179). An EVMS that complies with the standard will contain the characteristics of a good EVMS. Some of these characteristics include:

*thorough planning;
*information broken down by organization and product;
*objective measurement of accomplishing tasks against the EVMS;
*summary of the level where work is performed, reported to management or used in decision making;
*improved reporting discipline; and
*implementation of management actions to manage risk, cost, and schedule performance.

2. What are the requirements for EVMS?

DOE O 413.3, Attachment 3, Contractor Requirements Document requires the industry standard for project control systems described in ANSI EIA 748-1998, *Earned Value Management Systems*, to be implemented on all projects with a total project cost greater than $20M.

Both DOE O 413.3 and DOE M 413.3-1 state that the OECM within the Office of Management, Budget and Evaluation (OMBE) manages the EVMS certification process. For projects executed under time-and-material contracts, firm-fixed-price contracts, or level of effort support contracts, the Acquisition Executive may approve an alternative performance management system. The alternative performance management system must be described in the Project Execution Plan.

OMB Circular No. A-11, Part 7, Section 300 provides definitions for earned value computations, requires performance curve graph plotting on a monthly basis, and EVMS variance analysis.

OMB evaluates business cases and capital asset plans based on earning the maximum scoring when an agency uses an EVMS that meets ANSI/EIA Standard 748 and the investment is earning the value as planned for costs, schedule, and performance goals. It also requires a description of the performance-based management system used by the agency to analyze and use the earned value performance data to manage performance and the process planned to verify that the contractor's project management system follows the ANSI/EIA Standard 748A.

3. How has the department implemented EVMS?

DOE O 413.3 requires that project Acquisition Strategies be written early in the project planning phase and prior to Critical Decision -1 *Approve Alternative Selection and Cost Range* - must address the IPT's approach to managing the project. This includes a description of the project management and control system that will be used to successfully execute the project, i.e., EVMS for projects over $20M.

Please note that DOE O 413.3 is in the process of being updated. One of the updates will be an enhancement of the definition of major information technology investments and the use of EVMS as required by OMB Circular A-11. It is the responsibility of the federal project director to insure that EVMS is properly invoked in contracts.

Contracting Officers insert the clause at DEAR 970.5204-2, *Laws, Regulations and DOE Directives* in management and operating (M&O) contracts. Department of Energy directives are identified in the List of Applicable Directives (List B should include DOE O 413.3) appended to the contract. The contracting officer may, from time to time and at any time, revise List B by unilateral modification to the contract to add, modify, or delete specific requirements.

For other than M&O contracts, contracting officers have used a Section H clause on Project Control Systems or an EVMS clause requiring DOE O 413.3 with CO approval of the following: (1) project control system; (2) compliance review of the contractor system; (3) any changes to the approved system; and flow down to subcontracts.

When implementing the EVMS, contractors must be prepared to demonstrate compliance with the criteria and undergo a certification review by the Department. The certification authority for the Department is OECM within OMBE. A system description is usually used to document the system and should be available for the review. The objective of the review is for the Department and the contractor to jointly assess compliance with the standard. This will be accomplished by assessing specific areas, such as the contractor's planning, to ensure complete coverage of the statement of work, logical scheduling of the work activities, and adequate resources allocation.

Once an EVMS has been accepted, all significant proposed changes to the system should obtain concurrence to ensure that the certification is not compromised. The Department has entered into a Memorandum of Agreement with the Defense Contract Management Agency (DCMA) to conduct acceptance reviews in cooperation and coordination with the Department. The DCMA

is the executive agent for EVMS in the Department of Defense and provides EVMS support to the Department of Defense and other Government agencies.

Previously accepted and/or certified EVMSs by the DCMA will be accepted by the Department. If the contractor proposes to use a system previously approved by the Department or other Federal agency, the project office, or program office should submit a memorandum to OMBE stating that the project will use a previously approved system, and include the particulars of that approval. An EVMS that was previously approved for a small project may not be deemed as adequate for a Major System. If a contractor is responsible for an entire site location that requires execution of projects, a site certification may be requested and issued upon review or assessment.

Additional information on earned value management systems is available at http://oecm.energy.gov/ and http://wwwacq.osd.mil/pm

What are the Contracting Officer's Responsibilities under Project Management and the EVMS?

The contracting officer is broadly responsible for ensuring that the requirements of the contract (cost, schedule, quality, etc.) are met by the contractor. FAR 1.602-2 states that "contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships." In fulfilling these responsibilities, it is inherent within the scope of the contracting officer's duties that he or she must monitor the contractor's performance under the contract.

Performance monitoring is conducted with the assistance of representatives expert in various technical and administrative areas including the Federal Project Director. DOE Order 413.3 provides project management tools for monitoring performance. The EVMS is an excellent tool for monitoring both cost and schedule performance under the contract.

While the contracting officer is not expected to be an expert in the EVMS, he or she must have a basic understanding of the principles of the system in order to monitor performance effectively and be conversant with the other members of the Integrated Project Team. The EVMS is capable, when properly used, to provide insight into whether the contractor is on schedule and performing within budget and scope. In other words, EVMS provides the ability to assess if the contractor is making satisfactory progress.

We all would like the contractor to achieve satisfactory performance under the contract and deliver that project on time. It makes our jobs so much simpler. However, we all know that sometimes that just doesn't happen.

The EVMS gives us an early warning system for detecting performance problems. If we listen to that early warning system and take timely action when appropriate, the opportunity exists to identify problems and, hopefully, get the contractor back on track. However, if we don't pay attention to the warning signs that the EVMS provides us and take timely corrective actions, getting the contractor back on track may not be possible, and additionally, the Government may inadvertently waive its rights under the contract.

The Contractor Requirements Document attached to DOE O 413.3 lays a number of requirements on the contractor relating to project management and the EVMS. If problems in the contractor's performance do produce variances which "exceed DOE-established reporting thresholds," the contractor is required to prepare and report variance analyses and corrective action plans to hopefully resolve the problem. The Integrated Project Team (IPT) needs to be constantly aware of the contractor's performance progress.

If performance does become a problem, there are a number of remedies open to the IPT and the contracting officer. Whenever the contractor's satisfactory progress under the contract is perceived to be endangered but before a contractual delivery is actually missed, the contracting officer always has the right to notify the contractor and request an explanation regarding the cause of the problem and the contractor's plans for getting back on track. When identification of a problem becomes more severe, the Government has more formal remedies which can be exerted in order to preserve its rights. Such remedies are the Show Cause Notice and Cure Notice discussed at FAR 49.607.

If progress under the contract or project is so poor that termination or rebaselining is contemplated, DOE O 413.3 identifies the DOE management individuals who must be involved in making the decision for either termination or rebaselining. A specific determination must be made by the Secretarial Acquisition Executive for Major System projects, and the Program Secretarial Officer/Deputy Administrator NNSA for non-major system projects, whether to terminate the project or change the Performance Baseline.

Where can I find information on project management training requirements?

For more information please refer to DOE O 361.1A, *Acquisition Career Development Program*, which lists the specific training requirements for project/program managers and contracting officers in the area of project management. For example, for a Contract Specialist certified at Level III, a Project Management Overview course is required. Included in the Order is the DOE Project Management Career Development Program for project managers that details the training requirements by four certification levels.

WHAT ARE MY MAJOR ROLES AND RESPONSIBILITIES IN THE AREA OF PROJECT MANAGEMENT?

On the following pages are the major roles and responsibilities of members of the contract administration team. Key sections of documents have been summarized for ease of reference. Please bear in mind that the referenced documents themselves are controlling and should be consulted for a complete discussion of the various roles, responsibilities and requirements. Additionally, other documents, not listed here, may contain other roles and responsibilities.

Note: Various responsibilities on the following pages are marked with an asterisk (*). This signifies that the responsibility is not specifically assigned to this individual by a clause, regulation, or procedure. It is suggested because:

(1) The responsibility is necessary to perform Government contract administration responsibilities.
(2) (2) The responsibility is stated in the reference as a DOE/Government responsibility; and is either commonly performed by this individual or reflects "good business practice."

Local guidance may determine who specifically is obligated to perform the responsibility.

DEPUTY SECRETARY

Serves as the senior manager responsible and accountable for all project acquisitions. [DOE M 413.3-1]

Exercises decision-making authority, including Critical Decisions for all Major System projects. [DOE M 413.3-1]

Ensures senior executive level quarterly reviews are conducted for those projects. [DOE M 413.3-1]

Approves disposition of projects and Performance Baseline changes at SAE approval level following Performance Baseline deviations. [DOE M 413.3-1]

Serves as the chair for the Energy Systems Acquisition Advisory Board. [DOE M 413.3-1]

Approves site selection for facilities for new sites. [DOE M 413.3-1]

Addresses and resolves issues that crosscut between NNSA and Energy, Science and Environment programs. [DOE M 413.3-1]

UNDER SECRETARY FOR ENERGY, SCIENCE AND ENVIRONMENT AND THE ADMINISTRATOR FOR NNSA

Receive Acquisition Executive authority from the SAE and delegate, as appropriate. [DOE M 413.3-1]

Exercise decision-making authority, including Critical Decisions when functioning as Acquisition Executives. [DOE M 413.3-1]

Serve as chairs and appoint members for acquisition advisory boards. [DOE M 413.3-1]

Approve disposition of projects and Performance Baseline changes below SAE approval level following Performance Baseline deviations (may be delegated to PSOs/Deputy Administrators). [DOE M 413.3-1]

Establish Project management Support Offices or delegate responsibility to PSOs/Deputy Administrators/Associate Administrators. [DOE M 413.3-1]

PSOs AND DEPUTY ADMINISTRATORS/ASSOCIATE ADMINISTATORS FOR NNSA

Have line accountability for applicable program and capital asset project execution and implementation of policy. [DOE M 413.3-1]

Execute accountability for site-wide environment, safety, and health and safeguards and security. [DOE M 413.3-1]

Approve Mission Need Statement and Acquisition Strategy documents (cannot be delegated). [DOE M 413.3-1]

Approve disposition of projects and Performance Baseline changes below SAE approval level following Performance Baseline deviations, if delegated the authority (cannot be further delegated). [DOE M 413.3-1]

Exercise decision-making authority, including Critical Decisions when functioning as Acquisition Executive. [DOE M 413.3-1]

Responsible for Critical Decision – 0 Approve Mission Need, for all projects $100 million and below (cannot be delegated). [DOE M 413.3-1]

Delegate as appropriate, Acquisition Executive functions. [DOE M 413.3-1]

Approve selection of the Project Director for projects no later than Critical Decision – 1. [DOE M 413.3-1]

Serve as chairs, appoint members for acquisition advisory boards, and direct independent reviews. [DOE M 413.3-1]

Establish project management support offices when responsibility is delegated or directed by Under Secretary/Administrator NNSA. [DOE M 413.3-1]

PROJECT MANAGEMENT SUPPPORT OFFICES (WHEN ESTABLISHED)

Provide independent oversight and report directly to the Under Secretary, NNSA Administrator, or PSO, as appropriate. [DOE M 413.3-1]

Serve as the Secretariat for the PSO/NNSA-level Advisory board functions. [DOE M 413.3-1]

Coordinate quarterly performance reports. [DOE M 413.3-1]

Coordinate with other DOE organizations and offices, including OECM, to ensure effective and consistent implementation project management policies and directives. [DOE M 413.3-1]

Provide assistance and oversight to line project management organizations. [DOE M 413.3-1]

Analyze project management execution issues. [DOE M 413.3-1]

Actively assist senior management on issues related to project management performance, including implementation of corrective actions. [DOE M 413.3-1]

PROGRAM MANAGERS, HEADS OF FIELD ORGANIZATIONS AND OTHERS REPORTING AT THIS LEVEL

Direct initial project planning and execution roles for projects assigned by the Acquisition Executive. [DOE M 413.3-1]

Initiate definition of mission need based on input from sites, laboratories, and Program Offices. [DOE M 413.3-1]

Establish Integrated Project Teams no later than Critical Decision – 0. [DOE M 413.3-1]

Oversee development of project definition, technical scope, and budget to support mission need. [DOE M 413.3-1]

Initiate development of the Acquisition Strategy before Critical decision – 1. [DOE M 413.3-1]

Perform functions as Acquisition Executive when so delegated. [DOE M 413.3-1]

Develop project performance measures, and monitor and evaluate project performance throughout the project's life cycle. [DOE M 413.3-1]

Allocate resources throughout the program. [DOE M 413.3-1]

Oversee the project line management organization. [DOE M 413.3-1]

CONTRACTING OFFICER (CO)

Is a member of the Integrated Project Team. [DOE O 413.3]

Develops and concurs in Acquisition Strategies. [DOE O 413.3]

*Provides approval of the project control system, changes to the system and flow down to subcontracts. [DOE O 413.3]

*Based on input from the Federal Project Director:
1. When DOE O 413.3 and/or EVMS are required, ensure that the proper terms and conditions requiring DOE O 413.3 and EVMS are included in the solicitation/contract,
2. After award, ensure compliance with the requirements of the contract including DOE O 413.3 and EVMS (compliant with the ANSI/EIA Standard 748A) to the extent requirement.
[DOE O 413.3]

*Monitors project performance in coordination with members of the Integrated Project Team. [DOE O 413.3]

*Maintains communications with contractor on matters of contract compliance. [FAR 1.602-2]

Takes appropriate and timely remedial action(s) when contractor performance deficiencies, delinquencies or failures are identified. Actions may include the issuance of cure or show cause notices and/or full or partial terminations notices consistent with the terms and conditions of the contract and FAR Part 49.

OFFICE OF THE CHIEF INFORMATION OFFICER
Establishes and maintains Department-wide guidance for Information Technology investment management projects, including Information Technology hardware, software and application and capital assets. [DOE M 413.3-1]

*See Page 1-11.

Develops supporting policy, requirements, and guidance for Information Technology investments and projects. [DOE M 413.3-1]

Provide Information Technology investment management process assistance to Program Office, field elements, and contractor locations, as requested. [DOE M 413.3-1]

Regularly collects process performance measurement information, and prepares a summary report on the status and performance of Information Technology investment management processes. [DOE M 413.3-1]

OFFICE OF ENGINEERING AND CONSTRUCTION MANAGEMENT WITHIN THE OFFICE OF MANAGEMENT, BUDGET AND EVALUATION

Serves as DOE's principal point of contact relating to project management. [DOE M 413.3-1]

Develops policy, requirements, and guidance for the acquisition of capital assets. [DOE M 413.3-1]

Assists in the planning, programming, budgeting and execution process for the acquisition of capital assets in coordination with Program Secretarial Offices and project management support offices. [DOE M 413.3-1]

Supports the Office of the Secretary, the SAE, the NSA Administrator and the Program Assistant Secretarial Office in the Critical Decision process and oversight of the acquisition management process. [DOE M 413.3-1]

Serves as Secretariat for the Energy Systems Acquisition Advisory Board functions. [DOE M 413.3-1]

Serves as an acquisition advisory board member for non-Major System projects over $20 million. [DOE M 413.3-1]

Manages the Project Manager Career Development Program. [DOE M 413.3-1]

Manages the Earned Value Management System certification process. [DOE M 413.3-1]

Provides an independent assessment and analysis of project planning, execution and performance. [DOE M 413.3-1]

Reviews acquisition strategies for all capital asset projects. [DOE M 413.3-1]

Coordinates review of Mission Need Statement with OMBE Office of Program Analysis and Evaluation. [DOE M 413.3-1]

Maintains a corporate project reporting capability. [DOE M 413.3-1]

Establishes, maintains and executes a corporate independent review capability. [DOE M 413.3-1]

Validates the Performance Baseline for all capital asset projects to permit inclusion in the budget. [DOE M 413.3-1]

INTEGRATED PROJECT TEAM

Supports the Project Director. [DOE M 413.3-1]

Develops a project contracting strategy. [DOE M 413.3-1]

Ensures all project interfaces are identified, completely defined, and managed to completion. [DOE M 413.3-1]

Identifies and defines appropriate and adequate project technical scope, schedule, and cost parameters. [DOE M 413.3-1]

Performs monthly reviews and assessments of project performance and status against established performance parameters, baselines, milestones, and deliverables. [DOE M 413.3-1]

Plans and participates in project reviews, audits, and appraisals, as necessary. [DOE M 413.3-1]

Reviews all Critical Decision packages for completeness and recommends approval/disapproval. [DOE M 413.3-1]

Reviews and comments on project deliverables (e.g., drawings, specifications, procurement, and construction packages). [DOE M 413.3-1]

Reviews change request (as appropriate) and supports change control boards as requested. [DOE M 413.3-1]

Plans and participates in operational readiness reviews. [DOE M 413.3-1]

Supports the preparation, review, and approval of project completion and closeout documentation. [DOE M 413.3-1]

FEDERAL PROJECT DIRECTOR

Federal official responsible and accountable for overall success of the project. [DOE M 413.3-1]

Charters and leads the Integrated Project Team. [DOE M 413.3-1]

Tailors DOE project management requirements to the project. [DOE M 413.3-1]

Ensures timely completion and quality of required project documentation. [DOE M 413.3-1]

Assesses contractor project performance versus contract requirements. [DOE M 413.3-1]

Ensures quality and timely completion of project documentation and other deliverables. [DOE M 413.3-1]

Proactively identifies and ensures timely resolution of critical issues within Federal control that impact project performance – strives to remove any barriers to project success. [DOE M 413.3-1]

Integrates and manages the timely delivery of Government reviews, approvals, property, services, and information. [DOE M 413.3-1]

Assesses and reports project performance to DOE management. [DOE M 413.3-1]

Monitors contractor's risk management efforts. [DOE M 413.3-1]

Manages DOE project contingency funds. [DOE M 413.3-1]

CONTRACTOR PROJECT MANAGER

Contractor official responsible and accountable for successful execution of contractor's project scope of work. [DOE M 413.3-1]

Key member of the IPT. [DOE M 413.3-1]

Chairs the contractor's IPT. [DOE M 413.3-1]

Supports Federal Projector Director in implementing DOE project management process. [DOE M 413.3-1]

Provides input on project documents and develops and maintains contractor project documentation. [DOE M 413.3-1]

Defines the contractor project organization. [DOE M 413.3-1]

Manages the day-to-day project execution activities. [DOE M 413.3-1]

Implements contractor performance measurement system. [DOE M 413.3-1]

Delivers project deliverables as defined in the contract on time and within budget. [DOE M 413.3-1]

Proactively identifies and ensures timely resolution of critical issues within contractor's control which impact project. [DOE M 413.3-1]

WHERE CAN I GO FOR MORE DETAILED INFORMATION ON PROJECT MANAGEMENT?

1. DOE O 413.3 "Program and Project Management for the Acquisition of Capital Assets"
2. DOE M 413.3-1 "Project Management for the Acquisition of Capital Assets"
3. DOE P 413.1 "Program and Project Management for the Planning, Programming, Budgeting and Acquisition of Capital Assets"
4. DOE O 361.1 "Acquisition Career Development Program, Attachment 4 Project Management Career Development Program Module"
5. OMB Circular -11, Part 7 "Planning, Budgeting, Acquisition and Management of Capital Assets"
6. Office of Engineering and Construction management Community of Practices Website: http://oecm.energy.gov
7. Construction Industry Institute (DOE is a member of CII). For login and password to access CII products and publications contact Rajeev Railian, OECM 202-586-3620, Rajeev.railian@hq.doe.gov) http://www.construction-institute.org
8. Project Management Institute http://www.pmi.org
9. DOE Acquisition Guide, Chapter 70.7, "Contract Administration," (Reference Book for Contract Administrators, Chapter 42.5, "Contract Management Planning")

CHAPTER REVISIONS

Date	Subject of Revision
November 10, 2004.	1. Revised chapter to include an update on project management and earned value management systems.

DO YOU HAVE ANY COMMENTS OR SUGGESTIONS FOR IMPROVING THIS CHAPTER OR THE BOOK? IF SO, PLEASE CONTACT US AT:

editor@pr.doe.gov

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-10

DATE: December 8, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letter 2005-05, Proper Use of Non-DOE Procurement Instruments**

SUMMARY: This Policy Flash forwards the subject acquisition letter which provides guidance to Contracting Officers on the proper use of non-DOE acquisition instruments,

including Economy Act transactions and other Interagency Agreements, Government-wide Area Contracts, Federal Supply Schedules and Franchise Fund Organizations.

If there are any questions regarding this subject, please contact Jacqueline Kniskern at (202) 287-1342.

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment

Department of Energy
Acquisition Regulation

No. 2005-05
Date 12/08/04

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: **Use of Non-DOE Procurement Instruments**

References:

FAR Part 7	Acquisition Planning
FAR Part 8	Required Sources of Supplies and Services
FAR Part 10	Market Research
FAR 17.2	Options
FAR 17.5	Interagency Acquisitions Under the Economy Act
FAR 37.1	Support Service Contracts
FAR Part 38	Federal Supply Schedule Contracting
Guide Chapter 7.1	Acquisition Planning
Guide Chapter 17.1	Interagency Agreements
Guide Chapter 38.1	Task Order Contracting
	Strategic Acquisition Transaction Guide
Guide Chapter 71.1	Headquarters Review of Contract and Financial Assistance Actions

Effective date of the Acquisition Letter (AL)

This AL is effective 10 business days from the date of issuance.

AL Expiration

This AL remains in effect until superseded or canceled.

Contact for More Information

Contact Jacqueline Kniskern of the Department of Energy (DOE) Office of Procurement and Assistance Policy at (202) 287-1342, or at jacqueline.kniskern@hq.doe.gov.

Purpose of the AL

The purpose of this AL is to provide guidance on the use of external or non-DOE procurement instruments including the following: Economy Act transactions/Interagency Agreements (IAA) supported by servicing agency contracts, Government-Wide Acquisition Contracts (GWACs),

Federal Supply Schedules (FSS) awarded by the General Services Administration (GSA), and contracts or orders awarded through Franchise Fund organizations. This AL applies to all DOE elements, including the National Nuclear Security Administration. For the purpose of this AL, "DOE" refers to both DOE and/or NNSA, as applicable.

Background

Recent events involving the misuse of one Federal Government agency's contract by another Federal Government agency has created a need to re-emphasize the proper use of other agencies' procurement instruments by the DOE. The DOE and NNSA Senior Procurement Executives sent memorandums to DOE Procurement Directors and the NNSA Service Center Office of Business Services, respectively, reminding contracting professionals to practice due diligence in using other agencies' contracts (See Policy Flash 2004-23 and NNSA Memorandum dated September 27, 2004). On November 1, 2004, this DOE Policy Flash was forwarded to the Heads of all DOE Program Offices with a specific request for their cooperation, as well as, requesting their assistance and inviting them to participate in upcoming training.

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Guidance Included in this Acquisition Letter

1. General Areas of Guidance
- **A. Acquisition Planning**
- **B. Administration**

2. Guidance on Specific Non-DOE Procurement Instruments
- **A. Economy Act and Funds-Out Interagency Agreements**
- **B. Government-Wide Acquisition Contracts**
- **C. Federal Supply Schedules**
- **D. Franchise Fund Organizations**

Guidance Included in this Acquisition Letter

1. General Areas of Guidance

A. Acquisition Planning

The use of non-DOE acquisition instruments is an additional consideration in and not a substitute for acquisition planning. The Contracting Officer must work with the requiring program officials during acquisition planning to obtain supplies or services in a manner which best meets their needs. Factors to be considered in selection of instrument type during planning include:

- Customer Requirements
- Schedule
- Cost (which should include any applicable fee or service charge for use of another agency's contract)
- Scope of Work
- Oversight/Monitoring/Reporting requirements
- Unique terms, conditions or requirements needed to comply with any DOE-specific statutes, regulations, directives and other requirements
- DOE policies on small business, performance-based contracting and competition
- DOE funding restrictions

Another agency's contract shall not be used to circumvent DOE requirements.

B. Contract Administration

When another agency's contract is used to support a DOE requirement, the DOE Contracting Officer, in conjunction with the requiring program official and the servicing agency, should determine the nature and level of contract administration support to be provided by DOE and/or the servicing agency.

DOE Contracting Officers should monitor tasks provided to the servicing agency to ensure that they are consistent with the scope of the agreement with the other agency and/or the terms of the servicing agency contract.

Areas of consideration include:

- Designation of DOE Contracting Officer Representative (COR)
- Servicing agency Contracting Officer responsibilities, including quality assurance plan
- Verification of services proposed
- Verification of receipt of deliverables

Due diligence is required by DOE Contracting Officers and their designated representative(s) during the period of performance to ensure that the contractor, as well as

the servicing agency, continues to comply with all applicable regulations, policies and practices. Review of contractor required deliverables and invoices should include items such as ensuring that services provided remain within the scope of work and that labor is provided by appropriate, and if applicable, approved labor categories.

DOE Contracting Officers should undertake the same review process when exercising options or extending a period of performance as they perform during the pre-award phase. They must ensure than an extension or option to an instrument is in the best interest of the Government before proceeding with the extension or option. They must also document this rationale in the determination and findings for the option exercise, as required by FAR 17.207, or in a memorandum to the file for an extension.

2. Guidance on Specific Acquisition Instruments

A. Economy Act and Other Funds-Out Interagency Agreements

The Economy Act (31 U.S.C. 1535), as implemented by FAR 17.5, authorizes agencies under certain circumstances and in accordance with certain requirements to enter into mutual agreements to obtain supplies or services by interagency acquisition. The Economy Act applies when more specific statutory authority does not exist to enter into an interagency acquisition (FAR 17.500). For example, it does not apply to acquisitions from required or optional sources of supply prescribed in FAR Part 8. It also does not apply to acquisitions using GWACs. An Economy Act transaction shall not be used to circumvent: (1) Federal or DOE regulations, (2) limitations on the use of appropriated funds; (3) requirements of FAR 7.3, Contractor Versus Government Performance; or (4) any other agency's authority or responsibility.

To ensure that Interagency Agreements (IAAs) issued under the authority of the Economy Act are proper all IAAs shall be signed by a cognizant DOE Contracting Officer. In addition, Contracting Officers are instructed to undertake the following actions when DOE is the requiring agency:

1) If the IAA uses an existing servicing agency contract(s), the initiating DOE program official shall include a copy of the contract's statement of work and other applicable contractual documents with the Procurement Request. If the documents are not included, the DOE Contracting Officer should ensure they are obtained. The DOE Contracting Officer shall review the statement of work and other documents to determine that the supplies or services requested under the IAA are within the scope of the servicing agency's contract and confirm this determination with the servicing agency's Contracting Officer. The DOE Contracting Officer shall document this review in the written Determination and Findings discussed below. To the maximum extent practicable, the DOE Contracting Officer shall also ensure that use of the servicing agency's contract does not circumvent DOE policies with respect to competition, small business and performance-based acquisition.

2) If the servicing agency will be awarding a contract or awarding a task or delivery order under an existing contract to meet the IAA requirements, the DOE Contracting Officer shall include any special terms and conditions in the IAA to ensure that applicable DOE policies and procedures are not circumvented.

3) Prepare and sign a written Determination and Findings that:

a) sets forth, with supporting documentation, the prerequisites found at FAR 17.503;
b) states conformance to all DOE regulations, policies and procedures.
c) states that the supplies or services obtained are within the authority of the servicing agency;
d) states that any services to be contractually provided by the servicing agency are within the scope of the IAA statement of work and that any follow-on tasks will be reviewed by the DOE Contracting Officer to ensure that they are also within the scope of the IAA statement of work;
e) states that any services to be contractually provided by the servicing agency have been determined to be within the scope of the servicing agency's contract statement of work by both the DOE and the servicing agency's cognizant Contracting Officer;
f) includes detailed information on the supplies or services that are to be provided, performance/delivery schedules and the responsibilities of the servicing agency to ensure compliance with all contractual requirements;
g) describes any DOE special or unique terms, conditions or requirements to be incorporated into the IAA and/or servicing agency contract/order;
h) states it is in the best interest of DOE for satisfying customer requirements, schedule, cost and administrative requirements; and
i) complies with the requirements of FAR 7.3.

4) Unless the cognizant DOE Contracting Officer determines it appropriate to perform the functions directly, a DOE Contracting Officer's Representative (COR) shall be designated by the cognizant DOE Contracting Officer for each IAA to monitor the agreement and any DOE requirements to be fulfilled contractually by the servicing agency. The COR, in coordination with the DOE Contracting Officer, shall also provide such information as the servicing agency may require to support the administration of their contract or order.

5) Submit IAAs with supporting file documentation to the Office of Contract Management (ME-62) for DOE, and Office of Acquisition and Supply Management (NA-63) for NNSA, when the dollar value of the IAA is over the approval threshold of the Head of Contracting Activity.

B. Government-Wide Acquisition Contracts (GWACs)

A GWAC is a multiple award contract issued by one agency that may be used by other agencies to procure information technology products and services. Each GWAC is operated by an executive agent designated by the Office of Management and Budget

(OMB) pursuant to section 5112(e) of the Clinger-Cohen Act. OMB has designated four agencies as executive agents for GWACs: GSA, National Institutes of Health, National Aeronautics and Space Administration, and Department of Commerce. A list of GWACs is included in the Strategic Acquisition Transactions Guide.

GWACs are valuable tools for the acquisition of information technology supplies and services, but the DOE Contracting Officer must ensure that: (1) the GWAC is not used to circumvent applicable DOE policies or regulations; (2) the ordering agency properly administers all contract terms and conditions and adheres to Federal acquisition regulations and policy; (3) DOE requirements are within the scope of the master GWAC contract; and (4) subsequent task orders are under the scope of the contract.

To ensure that GWACs are used properly, DOE Contracting Officers shall undertake the following actions:

1) Obtain a copy of the statement of work and other applicable contractual documents and validate that the services requested are within the scope of that GWAC. Document in a memo to the file this review of the statement of work for the file.

2) Place only orders that comply with all DOE regulations, policies and procedures. The Contracting Officer must pay particular attention to complying with performance-based and small business policies, and the procedures prescribed in the GWAC for providing a fair opportunity to all GWAC contractors.

3) Document that the order is in the best interest of DOE for satisfying customer requirements, schedule, cost and administrative requirements.

4) Designate a DOE COR if the servicing agency is no acting as the COR.

C. Federal Supply Schedules (FSS)

The General Services Administration (GSA) has statutory authority to enter into contracts for government-wide use. The primary statutory authority for the FSS program is derived from both Title III of the Administrative Services Act of 1949 (41 U.S.C. 251, et seq.) and Title 40 U.S.C., Public Buildings, Property and Works. The FSS contracts, also known as Multiple Award Schedules, are awarded by GSA for acquisition of supplies or services by all Federal Government agencies. Each schedule in FSS has specific supplies or specialized services that can be obtained by the ordering agency. **All task or delivery orders issued under FSS shall be signed by the cognizant DOE Contracting Officer.**

When placing orders against the FSS, DOE Contracting Officers must comply with the procedures in FAR Part 8. GSA has additional instructions and information for use of the schedules at www.gsa.gov. Contracting Officers may only place orders against the FSS for supplies or services listed on the vendor's schedule contract. The Contracting Officer

shall not include services outside the scope of the Schedule contract in the order. If new labor rates are required for the task order, they must be negotiated and incorporated into the schedule contract by GSA before they can be included in the order.

To ensure that FSS are used properly, DOE Contracting Officers shall:

1) Ensure that use of FSS is not being used to circumvent DOE policy or regulation.

2) Review the schedule contract's statement of work and other applicable contractual documents and validate that the supplies/services requested are within the scope of that schedule. Document the review of the statement of work in a memorandum for the file.

3) Review follow-on task orders to ensure that they remain within the scope of the contract.

4) Comply with the specific requirements of the FSS, including those for competitive tasking, consistency with the scope of work, and use of the instruments for a specific, not overly broad or undefined, purpose.

5) Seek and document advice from the cognizant GSA Contracting Officer on proper us of the FSS whenever an issue is in doubt.

D. Franchise Fund Organizations

The Government Management Reform Act of 1994 authorized the Office of Management and Budget to designate franchise fund pilots. A franchise pilot is a self-supporting business-like entity that provides common administrative services on a fully reimbursable basis to other Federal agencies. These services include procurement support services.

DOE's past experience with the use of franchise fund organizations to support the acquisition of its requirements has not been positive. **Accordingly, no franchise fund organization shall be used to obtain acquisition management services unless approved by the cognizant Head of Contracting Activity with notice to the Senior Procurement Executive.** As in the case of other non-DOE procurement instruments previously discussed, franchise fund organizations may not be used to circumvent DOE policies or regulations. All services to be provided by a franchise fund organization must be obtained through an interagency agreement that follows the requirements described in paragraph 2A above under Economy Act and Funds-Out Interagency Agreements.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-11

DATE: December 8, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Purchase Card Policy and Procedures**
--Merchant Category Codes
--Convenience Checks
--Section 508 of the Rehabilitation Act

SUMMARY: This Policy Flash advises you of four changes being made in Chapter 13 of the Department of Energy (DOE) Acquisition Guide entitled Policy and Procedures for Use of the General Services Administration (GSA) SmartPay Purchase Card. The first change is in the title of our document. We have changed "Guidelines and Procedures" to "Policy and Procedures" to reflect the more mandatory nature

of the guidance contained in the procedures. The second concerns a general prohibition on purchases from certain merchants through an automated block on merchants identified by their Bank assigned Merchant Category Codes. This will prevent the use of the card in certain types of businesses. The third change concerns the use of convenience checks. Convenience checks are not to be issued in amounts greater than $2,500. The fourth change makes cardholders aware of their responsibilities under Section 508 of the Rehabilitation Act when they use the card to acquire electronic and information technology.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

November 2004 Update

Contracting activities and authorized contractor SMARTPAY participants may revise the content to reflect their specific circumstances, e.g., identify your local coordinator, identify your central receiving office, etc. Revisions may not delete prohibitions or reduce the level of controls required by the GSA Purchase Card Guide or these DOE Guidelines. The GSA Master Contract and the Contract Guide, listed as Attachment 1, are available on the GSA Home Page at

http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=11989&noc=T

DEPARTMENT OF ENERGY

POLICY AND OPERATING PROCEDURES FOR USE OF THE GSA SMARTPAY PURCHASE CARD BY DOE AND AUTHORIZED CONTRACTOR PERSONNEL

ISSUED BY THE DIRECTOR
OFFICE OF PROCUREMENT AND ASSISTANCE MANAGEMENT

November 2004 REVISION

DEPARTMENT OF ENERGY

**POLICY AND OPERATING PROCEDURES
FOR USE OF THE
GSA SMARTPAY PURCHASE CARD
BY DOE AND AUTHORIZED CONTRACTOR EMPLOYEES**

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1. GOVERNMENT-WIDE COMMERCIAL CREDIT CARD SERVICE CONTRACT GUIDE GS-23-98004

FAR REFERENCES

2. FAR SUBPART 3.104, PROCUREMENT INTEGRITY

3. FAR SUBPART 8.4, FEDERAL SUPPLY SCHEDULES; FAR SUBPART 8.6, ACQUISITION FROM FEDERAL PRISON INDUSTRIES; AND FAR SUBPART 8.7, ACQUISITION FROM NONPROFIT AGENCIES EMPLOYING PEOPLE WHO ARE BLIND OR SEVERLY DISABLED

4. FAR PART 12, ACQUISITION OF COMMERCIAL ITEMS

5. FAR PART 13, SIMPLIFIED ACQUISITION PROCEDURES

6. FAR PART 23, ENVIRONMENTAL CONSIDERATIONS

PURCHASE CARD FORMS AND THE SELF ASSESSMENT QUESTIONNAIRE ARE AT THE DOE PROCUREMENT HOME PAGE AT CHAPTER 13 OF THE DOE ACQUISITION GUIDE

7. **DISPUTE (STATEMENT OF QUESTIONED ITEM) FORM**

8. **DOE PURCHASE CARD DESTRUCT NOTICE FORM**

9. **PURCHASE CARD TELEPHONE QUOTATION WORKSHEET**

10. **PURCHASE CARD TELEPHONE ORDER LOG**

11. **U.S. TAX EXEMPT CERTIFICATE**

12. **SELF ASSESSMENT QUESTIONNAIRE**

13. **APPLICATION/RECORD FORM PURCHASE CARDHOLDER**

DEPARTMENT OF ENERGY GUIDELINES FOR THE USE OF THE GOVERNMENT SMARTPAY PURCHASE CARD

1. PURPOSE

The purpose of this document is to establish DOE policy for the use of the Government purchase card. These procedures supplement and implement procedural aspects of the "U.S. General Services Administration Federal Supply Service Government-wide Commercial Credit Card Service, Contract Guide GS-23F-98004". In the event of any inconsistencies between these Guidelines and the terms and conditions of the Contract Guide or Federal Acquisition Regulation (FAR) Parts 3, 8, 13 and 23, the inconsistency will be resolved in favor of (1) the FAR, (2) the terms and conditions of the Contract Guide, and (3) these procedures.

Commercial purchase card services provide DOE with a means to simplify its small purchase procedures and improve its cash management by:

a. offering an alternative to the use of purchase orders, blanket purchase agreements (BPAs), and imprest funds;
b. streamlining the acquisition process by reducing paperwork, improving lead times, and expediting Contractor payments;
c. reducing the administrative costs associated with small purchases, BPAs, and imprest fund transactions; and
d. providing greater and more detailed statistical data and an audit trail as an aid in managing purchasing activities.

2. DEFINITIONS

The following definitions supplement the definitions contained in the Federal Supply Schedule.

a. DOE Purchase Card is a distinctly designed VISA purchase card issued by the Bank of America under the General Services Administration SMARTPAY Program. The plastic purchase card is embossed with the employee's name and can only be used by the employee. "U. S. Govt Tax Exempt" is also embossed on the card. The card is uniquely designed so that it will not be easily confused with personal credit cards. Unlike most personal credit card programs, the SMARTPAY Program is not a revolving credit program.
b. Cardholder is a DOE, or authorized contractor, employee with purchasing authority who:
   (1) Is issued the DOE Purchase Card;
   (2) Has his or her name embossed on the card;
   (3) Is the sole user of the card; and
   (4) Is the custodian of the card.
c. Approving Official is the individual delegated approving authority by the Head of the Contracting Activity (HCA) or designee who is responsible for reviewing the monthly Statement of Account for each cardholder under his or her cognizance to ensure that purchases are made in accordance with all regulatory and procedural guidance contained or referenced herein.
d. Administrative Office is the office with oversight responsibility for the DOE Purchase Card Program.
e. Contractor is Bank of America.
f. Statement of Account is a monthly listing of all payments authorized for purchases and credits by a cardholder and billed by the merchant during a designated billing period.
g. Consolidated Statement is a monthly statement sent by Bank of America to the Finance Office which shows purchases by and credits issued to all the Card Holders under their purview.
h. Agency Purchase Card Coordinator, or Agency Program Coordinator, is the individual having overall responsibility for the SMARTPAY Program at DOE. Serves as the lead DOE representative in discussions with the Bank at the Agency level.
i. Contracting Activity or Contractor Purchase Card Coordinator, or Contracting Activity Program Coordinator, is responsible for managing the purchase card program at the contracting activity or contractor organization.

j. Limits
   (1) Single Purchase Limit is the maximum dollar limit for an individual purchase card transaction.
   (2) Monthly Spending Limit is the maximum dollar amount authorized to be spent by the cardholder within a 30-day period.

k. 30-Day Cycle is a monthly reporting/billing cycle which begins on the 28th of one month and ends on the 27th of the following month.

l. Certificate of Appointment (SF-1402) is a formal written Contracting Officer warrant that is issued by the HCA to a cardholder, stating any limitations on the scope of authority to be exercised. The SF-1402 shall be used to evidence the contracting officer appointment for delegation of purchase cardholders exceeding micro-purchase authority.

m. Delegation of Authority is a formal written delegation of DOE Purchase Card purchasing authority that is issued by the HCA or designee, to a cardholder with single purchase limit authority up to $2,500. This purchasing authority is not evidenced by a Certificate of Appointment. This delegation specifies the dollar limitations and any other conditions applicable to DOE Purchase Card purchases made by that individual.

n. Oral Purchase Procedure, as used herein, is a procedure where an order is placed or a purchase is made through an oral agreement which is made in person or by telephone by the cardholder. No written purchase order or contract is issued by the Government. The supplies or services are provided by the merchant and payment is made using the DOE Purchase Card.

o. Head of the Contracting Activity (HCA), means the official in charge of the purchasing function for a contracting activity.

3. RESPONSIBILITIES

a. The Head of the Contracting Activity or designee, will:
   (1) Designate an individual to serve as the contracting activity purchase card coordinator.
   (2) Determine who the approving officials and cardholders will be and ensure that purchasing authority is delegated to cardholders and approving officials are designated.
   (3) Establish a single purchase limit as part of the Delegation of Purchasing Authority or Certificate of Appointment (SF-1402) for each cardholder.
   (4) Establish a monthly spending limit by the Certificate of Appointment or Delegation of Purchasing Authority for each cardholder.
   (5) Establish the monthly office limit consistent with budget restrictions.
   (6) Establish and maintain written local procedures for use of the DOE Purchase Card consistent with the procurement regulations, the GSA Contract Guide terms and conditions, and this document. This will include the establishment of procedures to ensure the physical security and proper use of the DOE Purchase Card Program and the conduct of an annual review addressing at least the considerations in the Self Assessment Questionnaire at Attachment 12.
   (7) Ensure that training on the DOE Purchase Card Program and related responsibilities are developed and provided to approving officials, cardholders, and other appropriate personnel. The training should address acquiring the minimum needs of the Government. Conduct refresher training based upon these procedures, lessons learned over time, and feedback from annual reviews. The refresher training should be provided to cardholders and approving officials at least every two years.

(8) Authorize no more than one purchase card to an individual cardholder unless the Head of the Contracting Activity or designee determines that a card holder has a need for more than one card.
(9) Ensure that personnel procedures include return of the card in the departing employees checklist. The procedures should ensure that the card is returned to the Contracting Activity Purchase Card Coordinator who will deactivate the cardholder account.
(10) Ensure that departing employees leave their log and records with the approving official or another designated employee for appropriate retention.
(11) Consider suspending or terminating cardholder accounts if the cardholder does not submit monthly account reconciliations in a timely manner.
(12) Authorize purchase cards to the minimum extent necessary to carry out the contracting activities mission.
(13) Authorize cards only for employees of the contracting activity or contractor organization.
(14) Counsel and, if necessary, replace Approving Officials, who do not submit monthly account reconciliations in a timely manner.

(b) Contracting Activity/Contractor: Purchase Card Coordinators will:
(1) Review and coordinate the approval of Delegations of Purchasing Authority or Certificates of Appointments.
(2) Process applications for new cardholders through Bank of America.
(3) Arrange for or provide training, including biennial refresher training, for cardholders and approving officials as needed.
(4) Maintain and process changes for cardholders.
(5) Maintain records of cardholder training and purchase limits.
(6) Handle problems or issues related to the purchase card program with the cardholders and/or Bank of America.
(7) Arrange for or conduct reviews and assessments of cardholders' purchases to ensure compliance with the regulations, policies, and agency procedures.
(8) Refer cardholders to the Head of the Contracting activity or designee for suspension or termination if monthly account reconciliations are not submitted in a timely manner.
(9) Maintain an up-to-date inventory of purchase cardholders.
(10) Deactivate purchase card accounts of past employees.
(11) Refer Approving Officials to the Head of the Contracting Activity or designee if monthly account reconciliations are not submitted in a timely manner.

(c) Cardholders will:
(1) Certify that the quantity and quality of the items/services furnished are in accordance with the agreement (verbal or written) with the vendor.
(2) Ensure that funds are reserved prior to the items being purchased.
(3) Comply with the requirements of FAR Part 8 entitled, Required Sources of Supplies and Services, and Part 13 entitled, Simplified Acquisition Procedures, when making purchases using the DOE Purchase Card as well as these procedures.
(4) Maintain physical custody of the DOE Purchase Card at all times. The cardholder must not allow anyone to use the purchase card or account number. A violation of this trust may require that the card be withdrawn from the cardholder with the possibility of subsequent disciplinary action. The cardholder will take care to separate the Government card from personal cards in order to prevent its accidental use for personal transactions.
(5) Not "split" purchases in order to fall within the single purchase limit. If a purchase would exceed a cardholder's single purchase limit, the purchase must be accomplished using other acquisition procedures, as appropriate. These purchases will be accomplished by the local purchasing staff.
(6 Make purchases only in accordance with the requirements of these Guidelines and its references.
(7) Save all customer receipts.
(8) Review, complete and sign Statement of Account.
(9) Submit completed Statement of Account and customer receipts to approving official.
(10) Comply with monetary and activity limits.
(11) Immediately report lost or stolen cards to Bank of America, to the approving official, and to the local Purchase Card Coordinator.

(12) Inform the merchant that the purchase is tax exempt, to prevent being charged with taxes.
(13) Perform follow-up on purchases to ensure items are received prior to signing Statement of Account.
(14) Ensure compliance with property requirements.
(15) Ensure that supplies and services that are purchased with the card are consistent with appropriation guidelines.
(16) Complete training prescribed at section 32.
(17) Federal cardholders will complete Annual Financial Disclosure Report (OGE-450) or Executive Branch Public Financial Disclosure Report (SF-278) and complete the annual online Ethics Training.

(d) Approving Officials will:
(1) Nominate employees to serve as cardholders by submitting a form such as that illustrated at Attachment 13.
(2) Ensure that each cardholder has access to the Policy and Operating Procedures and understands the requirements for use of the DOE Purchase Card.
(3) Review and approve, in a timely manner, DOE Purchase Card purchases, except those having prior authorizations.
(4) Review and approve, in a timely manner, cardholders' monthly Statements of Account ensuring that the statements have supporting documentation and are complete, accurate, and reflect only authorized purchases.
(5) Promptly sign and forward all cardholders' Statements of Account and all supporting documentation to the Finance Office so that the statements are received by the Finance Office not later than the date required by the Finance Office.
(6) Complete the training prescribed at section 33.

(e) Finance Offices will:
(1) Review and reconcile all Statements of Account to the invoice submitted from the Contractor.
(2) Ensure that payments to the Contractor are made in accordance with the Prompt Payment Act and the provisions of Office of Management and Budget (OMB) Circular A-125.
(3) Distribute DOE Purchase Card charges and credits to the appropriate accounts.
(4) Assure all payments meet the requirements of applicable law and regulations, including determining the availability of appropriations as to purpose for items purchased.
(5) Establish procedures for receiving and verifying the amount of rebates received from Bank of America and depositing rebate checks received from Bank of America.
(6) Notify purchase card program coordinator of any problems with individual cardholder accounts.
(7) Ensure that:
(a) proper approvals are present on all statements before charging program office accounts;
(b) instances in which cardholders statements are not received in a timely manner are referred to the Contracting Activity Program Coordinator; and,
(c) program accounts are only charged in accordance with the funding direction provided on approved cardholder statements.

4. PROGRAM FEATURES

a. The DOE Purchase Card is a VISA commercial purchase card that has a unique numbering system which identifies the Agency/Bureau, subunit, single purchase limit, and the cardholder number. The DOE Purchase Card is not to be used by anyone other than the employee whose name appears on it and shall not be used for personal purchases.
b. Bank of America will be paid the actual cost of transactions for which the DOE Purchase Card was used.
c. Purchases that have been made using the DOE Purchase Card will be paid in accordance with the Prompt Payment Act and OMB Circular A-125.
d. Bank of America provides program services support, full reporting, purchase authorization, customer service, and account setup services.
e. Purchases can be returned within 120 days following purchase to the merchant for credit.
f. Purchases are tax exempt in those states which honor the tax exempt status of the U.S. Government.

g. DOE Purchase Cards are mailed to the cardholders' offices. Bank of America will have no record of the cardholder's home address, personal credit history, or social security number.

5. **PURCHASING AUTHORITY**

Each cardholder must have purchasing authority evidenced by either a Delegation of Authority or a Contracting Officer's Certificate of Appointment. This authority allows the cardholders to use the DOE Purchase Card to purchase goods and services within established single purchase and monthly spending limits. The single purchase dollar limitation delegated to the purchase card holder shall accurately reflect the dollar levels of purchases that the cardholder will be making as part of their official duties.

6. **CONDITIONS FOR USING THE DOE PURCHASE CARD**

The DOE Purchase Card will be used for purchases that meet the dollar and activity limits authorized on the DOE Purchase Card. Purchases accomplished using the DOE Purchase Card must meet the following conditions:

(a) The total of a single purchase may comprise multiple items and cannot exceed the authorized single purchase limit stated in the delegation of authority or the notice of limitations and conditions.
(b) All purchases accomplished using the DOE Purchase Card will be in accordance with Part 8, "Required Sources of Supplies and Services" and Part 13, "Simplified Acquisition Procedures" of the Federal Acquisition Regulation (FAR) and the Guidelines and Operating Procedures attached to each Delegation of Purchasing Authority or furnished in conjunction with the Certificate of Appointment.
(c) The supplies or services must be available and received prior to the end of the billing period wherever practicable. Items or services not received prior to the end of the billing cycle may not be approved for payment by the cardholder and approving official on the monthly Statement of Account.

7. **PERSONAL PROPERTY MANAGEMENT AND ACCOUNTABILITY**

(a) **Personal Property Management**

(1) DOE maintains a personal property management program to maintain adequate inventory controls and accountability systems for all property under its control. A critical element of the personal property management program involves the acquisition and receipt of needed items and the recording of the transaction on the formal accountable records of the Department. The acquisition of personal property can be accomplished by a number of methods, including credit card purchases.
(2) In all acquisitions of personal property, after receiving the item, the physical property must be issued for use or placed into service and the documentation of receipt must be forwarded to the property management office. Generally, this responsibility lies with other than the end user of the property. However, when the end user has acquired the personal property with a credit card and the property is delivered directly to the cardholder, the cardholder becomes accountable for the property and assumes responsibility for ensuring that the property items are recorded in the property management system.

(b) **Property Accountability**

(1) Purchases Shipped or Delivered by the Vendor. All personal property acquired by using the purchase card should generally be delivered to and *processed by the receiving office.* This will ensure *inventory control identification,* as *appropriate* and *recording in the personal property management records.*
(2) Purchases Hand Carried by the Cardholder. Personal property purchased and hand carried by the cardholder or delivered directly to the cardholder requires inventory control identification and recording in the personal property management records, as appropriate. As soon as practicable following the purchase of the personal property, the cardholder will advise the property management office in writing (i.e., via E-mail or facsimile) requesting that the equipment/property be identified and recorded, as appropriate. Written confirmation should include the following information:

(a) Cardholder name, office symbol, telephone number, building and room number;
(b) Brief description of the personal property;
(c) Model No. and Serial No. of the personal property; and
(d) Receipt verification witness name, office symbol, telephone number, building and room number.

8. **PROHIBITIONS AND RESTRICTIONS**

(a) DOE Purchase Card purchases are subject to the following restrictions and prohibitions: The following are prohibited uses of the DOE Purchase Card:
   (a) Cash advances;
   (b) Rental or lease of land or buildings;
   (c) Purchase of ADP software requiring a negotiated license agreement between DOE and the contractor (excludes "shrink wrap" license affixed to commercially available software);
   (d) Reserved.
   (e) Purchases of food, beverages and entertainment except under very limited circumstances generally associated with away from work place training; and
   (f) The DOE Purchase Card will not be used in lieu of the Government authorized travel charge card.

(b) Generally, the following items are centrally managed and procured. Check for local guidance before using the purchase card to obtain the following.

   (a) Messenger services and package delivery services;
   (b) Office supplies and paper;
   (c) Lease or purchase of Government vehicles;
   (d) Building alterations;
   (e) Office moves;
   (f) Carpet installation and repair;
   (g) Shuttle bus service;
   (h) Printing jobs;
   (i) Photocopier equipment;
   (j) Books, publications, subscriptions, etc.

(c) The Bank groups vendors within merchant categories based on their type of business. Purchases from the following merchant category codes have been blocked. Should a cardholder need to make a valid purchase from a vendor in one of these category codes, their Purchase Card Coordinator will need to clear the purchase with the Bank.

3000 - 3441Airlines & Rental Cars
4111 Commuter Transp, Ferries
4112 Passenger Railways
4119 Ambulance Services
4411 Cruise Lines
4511 Airlines, Air Carriers
4722 Travel Agencies, Tour Oper
4723 TUI Travel - Germany
4761 Transportation Travel
4829 Wires, Money Orders
5309 Duty Free Stores
5681 Fur Stores
5698 Wig and Toupee Stores
5718 Fireplace Accessory Stores
5735 Record Shops
5932 Antique Shops
5933 Pawn Shops
5937 Antique Reproductions
5944 Jewelry Stores
5945 Hobby, Toys and Game shops
5960 Direct Marketing - Insurance
5962 Direct Marketing - Travel
5972 Stamp and Coin Stores
5973 Religious Goods Stores
5977 Cosmetic Stores
5993 Cigar Stores and Stands
5996 Swimming Pools Sales/Serv
6010 Manual Cash Disburse
6011 Automated Cash Disburse
6051 Non FI, Money Order

5814 Fast Food Restaurants
5921 Package Liquor Stores
6760 Savings Bonds
7012 Timeshares
7032 Sporting/Recr Camps
7033 Trailer Parks, Campgrounds
7273 Dating/Escort Services
7276 Tax Preparation Service
7297 Massage Parlors
7832 Motion Picture Theaters
7841 Video Tape Rental Stores
7932 Billiard/Pool Establishments
7933 Bowling Alleys
7941 Sports Clubs/Fields
6211 Security Brokers/Dealers
6300 Insurance Underwriting, Pre
7992 Golf Courses – Public
7993 Video Game Supplies
7994 Video Game Arcades
7995 Betting/Casino Gambling
7996 Amusement Parks/Carnivals
7998 Aquariums
8661 Religious Organizations
8675 Automobile Associations
9223 Bail Bonds Payments
9311 Tax Payments
9700 Automated Referral Serv.

9. **PURCHASES**

Purchases of goods and services should be made based upon a properly approved requisition signed by an authorized employee, independent of the purchase card holder, describing the good or service to be purchased, the delivery requirements, potential sources, and documentation that funds are available for the purchase. In limited circumstances, as provided by the Head of the Contracting Activity or designee, purchases may be authorized without prior review. The goods or services to be purchased shall be those necessary to meet the Government's minimum needs, given cost, schedule, and performance requirements.

Purchases of support services may be made with the purchase card, however, if the nature of the service is subject to the Service Contract Act, refer the matter to the contracting officer. Such purchases should be fixed price or fixed hourly rate with a maximum ceiling. If the support services are purchased on a recurring basis, consideration should be given to consolidation under a contract.

Purchases of construction may be made with the purchase card only if local procedures provide for such use. Purchase card purchases of construction may not exceed $2,000.

If the cardholder purchases goods or services directly from a merchant, the merchant then gives the cardholder a copy of the charge slip and, if applicable, any other customer receipt. The cardholder must ensure that the charge slip contains full documentation of items purchased. The cardholder is required to save the charge slip and any other receipt for forwarding to the cognizant approving official along with the monthly Statement of Account. In addition, if an item is returned to the merchant and a credit is given, the credit slip should also be saved and attached to the Statement of Account which shows the credit.

10. **RESERVED**

11. **RESERVED**

12. **TELEPHONE ORDERING**

Care must be taken to ensure that the items are received prior to the end of the billing cycle. Since the Statement of Account will be issued to the cardholders immediately after the end of each billing cycle, the following instructions will apply:

(1) Telephone ordering should allow enough time for purchases to be delivered within the same cycle;
(2) Subscriptions may be telephonically ordered and payment authorized even though the subscription has not been received by the end of the billing cycle;

(3) Merchants must agree to not charge the DOE Purchase Card account number until the shipment is made;

(4) Cardholders must instruct the merchant to include the following information on the shipping document or packing slip:

- X Cardholder name;
- X Cardholder telephone number;
- X Building number, room address, street address, city, and state of delivery point.

13. **ORAL PURCHASES (INCLUDING TELEPHONE ORDERS) AND MAIL ORDER PURCHASES**

(1) Oral Purchases and mail order purchases to acquire supplies or services may be accomplished using the DOE Purchase Card provided that (1) the supplies or services can be described in sufficient detail so that the parties have a clear understanding of what is required; (2) the amount of the purchase is $25,000 or less; and (3) a purchase order or contract is not required by either the merchant or DOE. These types of purchases must be documented. Documentation will address such things as extent of competition (see Section 34).

(2) As used in these Guidelines, oral purchasing procedures mean a procedure whereby an order is placed using the purchase card through a verbal agreement which is made in person or via telephone. The cardholder verbally places the order, the vendor supplies the items or services requested by the card holder, and payment is made to the vendor using the purchase card.

(3) When an order is placed via telephone using the purchase card, the cardholder will:

(a) Notify the vendor that the purchase is tax exempt. Should a vendor refuse to acknowledge the tax exempt status of the purchase, the ultimate recourse for the card holder is to inform the vendor that the Government's purchase will be taken elsewhere.

(b) Ensure that the items or services acquired will be received prior to the end of the billing cycle. Items or services not received prior to the end of the billing cycle may not be approved for payment by the cardholder and approving official on the monthly Statement of Account. Therefore, the cardholder should confirm that the vendor agrees not to charge the purchase card until shipment is made so that the receipt of supplies may be certified on the monthly Statement of Account.

(c) Ensure that the price quoted represents the full obligation of the Government for the item or service acquired. Cardholders will ensure that the prices quoted represent the total price to the Government, including shipping charges, packaging, etc., to avoid future billing and payment problems.

(d) Instruct the vendor to include the following information on the shipping document or packing slip, if required. This information will alert the receiving officer and the requisitioner that the supplies have been purchased with the purchase card:

(i) Cardholder's name and routing symbol;

(ii) Building number, room number, street address, city and state of delivery point; and

(iii) Cardholder's telephone number.

(4) The cardholder will execute and maintain appropriate records of each transaction.

14. **RECORD KEEPING**

All cardholders must keep complete and accurate records of their purchases in accordance with Attachments 9 and 10 and the instructions for their use included in Section 18 of these Guidelines. This shall include evidence of receipt of any property or supplies purchased using The Purchase Card. Central filing of such documentation is acceptable. Automated systems are acceptable provided they provide equivalent documentation. Records of departing employees should be maintained by the approving official or another employee for the appropriate retention period.

15. **RESERVATION/OBLIGATION OF FUNDS**

Local procedures shall be established to certify and obligate funds.

16. **CARD ABUSE**

Intentional use of this card for other than Official Government business may be considered as an attempt to commit fraud against the U. S. Government and may result in immediate cancellation of the card and disciplinary action against the cardholder under applicable Departmental or Government-wide administrative procedures. Suspected fraudulent misuse should be reported to the Office of the Inspector General and the Contracting Activity Purchase Card Coordinator. The cardholder will be personally liable to the Government for the amount of any non-approved purchases and possible subjection to a fine of not more than $10,000 or imprisonment for not more than five (5) years or both under 18 U.S.C. 287.

17. **REPORTING**

At the end of the billing cycle, Bank of America will issue detailed statements as follows:

a. Cardholders will receive an individual Statement of Account showing all purchases and credits processed by Bank of America during the billing cycle.
b. The Finance Office will receive a consolidated statement of all purchases and credits applicable to all cardholders.

18. **REVIEW PROCESS**

The manual reconciliation process is currently used by DOE offices. Each monthly statement must be reviewed and approved, in a timely manner, by both the cardholder and an approving official, who is either in the cardholder's supervisory chain of command, or a person independent of the purchase card holder at a level equivalent to a supervisor. An approving official should normally be responsible for no more than five card holders, except with the approval of the HCA or designee. For NNSA contracting activities, an approving official should be responsible for no more than a reasonable number of cardholders consistent with the activities normal span of supervisory control except with the approval of the HCA or designee.

Upon receipt of the statements from Bank of America, the following actions will be performed:

a. Cardholders will:
   (1) Reconcile the Statement of Account with their Bankcard Telephone Ordering Log, copies of charge/credit slips and any other customer receipts, and certify that the supplies and services are in accordance with the orders that were placed.
   (2) Retain any charge/credit slips and customer receipts for purchases not listed on the Statement of Account for the next billing cycle.
   (3) Document statement errors with an explanation using the Bank of America cardholder dispute form and forward a copy to Bank of America.
   (4) Certify the receipt and accuracy of all purchases by signing and dating each page of the Statement of Account.
   (5) Forward the reconciled Statement of Account, charge/credit slips, other customer receipts and, if applicable, the completed dispute form to the approving Official within five working days of receipt of the Statement of Account.
   (6) If Cardholder does not have a customer copy of the charge/credit slip, the cardholder will mark the word "lost" over in the date of purchase column on the Statement of Account and attach an explanation. If the cardholder is planning to be on travel or on leave and will not be available to review the Statement of Account at the time it is received, the cardholder should provide the approving official with the charge/credit slips.
b. Approving Officials will:
   (1) Review the individual cardholder's Statement of Account for accurate reconciliations, supporting documents, authorized purchases, credits, budget and cost classifications, and other related information.

(2) Obtain any other necessary information in a timely manner from the cardholders within their jurisdiction.

(3) Approve by signing and dating the reconciled Statements of Account and forward them to the Finance Office by the 15th day of each month. Return receipts and other supporting documentation to the cardholder for record maintenance unless local procedures provide for Finance Office maintenance of records.

c. Finance Offices will:

(1) Review original cardholder Statements of Account and any dispute forms for accurate reconciliations.

(2) Account for all DOE Purchase Card transactions.

(3) Reconcile Finance Offices consolidated statement with cardholders' Statements of Account.

(4) Reconcile the Contractor's invoice with the consolidated report.

(5) Make payment to Bank of America in accordance with the Prompt Payment Act and OMB Circular A-125.

(6) Forward any dispute forms to Bank of America.

(7) Assure all payments meet the requirements of applicable law and regulations, including determining the availability of appropriations as to purpose for items purchased.

19. BILLING ERRORS AND DISPUTES

a. Dispute Form

If a cardholder receives a statement that lists a transaction for an item or service that has not been received, or represents an unauthorized charge, the cardholder or approving official will complete the cardholder dispute form and forward a copy of the form to Bank of America and the original to the Finance Office with the cardholder's reconciled monthly Statement of Account and supporting documentation. Bank of America will credit the transaction until the dispute is resolved. Bank of America will assist in reconciling the questioned item only if it is evidenced by the dispute form within 60 days from the date of the Statement of Account that first contained the questioned item. However, it is the responsibility of the cardholder to make every effort to resolve errors, discrepancies and disputes.

b. Defective Items

If items purchased with the purchase card are found to be defective, the cardholder has the responsibility to obtain replacement or correction of the item as soon as possible. If the merchant refuses to replace or correct a faulty item, then the purchase of the item will be considered in dispute. Items in dispute are handled in the same manner as billing errors in that disputed items are reported using the dispute form by forwarding a copy to Bank of America and a copy to the Finance Office with the monthly Statement of Account. The 60 day period applies to defective items as well as questioned items.

20. DEPARTURE OF EMPLOYEES

a. Employees Leaving the Agency

If a cardholder's employment is ending (e.g., transfer, resignation, retirement), the DOE Purchase Card should be destroyed 30 days prior to the release date or as soon as the event is known if within 30 days. The cardholder must complete the form entitled "DOE Purchase Card Destruct Notice Form" (copy attached). This completed form should be forwarded through the approving official to the contracting officers representative for submission to Bank of America.

b. Transferring Employees

If a cardholder is transferring to another position, which will also require use of the purchase card, the cardholder will notify the contracting officer's representative. The contracting officer's representative, in consultation with the losing and gaining Approving Officials and Bank of America will arrange for transfer of the account to the new position. If it is determined that the purchase card should not be retained by the cardholder, the purchase card should be destroyed and the notification procedures outlined above should be followed by the card holder.

21. UTILIZATION OF SMALL BUSINESS

Federal Acquisition Regulation (FAR) Part 13 (copy attached) prescribes that acquisition of supplies and services of an anticipated dollar value of $2,501 through $100,000 will be reserved exclusively for small business concerns. Only when there is no reasonable expectation of obtaining the goods or services from two or more responsible small business concerns that will be competitive in terms of market price, quality, and delivery, may the purchase be made from a large business. Each such purchase will be appropriately documented.

22. **COMPETITION**

Purchases not exceeding $2,500 are called "micro-purchases" and may be made without securing competitive quotations if the cardholder considers the prices obtained from a single source to be reasonable. Purchases made without securing competition will be distributed among qualified suppliers by means of rotating recurring purchases among vendors. If a purchase recurs frequently, consideration should be given to consolidating the requirements to obtain quantity discounts. Refer such matters to your purchase card coordinator.

23. **MICRO-PURCHASES UNDER THE DOE PURCHASE CARD PROGRAM**

The Federal Acquisition Streamlining Act (FASA) of 1994 was signed into law by President Clinton on October 13, 1994. FASA established "micro-purchase" procedures for acquiring products and services valued at $2,500 and below.

The primary objective of micro-purchase procedures is to dramatically simplify the method in which Government officials can acquire low-dollar value products and services in the performance of their mission duties and responsibilities.

Key streamlining features of the micro-purchase program are that (1) purchases may be made without securing competitive quotations if it is determined that the price for the purchase is reasonable, and (2) purchases are exempt from the provisions of the Buy American Act and the small business set-aside provisions of the Small Business Act.

The following requirements apply to micro-purchases:

(1) Micro-purchases do not need to be competed. However, noncompetitive micro-purchases should be equitably distributed among qualified vendors, i.e., if there are multiple vendors and a recurring requirement, rotate the award among the vendors.

(2) The mandatory sources described in Section 29 of the Guidelines and Operating Procedures apply to micro-purchases. In addition, all other requirements contained in the Guidelines and Operating Procedures apply to micro-purchases.

24. **PROCUREMENT INTEGRITY REQUIREMENTS FOR FEDERAL EMPLOYEE PURCHASE CARDHOLDERS**

FAR Subpart 3.104 implements the Federal Government's policy related to conduct and procurement activities of Federal employee procurement officials. For the purposes of these procedures, purchase cardholders are considered procurement officials. This applies to the cardholder's approving officials to the extent that the approving official had personal and substantial participation in a purchase card transaction.

For cardholders, whose purchases do not exceed the Simplified Acquisition Threshold or are delegated with a single purchase limit of $25,000, the requirements of FAR 3.104-4(c) do not apply. Namely, if a cardholder or approving official is contacted by a person who is a bidder or offeror for a purchase transaction regarding non-Federal employment, the cardholder or approving official need not:

- X Promptly report the contact in writing to his/her supervisor and to the designated agency ethics official; and
- X Reject the possibility of non-Federal employment; or
- X Disqualify himself/herself from further personal and substantial participation in that purchase.

Prohibited Conduct of Federal Procurement Officials - During the conduct of any Federal agency procurement, including purchase card transactions, of property or services, no procurement official will knowingly:

(1) Solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor;

(2) Ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or,

(3) Disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

25. **ACQUISITON REGULATION**

The Federal Acquisition Regulation applies to card purchases. See especially, FAR Subpart 3.104, FAR Part 8, FAR Part 12 and FAR Part 13. Copies of these parts are attached.

26. **PROGRAM SUPPORT**

The purchasing and finance offices will provide full program support and assistance to cardholders and approving officials. Each of these offices will identify staff members who can assist cardholders and resolve problems which may be encountered.

27. **HEAD OF THE CONTRACTING ACTIVITY REVIEWS**

The HCA is responsible for the conduct of an effective and efficient acquisition program. Accordingly, purchase cardholders and approving officials are responsible for the card purchases in accordance with the Policy and Operating Procedures and Guidelines and the references attached. The HCA should conduct annual reviews of cardholder records to determine the extent of adherence to prescribed procedures, guidelines, policies, regulations, and good management practices, and to identify any needs for improvement, guidance and/or training. Annual reviews should include an assessment of the appropriateness of transaction dollar limitations as well as a validation of the need for the account based upon usage, e.g. no transactions within the past 6 months. If purchases are at significantly lower levels, lower limitations should be considered. Attachment 12 to this Guideline provides a review checklist that should be used in conducting this annual review.

Additionally, the Contracting Activity Purchase Card Coordinator should conduct monthly oversight reviews to identify any seemingly abnormal purchases so that they may be promptly reviewed and any problems resolved.

28. **U.S. GOVERNMENT TAX EXEMPT PURCHASES**

Each DOE Purchase Card is embossed with the notice: "U.S. GOVT TAX EXEMPT." The cardholder must inform the merchant prior to placing the telephone order or making an over the counter purchase, that the purchase is exempt from all state or local taxes, including sales taxes.

To the extent that the merchant does not initially acknowledge that DOE Purchase Card purchases are exempt from state and local taxes, the cardholder will specifically instruct the merchant that the Government wide card provides that all DOE Purchase Card purchases will be exempt from state and local taxes. In addition, FAR Subpart 29.302, "Application of state and local taxes to the Government," states that purchases and leases made by the Federal Government are immune from state and local taxation. FAR Subpart 29.305, "State and local tax exemptions," states that evidence of exemption from state and local taxes includes copies

of purchase orders, shipping documents, purchase card imprinted sales slips, paid or acknowledged invoices, or similar documents that identify an agency of the U.S. as the buyer.

Another method of evidencing the purchase as tax exempt from state and local taxes is by furnishing a copy of the U.S. Tax Exemption Certificate (SF-1094) to the merchant. This Certificate may be executed by the cardholder. A copy of the SF-1094 (U.S. Tax Exemption Certificate) is made a part of these Guidelines and Operating Procedures as Attachment 12.

To the extent the merchant will not agree to excluding taxes from the purchase price, the purchase should not be executed with that merchant.

29. **MANDATORY SOURCES**

a. Cardholders are subject to the regulatory requirements contained in FAR Part 8, "Required Sources of Supply," a copy of which is hereby attached.

b. By law, the Javits-Wagner-O'Day Act Program (JWOD) is a mandatory source program for the Federal Government. The program was established as a result of the passage of the Wagner-O'Day Act of 1938. That Act, and subsequent amendments are designed to promote the socioeconomic goal of generating employment and training opportunities for persons who are blind or are otherwise severely disabled. The JWOD program carries the highest socioeconomic priority involving Federal acquisitions in that no other provision of the FAR permits exception to the mandatory nature of JWOD products and services provided by the National Industries for the Blind and NISH nonprofit agencies and only the Federal Prison Industries can override JWOD's priority for products. In addition, the provisions of the Federal Acquisition Streamlining Act of 1994 do not amend the mandate to procure JWOD products and services set forth in the JWOD Act. **Purchase cardholders are prohibited from acquiring supplies equivalent to JWOD items from other sources, including discount office supply stores and firms supplying Federal agencies under consolidated office supply contracts except as provided for at Section 30 below.** The JWOD program uses the General Services Administration (GSA) as the prime distributor of its office supplies and other common-use items. Therefore, all such mandatory source items must be purchased directly from GSA. Further detailed guidance for the purchase of office supplies follows in Section 30 below, entitled **OFFICE SUPPLIES AND JWOD**.

c. Federal Prison Industries (FPI) provides training and employment for prisoners confined in Federal prison and correctional institutions through the sale of its supplies and services to Federal agencies. Cardholders are required to purchase those supplies listed in the FPI schedule only from FPI to the extent the supplies are otherwise not prohibited under Section 8 of these Procedures.

30. **OFFICE SUPPLIES AND JWOD**

Under the provisions of the Javits-Wagner-O'Day Act, GSA, JWOD, and those GSA Multiple Award Office Supply Schedule contractors are the exclusive distributors of JWOD office supplies with the following ordering options:

WWW.JWOD.COM. This is JWOD's on-line system for ordering next-day delivery of thousands of Skilcraft and other JWOD products. This is the recommended ordering option for purchase cardholders using the purchase card as the most convenient and efficient method of purchasing office supplies.

■ GSA Advantage On-Line Shopping Service. This Internet site (http://www.gsa.advantage.gov) allows customers to browse, search and review prices and delivery options before placing an order on the Internet. GSA's National Help Line at 800-488-3111 will answer questions and refer you to local JWOD Program assistance through Customer Service Directors in each state.

■ GSA Multiple Award Schedule Program. In addition to acquiring office supplies directly from GSA using one of the options described above, as of August 30, 1996, high quality office supplies under the JWOD Program are available nationwide from commercial vendors under GSA's Multiple Award Office

Products Next Day Delivery Program (Desktop Schedule 75 III A). There is no maximum order quantity under the GSA Multiple Award Schedule Program. **Discounts and JWOD supplies are only available for catalog orders placed using the Government toll-free numbers below – walk-in stores are not included.** The authorized Office Supply vendors accept the Government Purchase Card. Blanket Purchase Agreements (BPAs) between DOE buying activities and the vendors are permitted. The following vendors are included in the GSA Desktop Schedule:

? Boise Cascade Office Products
Telephone No. 800-505-3337

? BT Office Products International
Telephone No. 888-862-8674

? Corporate Express
Telephone No. 800-706-9267

? Innovative Sales Brokers
Telephone No. 800-283-1903

? Office Depot
Telephone No. 888-263-9586

? Staples National Advantage
Telephone No. 800-538-2728

These GSA multiple award vendors accept the Government purchase card. Product schedules are available to cardholders by phoning the telephone numbers listed above. It is recommended that cardholders obtain product schedules from each of the GSA multiple award vendors and utilize either the GSA Advantage On-Line Shopping Service or the GSA Multiple Award Schedule Program to acquire office supplies. GSA Multiple Award Schedule Program vendors are prohibited from selling commercial products which are essentially the same as JWOD products.

31. **BLANKET PURCHASE AGREEMENTS FOR INFORMATION TECHNOLOGY PRODUCTS**

The Office of Headquarters Procurement Services has awarded four Blanket Purchase Agreements (BPAs) for Information Technology (IT) products as of March 1, 1999, superceding BPAs previously awarded. These BPAs are for computer products and application software using the GSAMultiple Award Federal Supply Schedule. These are DOE-wide instruments available to all DOE Federal buyers, Management and Operating contractors and other authorized contractors. DOE has obtained discounts below GSA Schedule pricing. Manufactured products from Gateway, Dell, Micron, IBM, Hewlett Packard, Compaq, Macintosh, Canon, Epson, Lexmark, Philipps/Magnavox, Panasonic, and Sun Microsystems are included, among others. In addition, application software from Microsoft and Lotus, among others, are included.

A listing of the four BPA awards are listed below:

- Dell Marketing, L.P.
  BPA Number: DE-AB01-99AD38160
  Address: 1 Dell Way, Round Rock, TX 78682
  Telephone Number: 1-800-727-1100

- Gateway 2000
  BPA Number: DE-AB01-00AD38189
  Address: 610 Gateway Drive, P.O. Box 2000
  North Sioux City, SD 57049-2000

Telephone Number: 1-800-846-2000

- Micron Government Computer Systems, Inc.
  BPA Number: DE-AB01-00AD38190
  Address: 625 Stratford, Meridian, ID 83642
  Telephone Number: 1-800-249-1179, X31006

- Comteq Federal
  BPA Number: DE-AB01-00AD38192
  Address: 7503 Standish Place
  Telephone Number: 301-340-3430

32. **QUALIFICATIONS AND TRAINING REQUIREMENTS FOR PURCHASE CARDHOLDERS**

Federal Acquisition Regulation (FAR) Subpart 1.603-3 Appointment, states that contracting officers shall be appointed in writing on a Standard Form (SF) 1402, Certificate of Appointment, stating any limitations on the scope of authority to be exercised. The SF 1402 shall be used to evidence the contracting officer appointment for delegation of purchase cardholders exceeding micro-purchase authority (i.e. above $2,500). A Certificate of Appointment is not required for cardholders exercising only micro-purchase authority. A Delegation of Purchasing Authority will evidence this appointment.

Minimum Training Requirement for Micropurchase Cardholders

- All cardholders should receive a seminar on the Purchase Card Program arranged for or presented by the local Purchase Card Coordinator.
- GSA SMARTPAY Purchase Card Program, a 1 hour online training course addressing responsible use of the purchase card at http://www.energyolc.com
- and 1/2 hour training entitled *Online Affirmative Procurement Training for Purchase Card Users* available at http://tis.eh.doe.gov/p2/ap/default.htm

Recommended Training for Micropurchase Cardholders

1-day Government-wide Purchase Card courses available from the GSA Interagency Training Center; USDA Graduate School, Management Concepts, Inc., and other training centers.

Minimum Experience and Training Requirement for Cardholders with Authority Exceeding Micropurchase

X Experience: At least 6 months of experience as a cardholder at the micropurchase threshold; and,

Minimum Training:

Training course of at least 16 hours on simplified acquisition techniques, including market research, competition, commercial item purchasing, best value source selection, and socioeconomic procurement programs. This training may be waived by the HCA for experienced cardholders who have acquired experience equivalent to this training.

Other Training Requirements

In addition to this formal training, the Purchase Card Coordinator will conduct, biennially, a refresher training seminar for all card holders, using this Guideline, lessons learned throughout the year, and feedback from the annual review source material.

33. **APPROVING OFFICIAL TRAINING**

a. Training

The Purchase Card Program Coordinator shall arrange for or provide approving official training. This training should be at least four hours in length and encompass the roles and responsibilities of an approving official as well as an understanding of the responsibilities of the card holder. Biennial refresher training will be provided.

b. Available Online Training

Online training is available and may count toward the 4 hour requirement.

X Course Title: GSA SMARTPAY Purchase Card Program. This online training tool addresses responsible use of the purchase card by your cardholders. http://www.energyolc.com

X Online Affirmative Procurement Training for Purchase Card Users at http://tis.eh.doe.gov/p2/ap/default.htm

34. DOCUMENTATION FOR EACH PURCHASE

Each card purchase will be documented by completion of the following forms:

X Purchase Card Telephone Quotation Worksheet

X Bankcard Telephone Ordering Log

Similar local forms which capture the necessary information are acceptable. A copy of each of these forms will be submitted with the monthly Cardholder Statement of Account to the approving official. The original of each of these forms will be maintained by each cardholder for record keeping purposes.

35. LOST OR STOLEN CARDS

a. Telephone Notification

If the purchase card is lost or stolen, it is the responsibility of the cardholder to notify Bank of America as soon as practicable at the following telephone numbers 24 hours/day:

Inside the continental United States - 1-800-472-1424
Outside the continental United States - call collect 1 (757) 441-4124

b. Written Notification

The cardholder will also notify the approving official and the contracting activity program coordinator of the lost or stolen card within 1 work day after discovering the card missing, or as soon as practicable. The approving official will submit a written report to the local program coordinator within 5 work days. The report will include the following information:

(1) Card number;
(2) Cardholder's complete name;
(3) Date and location of the loss;
(4) Date and time Bank of America was notified;
(5) Any purchases made on the day the card was lost/stolen, or the last known purchase before the card was lost/stolen;
(6) Any other pertinent information.

c. Card Replacement

A new card will be mailed within 2 business days of the loss or theft. A card that is subsequently found should be cut in half and given to the approving official. The approving official will be responsible for notifying Bank of America that the card has been destroyed.

d. Unauthorized Use

The Government will not be liable for any unauthorized use of the card. "Unauthorized use" means the use of the purchase card by a person other than the card holder, who does not have the actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit. A cardholder who makes unauthorized purchases or carelessly uses the card may be liable to the Government for the total dollar amount of unauthorized purchases made in connection with the intentional or negligent use of the card. In addition, the cardholder may be subject to disciplinary action for unauthorized or negligent use of the card, including a fine not to exceed $10,000 or imprisonment for not more than 5 years, or both pursuant to Title 18 United States Code 287.

36. AFFIRMATIVE PROCUREMENT PROGRAM

This section discusses Government practices for maximizing the purchase of recycled products. These requirements have been incorporated into the Department of Energy facility management contracts so purchase cardholders, Federal or contractor, need to be aware of these requirements. Section 6002 of the Resource Conservation and Recovery Act and Executive Order 13101, Greening the Government Through Waste Reduction, Recycling and Federal Acquisition, require Federal agencies to develop Affirmative Procurement Programs for Environmental Protection Agency (EPA)-designated items when purchases of these items exceed $10,000 in a fiscal year.

The EPA is responsible for designating items that are or can be made with recovered materials. EPA-designated items are listed at 40 CFR Part 247, "Comprehensive Guideline for Procurement of Products Containing Recovered Materials" (CPG). Current items are identified in the attached list. In addition, EPA's Recovered Materials Advisory Notice (RMAN) provides recovered material content ranges for designated items. EPA's Home Page for this topic is http://www.epa.gov/epaoswer/non-hw/procure/index.htm

One hundred percent of an agency's purchases of EPA-designated items are to contain recovered materials unless written justification is provided that the recycled item does not meet performance, availability, competition, or price criteria.

DOE's Affirmative Procurement Program

In a May 3, 1996 memorandum, the Secretary of Energy set a Departmental goal to increase procurement of EPA-designated, recycled products to 100 percent.

The Department's Environmental Executive has issued the U.S. Department of Energy Affirmative Procurement Program for Recovered Materials. This guidance outlines the Department's affirmative procurement program for purchasing EPA-designated items. Extensive information on this program is available on the Internet at http://www.eh.doe.gov/p2

The Department of Energy Acquisition Regulation (DEAR), Parts 923 and 970, provide for the acquisition and use of environmentally preferable products and services, including recycled products. It includes a clause for incorporating environmentally preferable purchasing into the Department's facility management contracts.

EPA's Availability Lists

EPA has compiled availability lists for all designated items. These lists do not represent an endorsement by EPA, but rather serve as potential sources of vendors for procurement initiators and contracting officers to

consider. EPA's availability lists may be obtained by calling the EPA Hotline at (800) 424-9346, or, for customers in the Washington, DC area, at (703) 412-9810.

Best Practices

Affirmative Procurement Program purchases must be reported. Procedures vary from site to site. If cardholders purchase these items they should consult their Site Recycling Coordinator. In the case of purchases through the GSA Advantage system, if your order from GSA stores stock with your GSA Account (Activity Address Code) GSA will report the purchase. If you order direct from the vendor or create your own order in GSA Advantage, you need to report the purchase. You should also report purchases from Federal Supply Schedule vendors.

Procurement initiators should consider Federal supply sources such as the GSA, the Government Printing Office, and the Defense Supply Center as sources for recycled products. These sources offer products that have been competitively bid, and meet or exceed recycled content and performance standards. EPA-designated items purchased through GSA do not have to be tracked and reported by individual agencies as GSA performs this function.

Procurement initiators should include recycled content requirements in their statements of work/specifications. Contracting officers do not process procurement requests for EPA-designated items without the requisite recycled content unless a justification accompanies the request.

Affirmative Procurement Program purchases must be reported. Procedures vary from site to site. If Cardholders purchase these products they should consult their Site Recycling Coordinator.

ITEMS LISTED IN EPA'S COMPREHENSIVE PROCUREMENT GUIDELINES

Construction Products

Building insulation products
Carpet
Carpet cushion
Cement and concrete containing
    fly ash
    ground granulated blast furnace slag
Consolidated and reprocessed latex paint
Floor tiles
Flowable fill
Laminated paperboard
Patio blocks
Railroad grade crossing surfaces
Shower and restroom dividers/partitions
Structural fiberboard

Landscaping Products

Compost made from yard trimmings or food waste
Garden and soaker hoses
Hydraulic mulch
Plastic lumber and landscaping timbers
Lawn and garden edging
Yard trimmings compost

Miscellaneous Products

Awards and plaques
Industrial drums
Mats
Pallets
Signage
Sorbents
Manual-grade strapping

Non-Paper Office Products

Binders, clipboards, file folders, clip portfolios, and presentation folders
Office recycling containers
Office waste receptacles
Plastic desktop accessories
Plastic envelopes
Plastic trash bags
Printer ribbons
Toner cartridges

Paper and Paper Products

Commercial/Industrial sanitary tissue
Miscellaneous papers
Newsprint
Paperboard and packaging products
Printing and writing paper

Park and Recreation Products

Park benches and picnic tables
Plastic fencing
Playground surfaces
Playground equipment
Running tracks

Transportation Products

Channelizers
Delineators,
Flexible delineators
Parking stops
Traffic barricades
Traffic cones

Vehicular Products
Engine coolants
Re-refined lubricating oils
Retread tires

37. **ENERGY EFFICIENCY**
Reference: FAR 10.002(e), FAR 23.203 and Executive Order 13123

Overview

This section discusses the procurement of energy efficient and water-saving products.

Background

Executive Order 13123, Greening the Government Through Efficient Energy Management directs Federal agencies to increase, to the extent life cycle cost-effective, purchases of energy efficient and water-saving products. Energy-efficient products are defined as those identified through the Energy Star Program or those that are in the upper 25 percent of energy efficiency as designated by the Federal Energy Management Program.

Among other things, the Order requires goals and reporting for energy and water efficiency in Federal facilities.

In addition, each agency's implementation program is to be designed to speed the introduction of cost-effective, energy-efficient technologies into Federal facilities. The Order assigns the Department of Energy, through its Federal Energy Management Program, the lead in implementing the Order. While it is unlikely that cardholders will be making acquisitions of this type, seek further information if you are purchasing such things as electrical appliances, office equipment, construction products, etc.

Further Information

For more information on the Product Recommendation program or to request that an efficiency recommendation be developed for a specific product, contact the Federal Energy Management Program at (202) 586-4858. The Home Page for this effort is at http://www.eere.energy.gov/femp. For Energy Star Program information see http://www.energystar.gov.

38. **CONVENIENCE CHECKS**

Bank of America will furnish convenience checks upon request. These may be used for purchases from merchants who do not accept the purchase card. When a purchase is made with a convenience check, the check value will be treated as a charge against the cardholders account. There is a charge of 1.75% of the face value of each check processed. Cardholders are to manage such checks in the same manner as they do card purchases, i.e. reservation of funds, approving official coordination, documentation, maintenance of receipts, and reconciliation. Cardholders individual purchase limits are the same for convenience checks as for card transactions except for the convenience check ceiling.

The purchase card is the preferred method for completion of simplified acquisitions. When considering the use of convenience checks, the total cost to the Government, including the 1.75% fee, should be included in determining which method is the best value for the Government. If there is another merchant from whom the transaction could reasonably be completed then that method might offer a better value than utilizing the convenience check.

Convenience checks shall not be issued in amounts greater than $2,500 except by a Contracting Officer. Convenience checks shall not be written to cash, to the account holder or to other employees. Cardholders must maintain a Convenience Check Log which must include the check number, merchant name, merchant Tax Identification Number (only needed when issuing checks for services in amounts greater than $600), the items purchased, the dollar amount of the purchase, the dollar amount of the check fee, and the total cost.

The following description is extracted from the GSA contract guide description.

Convenience Checks

Convenience checks shall be issued and accepted domestically and internationally by merchant establishments and financial institutions. Convenience checks are an integrated part of the purchase card program. The checks shall be guaranteed by the Contractor against theft or loss, thus affording the agency protection against financial loss when using the Contractor's product. The Contractor shall:

- Assist agencies in the implementation of their convenience check program;
- Provide a supply of checks to a designated cardholder drawn on the cardholder's purchase card account;
- Process the checks as they are presented for payment;
- Provide a listing of the checks cleared on the cardholder's statement of account and official invoice as a separate line item;
- Provide convenience checks that vary in maximum payment amounts as designated by the agency;
- Ensure that convenience checks are multi-copied (one copy for the cardholder's records, the original for the merchant);
- Store cleared convenience checks in accordance with Record Retention and Retrieval;
- Provide copies of cleared convenience checks within 14 calendar days of the agency's request;
- Have the ability to stop payment on the convenience check within 24 hours, as requested by the A/OPC;
- Provide electronic access or Contractor-provided software to enable agencies to automate their convenience check system. The system shall, at a minimum, provide the ability to track, add, tally, report and reorder convenience checks;
- Provide an audit trail which permits tracing of all transactions; and
- Establish payment procedures for agency-issued convenience checks. Payment for these checks shall not occur prior to use by the agency.

Convenience Check Account Establishment: Within 10 calendar days after receipt of a task order issued in accordance with the terms and conditions of this contract, the Contractor shall contact the A/OPC to discuss implementation procedures and, if requested by the agency, meet with agency representatives to review specific requirements. All Contractor travel costs associated with this meeting shall be borne by the Contractor.

Convenience Check Inventory Replenishment: The Contractor shall provide the following inventory replenishment options:

- Automatic replenishment; and
- Toll free or collect telephone line reorder capability; and
- 24 hour replenishment when requested by the A/OPC.

39. <u>ELECTRONIC AND INFORMATION TECHNOLOGY (EIT)</u>

(a) This section implements section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards (36 CFR part 1194).

(b) Further information on section 508 is available via the Internet at http://www.section508.gov.

(c) When acquiring EIT, Cardholders should be aware that agencies must ensure that --

(1) Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities; and

(2) Members of the public with disabilities seeking information or services from an agency have access to and use of information and data that is comparable to the access to and use of information and data by members of the public who are not individuals with disabilities.

(d) When cardholders acquire EIT, they should ask whether the equipment users may have disabilities such that special features may be required and ask the vendor if the equipment they plan to provide will afford equal access for those with disabilities.

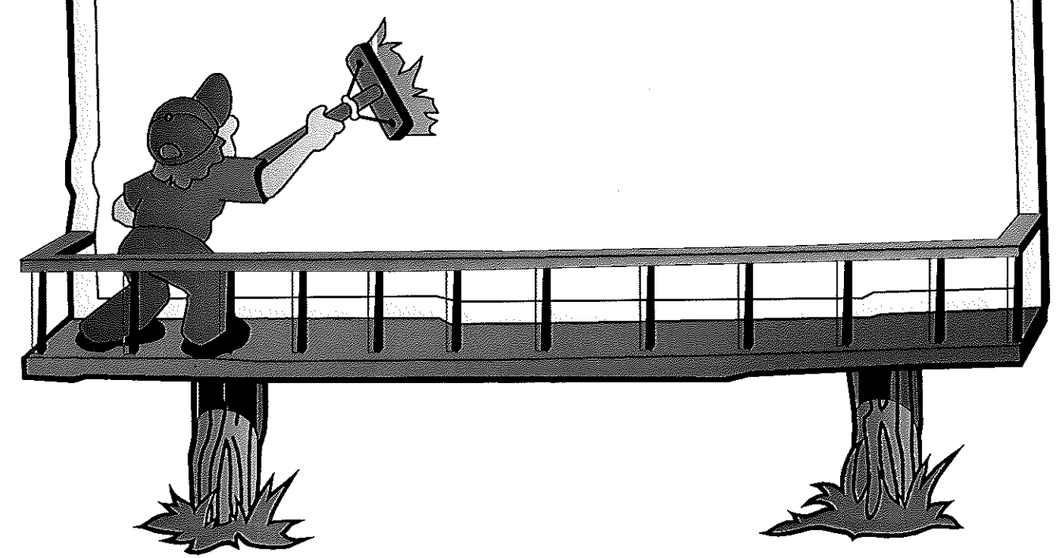
Headquarters Policy Flash

FLASH 2005-12

DATE: December 9, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Undue Influence Over the Procurement Process**

SUMMARY: This Policy Flash transmits the attached memorandum advising program office personnel to understand basic policies governing the Federal procurement process and respect the role of contracting professionals, in order to ensure compliance with applicable laws, regulations, and ethical standards, as well as sound business practices.



Questions may be addressed to Denise P. Wright at (202) 287-1340 or Denise.Wright@hq.doc.gov .

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Department of Energy
Washington, DC 20585

December 8, 2004

MEMORANDUM FOR DISTRIBUTION

FROM: RICHARD H. HOPF, DIRECTOR
OFFICE OF PROCUREMENT
AND ASSISTANCE MANAGEMENT

SUBJECT: Undue Influence Over the Procurement Process

Recently there have been many changes to organizational structures within the Department. One of the more significant organizational trends is that Headquarters Program Offices and field organizations have been restructured to incorporate acquisition functions within their direct line of authority. While this structure has the potential for certain improvements in the flow of authorities and managerial accountability, it also has the potential for certain problems, including the execution of undue or inappropriate influence on the professional conduct of contracting personnel by uninformed officials. Accordingly, program office personnel are cautioned that their interaction with contracting personnel should be conducted with a good understanding of basic policies governing Federal procurement and a respect for the role acquisition personnel play in ensuring compliance with applicable laws, regulations, and ethical standards as well as the conduct of sound business practices. A newly released Department of Labor (DOL), Office of Inspector General (OIG), audit report dated October 29, 2004, gives a good example of the consequences of not doing so.

Program staff of the Mine Safety and Health Administration (MSHA), an office within the DOL, were found to have influenced the circumventing of regulations to procure needed items, which resulted in the Government not receiving the best value on goods purchased, causing among other things excessive unauthorized commitments. The OIG report concluded that ". . . program staff exerted undue influence over the procurement process." As a result, the report recommends that the Secretary of Labor direct the relationship between the program office and the procurement authority be severed to ensure a completely independent procurement process. The full report can be viewed at http://www.oig.dol.gov/public/reports/oa/2005/25-05-001-06-001.pdf .

As evidenced above, there are inherent risks in commingling procurement and program staff under one authority. Program office personnel should be aware of this and guard against procurement failures or the appearance of such failures. Contracting officers must follow a defined set of policies and procedures in order to safeguard the public trust and these responsibilities must be respected and supported by program personnel.

To assist in ensuring that program staff understand the role of the contracting officer and the basic requirements of the Federal procurement systems, we urge you to ensure that program managers and other personnel who interface with the contracting function

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review Federal Acquisition Regulation (FAR) (48 CFR 1.6) which discusses contracting authority and responsibilities. In addition, my office has developed the relevant guidance listed below which should be periodically reviewed:

- Acquisition Guide Chapter 3—Improper Business Practices;
- Acquisition Guide Chapter 5—Publicizing Contract Actions;
- Acquisition Guide Chapter 6—Competition Requirements;
- Acquisition Guide Chapter 9—Contracting Qualifications;
- Acquisition Guide Chapter 15—Contracting by Negotiation;
- Acquisition Guide Chapter 7.1—Acquisition Planning
- Acquisition Letter 2000-09, Source Selection Authority;
- "Procurement Integrity" Brochure, dated March 2003.

Also use the following link to access additional acquisition guidance
http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Regulations+and+Guidance?OpenDocument

If there are questions concerning this subject, please contact Ms. Denise Wright, of my staff, at (202) 287-1340.

cc:
Bruce Carnes, Chief Acquisition Officer
Rosita Parks, Chief Information Officer
Susan Grant, Chief Financial Officer

HEADQUARTERS ELEMENTS:

Assistant Secretary for Energy Efficiency and Renewable Energy
Assistant Secretary for Environmental Management
Assistant Secretary for Environment, Safety and Health
Assistant Secretary for Fossil Energy
Assistant Secretary for Congressional and Intergovernmental Affairs
Assistant Secretary for Policy and International Affairs
Administrator, Energy Information Administration
Director, Office of Civilian Radioactive Waste Management
Director, Office of Nuclear Energy, Science and Technology
Director, Office of Science
Director, Office of Legacy Management
Director, Office of Counterintelligence
Director, Office of Economic Impact and Diversity
Director, Office of Energy Assurance
Director, Office of Hearings and Appeals
Director, Office of Intelligence
Director, Office of Public Affairs
Director, Office of Security and Safety Performance Assurance
Director, Office of Electric Transmission & Distribution
Head of Contracting Activity/COO, Office of Science
Head of Contracting Activity/Golden Field Office
Head of Contracting Activity/NETL
Head of Contracting Activity/EM

cc:
Acting Under Secretary for Energy, Science and Environment
General Counsel
Senior Procurement Executive, NNSA
DOE Procurement Directors (via e-mail)

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-13

DATE: January 5, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Regulatory Actions – Work for Others and Make or Buy Plans**

SUMMARY: Two regulatory notices were published in the *Federal Register* on December 15, 2004.

The first notice was an Interim Final Rule published at 69 FR 75001 regarding Work for Others. It moves the requirements previously found in the Contractor Requirements Document of DOE Order 481.1B to

a new contract clause found at DEAR 970.5217-1. The Interim Final Rule is effective January 14, 2003, and public comments will be accepted through that date. The contact person is Andrew Geary at (202) 287-1507.

The second notice was a Notice of Proposed Rulemaking published at 69 FR 75017. It invites public comments through January 14, 2005, concerning the plan to eliminate Make-or-Buy Plans from Part 970 of the DEAR. The contact person is Irma Brown at (202) 287-1374.

The contents of the Work for Others rule have been added to the Electronic DEAR on the Home Page as well as the Hill Air Force Base site.

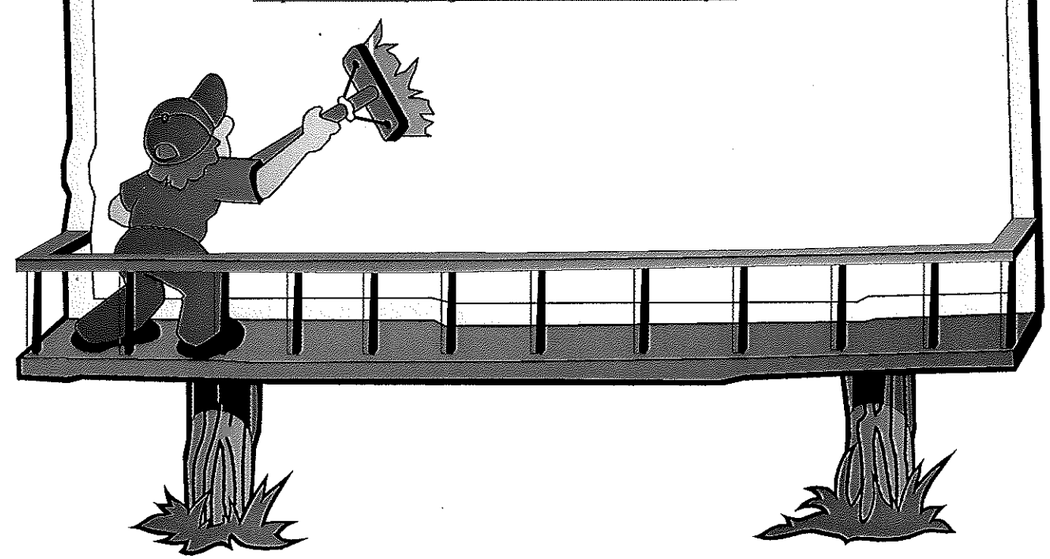
Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Headquarters Policy Flash

FLASH 2005-14

DATE: January 4, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management
SUBJECT: **Federal Acquisition Circulars (FAC) 2001-26 and 27, Final and Interim Rules Amending the FAR**

SUMMARY: This Policy Flash transmits summary information regarding the revisions to the FAR resulting from FAC 2001-26 and FAC 2001-27 published in the Federal Register at 69 FR 76430 (December 20, 2004) and at 69 FR 77870 (December 28, 2004), respectively. The FACs are available via the internet at http://www.acqnet.gov/far/FAC/fac2001-26.pdf and http://www.acqnet.gov/far/FAC/fac2001-27.pdf



A. Federal Acquisition Circular (FAC) 2001-26

1. Electronic Representations and Certifications (Final) (FAR Case 2002-024)

Effective Date: January 1, 2005

What is the purpose of this FAR Case?

This final rule amends the FAR to eliminate the paper based process for the submission of representations and certifications and introduces an Online Representations and Certifications Application (ORCA) website http://orca.bpn.gov The final rule requires offerors to:

- Submit representations and certifications (reps. and certs.) electronically via the Business Partner Network (BPN) website; thus, eliminating the need for a paper-based system;
- Update the reps. and certs. as necessary, but at least annually;
- Maintain current and complete reps. and certs.; and

Additionally, the final rule enables contractors to make changes that affect only one solicitation by addressing the established FAR provisions.

How will this affect work processes?

- Eliminates the use of paper based reps. and certs. and specifically tailors an offeror's information to a particular procurement via electronic means.
- Ensures that a prospective contractor completes the electronic reps. and certs. at http://orca.bpn.gov in conjunction with the firm's required registration in the Central Contractor Registration (CCR) database.
- Informs prospective offerors of the requirement to provide reps. and certs. via the BPN.

2. Excluded Parties List System Enhancement (Final) (FAR Case 2002-023)

Effective Date: January 19, 2005

What is the purpose of this FAR Case?

This final rule amends the FAR to incorporate the electronic Excluded Parties List System (EPLS). The General Services Administration (GSA) is implementing its

new searchable electronic list of parties excluded from doing business with the Federal Government via the FAR. The new searchable system eliminates the need for a paper based system and provides for direct agency input of an excluded party from Federal Procurement and Non-procurement Programs.

How will this affect work processes?

- As provided in DEAR Subpart 909.4, Debarment, Suspension, and Ineligibility, general policy and procedure may remain unchanged. However, additional DEAR coverage may be forthcoming to incorporate the collection of added data elements and the direct entry of data on parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the non-procurement common rule by agencies or the Government Accountability Office.

3. **Special Emergency Procurement Authority (Final) (FAR Case 2003-022)**

Effective Date: January 19, 2005

What is the purpose of this FAR Case?

This rule finalizes an interim rule that implements, with changes, Section 1443 of the Services Acquisition Reform Act (SARA) and Section 822 of the Ronald W. Regan National Defense Authorization Act. Jointly, these provisions increase the thresholds for micro-purchase, simplified acquisition, and contracts to be awarded and performed in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical, or radiological attack.

How will this affect work processes?

- As determined by the head of the agency, when cited, the coverage provides contracting officers expanded use of simplified acquisition and commercial items procedures when acquiring supplies and services.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Circular 2001–27; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of interim rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–27. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.acqnet.gov/far.*

DATES: For effective date and comment date, see separate document which follows.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2001–27, FAR case 2004–027. Interested parties may also visit our Web site at *http://www.acqnet.gov/far.*

Item	Subject	FAR case	Analyst
I	Free Trade Agreements—Australia and Morocco	2004–027	Davis.

SUPPLEMENTARY INFORMATION: A summary of the FAR rule follows. For the actual revisions and/or amendments to this FAR case, refer to the specific item number and subject set forth in the document following this item summary.

FAC 2001–27 amends the FAR as specified below:

Free Trade Agreements—Australia and Morocco (FAR case 2004–027)

This interim rule allows contracting officers to purchase the products of Australia and Morocco without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements. The U.S. Trade Representative negotiated Free Trade Agreements with Australia and Morocco, which go into effect January 1, 2005, according to Public Laws 108–286 and 108–302. These Agreements join the North American Free Trade Agreement (NAFTA) and the Chile and Singapore Free Trade Agreements which are already in the FAR. The threshold for applicability of the Australian Free Trade Agreement is $58,550 (the same as other Free Trade Agreements to date), but the threshold for applicability of the Morocco Free Trade Agreement is $175,000. Because of the short statutory time frame, this is an interim rule. Also in this rule are changes requested by the U.S. Trade Representative, in the list of Least Developed Countries, and changes in terminology on how the FAR uses the terms "designated country" and "Trade Agreements Act." Some technical changes are also included.

Dated: December 22, 2004.

Laura Auletta,

Director, Contract Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001–27 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–27 is effective January 1, 2005.

Dated: December 21, 2004.

Lt. Col. Vincent Feck,

Deputy Director (Operations), Defense Procurement and Acquisition Policy.

Dated: December 22, 2004.

David A. Drabkin,

Senior Procurement Executive, General Services Administration.

Dated: December 21, 2004.

Scott Thompson,

Acting Deputy Chief Acquisition Officer, National Aeronautics and Space Administration.

[FR Doc. 04–28399 Filed 12–27–04; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 6, 9, 12, 14, 17, 22, 25, and 52

[FAC 2001–27; FAR Case 2004–027]

RIN 9000–AK09

Federal Acquisition Regulation; Free Trade Agreements—Australia and Morocco

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement new Free Trade Agreements with Australia and Morocco as approved by Congress (Public Laws 108–286 and 108–302). These Free Trade Agreements are scheduled to go into effect January 1, 2005.

The interim rule also establishes a table of services excluded from the coverage of the various trade agreements, corrects the threshold for Canadian services, revises the list of Least Developed Countries, revises FAR terminology relating to international trade agreements and the Trade Agreements Act (TAA), and revises the FAR clauses that implement application of the Buy American Act (41 U.S.C. 10a, 10b, 10b–1, and 10c) and trade agreements to construction material.

DATES: *Effective Date:* January 1, 2005.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before February 28, 2005, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2001–27, FAR case 2004–027, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Agency Web site: *http://www.acqnet.gov/far/ProposedRules/*

proposed.htm. Click on the FAR case number to submit comments.

• E-mail: *farcase.2004-027@gsa.gov*. Include FAC 2001–27, FAR case 2004–027, in the subject line of the message.

• Fax: (202) 501–4067.

• Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW., Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2001–27, FAR case 2004–027, in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. Please cite FAC 2001–27, FAR case 2004–027.

SUPPLEMENTARY INFORMATION:

A. Background

New Free Trade Agreements. This rule amends FAR Part 25 and the clauses at 52.212–3, Offeror Representations and Certifications—Commercial Items, 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders— Commercial Items, 52.225–3, Buy American Act—Free Trade Agreements—Israeli Trade Act, 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate, 52.225–5, Trade Agreements, 52.225–6, Trade Agreements Certificate, 52.225–9, Buy American Act—Construction Materials, and 52.225–11, Buy American Act—Construction Materials under Trade Agreements, and 52.225–12, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements, to implement new Free Trade Agreements with Australia and Morocco, as approved by Congress (Public Laws 108–286 and 108–302). The Free Trade Agreements with Australia and Morocco waive the applicability of the Buy American Act for some foreign supplies and construction materials from Australia and Morocco, and specify procurement procedures designed to ensure fairness, applicable to the acquisition of supplies and services.

Other related revisions.

• *Table of excluded services.* The rule includes a table of excluded services to improve clarity.

• *NAFTA threshold for Canadian services.* The rule corrects the NAFTA threshold for services from Canada from $25,000 to $58,550 (FAR 25.402(b)).

• *Terminology.*

1. The TAA and the WTO Agreement on Government Procurement. The FAR currently equates the term "Trade Agreements Act" with the Agreement on Government Procurement (meaning the World Trade Organization Government Procurement Agreement ("WTO GPA") (see FAR 25.400(a)(1)). The Trade Agreements Act (19 U.S.C. 2501 *et seq.*) (TAA) is not synonymous with the WTO GPA. The TAA provides authority for the President (designated by Executive Order 12260 of December 31, 1980 to the United States Trade Representative (USTR)) to waive discriminatory purchasing requirements (such as the Buy American Act), designate eligible countries (including least developed countries), and bar procurement from non-designated countries. It does not contain thresholds or the terms of the various trade agreements. The rule substitutes the term "World Trade Organization Government Procurement Agreement" in all places in the FAR where the term "Trade Agreements Act" is currently used to mean the WTO GPA.

2. "Designated country," "WTO GPA country," and "least developed country." The list of designated countries at FAR 25.001 is currently a combination of WTO members subject to the WTO GPA (WTO GPA countries) and certain least developed countries for which the USTR has waived discriminatory purchasing requirements, in accordance with section 301 of the TAA. The rule redefines "designated country" to include WTO GPA countries, Free Trade Agreement countries, least developed countries, and Caribbean Basin countries. Free Trade Agreement countries and Caribbean Basin countries are now also designated countries. Each of these terms will retain a separate definition, because in some instances, the regulation does not apply to all designated countries, but only some of the specific subsets.

• *FAR clauses that implement application of the Buy American Act and trade agreements to construction material.*

1. Caribbean Basin construction material. The **Federal Register** notices issued by the USTR under the Caribbean Basin Trade Initiative state that "products" of the listed Caribbean Basin countries shall continue to be treated as "eligible products" (unless excluded from duty-free treatment under 19 U.S.C. 2703(b)). To be consistent with the statutory definition at 19 U.S.C. 2518(4), this rule modifies the definition of "eligible product" to include "construction material" and modifies the construction clauses that implement the trade agreements to extend nondiscriminatory treatment to all designated country construction material, including Caribbean Basin country construction material.

2. Cost of components. The rule makes a technical correction to the definition of "cost of components" as contained in the clauses that apply Buy American Act and trade agreements to construction material (52.225–9, Buy American Act—Construction Materials, and 52.225–11, Buy American Act—Construction Materials under Trade Agreements). When applied to components of construction material, the definition must be modified in the second paragraph to delete the term "end product" and replace it with the term "construction material." Note that the definition of the term "component" in these clauses has already been so modified.

• *Revising the list of Least Developed Countries.* The U.S. Trade Representative has requested that the list of Least Developed Countries (LDC) be revised. These countries are included within the definition of "designated country". This list has been approved by the Trade Policy Staff Committee. The TAA allows USTR (pursuant to authority delegated from the President in Executive Order 12260) to waive the purchasing prohibition and discriminatory purchasing requirements for LDCs. As defined in 19 U.S.C. 2518, a "least developed country" is "any country on the United Nations General Assembly list of least developed countries." The countries designated as eligible countries under the TAA are listed in the FAR to inform contracting officers of countries that are eligible to participate in Federal Government procurement. Botswana is no longer designated as an LDC by the United Nations. Further, the following countries have been designated as LDCs by the United Nations, but are not currently included in the FAR list: Afghanistan; Angola; Burma (Myanmar); Cambodia; Democratic Republic of Congo; Eritrea; Ethiopia; Laos; Liberia; Madagascar; Mauritania; Senegal; Solomon Islands; Sudan; East Timor; and Zambia. Therefore, the USTR has removed Botswana and included the additional LDCs, with the exceptions of Burma (Myanmar), Liberia and Sudan, which are subject to United States economic sanctions.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and

Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Although the rule opens up Government procurement to the products of Australia and Morocco and Caribbean Basin country construction material, the Councils do not anticipate any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at DFARS 225.401–70, and acquisitions that are set aside for small businesses are exempt. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 5, 6, 9, 12, 14, 17, 22, 25, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2001–27, FAR case 2004–027), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the provisions at FAR 52.212–3, 52.225–4, 52.225–6, and 52.225–11 regarding the paperwork burdens previously approved under OMB Control Numbers 9000–0130, 9000–0025, and 9000–0141. The impact is negligible.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the Free Trade Agreements with Australia and Morocco, as approved by Congress (Public Laws 108–286 and 108–302), are scheduled to go into effect January 1, 2005. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 5, 6, 9, 12, 14, 17, 22, 25, and 52

Government procurement.

Dated: December 22, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 6, 9, 12, 14, 17, 22, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 6, 9, 12, 14, 17, 22, 25, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Amend section 5.202 by revising paragraph (a)(12) to read as follows:

5.202 Exceptions.

* * * * *

(a) * * *

(12) The proposed contract action is by a Defense agency and the proposed contract action will be made and performed outside the United States and its outlying areas, and only local sources will be solicited. This exception does not apply to proposed contract actions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement (see Subpart 25.4);

* * * * *

5.203 [Amended]

■ 3. Amend section 5.203 in the first sentence of paragraph (h) by removing "subject to the Trade Agreements Act" and adding "covered by the World Trade Organization Government Procurement Agreement" in its place.

■ 4. Amend section 5.301 by revising paragraph (a)(1); and removing from paragraph (c) "subject to the Trade Agreements Act," and adding "covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement," in its place. The revised text reads as follows:

5.301 General.

(a) * * *

(1) Covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement (see Subpart 25.4); or

* * * * *

PART 6—COMPETITION REQUIREMENTS

6.303–1 [Amended]

■ 5. Amend section 6.303–1 by removing paragraph (d) and redesignating paragraph (e) as paragraph (d).

PART 9—CONTRACTOR QUALIFICATIONS

■ 6. Amend section 9.205 by revising paragraph (b) to read as follows:

9.205 Opportunity for qualification before award.

* * * * *

(b) The activity responsible for establishing a qualification requirement must keep any list maintained of those already qualified open for inclusion of additional products, manufacturers, or other potential sources.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.205 [Amended]

■ 7. Amend section 12.205 by removing from paragraph (c) "subject to the Trade Agreements Act" and adding "covered by the World Trade Organization Government Procurement Agreement" in its place.

PART 14—SEALED BIDDING

■ 8. Amend section 14.409–1 by revising the introductory text of paragraph (a)(2) to read as follows:

14.409–1 Award of unclassified contracts.

(a)(1) * * *

(2) For acquisitions covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement (see 25.408(a)(5)), agencies must include in notices given unsuccessful bidders from World Trade Organization Government Procurement Agreement or Free Trade Agreement countries—

* * * * *

PART 17—SPECIAL CONTRACTING METHODS

■ 9. Amend section 17.203 by revising paragraph (h) to read as follows:

17.203 Solicitations.

* * * * *

(h) Include the value of options in determining if the acquisition will exceed the World Trade Organization Government Procurement Agreement or Free Trade Agreement thresholds.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1503 [Amended]

■ 10. Amend section 22.1503 by removing from the end of paragraph (b)(4) "(see 25.403(b))" and adding "(see 25.402(b))" in its place.

PART 25—FOREIGN ACQUISITION

■ 11. Amend section 25.003 by revising the definitions "Designated country", "Designated country end product", "Eligible product", and "Free Trade Agreement country"; and adding the definitions "Least developed country", "Least developed country end product", "World Trade Organization Government Procurement Agreement (WTO GPA) country", and "WTO GPA country end product" to read as follows:

25.003 Definitions.

* * * * *

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom);

(2) A Free Trade Agreement country (Australia, Canada, Chile, Mexico, Morocco, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

Designated country end product means a WTO GPA country end product, an FTA country end product, a least developed country end product, or a Caribbean Basin country end product.

* * * * *

Eligible product means a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment.

* * * * *

Free Trade Agreement country" means Australia, Canada, Chile, Mexico, Morocco, or Singapore.

* * * * *

Least developed country means any of the following countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia.

Least developed country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

* * * * *

World Trade Organization Government Procurement Agreement (WTO GPA) country means any of the following countries: Aruba, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom.

WTO GPA country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

25.204 [Amended]

■ 12. Amend section 25.204 by removing from paragraph (a) "excepted under the Trade Agreements Act or" and adding "covered by the WTO GPA or a" in its place.

■ 13. Revise section 25.400 to read as follows:

25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions that are covered by—

(1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Pub. L. 103–465);

(2) Free Trade Agreements (FTA), consisting of—

(i) NAFTA (the North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C. 3301 note));

(ii) Chile FTA (the United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108–77));

(iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108–78));

(iv) Australia FTA (the United States—Australia Free Trade Agreement, as approved by Congress in the United States— Australia Free Trade Agreement Implementation Act (Pub. L. 108–286); and

(v) Morocco FTA (The United States—Morocco Free Trade Agreement, as approved by Congress in the United States— Morocco Free Trade Agreement Implementation Act (Pub. L. 108–302);

(3) The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act (19 U.S.C. 2511(b)(4)), in acquisitions covered by the WTO GPA;

(4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA);

(5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or

(6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American Act for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

(b) For application of the trade agreements that are unique to individual agencies, see agency regulations.

■ 14. Amend section 25.401 by removing from paragraph (a)(2) ", including all services purchased in support of military forces located overseas"; removing from paragraph (a)(5) "(but see 6.303–1(d))"; and revising paragraph (b) to read as follows:

25.401 Exceptions.

* * * * *

(b) In the World Trade Organization Government Procurement Agreement (WTO GPA) and each FTA, there is a U.S. schedule that lists services that are excluded from that agreement in acquisitions by the United States. Acquisitions of the following services are excluded from coverage by the U.S. schedule of the WTO GPA or an FTA as indicated in this table:

The service (Federal Service Codes from the Federal Procurement Data System Product/Service Code Manual are indicated in parentheses for some services.)	WTO GPA	NAFTA and Chile FTA	Singapore FTA	Australia and Morocco FTA
(1) All services purchased in support of military services overseas.	X	X	X	X
(2) (i) Automatic data processing (ADP) telecommunications and transmission services (D304), except enhance (*i.e.*, value-added) telecommunications services..	X	X	.....	.....
(ii) ADP teleprocessing and timesharing services (D305), telecommunications network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399).	X	X	.....	.....
(iii) Basic telecommunications network services (*i.e.*, voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, and private leased circuit services, but not information services, as defined in 47 U.S.C. 153(20))..	*	*	X	X
(3) Dredging	X	X	X	X
(4) (i) Operation and management contracts of certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers.	X	.....	X	.....
(ii) Operation of all Department of Defense, Department of Energy, or the National Aeronautics and Space Administration facilities; and all Government-owned research and development facilities or Government-owned environmental laboratories.	**	X	**	X
(5) Research and development	X	X	X	X
(6) Transportation services (including launching services, but not including travel agent services—V503).	X	X	X	X
(7) Utility services	X	X	X	X
(8) Maintenance, repair, modification, rebuilding and installation of equipment related to ships (J019).	.....	X	.....	X
(9) Nonnuclear ship repair (J998)	.....	X	.....	X

*NOTE 1. Acquisitions of the services listed at (2)(iii) of this table are a subset of the excluded services at (2)(i) and (ii), and are therefore not covered under the WTO GPA.

**NOTE 2. Acquisitions of the services listed at (4)(ii) of this table are a subset of the excluded services at (4)(i), and are therefore not covered under the WTO GPA.

■ 15. Revise section 25.402 to read as follows:

25.402 General.

(a)(1) The Trade Agreements Act (19 U.S.C. 2501, *et seq.*) provides the authority for the President to waive the Buy American Act and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country. The President has delegated this waiver authority to the U.S. Trade Representative. In acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade Act, the USTR has waived the Buy American Act and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers.

(2) The contracting officer shall determine the origin of services by the country in which the firm providing the services is established. See Subpart 25.5 for evaluation procedures for supply contracts covered by trade agreements.

(b) The value of the acquisition is a determining factor in the applicability of trade agreements. Most of these dollar thresholds are subject to revision by the U.S. Trade Representative approximately every 2 years. The various thresholds are summarized as follows:

Trade agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA	$175,000	$175,000	$6,725,000
FTAs:			
NAFTA:			
—Canada	25,000	58,550	7,611,532
—Mexico	58,550	58,550	7,611,532
Chile FTA	58,550	58,550	6,725,000
Singapore FTA	58,550	58,550	6,725,000
Australia FTA	58,550	58,550	6,725,000
Morocco FTA	175,000	175,000	6,725,000
Israeli Trade Act	50,000		

■ 16. Amend section 25.403 by revising the section heading and paragraphs (a), (b)(1) introductory text, (b)(3), and (c)(1) to read as follows:

25.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

(a) Eligible products from WTO GPA and FTA countries are entitled to the nondiscriminatory treatment specified in 25.402(a)(1). The WTO GPA and FTAs specify procurement procedures designed to ensure fairness (see 25.408).

(b) *Thresholds.* (1) To determine whether the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase) is covered by the WTO GPA or an FTA, calculate the estimated acquisition value as follows:

* * * * *

(3) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the WTO GPA or an FTA applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA or an FTA.

(c) *Purchase restriction.* (1) Under the Trade Agreements Act (19 U.S.C. 2512), in acquisitions covered by the WTO GPA, acquire only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.

25.405 [Removed]

■ 17. Remove section 25.405.

25.404 [Redesignated as 25.405]

■ 18. Section 25.404 is redesignated as section 25.405 and revised; and a new section 25.404 is added to read as follows:

25.404 Least developed countries.

For acquisitions covered by the WTO GPA, least developed country end products, construction material, and services must be treated as eligible products.

25.405 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions covered by the WTO GPA, Caribbean Basin country end products, construction material, and services must be treated as eligible products.

■ 19. Amend section 25.406 by revising the first sentence to read as follows:

25.406 Israeli Trade Act.

Acquisitions of supplies by most agencies are covered by the Israeli Trade Act, if the estimated value of the acquisition is $50,000 or more but does not exceed the WTO GPA threshold for supplies (see 25.402(b)). * * *

■ 20. Amend section 25.408 by revising paragraph (a) introductory text and (a)(5) to read as follows:

25.408 Procedures.

(a) If the WTO GPA or an FTA applies (see 25.401), the contracting officer must—

* * * * *

(5) Provide unsuccessful offerors from WTO GPA or FTA countries notice in accordance with 14.409–1 or 15.503.

* * * * *

■ 21. Amend section 25.502 by revising the introductory text of paragraph (b), paragraphs (b)(1) and (b)(3), and the introductory text of paragraph (c) to read as follows:

25.502 Application.

* * * * *

(b) For acquisitions covered by the WTO GPA (see Subpart 25.4)—

(1) Consider only offers of U.S.-made or designated country end products, unless no offers of such end products were received;

* * * * *

(3) If there were no offers of U.S.-made or designated country end products, make a nonavailability determination (see 25.103(b)(2)) and award on the low offer (see 25.403(c)).

(c) For acquisitions not covered by the WTO GPA, but subject to the Buy American Act (an FTA or the Israeli Trade Act also may apply), the following applies:

* * * * *

■ 22. Amend section 25.503 by revising paragraph (a)(2) to read as follows:

25.503 Group offers.

(a) * * *

(2) If the acquisition is covered by the WTO GPA and any part of the offer consists of items restricted in accordance with 25.403(c).

25.504–2 WTO GPA/Caribbean Basin Trade Initiative/FTAs.

* * * * *

■ 23. Revise 25.504–2 section heading to read as set forth above; and remove "Trade Agreement Act applies" from the first sentence of the undesignated paragraph following the table in Example 1 and adding "acquisition is covered by the WTO GPA" in its place.

25.504–3 [Amended]

■ 24. Amend section 25.504–3 in paragraphs (b) and (c) by removing from the first sentence of the undesignated paragraph following the tables in Examples 2 and 3 "subject to the Trade Agreements Act" and adding "covered by the WTO GPA" in their place.

25.504–4 [Amended]

■ 25. Amend section 25.504–4 in paragraph (a) by removing from the paragraph entitled "Problem", following the table, "Trade Agreements Act does not apply" and adding "acquisition is not covered by the WTO GPA" in its place; and removing "subject to the Trade Agreements Act" from the last

paragraph of "STEP 2", and adding "covered by the WTO GPA" in its place.

25.1002 [Amended]

■ 26. Amend section 25.1002 in the first sentence of paragraph (a) by removing "Trade Agreements Act" and adding "WTO GPA" in its place.

25.1101 [Amended]

■ 27. Amend section 25.1101 by removing from the first sentence of paragraph (c)(1) "Trade Agreements Act applies" and adding "acquisition is covered by the WTO GPA" in its place.

■ 28. Amend section 25.1102 by revising paragraph (c)(1) and the last sentence of paragraph (c)(3) to read as follows:

25.1102 Acquisition of construction.

* * * * *

(c) * * *

(1) List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, other than WTO GPA country, least developed country, or FTA country construction material.

* * * * *

(3) * * * List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, other than designated country, or Australian, Chilean, or Moroccan construction material.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 29. Amend section 52.212–3 by revising paragraphs (g)(1)(ii), (g)(4)(i), the first sentence of (g)(4)(ii), and (g)(4)(iii) of the provision to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Jan 2005)

* * * * *

(g)(1) * * *

(ii) The offeror certifies that the following supplies are end products of Australia, Canada, Chile, Mexico, or Singapore, or Israeli end products as defined in the clause of this solicitation entitled "Buy American Act—Free Trade Agreements—Israeli Trade Act":

END PRODUCTS OF AUSTRALIA, CANADA, CHILE, MEXICO, OR SINGAPORE OR ISRAELI END PRODUCTS:

Line Item No.	Country of origin
_____	_____
_____	_____
_____	_____

[List as necessary]

* * * * *

(4) * * *

(i) The offeror certifies that each end product, except those listed in paragraph (g)(4)(ii) of this provision, is a U.S.-made or designated country end product, as defined in the clause of this solicitation entitled "Trade Agreements."

(ii) The offeror shall list as other end products those end products that are not U.S.-made or designated country end products. * * *

(iii) The Government will evaluate offers in accordance with the policies and procedures of FAR Part 25. For line items covered by the WTO GPA, the Government will evaluate offers of U.S.-made or designated country end products without regard to the restrictions of the Buy American Act. The Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer determines that there are no offers for such products or that the offers for such products are insufficient to fulfill the requirements of the solicitation.

* * * * *

■ 30. Amend section 52.212–5 by—

■ a. Removing from the clause heading "(Dec 2004)" and adding "(Jan 2005)" in its place;

■ b. Revising paragraph (b)(24)(i) and (b)(25) to read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (JAN 2005)

(b) * * *

(24)(i) 52.225–3, Buy American Act—Free Trade Agreements— Israeli Trade Act (Jan 2005) (41 U.S.C. 10a–10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note, Pub. L. 108–77, 108–78, 108–286).

* * * * *

(25) 52.225–5, Trade Agreements (Jan 2005) (19 U.S.C. 2501, *et seq.*, 19 U.S.C. 3301 note).

* * * * *

■ 31. Amend section 52.225–3—

■ a. By revising the date of the clause to read "(JAN 2005)";

■ b. In paragraph (a) of the clause by adding, in alphabetical order, the definition "End product of Australia, Canada, Chile, Mexico, or Singapore"; and removing the definitions "Free Trade Agreement country" and "Free Trade Agreement country end product"; and

■ c. By revising the first and last sentences of paragraph (c) of the clause to read as follows:

52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

* * * * *

Buy American Act—Free Trade Agreements—Israeli Trade Act (Jan 2005)

(a) * * *

End product of Australia, Canada, Chile, Mexico, or Singapore means an article that—

(1) Is wholly the growth, product, or manufacture of Australia, Canada, Chile, Mexico, or Singapore; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Australia, Canada, Chile, Mexico, or Singapore into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

* * * * *

(c) *Delivery of end products.* The Contracting Officer has determined that FTAs (except the Morocco FTA) and the Israeli Trade Act apply to this acquisition. * * * If the Contractor specified in its offer that the Contractor would supply an end product of Australia, Canada, Chile, Mexico, or Singapore or an Israeli end product, then the Contractor shall supply an end product of Australia, Canada, Chile, Mexico, or Singapore, an Israeli end product or, at the Contractor's option, a domestic end product.

* * * * *

■ 32. Amend section 52.225–4 by—

■ a. Revising the date of the provision to read "(Jan 2005)";

■ b. Revising the last sentence of paragraph (a) of the provision; and

■ c. Revising paragraph (b) of the provision to read as follows:

52.225–4 Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

* * * * *

Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate (Jan 2005)

(a) * * * The terms "component," "domestic end product," "end product," "end product of Australia, Canada, Chile, Mexico, or Singapore," "foreign end product," "Israeli end product," and "United States" are defined in the clause of this solicitation entitled "Buy American Act—Free Trade Agreements—Israeli Trade Act."

(b) The offeror certifies that the following supplies are end products of Australia, Canada, Chile, Mexico, or Singapore or Israeli end products as defined in the clause of this solicitation entitled "Buy American Act—Free Trade Agreements—Israeli Trade Act":

END PRODUCTS OF AUSTRALIA, CANADA, CHILE, MEXICO, OR SINGAPORE OR ISRAELI END PRODUCTS:

Line item No.	Country of origin
_____	_____
_____	_____
_____	_____

[List as necessary]

* * * * *

■ 33. Amend section 52.225–5 by—

■ a. Revising the date of the clause to read "(Jan 2005)";

■ b. Removing from paragraph (a) of the clause the definition "Caribbean Basin country"; revising the definitions "Designated country" and "Designated country end product"; removing the definition "Free Trade Agreement country"; adding, in alphabetical order, the definitions "Least developed country end product" and "WTO GPA country end product"; and

■ c. Revising paragraph (b) of the clause to read as follows:

52.225–5 Trade Agreements.

* * * * *

Trade Agreements (Jan 2005)

(a) * * *

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom);

(2) A Free Trade Agreement country (Australia, Canada, Chile, Mexico, Morocco, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

Designated country end product means a WTO GPA country end product, an FTA country end product, a least developed country end product, or a Caribbean Basin country end product.

* * * * *

Least developed country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

* * * * *

WTO GPA country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services, (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(b) *Delivery of end products.* The Contracting Officer has determined that the WTO GPA and FTAs apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only U.S.-made or designated country end products except to the extent that, in its offer, it specified delivery of other end products in the provision entitled "Trade Agreements Certificate."

(End of clause)

■ 34. Amend section 52.225–6 by—

■ a. Removing from the provision heading "(Jan 2004)" and adding "(Jan 2005)" in its place; and

■ b. Revising paragraph (a), the first sentence of paragraph (b), and paragraph (c) of the provision to read as follows:

52.225–6 Trade Agreements Certificate.

* * * * *

Trade Agreements Certificate (Jan 2005)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a U.S.-made or designated country end product, as defined in the clause of this solicitation entitled "Trade Agreements."

(b) The offeror shall list as other end products those supplies that are not U.S.-made or designated country end products.

* * *

(c) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation. For line items covered by the WTO GPA, the Government will evaluate offers of U.S.-made or designated country end products without regard to the restrictions of the Buy American Act. The Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer determines that there are no offers for such products or that the offers for those products are insufficient to fulfill the requirements of this solicitation.

(End of provision)

52.225–9 [Amended]

■ 35. Amend section 52.225–9 in the clause heading by removing "(June 2003)" and adding "(Jan 2005)" in its place; and in paragraph (a) in the definition "Cost of components" by removing from the end of paragraph (2) the words "end product" and adding "construction material" in its place.

■ 36. Amend section 52.225–11—

■ a. By removing from the clause heading "(Oct 2004)" and adding "(Jan 2005)" in its place;

■ b. In paragraph (a) by adding, in alphabetical order, the definition "Caribbean Basin country construction material"; by removing from the end of paragraph (2) in the definition "Cost of components" the words "end product" and adding "construction material" in its place; by revising the definitions "Designated country" and "Designated country construction material"; by removing the definition "Free Trade Agreement country"; and by adding the definitions "Least developed country construction material" and "WTO GPA country construction material";

■ c. By revising paragraphs (b)(1) and (b)(2) of the clause; and

■ d. By revising Alternate I. The added and revised text reads as follows:

52.225–11 Buy American Act—Construction Materials under Trade Agreements.

* * * * *

Buy American Act—Construction Materials Under Trade Agreements (Jan 2005)

(a) *Definitions.* * * *

Caribbean Basin country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

* * * * *

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom);

(2) A Free Trade Agreement country (Australia, Canada, Chile, Mexico, Morocco, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

Designated country construction material means a construction material that is a WTO GPA country construction material, an FTA country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

* * * * *

Least developed country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

* * * * *

WTO GPA country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

* * * * *

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American Act restrictions are waived for designated country construction materials.

(2) The Contractor shall use only domestic, designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

* * * * *

Alternate I (Jan 2005). As prescribed in 25.1102(c)(3), delete the definition of "designated country construction material" from the definitions in paragraph (a) of the basic clause, add the following definition of "Australian, Chilean, or Moroccan construction material" to paragraph (a) of the basic clause, and substitute the following paragraphs (b)(1) and (b)(2) for paragraphs (b)(1) and (b)(2) of the basic clause:

Australian, Chilean, or Moroccan construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of Australia, Chile, or Morocco; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Australia, Chile, or Morocco into a new and different construction material distinct from the materials from which it was transformed.

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA and all the Free Trade Agreements except NAFTA apply to this acquisition. Therefore, the Buy American Act restrictions are waived for WTO GPA country and Australian, Chilean, and Moroccan, least developed country, and Caribbean Basin country construction materials.

(2) The Contractor shall use only domestic, WTO GPA country, Australian, Chilean, or Moroccan, least developed country, or Caribbean Basin country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

■ 37. Amend section 52.225–12 by—

■ a. Removing from the provision heading "(JAN 2004)" and adding "(JAN 2005)" in its place;

■ b. Revising paragraphs (a), (d)(1), and the introductory text of (d)(3) of the provision; and

■ c. Removing from Alternate II "*(Jan 2004)*" and adding "*(Jan 2005)*" in its place; and revising paragraphs (a), (d)(1), and the introductory text of (d)(3) to read as follows:

52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

* * * * *

Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements (Jan 2005)

(a) *Definitions.* "Construction material," "designated country construction material," "domestic construction material," and "foreign construction material," as used in this provision, are defined in the clause of this solicitation entitled "Buy American Act—Construction Materials Under Trade Agreements" (Federal Acquisition Regulation (FAR) clause 52.225–11).

* * * * *

(d) *Alternate offers.* (1) When an offer includes foreign construction material, other than designated country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–11, the offeror also may submit an alternate offer based on use of equivalent domestic or designated country construction material.

* * * * *

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225–11 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or designated country construction material, and the offeror shall be required to furnish such domestic or designated country construction material. An offer based on use of the foreign construction material for which an exception was requested—

* * * * *

(End of provision)

* * * * *

Alternate II (Jan 2005). * * *

(a) *Definitions.* "Australian, Chilean, or Moroccan construction material," "Caribbean Basin country construction material," "construction material," "domestic construction material," "foreign construction material," "least developed country construction material," and "WTO GPA country construction material," as used in this provision, are defined in the clause of this solicitation entitled "Buy American Act—Construction Materials Under Trade Agreements" (Federal Acquisition Regulation (FAR) clause 52.225–11).

(d)(1) When an offer includes foreign construction material, other than WTO GPA country, Australian, Chilean, or Moroccan, least developed country, or Caribbean Basin country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–11, the offeror also may submit an alternate offer based on use of equivalent domestic, WTO GPA country, Australian, Chilean, or Moroccan, least developed country, or Caribbean Basin country construction material.

* * * * *

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225–11 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic, WTO GPA country, Australian, Chilean, or Moroccan, least developed country, or Caribbean Basin country construction material, and the offeror shall be required to furnish such domestic, WTO GPA country, Australian, Chilean, or Moroccan, least developed country, or Caribbean Basin country construction material. An offer based on use of the foreign construction material for which an exception was requested—

* * * * *

[FR Doc. 04–28400 Filed 12–27–04; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2001–27 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2001–27, which precedes this document. These documents are also available via the Internet at *http://www.acqnet.gov/far.*

FOR FURTHER INFORMATION CONTACT: Laurieann Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact Cecelia Davis at (202) 219–0202.

Free Trade Agreements—Australia and Morocco

This interim rule allows contracting officers to purchase the products of Australia and Morocco without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements. The U.S. Trade Representative negotiated Free Trade Agreements with Australia and Morocco, which go into effect January 1, 2005, according to Public Laws 108–286 and 108–302. These Agreements join the North American Free Trade Agreement (NAFTA) and the Chile and Singapore Free Trade Agreements which are already in the FAR. The threshold for applicability of the Australian Free Trade Agreement is $58,550 (the same as other Free Trade Agreements to date), but the threshold for applicability of the Morocco Free Trade Agreement is $175,000. Because of the short statutory time frame, this is an interim rule. Also in this rule are changes requested by the U.S. Trade Representative, in the list of Least Developed Countries, and changes in terminology on how the FAR uses the terms "designated country" and "Trade Agreements Act." Some technical changes are also included.

Dated: December 22, 2004.

Laura Auletta,

Director, Contract Policy Division.

[FR Doc. 04–28401 Filed 12–27–04; 8:45 am]

BILLING CODE 6820–EP–P

4. **Notification of Employee Rights Concerning Payment of Union Dues of Fees (Interim) (FAR Case 2004-010)**

Effective Date: December 20, 2004

What is the purpose of this FAR Case?

This interim rule amends the FAR in implementing Executive Order 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, to require Government contractors and subcontractors to post notices in all workplaces. The notice informs employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs or, if not a union member, to pay dues or fees to support activities not related to collective bargaining, contract administration, or grievance adjustment.

How will this affect work processes?

- Requires that the prescribed clause be included in solicitations and contracts as well as Subcontracts for Commercial Items.
- Requires that any complaints relating to the notice be referred to the Department of Labor.
- Requires that any requests for waiver of the posting requirement from prospective contractors or subcontractors be referred to the Secretary of Labor.

5. **Mentor Protégé Program-Delegation of Approval Authority for Mentor Protégé Agreements (Final) (FAR Case 2003-010)**

Effective Date: January 19, 2005

What is the purpose of this FAR Case?

The final rule amends FAR 19.702, Statutory Requirements, to change the approval authority of Mentor Protégé Agreements to the DOD Military Departments or Defense Agencies.

How will this affect work processes?

- DOE work processes remain unchanged.

6. **Applicability of the Cost Principles and Penalties for Unallowable Costs (Final) (FAR Case 2001-018)**

Effective Date: January 19, 2005

What is the purpose of this FAR Case?

The final rule increases the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement.

How will this affect work processes?

- Requires that a contractor's claim for reimbursement be assessed against FAR Part 31, Cost Principles, for allowability of costs.

7. **Technical Amendments**

The amendment makes editorial changes to FAR 11.201(d)(2)(i), 41.301(a), 44.203(b)(1), 51.102(c)(1) and in the introductory text of FAR provision 52.219-1 in order to update references.

B. <u>Federal Acquisition Circular (FAC) 2001-27</u>

1. **Free Trade Agreements – Australia and Morocco (Interim) (FAR Case 2004-027)**

Effective Date: January 1, 2005

What is the purpose of this FAR Case?

This interim rule implements new Free Trade Agreements with Australia and Morocco. In addition, the rule-

- Establishes a table of services excluded from the coverage of the various trade agreements;
- Corrects the threshold for Canadian services;
- Revises FAR terminology relating to international trade agreements and the Trade Agreements Act (TAA); and

- Revises the FAR clauses that implement application of the Buy American Act and trade preferences for supplies and construction material.

How will this affect work processes?

- Provides contracting officers guidance for procuring products from Australia and Morocco in conformity with the Free Trade Agreements.

- Provides updated guidance on the effect of Free Trade Agreements on all Federal procurements.

Written comments to the interim rulemakings (FAC 2001-26 and FAC 2001-27) are due to this office on or before February 8, 2004. This will allow time to prepare a consolidated response to the General Services Administration, as necessary.

Questions concerning this Flash should be directed to Denise P. Wright at (202) 287-1340 or Denise.Wright@hq.doe.gov

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Federal Register

Monday,
December 20, 2004

Part V

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1, et al.
Federal Acquisition Circular 2001–26; Introduction, Federal Acquisition Regulation; Electronic Representations and Certifications, et al.; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Circular 2001–26; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final rules and a technical amendment.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001–26. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.acqnet.gov/far.*

DATES: For effective dates and comment dates, see separate documents which follow.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001–26 and specific FAR case number(s). Interested parties may also visit our website at *http://www.acqnet.gov/far.*

Item	Subject	FAR case	Analyst
I	Electronic Representations and Certifications	2002–024	Zaffos.
II	Excluded Parties List System Enhancement	2002–023	Goral.
III	Special Emergency Procurement Authority	2003–022	Zaffos.
IV	Notification of Employee Rights Concerning Payment of Union Dues or Fees (Interim)	2004–010	Goral.
V	Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements	2003–010	Cundiff.
VI	Applicability of the Cost Principles and Penalties for Unallowable Costs	2001–018	Loeb.
VII	Technical Amendments.		

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001–26 amends the FAR as specified below:

Item I—Electronic Representations and Certifications (FAR Case 2002–024)

This final rule requires offerors to provide representations and certifications electronically via the BPN website; to update the representations and certifications as necessary, but at least annually, to keep them current, accurate and complete; and to make changes that affect only one solicitation by completing the appropriate sections of either paragraph (j) of FAR provision 52.212–3 or FAR provision 52.204–8, whichever is included in the solicitation. This change represents a conversion of a paper-based process to a more efficient electronic process to obtain offerors' representations and certifications. It will also significantly reduce the paperwork burden for both offerors and contracting officers.

Item II—Excluded Parties List System Enhancement (FAR Case 2002–023)

This final rule amends the FAR to incorporate the Excluded Parties List System (EPLS), GSA's new searchable on-line electronic list of parties excluded from doing business with the Federal Government. The EPLS enables agencies to directly input data into this system and obviates the need for the hard copy List of Parties Excluded from Federal Procurement and Nonprocurement Programs. The EPLS will provide more up-to-date and readily accessible information to the contracting officer on parties excluded from doing business with the Federal Government.

Item III—Special Emergency Procurement Authority (FAR Case 2003–022)

This rule finalizes the interim rule 2003–022 by including under FAR subpart 13.5 the acquisition of supplies and services that meet the definition of a commercial item in FAR 2.101, and which, as determined by the head of the agency, are to be used to support a contingency operation. This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and also incorporates the higher thresholds authorized by Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. This rule allows the contracting officer expanded use of Simplified Acquisition and Commercial Items procedures when acquiring supplies or services that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack.

Item IV—Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004–010) (Interim)

This interim rule amends FAR Parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR part 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes. This rule applies to Federal contractors and subcontractors with contracts or subcontracts that exceed the simplified acquisition threshold, unless covered by an exemption granted by the Secretary of Labor.

Item V—Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements (FAR Case 2003–010)

This final rule amends FAR 19.702, Statutory Requirements, to change the approval authority of the Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies and to make some minor changes for clarification. This change is being made in order for DoD to streamline and

transform itself to more effectively achieve its mission.

Item VI—Applicability of the Cost Principles and Penalties for Unallowable Costs (FAR Case 2001–018)

This final rule increases the threshold at FAR 42.709(b) and FAR 42.709–6 from $500,000 to $550,000 for contracts subject to penalties if a contractor includes expressly unallowable costs in a claim for reimbursement. The threshold was increased to reflect inflation and is authorized by 10 U.S.C. 2324(l) and 41 U.S.C. 256(l).

The rule is of importance to contracting officers and contractors who negotiate contracts and modifications, and determine costs in accordance with FAR Part 31 contract cost principles.

Item VII—Technical Amendments

Editorial changes are made at FAR 11.201(d)(2)(i), 41.301(a), 44.203(b)(1), 51.102(c)(1), and in the introductory text of FAR provision 52.219–1 in order to update references.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001-26 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-26 is effective December 20, 2004, except for Item I, which is effective January 1, 2005, and Items II, III, V, and VI, which are effective January 19, 2005.

Dated: December 6, 2004.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: December 8, 2004.

David A. Drabkin,

Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

Dated: December 2, 2004.

Tom Luedtke,

Deputy Chief Acquisition Officer, National Aeronautics and Space Administration.

[FR Doc. 04–27632 Filed 12–17–04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 14, 15, and 52

[FAC 2001–26; FAR Case 2002–024; Item I]

RIN 9000–AJ80

Federal Acquisition Regulation; Electronic Representations and Certifications

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require offerors to submit representations and certifications electronically via the Business Partner Network (BPN), unless certain exceptions apply.

DATES: *Effective Date:* January 1, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 501–6091. Please cite FAC 2001–26, FAR case 2002–024.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 4012, January 27, 2004. The 60-day comment period for the proposed rule ended March 29, 2004. Forty-five comments were received. Some of the comments merely agreed with the concept of ORCA; others pointed out typographical errors. The substantive comments are discussed below.

1. *Comment:* Should a contracting officer check for paper reps and certs and, failing to find them, check for electronic ones? Or, should a contracting officer only check for electronic ones if the offeror falls within a particular class of small business?

Council's response: The inclusion of the FAR provisions at 52.204–8 or 52.212–3(j) (as described in the final rule) in a solicitation would alert both the vendor and the contracting officer that the electronic completion of representations and certifications on the Online Representations and Certifications Application (ORCA) module is required for the specific contracting action.

2. *Comment:* Without reps and certs, how would a Contracting Officer know what class of small business an offeror is?

Council's response: ORCA includes the socio-economic representations and certifications (such as FAR 52.219–1, Small Business Program Representations.) A vendor would revise its responses in either FAR 52.204–8 or 52.212–3(j) (as described in the final rule) if its responses in ORCA is incorrect for the present solicitation.

3. *Comment:* The possibility of parallel paper and electronic systems offers myriad chances for error. What if paper and electronic versions differ? What if an offeror from the class of small businesses not required to build an electronic record chooses to build an electronic record? What if someone required to build an electronic record submits paper reps and certs instead?

Council's response: The provisions at FAR 52.204–8 and 52.212–3(j) make it clear that vendors are required to complete the representations and certifications in ORCA. Those certifications and representations would take precedence over any other representations and certifications received (for the same provisions included in ORCA) for the specific contract action unless the offeror indicates he is amending those answers in accordance with the referenced provisions.

4. *Comment:* Since contractors are currently using the CCR database, the EEO database, PRO-Net, and EPLS (consolidated under "*BPN.com*"), will there be a future consideration for a contractor to have access and use the contractor's reps and certs rather than have the contractor continuing to request a new reps and certs package for the same sources that are on the "BPN" reps and certs database?

Council's response: Vendors will have access to ORCA. Please also note that the PRO-Net system has been retired, with its key capabilities being incorporated into CCR.

5. *Comment:* An additional clarification at FAR 12.301 is needed for oral solicitations. FAR 13.106–1(c) states the contracting officer shall solicit quotations orally to the maximum extent practicable. FAR 5.101(a)(2)(ii) exempts contracting officers from posting $10K-$25K requirements if oral solicitations are used. Otherwise, the requirement has to be posted for 10 days - a millennium in the customer's

eyes. In contrast, FAR 12.301(a)(2) says we have to use FAR 52.212–3, Offeror Representations and Certifications—Commercial Items, in all commercial solicitations. Recommend verbiage be added to stating, "...other than oral..." just before the first "solicitation" in FAR 12.301(b). It would then read, "To implement this Act, the contracting officer shall insert the following provisions in other than oral solicitations for ...." If this isn't the best place for it, then I would recommend similar verbiage in FAR 12.301(b)(2) to clear up this ambiguity.

Council's response: This comment will be separately considered by the Councils for appropriate action.

6. *Comment:* The requirement for a physical affirmation (check box) that the representations and certifications posted to BPN are current appears unnecessary. Respondent recommends the following language: "The Offeror has completed the annual representations and certifications electronically via the Business Partner Network (BPN) web site at *http://orca.bpn.gov*, however, submits the following changes pertaining to this specific solicitation as identified below (insert changes, identifying change by clause number, title, and date). These amended representation(s) and/or certifications are also incorporated in this offer and are current, accurate, and complete as of the date of this proposal." This (a) addresses the true intent of the proposed language; (b) eliminates additional physical check boxes; and (c) reinforces the fact that the vendor is being held responsible for the currency of their online reps and certs information.

Council's response: We concur and have revised the applicable provisions accordingly.

7. *Comment:* Should FAR 52.222–38, Compliance with Veteran's Employment Reporting Requirements, be included in FAR 14.213(b)?

Council's response: We concur. The final rule and ORCA reflect the addition of this provision.

8. *Comment:* Can the electronic representations and certifications be incorporated with the Central Contractor Registration (CCR) file so as not to cause an additional burden on contractors already registered in the CCR?

Council's response: The ORCA portion of the BPN was built to supplement the data in CCR. Because CCR is now used for more than contracting purposes, we decided to not require additional representation and certification information from all CCR registrants, as it is only necessary for contracting offices. To alleviate the burden on the vendors, company information collected in CCR is electronically provided and pre-populated into ORCA. The vendor is not asked to re-enter any information that is found in CCR. The only information the vendor needs to supply in ORCA is directly related to representations and certifications.

9. *Comment:* Our contracts are for low dollar amounts and I cannot see the contractors doing all this preliminary work just for a small amount of business for them. All of this may work for higher dollar business. Can there be a dollar value attached?

Council's response: The provisions included in ORCA have applicability at different dollar values with the majority applying to items over the micro-purchase level. As such, ORCA must be applied to all acquisitions over the micro-purchase threshold. (However, in accordance with FAR 4.1102, micro-purchases can also be exempted from Central Contractor Registration (CCR) requirements.)

10. *Comment:* If vendors already access CCR, why is ORCA available only through the Business Partner Network? It seems it would be easier to include the necessary fields for ORCA into CCR so that vendors would not have to access two systems.

Council's response: ORCA is available through the BPN because it is part of the BPN, as is CCR. However, just like CCR, it can be reached directly via the URL *http://orca.bpn.gov*. To alleviate the burden on the vendor, company information collected in CCR is electronically provided and pre-populated into ORCA. The vendor is not asked to re-enter any information that is found in CCR.

11. *Comment:* Does a contractor first submit online reps and certs when he/she receives a solicitation and decides to submit an offer; or are the CCR database administrators going to notify its registrants and instruct them to go to the "Online Representations and Certifications Application (ORCA)" at bpn.gov and enter in the reps and certs?

Council's response: The first time the vendor responds to a solicitation that includes either FAR 52.204–8 or 52.212–3(j), the vendor would be required to complete the online representations and certifications. However, the Government plans an extended outreach effort, including notifications from CCR, in order to publicize ORCA's availability and required use.

12. *Comment:* Informational language in the proposed rule stated, "Small businesses that are exempted from registering in the CCR database are also exempted from submitting representations and certifications electronically." This statement is confusing. We are not aware of any business class exceptions to CCR registration. The exception to CCR registration at FAR 4.1102 does not apply to the entity doing business with the Government insomuch as it applies to the type of acquisition or contract being awarded at the time. Even if a contractor was awarded a contract that happened to be exempt from the CCR requirement, the exception does not then apply for subsequent or new awards, if the new award does not meet one of the exceptions.

Council's response: We concur. The informational language has been corrected in the final rule.

13. *Comment:* We think that contractors may become frustrated or confused if, after completing reps and certs on line, they are then required to fill out reps and certs in another contract, just because that particular contract is exempt from the CCR requirements. Perhaps there should be direction to the CO to check ORCA before deciding which reps and certs clause to include in a solicitation for an award that may be exempt from CCR. If the contractor has already completed the annual reps and certs, then the annual reps and certs clause(s) could be used in the solicitation. If not, then the CO would include all applicable reps and certs required for the solicitation. However, since reps and certs are required for every award (except for micropurchases), there should be no exceptions for annual reps and certs. All solicitations should include the annual reps and certs clause. We believe that even contractors who may have had a contract exempted from CCR will eventually have to be registered in the CCR and therefore will be able to submit annual reps and certs.

Council's response: Concur. Final rule includes language to encourage ORCA use when CCR is not required and provides further instructions if the offeror has already completed representations and certifications in ORCA.

14. *Comment.* Perhaps the requirement for annual reps and certs should be moved from FAR Parts 12, 14, and 15 and moved to FAR Part 4, in a new Subpart, 4.12 (after 4.11, Central Contractor Registration). Alternatively, revise Subpart 4.11 to be a subpart titled Business Partner Network, with two sections. The scope of the subpart would prescribe policies and procedures for requiring contractor registration in the CCR database, and

submission of annual representations and certifications.

Council's response: We concur. The final rule adds a new Subpart 4.12 that addresses these requirements.

15. *Comment.* We have a concern about the submission process of the "Online Representations and Certification Application (ORCA)". In reading the ORCA procedures, we noted that contractors would be required to have a Marketing Partner Identification Number (MPIN) in order to enter information into ORCA. This is a number created by the vendor during the registration process in the CCR. We have a concern about this requirement. The MPIN is not a mandatory field in the CCR and it is likely that quite a few contractors did not create an MPIN at the time of CCR registration. It is possible that a lot of contractors will now have to go back to CCR and create an MPIN. We suggest allowing that the Trading Partner Identification Number (TPIN) issued by CCR be used instead, or change the MPIN field in CCR to a mandatory one. While this may be outside the scope of this case, this is something that should be looked into.

Council's response: The TPIN, for security reasons, is not provided to anyone (including other government systems) other than the Point of Contact provided by the registrant in its CCR record. The MPIN is required for vendors to use other Government systems (such as the Past Performance Information Retrieval System (PPIRS) and Federal Technical Data Solution (FedTeDS)), so its use for ORCA is consistent. However, it is true that currently the MPIN is an optional field in CCR. The suggestion to make it mandatory has been provided to the CCR Program Manager for consideration. Additionally, vendor outreach is planned for the implementation of ORCA, which will include instructions on the MPIN and its use.

16. *Comment:* Why is there no reference to annual representations and certifications in FAR Part 13 for use with non-commercial item acquisitions. We assume that either FAR 52.214–30 or 52.215–7 would be used. We recommend adding language similar to that at the proposed FAR 15.209(g) to FAR 13.302–5(d).

Council's response: Although FAR Part 13 does not specifically discuss representations and certifications, FAR 13.003(g)(1) states that any appropriate combination of procedures in FAR parts 13, 14, 15, 35, or 36 may be used for non-commercial items that do not exceed the simplified acquisition threshold. This would include using ORCA.

17. *Comment:* We recommend adding language similar to that at the proposed FAR 15.209(g) to FAR 14.201–9(e).

Council's response: By adding new Subpart 4.12, there is no need to add language to FAR 14.201–9(e).

18. *Comment:* FAR 52.222–18, Certification Regarding Knowledge of Child Labor for Listed End Products. This particular certification, which is listed as a certification that is not to be included in a solicitation that includes the annual reps and certs clause, doesn't seem appropriate as an annual certification because it contains contract specific fill-ins for the CO. This is only used for acquisition of certain products, which the CO must identify in the solicitation. How can this be an "annual certification?"

Council's response: For the majority of vendors completing FAR 52.222–18, the answer would likely be the same: that they do not supply any end products from the identified countries. Vendors that have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204–8 or 52.212–3(j) (whichever is included in the solicitation).

19. *Comment:* We think the language in the "Annual Reps and Certs" clauses should be revised to make it clear to offerors that any reps and certs posted on the BPN that do not apply or are different because of a particular solicitation must be identified. We are especially concerned that offerors understand that while they may be certified as a small business under one NAICS code, they may not be small under another one.

Council's response: We concur. The language included in the new Subpart 4.12 and in the provisions at FAR 52.204–8 and 52.212–3(j) makes it clear that offerors are required to indicate in the specific solicitation differences from the representations and certifications in ORCA.

20. *Comment:* When using ORCA, will contractors indicate their business size for the NAICS that they most commonly do business under and then be required to update the listing and business size when additional NAICS are used for particular situations? Or will they just indicate how many employees/dollars and then have the Government make assessments based on the particular NAICS that pertains to each solicitation?

Council's response: The vendor can provide up to 20 NAICS in CCR and consequently ORCA. Every NAICS the vendor provides to CCR is listed in ORCA. Size determination is automatically calculated (using annual revenue and number of employees) and displayed for each NAICS given. Additionally, the vendor-provided annual revenue and number of employees is shown. Contracting officers can use that information to calculate size status for NAICS not provided.

21. *Comment:* Vendors may be reluctant to publish TIN numbers because of concerns that it would be accessible to other parties.

Council's response: TIN numbers are never displayed in ORCA. The notice "TIN on File with CCR" is shown in place of the actual TIN.

22. *Comment:* An offeror's response to the Buy American Act certification would depend on the type of product being provided by the vendor.

Council's response: Vendors can list all of their foreign end products and the associated countries in ORCA. If in response to a solicitation a vendor offers a foreign end product not listed in ORCA, the vendor would provide the information in accordance with either provision FAR 52.204–8 or 52.212–3(j).

23. *Comment:* The proposed FAR 52.214–30 and 52.215–7 clauses are nearly identical (one referring to sealed bids and the other referring to negotiation and offerors). Consider combining the two proposed clauses into a single clause.

Council's response: Concur. The two provisions have been combined into new provision FAR 52.204–8.

24. *Comment:* Will the BPN Web site for the representations and certifications also accommodate agency-specific reps and certs, such as DFARS 252.247–7022?

Council's response: At this time ORCA only contains FAR level representations and certifications. Agency specific provisions are included in RFPs as required by Agency policies and regulations. However, this recommendation has been forwarded to the ORCA Program Manager for possible future inclusion in ORCA.

25. *Comment:* It would appear that Certificates of Current Cost and Pricing Data (when required – *i.e.*, non-competitive RFPs) would need to be included within RFPs, outside of their place within the Reps and Certs.

Council's response: We concur. The certification at FAR 15.406–2, Certificate of Current Cost or Pricing Data, is not included in ORCA.

26. *Comment:* Reps and Certs concerning Limited Rights Data/ Restricted Software would have to remain and RFP-specific requirement to

be called out by a contractor in some other portion of their proposal.

Council's response: ORCA allows the vendor to enter multiple Limited Rights Data and Restricted Computer Software into their record. A vendor that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204–8 or 52.212–3(j) (whichever is included in the solicitation).

27. *Comment:* Information pertaining to Place of Performance would have to be RFP- specific and identified by contractors in another portion of their proposal.

Council's response: ORCA allows the vendor to enter multiple Places of Performance. A vendor that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204–8 or 52.212–3(j) (whichever is included in the solicitation).

28. *Comment:* The identification of "authorized negotiators," often included within Reps and Certs, is RFP-specific information for most contractors, and would have to be identified elsewhere in a contractor's proposal.

Council's response: ORCA does not provide for identification of authorized negotiators. This requirement is solicitation specific.

29. *Comment:* There are a number of issues regarding the handling of subcontractor Reps and Certs: (a) prime contractors could be given controlled access to the CCR database, to determine whether and what Reps and Certs have been completed by a subcontractor; (b) prime contractors could rely on a written affirmation/certification from subcontractors that they have completed the all-encompassing Reps and Certs; and (c) giving prime contractors access to the CCR database is probably the best solution, otherwise, there is a large amount of information that prime contractors would still have to get from subcontractors: business size, DUNS #, taxpayer ID #, whether they are debarred, or whether they are subject to the Cost Accounting Standards, for several examples.

Council's response: ORCA is available to the public to search and view. However, as previously stated, a vendor's TIN Number is never publicly displayed on ORCA.

30. *Comment:* Contractors must be required to update their BPN annual revenue size certifications whenever they complete a fiscal year, and must be required to update their BPN number of employees size certifications on a monthly basis in order for such certifications to be current, accurate, and complete. Otherwise the BPN reps and certs will be most likely be out–of–date, inaccurate, and incomplete, resulting in increased costs for both the procuring agency (increased number of size protests and related GAO protests) and offerors (costs associated with preparing offer for procurement where concern is ultimately found to be ineligible for award).

Council's response: In accordance with the provisions at FAR 52.204–8 and 52.212–3(j) (whichever is included in the solicitation), the vendor's offer constitutes affirmation that the information in ORCA is current, accurate, and complete as of the date of the offer. The offeror assumes the risk of out–of–date, inaccurate, or incomplete information by submission of his offer.

31. *Comment:* FAR 52.219–1 also contains reps and certs with respect to offers from HUBZone joint ventures, which are contract–specific reps and certs that cannot be submitted through the BPN (FAR 52.219–1(b)(6)(ii)). If the rule is adopted as proposed, the HUBZone joint venture reps and certs must be added to another FAR clause so that affected entities can make the required joint venture reps and certs with respect to particular contracts.

Council's response: We disagree. Vendors that would have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204–8 or 52.212–3(j) (whichever is included in the solicitation).

32. *Comment:* Under the proposed rule, firms will not have to submit FAR 52.219–2, Equal Low Bids, on a contract-by-contract basis. However, under FAR 52.219–2, a concern must identify the labor surplus area (LSA) "in which the costs to be incurred on account of manufacturing or production (by the bidder or first-tier subcontractors) amount to more than 50 percent of the contract price." Such a representation can only be made on a contract-by-contract basis. FAR clause 52.219–2 must be included in each particular contract. We recommend that proposed FAR 14.213(b)(9) be deleted.

Council's response: We disagree. For the majority of vendors completing FAR 52.219–2, the answer would likely be the same regardless of the solicitation. Vendors that have different answers in response to a specific solicitation would provide those differences in accordance with FAR 52.204–8 or 52.212–3(j), (whichever is included in the solicitation).

33. *Comment:* Under the proposed rule, firms will not have to submit FAR 52.219–22, Small Disadvantaged Business Status, on a contract-by-contract basis. However, this clause allows a firm that has not been certified as small disadvantaged business (SDB) to claim entitlement to SDB preferences while an application for SDB certification is pending (FAR 52.219–22(b)(1)(ii)). Procedures are currently in place for expediting SBA's review of an SDB application when an applicant is the apparent successful offeror (FAR 19.304(c)(2), 19.304(d); 13 CFR 124.1001(c)(2) and 124.1010). It is unclear if concerns can only represent themselves as SDBs in BPN if they have in fact already been certified as SDBs by SBA. If that is the case, then the provisions of FAR clause 52.219–22(b)(1)(ii) must be included in all solicitations so that firms can take advantage of the regulatory provisions which allow concerns to claim entitlement to SDB preferences while an SDB application is pending.

Council's response: We disagree. FAR 52.219–22(b)(1)(ii) is included in ORCA. A vendor can initially indicate that it has submitted a completed application to SBA and then update the representation if and when it is certified. A vendor can also indicate a change in status in either FAR 52.204–8 or 52.212–3(j), as appropriate.

Therefore, this final rule amends FAR parts 2, 4, 14, 15 and 52 to require offerors to—

- Provide representations and certifications electronically via the BPN Website at *http://orca.bpn.gov*;
- Update the representations and certifications as necessary, but at least annually to ensure they are kept current, accurate and complete; and
- Make changes that affect only one solicitation by completing the appropriate sections of either FAR 52.204–8 or 52.212–3(j); whichever is included in the solicitation.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA) as follows:

1. A succinct statement of the need for, and the objectives of, the rule.

The FAR requires small businesses to provide representations and certifications for individual solicitations. However, FAR 15.209(g) and FAR 14.213 do permit annual submissions if authorized by individual agencies. This rule establishes the requirement for annual submissions by electronic means.

In an effort to broaden use and reliance upon e-business applications, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are working with the Office of Federal Procurement Policy to eliminate the need to maintain paper-based sources of contractor information. The objective of this rule is to eliminate the need for offerors to submit the same information (*i.e.*, representations and certifications) to different Government contracting and payment offices. By the offerors providing this information to a centralized location, it is anticipated that this rule will have a significant positive impact on small businesses by reducing their overall administrative burden.

2. Legal basis for the rule.

There is no statutory basis for this rule but, rather, an e-Government Integrated Acquisition Environment's (IAE) initiative to re-use data as much as possible throughout the Federal procurement workspace (*i.e.*, "submit once, use many" times).

3. Description of, and, where feasible, estimate of the number of small entities to which the rule will apply.

The rule applies to small business offerors that also are required to register in the Central Contractor Registration (CCR) database. The reason for the link with CCR is that, as part of the online representations and certifications process, the software will use information that an offeror has already provided into the CCR database. The offeror will provide the additional information needed. Therefore, small businesses that are exempted from registering in the CCR database are also exempted from submitting representations and certifications electronically. The following CCR exceptions also apply to this rule:

(a) The purchase uses a Governmentwide commercial purchase card as the purchasing mechanism.

(b) Registration (see 4.401) in the CCR database, or use of CCR data, could compromise the safeguarding of classified information or national security.

(c) The contract is awarded by—

(1) A deployed contracting officer in the course of military operations, including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(7); or

(2) A contracting officer in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, *e.g.*, Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121).

(d) The contract is to support unusual or compelling needs.

(e) The award made is to a foreign vendor for work performed outside the United States, if it is impractical to obtain CCR registration before award.

Based on Governmentwide data, approximately, 20,825 small businesses were awarded contracts of $25,000 or more in fiscal year 2002. It is estimated that a majority of them will be subject to the rule. Many of these businesses are already among the over 240,000 registrants in CCR. Information is not available to identify the additional number of small businesses that were awarded contracts of less than $25,000, or were awarded basic agreements, basic ordering agreements, or blanket purchase agreements.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The Office of Management and Budget has already approved the current FAR information and recordkeeping requirement for obtaining representations and certifications under OMB Control Number 9000–0034. The rule decreases the collection requirements since the rule requires offerors to provide representations and certifications annually into a centralized database, in lieu of providing this information with each solicitation.

Administrative or financial personnel that have general knowledge of the contractor's business are able to register by providing the pertinent information into the Business Partner Network website.

5. Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the rule.

The rule will not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the final rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the rule on small entities.

There are no significant practical alternatives that will accomplish the objective of this rule. Continued reliance on a paper-based system would unnecessarily promote inefficiency associated with paper-based processes. The successful phase-in of CCR by the Department of Defense demonstrates that the Federal contracting community, including small businesses, is successfully transitioning to greater use of electronic tools and their associated efficiencies to conduct business.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the final rule contains information collection requirements; however, these changes do not impose additional information collection requirements to the paperwork burdens previously approved under the Office of Management and Budget (OMB) Control Numbers 9000–0018, 9000–0024, 9000–0025, 9000–0047, 9000–0090, 9000–0094, 9000–0097, 9000–0130, 9000–0134, 9000–0139, 9000–0150, and 9000–0155, since the rule requires offerors to provide representations and certifications annually into a centralized database, in lieu of providing the same information with each solicitation.

List of Subjects in 48 CFR Parts 2, 4, 14, 15, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 14, 15, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 14, 15, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definitions "Business Partner Network (BPN)" and "Online Representations and Certifications Application (ORCA)" to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Business Partner Network (BPN) means an integrated electronic infrastructure the Government uses to manage (*i.e.*, collect, validate, access and maintain) the information it needs to transact business with its contractors. The BPN is located at *http://www.bpn.gov.*

* * * * *

Online Representations and Certifications Application (ORCA) means the primary Government repository for contractor submitted representations and certifications required for the conduct of business with the Government. ORCA is part of the Business Partner Network (BPN). ORCA is located at *http://orca.bpn.gov.*

* * * * *

PART 4—ADMINISTRATIVE MATTERS

4.1101 Definition.

■ 3. Amend section 4.1101 by revising the section heading to read as set forth above; and removing the definition "Business Partner Network."

■ 4. Add Subpart 4.12 to read as follows:

Subpart 4.12—Annual Representations and Certifications

Sec.

4.1200 Scope.
4.1201 Policy.
4.1202 Solicitation provision and contract clause.

4.1200 Scope.

This subpart prescribes policies and procedures for requiring prospective contractors to submit Annual

Representations and Certifications via the Online Representations and Certifications Application (ORCA), a part of the Business Partner Network (BPN), to—

(a) Eliminate the administrative burden for contractors of submitting the same information to various contracting offices; and

(b) Establish a common source for this information to procurement offices across the Government.

4.1201 Policy.

(a) Prospective contractors shall complete electronic annual representations and certifications at *http://orca.bpn.gov* in conjunction with required registration in the Central Contractor Registration (CCR) database (see FAR 4.1102).

(b) Prospective contractors shall update the representations and certifications submitted to ORCA as necessary, but at least annually, to ensure they are kept current, accurate, and complete. The representations and certifications are effective until one year from date of submission or update to ORCA.

4.1202 Solicitation provision and contract clause.

Except for commercial item solicitations issued under FAR Part 12, insert in solicitations the provision at 52.204–8, Annual Representations and Certifications. When the clause at 52.204–7, Central Contractor Registration, is included in the solicitation, do not include the following representations and certifications:

(a) 52.203–2, Certificate of Independent Price Determination.

(b) 52.203–11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.

(c) 52.204–3, Taxpayer Identification.

(d) 52.204–5, Women-Owned Business (Other Than Small Business).

(e) 52.209–5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters.

(f) 52.214–14, Place of Performance—Sealed Bidding.

(g) 52.215–6, Place of Performance.

(h) 52.219–1, Small Business Program Representations (Basic & Alternate I).

(i) 52.219–2, Equal Low Bids.

(j) 52.219–19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program.

(k) 52.219–21, Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program.

(l) 52.219–22, Small Disadvantaged Business Status (Basic & Alternate I).

(m) 52.222–18, Certification Regarding Knowledge of Child Labor for Listed End Products.

(n) 52.222–22, Previous Contracts and Compliance Reports.

(o) 52.222–25, Affirmative Action Compliance.

(p) 52.222–38, Compliance with Veterans' Employment Reporting Requirements.

(q) 52.222–48, Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain Information Technology, Scientific and Medical and/or Office and Business Equipment—Contractor Certification.

(r) 52.223–4, Recovered Material Certification.

(s) 52.223–9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (Alternate I only).

(t) 52.223–13, Certification of Toxic Chemical Release Reporting.

(u) 52.225–2, Buy American Act Certificate.

(v) 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate (Basic, Alternate I & II).

(w) 52.225–6, Trade Agreements Certificate.

(x) 52.226–2, Historically Black College or University and Minority Institution Representation.

(y) 52.227–6, Royalty Information (Basic & Alternate I).

(z) 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

PART 14—SEALED BIDDING

14.201–6 [Amended]

■ 5. Amend section 14.201–6 by removing and reserving paragraph (u).

14.213 [Removed]

■ 6. Remove section 14.213.

PART 15—CONTRACTING BY NEGOTIATION

15.209 [Amended]

■ 7. Amend section 15.209 by removing and reserving paragraph (g).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Add section 52.204–8 to read as follows:

52.204–8 Annual Representations and Certifications.

As prescribed in 4.1202, insert the following provision:

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (JAN 2005)

(a)(1) If the clause at 52.204–7, Central Contractor Registration, is included in this solicitation, paragraph (b) of this provision applies.

(2) If the clause at 52.204–7 is not included in this solicitation, and the offeror is currently registered in CCR, and has completed the ORCA electronically, the offeror may choose to use paragraph (b) of this provision instead of completing the corresponding individual representations and certifications in the solicitation. The offeror shall indicate which option applies by checking one of the following boxes:

[ ] (i) Paragraph (b) applies.

[ ] (ii) Paragraph (b) does not apply and the offeror has completed the individual representations and certifications in the solicitation.

(b) The offeror has completed the annual representations and certifications electronically via the Online Representations and Certifications Application (ORCA) website at *http://orca.bpn.gov*. After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [*offeror to insert changes, identifying change by clause number, title, date*]. These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

FAR Clause #	Title	Date	Change
_____	_____	_____	_____

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.

(End of Provision)

■ 9. Amend section 52.212–1 by revising the date of the provision and paragraph (b)(8) to read as follows:

52.212–1 Instructions to Offerors—Commercial Items.

* * * * *

INSTRUCTIONS TO OFFERORS—COMMERCIAL ITEMS (JAN 2005)

* * * * *

(b) *Submission of offers.* * * *

(8) A completed copy of the representations and certifications at FAR 52.212–3 (see FAR 52.212–3(j) for those representations and certifications that the offeror shall complete electronically);

* * * * *

■ 10. Amend section 52.212–3 by revising the date of the provision; adding an introductory paragraph and paragraph (j) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (JAN 2005)

An offeror shall complete only paragraph (j) of this provision if the offeror has completed the annual representations and certifications electronically at *http://orca.bpn.gov.* If an offeror has not completed the annual representations and certifications electronically at the ORCA website, the offeror shall complete only paragraphs (b) through (i) of this provision.

* * * * *

(j)(1) *Annual Representations and Certifications.* Any changes provided by the offeror in paragraph (j) of this provision do not automatically change the representations and certifications posted on the Online Representations and Certifications Application (ORCA) website.

(2) The offeror has completed the annual representations and certifications electronically via the ORCA website at *http://orca.bpn.gov.* After reviewing the ORCA database information, the offeror verifies by submission of this offer that the representations and certifications currently posted electronically at FAR 52.212–3, Offeror Representations and Certifications—Commercial Items, have been entered or updated in the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer and are incorporated in this offer by reference (see FAR 4.1201), except for paragraphs _____.

[*Offeror to identify the applicable paragraphs at (b) through (i) of this provision that the offeror has completed for the purposes of this solicitation only, if any.*

These amended representation(s) and/or certifica-tion(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.]

(End of provision)

52.214–30 [Removed and Reserved]

■ 11. Remove and reserve section 52.214–30.

52.215–7 [Removed and Reserved]

■ 12. Remove and reserve section 52.215–7.

[FR Doc. 04–27633 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 9, 22, 28, 44, and 52

[FAC 2001-26; FAR Case 2002-023; Item II]

RIN 9000-AJ78

Federal Acquisition Regulation; Excluded Parties List System Enhancement

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to publish an electronic list of parties excluded from doing business with the Federal Government online identified as the Excluded Parties List System (EPLS). This will obviate the need to publish the hard copy of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (List of Parties) produced by the Government Printing Office.

DATES: *Effective Date:* January 19, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Craig Goral, Procurement Analyst, at (202) 501-3856. Please cite FAC 2001-26, FAR case 2002-023.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule incorporates the Excluded Parties List System into the FAR and enables agencies to directly enter data on parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the nonprocurement common rule by agencies or the Government Accountability Office. GSA maintains that direct entry by the acting agency will improve the reliability of the system, eliminate the need for a hard copy list, provide access to the archival data, and enhance the ability to verify entries by permitting a search by exact name and social security number where the agencies entering the data have the authority to collect, retain, and publish the party's social security number.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 67353, December 1, 2003. The Councils received comments in response to the proposed rule from six respondents. Several respondents concurred in the rule as written. Other comments are categorized as follows:

1. One respondent recommended that the names of the parties listed in the EPLS be linked to the Central Contractor Registry (CCR) accessible on the Internet at *http://www.ccr.gov/index.cfm.* The Councils partially concur; however, in light of impending review of the CCR and the Business Partner Network (BPN) by their Program Manager, within the next six months to ascertain the capabilities of these systems, no change was made at the present time.

2. One respondent pointed out a technological glitch in conducting searches using the EPLS search engine for a field for DUNS number that is not a required entry. He points out that if the searcher has a DUNS number and searches for that given DUNS number but the agency data entry person has not entered the number, the research results will indicate no such entry or "No records were found matching this criteria." Searchers could readily interpret this search engine response as an indication that the party to which Dun and Bradstreet assigned a DUNS number is not listed in EPLS when what such search results could also mean is that there is no data actually entered into a non-mandatory field. He suggested adding a cautionary note to FAR 9.404 or 9.105-1(c)(1). The Councils acknowledge the validity of his concern but decline to add a cautionary note to the FAR. The Councils acknowledge that while obtaining a DUNS number is a

requirement in many areas within which one "conducts business with the government," it is not yet a universal requirement. For instance, OMB has issued guidance for its use by grantees but the requirement does not extend to sub-recipients. The Councils also noted that his concern may be equally applicable to any field where entry is optional or not required. GSA has been requested to modify the automated response when a searcher searches on data possibly entered into an optional/not required field, so that the search engine response states words to the effect of "No records were found matching this criteria; however, you have searched for data contained in a non-mandatory field. A negative response may only indicate that no data matching your search criterion has been entered in the field DUNS number field or SSN/TIN field. A search on other required fields is recommended."

3. One respondent made five suggestions addressing broad policy changes in the suspension and debarment system. The respondent stated that the EPLS has not been adequately applied or uniformly enforced against large and small contractors and recommends five changes to improve the suspension and debarment system:

a. Create a centralized information database that should be consulted before awarding a contract or making a suspension and debarment system.

b. Require a contractor to disclose current suspensions or debarment, Federal or state litigation initiated against them in the past 3 years, and any Administrative Agreements the contractor is currently implementing.

c. Require an agency debarment official to use suspension and debarment actions equally against large and small contractors or to justify in writing a determination to do business with a nonresponsible contractor.

d. Amend the FAR to require mandatory suspension or debarment for a contractor that either had been criminally convicted or had a civil judgment entered against them for more than once in a three-year period.

e. Empower the Interagency Suspension and Debarment Committee (ISDC) to coordinate with the Federal agency taking a leadership role in a suspension or debarment case (especially with a repeat offender) and require the Interagency Committee to submit semi-annual reports to Congress regarding suspension and debarment decisions.

Because these comments lay outside the scope of the rule and addressed basic principles and policies leading to decisions to exclude parties rather than with the procedural changes in the operation of the electronic system, no change to the final rule is required. However, we will bring these comments to the attention of the ISDC.

4. One respondent had a list of comments regarding errors in citation and conflicts between definitions used in the FAR and the Nonprocurement Common Rule (NCR) published November 26, 2003 (68 FR 66553). The Councils acknowledge the definitions used in the NCR, but do not concur with the recommended changes to the proposed rule in the FAR. The FAR terminology, although not identical to the NCR terminology, is not entirely inconsistent. The FAR uses the specific terms "suspension," "debarment," or "proposed for debarment" which are also used in the NCR, but for which the NCR has provided an overall term of "excluded," which the FAR does not use. The FAR uses the term "ineligible" (defined in FAR 2.101) rather than the comparable term "disqualified" used in the NCR, but the NCR also uses the term "ineligible" to cover both "excluded" and "ineligible." Therefore, the actions described as "ineligible" in the FAR are also "ineligible" under the NCR, although the NCR uses the term more broadly. The term "ineligible" has been used for many years in the FAR, and is imbedded in the "Procurement Cause and Treatment Codes" and in agency supplements such as the Defense Federal Acquisition Regulation Supplement. The Councils consider that it would be unnecessarily disruptive to remove this term from the FAR. As stated in paragraph (b) of FAR 9.400, although FAR Subpart 9.4 covers the listing of ineligible contractors and the effect of this listing, it does not prescribe policies and procedures governing declarations of ineligibility. The main thing a contracting officer needs to know is the effect of being listed in the "Excluded Parties List System," not the underlying basis for the listing, and whether the party is considered "ineligible" or "disqualified." The contracting officer also needs to know the effect of being listed and may glean this from consultation with the cause and treatment codes. Accordingly, the final rule retains the current definition of "ineligible" in the FAR and deletes the NCR definitions of "disqualified" and "excluded or exclusion" which appeared in the proposed rule. However, the final rule adds "or disqualified under the Nonprocurement Common Rule" to paragraph (b)(1) of FAR 9.404. The respondent also noted that the proposed rule also used the definition "covered transactions" but no definition was provided and that the statutory citations to the listing of violating facilities in the Clean Water Act and Clean Air Act were erroneous in the definition of "excluded or exclusion." Because the final rule deletes this definition, no change has been made, although the respondent was correct in noting the citations were wrong. Lastly, the respondent recommended that the word "generally" be added to paragraph (c)(5) of FAR 9.404 to occasions where 5 working days may be insufficient. The final rule includes the adverb but notes that posting the data beyond the five days provided should occur rarely.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule only makes changes in the way GSA manages and maintains the list of excluded parties. It does not change the criteria for inclusion on the list or the effect of the list on award or administration of contracts.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 2, 9, 28, 44, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 9, 22, 28, 44, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 9, 22, 28, 44, and 52 is revised to read as follows:

Authority: Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition "Excluded Parties List System"; and removing the definition "List of Parties Excluded from Federal Procurement and Nonprocurement Programs." The added definition reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

Excluded Parties List System means an electronic database maintained and posted by the General Services Administration containing the list of all parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified under the nonprocurement common rule by agencies, Government corporations, or by the Government Accountability Office.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Amend section 9.105-1 by revising paragraph (c)(1) to read as follows:

9.105-1 Obtaining information.

* * * * *

(c) * * *

(1) The Excluded Parties List System maintained in accordance with Subpart 9.4.

* * * * *

■ 4. Amend section 9.207 by revising paragraph (a)(9) to read as follows:

9.207 Changes in status regarding qualification requirements.

(a) * * *

(9) The source is on the Excluded Parties List System (see Subpart 9.4); or

* * * * *

■ 5. Revise section 9.404 to read as follows:

9.404 Excluded Parties List System.

(a) The General Services Administration (GSA)—

(1) Operates the web-based Excluded Parties List System (EPLS);

(2) Provides technical assistance to Federal agencies in the use of the EPLS; and

(3) Includes in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The EPLS includes the—

(1) Names and addresses of all contractors debarred, suspended, proposed for debarment, declared ineligible, or excluded or disqualified under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;

(2) Name of the agency or other authority taking the action;

(3) Cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) Effect of the action;

(5) Termination date for each listing;

(6) DUNS No.;

(7) Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and

(8) Name and telephone number of the agency point of contact for the action.

(c) Each agency must—

(1) Obtain password(s) from GSA to access the EPLS for data entry;

(2) Notify GSA in the event a password needs to be rescinded (*e.g.*, when an agency employee leaves or changes function);

(3) Enter the information required by paragraph (b) of this section within 5 working days after the action becomes effective;

(4) Determine whether it is legally permitted to enter the SSN, EIN, or other TIN, under agency authority to suspend or debar;

(5) Update EPLS, generally within 5 working days after modifying or rescinding an action;

(6) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, or proposed debarment taken by the agency;

(7) Establish procedures to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors whose names are in the EPLS, except as otherwise provided in this subpart;

(8) Direct inquiries concerning listed contractors to the agency or other authority that took the action; and

(9) Contact GSA for technical assistance with the EPLS, via the support e-mail address or on the technical support phone line available at the EPLS web site provided in paragraph (d) of this section.

(d) The EPLS is available at *http://epls.gov*.

9.405 [Amended]

■ 6. Amend section 9.405 by—

a. Removing from paragraph (b) "on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "in the EPLS" in its place; and

b. Removing from paragraphs (d)(1) and (d)(4) "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "EPLS" in their place.

9.405-2 [Amended]

■ 7. Amend section 9.405-2 by removing from paragraphs (b) introductory text, (b)(2), and (b)(3) "on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "in the EPLS" in their place.

PART 22—APPLICATIONS OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1025 [Amended]

■ 8. Amend the first sentence of section 22.1025 by removing "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "Excluded Parties List System" in its place.

PART 28—BONDS AND INSURANCE

28.203-7 [Amended]

■ 9. Amend section 28.203-7 in paragraphs (c) and (d) by removing "on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "in the Excluded Parties List System" in their place.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.202-2 [Amended]

■ 10. Amend section 44.202-2 in paragraph (a)(13) by removing "on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "in the Excluded Parties List System" in its place.

44.303 [Amended]

■ 11. Amend section 44.303 in paragraph (c) by removing "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "Excluded Parties List System" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.209-6 [Amended]

■ 12. Amend section 52.209-6 by revising the date of the clause to read "(JAN 2005)" removing from the introductory text of paragraph (c) "List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "Excluded Parties List System" in its place; and removing from paragraphs (c)(2) and (c)(3) "on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs" and adding "in the Excluded Parties List System" in their place.

52.213-4 [Amended]

■ 13. Amend section 52.213-4 by revising the date of the clause to read "(JAN 2005)"; and by removing from paragraph (b)(2)(i) of the clause "(July 1995)" and adding "(JAN 2005)" in its place.

[FR Doc. 04–27634 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 12, 13, and 15

[FAC 2001–26; FAR Case 2003–022; Item III]

RIN 9000–AJ88

Federal Acquisition Regulation; Special Emergency Procurement Authority

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to convert the interim rule published in the **Federal Register** at 69 FR 8312, February 23, 2004, to a final rule with changes. The rule amends the Federal Acquisition Regulation (FAR) to implement the special emergency procurement authorities of Section 1443 of the Services Acquisition Reform Act of 2003 (Pub. L. 108–136, Title XIV, codified at 41 U.S.C. 428a), and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. Section 822 of the Fiscal Year 2005 Defense Authorization Act further increased the threshold amounts for any contract to be awarded and performed, or purchases to be made, outside the United States.

Also, under section 1443, the head of the contracting activity carrying out a procurement of supplies or services to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack may treat such supplies or services as a commercial item.

DATES: Effective Date:January 19, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208–6091. Please cite FAC 2001–26, FAR case 2003–022.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (SARA) (41 U.S.C. 428a) and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. Section 1443 also authorizes the expanded use of Simplified Acquisition and Commercial Items procedures. Section 822 authorized a higher micro-purchase and simplified acquisition threshold for any contract to be awarded and performed, or purchases to be made, outside the United States, for the same purposes as authorized under section 1443 of SARA.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 69 FR 8312, February 23, 2004. The 60-day comment period for the interim rule ended April 23, 2004. Three comments were received; they are addressed below. Section 822 of the Fiscal Year 2005 Defense Authorization Act was enacted after publication of the interim rule. As a result, this final rule incorporates the increased thresholds provided by section 822.

One commenter recommended that the Councils seek a Governmentwide waiver from the Secretary of Labor from application of FAR clauses 52.222–26, Equal Opportunity, and 52.222–36, Affirmative Action for Workers With Disabilities, so that the purchase card could be used without having to also issue a purchase order with these clauses. The final rule does not adopt this suggestion because the FAR already authorizes the agency head to waive the inclusion of these clauses when deemed to be in the interest of national security (FAR 22.807(a)(1) and 22.1403(b), respectively).

The same commenter suggested that the final rule address the fact that the Service Contract Act requires clauses in all service contracts above $2,500. The final rule does not adopt this suggestion because neither SARA nor the Fiscal Year 2005 Defense Authorization Act suggested that these acquisitions are exempt from statutory requirements.

Another commenter questioned why the interim rule did not include contingency operations in the increased limitation on use of simplified acquisition procedures, as authorized by Section 1443. The final rule has been amended to include the procurement of commercial supplies and services in support of contingency operations in the increased limitation on use of simplified acquisition procedures. However, services and supplies procured in support of a contingency operation must meet the definition of a commercial item in FAR 2.101 for the increased limitation to apply.

This is not a significant regulatory action and, therefore, is not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This final rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, the increased limitations are limited to procurements that are entered into in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack. There are no data available on the number of procurements that will be eligible. We expect the increased thresholds to this limited class of procurements will apply to a very small number of small entities.

This final rule does not impose any data collection requirements on small business concerns. The rule does not duplicate, overlap, or conflict with other relevant Federal rules. There is no significant alternative to the final rule that would accomplish the stated beneficial objective.

The Councils prepared a Final Regulatory Flexibility Analysis (FRFA) as follows:

1. *Description of the reasons why action by the agency is being considered.* This final rule revises the Federal Acquisition Regulation (FAR) in order to implement

Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies and services to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. Section 822 increases the micro-purchase threshold and simplified acquisition threshold for any contract to be awarded and performed, or purchases to be made, outside the United States.

2. *Succinct statement of the objectives of, and legal basis for, the final rule.* This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

3. *Description of, and, where feasible, estimate of the number of small entities to which the final rule will apply.* The increased thresholds are limited to procurements that are to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. There are no data available on the number of procurements that will be eligible. However, we expect the number of small entities that will be impacted by the increased thresholds to this limited class of procurements to be very small. In addition, although not required by the statute, the final rule raises the small business set-aside ceilings for purchases made under the authority of Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a). Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 is unlikely to affect small businesses in the United States as it applies outside the United States.

4. *Description of projected reporting, record keeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* There are no reporting, record keeping, or other compliance requirements for this final rule.

5. *Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the final rule.* This rule does not duplicate, overlap, or conflict with other relevant Federal rules.

6. *Description of any significant alternatives to the final rule, which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the final rule on small entities.* There are no significant alternatives to the final rule that would accomplish the stated objectives yet further reduce impact on small entities. The rule includes only FAR text revisions required to implement the statute.

The FAR Secretariat has submitted a copy of the Final Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001–26, FAR case 2003–022) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 12, 13, and 15

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

Interim Rule Adopted as Final With Changes

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 2, 10, 12, 13, 15, 19, and 25 which was published in the **Federal Register** at 69 FR 8312, February 23, 2004, as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 2, 12, 13, and 15 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by revising the definitions "Micro-purchase threshold" and "Simplified acquisition threshold" to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Micro-purchase threshold means $2,500, except it means—

(1) For construction subject to the Davis-Bacon Act, $2,000; and

(2) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as described in 13.201(g)(1), except for construction subject to the Davis-Bacon Act (41 U.S.C. 428a)—

(i) $15,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) $25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

* * * * *

Simplified acquisition threshold means $100,000, except for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (41 U.S.C. 428a), the term means—

(1) $250,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and

(2) $1 million for any contract to be awarded and performed, or purchase to be made, outside the United States.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 12.203 by revising the last sentence to read as follows:

12.203 Procedures for solicitation, evaluation, and award.

* * * For acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding $5 million ($10 million for acquisitions as described in 13.500(e)), including options, contracting activities shall employ the simplified procedures authorized by Subpart 13.5 to the maximum extent practicable.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 4. Amend section 13.000 by revising the second sentence to read as follows:

13.000 Scope of part.

* * * Subpart 13.5 provides special authority for acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding $5 million ($10 million for acquisitions as described in 13.500(e)), including options. * * *

■ 5. Amend section 13.003 by revising paragraphs (c)(1)(ii) and (g)(2) to read as follows:

13.003 Policy.

* * * * *

(c)(1) * * *

(ii) $5 million ($10 million for acquisitions as described in 13.500(e)), including options, for acquisitions of commercial items using Subpart 13.5.

* * * * *

(g) * * *

(2) $5 million ($10 million for acquisitions as described in 13.500(e)),

for commercial items, use any appropriate combination of the procedures in Parts 12, 13, 14, and 15 (see paragraph (d) of this section).

* * * * *

■ 6. Amend section 13.201 by removing "$15,000." from the end of paragraph (g)(1) and adding "." in its place; and adding paragraphs (g)(1)(i) and (g)(1)(ii) to read as follows:

13.201 General.

* * * * *

(g)(1) * * *

(i) $15,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

(ii) $25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

* * * * *

■ 7. Amend section 13.303–5 by revising paragraph (b)(2) to read as follows:

13.303–5 Purchases under BPAs.

* * * * *

(b) * * *

(2) The limitation for individual purchases for commercial item acquisitions conducted under Subpart 13.5 is $5 million ($10 million for acquisitions as described in 13.500(e)).

* * * * *

■ 8. Amend section 13.500 by revising the first sentence of paragraph (a); and adding paragraph (e) to read as follows:

13.500 General.

(a) This subpart authorizes, as a test program, use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding $5 million ($10 million for acquisitions as described in 13.500(e)), including options, if the contracting officer reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial items. * * *

* * * * *

(e) Under 41 U.S.C. 428a, the simplified acquisition procedures authorized by this test program may be used for acquisitions that do not exceed $10 million when—

(1) The acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack; or

(2) The acquisition will be treated as an acquisition of commercial items in accordance with 12.102(f)(1).

■ 9. Amend section 13.501 by revising paragraph (a)(1)(ii) to read as follows:

13.501 Special documentation requirements.

(a) * * *

(1) * * *

(ii) Prepare sole source justifications using the format at 6.303–2, modified to reflect an acquisition under the authority of the test program for commercial items (section 4202 of the Clinger-Cohen Act of 1996) or the authority of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

15.403–1 [Amended]

■ 10. Amend section 15.403–1 in paragraph (c)(3)(ii) by removing "(Pub. L. 108–136, Sec. 1443)" and adding "(41 U.S.C. 428a)" in its place.

[FR Doc. 04–27635 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 22, and 52

[FAC 2001–26; FAR Case 2004–010; Item IV]

RIN 9000–AK04

Federal Acquisition Regulation; Notification of Employee Rights Concerning Payment of Union Dues or Fees

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees. The rule requires Government contractors and subcontractors to post notices, in all plants and offices, whether or not used in performing work that supports a Federal contract, informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes.

DATES: *Effective Date*: December 20, 2004.

The Department of Labor's final rule implementing Executive Order 13201 was published on March 29, 2004, with an effective date of April 28, 2004. This rule amending the FAR is the formal notification to contracting officers to insert the Executive Order 13201 clause in covered solicitations issued on or after the effective date of this rule.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before February 18, 2005 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2001–26, FAR case 2004–010, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.
- E-mail: *farcase.2004–010@gsa.gov*. Include FAC 2001–26, FAR case 2004–010 in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2001–26, FAR case 2004–010, in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Craig Goral, Procurement Analyst, at (202) 501–3856. Please cite FAC 2001–26, FAR case 2004–010.

SUPPLEMENTARY INFORMATION:

A. Background

On April 13, 1992, President George H. W. Bush issued Executive Order (E.O.) 12800. E.O. 12800 required unionized Federal contractors to post a notice in the workplace that workers are

not required to join or support a union and threatened sanctions against contractors who did not comply. The next month, the Councils issued an interim rule implementing E.O. 12800 (57 FR 20373–20375, May 12, 1992).

However, E.O. 12800 was revoked on February 1, 1993, by President Clinton's E.O. 12836 (58 FR 7045, February 3, 1993). On March 2, 1993, the Councils issued a final rule (58 FR 12140) eliminating the interim rule.

On February 17, 2001, President George W. Bush issued E.O. 13201 (66 FR 11221, February 22, 2001). This Executive order revoked President Clinton's E.O. 12836 and reasserts the notification provisions and sanctions of E.O. 12800.

On October 1, 2001, the Department of Labor (DoL) published a proposed rule implementing E.O. 13201 (66 FR 50010). DoL finalized its implementing rule on March 29, 2004 (69 FR 16376).

E.O. 13201 is designed to promote economy and efficiency in Government procurement due to a better-informed American workforce. E.O. 13201 contains requirements similar, but not identical, to those in E.O. 12800.

The interim rule amends the FAR to—

- Provide a new FAR subpart on Notification of Employee Rights Concerning Payment of Union Dues or Fees;
- Add a clause at 52.222–39 to be included in every solicitation and contract, other than purchases that do not exceed the simplified acquisition threshold and contracts covered by an exemption granted by the Secretary of Labor. The new clause applies to contracts (commercial or non-commercial) and subcontracts (commercial or non-commercial) that exceed the simplified acquisition threshold;
- Amend the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, in order to include the new 52.222–39 clause; and
- Amend the clause at 52.244–6, Subcontracts for Commercial Items, in order to include the new 52.222–39 clause.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule merely requires contractors to post notices and to insert a clause in subcontracts and purchase orders requiring subcontractors and vendors to post the notices also. The notices advise the contractors' and subcontractors' nonunion member employees of their rights under existing law concerning use of their union dues or fees where a union security agreement is in place. The rule provides sanctions for noncompliance, but full compliance with the Executive order and any related rules, regulations, and orders of the Secretary of Labor is expected of all contractors. Further, this interim rule is only implementing the DoL final rule. The Secretary of Labor has certified to the Chief Counsel for Advocacy at the Small Business Administration that the DoL final rule will not substantially change existing obligations for Federal contractors. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 22, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2001–26, FAR case 2004–010), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the interim rule contains information collection requirements; however, this rule's changes do not impose additional information collection requirements to the paperwork burden previously submitted to the Office of Management and Budget (OMB) and approved on November 15, 2004, under OMB Control Number 1215–0203. The DoL has identified the burdens associated with the filing and processing of complaints by complainants and contractors in the notice of final rulemaking at 69 FR 16376, March 29, 2004. The Councils believe that the package submitted by DoL meets the requirement imposed by the Paperwork Reduction Act and sufficiently covers this interim rule and no further action is necessary.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Executive Order 13201 and the DoL rule at 29 CFR part 470 effective April 28, 2004. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 2, 22, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 22, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) in the definition "United States" by redesignating paragraphs (4) and (5) as (5) and (6), respectively, and adding a new paragraph (4) to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

United States, when used in a geographic sense, means the 50 States and the District of Columbia, except as follows:

* * * * *

(4) For use in Subpart 22.16, see the definition at 22.1601.

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 3. Add Subpart 22.16, consisting of sections 22.1600 through 22.1605, to read as follows:

Subpart 22.16–Notification of Employee Rights Concerning Payment of Union Dues or Fees

Sec.

22.1600 Scope of subpart.
22.1601 Definitions.
22.1602 Policy.
22.1603 Exemptions granted by the Secretary of Labor.
22.1604 Compliance investigations and sanctions for violations.
22.1605 Contract clause.

22.1600 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order 13201, February 17, 2001.

22.1601 Definitions.

As used in this subpart—

Secretary means the Secretary of Labor, U.S. Department of Labor.

United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

22.1602 Policy.

Executive Order 13201 generally requires contractors to post a notice informing employees of their rights concerning payment of union dues or fees and to include this requirement in subcontracts and purchases that exceed the simplified acquisition threshold.

22.1603 Exemptions granted by the Secretary of Labor.

(a) The Secretary may grant exemptions from the requirements of this subpart, including the requirement to include the clause at 52.222–39, or parts of that clause, in contracts. Requests for exemptions may be submitted in accordance with Department of Labor regulations at 29 CFR 470.3.

(b) The requirements of this subpart do not apply to contracts or subcontracts or purchases that do not exceed the simplified acquisition threshold.

22.1604 Compliance investigations and sanctions for violations.

The Secretary may investigate any contractor, subcontractor, or vendor to determine if any of the requirements of the clause at 52.222–39 have been violated. The procedures for conducting the investigations and effecting the sanctions are in 29 CFR part 470, Subpart B—Compliance Evaluations, Complaint Investigations and Enforcement Procedures. If the Secretary determines that there has been a violation, the Secretary may, to the extent authorized by 29 CFR 470.14 (which, in part, requires coordination between the head of the agency and the Secretary), direct that the contract be cancelled, terminated, or suspended in whole or in part. The Secretary may also declare the contractor ineligible for further Government contracts. Each contracting agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions.

22.1605 Contract clause.

Insert the clause at 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees, in all solicitations and contracts, except—

(a) Acquisitions that do not exceed the simplified acquisition threshold. For indefinite quantity contracts, include the clause only if the value of orders in any calendar year of the contract is expected to exceed the simplified acquisition threshold; or

(b) Contracts covered by an exemption granted by the Secretary of Labor. A contracting agency may modify the clause at 52.222–39, if necessary, to reflect an exemption granted by the Secretary (see 22.1603(a)).

PART 52—SOLICITATION PROVISONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (b)(21) through (b)(34) as (b)(22) through (b)(35), respectively, and adding a new paragraph (b)(21);

■ c. In the introductory text of paragraph (e)(1), by removing "paragraphs (i) through (vi)" and adding "paragraphs (i) through (vii)" in its place; and redesignating paragraphs (e)(1)(v) and (e)(1)(vi) as (e)(1)(vi) and (e)(1)(vii), respectively, and adding a new paragraph (e)(1)(v) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (DEC 2004))

* * * * *

(b) * * *

____(21) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201).

* * * * *

(e)(1) * * *

(v) 52.222–39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201).

* * * * *

52.213–4 [Amended]

■ 5. Amend section 52.213–4 by removing from the clause heading "(Oct 2004)" and adding "(DEC 2004)" in its place; and removing "(July 2004)" from paragraph (a)(2)(vi) of the clause and adding "(DEC 2004) " in its place.

■ 6. Add section 52.222–39 to read as follows:

52.222–39 Notification of Employee Rights Concerning Payment of Union Dues or Fees.

As prescribed in 22.1605, insert the following clause:

NOTIFICATION OF EMPLOYEE RIGHTS CONCERNING PAYMENT OF UNION DUES OR FEES (DEC 2004)

(a) *Definition.* As used in this clause—

United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

(b) Except as provided in paragraph (e) of this clause, during the term of this contract, the Contractor shall post a notice, in the form of a poster, informing employees of their rights concerning union membership and payment of union dues and fees, in conspicuous places in and about all its plants and offices, including all places where notices to employees are customarily posted. The notice shall include the following information (except that the information pertaining to National Labor Relations Board shall not be included in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 151–188)).

Notice to Employees

Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.

If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address or toll free number:

National Labor Relations Board
Division of Information
1099 14th Street, N.W.
Washington, DC 20570
1–866–667–6572
1–866–316–6572 (TTY)

To locate the nearest NLRB office, see NLRB's website at *http://www.nlrb.gov.*

(c) The Contractor shall comply with all provisions of Executive Order 13201 of February 17, 2001, and related implementing regulations at 29 CFR part 470, and orders of the Secretary of Labor.

(d) In the event that the Contractor does not comply with any of the requirements set forth in paragraphs (b), (c), or (g), the Secretary may direct that this contract be cancelled, terminated, or suspended in whole or in part, and declare the Contractor ineligible for further Government contracts in accordance with procedures at 29 CFR part 470, Subpart B—Compliance Evaluations, Complaint Investigations and Enforcement Procedures. Such other sanctions or remedies may be imposed as are provided by 29 CFR part 470, which implements Executive Order 13201, or as are otherwise provided by law.

(e) The requirement to post the employee notice in paragraph (b) does not apply to—

(1) Contractors and subcontractors that employ fewer than 15 persons;

(2) Contractor establishments or construction work sites where no union has been formally recognized by the Contractor or certified as the exclusive bargaining representative of the Contractor's employees;

(3) Contractor establishments or construction work sites located in a jurisdiction named in the definition of the United States in which the law of that jurisdiction forbids enforcement of union-security agreements;

(4) Contractor facilities where upon the written request of the Contractor, the Department of Labor Deputy Assistant Secretary for Labor-Management Programs has waived the posting requirements with respect to any of the Contractor's facilities if the Deputy Assistant Secretary finds that the Contractor has demonstrated that—

(i) The facility is in all respects separate and distinct from activities of the Contractor related to the performance of a contract; and

(ii) Such a waiver will not interfere with or impede the effectuation of the Executive order; or

(5) Work outside the United States that does not involve the recruitment or employment of workers within the United States.

(f) The Department of Labor publishes the official employee notice in two variations; one for contractors covered by the Railway Labor Act and a second for all other contractors. The Contractor shall—

(1) Obtain the required employee notice poster from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5605, Washington, DC 20210, or from any field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs;

(2) Download a copy of the poster from the Office of Labor-Management Standards website at *http://www.olms.dol.gov*; or

(3) Reproduce and use exact duplicate copies of the Department of Labor's official poster.

(g) The Contractor shall include the substance of this clause in every subcontract or purchase order that exceeds the simplified acquisition threshold, entered into in connection with this contract, unless exempted by the Department of Labor Deputy Assistant Secretary for Labor-Management Programs on account of special circumstances in the national interest under authority of 29 CFR 470.3(c). For indefinite quantity subcontracts, the Contractor shall include the substance of this clause if the value of orders in any calendar year of the subcontract is expected to exceed the simplified acquisition threshold. Pursuant to 29 CFR part 470, Subpart B—Compliance Evaluations, Complaint Investigations and Enforcement Procedures, the Secretary of Labor may direct the Contractor to take such action in the enforcement of these regulations, including the imposition of sanctions for noncompliance with respect to any such subcontract or purchase order. If the Contractor becomes involved in litigation with a subcontractor or vendor, or is threatened with such involvement, as a result of such direction, the Contractor may request the United States, through the Secretary of Labor, to enter into such litigation to protect the interests of the United States.

(End of clause)

■ 7. Amend section 52.244-6 by revising the date of the clause; redesignating paragraph (c)(1)(v) as (c)(1)(vi), and adding a new paragraph (c)(1)(v) to read as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (DEC 2004)

* * * * *

(c)(1) * * *

(v) 52.222-39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201). Flow down as required in accordance with paragraph (g) of FAR clause 52.222-39).

* * * * *

[FR Doc. 04-27636 Filed 12-17-04; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2001-26; FAR Case 2003-010; Item V]

RIN 9000-AJ90

Federal Acquisition Regulation; Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: TheCivilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to change the approval authority of Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies.

DATES: Effective Date: January 19, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. Please cite FAC 2001-26, FAR case 2003-010.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR 19.702, Statutory Requirements, to change the approval authority of Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies. This change is being made in order for DOD to streamline and transform itself to more effectively achieve its mission. The Pilot Mentor-Protégé Program was established under Section 831 of Pub. L. 101-510, the National Defense Authorization Act for Fiscal Year 1991 (10 U. S. C. 2302 note). The purpose of the Program is to provide incentives to major Department of Defense (DoD) contractors to assist protégé firms in

enhancing their capabilities to satisfy DoD and other contract and subcontract requirements. Under the Mentor-Protégé Program, eligible companies approved as mentor firms will enter into mentor-protégé agreements with eligible protégé firms to provide appropriate developmental assistance to enhance the capabilities of the protégé firms to perform as subcontractors and suppliers. DoD may provide the mentor firm with either cost reimbursement or credit against applicable subcontracting goals established under contracts with DoD or other Federal agencies.

The Department of Defense, in an effort to streamline and transform itself in order to more effectively achieve its mission and in recognition that the Military Departments have the necessary expertise to manage programs efficiently, is transferring the management of the Mentor Protégé program to the Military Departments and Defense Agencies. The Office of the Secretary of Defense will maintain oversight and policy development responsibilities.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 69 FR 18244, April 6, 2004, with request for comments. One respondent submitted a comment that was outside the scope of the rule and no action was taken. The Councils agreed to convert the proposed rule to a final rule.

Accordingly, the FAR is amended to state that the Director, Small and Disadvantaged Business Utilization of the cognizant DoD Military Department or Defense Agency, will be the approval authority for mentor-protégé agreements.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule removes a restriction, thus allowing DoD to make a minor policy change.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 19

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 19 as set forth below:

■ 1. The authority citation for 48 CFR part 19 is revised to read as follows:

PART 19—SMALL BUSINESS PROGRAMS

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 19.702 by revising paragraph (d) to read as follows:

19.702 Statutory requirements.

* * * * *

(d) As authorized by 15 U.S.C. 637(d)(11), certain costs incurred by a mentor firm in providing developmental assistance to a protégé firm under the Department of DefensePilot Mentor-Protégé Program, may be credited as if they were subcontract awards to a protégé firm for the purpose of determining whether the mentor firm attains the applicable goals under any subcontracting plan entered into with any executive agency. However, the mentor-protégé agreement must have been approved by the Director, Small and Disadvantaged Business Utilization of the cognizant DoD military department or defense agency, before developmental assistance costs may be credited against subcontract goals. A list of approved agreements may be obtained at *http://www.acq.osd.mil/sadbu/mentor_protege/* or by calling (703) 588–8631.

[FR Doc. 04–27637 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 42

[FAC 2001–26; FAR Case 2001–018; Item VI]

RIN 9000–AJ77

Federal Acquisition Regulation; Applicability of the Cost Principles and Penalties for Unallowable Costs

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by increasing the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement.

DATES: Effective Date: January 19, 2005.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Richard C. Loeb at (202) 208–3810. Please cite FAC 2001–26, FAR case 2001–018.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 66988 on November 28, 2003, with request for comments. The Councils proposed to amend the FAR to: (1) remove the requirement to apply the cost principles and procedures at FAR Part 31 when pricing a contract if cost or pricing data are not obtained; (2) add a definition to FAR Part 31 for fixed-price contracts, subcontracts, and modifications; and (3) increase the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement (FAR Part 42). Three respondents submitted comments on the proposed FAR rule; a discussion of the comments are provided below. The Councils considered all comments and decided not to adopt the proposed revisions to FAR Parts 15 and 31, and to convert the proposed rule at FAR Part 42 to a final rule. Differences between

the proposed rule and final rule are discussed in comments 1, 2, and 3, below.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

Public Comments:

Applicability of FAR Part 31

1. *Comment:* Two of the three respondents believe the change should not be made.

The first respondent urged the withdrawal of the proposed rule and expressed the position that the need for the proposed change was not clearly and fully disclosed. The respondent strongly believes that the Government's prenegotiation objective for cost based fixed-price contracts should continue to be predicated on the consistent application of applicable FAR Part 31 cost principles. Whether a contractor's submitted cost data is "certified" or "uncertified" should not alter the basis for determining the Government's prenegotiation objective, or a determination on whether the negotiated fixed-price is fair and reasonable.

The respondent noted that FAR Part 31 has more than just unallowable costs within it, *e.g.*, allocability, consistency, direct vs. indirect, and accounting methods. The respondent also made the following points:

- If FAR Subpart 31.2 policies and procedures are not consistently applied to cost-based fixed-price contracts, what are the alternate policies, procedures and principles to be applied when performing a "cost analysis" of the "uncertified" information other than cost or pricing data?
- What fundamental constructs will the proposing contractor have to comply with?
- What will guide the cost analyst and/or auditor when performing the "cost analysis" of the contractor's uncertified data?

After referencing the Councils' stated goal "...to reduce Government unique regulations when the risk to the Government is low," the respondent opined:

When negotiating fixed-price contracts based on a prenegotiation objective that was predicated on a "cost analysis" of contractor submitted information other than cost or pricing cost data, the respondent believes that the risk to the Government is higher, not lower, than if "certified" cost or pricing data had been obtained. Without certified data, there is less assurance that contractor submitted data are current, complete and accurate.

The respondent concluded that FAR Part 31 contract cost principles should continue to be applied to pricing contracts whenever cost data is submitted to support a contract price, regardless of whether the contract type is fixed-price.

The second respondent believes that the Government's policy objective should be clarified, and that the mention of cost analysis is potentially confusing and unnecessary. The respondent characterized the phrasing of the proposed rule as terribly awkward (due to using the passive voice) and suggested alternative language.

The third respondent was concerned that the proposed coverage at FAR 31.000 appears to restrict in some way the underlying Truth in Negotiations Act (TINA) mandate to obtain cost or pricing data in the first place (as to both negotiated contracts and negotiated modifications).

Councils' response: Concur that the proposed change should not be made. The Councils believe that the Government needs a consistent playing field when dealing with cost data whether "certified" or not. The Councils are also concerned that the proposed language could be construed as limiting the Government's use of FAR Part 31 for its prenegotiation positions. This would adversely affect any requests for audit support made by the contracting officer. The General Accepted Government Auditing Standards (GAGAS) under attestation standards AT 101.23, "Suitability of Criteria," require auditors to have objective, measurable, complete, and relevant criteria to apply during their work. The Councils believe that the guidance in FAR Part 31 meets these requirements, as General Accepted Accounting Principles (GAAP) alone does not go to the level necessary to support contract pricing. Therefore, the Councils have withdrawn the proposed revisions to FAR Parts 15 and 31.

Definition of fixed-price contracts

2. *Comment:* Two respondents believe the proposed FAR 31.001 definition of fixed-price contracts, subcontracts and modifications would lead to confusion in the area of Time-and-Material (T&M) type contracting actions.

The first respondent stated that it strongly opposes the proposed "redefinition" of fixed-price contracts to include the fixed hourly portion of a T&M and labor-hour (LH) contract, and that it flies in the face of law and common sense. The respondent cited GSBCA decision CACI, Inc.—Federal v. General Services Administration, dated December 13, 2002, to support its position that T&M/LH contracts are not fixed-price. The respondent believes that the Council's attempt to rationalize a portion a T&M/LH contract as "fixed-price" is a shameful capitulation to contractors interests, and an abrogation of the Council's duty to taxpayers.

The second respondent was concerned the proposed definition may impact T&M orders placed under GSA's Multiple Award Schedule (MAS) contracts. The proposed definition would include the fixed hourly rate portion of the T&M and LH contracts and subcontracts in FAR Subpart 16.6. The respondent believes this may suggest that time-and-material orders with a fixed labor hour component are fixed-price in nature for any contracting or FAR purpose. GSA mandates that all T&M orders placed under MAS contracts include the contract clause at FAR 52.232–7, Payments under Time-and-Materials and Labor-Hour Contracts. This clause provides contracting officers with an ability to require more substantiation of hours worked under a time-and-materials order. Because such task orders have fixed labor components, the respondent is concerned that contracting officers may—based on this proposed FAR change—consider such task orders to be fixed price and not invoke the controls attendant with this clause or other necessary safeguards to the use of such vehicles.

Councils' response: Partially concur. The Councils believe there is a limited risk that contracting officers could be confused by the inclusion of the "fixed rate portion" of a T&M contracting action in the proposed definition. However, due to the Council's decision not to adopt the proposed revisions discussed at Comment 1, above, this definition is no longer required.

Dollar threshold for assessing penalties—FAR 42.709

3. *Comment:* One respondent stated that it had no objection to the proposed change in the threshold from the current $500,000 to $550,000 to adjust for inflation. The other two respondents did not address the proposed change.

Councils' response: Concur. The Councils agree that the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement should be increased from $500,000 to $550,000, to adjust for inflation. This increase is authorized by 10 U.S.C. 2324(l) and 41 U.S.C. 256(1). Therefore, the dollar threshold amounts

in FAR 42.709(b) and FAR 42.709–6 are increased from $500,000 to $550,000.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles discussed in this rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 42

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 42 as set forth below:

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 1. The authority citation for 48 CFR part 42 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

42.709 and 42.709–6 [Amended]

■ 2. Amend sections 42.709(b) and 42.709–6 by removing "$500,000" and adding "$550,000" in its place.

[FR Doc. 04–27638 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 11, 41, 44, 51, and 52

[FAC 2001-26; Item VII]

Federal Acquisition Regulation; Technical Amendments

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make editorial changes.

DATE: *Effective Date:* December 20, 2004.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2001-26, Technical Amendments.

List of Subjects in 48 CFR Parts 11, 41, 44, 51, and 52

Government procurement.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 11, 41, 44, 51, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 11, 41, 44, 51, and 52 is revised to read as follows:

Authority: Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 11—DESCRIBING AGENCY NEEDS

11.201 [Amended]

■ 2. Amend section 11.201 in paragraph (d)(2)(i) by removing *http://assist.daps.mil* and adding *http://assist.daps.dla.mil* in its place.

PART 41—ACQUISITION OF UTILITY SERVICES

■ 3. Amend section 41.301 by revising the second sentence of paragraph (a) to read as follows:

41.301 Requirements.

(a) * * * The names and locations of GSA regional offices are available from the General Services Administration, Energy Center of Expertise, 301 7th Street, SW., Room 4004, Washington, DC 20407.

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.203 [Amended]

■ 4. Amend section 44.203 in paragraph (b)(1) by removing "16.301-3" and adding "15.404-4(c)(4)(i)" in its place.

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

51.102 [Amended]

■ 5. Amend section 51.102 by removing "FCSI" from paragraph (c)(1) and adding "FXS" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.219–1 [Amended]

■ 6. Amend section 52.219-1 by removing "19.307(a)(1)" from the introductory text and adding "19.308(a)(1)" in its place.

[FR Doc. 04–27639 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001–26 which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2001–26, which precedes this document. These documents are also

available via the Internet at *http://www.acqnet.gov/far.*

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2001–26

Item	Subject	FAR case	Analyst
*I	Electronic Representations and Certifications	2002–024	Zaffos.
II	Excluded Parties List System Enhancement	2002–023	Goral.
*III	Special Emergency Procurement Authority	2003–022	Zaffos.
IV	Notification of Employee Rights Concerning Payment of Union Dues or Fees (Interim)	2004–010	Goral.
V	Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements	2003–010	Cundiff.
VI	Applicability of the Cost Principles and Penalties for Unallowable Costs	2001–018	Loeb.
VII	Technical Amendments.		

Item I—Electronic Representations and Certifications (FAR Case 2002–024)

This final rule requires offerors to provide representations and certifications electronically via the BPN website; to update the representations and certifications as necessary, but at least annually, to keep them current, accurate and complete; and to make changes that affect only one solicitation by completing the appropriate sections of either paragraph (j) of FAR provision 52.212–3 or FAR provision 52.204–8, whichever is included in the solicitation. This change represents a conversion of a paper-based process to a more efficient electronic process to obtain offerors' representations and certifications. It will also significantly reduce the paperwork burden for both offerors and contracting officers.

Item II—Excluded Parties List System Enhancement (FAR Case 2002–023)

This final rule amends the FAR to incorporate the Excluded Parties List System (EPLS), GSA's new searchable on-line electronic list of parties excluded from doing business with the Federal Government. The EPLS enables agencies to directly input data into this system and obviates the need for the hard copy List of Parties Excluded from Federal Procurement and Nonprocurement Programs. The EPLS will provide more up-to-date and readily accessible information to the contracting officer on parties excluded from doing business with the Federal Government.

Item III—Special Emergency Procurement Authority (FAR Case 2003–022)

This rule finalizes the interim rule 2003–022 by including under FAR subpart 13.5 the acquisition of supplies and services that meet the definition of a commercial item in FAR 2.101, and which, as determined by the head of the agency, are to be used to support a contingency operation. This final rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (41 U.S.C. 428a) and also incorporates the higher thresholds authorized by Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. This rule allows the contracting officer expanded use of Simplified Acquisition and Commercial Items procedures when acquiring supplies or services that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical or radiological attack.

Item IV—Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004–010)

This interim rule amends FAR Parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR part 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes. This rule applies to Federal contractors and subcontractors with contracts or subcontracts that exceed the simplified acquisition threshold, unless covered by an exemption granted by the Secretary of Labor.

Item V—Mentor Protégé Program—Delegation of Approval Authority for Mentor Protégé Agreements (FAR Case 2003–010)

This final rule amends FAR 19.702, Statutory Requirements, to change the approval authority of the Mentor Protégé Agreements to the DoD Military Departments or Defense Agencies and to make some minor changes for clarification. This change is being made in order for DoD to streamline and transform itself to more effectively achieve its mission.

Item VI—Applicability of the Cost Principles and Penalties for Unallowable Costs (FAR Case 2001–018)

This final rule increases the threshold at FAR 42.709(b) and FAR 42.709–6 from $500,000 to $550,000 for contracts subject to penalties if a contractor includes expressly unallowable costs in a claim for reimbursement. The threshold was increased to reflect inflation and is authorized by 10 U.S.C. 2324(l) and 41 U.S.C. 256(l).

The rule is of importance to contracting officers and contractors who negotiate contracts and modifications, and determine costs in accordance with FAR Part 31 contract cost principles.

Item VII—Technical Amendments

Editorial changes are made at FAR 11.201(d)(2)(i), 41.301(a), 44.203(b)(1), 51.102(c)(1), and in the introductory text of FAR provision 52.219–1 in order to update references.

Dated: December 9, 2004.

Laura Auletta,

Director, Contract Policy Division.

[FR Doc. 04–27640 Filed 12–17–04; 8:45 am]

BILLING CODE 6820–EP–S

Federal Register

Tuesday,
December 28, 2004

Part III

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1, Parts 5, 6, et al.
Federal Acquisition Circular 2001–27; Introduction, Free Trade Agreements—Australia and Morocco; Small Entity Compliance Guide; Final Rules

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-15

DATE: January 10, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Guide Updates**

SUMMARY: This Policy Flash advises you of changes being made to four Chapters of the Department of Energy (DOE) Acquisition Guide. These changes are as follows:

Chapter 15.1 Source Selection – This Chapter has been redesignated 15.1 rather than 15.4 to better track the FAR numbering system. Editorial changes were made.

Chapter 15.4 Weighted Guidelines – This Chapter has been redesignated 15.4 rather than 15.1 to better track the FAR numbering system. Editorial changes were made.

Chapter 41 Acquisition of Utility Services – This Chapter has been revised and updated. The changes are editorial in nature.

Chapter 42.1 Indirect Cost Rates – This Chapter has been revised and updated. The changes are editorial in nature.

Questions on any of these chapters may be addressed to Terry Sheppard (202) 287-1339 or Terry.Sheppard@hq.doe.gov .

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachments
cc:
PPAG Members

Source Selection Guide

Overview

Recent regulation changes have introduced greater flexibility and discretion into the source selection process. This section provides guidance to contracting staff on conducting source selection.

Background

The last decade has seen significant change in many areas of procurement, particularly in the introduction of new tools and processes that help the procurement professional better meet the needs of demanding customers. The passage of the Federal Acquisition Reform Act in 1995 and the Federal Acquisition Streamlining Act in 1994, coupled with Government-wide and Department of Energy (DOE) contract reform efforts have not only changed traditional procurement processes but have also changed the role of the procurement professional. No longer are procurement professionals merely the keepers of what some view as an arcane process called Federal contracting.

One area that has received considerable attention in most all of the reform initiatives is source selection, as set forth in Part 15 of the Federal Acquisition Regulation (FAR).
In 1998, significant, and sometimes subtle, changes were made to long-standing policies, practices and procedures relating to competitive negotiation. These included the introduction of oral presentations, changes in the standards for determining competitive range, and new rules governing communications and the submission of best and final offers. These changes place an even greater responsibility on today's procurement professional to ensure that the integrity and fairness of procurement is maintained and that the contract ultimately awarded delivers high-quality goods and services to the customer.

General

In today's world, the procurement professional needs to be not only an expert in procurement laws, regulations and policies, but also an expert in business and market areas. The procurement

professional is now an integral part of a team that manages all phases of the acquisition process, from requirements identification to contract close-out. This is reinforced in guiding principles for the Federal Acquisition System (see FAR 1.102).

This guide provides a series of topics-focused dissertations on key areas of source selection. The intent of the guide is to present DOE procurement professionals with useful "hands-on" information on key principles and practices that will enhance the effectiveness of the source selection process. The guide does not present a road map of the source selection process, nor does it mandate activities or actions. The source selection process is adequately set out in regulation and other instruction material. This guide should not be construed to convey any rights to third parties.

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PART I DRAFT REQUEST FOR PROPOSAL (DRFP)

Background

The Draft Request For Proposal (DRFP) is the initial, informal document(s) that communicates the Government's intentions/needs to industry and requests questions, comments, suggestions, and corrections that improve the final product. It is a communication tool used early in competitive acquisitions to promote a clearer understanding of the Government's requirements to industry and to obtain industry feedback on the planned acquisition. The DRFP need not include all of the sections of the Request For Proposal (RFP), but should contain as much as possible of the "business" sections necessary for industry to provide meaningful comments. As a minimum, the DRFP should include Section L (Instructions to Offerors) and Section M (Evaluation Criteria), and the Specification/Statement of Work.

No hard and fast rule exists as to when it is desirable to issue a DRFP; however, in the early stages of acquisition planning/procurement strategy development, the program officer(s), advisory (legal) staff and Contracting Officer/Contract Specialist are strongly encouraged to address the desirability of issuing a DRFP in advance of the final RFP. Likewise, no formal process for comment resolution presently exists. However, a methodology should be established to ensure implementation of beneficial comments in the final RFP as well as ensuring fair disposition of all comments.

Applicable statutes, procurement regulations, or small business regulations

FAR 3.104-2 (General [Procurement Integrity]); FAR 15.201(Exchanges with Industry Before Receipt of Proposals); and FAR 5.101(b) (Methods of Disseminating Information)

Issues/Questions

- When is it appropriate to issue a DRFP?
- What should a DRFP include?
- What are the requirements for publicizing a DRFP?
- What benefits are accrued from issuing a DRFP in advance of issuing a final RFP?
- How should comments received in response to the DRFP be handled?

Discussion Topics

When is it appropriate to issue a Draft Request for Proposal (DRFP)?

It is appropriate to use DRFP's whenever, in the Contracting Officer's (CO's) judgment, the acquisition will benefit significantly from early involvement from interested parties and when award without discussions is contemplated.
Considerations in determining the feasibility of issuing a DRFP in advance of an RFP for an acquisition include: complexity and dollar value, introduction of new business and/or technical

requirements, timing and/or uncertainties as to the clarity of the proposed Statement of Work/Statement of Objective. DRFP's are not used for a noncompetitive procurement.

What should a Draft Request for Proposal (DRFP) include?

To the extent practicable, the DRFP should include all relevant parts of the solicitation, including the model contract, Statement of Work (SOW), technical requirements, instructions to offerors (Section L), and the evaluation criteria (Section M). The DRFP should identify the point of contact to which comments should be directed, the preferred method by which contact may be established, i.e., via e-mail, facsimile, and the date by which all comments are due, etc. The DRFP should include a statement to the effect that "information presented in the DRFP is subject to change and that incurring expenses or beginning to formulate an approach in preparation for the acquisition based on information presented in the DRFP is solely at the potential offerors risk".

What are the requirements for publicizing a DRFP?

The Contracting Officer/Contract Specialist should publicize the DRFP in much the same manner as the final RFP would be publicized, using a variety of methods, such as posting announcements on the INTERNET using Federal Business Opportunities for Vendors (FBO for Vendors) at http://www.eps.gov/spg/, posting the DRFP on the DOE Industry Interactive Procurement System (IIPS) at http://e-center.doe.gov and those methods addressed at FAR 15.201(c) and FAR 5.101(b). Publication and response times for proposed contract actions at FAR 5.203 are not mandatory for DRFPs. The Contracting Officer should establish reasonable times for receipt of responses to DRFPs that reflect the nature of the product or service, the supply base, and the specifics of the individual procurement. Requirements shall be synopsized in accordance with FAR 5.203 prior to issuance of the solicitation. Alternatively, the notice of availability of a DRFP and a future date when the solicitation will be issued may be included in the same synopsis.

What benefits are accrued from issuing a DRFP in advance of issuing a final RFP?

DRFP's provide an effective means to resolve potential contract issues and obtain feedback from prospective offerors in advance of issuing the final RFP. In certain cases, such information can lead to (1) significant cost savings and productivity enhancements; (2) reduce proposal preparation and evaluation time; (3) reduce the need for solicitation amendments and preclude other delays that disrupt timely completion of the acquisition; or (4) result in better proposals, end products and services.

How should comments received in response to the DRFP be handled?

The Contracting Officer/Contract Specialist, in conjunction with support from appropriate technical or other functional advisory staff as merited (i.e., cost price analysts, legal counsel, Small and Disadvantaged Business Specialist) should carefully review each question to: (1) determine whether the suggestion has merit and should be pursued; (2) develop a recommended

course of action considering the impact to other processes and elements of the RFP or program; and (3) develop a proposed Government response. Care must also be taken to ensure that incorporating a comment into the RFP does not give and unfair competitive advantage to an offeror.

Though not mandatory, two suggested means by which the Contracting Officer/Contract Specialist may disseminate the government's response to industry are:

(1) A DRFP Amendment or letter may be prepared that formally responds to the comments received. This response may group similar questions together for a single response. The amendment or letter should not attribute comments to any particular offeror. The amendment or letter should include a clear statement as to the comments disposition, i.e., accepted, rejected, deferred, etc., along with an explanation as to why that action was taken. The response should be made publicly available in the same manner as the DRFP.

(2) If the nature of the comment or the government response is complex, it may be beneficial for the government to convene a presolicitation conference to discuss the responses to the DRFP comments. Notice of the conference should be publicly announced in a manner to ensure that all interested parties/potential offerors have an opportunity to respond/attend. Minutes of the conference should be maintained which include a written response to all of the DRFP comments received. Copies of these minutes should be publicly distributed in the same manner as the DRFP, e.g., though posting on the website.

Regardless of which response method or combination of methods is used, it is critical that all potential offerors be treated fairly and given identical information so as not to provide a basis for a perception of unfair competitive advantage by any one offeror or group of offerors.

If a private conference is requested, the Contracting Officer/Contract Specialist must take special care to ensure that either: (1) no additional information is provided during the conference which would give the offeror an unfair competitive advantage; or (2) ensure that any new information provided during the conference is provided to all potential offerors.

PART II PREPROPOSAL CONFERENCES

Background

A preproposal conference is a technique to promote early exchange of information with industry after the solicitation is issued, and prior to receipt of proposals. The principal purpose of a preproposal conference is to provide for uniform interpretation and understanding of work statements, specifications, and other technical and administrative requirements by all prospective contractors responding to competitive solicitations.

Additionally, in conducting the preproposal conference, remember the following: (1) release information on a fair and equitable basis consistent with regulatory and legal restrictions; (2) establish clear ground rules for the conduct, timing, and documentation of preproposal conferences; (3) protect any proprietary information you may be given during this process; and (4) request legal counsel advice if any questions arise about any preproposal exchanges.

Applicable statutes, procurement regulations, or small business regulations

FAR 3.104-2 (General [Procurement Integrity]); and FAR 15.201 (Exchanges with Industry Before Receipt of Proposals)

Issues/Questions

- When is it appropriate to conduct a preproposal conference?
- What should preproposal conferences accomplish?
- How should the preproposal conference be conducted?

Discussion Topics

When is it appropriate to conduct a preproposal conference?

It is appropriate to conduct a preproposal conference when issues exist which make a government and industry dialogue necessary. The following factors often drive a need to conduct a preproposal conference: (1) the complexity of the project; (2) the desirability of having prospective contractors visually examine Government owned facilities (Site visits are normally conducted in conjunction with preproposal conferences); (3) the need to disseminate additional background data; (4) exceptional demands on a contractor's capability; (5) unavoidable ambiguities in the statement of work; or (6) complications involving access to classified material.

What should preproposal conference accomplish?

The preproposal conference should accomplish the following: (1) outline principal features of the project, (2) fully describe all details of the work statement and specifications, (3) explain and clarify instructions for completing the proposal, (4) provide an opportunity for offerors to ask

questions and receive answers, thus providing them with a better understanding of the government's requirements, and (5) stress the importance of significant elements of the solicitation.

How should the preproposal conference be conducted?

The Contracting Officer should publicize the arrangements for the conference in the solicitation. Attendees should be advised that remarks and explanations made by government personnel do not qualify, change, or otherwise amend the terms of the solicitation, and that only a formal, written amendment to the solicitation is binding. A written record of the conference proceedings should be kept. This record of proceedings, including any new material provided at the conference and questions and answers addressed should be provided to all potential offerors, regardless of whether they attend the conference.

Where possible, written questions should be requested in advance, and answers should be prepared in advance and delivered during the conference. Questions answered during the conference should be included in the record of conference proceedings.

As soon as possible after the preproposal conference, the Contracting Officer should ensure that all potential offerors receive the written record of the conference proceedings, including any new material provided, and any questions and answers addressed. If any of the terms and conditions or requirements of the solicitation were changed, a formal solicitation amendment should be issued.

Additionally, a site tour should be part of any preproposal conference if there is a site to tour.

Alternatives or In Addition to a Preproposal Conference

In addition to a preproposal conference, or in lieu thereof, the following approaches may also be used:

- Establish a reading room that contains public information regarding the requirement. A reading room is mandatory for any procurement. This can be accomplished either through a web-based electronic reading room, a walk-in reading room, or both.

- The Request for Proposal (RFP) should identify how questions regarding the RFP are to be submitted, and if a response to a question is appropriate, it should be conveyed to all potential offerors either by using the web, by letter, or by an amendment to the RFP when appropriate.

- One on one meetings can be held with potential offerors prior to submission of proposals with the express intent to receive feedback from potential offerors regarding the RFP. Based on these meetings, public information and exchanges

should be provided to all parties by using the web, by letter, or by an amendment to the RFP when appropriate. Note: Care must be taken during these one on one meetings to not provide information that might give a potential offeror an unfair competitive advantage.

PART III SCORING METHODOLOGIES

Background

The objective of an acquisition conducted under source selection procedures is to select the source or sources which represent the best value to the Government. FAR Part 15 discusses source selection processes and techniques, including tradeoff processes. The tradeoff process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. FAR 15.305 (a) Proposal Evaluation, states: "(a) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and sub-factors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file."

The Source Selection Authority (SSA) is required to follow the evaluation criteria and relative weighting factors set forth in the solicitation. How the SSA achieves this objective is not prescribed by the Regulations. In fact, the FAR specifically states that the rating method need not be disclosed in the solicitation. GAO has repeatedly held that Rating Plans are internal documents, and that offerors are not entitled to enforce the provisions of a Rating Plan that were not included in the solicitation. Beyond the implications in the FAR that a rating method will be used, there is no known regulatory requirement for creation of a Proposal Scoring or Rating Plan. In theory, an SSA could review the proposals, identify the strengths and weaknesses of the proposals and based on his/her judgment, following the evaluation factors and weightings in the solicitation, reach a selection decision. This approach is simply not practical and SSAs normally employ the use of an advisory board, team or panel to evaluate the proposals. Scoring/Rating Plans have evolved as the structured means of communicating the relative standings of each offeror to the SSA. In the end however, the SSA must base the selection decision on the strengths, deficiencies, and weaknesses of the proposals submitted - not merely on the score derived through use of a Proposal Scoring or Rating Plan.

A Proposal Scoring or Rating Plan helps evaluators assess a proposal's merit with respect to the evaluation factors and significant sub-factors in the solicitation. It uses a scale of words, colors, numbers, or other indicators to denote the degree to which proposals meet the standards for the non-cost evaluation factors. Some commonly used rating systems are adjectival, color coding, and numerical. What is key in using a rating system in proposal evaluations is not the method or combination of methods used, but rather the consistency with which the selected method is applied to all competing proposals and the adequacy of the narrative used to support the rating.

A traditional Scoring or Rating Plan is comprised of three basic elements: (1) evaluation factors and sub-factors set forth in the solicitation; (2) a rating system (e.g., adjectival, color coding, numerical, or ordinal); and (3) evaluation standards or descriptions which explain the basis for assignment of the various rating system grades/scores.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.305 (Proposal Evaluation); FAR 15.505 (Preaward Debriefing of Offerors); and FAR 15.506 (Postaward Debriefing of Offerors)

Issues/Questions

- What should be considered when developing evaluation standards?
- What are the most common types of rating systems?
- What does a sample rating scale look like?
- Does an evaluation need to include the identification of strengths and weaknesses?

Discussion Topics

What should be considered when developing evaluation standards?

Evaluators must be able to determine the relative merit of each proposal with respect to the evaluation factors. Evaluation standards/descriptions provide guides to help evaluators measure how well a proposal addresses each evaluation factor and sub-factor identified in the solicitation. (Standards must not introduce unstated evaluation criterion.) Standards permit the evaluation of proposals against a uniform objective baseline rather than against each other. The use of evaluation standards minimizes bias that can result from an initial direct comparison of proposals. Standards also promote consistency in the evaluation by ensuring that the evaluators evaluate each proposal against the same baseline. In developing standards for each evaluation factor and sub-factor, you should consider the following:

- As you develop your evaluation factors, concurrently draft a standard for each factor and sub-factor.
- Define the standard by a narrative description that specifies a target performance level that the proposal must achieve in order to meet the standard for the factor or sub-factor consistent with the requirements of the solicitation.
- Describe guidelines for higher or lower ratings compared to the standard "target."
- Overly general standards should be avoided because they make consensus among evaluators more difficult to obtain and may obscure the differences between proposals. A standard should be worded so that mere inclusion of a topic in an offeror's proposal will not result in a determination that the proposal meets the standard.
- While it is sometimes easier to develop quantitative standards because of their definitive nature, qualitative standards are commonly used in source selections.

What are the most common types of rating systems?

Common Rating Systems

Adjectival Ratings

Adjectival ratings are a frequently used method of scoring or rating an offeror's proposal. Adjectives are used to indicate the degree to which the offeror's proposal has met the standard for each factor evaluated. Subsequent to, and consistent with, the narrative evaluation, an appropriate adjective rating may be given to each factor and sometimes to each significant sub-factor. Adjectival systems may be employed independently or in connection with other rating systems.

Color Coding

This system uses colors to indicate the degree to which the offeror's proposal has met the standard for each factor evaluated. For instance, the colors blue, green, yellow, amber, and red may indicate excellent, good, satisfactory, marginal, or unsatisfactory degrees of merit, respectively.

Note: It should be noted that while the adjectival and color coding systems may be the most difficult to use; they may be the most effective. The reason for the difficulty in use results from having to derive a consensus rating when, for example, one element is weighted at 50% with a Good (Green) rating and one element is weighted at 40% with a Excellent (Blue) rating. Under these systems, there is not a simple process to aid the evaluators to reach the consensus rating. The evaluators must assess the collective impact of evaluation sub-factors on each higher tier factor, and then assess the totality of the evaluation factors as they related to each other under the weighting methodology set forth in the solicitation. This complexity forces the evaluators to thoroughly understand the strengths and weaknesses of each individual proposal in relation to the evaluation criteria and standards in order to reach consensus. While it is critical that this understanding is reflected in the narrative of the evaluation, this depth of understanding aids in the writing of the competitive range and source evaluation report.

Numerical

This system assigns point scores (such as 0-10 or 0-100) to rate proposals. This rating system may appear to give more precise distinctions of merit; however, numerical systems can have drawbacks as their apparent precision may obscure the strengths and weaknesses that support the numbers. As opposed to the adjective and color coding systems, numeric systems can provide a false sense of mathematical precision which can be distorted depending upon the evaluation factors used and the standards therefore. For example, if a standard indicated there could be no weaknesses, a very minor weakness in a proposal would force assignment of the next lower level rating. This would potentially cause a significant mathematical difference in the proposals.

In any evaluation process, the source evaluation board should first identify the strengths and weaknesses involved with a proposal, and then assign the adjective, color or numeric ratings to the criteria. However, this is particularly important when using numeric system because it is too easy to fall into the trap of relying on the numeric rating as opposed to the actual merits or weaknesses of the proposal. Due to the potential pitfalls with the use of numeric ratings, some organizations do not permit the use of numerical rating systems.

It is strongly suggested that if a numerical system is used, the point system used should be a staggered numeric rating system (e.g., 1, 3, 5, 8 and 10) representing the various ratings and not use a full sequential scale (i.e., 0, 1, 2, 3 . . . 10) to represent the various ratings. If the sequential system is used, it forces the evaluation team to differentiate the rating of each evaluation factor within a range of points (e.g., a satisfactory element of a proposal must receive either 4, 5 or 6 rating points) as opposed to the assignment of a standard 5 point rating for a satisfactory rating. The sequential system also can result in generating overall proposal ratings which are numerically close in the total rating which may disguise the proposal differences. Moreover, using a 1-100 scale often results in using "public school" types of grading levels, even if the rating plan provides differently - that is, an A proposal gets a 90-100, a B proposal gets 80-89, a C proposal gets 70-79, and so on. This results in over half of the rating scale [59 and below] effectively not being used. In our experience, using a 1-100 rating scale usually results in ratings being clustered in the 85 to 90 range and blurs the real distinctions between proposals. It also makes the cost-technical tradeoff more difficult, where the technical difference amounts to just a few percentage points.

What does a sample rating scale look like?

The following is a sample of a rating scale that could be used to evaluate technical and management factors and significant sub-factors. A proposal need not have all of the characteristics of a rating category in order to receive that rating. The evaluators must use judgment to rate the proposal using one of the three systems: numeric, adjectives or colors.

Examples

Typical Ratings and Descriptors
Each rating must have a definition.
TECHNICAL MERIT ratings reflect the government's confidence in each offeror's ability, as demonstrated in its proposal, to perform the requirements stated in the RFP. Choose one method (e.g., numerical, adjectival, or color) to evaluate technical merit.

NUMERICAL	ADJECTIVAL	COLOR	DEFINITION/STANDARDS
10	Excellent	Blue	Proposal demonstrates excellent understanding of requirements and approach that significantly exceeds performance or capability standards. Has exceptional strengths that will significantly benefit the Government.
8	Good	Green	Proposal demonstrates good understanding of requirements and approach that exceeds performance or capability standards. Has one or more strengths that will benefit the Government.
5	Satisfactory	Yellow	Proposal demonstrates acceptable understanding of requirements and approach that meets performance or capability standards. Acceptable solution. Few or no strengths.
3	Marginal	Amber	Proposal demonstrates shallow understanding of requirements and approach that only marginally meets performance or capability standards necessary for minimal but acceptable contract performance.
0	Unsatisfactory	Red	Fails to meet performance or capability standards. Requirements can only be met with major changes to the proposal.

COST - NOT "RATED." Reflects the evaluated cost. RFP must describe method by which cost will be evaluated (e.g., how probable cost or life cycle cost will be evaluated.)

Alternate language for defining the Standards might be:

Outstanding: <u>An outstanding proposal is characterized as follows:</u>

The proposed approach indicates an exceptionally thorough and comprehensive understanding of the program goals, resources, schedules, and other aspects essential to performance of the program.

In terms of the specific factor (or significant sub-factor), the proposal contains major strengths, exceptional features, or innovations that should substantially benefit the program.

There are no weaknesses or deficiencies.

The risk of unsuccessful contract performance is extremely low.

Good: <u>A good proposal is characterized as follows:</u>

The proposed approach indicates a thorough understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

The proposal has major strengths and/or minor strengths which indicate the proposed approach will benefit the program.

Weaknesses, if any, are minor and are more than offset by strengths.

Risk of unsuccessful performance is very low.

Satisfactory: A satisfactory proposal is characterized as follows:

The proposed approach indicates an adequate understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

There are few, if any, exceptional features to benefit the program.

The risk of unsuccessful performance is low.

Weaknesses are generally offset by strengths.

Marginal: A marginal proposal is characterized as follows:

The proposed approach indicates a superficial or vague understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

The proposal has weaknesses that are not offset by strengths.

The risk of unsuccessful contract performance is moderate.

Unsatisfactory: An unsatisfactory proposal is characterized as follows:

The proposed approach indicates a lack of understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

Numerous weaknesses and deficiencies exist.

The risk of unsuccessful performance is high.

Does an evaluation need to include the identification of strengths and weaknesses?

Strengths and Weaknesses

Regardless of whether an adjectival, color, or numerical rating system is used, proposal evaluations must be supported with narrative statements which describe each strength and weakness associated with each aspect of a proposal in relation to the evaluation criteria. The identification of the specific strengths and weaknesses provides the SSA the information needed to make a reasonable and rational basis for the selection decision. The detailed information on strengths and weaknesses is also required by the contracting officials in order to provide the debriefings to unsuccessful offerors required by FAR 15.506(d), as well as contracting and legal

personnel in order to defend any protests which might be filed with the agency or the General Accounting Office.

PART IV CONTRACTING OFFICER ROLE AND ROLE OF COUNSEL IN THE ACQUISITION PROCESS

Background

One important role of the contracting officer and counsel is to provide business, procurement and legal advice and guidance to the Source Selection Official and Source Evaluation Board Chair. Prior to the initiation of a procurement in a Federal Acquisition Regulations (FAR) Part 15 competitive procurement, the contracting officer and counsel should brief the source evaluation board or the technical evaluation committee (SEB/TEC) on the workings of the source selection process. The briefing should include an explanation of the evaluation process and pertinent documents, conflicts of interest, proposal security, and procurement integrity. The briefing should be designed to inform the evaluators of their responsibilities and provide guidance to the evaluators on how to review the proposals. If there are non-voting members on the SEB/TEC, the contracting officer should explain the limits of their involvement in the selection process. The contracting officer should also advise the SEB/TEC members of the planned schedule for the evaluations, including the time allotted for individual evaluations, consensus discussions, completion of a draft evaluation report, and the anticipated date for completion of the final report. If the solicitation included a requirement for oral presentations by the offerors, the contracting officer must explain the evaluation process for the oral presentations.

In any acquisition the contracting officer should involve the counsel to the greatest extent possible, and as early in the process as possible. The counsel should act as part of the team engaged in making this acquisition occur. At the latest, the counsel should be consulted while the Request for Proposals (RFP) is being drafted. By proceeding in this way, the contracting officer informs the counsel about the requirements of the acquisition, and anticipates problems which may arise in the award. Further, involving the counsel at the earliest part of the process so that he or she is fully informed regarding the program office's needs permits the counsel to suggest options available to accomplish those needs, which may result in changes to the RFP and model contract.

Time consuming activities associated with rework of the evaluation process can be avoided by taking the time for a thorough briefing prior to allowing the evaluators to open the proposals. The contracting officer leads the pre-evaluation briefing; however, the legal advisor to the SEB/TEC should attend and may take the lead for pieces of the briefing. For example, the contracting officer may ask the legal advisor to explain the procurement integrity or conflicts of interest provisions to the evaluators. Additionally, the counsel should be involved in reviewing solicitation strategy; reviewing the RFP (evaluation criteria, award criteria, applicable contract clauses) reviewing the rating plan; overseeing the evaluation; reviewing the competitive range determination (if any); overseeing the discussions (if any); and reviewing the selection, and the selection statement.

Applicable statutes, procurement regulations, or small business regulations:

FAR 3.104 (Procurement Integrity); FAR 15 (Contracting by Negotiation); DEAR 915 (Contracting by Negotiation); FAR Part 9.5 (Organizational and Consultant Conflicts of Interest); DEAR 909.5 (Organizational and Consultant Conflicts of Interest); DEAR 952.209-72 (Organizational Conflicts of Interest); DEAR 970.0905 (Organizational Conflicts of Interest); and DEAR 903.104-10 (Violations or Possible Violations)

Issues/Questions

- What aspects should the contracting officer brief the SEB/TEC prior to evaluation of proposals?
- What is the role of counsel in the procurement process?

Discussion Topics

What aspects should the contracting officer brief the SEB/TEC prior to evaluation of proposals?

Certification requirements for evaluators

The briefing is a good opportunity to make sure that all evaluators have signed the required certifications. Prior to commencing evaluations, evaluators are required to complete confidentiality certificates, conflict of interest certificates, or other certifications established in the rating plan.

Security of proposals

The proposals and any other proprietary or source selection information need to be kept in locked cabinets or locked rooms. The SEB/TEC chairman should arrange for appropriate facilities for safeguarding the proposals and other source selection information prior to the receipt of the proposals. Copies of proposals and proprietary/source selection information should be numbered and tracked by the SEB/TEC chairman or other clearly designated member of the evaluation board (for example, the contracting officer). The contracting officer should inform the evaluators that proposals shall not be taken home. The evaluation and contents of proposals shall not be discussed outside the SEB/TEC with the exception of ex-officio members, procurement advisors, legal advisors, and other selection officials.

Potential individual conflicts of interest

Individual conflicts of interest need to be resolved prior to commencing evaluation. The evaluators need to be reminded to review all contractors, subcontractors, consultants, and teaming arrangements proposed under the procurement and report any potential conflicts of interest to the contracting officer, legal advisor, and the SEB/TEC chairman. Evaluators need to report any relatives employed by the proposing entities, friendships, financial interests, pension benefits, and prior employment. The existence of these relationships does not necessarily mean that a conflict of interest exists, but legal counsel will review the specifics of the situation to determine if a potential conflict exists. The evaluator will then be informed if any actions need to be taken to avoid the conflict of interest. Actions that may be taken include divestment of stock, reclusion from review of selected offerors, or removing the evaluator from the source evaluation process.

The evaluators need to be advised against the appearance of a conflict of interest. For example, evaluators should not have lunch or go golfing with offerors or prospective offerors, or engage in any other activity that could give the appearance of a conflict of interest. Evaluators should be encouraged to discuss any questions regarding the appearance of a conflict of interest with the contracting officer and legal advisor.

Procurement Integrity Act

The procurement integrity provisions of the Office of Federal Procurement Policy Act (OFPP Act) (41USC 423) (commonly referred to as the Procurement Integrity Act) address a variety of issues, but the two of most concern to evaluators are the prohibitions against employment discussions and the release of information regarding a procurement. The provisions of the Procurement Integrity Act are implemented in FAR Part 3.104. The contracting officer should inform the evaluators that civil and criminal penalties, and administrative remedies, may apply to conduct that violates the Procurement Integrity Act and related statutes and regulations. The procurement integrity piece of the briefing to evaluators can either be provided by the contracting officer or the legal advisor to the SEB/TEC.

Employment prohibitions

Evaluators should be instructed to consult with the legal advisor and the legal staff of the agency ethics office regarding any contact with an offeror regarding non-Federal employment as well as questions related to post employment restrictions. In general, evaluators need to be informed that they can't be involved in the source selection process and discuss potential employment with any offerors, including subcontractors and consultants, proposing under the solicitation. This includes submitting resumes to firms. Evaluators need to be told that if they are approached by a firm, they can't leave the door open for employment discussions and tell the firm that conversations about employment will resume after the evaluation is completed.
In fact, the FAR requires that if an agency official is contacted by a person who is an offeror under the solicitation that official must report that contact, in writing, to the official's supervisor and the agency ethics official. The FAR further states that the agency official must either reject

the offer of employment or disqualify himself/herself from further participation in that procurement.

Evaluators should be advised that participation in a Federal agency procurement will result in some post-employment restrictions. Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641 and Subsection 27(d) of the OFPP Act and FAR 3.104-3(d). Former Government employees are prohibited from engaging in certain activities, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific activities in which the former employee participated personally or substantially while employed by the Government. Evaluators who have concerns about the post-employment restrictions should be instructed to discuss their situation with the legal staff within the agency responsible for interpreting post-employment restrictions prior to commencing evaluation of the proposals or becoming further involved with the procurement.

Disclosure of proprietary or source selection information

The second area of concern to evaluators is the disclosure of any proprietary or source selection information during the conduct of a procurement. The Procurement Integrity Act prohibits the disclosure of contractor bid or proposal information or source selection information prior to the award of a Federal contract. Evaluators should be informed that source selection information includes: 1) proposed costs or prices; 2) source selection plans; 3) technical evaluation plans; 4) technical evaluation of proposals; 5) cost or price evaluation of proposals; 6) competitive range determinations; 7) ranking of bids, proposals, or competitors; 8) reports and evaluations of source selection panels, boards, or advisory counsel; and 9) any other information marked source selection.

Evaluators should be reminded that they can only discuss contractor bid or proposal information or source selection information with individuals who are authorized, in accordance with applicable agency regulations or procedures, to receive such information. It is useful for evaluators to keep in mind what is public information and what is not. For example, information in the solicitation is public, but the rating plan is not. The weights assigned to the evaluation criteria are not public unless they are identified in the solicitation. Once a competitive range is established, even though the Government has written letters to offerors letting them know whether or not they are in the competitive range, that is not public information. Evaluators should be cautioned against holding any conversations with or answering any questions from offerors. All questions should be referred to the contracting officer.
If a potential violation of the Procurement Integrity Act is reported, the contracting officer is required to determine if there is any impact on the pending award or selection of the contractor.

FAR Part 3.104-7 identifies the procedures the contracting officer and agency are required to follow. Evaluators should be advised that the earlier a potential procurement integrity violation is reported, the greater is the contacting officer's ability to mitigate its effect on the procurement. For example, the contracting officer may be able to mitigate an unauthorized disclosure of information by making that information available to all offerors or by taking other appropriate action. Additionally, evaluators should be advised that if they are asked to prepare information

related to solicitation or the evaluation that they cannot re-delegate the action to a contractor, even if the action appears to be clerical.

It is helpful to provide examples of procurement integrity violations in the briefing so that the evaluators can relate the procurement/legal jargon to real situations they may encounter. For example, in one case a SEB/TEC evaluator allegedly communicated to an offeror in the competitive range, in general terms, how it needed to revise its technical and price proposals in order to receive an award. The potential violation was reported by the offeror and the case was referred to the appropriate criminal investigative organization for further investigation. As another example, a senior level program official asked a support service contractor to assist in developing the statement of work and required labor mix for the re-compete of its own contract. After the violation was reported, the program official attempted to argue that the documents prepared by the support service contractor were only an outline and the information was significantly modified prior to release of the solicitation. This argument was not found to be convincing by the investigative organization.

Evaluation process

The contracting officer should provide an overview of the evaluation process and the steps to be followed. The evaluators should be instructed to review the pertinent documents prior to evaluating the proposals. Evaluators should review and become familiar with the source selection plan/rating plan, statement of work, evaluation scoring sheets, the evaluation criteria in sections L and M of the solicitation, and the established weights for each criterion and sub-criterion.

The proposals need to be individually evaluated by each SEB/TEC member. Evaluations shall be based on the evaluation criteria in the solicitation, and evaluators need to be cautioned against deviating from the evaluation criteria or substituting evaluation criteria.

The contracting officer should discuss the unique aspects of the past performance criteria, and how evaluation of past performance differs from the other criteria. Evaluation under this criterion relies on information provided by the offeror's previous customers.

Evaluators shall be instructed to develop strengths and weaknesses for each criteria that are sufficiently detailed to support the assigned score or adjectival rating. This does not mean that evaluators will assign individual scores or ratings. This depends on the evaluation process established in the source selection plan/rating plan.

Commonly, individual evaluators develop individual strengths and weaknesses, and then the SEB/TEC meets to develop consensus strengths and weaknesses prior to assigning scores. This is the preferred method at the Department of Energy. Evaluators should also be encouraged to use the full range of adjectival ratings or scores.

Evaluators must be cautioned not to compare proposals against each other. Proposals shall be evaluated against the criteria and standards established in the solicitation. FAR Part 15

specifically states that competitive proposals shall be evaluated solely on the factors and sub-factors identified in the solicitation. Evaluators should be instructed that if the information sought does not exist where it is expected, that they should check if it exists elsewhere, such as in the introduction, on a diagram, or in the appendices.

The briefing should advise evaluators to be consistent during the evaluations, scoring, and developing of questions. The contracting officer should instruct the evaluators to discuss questionable issues as a group. Evaluators should be instructed to only credit or fault an offeror once for the same fact or idea unless the solicitation has a redundancy in the criteria. Similarly, evaluators need to evaluate the same fact or idea consistently. If something is noted as a weakness under one proposal, it must be designated as a weakness in other proposals with the same fact or idea.

SEB/TEC report and documentation of evaluation

FAR Part 15 states that the source selection records must include "a summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors." The consensus strengths and weaknesses by criterion are included in the SEB/TEC report. The contracting officer should advise the SEB/TEC that the report needs to be complete, accurate, and contain sufficient detail on strengths, weaknesses, deficiencies, and risks to demonstrate to an outside reviewer that the Government's evaluation was fair, reasonable, and unbiased. The evaluators should be informed that the reports prepared by the SEB/TEC must be clear, convincing and supportable, and may be reviewed by the General Accounting Office or a judge during a protest. Some contracting officers encourage evaluators to reference the pertinent part of the applicable evaluation criteria and the applicable page of the offeror's proposal for each strength or weakness. Evaluators should be told to avoid generalizations of a proposal's merits or problems, and instead state the facts that support the conclusions.

The contracting officer must instruct the evaluators to refrain from making personal notes in the proposals and on other documents that are retained. These documents may become part of the source selection record, and personal notes may be used during a protest to show inconsistencies. Evaluators must be advised to stamp all documents and worksheets with "Source Selection Information - See FAR 2.101 and 3.104.

What is the role of counsel in the procurement process?

Counsel Advisory Role

In some applicable cases, the Assistant General Counsel for Procurement and Financial Assistance, GC-61 acts by advising the Office of Contract Management, ME-62 in relation to all the above actions when the acquisition has been selected for headquarters review. In those cases, GC-61 advises ME-62, in addition to the advice given to the SEB/TEC and Source Selection Official by the applicable field attorney. In this situation, each attorney has a different client: the field attorney advises the SEB/TEC, and the Headquarters attorney advises ME-62. In most

cases, the advice is similar. Nothing prohibits field personnel from consulting the office of the Assistant General Counsel for Procurement and Financial Assistance at any time, but that office generally prefers that field personnel consult with the field counsel in the first instance, and that field consult contact GC-61 when necessary. Furthermore, both the field attorney and GC-61 are involved if there is a protest of any sort.

PART V PAST PERFORMANCE AS AN EVALUATION FACTOR

Background

The use of past performance as an evaluation factor adds a new aspect to the evaluation process. As required by FAR 9.1, past performance was generally examined only in the context of a determination of responsibility. Contractors with a history of unsatisfactory performance were considered not responsible contractors. This type of determination generally involved a minimum of paperwork and time. Formal documentation is required only if the contractor is found to be not responsible.

Now past performance must also be examined through a comparative assessment during the evaluation process. The examination is of information regarding a contractor's actions and performance under previously awarded contracts. It is a review of deeds not words. The currency and relevance of information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This assessment is compared with the assessment of the past performance of the competing contractors to help determine which contractor is offering the best value.

Key to the successful use of past performance - and any factor- in the source selection process is the establishment of a clear relationship between the statement of work (SOW), Section L (instructions to offerors), and Section M (evaluation criteria). The factors chosen for evaluation must track back to the requirements in the SOW. They should be reasonable, logical, and coherent.

The use of past performance as an evaluation factor potentially increases the workload and paperwork related to the evaluation effort. The problem is that evaluating past performance requires gathering and evaluating additional information - information not found in proposals. The evaluation of past performance requires making inquires of third parties about contractor performance on other contracts and evaluating the responses.

Use of past performance as an evaluation factor is mandatory unless the contracting officer documents in the contract file why the evaluation of past performance is not appropriate. It is up to the contracting officer to document the reason that the use of past performance as an evaluation factor is inappropriate.

Using past performance as an evaluation factor depends on the significance of past performance as a discriminator. The purpose of an evaluation factor is to enhance the evaluator's ability to distinguish one proposal from another in terms of its relative worth or value to the government. An evaluation factor that does not help discriminate between proposals should not be used as an evaluation factor.

Applicable statutes, procurement regulations, or small business regulations

FAR 8.404 (b) (Using Schedules); FAR 15.101-2 (b) (Lowest Price Technically Acceptable Source Selection Process); FAR 15.102 (c) (Oral Presentations); FAR 15.202 (a) (Advisory Multi-Step Process); FAR 15.304 (Evaluation factors and significant sub-factors); FAR 15.305 (Proposal evaluation); FAR 15.306 (Exchanges with offeror after receipt of proposals); FAR 16.505 (b) (Order under multiple award contract; and FAR 42.15 (Contractor Performance Information)

Issues/Questions

- What past performance information should be requested?
- How should the solicitation aspects regarding past performance be structured?
- How much past performance information should be requested?
- How much weight should be placed on past performance information?
- When and what information can be discussed with offerors regarding past performance?

Discussion Topics

What past performance information should be requested?

Information requested under section L should be focused on contracts for similar efforts that have been awarded and in place for at least three months. Similar efforts should be defined by the size, scope, complexity, contract type, etc...

Information concerning past performance by subcontractors should not be requested unless they are a major subcontractor.

It is important to ask for at least two references on each contract. In addition to ensuring that all aspects of the contractor's performance will be discussed, it also ensures that the anonymity of the references can be maintained. FAR 15.306(e)(4) prohibits release of the names of individuals providing reference information about an offeror's past performance.

How should the solicitation aspects regarding past performance be structured?

The solicitation should explain that past performance information that is not similar will be considered when a contractor has no past performance information from contracts for similar efforts.

Information from previously established companies and the key personnel from which newly formed companies and mergers are formed should be used to mitigate the newly formed company and merger not having past performance information. Additionally, if there is no Federal contract information, past performance information should be reviewed from other

sources such as state and local government contracts and private sector contracts and subcontracts.

The RFP section M should identify if the information requested to mitigate a company not having relevant past performance information will be rated lower then relevant past performance information.

The RFP section M should indicate that newly formed companies, which cannot mitigate having no past performance information, shall not be given a rating of favorable or unfavorable. What constitutes a not being given a rating of favorable or unfavorable should be included in the rating plan.

The RFP section M should state that, if the government's attempts at gathering and verifying the offerors referenced past performance information fails, and the offeror has been notified and not been able to correct this problem, the offeror will be not be given a rating of favorable or unfavorable.

The RFP section M must stipulate the relative importance of past performance information.

If corporate experience and past performance are separate evaluation criteria do not ask for the same information under each of these criteria, in order to avoid the potential for double counting the same information. Do not confuse evaluation of past experience with evaluation of past performance.

Make certain that section L explains that offerors shall be defined as business arrangements, and each firm in the business relationship (i.e., joint venture, teaming partners, and major subcontractors) will be evaluated on its past performance.
Section L should include a statement that the government may use past performance information obtained from other than the sources identified by the offeror and that the information obtained will be used for both the responsibility determination and the best value decision.

Since past performance evaluation is essentially an informed judgmental decision of the government, in order for the government's decision to withstand scrutiny, the contract file should contain detailed documentation identifying that the past performance information has been appropriately analyzed and verified by the government.

Attempts at gathering and verifying information from the references on how the contractor performed is the responsibility of the government. Questionnaires followed up by telephone interviews have the most success in getting useful and timely responses from references.

Questionnaires that will be forwarded to reference checks should be provided in the RFP for informational purposes only. This allows offerors to know what is important to the government on this contract and helps offerors in their proposal decisions. The questionnaire should be listed as an attachment in Section J, and Section L should note that it will be used to collect past

performance information. The questionnaire should be short. No more than a page to a page and a half of questions should be asked.

Information that supports an entity's past performance, such as awards of excellence presented to the companies that will be performing the work, should be requested.
Avoid formula driven past performance decisions, as past performance is essentially a subjective best value decision.

How much past performance information should be requested?

Be prudent about the amount of past performance information that is requested. It should be a reasonable amount that does not cause excessive burdens for the contractor and the government. Additionally, FAR 42.1503(e) states that past performance information shall not be retained to provide source selection information for longer than three years after completion of the contract. Therefore, the information requested should not go beyond three years past completion of the contract.

How much weight should be placed on past performance information?

It is recommended that under the evaluation criteria of the RFP, past performance should be given a weighting of 25% or be equal to the most heavily weighted non-cost evaluation factors. However, if knowledge and information about the market place reveal that there is strong reason to believe that there are only a few capable offerors, there is substantially no discrimination among these potential offerors' past performance, the Source Selection Board should consider assigning a lesser weight for past performance. This type of situation is more likely to occur under requirements for complex scientific efforts.

Contractor successful performance of relevant past performance information should be rated higher than a contractor that has no past performance information.

For administrative requirements and the less complex scientific requirements, where there tends to be a greater market of capable offerors, past performance should be a very significant factor in the evaluation criterion.

Contracting activities should not downgrade a contractor for filing protests or claims or not agreeing to use alternative dispute resolution (ADR) techniques. Conversely, contracting activities should not rate a contractor positively for not having filed protests or not having made claims or agreeing to use ADR techniques. However, the quality of a contractor's performance that gave rise to the protest or claim may be considered. In other words, while performance must be considered, a contractor exercising its rights may not.

When and what information can be discussed with offerors regarding past performance?

Past performance information is proprietary source selection information. Therefore, section L should explain that the government will only discuss past performance information directly with

the prospective prime or sub-contractor that is being reviewed. If there is a problem with the past performance entities that have formed business arrangements with the prime contractor, such as subcontractors, joint ventures, and teaming partners, the prime contractor can only be informed that there is a problem with the entity under review. The details of the problem cannot be provided, unless the affected entity agrees.

The offeror should be asked to discuss any major problems encountered on the contracts listed and the corrective actions taken to resolve them.

If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond).

The questions asked of the past performance points of contract should be the same. Inconsistency in questions can lead to the potential issue of unequal evaluation of offerors. However, if there is a concern raised based on the responses to questions, then it may be necessary to hold discussions to resolve the matter.

PART VI ORAL PRESENTATIONS

Background

This topic is a digest of the 1996 Office of Federal Procurement Policy Guidelines For The Use Of Oral Presentations. This digest provides the most salient aspects of these Guidelines.

The use of oral presentations is a technique which provides offerors with an opportunity to present information through verbal means as a substitute for information traditionally provided in written form under the cover of the offeror's proposal. Oral presentations can be used as a substitute for written proposals or can be used to augment written proposals and may occur at any time during the acquisition process. Oral presentations are subject to the same restrictions as written information, regarding timing FAR 15.208 and content FAR 15.306. Its major use has been to permit evaluators to receive information as to the capability of the offeror - generally demonstrating its understanding of the work or describing how the work will be performed - directly from the key members of the offeror's team that will actually perform the work. In a number of cases, the evaluators have conducted the oral presentation in the form of an interview, probing for additional information, posing sample tasks or using other techniques to test the ability of the offeror's team.

Certain types of written proposal information, particularly in the technical and management areas, are costly to prepare and time consuming to evaluate. In addition, oral presentations avoid the use of lengthy written marketing pitches and essays. The use of oral presentations allows for greater communication between the government personnel and the offerors' key personnel and often can be used as essentially a "job interview" of the proposed key personnel. Using oral presentations can have the effect of greatly reducing procurement acquisition lead time and costs associated with the source selection process. These advantages are realized by both government and industry.

A list of the advantages is as follows:

- Can save significant procurement lead time;
- Can improve communication and the exchange of information between government and offerors;
- Can reduce government costs;
- Can reduce offerors' costs and increase competition;
- Can make customers feel more involved in contract selection and award; and,
- Can improve ability to select the most advantageous offer.

There is not one best approach for using oral presentations. There are variations in the approach for oral presentations to be considered by the acquisition team when developing the oral presentation methodology. The acquisition team should consider the following when developing the oral presentation methodology:

- media used to record the presentation;
- restrictions on the extent and nature of material used in the presentation;
- the Government participants; the offeror's presentation team; and,
- the amount of time permitted for the presentation.

Additional concerns to be considered are as follows:

- The influence of presentation mannerisms, as distinguished from technical content, on the evaluators' decisions;
- The failure to allow an effective exchange between evaluators and presenters; and
- In some cases, the redundant effort involved in preparing the same material for both oral and written formats.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.102 (Oral Presentations); FAR 15.208 (Submission, Modification, Revision and Withdrawal of Proposals); FAR 15.306 (Exchanges With Offerors After Receipt of Proposals); FAR 15.307 (Proposal Revisions); and the Office of Federal Procurement Policy Guide For The Use Of Oral Presentations.

Issues/Questions

- What instructions should be provided regarding oral presentations?
- How should oral presentations be prepared for?
- How should the oral presentations be handled?
- How should oral presentations be evaluated?

Discussion Topics

What instructions should be provided regarding oral presentations?

Proposal Preparation Instructions

The instructions governing the oral presentation should encourage the offeror to not develop overly elaborate presentations or presentation material. The instructions for oral presentation should include the following:

- Description of the topics that the offeror must address and the technical and management factors that must be covered;

- Statement concerning the total amount of time that will be available to make the presentation;
- Description of limitations on Government-offeror interaction during, and, if possible after, the presentation;
- Statement whether the presentation will constitute discussions as defined in FAR 15.306(d);
- Statement whether the presentation will encompass price or cost and fee;
- Description and characteristics of the presentation site;
- Rules governing the use of presentation media;
- The anticipated number and types of positions of the Government attendees;
- Description of the format and content of presentation documentation, and their delivery; and
- Statement whether the presentation will be recorded (e.g., videotaped).

The solicitation should require that, as part of the presentation, the offeror will provide a listing of names and position titles of all presenters and copies of all slides and other briefing materials that will actually be used in the presentation. It is preferable that such materials be provided to the evaluation team prior to the presentation to permit the evaluators to familiarize themselves with the information. Materials referenced in a presentation, but not an actual part of the presentation, must not be accepted, or used in, evaluations.

How should oral presentations be prepared for?

Initial Preparation

The order of presenters must be determined. A lottery is most often used to determine the sequence of presentations by offerors. The time between the first and the last presentation should be as short as practicable to minimize any advantage to the later presenters. In addition, oral presentations should be scheduled as soon as practicable after receipt of proposals.

The facility in which the presentation is to occur must be determined. In most cases the facility is one selected and controlled by the buying activity. However, nothing would preclude an oral presentation being given at an offeror's facility.

The selection of a facility can be reduced to the following:

- Make it comfortable for both the presenters and the Government evaluators. The room should be large enough to accommodate all of the participants, the recording equipment, lighting, audio-visual aids, and furniture.
- Make it accessible.
- Make it available, if possible, for inspection by the offerors prior to the time set for the actual presentation.

The solicitation should, to the extent practicable, describe the physical characteristics of the facility and resources available to the offeror. In addition, the solicitation should be clear as to what types of equipment will be available to the offeror for use in the presentation, what equipment, if any, should be provided by the offeror, and any prohibitions regarding equipment types and uses.

Prior to the presentation, the Contracting Officer should review the ground rules of the presentation session with the offeror. Additional matters for discussion include any restrictions on Government-offeror communications, information disclosure rules, documentation requirements, and housekeeping items.

Also, prior to the commencement of the presentation, the contracting officer should remind the Government participants of their responsibilities during and following the presentation. They should be advised that an oral presentation is procurement sensitive and that they may not discuss, within or outside the agency, (except among themselves) anything that occurred or was said at a presentation.

As a general rule, all of the Government evaluators should be present at every presentation. The Contracting Officer must attend and should chair every presentation. In a GAO case the offeror protested that the agency erred in not having the Source Selection Official (SSO) attend the presentation. The GAO stated that they are unaware of any requirement that an SSO attend presentation sessions.

Presentations by the offeror should to be made in person since, through the use of video conferencing a measure of government control of the meeting may be diminished. Accordingly, the submission of video tapes or other forms of media should not be authorized and should be rejected.

In addition, it is strongly recommended that the presenters should be the actual key personnel who will perform or personally direct the work being described, such as project managers, task leaders, and other in-house staff.

There are two tools available to manage the time each offeror is allotted for the oral presentation. First, and most obvious, is the imposition of a firm time limit. Firm time limits for the presentation must be established in the RFP, and each offeror must be allotted the same amount of time. Second, time may be controlled by restricting the amount of presentation material that an offeror may use during the presentation. Agencies used a combination of both a firm time limit and restrictions on information to control the time. There is no single or ideal amount of time to be allotted. The general rule of using the complexity of the procurement requirement to determine the time needed for the oral presentation may not be a reliable indicator. Another factor to consider when determining the proper amount of time is the effect on both the presenters and the evaluation team. The longer the presentation goes on the harder it is on both parties to stay focused on the presentation. Furthermore, by limiting the amount of time available for the presentation, sales pitches and theatrics can be minimized. The length of time spent on each part of the presentation should be left to the offeror's discretion. It is not generally advisable

to limit the time of individual topics or sections within the presentation; that can be the responsibility of the presenter.

How should the oral presentation be handled?

The Presentation

One of the more problematic areas of the oral presentation approach is the nature and extent of communications between the offeror and the Government evaluation team. This is largely due to the strict rules established in regulation regarding communications with offerors during the course of the solicitation process.

The term "oral presentation" is not synonymous with "oral discussions" as defined in Section 15.306 of the Federal Acquisition Regulation. Oral discussions, as envisioned by the FAR, generally consist of verbal communications between the Government and an offeror that provides an opportunity for an offeror to explain, supplement, or enhance written material previously provided to address evaluated deficiencies and significant weaknesses in the proposal, with the end objective being the submission of a revised proposal by the offeror. The FAR prescribes strict controls (see FAR 15.306, 15.306(d), and 15.307) over when, where, and to what extent, the Government can communicate with an offeror regarding its proposal.

This is done in order to ensure fairness in the evaluation process. The result is a very rigid and somewhat unnatural communication process. As such, oral presentations, by their very nature can become problematic because of the concern about inadvertently triggering the rules regarding discussions. As stated earlier, restrictions on communications between the Government and the offeror should be addressed by the Contracting Officer to all parties prior to the commencement of the presentation.

Another significant area of concern is the record of the oral presentation. FAR 15.102(e) states that the Contracting Officer shall maintain a record concerning what the government relied upon to make a source selection decision. The method and level of detail is up to the agency and must be communicated to the offerors prior to commencement of the oral presentation. Some examples of records include videotaping, audio tape recording, a written record, Government notes, and copies of briefing slides or presentation notes. A caution on the use of video- and audio-taping is needed. Since the tape will become part of the official record, it may be available to the public under the Freedom of Information Act. Like a written proposal, the tape must undergo review by both the Government and the offeror whose presentation is being requested, and a redacted version of the tape must be generated. Because of the tape media, this can be both difficult and time consuming.

In a GAO case, a protestor claimed that the presentation/discussion sessions had not been recorded. In this case, the contemporaneous record consists of handwritten notes taken by the agency. The offeror did not provide the agency with any presentation materials during its presentation. The GAO ruled that given that "government notes" are specifically mentioned in FAR 15.102(e) as a permissible method of maintaining a record of oral presentations, and given

the lack of any prejudicial disagreement between the parties as to what was said during the presentation, the protestors complaint provides no basis to challenge the award.

How should the oral presentation be evaluated?

Evaluation

There is no firm rule regarding the most appropriate time to evaluate the presentation. Some agencies have elected to perform the evaluation immediately upon conclusion of each presentation. Other agencies have performed the evaluations of presentations after all of the presentations have been made. If practicable, it is recommended to score the oral presentations immediately after each presentation is made. If the latter approach is chosen, it is recommended that the evaluators should caucus following each presentation to exchange reactions, summarize potential strengths and weaknesses, and verify perceptions and understandings.

PART VII CLARIFICATIONS VERSUS COMMUNICATIONS

Background

Clarifications and Communications are defined in the Federal Acquisition Regulation (FAR) as follows:

Clarifications are limited exchanges between the Government and offerors that may occur when award without discussions is contemplated (see FAR 15.306 (a)).

Communications are exchanges between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range (see FAR 15.306 (b)).

Discussions are negotiations conducted in a competitive acquisition, that take place after establishment of the competitive range (see FAR 15.306(d)).

The difference between what constitutes discussion or clarification has been a prominent problem within government contracting activities. A discussion between the Contracting Officer (CO) and an offeror obligates the CO to conduct discussions with all offerors in the competitive range, however, a request for clarification does not. When a CO communicates with some but not all offerors in the competitive range, other offerors may allege that they have been improperly excluded from discussions and thereby denied an equal opportunity to compete and may protest the source selection.

The CO may enter into communications with offerors who may or may not be included in the competitive range and not be obligated to communicate with the other offerors. The exchange may include critical information pertaining to the acceptability of the proposal or past performance concerns.

The objective of exchanges, including clarifications and communications, is to allow the Government to meet its needs in the most effective, economical and timely manner. However, there are limitations as to how this can be accomplished. Prior to the Clinger-Cohen Act, there were prohibitions on technical leveling and auctioning that have been removed from the FAR. However, there are new prohibitions in FAR 15.306 (e) specifically forbidding: (1) favoring one offeror over another; (2) revealing an offeror's technical solution including unique technology, innovative and unique uses of commercial items, or any other information that would compromise an offeror's intellectual property; (3) revealing the names of individuals proving past performance information, knowingly furnishing source selection information; or (5) revealing an offeror's price without permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable.

Another important limitation during pre-competitive range exchanges of information is that clarifications and communication shall not provide an opportunity for proposal revisions. If this happens, all other offerors must also be allowed to revise their proposals. This can become especially complicated during oral presentations since an important goal of oral presentations is to provide an opportunity for dialogue among the parties. Since oral proposals generally include a session of questions and answers, care must be taken that the questions asked and the answers received do not modify the oral proposal presented. The CO must anticipate problems, take care to treat all offerors equally and keep records of all such communications.

Clarifications are used to enable the Contracting Officer to clarify certain aspects of proposals in order to proceed to award without discussions. Communications are used to clarify areas of ambiguity in order to determine whether the affected proposal should be included in the competitive range.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.306 (Exchanges with Offerors after Receipt of Proposals); and FAR 52.215-1 (Instructions to Offerors--Competitive Acquisition)

Issues/Questions

- What should clarifications include?
- What should communications be used to accomplish?
- What are the limitations on pre-competitive range communications?
- How are clarifications and communications appropriately used?

Discussion Topics

What should clarifications include?

1. To learn the relevance of past performance information

2. To respond to adverse past performance information if the offeror has not previously had that opportunity

3. To resolve minor or clerical errors such as

   - Obvious misplacement of decimal point in proposed price or cost information
   - Obviously incorrect prompt payment discount
   - Obvious reversal of price f.o.b. destination and f.o.b. origin or
   - Obvious error in designation of the product unit

4. Resolve issues of offeror responsibility or acceptability of the proposal as submitted.

The key word in applying clarifications is "limited" communication. Clarifications are permitted to give the offeror an opportunity to make clear and obvious key points about the proposal as originally submitted. The offeror may not revise, expand (by adding new information that enhances the proposal), or amplify its proposal. The intent of clarifications is to remove obvious ambiguity, not to permit the offeror to improve its position by drawing inferences from the Government's questions/information gathering exchanges and using those inferences to shade the meaning of the original proposal so that it becomes more attractive and more beneficial to the Government.

Of course, any opportunity for revision or enhancement must be made available to all offerors with proposals deemed acceptable for inclusion in a competitive range.

Communications are exchanges between the Government and offerors after receipt of proposals with the purpose of establishing a competitive range. Communications are authorized only when the offeror is not clearly in or clearly out of the competitive range. In other words, communications are used to determine whether an offer has a reasonable chance for award, i.e., should be included in the competitive range.

Specifically, communications:

- must be held with offerors whose past performance information is the determining factor that would prevent them from being in the competitive range. Adverse past performance must be addressed if the offeror has not had a prior opportunity to respond
- may be held with other offerors whose exclusion from or inclusion in the competitive range is uncertain.

What should communications be used to accomplish?

- Enhance the Government's understanding of the proposal (again, in order to determine whether to include the proposal in the competitive range):
- May address ambiguities of concern in the proposal (perceived deficiencies, weaknesses, errors, obvious omissions or mistakes)
- May address information relating to relevant experience
- Allow reasonable interpretation of the proposal (but not to enhance or revise it)
- Facilitate the Government's evaluation process

As stated previously, neither clarifications nor communications are permitted to be discussions in the pre-competitive range phase. Once a competitive range has been established, communications will be expanded to include discussions and may also include additional clarifications.

What are the limitations on pre-competitive range communications?

- Cure proposal defects or material omissions.

- Materially alter the technical or cost elements or the proposal .
- Otherwise revise the proposal.

Should any of the above circumstances occur, discussions have ensued. The Contracting Officer must then hold the same level of discussions with all offerors. For all practical purposes, the Contracting Officer has then established a competitive range that consists of all offerors. This could lead to holding discussions with offerors that do not have acceptable proposals and most probably would not be included in the competitive range. Accordingly, it is important not to let pre-competitive range communications stray into discussions.

How are clarifications and communications appropriately used?

Clarifications and communications are effective tools when used appropriately and well documented. They allow some limited exchanges with offerors to facilitate the Government's decisions concerning award without discussions or inclusion in the competitive range. Invocation of either clarifications or communications with one offeror does not require exchanges with all offerors - if they are handled correctly and documented carefully.

Care needs to be taken by the Contracting Officer to ensure that the exchanges are within the limits defined in FAR 15.306 (a) and (b) and that no offeror is allowed to revise its proposal as the result of these types of exchanges.

As with all elements of the source selection/negotiation process, clarifications and communications must be carefully documented by the Contracting Officer to insure that there is no appearance that one offeror is favored over another. The nature and extent of the exchanges needs to be set out clearly for the record.

PART VIII COST OR PRICE ANALYSIS

Background

Probable cost to the Government is a mandatory evaluation factor, FAR 15.404-1(d). Thus, this element must be evaluated in all procurements. There are two aspects of this evaluation. First, the contracting officer must ensure that the contract price, or cost and fee, is fair and reasonable. Second, in cost-reimbursement contracts the contracting officer must determine the probable cost of performance and use that cost in the selection process. The contracting officer shall use cost or price analysis to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the work. The contracting officer shall document the cost or price evaluation.

The term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.401 (Definitions); FAR 15.403 (Obtaining Cost or Pricing Data); FAR 15.404-1 (Proposal Analysis Techniques); and FAR 31.201-4 (Determine Allocability)

Issues/Questions

- What is price analysis and when should it be performed?
- What is cost analysis and when should it be performed?

Preferred Approaches

What is price analysis and when should it be performed?

Price Analysis

The contracting officer is required to make a price analysis on every procurement to ensure that the overall price to be included in the contract is fair and reasonable.
In the competitive negotiation process, price analysis is the preferred technique for determining price reasonableness because it permits the contracting officer to make the determination without a detailed analysis of the cost and profit elements of each proposal using cost analysis techniques.

Price analysis is generally based on data obtained from sources other than the prospective contractor. This data is gathered by the Government negotiating team from as many sources as

possible. Generally, to assure that the price being included in the contract is reasonable, a sound price analysis will be based on several different types of data.

The contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. One or more of the following techniques may be used to perform price analysis.

Comparison of proposed prices received in response to the solicitation. In this case competition is relied on to ensure that the costs are fair and reasonable.

Comparison of previously proposed prices and previous Government and commercial contract prices with current proposed prices for the same or similar items, if both the validity and the reasonableness of the previous prices can be established. A determination must be made that ensures that the price that is being compared to the proposed price has been determined to be fair and reasonable, either through presence of adequate price competition or some other manner such as cost or price analysis.

Use of parametric estimating. This analysis tool is used to identify inconsistencies in pricing that require further review. It is a technique used to estimate a particular cost or price by using an established relationship with an independent variable. Steps to follow when using this technique are:

- Define the dependent variable (e.g. cost dollars, hours, and so forth.)
- Select the independent variable to be tested for developing estimates of the dependent variable.
- Collect data concerning the relationship between the dependent and independent variables.
- Explore the relationship between the dependent and independent variables.
- Select the relationship that best predicts the dependent variable.
- Document your findings.

Comparison between competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

Comparison of proposed prices with independent Government cost estimates.

Analysis of pricing information provided by the offeror. Sufficient information must be obtained to determine the reasonableness of the proposed price. When there is insufficient information available from other sources, information must be requested from the contractor that is sufficient to determine a fair and reasonable price. Care must be taken to ensure that you request only the required information and not certified cost and pricing.

What is cost analysis and when should it be performed?

Cost Analysis

Cost analysis is used to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. Cost analysis is: (1) the review and evaluation of the separate cost elements and profit/fee in an offeror's or contractor's proposal (including cost or pricing data or information other than cost or pricing data), and (2) Application of judgment.

A cost analysis must performed anytime that certified cost and pricing data is required as defined in FAR 15.403-(4)(a)(1). A proposal must be analyzed to determine what costs to use in developing your negotiation objective and what price you determine to be fair and reasonable. When using cost analysis to negotiate contracts a price analysis must also performed as it is possible to assure that all of the specific cost elements in a proposal are reasonable and determine that the overall price is not.

In accordance with FAR 15.404-1(d)(2), a cost realism analysis when awarding a cost type contract must be performed. This is a special analysis required primarily to ensure that proposed costs are not unrealistically low. In addition, this analysis provides the foundation for estimating the fee. Furthermore, a cost realism analyses may also be used on competitive fixed-priced incentive contracts or, in exceptional cases, on other competitive fixed-price type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors proposed costs have resulted in quality or service shortfalls (See FAR 15.404-1(d)(3). Additionally, one of the criteria required for the determination of reasonableness and allocability is the determination that the cost is allocable to the contract. The FAR at 31.201-4 states that " a cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship.

Subject to the foregoing a cost is allocable if it (a) Is incurred specifically for the contract; (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown".

Direct Costs: Those costs that are incurred specifically for the contract are identified as direct costs. These costs take the form of material, labor, tooling, subcontract costs and other direct costs. There are two aspects of these costs that must be analyzed, volume and unit price. As an example, the amount of labor hours, rates and skill mix proposed must be analyzed to determine if they are reasonable to perform the contract.

Indirect Costs: Indirect costs are (1) costs that cannot practically be assigned directly to the production or sale of a particular product. In accounting terms such costs are not directly identifiable with a specific cost objective, or (2) direct costs of such minor amount that the costs associated with directly accounting for them exceed the benefit of directly accounting for them.

These costs may be treated as indirect costs provided that the accounting treatment is consistently applied and it produces substantially the same results as treating the cost as a direct cost.

The term indirect cost covers a wide variety of cost categories and the costs involved are not all incurred for the same reasons. A firm may have as few as one or as many as one hundred cost accounts. In general indirect cost accounts fall into two major categories:

Overhead: These are indirect costs incurred primarily to support specific operations. Examples include: material overhead; manufacturing overhead; engineering overhead; field service overhead; and site overhead.

General and Administrative Costs (G&A): These are management, financial, and other expenses related to the general management and administration of the business unit as a whole. These costs may be either incurred by or allocated to the general business unit. Allocation occurs when home office expenses are allocated to a division as a business unit. Examples of G&A costs include; salary and other costs of the executive staff of the corporate or home office; salary and other costs of such staff services as legal, accounting, public relations, and financial offices; selling and marketing expense.

PART X COST/TECH TRADEOFFS UNDER "BEST VALUE" PROCUREMENTS

Background

Under a "Best Value" continuum there is a recognition that the Government always seeks to obtain the best value in negotiated acquisitions using any one, or a combination, of source selection approaches, and that the acquisition should be tailored to the requirement. At one end of this continuum is the low priced technically acceptable strategy, and at the other end is a process by which cost or price, past performance, and technical considerations can be traded off against each other to identify the proposal that provides the Government with the overall best value. Tradeoffs are used when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

A best value analysis lends itself to determining the lowest cost alternative. Best value procurements involve tradeoffs between cost, technical and past performance--For example, if the government's requirement needs are to increase efficiency and thereby reduce the agencies operating cost, the purchase of a high end computer at a high price may a better value than a low end computer at a low price in achieving these requirements.

Establishing the evaluation scheme allowing for a cost/technical tradeoff decision allows for a great deal of discretion and the exercising of judgment by the Source Selecting Official (SSO).

Applicable statutes, procurement regulations, or small business regulations

Federal Acquisition Regulation (FAR) 15.101-1 (Tradeoff Process) and FAR 15.308 (Source Selection Decision)

Issues/Questions

- What are the steps in performing a cost/tech tradeoff?
- What documentation is needed for a tradeoff decision?

Discussion Topics

What are the steps in performing a cost/tech tradeoff?

Steps in Performing a Cost/Tech Tradeoff

The Request For Proposal (RFP) should contain language which establishes the procedures that allow award to other than the lowest price offeror or other than the highest technically rated offeror. After establishing all factors to be evaluated and their relative importance, the RFP must, "state whether all evaluation factors other than cost or price, when combined, are significantly

more important than, approximately equal to, or significantly less important than cost or price." See FAR 15.101-1(b)(2).

An evaluation of all the technical and management criteria should be performed in accordance with the evaluation scheme provided for in the RFP. It is important for the source evaluation team to develop written narratives which describe the strengths and weaknesses of each offer as they are important tools in making and documenting a tradeoff decision.

The price the Government will use in making a tradeoff decision should be defined in the RFP. For a fixed price offer, this will usually be the offered price. For a cost reimbursable contract, this may be calculated as a "most probable cost" under cost realism procedures.

If the Government receives an offer which, when evaluated offers both the lowest evaluated price and the highest rated technical/management offer, no tradeoff analysis is required. If however, that is not the case, the SSO should determine whether the value of technical and management differences between proposals justifies paying the cost differential between the proposals. The ability to differentiate meaningfully among the proposals is very important in making this decision. Often an RFP will state that the closer the technical score is, the more important cost will become.

What documentation is needed for a tradeoff decision?

Documentation of Tradeoff Decision

In accordance with FAR 15.308, source selection decision, "The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSO, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision".

The agency files should contain documentation which demonstrates that its evaluation of the offerors responses to a Request for Proposals was reasonable and in accordance with the criteria outlined in the RFP. In a protest, given the discretion granted to agencies in conducting best value procurements, disappointed offerors generally will have only two legal bases for challenging an agency's cost/technical tradeoff analysis-first, that the agency's underlying cost and technical evaluations that formed the basis for the cost/technical tradeoff are inconsistent with the terms of the solicitation, and second that the cost/technical tradeoff decision was unreasonable. There is no legal requirement that the agency quantify any cost/technical tradeoffs in dollars. An agency should use whatever evaluation approach (e.g., narrative, quantification) that best its needs. For example, agencies can use narrative explanations of its cost/technical tradeoff so long as it is reasonable and consistent with the criteria identified in the RFP. Some examples of rationale for the business judgments and tradeoffs made by the Source Selection Authority include, but are not limited to, the amount of cost differential, project or service criticality, and potential consequences to the DOE in the event of poor performance. The

determining factors should be described in a clear and convincing manner, providing justification as to how they relate to anticipated contract success.

PART XI AWARD WITHOUT DISCUSSIONS

Background

Part 15 of the FAR allows contracts award without discussions with the offerors if the solicitation states that the Government intends to evaluate proposals and make award without discussions. Clarifications are limited exchanges between the Government and offerors, that may occur without jeopardizing the ability to award without discussions. Additional information on the nature of clarifications versus discussions is presented in subsequent sections.

Applicable statues, procurement regulations, or small business regulations

FAR 15.306(a)(3) (Clarifications and Award Without Discussions), FAR 52.215-1 (Instructions to Offerors - Competitive Acquisition), 10 U.S.C 2305(b)(4)(A)(ii) and 41 U.S.C.253b(d)(1)(B)

Issues/Questions

- What is DOE's position regarding award without discussions?
- Why make an award without discussions?
- What are the guidelines regarding award without discussions?

Discussion Topics

What is DOE's position regarding award without discussions?

Contracting Officers should, to the maximum extent practicable, award contracts without discussions. However, consideration should be given to the nature of the requirement and the evaluation criteria to ensure that it would unlikely that discussions would result in any improvement to proposals.

Why make an award without discussions?

Discussions may add weeks to procurement lead time. The time involved in solicitation preparation, evaluation and source selection tax our limited procurement and program personnel resources. The additional time necessary to conduct negotiations imposes yet another burden on personnel that have many other commitments they must meet.

In most cases, discussions will not enhance the Government's ability to obtain best value. Though it is unlikely that discussion will improve an offerors chances of award, discussion will likely increase offerors costs since, they will need to keep the proposal team in tact in order to address discussion questions as well as prepare a revised proposal.

What are the guidelines regarding award without discussions?

Application of the following guidelines will increase the likelihood of evaluating proposals and making awards without discussions.

Evaluation factors must be specific to the needs of the program and the statement of work in the solicitation as opposed to using generic factors that can be applied to many different types of procurements.

Information that offerors are required to submit for evaluation must be closely tied to the evaluation factors. Solicitation instructions for submission of information must be specific and in sufficient detail so that proposals submitted by responsive offerors will contain all of the information necessary for evaluators to clearly assess, in accordance with the evaluation factors, the offeror's strengths, weaknesses and risks in performance of the prospective contract.

The solicitation should state that any proposed deviation from the terms and conditions in the solicitation may make the offer unacceptable for award without discussions, and that the Government may make an award without discussions to another offeror that did not take exception to the terms and conditions of the solicitation.

The solicitation must state that the Government intends to evaluate proposals and make award without discussions. This language is contained in FAR clause 52.215.1 without alternates. If a solicitation contains such a notice and the Government determines it is necessary to conduct discussions, the rationale for doing so must be documented in the contract file.

PART XII CONTENTS OF AN EVALUATION REPORT

Background

The FAR requires that the evaluation of the relative strengths, deficiencies, and significant weaknesses of a proposal be documented in the contract file. The content of this evaluation should be in the form of a report that definitively and comprehensively reflect the Government's evaluation consistent with the evaluation criteria stated in the solicitation. Furthermore, the report should accurately reflect the deliberations of the Source Evaluation Board or the Technical Evaluation Committee (SEB/TEC), and be consistent with the rating plan. Though the content of the report is consistent for a either a SEB or TEC, the report prepared by the SEB should be significantly more detailed.

The evaluation report outline below is a listing of areas that may be appropriate to address in the evaluation report. The selection and use of these areas must be consistent with the nature of the specific proposals being evaluated and the particular situation of the individual acquisition. Some of these areas may be combined as appropriate. Some of these areas will only be applicable depending on the circumstances of the acquisition, e.g., establishing the competitive range, award without discussions. The subject areas may be used, as appropriate, for both the initial evaluation report (competitive range report) and the final evaluation report. The individual areas may be included in the main body of the report or certain areas may be more appropriate for inclusion as an attachment to the report.

Applicable Regulations

FAR 15.305 (Proposal Evaluation) and FAR 15.308 (Source Selection Decision)

Issues/Questions

- What are the guiding principles for developing an evaluation report?
- What does an evaluation address and what does a sample resemble?

Discussion Topics

What are the guiding principles for developing an evaluation report?

Develop concise and comprehensive documentation that reflects the Government's overall evaluation of proposals.

The evaluation report becomes the official record documenting the logic and rationale used to arrive at the evaluation and ratings.
The evaluation report must as a minimum contain the relative strengths, weaknesses, deficiencies, and other considerations of each proposal evaluated against the stated evaluation criteria contained in the solicitation.

Include scores, adjectival ratings, and relative rankings of offerors in the evaluation report.

The level of detail of the evaluation documentation is dependent on the nature, scope, and complexity of the acquisition. Evaluated strengths, weaknesses, and deficiencies must be addressed in sufficient detail to support the rating or ranking given.

The report should reflect the process used to evaluate proposals (consistent with the rating or source selection plan).

The evaluation report should either incorporate, attach, or reference all relevant evaluation information upon which the panel or board used to arrive at its consensus evaluation, e.g., audits reports, technical evaluation reports, etc.

Develop a comparative assessment of proposals that can be used by the source selection authority (SSA) as a basis for making a selection decision.

Provide sufficient information so that the SSA can clearly understand the area being evaluated and how it relates to the stated evaluation criteria.

Provide information that helps the SSA appreciate distinctions among proposals and the relative significance of those distinctions.

Develop documentation which the Government can use as a basis for debriefing unsuccessful offerors.

The report can become either the "script" for the oral debriefing or written excerpts from the report can be provided to individual offerors as a part of a written debriefing.

Consider that the evaluation report may be reviewed by a third party, e.g., GAO or a court, and the report needs to be very definitive as to its conclusions reached and the basis for such conclusions.

What does an evaluation address and what does a sample resemble?

Sample Evaluation Report Outline

Executive Summary

Description of Acquisition and Solicitation

Proposals Received
Summary Evaluation and Ratings

Competitive Range Determination or Award Without Discussions

Special Considerations

Award Recommendation

Description of Acquisition

Mission Need and Scope of Work

Programmatic Approvals

Funding

Development of Acquisition Strategy

Procurement History

Development of Source List

Evaluation Panel/Board Membership

Name, Functional Title, and Organization

Chronology of Major Events

Description of Request for Proposals (RFP)

Qualification Criteria

Technical Evaluation Criteria, Sub-criteria, and Relative Weights

Business Management Evaluation Criteria, Sub-criteria, and Relative Weights

Cost/Price Evaluation Criteria and Relative Weight

Fee Evaluation Criteria and Relative Weight

Basis for Award

Amendments to RFP

Evaluation Process

Rating/Evaluation Plan

Scoring or Rating Methodology

Use of Committees and Advisors

Preproposal Conference and Site Tour

Date and Place

Number of Firms Attending

Elimination of Proposals Before Initial Ratings

Late Proposal

Not Meet Qualification Criteria

Totally Unacceptable Proposal

Proposal Evaluation

Technical Proposal Evaluation

Strengths and Weaknesses

Scoring or Rating - Initial and final

Business Management Proposal Evaluation

Strengths and Weaknesses

Scoring or Rating - Initial and final

Past Performance Evaluation

Means of Obtaining Information

Results of Past Performance Information

Cost/Price Evaluation

Audit Results

Comparison to Independent Government Cost Estimate
Scoring or Rating - Initial and final

Fee Evaluation

Weighted Guidelines Analysis

Comparison with DOE Fee Curves

Assumption of Risk

Other Considerations

Organizational Conflicts of Interest

Foreign Ownership, Control, or Influence

Intellectual Property

Offer and Other Documents

Financial Capability

Responsibility of Prospective Contractors

Special Areas of Concern

Competitive Range Recommendation

Included in Competitive Range Report

Competitive Range Determination

Included in Final Evaluation Report

Discussions with Offerors in the Competitive Range

Principal Areas Covered During Written or Oral Discussions

Summary of Differences Between Initial and Final Proposals

Award Recommendation

If Requested by the SSA

Signature Page for Evaluators

PART XIII PROPERLY DOCUMENTED RECORD

Background

Proper documentation of the entire Source Selection Process is a critical aspect of source selection that can seriously affect the success of the procurement.

The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment. The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

The source selection process requires proper documentation. Proper documentation can greatly assist the SSA in understanding the rationale employed by the evaluation team and give confidence to the SSA that the findings of the Source Evaluation Board (SEB) were consistent with the stated evaluation criteria and rating plan and are reliable. The documentation can also demonstrate to any third-party forum that the evaluation is performed in a fair and honest manner and in a manner consistent with the solicitation. Also, a properly documented record will greatly assist those called on to justify the selection decision.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.308 (Source Selection Decision); FAR 15.102 (Oral Presentations); and 15.305 (Proposal Evaluation)

Issues/Questions

- What documentation should be used to support the selection decision?
- What evidence should be provided regarding proposal evaluations?
- How are oral presentations documented?
- What documentation is necessary regarding electronic communications?

Discussion Topics

What documentation should be used to support the selection decision?

Documentation for the Selection Decision

FAR 15.308 requires that the "documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the [Source Selection Authority], including benefits associated with additional costs.

In ITT Federal Services International Corp., Comp. Gen. Dec. B-283307.2, Nov 3, 1999, the Comptroller General has interpreted this requirement as follows:

> ITT contends that the selection decision document here is inadequate, on its face, to support the cost/technical tradeoff it purports to make. Where a cost/technical tradeoff is made, the selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, "including benefits associated with additional costs." Federal Acquisition Regulation (FAR) sect. 15.308; Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD para. 61 at 5. ...The selection decision document here fails to meet the standard set forth in the FAR for explaining the rationale for tradeoffs that lead to incurring of additional costs. As quoted above, the document first concludes that overall the proposals were technically equal, then that CSA's costs were reasonable, and that the quality of CSA's proposal outweighs its higher cost. Not only are these findings inconsistent, but there is no explanation of the benefits associated with the allegedly higher costs of the CSA proposal.

In the above case, the protest was sustained and the decision recommends, in part, that the agency perform a new best value determination.

The Source Evaluation Board (SEB) must bear in mind that while the SSA has a great deal of discretion in making the source selection decision, he/she must first have a full understanding of the evaluations. For this reason the SSA must be presented with sufficient information on each of the competing offerors and their proposals in order to make a comparative analysis and arrive at a rational, fully supportable selection decision. Narrative statements serve as the most important part of the documentation supporting the decision. The selection decision must show the relative differences among proposals and their strengths, weaknesses and risks in terms of the evaluation factors. Each of these is an essential part of providing adequate support for the ultimate selection decision. Narrative statements serve to communicate specific information concerning relative advantages or disadvantages of proposals to the SSA that the rating scheme alone (whether adjectival or numerical) obviously cannot.

Such documentation need not be lengthy, as long as it effectively conveys the basis for the evaluator's assessment.
Proposals receiving the same rating can still have obvious distinctions, requiring an assessment of the offeror's ability to accomplish the task; these distinctions could have a direct impact on the source selection decision.

Preparation of such statements provides an excellent discipline for the evaluators because it forces them to justify their ratings and be consistent with the stated evaluation criteria.

With the high costs for the preparation of a proposal, offerors want to be assured that the evaluation was fair and impartial. Protests often arise when an offeror feels that this was not the case.

The Comptroller General has ruled that an award will not be overturned unless there is no rational basis for the award decision or unless the RFP criteria are not adhered to. See 51 Com. Gen. 272 (1971). Procuring agencies have an obligation to adequately document their source selection decisions so that a reviewing body can determine whether those actions were in fact proper. See KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD

What evidence should be provided regarding proposal evaluations?

Proposal Evaluation

Evaluation decisions must be based on tangible evidence to support an agency's decision. In Amtec Corp., Comp. Gen Dec. B-240647, 91-2 CPD, the Comptroller overturned a marginal technical evaluation because the agency record contained no evidence supporting such a grading. Similarly, in Compuware Corp. GSBCA 9533-P, 88-3 BCA, the board rejected a cost realism evaluation in which the contracting officer refused to accept auditor conclusions. The board commented that the contracting officer's decision was not supported by any evidence. Therefore, it is clear that proposal evaluations conducted in accordance with FAR 15.305 must be appropriately documented in order to withstand scrutiny.

How are oral presentations documented?

Oral Presentations and Documentation

There are numerous instances where the source selection decision was overturned because it lacked a reasoned analysis (e.g., there was no documentation of the relative strengths and weakness of the proposals or not being able to furnish sufficient supporting documentation).

Complicating even further the matter of sufficient documentation is the use of oral presentations. FAR 15.102(e) requires that the CO keep a record of oral presentations, but allows wide discretion as to type and degree of documentation required. This places a greater burden on the SEB to be able to capture the data provided by the proposer. To document the oral presentation,

To document the oral presentation, the SEB can either rely on all offerors presenting a sufficient amount of detailed graphics, the dictation skills of evaluators, or by preserving a record of the oral presentation proceedings through the use of video or audio recording. Remember, where an agency fails to create or retain such documentation, it bears the risk that the GAO will not conclude that the agency had a reasonable basis for its procurement decisions. See American President Lines, B-236834.2, July 20, 1990.

What documentation is necessary regarding electronic communications?

Electronic Record Documentation

Given the need for proper documentation, the advent of the electronic age requires that additional measures be taken to ensure adequacy of the record. Given the requirement for proper documentation, the contract file must still contain the final record. Some offices have been using electronic media for storage of these records. With the rapid changes in information technology, will that media be readable in five or ten years? All critical documents (Source Selection Statements, SEB Reports, approvals, protest decisions, etc.) should still be kept in the official contract file. E-mail correspondence and electronic approvals must still be printed and kept in the official contract file. The electronic age has also revolutionized the way we do business and raises concerns regarding the safeguarding and protecting of procurement sensitive data. When transmitting procurement sensitive data electronically, adequate precautions must be taken to ensure data does not end up in the wrong hands. In those rare cases when sensitive data is transmitted, the use of password is essential.

PART XV FOREIGN OWNERSHIP, CONTROL OR INFLUENCE (FOCI)

Background

Before awarding a contract the performance of which requires access to classified information or a significant quantity of special nuclear material, the Department of Energy (DOE) must insure that the contractor has a Facility Clearance. In deciding whether or not to grant such a Facility Clearance, DOE must determine whether or not the contractor is subject to Foreign Ownership, Control or Influence that could pose an undue risk to the common defense and security.

In addition to these regulatory FOCI situations, the DOE is also prohibited by statute from awarding a DOE contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. Such an award can be made only after obtaining a Secretarial waiver in accordance with the statutory provisions.

Before awarding a contract the performance of which requires access to classified information or a significant quantity of special nuclear material, DOE must determine whether or not the contractor possesses a "Facility Clearance." A "Facility Clearance" is an administrative determination that a facility is eligible for access to classified information or special nuclear material. In deciding whether or not to grant a Facility Clearance, DOE must determine whether the contractor is subject to Foreign Ownership, Control or Influence.

Foreign ownership, control, or influence means the situation where the degree of ownership, control, or influence over an offeror by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may possibly result.

In order to make this determination, DOE obtains FOCI information from offerors using the solicitation provision at DEAR 952.204-73, Standard Form 328, Certificate Pertaining to Foreign Interests, (and various other documents relating to the company's finances; owners, officers and directors, etc.). Based on the information disclosed by the offeror, and after consulting with the DOE Office of Safeguards and Security, the contracting officer must determine that award of a contract to an offeror will not pose an undue risk to the common defense and security.

In those cases where FOCI is present, and the DOE determines that an undue risk to the common defense and security may exist, the offeror or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate the foreign influences by isolation of the foreign interest.

The types of plans that a contractor can propose are: (1) measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; (2) modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; (3) assignment of

specific security duties and responsibilities to board members or special executive level committees; or (4) any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis.

If the offeror and the DOE cannot negotiate a plan of action that isolates the offeror from FOCI satisfactory to the DOE, then the offeror will not receive a Facility Clearance and shall not be considered for contract award.

National Security Program Contracts

In addition to the general FOCI situations described above, which are governed by regulatory provisions (i.e., DEAR), there is also a special FOCI situation that is governed by statute.

Specifically, 10 U.S.C. § 2536, prohibits the award of a Department of Energy contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. (Note that the entity must be controlled by a foreign government for this statute to apply.)

"Entity controlled by a foreign government" means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. "Effectively owned or controlled" means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law. "Proscribed categories of information" include: (1) Top Secret information; (2) Communications Security (COMSEC) information (3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended; (4) Special Access Program (SAP) information; or, (5) Sensitive Compartmented Information (SCI).

The Secretary of Energy may waive this prohibition, pursuant to 10 U.S.C. 2536(b)(1)(A), if the Secretary determines that waiver is essential to the national security interests of the United States.

The Secretary may also waive this prohibition in the case of a contract awarded for environmental restoration, remediation, or waste management at a Department of Energy facility, if the Secretary determines that the waiver will advance the environmental restoration, remediation, or waste management objectives of the Department and will not harm the national security interests of the United States, and the entity to which the contract is awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under section 144c of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)) (10 U.S.C. 2536(b)(1)(B).

Applicable statutes, procurement regulations, or small business regulations

10 U.S.C. § 2536; Executive Order 12829, Jan 6, 1993, National Industrial Security (NISP); National Industrial Security Program Manual, DOD 5220.22-M; Department of Energy Acquisition Regulations (DEAR) 904.70 (Foreign Ownership, Control or Influence over Contractors); DEAR 952.204-2, (Security Clause); DEAR 952.204-73 (Facility Clearance); DEAR 952.204-74 (Foreign Ownership, Control or Influence over Contractors; and Standard Form 328, (Certificate Pertaining to Foreign Interests;

Issues/Questions

What procedures are followed when a contractor requires access to classified information or a significant quantity of special nuclear material?

Discussion Topics

What procedures are followed when a contractor requires access to classified information or a significant quantity of special nuclear material?

The contracting officer should receive a Procurement Request-Authorization (DOE F 4200.33 or equivalent) and Contract Security Classification Specification (CSCS) (DOE F 5634.2) from the procurement request originator.

Upon receipt of these forms, the contracting officer must include the appropriate terms and conditions in the solicitation [DEAR 952.204-73, Facility Clearance], and should state in the solicitation that if an offeror is included in the competitive range, they may be required to complete the FOCI Certificate Pertaining to Foreign Interests, SF 328, which contains questions concerning the degree and extent of foreign ownership and control over the offeror.

Once the contracting officer identifies a competitive range, the Defense Security Service/ Central Verification Activity should be reviewed and the local safeguards and security office should be contacted to determine if the possible offerors have an approved facility clearance.

If an offeror possesses a facility clearance, the contracting officer will send the CSCS (DOE F5634.2) to the local DOE safeguards and security office for approval. Once the local DOE safeguards and security office signs and returns the CSCS to the contracting officer, an award of the contract can be made.

If an offeror in the competitive range does not possess a facility clearance, the contracting officer shall forward a FOCI package to the offeror (and any tier parents, if applicable). This package includes the Certificate Pertaining to Foreign Interests (SF 328).

After obtaining the Certificate Pertaining to Foreign Interests (SF 328) and accompanying documents from an offeror, the contracting officer must review the submission to ensure that the

SF 328 as well as all supporting documentation are attached prior to submitting the package to safeguards and security.

Upon receipt of the complete FOCI package, the contracting officer forwards the FOCI package to safeguards and security for processing.

Upon completion of DOE's review of the offeror's foreign involvement, the local safeguards and security office should provide the contracting officer with written notification of the results of the FOCI review. If the FOCI determination is favorable and the offeror is granted a DOE-approved facility clearance, the local DOE safeguards and security office will sign and return the DOE F 5634.2 (CSCS) to the contracting officer. (If the FOCI determination is unfavorable, the safeguards and security office will attempt to negotiate a plan to negate or mitigate FOCI. If a satisfactory plan cannot be negotiated then the offeror will not receive a Facility Clearance and the offeror shall not be considered for contract award.)

Contract award can be made upon: (1) receipt of notification of a favorable FOCI determination from the local safeguards and security office, (2) receipt of the signed DOE F 5634.2 (CSCS) from the local DOE safeguards and security office, and (3) assurance from the contracting officer that the appropriate security clauses are included in the contract.

It should be noted that if, after contract award, a contractor's FOCI situation changes so that it becomes subject to FOCI for the first time or the extent and nature of FOCI changes, DOE must assess whether those changes will pose an undue risk to the common defense and security.

In making this determination, the Department considers proposals made by the contractor to avoid or mitigate foreign influences. If these foreign influences cannot be avoided or mitigated, the contracting officer may terminate the contract.

The contracting officer may terminate the contract for default if the contractor fails to meet obligations imposed by the FOCI clause (e.g., provide the information required by the clause, or make the clause applicable to subcontractors), or if, in the contracting officer's judgment, the contractor creates a FOCI situation in order to avoid performance or a termination for default. The contracting officer may terminate the contract for convenience if the contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem. In any event, without an adequate mitigation plan, the contractor's Facility Clearance will be terminated and they can no longer perform work requiring access to classified information or a significant quantity of nuclear material.

PART XVI DEBRIEFINGS

Background

In FAR Part 15 procurements, contracting officers are required to offer debriefings to all unsuccessful offerors. The debriefing is the method by which the offerors obtain information to decide whether to protest and is a possible venue for heading off a protest. Debriefings need to be informative and professionally presented. They should never degenerate into debates over the propriety of the source selection process or the accuracy of the government's evaluation. The general approach to a debriefing should be to provide all required information, satisfy the debriefed offeror's reasonable questions about the procurement, and provide as much information as possible without prejudicing the procurement in the event it must be reopened for any reason. The timing of a debriefing affects both the timeframe for filing a GAO protest and also the time within which a protest will require the protested contract performance to be suspended. Because most of DOE's Part 15 procurements are for services, this guidance is written with services procurements in mind.

When a contract is awarded on a basis other than price alone, unsuccessful offerors, upon their written request, shall be debriefed as soon as possible and furnished the basis for the selection decision and contract award.

However, the debriefing requirements only apply to procurements carried out under FAR Part 15 requirements. There is no requirement for a debriefing for placement of an order under a schedule contract pursuant to FAR Subpart 8.4, for placement of a contract using simplified acquisition procedures under FAR Part 13 (including the test program for certain commercial items in FAR Subpart 13.5), for placement of a task or delivery order under an indefinite delivery contract pursuant to FAR Subpart 16.5, for an contract issued pursuant to the sealed bid procedures of FAR Part 14, or at the time an option is exercised.

The debriefing should provide the unsuccessful offeror with sufficient information to enable him to understand why his proposal was not selected and to enable him to present a better proposal in a future competition. In other words, the information should be of "value" to the unsuccessful offeror.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.503 (Notifications to Unsuccessful Offerors); FAR 15.505 (Preaward Debriefing of Offerors); FAR 15.506 (Postaward Debriefing of Offerors); FAR 15.507 (Debriefing Available When Procurement Reopened); FAR 33.104(c) (Interrelationship of Debriefing and Stay/Suspension of Contract); 4 C.F.R. § 21.2(a)(2); 31 U.S.C. § 3553(d)(4)(B) (Requiring Suspension of Protested Contract Performance if Protest is Filed Within Five Days of Required and Requested Debriefing); and 41 U.S.C. § 253b(e), (f), (g) (Preaward and Postaward Debriefing Requirements).

Issues/Questions

- What should be the contracting officer's strategy?
- When should debriefings be held and how should they be scheduled?
- What is the effect of the debriefing schedule on potential protests?
- What are the special considerations for preaward debriefings?
- What the clocks start when debriefings are conducted?
- What information is to be provided and when should it be provided?
- What information may not be provided?
- Who should attend debriefings?
- What are "Open Book" debriefings?
- What common questions or problems are associated with debriefings?

Discussion Topics

What should be the contracting officer's strategy?

The Contracting Officer's strategy

The contracting officer should plan for the debriefing well before award is made. Based on the particular circumstances of the procurement, the contracting officer should devise a debriefing strategy to provide as much information as the offeror might reasonably request and should prepare for likely offeror questions. Some contracting officers have found it useful to request the offerors to provide any questions in writing a day or so before the debriefing. This gives the agency time to review the questions and provide a more cogent answer to the questions. Even if the offeror provides questions in advance, it should not and cannot be prohibited from posing additional questions at the debriefing. The offeror should come away from the debriefing with an understanding of why its proposal was not selected. Oftentimes there are one or two elements of the offeror's strategy that negatively affected the evaluation and that can be summarized for the offeror's benefit. For example, an offeror might have decided that it understood the government's requirements better than the government and pursued a strategy of offering the government what the offeror believed was best notwithstanding the requirements in the solicitation.

In this instance, it can be helpful to be prepared to review the portion of the solicitation that stated these requirements. Where discussions were held, it can be very helpful to point out to an offeror where the issue that led to its lack of success was raised in discussions.

An understanding of the perspective of a disappointed offeror is sometimes useful in conducting a debriefing. Preparation and submission of a proposal may be a time consuming, costly, and a sometimes emotional exercise for the offeror's proposal team. Nonacceptance of a proposal under such circumstances can produce a degree of emotional and professional trauma in the team members. In response disappointed offerors may react with resentment ("How could I not win?!"), suspicion ("This process must be rigged!"), and anger ("The agency has it in for me!"). As a consequence, many debriefings are not viewed by disappointed offerors as an opportunity

to learn how to improve the next time, but rather as an opportunity to vent, demonstrate the poor judgment of the selecting official and evaluators, and identify a basis to overturn the decision through a, bid protest. Although government personnel frequently respond to this reaction by offering as little information as possible, this is not a desirable strategy for the debriefing. Indeed it is frequently more productive to use the debriefing to discharge the emotion, demonstrate the procedural credibility of the decision, and convince the disappointed offeror that a basis for protest does not exist. Strategies for doing so should be fully considered in preparing for the debriefing.

When should debriefings be held and how should they be scheduled?

The general principle applicable to debriefings is that an unsuccessful offeror should be offered a debriefing soon after DOE determines that the offeror is unsuccessful. The FAR distinguishes between preaward and postaward debriefings, depending on when the debriefing is held. The FAR establishes a clear preference that an offeror excluded from the competitive range be provided with a preaward debriefing, and we address the implications of this choice in the next section. A postaward debriefing should be held as soon as possible after the award.

The optimum schedule has the contracting officer faxing a letter to the unsuccessful offeror on day 0, informing the unsuccessful offeror of its right to request a debriefing within three days and, in the same letter, informing the unsuccessful offerors of the offered date for their debriefings should they choose to request a debriefing. The offered date should optimally be a date between four and eight days after the unsuccessful offeror letter is faxed. An unsuccessful offeror does not have the right to any particular schedule or location for the debriefing. For postaward debriefings, the letter offering the debriefing optimally should be sent to the offeror on the day of award. For preaward debriefings, the letter should be sent as soon as DOE makes a determination that the offeror is no longer under consideration for award.

What is the effect of the debriefing schedule on potential protests?

Effect of the debriefing schedule on potential protests

In a FAR Part 15 procurement, a company cannot pursue a GAO protest on an issue other than a solicitation issue before its debriefing, if that debriefing was "requested and required." GAO will dismiss a protest filed before the debriefing as premature. Therefore, it is generally best to schedule the debriefing very soon after the offeror is no longer under consideration for award.

What are the special considerations for preaward debriefings?

Special considerations for preaward debriefings

If the offeror was excluded from the competitive range, the debriefing generally should be held as a preaward debriefing soon after the offeror is notified of its exclusion from the competitive range. The debriefing may be held as a postaward debriefing based on the CO's decision or the offeror's request, but these choices have different consequences.

If the contracting officer delays the preaward debriefing

The contracting officer has the discretion to delay the debriefing until after award, based on "compelling reasons" that holding a preaward debriefing is not in the best interests of the government. The contracting officer is required to document the rationale for delaying the debriefing. If the government decides to delay the debriefing until after award, the unsuccessful offeror cannot protest until after the debriefing and, if there is a successful protest, the procurement actions after the offeror was excluded may be nullified.

If the offeror requests that the preaward debriefing be delayed

The offeror can request that the government delay a preaward debriefing until after award. In the event that the debriefing is delayed due to the offeror's request, the contracting officer should indicate in writing that debriefing is being postponed at the offeror's request. In the event the offeror requests the government to delay the debriefing from preaward to postaward, GAO generally will not find a protest based on the debriefing to be timely.

What clocks start when debriefings are conducted?

Clocks

Once a "required and requested" debriefing is held, two clocks start to run on the offeror's time for filing a protest. The first clock determines whether GAO will consider the protest. Generally, for a protest to be timely filed at GAO, it must be filed within ten days after the debriefing. If the protester waits until more than ten days after it learned of the basis for its protest and that date is more than ten calendar days after the debriefing, GAO will dismiss the protest as untimely. Please note that protesters can also pursue protests at the Court of Federal Claims, which does not have a ten calendar day time limit for filing protests. The second clock determines whether the agency will have to stay the award of the protested contract or suspend performance on the protested contract. If a protest is filed at GAO and GAO notifies DOE of the protest within either five calendar days after debriefing or ten calendar days after contract award, whichever is later, DOE must suspend performance of the protested contract. If GAO notifies DOE of a protest filed before award is made, DOE must stay the award of the protested contract. In both cases, the stay is in place until GAO decides the protest or until DOE overrides the stay.

What information is to be provided and when should it be provided?

FAR 15.506(d) and 15.505(e) set forth detailed lists of information to be provided and the applicable list provides a fairly good agenda for the debriefing.

Information in advance

Much of this information can be provided in advance of the actual debriefing, either in the unsuccessful offeror letter or in a later written communication prior to the debriefing. It is a

better practice to provide the debriefed offeror with a copy of its own evaluated strengths and weaknesses before the debriefing. This practice saves time for everyone, and prevents disagreement over what was said, gives the offeror a chance to get past any emotional reaction to the strengths and weaknesses in the privacy of its offices, and usually improves the cogency of the questions asked at the debriefing.

Dialogue

Because the debriefing rules require the government to provide reasonable responses to relevant questions about whether source selection procedures were followed, it is virtually impossible to provide a complete debriefing to an offeror without an opportunity for dialogue, either in person or by telephone.

Interpretation of "overall ranking" and "technical rating"

When FAR 15.506(d)(3) refers to providing the "overall ranking of all offerors," it means the ranking when there was a combined ranking including cost/price and technical factors and does not require the CO to provide just the technical rankings or just the cost/price rankings. DOE generally has not performed such rankings in its source selection process, nor are such rankings required. When FAR 15.506(d)(2) refers to providing the "technical rating" of the awardee and of the debriefed offeror, it does not mean that every factor and sub-factor score must be revealed. If a competitive range was drawn and discussions were held, there is no requirement to provide the offeror with its or the awardees pre-discussions scores. There is no requirement to provide the offeror with the awardee's sub-factor scores. Providing more than the required information concerning the awardee's scores can be regrettable if the procurement must be reopened for corrective action, a change in requirements, or some other reason. Moreover, in some instances, providing specific scoring information could amount to a violation of the prohibition against providing point-by-point comparisons between the awardee's and the debriefed offeror's proposals.

Whose ratings should be provided?

In the unlikely and hopefully rare event that the source selection official disagrees with aspects of the technical evaluation committee's report, either with respect to scores or to the strengths and weaknesses, the information that is required to be provided to the offeror is the evaluation on which the selection was based, that is, the source selection official's evaluation.

What information may not be provided?

FAR 15.505(f) and 15.506(e) provide detailed lists of information that must not be provided in the debriefing. The usual item that comes up is the prohibition on providing "point-by-point comparisons of the debriefed offeror's proposal with those of other offerors." For this reason, it is advisable that the government not have the other offerors' proposals or the evaluation of the other offerors in the debriefing room. Some agencies take the position that revealing detailed score

information about the awardee may constitute providing point-by-point comparisons. An exception to these limitations exists in the form of an "open book debriefing" described below.

Who should attend debriefings?

The FAR provides that the contracting officer is in charge of the debriefing and anticipates that he or she will get support from technical and legal personnel as needed. Neither the Source Selection Authority (SSA), nor the SEB Chair, or the individual SEB team members are required to attend. Normally it may be sufficient to have the contracting officer, a technical evaluator (to ensure that communication conveying the technical evaluation are accurate), and counsel to the procurement attend the debriefing. It is a good practice to have counsel present, especially if the offeror indicates it is bringing legal counsel to the debriefing, there are indications that a protest may be filed, or the procurement is significant based on dollar size, complexity, or other sensitivity. On those occasions where the contracting officer does not have the knowledge or expertise to explain the cost evaluation, it is advisable to bring someone who has that knowledge and expertise. Notwithstanding the foregoing, it should be noted that the presence of other critical officials in the source selection process such as the SSA and the SEB chair may aid in the presentation to the disappointed offeror and add to the credibility of the source selection.

These officials are particularly useful in explaining the basis for the selection decision and the results of the SEB's evaluation of the offeror's proposal. As the number and type of participants in the debriefing grows, however, the contracting officer must take particular care in preparing for and controlling the communication. Coordination with counsel is critical.

What are "Open Book" debriefings?

"Open Book" debriefings

In some very large, complex procurements, generally M&O procurements, DOE has used a technique called open book debriefings, in which DOE and all the offerors enter into a confidentiality agreement that permits DOE to reveal more information in the debriefing than is normally permitted. This technique has been extremely successful, but it is properly reserved for very large, complex procurements that do not involve repetitive requirements. If used improperly, this technique may conflict with the FAR and/or result in potential violations of the Trade Secrets Act (which subject the government personnel to personal criminal penalties as well as significant potential fines). Therefore, this technique should only be used after consultation with DOE counsel who can draft the appropriate agreements and ensure that all necessary consents are obtained.

What common questions or problems are associated with debriefings?

Common questions and problems

Do not debate the evaluation or the selection

The job of the debriefer is to provide information to the offeror about the procurement and not to reconsider the evaluation or debate it. This means that it is more important to listen to complaints about the evaluation results than to respond to them. It is especially important not to speculate about what would have happened if the offeror had proposed something different or a lower price.

Be sure the debriefing has a definite conclusion

The debriefing should have a definite conclusion so that the time when the offeror's two protest clocks begin to run is clear. Once DOE has provided the required information and the offeror has finished asking its "relevant questions about whether the source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed," the contracting officer should indicate that the debriefing is concluded. This means that it is strongly ill-advised to tell a protester that "we'll get back to you" on a topic. If necessary, take a short break during the debriefing and seek whatever advice or information or document is needed. A well-prepared debriefing team almost never needs an additional day to provide required information or respond to relevant questions.

Recording the debriefing

The government is not required to record the debriefing nor to permit the debriefed offeror to make an audio or video recording. DOE contracting officers have generally denied offerors' requests to record a debriefing. If the contracting officer considers agreeing to a request to record the debriefing, he or she should insist that two identical recordings be made and one left with the agency. This will avoid disputes over whether the recording was altered in some way. The contracting officer is required to prepare a summary of the debriefing and include it in the contract file.

Even untimely debriefing requests should be accommodated

If an offeror does not request a debriefing in a timely fashion, but later requests a debriefing, the better practice is to provide the debriefing but to be clear that it is an accommodation and not a "requested and required" debriefing. The contracting officer should, however, insist that the request be in writing and should include documentation in the file that the debriefing was not timely requested.

The awardee is also entitled to a debriefing

Although debriefings are commonly provided to unsuccessful offerors, FAR 15.506(a)(1) provides that offerors can request debriefings and does not exclude the awardee.

Debriefings go forward even if there is a protest

Sometimes an offeror will protest or state its intent to protest before the debriefing. This does not affect the offeror's right to a debriefing. In these instances, it is obviously prudent to have counsel present and involved in the debriefing planning.

Take a break

It is generally advisable to take breaks during the debriefing if the government attendees need to caucus concerning a question. Such discussion should take place in a different room and out of the hearing of the offeror. In addition, a break can be useful to permit the offeror to consolidate its questions and recover its composure.

Finally, do not obsess

While the debriefers should make every effort to be accurate during the debriefing, keep in mind that the statements made in a debriefing will virtually never form the basis of a GAO decision to sustain a protest. There are legions of denied protests where the information provided at the debriefing was inaccurate in some way or where the protester claims it was told one thing at the debriefing while the evaluation record shows the opposite. Moreover, GAO will not address the quality of the debriefing in a protest decision.

Weighted Guidelines

Guiding Principles:

It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to stimulate efficient contract performance.

Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance.

[References: FAR 15.4, DEAR 915.4]

Overview

This section provides guidance for applying the Department's structured approach in determining profit/fee.

Background

The FAR requires consideration of certain factors (described in 15.404-4 as "profit-analysis factors" or "common factors") in developing a structured profit/fee approach. DOE's structured approach for determining profit/fee objectives is used in those acquisitions when the contracting officer is required to perform a cost analysis. This system provides a comprehensive approach for determining a fair profit or fee. It ensures consistent consideration of the relative value of the factors and provides a basis for documenting the contracting officer's fee/profit objective.

The attached Weighted Guidelines Application establishes the factors to be considered, the normal ranges for the values of those factors, and the analysis required in determining the appropriate value for each factor.

Weighted Guidelines Application

A. *General.* This section discusses the DEAR 915.404-4-70-2 profit objective factors and provides guidance on how to evaluate them.

The factors or subfactors relating to Contractor Effort, as shown at DEAR 915.404-4-70-2, Item I, are: similar to cost elements in most pricing proposals; broad and basic; and sufficient to evaluate all items of cost generally found in proposals.

In making a judgment of the value of each factor, the contracting officer recognizes the definition, description, and purpose of the factors and evaluates them as set forth herein.

B. ***Contractor effort.*** This factor measures how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirements efficiently. This factor, which is apart from the contractor's basic responsibility for contract performance, takes into account what resources are necessary and what the contractor must do. This factor recognizes that, within a given performance output or sales dollar figure, necessary efforts of individual contractors can vary widely in both value and quantity, and that the profit objective reflects the extent and nature of the contractor's contribution to total performance. Evaluating this factor requires analyzing the cost content of the proposed contract as discussed below. Not to be included as part of the cost base (for purposes of computing profit) is any amount calculated for the cost of money for facilities capital computed in accordance with Cost Accounting Standard 414.

The following comprise the base elements for measuring contractor effort:

1. *Material acquisition.* Analysis of material acquisition cost items includes an evaluation of the managerial and technical effort necessary to obtain the required purchased parts, subcontracted items or services, and other materials, including consideration of the number of orders and supplies and whether established sources are available or new sources must be developed. In reviewing this element the contracting officer:

(a) Determines whether the contractor will obtain the material and tooling by routine orders from readily available suppliers (particularly orders of substantial value in relation to the total contract cost) or by subcontracts, and considers the extent to which the contractor must develop complex specifications involving creative design or close tolerance manufacturing requirements.

(b) Considers the managerial and technical efforts necessary for the prime contractor to administer subcontracts and select subcontractors, including efforts to break out sole source subcontractors through the introduction of competition. These determinations and considerations are made for purchases of raw materials or basic commodities, purchases of processed material, including all types of components of standard or near standard characteristics, and purchases of pieces, assemblies, subassemblies, special tooling, and other products special to the end item. The contracting officer recognizes that the contribution of the prime contractor to his purchasing program may be substantial. This may apply in the management of subcontracting programs involving many sources, new complex components and instrumentation, incomplete specifications, and close surveillance by the prime contractor.

(c) Evaluates recognized costs proposed as direct material costs, or proposed as material overhead costs, such as scrap charges, as material costs.

(d) Evaluates intra-company transfers which are accepted at price, in accordance with FAR 31.205-26(e), as material and evaluates other intra-company transfers by individual components of cost, i.e., material, labor, and overhead.

2. *Labor (technical and managerial, manufacturing, and support services).* Analyses of labor cost include evaluation of the comparative quality and level of the talents, skills, and experience of personnel employed for contract performance. In reviewing this element:

(a) Technical and managerial labor are evaluated by giving consideration to the amount of notable scientific, unusual or scarce engineering, and top management talent needed in contrast to journeyman engineering effort, professional staff, or closely related supporting personnel. The diversity, or lack thereof, of scientific, engineering and managerial specialties required for contract performance and the corresponding need for related supervision and coordination are evaluated. By way of definition, project management/ administration labor falling within this category includes senior project management personnel who oversee and direct the work, and usually consists of the project managers, project engineers, and comparable management personnel who form the project management team that plans, directs, and takes responsibility for the execution of the program or project assignment. The cost element for project management/administration labor usually applies to architect-engineer (A-E) contracts. The weight assigned takes into consideration the dollar amount of the project supervised.

(b) Manufacturing labor is evaluated by giving consideration to the variety and range of required manufacturing labor skills (i.e., department heads, supervisors, skilled and unskilled labor) and the contractor's manpower resources for meeting these requirements.

(c) Support services labor is evaluated in a manner similar to the above by assigning higher weights to professional-type skills and lower weights to semi-professional or other type skills required. Support services labor represents those classifications of direct labor whose efforts are not identifiable with the above descriptions of labor and may include labor classifications assigned exclusively for contract performance, such as on-site A-E firm employees performing project activities related to accounting, contract administration (including reporting), cost engineering, secretarial, clerical and the like. Direct charges of this nature are appropriately classified as direct rather than indirect, and like activities are not be allocated indirectly either to this contract or to the contractor's other work assignments. A weighting in excess of 9 percent for support service contract labor normally will be made only when the quality, skill, and experience of the support labor warrants a weighting corresponding to category (a) above.

3. *General management (overhead and general and administrative (G&A) but exclusive of IR&D costs).*

(a) Analyzing overhead and G&A expenses includes evaluating their makeup and contribution to contract performance and a determination of the amount of labor within the expense pools and how it would be treated if it were considered as direct labor. The allocable labor elements are given the same profit consideration that they would receive if they were treated as direct labor. The other elements of these expense pools are evaluated to determine whether they are routine expenses (such as utilities, supplies, and maintenance) and hence given lesser profit consideration, or whether they contribute significantly to contract performance. Depreciation on facilities capital is excluded since the profit reward for facilities capital investment is separately weighted as discussed in paragraph D. below. The composite of the individual determinations in relation to the elements of the expense pools is the profit consideration given the pools as a whole. The procedure here differs from that used in the direct labor. The upper and lower limits assignable to the direct labor are absolute. For overhead expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(b) The contractor whose accounting system only reflects one overhead rate on all direct labor need not make changes to reflect more detail data (if CAS exempt) to correspond with the above classifications. The contracting officer can break out the applicable sections of the composite rate which can be classified as technical, managerial, or engineering overhead, manufacturing overhead, and general and administrative expenses and follow the appropriate evaluation technique.

(c) Management problems surface in various degrees and the management expertise exercised to solve them is considered as an element of profit. For example, a new program for an item that is on the cutting edge of the state of the art will cause more problems and require more managerial time and abilities of a higher order than a follow-on contract. If new contracts create more problems and require a higher profit consideration, follow-ons are adjusted downward as many of the problems may have been solved. An evaluation is made of the underlying managerial effort involved on a case-by-case basis.

(d) Where an analysis of the profit weight to be assigned to the overhead pool has been made, the weight to be assigned may be used for future contracts with the same contractor until there is a change in the cost composition of the overhead pool or the contract circumstances, or until the factors discussed in paragraph (3) above are relevant.

4. *Other direct costs (exclusive of CAS 414, Facilities Capital Cost of Money).* In evaluating this element:

(a) Proposals, particularly for research and development, often list as direct costs the kinds of expenses usually treated as indirect for other contracts. Examples are travel and subsistence, consultants, telephone, computer costs and reports reproduction. The accounting treatment of a cost category does not change the weight appropriate to the cost being evaluated.

(b) The weight ranges in the format cover the broad categories of direct material, labor, and G&A expenses. Although cost submissions may vary from the way shown in the format, all cost categories contained in submissions will fall under one of the broad groupings shown in the format. Because other direct costs are not direct material or direct labor, it follows that they will be considered as indirect costs for weighting purposes.

C. ***Contract risk.*** This factor reflects DOE policy that contractors bear an equitable share of cost risk and are compensated for it. Risk associated with costs to perform under a Government contract is usually minimal under cost-reimbursement-type contracts. In developing a prenegotiation profit or fee objective, the negotiating official considers the type of contract to be negotiated and the anticipated contractor cost risk.

Profit/Fee allowances for contractor assumption of cost risk require a determination of the degree of cost responsibility the contractor assumes and the reliability of cost estimates. This factor is specifically limited to the risk of costs of contract performance, including unallowable cost elements. It does not include contractor risks regarding reputation, losing a commercial market, losing potential profits in other fields, or any risk on the part of the contracting activity, such as the risk of not acquiring an effective product or service.

The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total cost risk by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-fixed fee contract and a firm-fixed-price contract.

The second determination is that of the reliability of the cost estimates.

Contractors are likely to assume greater cost risk when contracting officers compensate them for it. Generally, a cost-plus-fixed-fee contract will not justify a reward for risk in excess of 0.5 percent, nor will a firm-fixed price contract justify a reward of less than the minimum on the following weighted guidelines. The reward for risk, by contract type, will usually fall into the following percentage ranges which are applied to total recognized contract costs, exclusive of facilities capital cost of money:

1. Type of contract and percentage ranges for profit objectives developed for equipment and supply contracts:

Cost-Plus-Fixed-Fee-0 to 0.5%

Cost-Plus-Incentive-Fee:

With Cost Incentives Only-1 to 2%

With Multiple Incentives-1.5 to 3%

Fixed-Price-Incentive:

With Cost Incentives Only-3 to 5%

With Multiple Incentives-4 to 6%

Prospective-Price-Redeterminable-4 to 6%

Firm-Fixed-Price-6 to 8%

2. Type of contract and percentage ranges for profit objectives developed for research and development contracts:

Cost-Plus-Fixed-Fee-0 to 0.5%

Cost-Plus-Incentive-Fee:

With Cost Incentives Only-1 to 2%

With Multiple Incentives-1.5 to 3%

Fixed-Price-Incentive:

With Cost Incentives Only-2 to 4%

With Multiple Incentives-3 to 5%

Prospective-Price-Redeterminable-3 to 5%

Firm-Fixed-Price-5 to 7%

3. Type of contract and percentage ranges for profit objectives developed for contracts for services:

Cost-Plus-Fixed-Fee-0 to 0.5%

Cost-Plus-Incentive-Fee-1 to 2%

Fixed-Price-Incentive-2 to 3%

Firm-Fixed-Price-3 to 4%

In selecting a weighting factor, the contracting officer considers that:

1. These ranges may not be appropriate for all acquisitions. For instance, a fixed-price-incentive contract that is closely priced with a low ceiling price and high incentive share may be tantamount to a firm fixed price contract. The converse is also true. A fixed-price incentive contract with a high ceiling and low share ratio can be very similar to a cost-

plus-incentive-fee contract. There are many permutations of this theme. A term in a cost-plus-incentive-fee contract that places unlimited negative fee adjustment risk on the contractor would create a contract similar to a fixed-price incentive contract.

2. The acquisition may not obviously fit a specific category shown. For example, effort under a particular A-E contract may better fall into the category of R&D, rather than services. Judgment is required, therefore, in establishing the category and weights to be applied in each case.

3. The contractor's subcontracting program may have a significant impact on the contractor's acceptance of risk under a contract form. It can cause risk to increase or decrease in terms of both cost and performance. This consideration is a part of the contracting officer's overall evaluation in selecting a factor to apply for cost risk. Subcontractors sometimes accept significant cost risk usually borne by the prime contractor. When this occurs, it may be appropriate to assign a percentage for contract risk below the low end of the range specified for the contract type. An example would be where a follow-on production contract has a substantial part of its costs falling on a subcontractor that accepts most of the incentive and penalty for cost performance. The mere presence of large subcontracts, however, does not imply the contract risk percentage should be lower than normal. The determinative factor is substantial transfer of the prime contractor's risk. The Department does not want to discourage appropriate subcontracting.

4. In evaluating cost risk in definitizing a letter contract, an unpriced change order, or an unpriced order under a basic ordering agreement, the effect on total contract cost risk as a result of partial performance is considered, but it can not be assumed that partial performance results in the contractor's cost risk being substantially reduced. The contract risk factor is applied to all costs, both incurred and estimated to be incurred, so determining the appropriate percentage for the factor entails considering all of the circumstances related to the total costs, not a portion of them.

5. Time and material, labor hour, and overhaul contracts priced on a time and material basis are considered to be cost-plus-fixed-fee contracts for the purpose of establishing a profit weight in the evaluation of the contractor's assumption of contract cost risk.

D. ***Capital investment (facilities).*** This element recognizes the investment risk associated with the facilities employed by the contractor. Measurement of the amount of facilities capital employed is discussed in FAR 30.414. Five to twenty percent of the net book value of facilities capital allocated to the contract is the normal range. The key factors that the contracting officer considers are:

1. The overall cost effectiveness of the facilities employed.

2. Whether the facilities are general purpose or special purpose items.

3. The age of the facilities.

4. The relationship of the remaining write-off life of the investment and the length of the program(s) or contract(s) on which the facilities are employed.

5. Special contract provisions that reduce the contractor's risk of recovery of facilities capital investment (termination-protection clauses, multi year cancellation ceilings, etc.).

The contracting officer requests the contractor to submit reasonable evidence that the new facilities are part of an approved investment plan and that benefits to the Government will result. New industrial facilities and equipment receive maximum weight when they:

1. Are to be acquired primarily for Government and energy related business and effort.

2. Have a long service life.

3. Have a limited economic life due to limited alternative uses.

4. Reduce the total life cycle cost of the products produced for, or services to, the Department of Energy.

If the new investment represents routine replacement of existing assets, a lesser weight is assigned.

E. ***Independent research and development.*** This factor rewards contractors in two ways:

1. As a reward for the contractor's investment in a viable independent research and development program, considering, among other things, the program's quality, scope, and resources employed. The normal weight range for this factor is from 5 to 7 percent of allowable IR&D costs allocable to the prospective contract.

2. As a reward for contractors who assume the extra risk of developing items with energy program applications on their own initiative with no direct Government assistance and little or no indirect Government assistance. Profit weights in the range of 0 to 20 percent of the basic profit dollars (total of profit dollars for DEAR 915.404-4-70-2, items I.A. through I.E.) are normal for this factor. The weight selection is based on the amount of assistance provided by the Government through independent research and/or development expense allowance under previous Government contracts and the extent the contractor already has been compensated for independent development through prior sales of the identical item to the Government.

F. ***Participation in special programs.*** A composite percentage weight within the range of -5 percent to +5 percent of the basic profit objective (total of profit dollars for DEAR 915.404-4-70-2, items I.A. through I.E.) is assigned. This profit factor, which applies to special circumstances as well as a particular acquisition, relates to rewards of outstanding achievement in contractor participation in the Government's small business, small disadvantaged business, women-owned small business concerns, labor surplus, energy conservation and other special programs. Participation that is rated as merely satisfactory is assigned a weight of zero, generally. Evidence of effective support may justify a plus weight and poor support a negative weight.

The contracting officer:

1. Gives favorable consideration to the contractor's policies and procedures that effectively support Government small business and small disadvantaged business subcontracting programs. Any unusual effort that the contractor displays in subcontracting with these concerns, particularly for development-type work likely to result in later production opportunities, and the overall effectiveness of the contractor in subcontracting with, and furnishing assistance to, such concerns is considered. Conversely, failure or unwillingness on the part of the contractor to support these Government policies is viewed as evidence of poor performance.

2. Makes a similar review and evaluation of the contractor's policies and procedures supporting the Government's labor surplus area program. In particular, favorable consideration is given to a contractor who: makes a significant effort to help find jobs and provide training for the hardcore unemployed; or promotes maximum subcontractor utilization of certified eligible concerns.

Gives favorable consideration to the contractor's initiatives and accomplishments in the conservation of energy and in carrying out any other special Government programs.

G. ***Other considerations***. Particular situations may justify consideration of a profit allowance in addition to those specifically identified elsewhere in the guidelines. These situations are identified and the reason(s) for their use documented in the price negotiation memorandum. An assigned weight of -5 to +5 percent of the basic profit objective is the normal range for this profit factor. A zero weight designates a satisfactory or average effort.

Examples of "other considerations" are described in the following subparagraphs.

1. *Cost-control and other past accomplishments*. This factor benefits a prospective contractor that has previously performed similar tasks effectively and economically. In addition, consideration is given to: measures taken by the prospective contractor that result in productivity improvements; and other cost-reduction accomplishments that will benefit Government contracts. Among other things, consideration is given to the contractor's efforts to explore additional production opportunities or to improve or develop new product, manufacturing, or performance technologies to reduce production cost.

2. *Complexity of R&D or services assignment*. This factor applies when a contract, such as an A-E contract, relates to a DOE project facility. The following complexity categories are used to establish the appropriate fee weight:

(a) *Class A*-Manufacturing plants involving continuous closed processes or other complicated operations requiring a high degree of design layout or process control, nuclear reactors, atomic particle accelerators; complex laboratories or industrial units especially designed for processing, testing or handling highly radioactive materials; facilities to be used for research, development, experimental or demonstration purposes which involve advance or unique design considerations that are peculiar to the purposes for which the facility is built.

(b) *Class B*-Normal manufacturing processes and assembly operations such as ore dressing, metal working plants and simple processing plants; power plants and accessory switching and transformer stations; water treatment plants; sewage disposal plants; hospitals and ordinary laboratories.

(c) *Class C*-Permanent administrative and general service buildings, permanent housing, roads, railroads, grading, sewers, storm drains and water and power distribution systems.

(d) *Class D*-Construction camps and facilities and other construction of a temporary nature.

3. *Operating capital*. This factor includes consideration of the level of the contractor's operating or working capital investment required for effective contract performance. This level will vary, depending on such circumstances as: the nature of the work and duration of the contract; contract type and dollar magnitude; the reimbursement or progress payment rate; the contractor's financial management practices; and the frequency of and

time lag between billings and Government payments. When the contractor will invest relatively few dollars for operating capital purposes (because of cost reimbursement and progress payment rates, or when an advance payment method (such as a letter of credit) is used to finance the contractor), a negative adjustment may be appropriate.

H. ***Productivity/Performance adjustment for follow-on contracts.*** One objective of DOE profit policy is to reduce costs needed to achieve national energy goals by encouraging contractor investment in modern cost-reducing facilities and other improvements in efficiency and performance. If costs serve as the basis for pricing (both cost and profit), success in reducing costs can reduce profit dollars on follow-on contracts. For example, a cost-plus-award-fee contract may be awarded as the first of two or more contracts. The incentive to increase productivity or performance and reduce cost under the first contract works against the contractor on any follow-on contracts because the reduced level of costs becomes a part of the basis for pricing subsequent contracts. In order to mitigate the relative loss of prospective profit dollars on a follow-on contract that occurs when costs are reduced under the predecessor contract or contracts due to productivity or performance gains, a special "Productivity/Performance Reward" may be included in the prenegotiation profit objective of a pending follow-on acquisition under certain circumstances.

The "Productivity/Performance Reward" may be applied when all of the following criteria are met:

1. The pending acquisition is for a follow-on contract.

2. Reliable actual cost data relating to the predecessor contract or contracts is available.

Changes made in the configuration of the item being acquired or in the technical aspects of the services being performed are not likely to invalidate price comparability.

The amount of productivity or performance reward for a given follow-on contract is based on the estimated cost reduction on the predecessor contract or contracts that can be attributed to productivity or performance gains. Set forth below are principles and procedures that apply to estimating cost reductions and calculating the productivity or performance reward:

1. The contractor prepares and supports the cost reduction estimate.

2. The overall contract cost decrease is based on estimated decreases measured at the unit cost level, or equivalent.

3. The lowest average unit cost or its equivalent (exclusive of profit) for a preceding performance period or production run serves as the unit cost baseline.

4. A technique is employed to determine that portion of the cost decrease attributable to productivity or performance gains as opposed to other factors such as the effects of quality differences between the base contract and the pending acquisition.

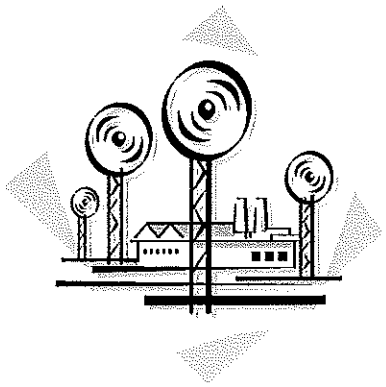
5. When the parties agree that the estimated overall contract cost decrease is materially affected by price level differences between the base period and the current point in time, an economic price adjustment may be applied to the estimate.

6. The reward is calculated by multiplying the contract cost decrease due to productivity/performance gains by the base profit objective rate.

7. The degree of review and validation of the data supporting the reward calculation is commensurate with the materiality of this profit element in relation to the overall price objective.

There may be several methods advanced, by both contracting officers and contractors, to quantify productivity/performance gains. Any technique may be acceptable, provided it equitably takes into account the principles and procedures listed above.

Utilities



[Reference: FAR 41, DEAR 941 and 970.4102]

Overview

This section discusses the acquisition and sales of utility services by DOE and its contractors.

Background

DOE's mission involves projects that use large amounts of electricity and other utilities. The acquisition of utilities requires analysis of the quantity of service necessary and proper planning to assure that the service is acquired efficiently and at the lowest reasonable cost. That planning should consider the availability of GSA area wide contracts and the appropriateness of a separate contract in accordance with FAR 41.2.

Headquarters Review

Solicitations, contracts, and modifications to contracts for the acquisition of utility services at facilities owned or leased by DOE are submitted to DOE Headquarters for review and approval. The term "contracts" includes interagency and intra-agency agreements and subcontracts.

The Headquarters review is coordinated by the Office of the Federal Energy Management Program, the Office General Counsel, the Office of Contract Management, and the cognizant Program Office which results in a consolidated response. Questions about utilities services acquisitions may be directed to the Office of the Federal Energy Management Program Headquarters at (202) 586-3703.

Indirect Cost Rate Administration

Guiding Principle

Establishing final indirect cost rates provides:

- uniformity of approach with a contractor when more than one contract, agency, or awarding office is involved;
- economy of administration; and,
- timely settlement and closeout of contracts.

References

- FAR 31.
- DEAR 931.
- FAR 42.7.
- DEAR 942.7.
- Title 10 CFR 600, DOE Financial Assistance Rules.
- OMB Circular A-21, Cost Principles for Educational Institutions.
- OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments.
- OMB Circular A-122, Cost Principles for Nonprofit Organizations.

Overview

This section discusses the Department's procedures for the administration of contractor overhead costs, general and administrative expenses, and rates for DOE awarded contracts and financial assistance instruments.

Terminology

The following terminology is used in the day-to-day administration of indirect cost rate issues.

Predominant Financial Interest - A term used to determine which Federal agency has the largest Federal involvement with an organization, and therefore, is normally responsible for establishing indirect cost rates applicable to all Federal awards. Predominant financial interest can be determined on the basis of an unliquidated contract dollar amount or the largest dollar value of all awards, or any other method that identifies the agency with the predominant Federal interest.

Cognizant Federal Agency (CFA) - Normally, the agency having the predominate financial interest in the organization. The CFA is responsible for performing a designated function on behalf of all Federal agencies, such as the establishment of indirect cost rates and indirect cost determinations.

Cognizant DOE Office (CDO) - Normally, the contracting activity having the predominant financial interest in the contractor organization will be designated the CDO. The CDO is assigned lead office responsibility for all DOE indirect cost matters relating to a particular organization receiving DOE contract and financial assistance awards.

Cognizant Contracting Officer (CCO) - The person delegated the DOE decision making authority on indirect cost rate matters for a specific organization receiving DOE contract and financial assistance awards.

Direct Cost - Any cost which is identified specifically with a particular final cost objective, e.g., material purchased for contract use.

Indirect Cost - Any cost not identified specifically with a single final cost objective but with two or more final cost objectives, e.g., heat, light, and power.

Indirect Cost Rate - The percentage or dollar factor that expresses the rate of indirect expenses incurred in a given period to direct labor, manufacturing cost, or other appropriate base for the same period. Such rates may be in the form of:

Billing Rates - These indirect cost rates are established temporarily for interim reimbursements of incurred indirect costs and are adjusted as necessary. Billing rates are "forecasted" or "estimated" rates and are based on previous audits or experience, information resulting from recent review, or similar reliable data or experience of other contracting activities. OMB Circulars A-21, A-87, and A-122 refer to this type of indirect cost rate as a "provisional" rate.

Final Indirect Cost Rates - These rates are established and agreed upon by the Government and the awardee for the purposes of determining allowable indirect costs under existing cost-type awards. Final indirect cost rates reflect actual cost experience for the covered period.

Predetermined Final Indirect Cost Rates - Predetermined final indirect cost rates may be established under cost reimbursement research and development awards placed with educational institutions. These rates are applicable to a specified current or future period and are estimates of the costs to be incurred during the period. Such rates are established when there is a reasonable assurance, normally based on experience and a reliable projection of an institution's probable level of activity, that the rate agreed to will approximate the institution's actual rates.

Fixed Rate With Carry Forward - This type of rate has the same characteristics as a predetermined rate, except that the difference between the estimated costs and the actual costs of the period covered by the rate is carried forward as an adjustment to the rate computation of a subsequent period.

Forward Pricing Rates - These cost rates are used to price indirect expenses during specified fiscal years and are used in developing contract negotiation objectives and

negotiating contract prices. The rates may, when deemed appropriate, be incorporated into a written forward pricing rate agreement and may include indirect cost rates, labor hour rates, material and labor variances, material handling rates, efficiency factors, etc. These rates may also be used as interim billing rates under cost-reimbursement type contracts, unless the contracting officer determines that changed conditions have invalidated part or all of the agreement.

DOE Procedures

The Office of Procurement and Assistance Policy (ME-61) develops and maintains policies and procedures for the establishment and administration of indirect cost rates for commercial and noncommercial organizations. This office also interacts with OMB where CFA assignments are designated to the DOE, and coordinates with OMB when changes to DOE CFA assignments are necessary.

Heads of Contracting Activities establish local written procedures for designating CCOs that will be responsible for establishing and approving indirect cost rate(s) and for distributing rate agreements within DOE and to other Federal agencies. HCAs also designate the CCO responsible for indirect cost rate matters affecting DOE awards placed with a specified organization when the HCA has been assigned CDO responsibility for that particular organization. CDO assignment changes are requested by the HCA, as appropriate.

Each awarding office designates a CDO for those organizations awarded a contract and/or financial assistance instrument that requires establishment of indirect cost rates or indirect cost determinations. Such designations are based on predominant DOE financial interest (the largest dollar balance of active and inactive DOE awards requiring allowable indirect cost determinations) in the organization.

The CDO cognizant contracting officer determines whether the DOE has CFA responsibilities. This can most easily be accomplished by asking the awardee to identify which Federal agency they have the most business with (the predominant financial interest), and contacting the agency for the purpose of establishing the CFA.

When the Department is identified as the Cognizant Federal Agency, the DOE office designated as the CDO establishes the indirect cost rates required for the administration of all Federal contract and assistance awards, including DOE awards, made to that organization.

When DOE is not the Cognizant Federal Agency, the Department will accept and use the indirect cost rates established for the respective organization by the Cognizant Federal Agency or another Federal agency, provided any required adjustments are made to reflect DOE-specific cost principles.

When CFA responsibilities are transferred from DOE to another Federal agency (i.e., the predominant financial interest has shifted to another Federal agency, or another agency

wishes to assume the CFA responsibilities even though DOE has the predominant financial interest), the change is agreed to by both the DOE and the other Federal agency. The Office of Procurement and Assistance Policy (ME-61) will notify the other Federal agency, and, if applicable, OMB so that publications that list the CFAs can be changed.

When determining allowable costs under DOE contracts and financial assistance instruments awarded to that organization, all DOE contracting officers use the same indirect rate(s) established for that organization.

The contracting activity designated as the CDO for a particular organization serves as the lead office responsible for all DOE indirect cost matters relating to the organization. The designation remains until all affected DOE awards placed with the organization are retired or another DOE office is assigned the CDO function.

Heads of contracting activities may request changes to CDO assignments for a particular organization. Redesignation requests are coordinated between the current CDO and the successor organization. They are jointly agreed to by the two affected contracting activities.

Upon agreement of a redesignation, the relinquishing office will forward appropriate summary information concerning negotiated billing rates, final rates, and forward pricing rates to the new designee. Detailed file documentation on negotiations will remain at the activity that negotiated the rates. Further, the relinquishing activity will notify all other awarding activities of the CDO change so that they can revise the CDO designations.

The CDO normally serves as the DOE focal point for that organization's corporate general and administrative expense distributions, if applicable.

CCOs perform the following tasks:

Determine whether DOE or another Federal agency is responsible for negotiating or determining required indirect cost rates for each assigned organization.

Where DOE has responsibility for negotiating rates, the CCO will perform the following tasks:

Negotiate advance understandings on particular indirect cost items, when appropriate.

Establish forward pricing rate agreements for all Federal agencies, when appropriate, as CFA and for the DOE when awards are only from the Department.

Establish billing rates or provisional rates, as required, for interim reimbursement of incurred indirect costs for all Federal awards when assigned CFA responsibility and for the DOE when awards are only from the Department.

Monitor the organization's actual indirect cost rates and initiate appropriate actions to revise billing rates that are significantly at a variance with expected final rates.

Assist other contracting officers, as necessary, when temporary billing rates are required in accordance with DEAR 942.704(b).

Assure an organization's final indirect cost rate proposal is submitted when due. (Cost allocation plans in the case of state and local governments.)

Establish final indirect cost rates, predetermined rates, or fixed rates with a carry forward provision, as required, for all Federal awards and for the DOE when awards are only from the Department.

Make determinations regarding the allowability of indirect costs suspended or disapproved when a written appeal has been received.

Request advisory audit services when warranted. Audit requests flow through the cognizant Federal audit agency (e.g., the Defense Contract Audit Agency or the Department of Health and Human Services). When requesting audits, the CCO requires the auditor to identify the percent of Government participation in each expense pool (i.e., the Federal Government allocated share).

Coordinate indirect cost rate negotiation activities, including prenegotiation objectives, and the review and approval of statewide central service allocation plans, etc., with other affected DOE offices and Federal departments or agencies.

Enter into indirect cost rate agreements with the contractor or financial assistance recipient.

Before finalizing indirect cost rate agreements when the DOE is the CFA: obtain management approval at two levels above the CCO when the Federal Government allocated share of the indirect cost pool exceeds $500,000 in a fiscal year; and approval of Headquarters, Office of Management Systems (ME-62), when the DOE allocated share of indirect costs exceeds $5,000,000 or more in a fiscal year.

Document actions taken in a formal negotiation memorandum and retain in the work paper files supporting the negotiations.

Promptly distribute the indirect cost rate agreement, negotiation report, or summary, as appropriate, to all affected DOE and other affected Federal contracting activities, including the audit office which performed the audit review. (For noncommercial organizations, distribute agreements to the Department of Health and Human Services for Government-wide distribution).

Assist other contracting officers, as necessary, when quick closeout procedures at FAR 42.708 are applied.

Where the DOE has no direct responsibility for the negotiation of rates with the organization in question, the CCO performs the following tasks:

Collect DOE contract information and identify all DOE awards with the specific organization.

Notify the CFA of all DOE awards placed with the organization in question.

Coordinate with and assist the CFA or cognizant Federal activity (cognizant Federal negotiator), as necessary, in the negotiation of required indirect cost rates with the organization, or a segment thereof, such as a home office, when it is not otherwise assigned to a DOE contracting activity.

Obtain and review all indirect cost rate agreements established by the CFA and assure that such indirect cost rates affecting DOE awards are in compliance with DOE regulations and policies (e.g., DOE unique cost principles).

Provide all affected DOE activities with the necessary indirect cost rate information required for making awards, administering payments, and determining allowable costs.

Monitor the organization's actual indirect cost rates and initiate appropriate actions with the CFA to revise billing rates when they significantly vary with expected final rates. Assist other contracting officers, as necessary, when temporary billing rates are required in accordance with DEAR 942.704(b).

Obtain copies of the organization's final annual indirect cost rate proposal(s) when due.

Assist other contracting officers, as necessary, when the quick closeout procedures at FAR 42.708 are applied.

DOE Contracting Officers perform the following tasks:

Prior to award, coordinate with the CCO regarding forecasted indirect cost rates and applicable billing rates to ensure that a consistent Department-wide approach is maintained.

Require awardees, in the award document, to submit indirect cost rate proposals directly to DOE's CCO when DOE is the CFA, or to the appropriate designated CFA activity. When DOE is not the CFA, the awardee is only required to submit an information copy of the proposal to DOE's cognizant contracting officer.

Notify the cognizant contracting officer of applicable awards and request that current forward pricing rates, billing rates, and final indirect cost rates be provided henceforth.

Ensure the billing rates and final indirect cost rates provided by the cognizant contracting officer are properly reflected in the awardee's payment requests.

When rates are not available from the CCO, the DOE contracting officer performs the following tasks:

Establish temporary billing rates pursuant to DEAR 942.704(b), when necessary to do so.

Establish appropriate final indirect cost rates when the quick closeout procedure at FAR 42.708 is applied.

Inform the CCO of such actions taken.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-16

DATE: January 28, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Changes in Small Business Contracting Policy**

SUMMARY: This Policy Flash forwards changes to the Small Disadvantaged Business (SDB) price evaluation adjustment, new guidance from the U.S. Small Business Administration (SBA) on improving subcontracting opportunities with small businesses, and the requirement for recertification of small business status.

POLICY FLASH 2005-16

1. The statute for the SDB price evaluation adjustment implemented in FAR Subpart 19.11 is no longer in effect for civilian agencies, except the National Aeronautics and Space Administration and Coast Guard. See the attached Civilian Agency Acquisition Council Letter, dated December 27, 2004:

   CAAC Letter
   2004-04, Expiration c

   Note: the Government-wide goal of at least 5 percent remains in effect.

2. On January 10, 2005, the SBA corrected a final rule that appeared in the Federal Register of December 20, 2004 (69 FR 75820), changing the effective date from December 20, 2004 to February 18, 2005. The links to those two (2) documents follow:

   http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=766829202711+1+1+0&WAISaction=retrieve

   http://frwebgate6.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=765742234285+13+1+0&WAISaction=retrieve

   Among other things, the final rule provides a list of factors to consider in evaluating a prime contractor's performance and good-faith efforts to achieve the requirements in its subcontracting plan, authorizes the use of goals in subcontracting plans, and/or past performance in meeting such goals as a factor in source selection when placing orders against Federal Supply Schedules, Government-wide acquisition contracts, and multi-agency contracts and implements statutory provisions and other administrative procedures relating to subcontracting goals and assistance. In particular, the final rule lists various categories of small businesses that must be afforded maximum practicable subcontracting opportunities, clarifies the responsibilities of prime contractors and SBA's Commercial Market Representatives (CMRs) under the subcontracting assistance program, and supplies guidance on Subcontracting Orientation and Assistance Reviews (SOARs), performed by CMRs to assist prime contractors in their efforts to understand and comply with the requirements governing the small business subcontracting assistance program.

3. Effective December 21, 2004, the SBA implemented a new policy requiring a small business that merges or is acquired to recertify itself as small on all current contracts. The recertification does not affect the status of the contract, but allows the agency to determine whether the contract should still be counted toward small business goals. See the following web site: http://www.sbaonline.sba.gov/news/04-87.pdf .

Acquisition Letter 2004-03, Small Business Programs is being updated to incorporate this new guidance, among other changes in the small business area. Any questions concerning this Policy Flash, or small business policy in general, may be directed to Mr. Stephen Zvolensky at (202) 287-1307.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-17

DATE: February 10, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Acquisition Guide Updates

SUMMARY: This Policy Flash advises you of changes being made to five chapters of the Department of Energy Acquisition Guide. These changes are as follows:

Chapter 26.1 Energy Policy Act Implementation — The changes to this chapter were updates and editorial style changes.

Chapter 26.2 Energy Policy Act Cost Sharing Requirements — The changes to this chapter were updates and editorial style changes.

Chapter 37.1 Support Service Contracting — Revisions were made to recognize performance based service acquisition. Other changes were updates and editorial style changes.

Chapter 39.1 Acquisition of Information Resources — The changes to this chapter were updates and editorial style changes. For your information, in the near future, we will be issuing a new Chapter 39.2 implementing the requirements of Section 508 of Public Law 105-220 regarding electronic and information technology and their accessibility to disabled employees and citizens. This guidance is currently in Acquisition Letter 2001-04.

Chapter 70.44 Approval of Contractor Purchasing Systems – Purchase Card Considerations — This chapter is new but its content is that previously contained in Acquisition Letter 2002-07. The changes to this chapter were updates and editorial style changes.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy
Office of Procurement and
Assistance Management

Energy Policy Act Implementation

[Reference: Section 3021(a) of the Energy Policy Act, (Pub. L. 102-486), DEAR 926.70]

Overview

This section discusses the general requirements of section 3021(a) of the Energy Policy Act of 1992 (EPACT) in the award of contracts for EPACT work and provides a list of budget line items that may be EPACT related.

Background

Section 3021(a) of the Energy Policy Act provided that the Department should award not less than 10 percent of the total combined amounts obligated for contracts and subcontracts in the performance of EPACT work to certain target groups.
These target groups are small business concerns owned and controlled by socially and economically disadvantaged individuals or by women, historically black colleges and universities, or colleges and universities having a student body in which more than 20 percent of the students are Hispanic Americans or Native Americans.

Determinations

A crucial part of meeting DOE's statutory duty under section 3021(a) is a determination of which procurements are EPACT requirements. Those procurements form the basis upon which the 10 percent goal is computed. The requestor has the responsibility to identify on the procurement request form whether the specific procurement is an EPACT requirement.

EPACT work involves any award that directly satisfies an Energy Policy Act program or requirement. Attached is a list of DOE budget line items that are most likely to involve EPACT work. This list makes the job of recognizing EPACT work easier for the requestor and for the Contracting Officer.

The fact that a particular procurement falls within one of the budget line items listed does not necessarily mean that the procurement is an EPACT procurement. The fact that the funds for a given procurement do not come from one of the listed budget line items does not necessarily mean that the procurement is not EPACT related. Each determination must be made on a case-by-case basis. The requestor must confirm that the procurement, in fact, is an EPACT requirement.

Best Practices

As one step in determining whether a given procurement is an EPACT requirement, the requestor consults the attached list. If the funds come from one of the listed budget line items, there is an increased likelihood that the requirement will accomplish an EPACT program or requirement, and is, therefore, an EPACT procurement.

Attachment

The attached listing identifies EPACT covered programs.

Energy Technologies in the Energy Policy Act

Energy Efficiency

Buildings

Building energy efficiency standards.
Residential energy efficiency ratings.
Energy efficient lighting and building centers.
Manufactured housing energy efficiency.
Energy efficient mortgages.
Energy efficient mortgages pilot program.

Utilities

Encouragement of investments in conservation and energy efficiency by electric utilities.
Energy efficient grants to state regulatory authorities.
Tennessee Valley Authority least-cost planning program.
Amendment of Hoover Power Plant Act.
Encouragement of investments in conservation and energy efficiency by gas utilities.

Appliance and Equipment Energy Efficiency Standards

Energy efficiency labeling for windows and window systems.
Energy conservation requirements for certain commercial and industrial equipment.
Energy conservation requirements for certain lamps and plumbing products.
High-intensity discharge lamps, distribution transformers, and small electric motors.
Energy efficiency information for commercial office equipment.
Energy efficiency information on luminares.
Report on the potential of cooperative advanced appliance development.
Evaluation of utility early replacement programs for appliances.

Industrial

Energy efficiency in industrial facilities.
Process-oriented industrial energy efficiency.
Industrial insulation and audit guidelines.

State and Local Assistance

Amendments to State energy conservation program.
Amendments to low-income weatherization program.
Energy Extension Service Program.

Federal Agency Energy Management

Federal energy management amendments.
General Services Administration Federal Buildings Fund.
Report by General Services Administtration.
Energy savings performance contracts.
Intergovernmental energy management planning and coordination.
Federal agency energy management training.
Energy audit teams.
Federal energy cost accounting and management.
Inspector General review and agency accountability.
Procurement and identification of energy efficient products.
Federal energy efficiency funding study.
United States Postal Service energy regulations.
United States Postal Service building energy survey and report.
United States Postal Service energy management report.

Energy management requirements for the United States Postal Service.
Government contract incentives.
Energy management requirements for congressional buildings.

Miscellaneous

Energy information
District heating and cooling programs.
Study and report on vibration reduction technologies.

TITLE II **Natural Gas**
Fewer restrictions on natural gas imports and exports.

TITLE III **Alternative Fuels-General**

Amendments to the Energy Policy and Conservation Act.
Minimum Federal fleet requiremnet.
Refueling
Federal agency promotion, education, and coordination.
Agency incentives program.
Recognition and incentive awards program.
Measurement of alternative fuel use.
Information collection.
General Services Administration report.
United States Postal Service.

TITLE IV **Alternative Fuels--Non-federal Programs**

Truck commercial application program.
Conforming amendments.
Alternative motor fuels amendments.
Vehicular natural gas jurisdiction.
Public information program.
Labeling requirements.

Data acquisition program.
Federal Energy Regulatory Commission authority to approve recovery of certain expenses in advance.
State and local incentives programs.
Alternative fuel bus program.
Certification of training programs.
Alternative fuel use in nonroad vehicles and engines.
Reports to Congress.
Low interest loan program.

TITLE V **Availability and use of replacement fuels, alternative fuels and alternatives fueled private vehicles.**

Mandated for alternative fuel providers.
Replacement fuel supply and demand program.
Replacement fuel demand estimates and supply information.
Modification of goals; additional rulemaking authority.
Voluntary supply commitments.
Technical and policy analysis.
Fleet requirement program.
Credits.
Secretary's recommendations to Congress.
Effect on other laws.
Prohibited acts.
Enforcements.
Powers of the Secretary.
Authorization of appropriations..

TITLE VI Electric Motor Vehicles

Electric Motor Vehicle Commercial Demonstration Program

Program and solicitations
Selection of proposals.
Discount payments.
Cost-sharing
Reports to Congress.
Authorization of appropriations.

Electric Motor Vehicle Infrastructure and Support Systems Development Program

General authority.
Proposals.
Protection of Proprietary information.
Compliance with existing law.
Electric utility participation study.
Authorization of appropriations.

TITLE VII Electricity

Exempt Wholesale Generators

Public Utility Holding Company Act reform.
State consideration of the effects of power purchases on utility cost of capital; consideration of the effects of leveraged capital structures
on the reliability of wholesale power sellers; and consideration of adequate fuel supplies.
Public utility holding companies to own interests in cogeneration facilities.
Books and records.
Investment in foreign utilities.

Federal Power Act; Interstate Commerce in Electricity

Amendments to section 211 of Federal Power Act.
Transmission Services.
Information requirements.
Sales by exempt wholesale generators.
Penalties.
Definitions.

State and Local Authorities

State authorities

TITLE VIII High-Level Radioactive Waste

Nuclear waste disposal.
Office of the Nuclear Waste Negotiator.
Nuclear Waste Management Plan.

TITLE IX United States Enrichment Corporation

Establishment of the United States Enrichment Corporation.
Conforming amendments and repealer's.
Restriction on nuclear exports.
Severability.

TITLE X Remedial Action and Uranium Revitalization

Remedial Action at Active Processing Sites

Remedial action program.
Regulations.
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Uranium Revitalization

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Sale of remaining DOE inventories.
Responsibility for the industry.
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Coalbed methane recovery.
Metallurgical coal development.
Utilization of coal wastes.
Underground coal gastification.
Low-rank coal research and development.
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Oil substitution through coal liquefaction.
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Additional clean coal technology solicitations.

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Additional Federal Power Act Provisions.

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Oil shale.
Natural gas supply.
Natural gas end-use technologies.
Midcontinent Energy Research Center.

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General transportation.
Advanced automotive fuel economy.
Alternative fuel vehicle program.
Biofuels user facility.
Electric motor vehicles and associated equipment research and development.
Renewable hydrogen energy.
Advance diesel emissions program.
Telecommuting study.

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Improved Energy Efficiency

General improved energy efficiency.
Natural gas and electric heating and cooling technologies.
Pulp and paper.
Advanced buildings for 2005.
Electric drives.
Steel, aluminum, and metal research.
Improving efficiency in energy-intensive industries.
Energy efficient environmental program.

Electricity Generation and Use

Renewable energy.
High efficiency heat engines.
Civilian nuclear waste.
Fusion energy.
Fuel Cells.
Environmental restorations and waste management program.
High-temperature superconductivity program.
Electric and magnetic field research and public information dissemination program.
Spark M. Matsunga Renewable Energy and Ocean Technology Center.

Advance Nuclear Reactors

Purposes and definitions.
Program, goals and plan.
Commercializationof advanced light waterreactor technology.
Prototype demonstration of advanced nuclear reactor technology.
Repeals.
Authorization of appropriations.

TITLE XXII Energy and Economic Growth

National advanced materials initiative.
National advanced manufacturing technologies initiative.
Supporting research and technical analysis.
Math and science education program.
Integration of research and development.
Definitions.

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Energy research, development, demonstration, and commercial application advisory board.
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Uncosted obligations.

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Third party contracting by FERC.
Improvement at existing Federal facilities.
Water conservation and energy production.
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Certain projects in Alaska.
Projects on fresh waters in state of Hawaii.
Evaluation of development potential.

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Hot dry roack geothermal energy
Hot dry rock geothermal energy in the eastern United States
Coal remining.
Surface mining act implementation
Federal lignate coal royalties.
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Indian energy resource regulation.
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Effect on pending proceedings.
Conforming amendment.

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Employee protection for nuclear whistleblowers.
Exemption of certain research and educational licensees from annual charges.
Study and implementation plan on safety of shipments of plutonium by sea.

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Research, development, demonstration and commercial application activities.
Cost sharing.

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Alaska natural Gas transportation Act of 1976 repeal.

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Use of energy futures for fuel purchases.
Energy subsidy study.
Tar sands.
Amendments to title 11 of the United States Code.
Radiation exposure compensation.
Strategic diversification.
Consultative Commission on Western Hemisphere Energy and Environment.
Disadvantaged business enterprises.

EPACT Cost Sharing Requirements

[Reference: Energy Policy Act, Pub. L. 102-486; DEAR 926.70]

Overview

This section provides implementation guidance on sections 3001 and 3002 of the Energy Policy Act, (EPAct) 42 U.S.C. 13541 and 13542 for acquisition awards.

Background

Sections 3001 and 3002 provide general provisions covering the research, development, demonstration, and commercial application activities to be carried out under EPAct. Section 3001 authorizes the Secretary to carry out research, development, demonstration and commercial application programs through the use of contracts, cooperative agreements, grants, cooperative research and development agreements, and joint ventures.

It also extends the protection of information coverage of the Stevenson-Wydler Technology Innovation Act of 1980, 15 U.S.C. 3710 a(c)(7) to research, development, demonstration, and commercial application programs and activities under EPAct.

Section 3002 imposes cost sharing requirements for such activities. For research and development programs, the Secretary requires a commitment from non-Federal sources of at least 20 percent of the cost of the project.

For demonstration and commercial application programs, the Secretary requires at least 50 percent of the costs directly and specifically related to any demonstration or commercial application project to be provided from non-Federal sources.

The Secretary may reduce or eliminate the non-Federal requirement for cost sharing for research and development programs if the Secretary determines that the research and development is of a basic or fundamental nature.

For demonstration and commercial application programs, the Secretary may reduce the non-Federal requirement if the reduction is necessary and appropriate considering the technological risks involved in the project and the project is necessary to meet the objectives of EPAct.

In calculating the amount of the non-Federal commitment, cash, personnel, services, equipment, and other resources are included.

Guidance

The requirements of Sections 3001 and 3002 apply to contracts for research and development, demonstration, and commercial application projects under an EPAct covered program which are made on or after October 24, 1992, the effective date of EPAct.

The Department of Energy has determined that programs executed under the authority of the Small Business Innovation Research and Small Business Technology Transfer programs are not covered under EPACT.

Contracting Officer Responsibilities.

Contracting officers must include the following information in any solicitation for research and development, demonstration, and commercial application programs covered under EPACT:

(1) Protection of Information.

The provisions of Section 12(c)(7) of the Stevenson-Wydler Technology Innovation Act of 1980, relating to the protection of information, apply to research, development, demonstration, and commercial application programs and activities under this Act.

These provisions specify:

- The protection from public disclosure of trade secrets or financial or commercial information that is privileged or confidential and obtained in the conduct of research or as a result of activities under this Act from a non-Federal party to a covered contract.

- The protection from public disclosure, for a period of up to five years from development, of information resulting from the contract that would be a trade secret or commercial or financial information that is privileged or confidential if the information had been obtained from a non-Federal party to a covered contract. This protection from public disclosure includes exemption from disclosure pursuant to 5 U.S.C. 552(b) (The Freedom of Information Act.)

The Contracting Officer coordinates with the DOE Patent Counsel prior to award of any contract covered under EPAct to assure appropriate intellectual property provisions.

In no event does the Contracting Officer construe the data protection provisions to apply to information or data generated by M&O contractors under their prime contract with the Department.

(2) Cost sharing requirement.

Contractor proposals must show the requisite cost sharing commitment. The following is suggested language which may be used in solicitations and resulting contracts.

Cost Sharing Requirement

EPACT 3002 requires a cost sharing commitment of 20 percent from non-Federal sources for research and development projects. For demonstration or commercial application projects, the cost sharing requirement from non-Federal sources is 50 percent. Your cost proposal must show the breakout between Federal and non-Federal sources and how you propose to meet the cost sharing requirement. The non-Federal share may include cash, personnel, services, equipment, and other resources.

All cost sharing or matching contributions, including cash and third party in-kind, shall meet the following criteria:
(1) are verifiable from the contractor's records,
(2) are not included as contributions for any other federally-assisted project or program,
(3) are necessary and reasonable for proper and efficient accomplishment of project or program objectives,
(4) are allowable under the applicable cost principles,
(5) are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.
Values for contractor contributions of services and property shall be established in accordance with applicable cost principles.

Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the contractor's organization. In those instances in which the required skills are not found in the contractor organization, rates shall be consistent with those paid for similar work in the labor market in which the contractor competes for the kind of services involved.

In addition to including the appropriate information in solicitations, the contracting officer also ensures that the award document incorporates the cost sharing requirement and that cost sharing is obtained.

Waiver of Cost Sharing Requirement

The Secretary has delegated the authority to make the determinations waiving the section 3002 non-Federal cost sharing requirement to the Director, Office of Procurement and Assistance Management.

The Director, Office of Procurement and Assistance Management, by separate document, redelegated authority to make EPAct cost sharing determinations to the Heads of Contracting Activities (HCAs) and, with respect to the financial assistance under the Office of Energy Research Financial Assistance Program Rule, 10 CFR Part 605, to the Director, Office of Energy ResearchScience.

Any determination waiving or reducing a cost sharing requirement must be based on the section 3002 criteria. For research and development programs, DOE must determine that the research and development is of a basic or fundamental nature.

For demonstration and commercial application programs, the determination must show that the reduction is necessary and appropriate, considering the technological risks involved in the project and the project is necessary to meet the objectives of EPAct. This determination should be based on demonstrated results of activities such as the following:

(1) Solicitations. The contracting activity has attempted to obtain cost sharing, but industry and others did not respond to the solicitation.

(2) Other studies. Market surveys or other studies have been conducted which provide significant data that commercial organizations are not willing to participate in programs, projects or other activities because of the cost sharing requirements.

Attachment

The attached listing identifies EPAct covered programs.

ATTACHMENT 1

COVERED PROGRAMS- § 3002 EPACT SECTIONS

Fossil Energy R & D

Coal All Programs Including § 1301-1312
Coal-fired Diesel Engines § 1302
Clean Coal, Waste-To-Energy § 1303
Nonfuel Use of Coal § 1304
Coal Refinery Program § 1305
Coalbed Methane Recovery § 1306
Metallurgical Coal Development § 1307
Utilization of Coal Wastes § 1308
Underground Coal Gasification § 1309
Low-rank Coal Research and Development § 1310
Magnetohydrodynamics § 1311
Oil Substitution Through Coal Liquefaction § 1312

Clean Coal Technology § 1321
Fossil Energy R & D

Petroleum

Enhanced Oil Recovery All Programs Including: § 2011
Heavy Oil § 2011
Light Oil § 2011
Tar Sands § 2011
Advanced Extraction & Process Tech All Programs Including: § 2011
Geological Science/Extract Research § 2011
SPT Technology/Environmental Research § 2011
University Geoscience Research § 2011
Oil Shale All Programs: § 2012

Gas

Natural Gas Research All Programs Including: § 2013-2015
Resource & Extraction § 2013, 2014
Delivery & Storage § 2013, 2014
Utilization § 2013, 2014
Environmental Research & Regulatory Analysis § 2013, 2014
Midcontinent Energy Research Center* § 2013, 2015
Fuel Cells All Programs Including: § 2115
Advanced Research § 2115
Phosphoric Acid Systems § 2115

Molten Carbonate Systems § 2115
Advanced Concepts § 2115

Energy Conservation

Transportation All Programs Including: § 2021-2025,
2027, 2028,
2112
Alternative Fuels Utilization § 2021, 2023
Materials Development § 2021
Heat Engine Development § 2021, 2112
Electric & Hybrid Propulsion Development § 2021, 2025
Implementation & Deployment § 2021
Management § 2021
Management-Capital Equipment § 2021
Advanced Automotive Fuel Economy § 2021, 2022
Biofuels User Facility* § 2021, 2024
Advanced Diesel Emissions Program* § 2021, 2027
Telecommuting Study* § 2021, 2028

Utility All Programs Including: § 2101
Integrated Resource Planning § 2101
Program Direction-IRP § 2101
Energy Management Control § 2101

Industry All Programs Including: § 2101-2108
Industrial Wastes § 2101
Municipal Solid Wastes § 2101
Cogeneration § 2101
Electric Drives § 2101, 2105
Materials Processing § 2101, 2107
Separations § 2101
Sensors & Controls § 2101
Bioprocessing § 2101
Enabling Materials § 2101
Improved Combustion Efficiency § 2101, 2107
Process Heating & Cooling § 2101, 2102
Implementation & Deployment § 2101
Management § 2101
Management-Capital Equipment § 2101
National Advanced Manufacturing Tech Initiative* § 2101, 2202
Pulp & Paper* § 2101, 2103
Steel, Aluminum, and Metal Research* § 2101, 2106
Energy Efficient Environmental Program* § 2101, 2108

Buildings All Programs Including: § 2101-2108
Solar Technologies § 2101
Materials & Structures § 2101
Lighting & Appliances § 2101
Heating & Cooling Equipment § 2101, 2102
Indoor Air Quality § 2101
Building Systems Research § 2101
Federal Energy Management Program § 2101
Implementation & Deployment § 2101
Management § 2101
Management-Capital Equipment § 2101
Advanced Buildings for 2005* § 2101, 2104

Energy Supply R & D

Energy Research

Fusion Energy All Programs Including: § 2114
Confinement Systems § 2114
Development & Technology . § 2114
Applied Plasma Physics § 2114
Planning & Projects § 2114
Inertial Fusion Energy § 2114
Program Direction-Op Exp § 2114
Capital Equipment & Construction § 2114
Basic Energy Sciences All Programs Including: § 2203
Materials Sciences § 2203
Chemical Sciences § 2203
Energy Biosciences § 2203
Engineering & Geosciences § 2203
Applied Math Sciences § 2203, 2204
Advanced Energy Projects § 2203
Advanced Neutron Source § 2203
Program Direction § 2203
Capital Equipment § 2203
Advisory & Oversight/Program Direction § 2203
Energy Research Analysis § 2203
University & Science Education Programs § 2203
Experimental Program to Stimulate Competitive Research* § 2203
Laboratory Technology Transfer § 2203
Multi-Program Laboratory Support § 2203

Nuclear Energy

Light Water Reactor § 2123, 2126

Advanced Reactor R&D § 2121, 2122
2124, 2126
Facilities § 2126
Solar & Renewables

Solar & Other Energy All Programs Including: § 2021, 2026,
§ 2111, 2117
Photovoltaics § 2111
Biofuels § 2021
Solar Technology Transfer § 2111
NREL § 2111
Program Direction- Other Solar Energy § 2111
Solar Building Technology Research § 2111
Solar Thermal Energy Systems § 2111
Wind Energy Systems § 2111
Ocean Energy System § 2111
International Solar Energy Program § 2111
Resource Assessment § 2111
Program Support § 2111
Geothermal § 2111
Hydrogen Research § 2026
Electric Energy Systems including: Superconductivity § 2117, 2111
Energy Storage Systems § 2111

Environmental Restoration & Waste Management

Facility Transition-Fast Flux Test Facility § 2116

Civilian Waste R & D § 2113

Electric & Magnetic Fields Research
and Public Dissemination Program* § 2118
Spark M. Matsunga Renewable Energy
& Ocean Technology Center* § 2111, 2119

*Direct citation from Title XX-XXIII.

SUPPORT SERVICE CONTRACTING

Guiding Principles

- Inherently Governmental functions may only be performed by Government personnel.
- Avoid the appearance of personal services relationships.
- Use a Statement of Objectives and a Performance Based Work Statement
- Assess performance through a quality assurance surveillance plan
- Practice appropriate management oversight to preserve agency control.

[Reference: FAR Part 37]

Overview

This section provides a guide for use in the planning and acquisition of support services contracts.

Background

Support service contracts are a significant portion of the Department's total contracting effort. These types of contracts must be carefully developed and administered to ensure that contractors do not perform inherently Governmental functions or personal services.

The purpose of the attached guide is to furnish Department personnel guidance addressing the acquisition and use of support service contracts. This guide will help contracting, program, and other personnel in the development and award of more definitive contracts which, in turn, will permit qualitative measurement of contractor performance.

SUPPORT SERVICE CONTRACTING
A GUIDE FOR DOE PERSONNEL

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Introduction

Approximately 20 percent of all DOE contract funds, excluding management and operating contract funds, were obligated for support services in each of the past two fiscal years. The services acquired included professional and technical services provided to program offices, library services, employee health services, audit services, elevator maintenance, ADP support, hearing officers, and the services of temporary help agencies. The size, diversity, and number of contract actions involved indicate the need for successfully planning, negotiating, awarding and administering this class of contracts.

This Guide will provide key information to those Department personnel acquiring support services. It is hoped that use of the Guide will result in improved support service contracting. Part I provides an Overview to furnish basic information regarding support service contracting. This part identifies types of services that are inherently Governmental functions that should never be contracted out and also discusses personal service contract prohibitions. Basic information regarding contract administration and the Service Contract Act is also provided. Part II provides information on the development of support service contracts. Coverage ranges from acquisition planning through drafting statements of work. Information is provided on performance-based service acquisition, including suggestions on developing performance work statements and statement of objectives for this contract type.

Part III identifies special circumstances which may arise in support service contracting as a result of the Federal Acquisition Streamlining Act of 1994. These special circumstances include the use of commercial contract terms and conditions for the acquisition of commercial services and the use of multiple award, task order contracts for the acquisition of advisory and assistance services.

Part IV provides a summary of pertinent parts of the Guide and includes a series of appendices containing more detailed information, various checklists, and a bibliography.

PART I - AN OVERVIEW

Support Service Contracts

Basic Ideas

Support services are those services and activities required by the Government to support the development and execution of assigned functions and programs. Support services do not include the exercise of discretionary Government authority which is the essence of an inherently Governmental function and should only be performed by Government personnel. Appendix A contains definitions of terms which are frequently used in support service contracting.
When contracting for support services, agencies must avoid contracting for inherently Governmental services. Some examples of inherently Governmental functions are listed on the following page. Inherently Governmental functions are discussed at Subpart 7.5 of the Federal Acquisition Regulation (FAR).

Government personnel must also avoid the creation or appearance of a personal service relationship with contractor personnel which could indicate circumvention of the rules covering the employment of civil service employees. Use common sense and be sensitive to appearances. A useful brochure on this subject is also available. It is titled "Contracting For Support Services - what You Need To Know.." It is available at
http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Regulations+and+Guidance?OpenDocument

Government versus Contractor Performance

Governmental Functions

An inherently Governmental function is one which is so closely related to the public interest as to mandate performance by Government employees. These activities require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Inherently Governmental functions generally fall into two categories: 1) the act of governing or 2) monetary transactions and entitlements. The first category would include the armed services, the courts, public roadways, etc. The second would include tax collection, money supply, control of banking, etc. Services or products in support of these Government functions are considered commercial activities.

The following examples illustrate services that should not be obtained under contract.

- Speaking before groups as a representative of the Department
- Initiating official documents intended to represent Departmental policy
- Drafting work assignments under a contract featuring task orders or assignments
- Procuring ADP equipment for use in Government facilities

The Department's management and operating contractors shall not be directed to award subcontracts to provide support service to a Departmental office; or, asked to provide support service if the service is outside their primary mission.

Appendix B provides examples of functions that should be performed only by Department of Energy personnel. Further examples may be found at FAR 7.503(c) and Appendix A of Policy Letter 92-1 published by the Office of Federal Procurement Policy.

Commercial Activities

A commercial activity, as described in OMB Circular A-76, Performance of Commercial Activities, is one which provides a service or product which could be obtained from a commercial source. Public policy is for commercial activities to be provided by the private sector whenever possible.

Appendix C provides a listing of services that are considered commercial services based on guidance contained in OMB Circular A-76.

An important distinction between inherently Governmental functions and commercial activities is that inherently Governmental functions are not permitted to be contracted out unless they are authorized by special statute whereas commercial functions should generally be performed only by the private sector.

Federal employees may perform commercial functions under certain circumstances. Circumstances under which Government performance of commercial functions could be justified might include when proposed commercial prices are unreasonable or there is a lack of commercial sources; e.g., when commercial sources refuse to perform in a geographically isolated location. Conversely, services in support of Government functions which may be similar to inherently Governmental functions, may be appropriately contracted for if sufficient management controls are in place to assure the contractor does not take over a Government function and the Government does not abrogate its responsibilities.

Appendix D lists services which are not inherently Governmental in nature but which may approach that category. Contracting for these types of services requires diligent attention to ensure that performance of the work does not require the contractor to perform inherently Governmental functions

Personal Service Contracts

The civil service laws and regulations of the U.S. Government impose requirements concerning Federal employees and establishes the conditions and descriptions of Federal employment. Personal services shall not be obtained by contract unless Congress has specifically authorized the acquisition of personal services.

A personal service contract results when Government personnel assume the role of instructing, supervising, or controlling a contractor employee's work. When DOE exercises direct supervision and control over contract personnel, the services become personal and are therefore improper.

The following examples illustrate situations in which the services obtained have become personal services.

- When DOE restricts contractor employee qualifications to a particular person.
- When DOE will review the performance of individual contractor personnel rather than review the final product or service.
- When the contractor employees are used interchangeably with DOE personnel to perform the same or similar functions.

The Federal Acquisition Regulation provides adequate guidance and procedural information which, if appropriately followed, should ensure that contracts for support services do not enter the realm of personal services. Appropriate care and attention can prevent personal service problems.

Service Contract Act

There are several labor statutes which apply to Federal contracts. See Part 22 of the FAR for full coverage. The one most likely to affect a support service contract is the Service Contract Act (SCA). Under SCA, contractors are required to comply with certain minimum wage levels and working conditions if they employ workers in certain labor categories (generally the trades or nonprofessional labor categories). The Secretary of Labor is authorized to administer the SCA and enforce its requirements. The SCA applies to any Government contract over $2,500 when its principal purpose is to furnish services through the use of service employees.

SCA does not cover service contracts that are performed (a) exclusively by executive-level, administrative, or professional personnel, or (b) primarily by bona fide executive, administrative, or professional employees, when service employees are only a minor factor in the performance of the contract.

Contract Administration

Contract administration under every contract is important but a support service contract requires especially diligent attention. A support service contract is labor intensive. This necessitates attention to the amount and types of labor being used under the contract to ensure that the appropriate skills are assigned to accomplish the work while still staying within the budgeted hours and dollars. As the work progresses, it may be necessary to furnish technical direction to ensure that the work stays within the intended scope of the contract or to better define the scope. It is also necessary to monitor the costs incurred to ensure that individual cost items are appropriate to the work being performed.

The type of contract involved will determine the focus of contract administration. For example, a performance-based contract will necessarily focus on performance measured against the contract's performance management criteria. A multiple award, task order type contract adds a new dimension to contract administration by introducing "contract award" responsibilities into the traditional contract administration duties.

Task assignment contracts are very common in support service contracting. They present their own difficulties in proper contract administration. Appendix E is included to describe contract administration under this type of contract.

PART II - DEVELOPING THE SUPPORT SERVICE CONTRACT

"Laws, policies, and regulations have dramatically changed the acquisition process into one that must operate with a mission-based and program-based focus." As a result of the Government Performance and Results Act of 1993 agencies are required to establish and manage to mission-related performance goals and objectives; in relation to this requirement, Performance Based Acquisition is the preferred method for acquiring mission related services (Public Law 106-398, § 821). The Department is committed to continued progress in support service contracting through the use of Performance Based Service Acquisition (PBSA).

DOE's efforts involve widespread use of PBSA to the maximum extent practicable. There is one of two ways to describe the Governments need under PBSA- a performance work statement (PWS) or a statement of objectives (SOO). In terms of organization of information, a statement of work (SOW) -like approach is suitable for a performance work statement, e.g., introduction, background information, scope, etc., recognizing that the PWS may be adapted as appropriate. The use of the statement of objectives is an emerging methodology that requires competing contractors to develop the statement of work, performance metrics and measurement plan, and quality assurance plan, which are evaluated before contract award. Acquisition planning and market research are integral components in assisting and maintaining our current PBSA success and building on it requires continued emphasis on the total acquisition approach.

Acquisition Planning

Advance acquisition planning is vital to the improvement of support service contracting. Acquisition planning means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition. Advance planning must be a team effort involving program, contracting, legal, finance, and other personnel. During this period the program and contracting personnel must combine their capabilities to develop the most definitive statement of work possible, develop comprehensive cost estimates, and otherwise develop the procurement package to define the Government's needs in sufficient detail to be understood by offerors and to permit qualitative measurement of the performance of the successful offeror(s). If a performance-based contract is to be used, this is the time to develop performance objectives and measurement criteria.

The requirements must be written in clear, understandable language and describe the requirements as precisely as possible. These actions will help to ensure that DOE obtains an acceptable end product.

Market Research

Market research means collecting and analyzing information about capabilities within the market to satisfy Government requirements. FAR Part 10 describes policies and procedures for conducting market research to determine the most suitable approach to acquiring supplies or

services. Market research is required for all acquisitions by the new Federal Acquisition Streamlining Act. The extent of market research to be conducted should be appropriate to the circumstances of the service being acquired. Factors such as urgency, estimated dollar value, complexity, and past experience in acquiring the service may impact the extent of market research involved. Procedures for conducting market research are found at Parts 10 and 12 of the FAR.

Drafting Statements of Work

Overview

The statement of work defines the overall objective of the contract and describes the Government's minimum support service requirements. An organized approach to preparing a statement of work is essential. The statement of work defines the overall objective of the services, details the tasks that must be completed, and the labor skills required to achieve that objective. It should ensure that the objective can be met within budget and schedule.

Personnel responsible for drafting the statement of work should ensure that objectives and performance requirements in the statement of work are complete and clearly written in conventional language to the extent practical. Complete elimination of technical language is not required, but it should be reduced to essentials required to describe the effort required. To ensure that inherently governmental functions are not performed, the statement of work shall contain language that reserves these functions for Government officials and causes contractor employees and products to be clearly identified. See FAR 11.106.

The writer of a statement of work should be aware that statements of work are often read and interpreted by persons of varied backgrounds. Therefore, strive to write the statement of work clearly and concisely.

Suggested Statement of Work Content

Include a description of the required objectives and desired results including the Government's minimum requirements.

Provide background information helpful to a clear understanding of the requirements.

Include a detailed description of the technical requirements and tasks; and
a description of reporting requirements and any other deliverable items, such as data, experimental hardware, mockups, prototypes, etc..

Writing Style

Use short sentences with simple and concise language.

Use active rather than passive voice.

Use terms consistently.

Mandatory and permissive language should be used properly.

Avoid use of pronouns.

Abbreviations and acronyms should only be used after first being defined.

Define who is responsible.

Avoid establishing a requirement that is dependent on actions by an entity who is not a party to the contract.

A checklist has been included at Appendix F to help in drafting and reviewing the statement of work.

To assist contracting activities in using performance-based service acquisition concepts, the next section of this chapter has been developed entitled "Performance Based Service Acquisition." The guide section provides information on performing a needs assessment, how to write a performance work statement, statement of objectives, and what should be included in a quality assurance surveillance plan. Sample performance work statements are also provided as tools to assist in the preparation of project specific work statements. NOTE: the performance incentive guidance provided in Chapter 70 of the Acquisition Guide was developed for specific use with management and operating contracts. However, use of this guide in the service contract environment is not precluded.

Performance-Based Service Acquisition

Law and regulation establish a preference for performance based service acquisition which provides for a more commercial like structure (See FAR 37.102). In keeping with this guiding principle, it is the policy of the Department of Energy to use Performance Based Service Acquisition where practicable. Through the use of PBSA methods, the Department will realize mission related program and project success via better competition and mission related solutions, more focus on intended results, better value and enhanced performance, and a number of other benefits.

PBSA places emphasize on the outcome rather than the process employed to achieve a final result. PBSA requires structuring all aspects of an acquisition around the purpose of the work to be performed with contract requirements that are-

- clear;
- specific; and have
- objective terms with measurable outcomes.

These components provide for objective assessment of contractor performance providing contractors with the freedom to determine how best to meet the Government's needs giving due consideration to appropriate levels of performance and accompanying measures of success while achieving established standards of accountability for the chosen acquisition approach.

Additional, guidance on the implementation of PBSA can be found in the Seven Steps to Performance Based Services Acquisition Guide located at http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/index.html . The guide breaks down performance based service acquisition into seven simple steps.

- Establish an integrated solutions team (See DOE O 413.3 and DOE M413.3-1)
- Describe the problem that needs solving
- Examine private sector and public sector solutions
- Develop a statement of objectives (SOO) or performance work statement (PWS)
- Decide how to measure and manage performance
- Select the right contractor
- Manage performance

The intent of the Seven Steps guide, in part, is to create a shift from traditional contract compliance to collaborative and innovative performance-oriented mission related solutions.

The following areas are key components that help to define PBSA requirements and demonstrate a unique set of characteristics that clearly distinguish PBSA procurements:

Needs Assessment: In the management of PBSA contracts, the first consideration is what goal or outcome is to be achieved as a result of the acquisition. Addressing this factor is the first task performed by the Integrated Project Team (IPT) which describes the problem that needs to be solved and establishes the agreed upon solution that links to the agency mission. *Note: In certain instances, DOE Project Acquisition Strategy requires that a minimum of three alternative solutions be developed by the IPT (see DOE M 413.3-1).* This is a collaborative effort and is a first step after the team is assembled. At this stage a determination will be made of the current level of performance versus the intended effect the acquisition needs to have on the mission or program goal and objectives. This assessment will allow for the acquisition to be described in terms of how it supports mission based performance goals establishing a clear link between acquistion and mission. The needs assessment sets a high-level acquisition framework.

Performance Work Statement: The PWS is the instrument that captures the conclusions arrived at during the needs assessment process, e.g., job analysis (apply the "so what test"), performance objectives, performance standards, etc. The PWS is a document that identifies the agency's requirement in clear, specific and objective terms. Elements of a performance work statement are: 1) a statement of the required services in terms of output, 2) a measurable performance standard for the output, and 3) an acceptable quality level or error rate.

Statement of Objectives: Is a short document, under five pages, that provides basic high level performance objectives of the acquisition which offerors are required to support. This document is to be used in the solicitation in place of the SOW or PWS and may be converted to a more definitive work statement as proposed by the contractor or developed by the agency. The statement of objectives (SOO) establishes how the acquisition relates to the agency mission and what problem is to be solved or outcome achieved. The core of the information in the SOO is derived from the needs analysis describing what problem needs to be solved, what mission related function is to be addressed, program authorization documents, the results of discussions with project owners and stakeholders, etc. The SOO maximizes the offeror's ability to plan their own program for meeting the Government's acquisition requirement.

Quality Assurance Surveillance Plan: Is a tool for assessing contractor success as it relates to achieving the desired outcome. Plans may be developed by the agency that include metrics, level of quality, performance standard, etc., and recognize the responsibility of the contractor as discussed in FAR 37.602; however, whenever possible a commercial Quality Assurance Surveillance Plan (QASP) may and should be relied upon for quality indicators of specific performance objectives. For example, the International Standards Organization (ISO) has established quality standards series ISO 9000 which are quality management standards that apply to most organizations in most business areas, e.g., manufacturing, servicing, computing, electronics, etc. Commercial standards may be used in contracts that have a direct relationship to a specific performance standard and were designated for use in the solicitation. In addition, since QASP are intended to be living documents which are to be revised or modified as the situation warrants, contractual language for negotiated changes to metrics and measures should be included in all PBSA contracts. The language should be designed to preserve the government's right to review and revise as necessary.

Contract Type Order of Precedence: Legislation has designated an order preference for Performance Based Service Acquisition which provides for the use of simplified commercial procedures. The order is as follows:

- Firm-fixed price performance-based contract or task order.
- Non-firm-fixed price performance based contract or task order.
- Contract or task order that is not performance-based.

While, historically firm-fixed price was the preferred contract type for PBSA it was not always the best motivator of performance. Contract type choice should be used as a motivator of superior performance, e.g., when risk is minimal or predictable use firm-fixed price, when risk is questionable or changeable make the most appropriate contract type selection other than firm-fixed.

PART III - SPECIAL CIRCUMSTANCES

Commercial Items

The Federal Acquisition Streamlining Act of 1994 (FASA) promoted the acquisition of "commercial items" and made many changes in the acquisition of services, including support services. Three Parts of the FAR were significantly revised to implement the Act's preference for the acquisition of commercial items and services. The revised Parts were Parts 10, Market Research, 11, Describing Agency Needs, and 12, Acquisition of Commercial Items.
The Act requires that agencies perform extensive market research to determine whether a commercial service is available that could fulfill its need. If such a commercial service is available, the agency must acquire that service utilizing customary commercial terms and conditions to the maximum extent possible.

For services to be considered commercial and therefore subject to the policies and procedures of FAR Part 12, the services must be for:

- installation services, maintenance services, repair services, or training services in support of a commercial item; or,
- be a type of service that is offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed.

Multiple Award Task Order Contracts

The Federal Acquisition Streamlining Act of 1994 also established a preference for the use of multiple award, task or delivery order contracts for indefinite quantity requirements. It mandated the use of that form of contract for advisory and assistance service requirements exceeding $10,000,000 and 3 years duration. An indefinite quantity, task order contract is one which does not specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract. When multiple awards are required and/or appropriate, the Federal Acquisition Streamlining Act of 1994 provides that each contractor must be given a fair opportunity to be considered for each task order issued.

In the past, support services, in this Department, have routinely been purchased through level of effort, task assignment contracts awarded to a single vendor on a cost reimbursement basis. While there are exceptions to the required use of the multiple award contracts, we should expect such contracts to become more common. Multiple award task order contracts will require significantly more administrative effort as there will not only be the competition for the contracts but also a series of selections for the award of individual task orders. Monitoring the activity of

multiple task orders may also increase the administrative responsibilities of the Government personnel.

Detailed coverage of this new aspect of support service contracting may be found at Chapter 2 of Acquisition Letter 96-03, the Federal Acquisition Streamlining Act Implementation Handbook.

PART IV - SUMMARY AND USER AIDS

Summary

Support service contracting is a significant portion of the Department of Energy's overall contract program. Support service contracting has two sensitive aspects:

- inherently Governmental functions may not be contracted out; and,
- contract personal services, that is those featuring employer-employee type relationships between Government and contractor personnel, are illegal.

If the market research reveals that the required support service is a service provided in the commercial market place on a firm fixed price basis and the service falls within the definition provided at FAR 2.101, it will generally be necessary to acquire the service on a fixed price basis under commercial contract terms and conditions.

Support service requirements for advisory and assistance services exceeding $10,000,000 and 3 years duration must generally be acquired by the use of multiple award, task order contracts. Use of the multiple award approach is encouraged below the mandated threshold.
The appendices of this Guide contain several excerpts from OMB and OFPP Policy Letters providing guidance regarding the distinctions of inherently Governmental and commercial functions. Also included are checklists to aid in assessing the adequacy of draft statements of work for support service requirements. In addition, definitions of terms important to support service contracting and a bibliography are included. The latter should help the reader locate more detailed guidance concerning support service contracting.

APPENDIX A

DEFINITIONS

Commercial items, as defined in the Federal Acquisition Streamlining Act of 1994, means installation services, maintenance services, repair services, training services and other services if in support of a commercial item and services offered and sold competitively in substantial quantities in the commercial marketplace for specific tasks performed and under standard commercial terms and conditions.

Inherently Governmental Function means a function that is so intimately related to the public interest as to mandate performance by Government employees. An inherently Governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Government functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to (1) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; (2) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; (3) Significantly affect the life, liberty, or property of private persons; (4) Commission, appoint, direct, or control officers or employees of the United States; or (5) Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of Federal funds.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services.

Nonpersonal services contract means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

Personal services contract means a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees (see FAR 37.104).

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. The contract can cover

services performed by either professional or nonprofessional personnel whether on an individual or organizational basis.

Support services are of the following types:

Technical support services include, but are not limited to, determining feasibility of design consideration; development of specifications, system definition, system review and reliability analyses; trade-off analyses; economic and environmental analyses, which may be used in DOE's preparation of environmental impact statements; test and evaluation, survey or reviews to improve the effectiveness, efficiency, and economy of technical operations.

Management support services include, but are not limited to, analyses of workload and work flow; directives management studies; automated data processing; manpower systems analyses; assistance in the preparation of program plans; training and education; analyses of Department management processes; and any other reports or analyses directed toward improving the effectiveness, efficiency, and economy of management and general administrative operations.

Maintenance and operations services include, but are not limited to, general housekeeping and custodial services, physical security, fire fighting, logistics, and maintenance.

APPENDIX B

INHERENTLY GOVERNMENTAL FUNCTIONS

Developed by the Office of Management, Budget and Evaluation, DOE

1. Assignment and evaluation of organizational responsibilities.
2. Establishment of employment goals and priorities.
3. Selection and direction of Federal employees.
4. Evaluation of Federal employee performance.
5. Development of budget policy, guidance and strategy.
6. Determination of acquisition strategy and development of acquisition plans.
7. Selection of procurement sources.
8. Control and disbursement of Government funds.
9. Determination of the success or failure of DOE management activities.
10. Determination of reporting requirements.
11. Determination of requirements and/or approval of final design of management information systems.
12. Determination of requirements for, and approval of final design of, program or project management systems.
13. Determination of environmental impacts of energy policies and projects.
14. Determination of economic barriers and tradeoffs for particular energy technologies.
15. Establishment of technical performance criteria for energy technologies.
16. Promulgation of any regulation.
17. Determination of the legality of proposed policies.
18. Final determination(s) regarding performance of DOE projects.
19. Determination and advocacy of legislative initiatives on behalf of DOE.
20. Representation of DOE in policy matters.
21. Determination of energy production and consumption targets.
22. Establishment of performance goals, priorities and schedules.
23. Establishment of assumptions for scientific and economic models.
24. Determination of final agency action on claims for or against the United States.
25. Contract award and/or administration functions.
26. Development and formulation of program goals, policy, strategy and guidance.
27. Conduct of hearings and appeals.

Another more general list may be found at FAR 7.503(c) which contains a list also published as Appendix A of OFPP Policy Letter 92-1.

APPENDIX C

COMMERCIAL ACTIVITIES

From Old OMB Circular A-76, Attachment A

EXAMPLES OF COMMERCIAL ACTIVITIES

Audiovisual Products and Services
- Photography (still, movie, aerial, etc.)
- Photographic processing (developing, printing, enlarging, etc.)
- Film and videotape production (script writing, direction, animation, editing, acting, etc.)
- Microfilming and other microforms
- Art and graphics services
- Distribution of audiovisual materials
- Reproduction and duplication of audiovisual products
- Audiovisual facility management and operation
- Maintenance of audiovisual equipment

Automatic Data Processing

ADP services - batch processing, time-sharing, facility management, etc.
- Programming and systems analysis, design, development, and simulation
- Key punching, data entry, transmission, and teleprocessing services
- Systems engineering and installation
- Equipment installation, operation, and maintenance

Food Services
- Operation of cafeterias, mess halls, kitchens, bakeries, dairies, and commissaries
- Vending machines
- Ice and water

Health Services
- Surgical, medical, dental, and psychiatric care
- Hospitalization, outpatient, and nursing care
- Physical examinations
- Eye and hearing examinations and manufacturing and fitting glasses and hearing aids
- Medical and dental laboratories
- Dispensaries
- Preventive medicine
- Dietary services

Veterinary services

Industrial Shops and Services
- Machine, carpentry, electrical, plumbing, painting, and other shops
- Industrial gas production and recharging
- Equipment and instrument fabrication, repair and calibration
- Plumbing, heating, electrical, and air conditioning services, including repair
- Fire protection and prevention services
- Custodial and janitorial services
- Refuse collection and processing

Maintenance, Overhaul, Repair, and Testing
- Aircraft and aircraft components
- Ships, boats, and components
- Motor vehicles
- Combat vehicles
- Railway systems
- Electronic equipment and systems
- Weapons and weapon systems
- Medical and dental equipment
- Office furniture and equipment
- Industrial plant equipment
- Photographic equipment
- Space systems

Management Support Services
- Advertising and public relations services
- Financial and payroll services
- Debt collection

Manufacturing, Fabrication, Processing, Testing, and Packaging
- Ordnance equipment
- Clothing and fabric products
- Liquid, gaseous, and chemical products
- Lumber products
- Communications and electronics equipment
- Rubber and plastic products
- Optical and related products
- Sheet metal and foundry products
- Machined products
- Construction materials
- Test and instrumentation equipment

Office and Administrative Services
- Library operations
- Stenographic recording and transcribing
- Word processing/data entry/typing services

Mail/messenger
Translation
Management information systems, products and distribution
Financial auditing and services
Compliance auditing
Court reporting
Material management
Supply services

Other Services
Laundry and dry cleaning
Mapping and charting
Architect and engineer services
Geological surveys
Cataloging
Training -- academic, technical, vocational, and specialized Operation of utility systems (power, gas, water steam, and sewage)
Laboratory testing services

Printing and Reproduction
Facility management and operation
Printing and binding -- where the agency or department is exempted from the provisions of Title 44 of the U.S. Code
Reproduction, copying, and duplication
Blueprinting

Real Property
Design, engineering, construction, modification, repair, and maintenance of buildings and structures; building mechanical and electrical equipment and systems; elevators; escalators; moving walks
Construction, alteration, repair, and maintenance of roads and other surfaced areas
Landscaping, drainage, mowing and care of grounds
Dredging of waterways

Security
Guard and protective services
Systems engineering, installation, and maintenance of security systems and individual privacy systems
Forensic laboratories

Special Studies and Analyses
Cost benefit analyses
Statistical analyses
Scientific data studies
Regulatory studies

Defense, education, energy studies
Legal/litigation studies
Management studies

Systems Engineering, Installation, Operation, Maintenance, and Testing
Communications systems - voice, message, data, radio, wire, microwave, and satellite
Missile ranges
Satellite tracking and data acquisition
Radar detection and tracking
Television systems - studio and transmission equipment, distribution systems, receivers, antennas, etc.
Recreational areas
Bulk storage facilities

Transportation
Operation of motor pools
Bus service
Vehicle operation and maintenance
Air, water, and land transportation of people and things
Trucking and hauling

APPENDIX D

FUNCTIONS REQUIRING INCREASED MANAGEMENT OVERSIGHT
From Appendix B of OFPP Policy Letter 92-1 and FAR 7.503(d)
(See FAR 37.114 for additional insights)

The following list is of services and actions that are not considered to be inherently governmental functions. However, they may approach being in that category because of the way in which the contractor performs the contract or the manner in which the Government administers contractor performance. When contracting for such services and actions, agencies should be fully aware of the terms of the contract, contractor performance and contract administration to ensure that appropriate agency control is preserved.

This is an illustrative listing, and is not intended to promote or discourage the use of the following types of contractor services:

1. Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.
2. Services that involve or relate to reorganization and planning activities.
3. Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.
4. Services that involve or relate to the development of regulations.
5. Services that involve or relate to the evaluation of another contractor's performance.
6. Services in support of acquisition planning.
7. Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).
8. Contractors providing technical evaluation of contract proposals.
9. Contractors providing help in the development of statements of work.
10. Contractors providing support in preparing responses to Freedom of Information Act requests.
11. Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information [other than situations covered by the Defense Industrial Security Program described in FAR 4.402(b)].
12. Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.
13. Contractors participating in any situation where it might be assumed that they are agency employees or representatives.
14. Contractors participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.
15. Contractors serving as arbitrators or providing alternative methods of dispute resolution.
16. Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.
17. Contractors providing inspection services.

18. Contractors providing legal advice and interpretations of regulations and statutes to Government officials.
19. Contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

APPENDIX E

ADMINISTRATION OF TASK ASSIGNMENT CONTRACTS

A task assignment contract features a budget of dollars and labor resources which may be brought to bear on the required work based on specific task assignments. The task assignments allocate the basic contract's budget of dollars and labor resources and provide detailed guidance regarding the task to be performed.

Individual task assignments will, generally, be developed by the contracting officer's representative in the program office. Contractors should not be requested to develop task assignments. The task assignment should contain a specific description of the work to be performed, reports or products to be delivered, a period of performance, an estimate of the hours expected to be consumed, and an estimate of the cost of the task. When developing individual task assignments, the contracting officer's representative must ensure that they are within the work scope of the basic contract and that they are within the contract's budget of costs and labor types.

Upon receipt of the task assignment, the contractor will develop a proposal or task plan for accomplishing the task. The task plan must be reviewed by the contracting officer's representative to ensure that the plan will accomplish the intent of the task assignment and that it is within the contract's overall cost and labor budget constraints. If apparent problems are detected by this review, they must be discussed to ensure an understanding of the contractor's plan. At this time, it may be necessary to modify the task assignment if its performance, when combined with budget allocations of other task assignments, would exceed the contract's overall cost and labor budget constraints.

While all these activities associated with the assignment of new task assignments evolve, the contracting officer's representative must perform the normal day to day contract administration functions for other task assignments already issued. These include such duties as issuing technical direction, monitoring technical, schedule and cost performance, reviewing invoices and the like.

Successful contract administration in the support service area demands attention to the following types of duties.

- Keep a copy of the basic contract, its modifications, and all task assignments, including modifications to them, readily available and be familiar with and understand them.
- When developing new task assignments ensure that they are within the scope of work and overall cost and labor constraints of the basic contract. Specify the task assignment's deliverables and their due dates.
- Ensure that individual task assignments can be completed within the term of the basic contract.

- Ensure that the cost and labor estimates of a proposed task plan, when accumulated with those of existing task assignments, do not exceed the limitations of the contract.
- Alert the contractor and contracting officer concerning perceived problems involving budget or performance.
- Before authorizing the use of Government furnished property under a task assignment, ensure that it is provided for in the basic contract to assure accountability.

Task assignment contracts differ somewhat from office to office due to the differing nature of the work to be performed. Local operating procedures spelling out responsibilities of the various personnel should be followed closely.

APPENDIX F

CHECKLIST FOR STATEMENT OF WORK PREPARATION

Ideally, the scope of work should be performance based. The key elements of a performance based work statement are: 1) a statement of the required services in terms of output, 2) a measurable performance standard for the output, and 3) an acceptable quality level or allowable error rate. It also specifies a standard of performance for the required tasks and the quality level the government expects the contractor to provide.

The statement of work should be sufficiently specific to permit the offeror to identify required resources (labor, materials, equipment, timing of deliveries, travel requirements, specific place of performance, etc.).

Contractor duties must be stated clearly enough to permit the technical representative to determine whether they have been completed.

Support service requirements must be defined in such a manner as to:

- avert the creation of employer-employee relationships; and,
- retain inherently Governmental functions for performance by DOE.

The statement of work must be written so that there is no question about the contractor's obligations, e.g., "the contractor shall do this work," not "this work will be required." The duties/interfaces of contractor and Government personnel must be clear.

General information should be separated from direction so that background information, suggested procedures, and the like are clearly distinguishable from contractor responsibilities.

Each task should have a completion date. If elapsed time is used, it should specify calendar days or workdays.

The section headings and content should be compatible.

Extraneous materials should be removed.

All obligations of the Government should be carefully delineated. If Government-furnished equipment is to be provided, state the nature, condition, and availability of the equipment.

Loopholes should be eliminated.

The requirements must be completely described. Specify "when" and "where" as well as "what."

Ambiguous, subjective, or "catch-all" statements should be eliminated.

The statement of work should not favor a particular source(s).

The work should be divided into tasks when possible and, when possible, feature a formal work breakdown structure.

Any necessary approvals must be stated.

All reports and documentation must be specified.

BIBLIOGRAPHY

Contracting for Support Services - What You Need To Know As A Federal Employee. This is a useful DOE brochure available at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Regulations+and+Guidance?OpenDocument

Federal Acquisition Regulation (FAR) This is the Government wide regulation on contracting matters. It is officially published as Chapter 1 of Title 48 of the *Code of Federal Regulations*. Especially relevant to support service contracting are:

- Part 6 Competition Requirements;
- Subpart 7.3 Contractor versus Government Performance;
- Subpart 7.5 Inherently Governmental Functions;
- Part 10 Market Research;
- Part 11 Describing Agency Needs;
- Part 12 Acquisition of Commercial Items;
- Subpart 15.3 Source Selection;
- Part 16 Types of Contracts;
- Subpart 22.10 Service Contract Act of 1965; and,
- Part 37 Service Contracting.

Department of Energy Acquisition Regulation (DEAR) This is DOE's supplement to the FAR. This is published as Chapter 9 of Title 48 of the Code of Federal Regulations. Subpart 909.57, Organizational Conflicts of Interest, should be reviewed as it differs from the FAR.

OMB Circular A-76, Performance of Commercial Activities Contains procedures for determining whether commercial activities should be performed under contract with the commercial sector or performed in-house.

Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting, http://www.acqnet.gov/AcqNet/Library/OFPP/PolicyLetters/

Office of Federal Procurement Policy Letter 92-1, Inherently Governmental Functions, http://www.acqnet.gov/AcqNet/Library/OFPP/PolicyLetters/

Office of Federal Procurement Policy Letter 91-2, Service Contracting, http://www.acqnet.gov/AcqNet/Library/OFPP/PolicyLetters/

Office of Federal Procurement Policy publication, Seven Steps to Performance-Based Services Acquisition provides detailed guidance on the implementation of performance-based service acquisition. Download at: http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/index.html

DOE Acquisition Guide Chapter 37.1 Support Service Contracting

DOE Acquisition Guide Chapter 37.2 Performance Based Service Acquisition (Draft)

Acquisition of Information Technology

Guiding principle - Prior to entering into a contract for information technology, an agency should analyze risk, benefits, and costs. This is the joint responsibility of the Chief Information Officer (CIO), program officials and the contracting office.

Overview

This section discusses the acquisition of information technology (IT) and related internal Departmental procedures. The guidance below is to be used in conjunction with the regulatory requirements in the FAR and DEAR.

Background

The Clinger-Cohen Act (formerly known as the Information Technology Reform Act of February 10, 1996) provides the statutory basis for the Department's acquisition policies and procedures for IT.

Section 508 of the Workforce Investment Act of 1998 provides standards for electronic and information technology for individuals with disabilities, whether federal employees or members of the public.

E-Government Act of 2002, PL 107-342, has a stated purpose as "an Act to enhance the management and promotion of electronic Government Services and processes...." The Act promotes interagency cooperation and internet based and citizen-centric use of information technology. Several sections of the act are highlighted below.

> Section 204, Federal Internet Portal, directs agencies to "maintain and promote an integrated Internet-based system of providing the public with access to Government information systems".
>
> Section 208, Privacy Provisions, provides direction on the protection of privacy of personal information and lists actions required prior to developing or procuring information technology.
>
> Section 210, Share-in-Savings Initiatives, provides agencies the authority to enter into "share-in-savings contracts for information technology in which the Government awards a contract to improve mission-related or administrative processes or to accelerate the achievement of its mission and share with the contractor in savings achieved through contract performance."

Federal Information Security Management Act of 2002 provides a comprehensive framework for ensuring the effectiveness of information security controls over information resources that support Federal operations and assets. Agencies are directed to develop programs for information security in information infrastructures, hardware and software. See also DOE Order 200-1 and the associated manual and guide.

The Chief Information Officer (CIO) has the responsibility to establish policies and guidelines regarding the conduct and management of the Department's IT program and to act as the primary advisor to the Secretary on IT matters.

The CIO maintains a website http://cio.doe.gov with pertinent information on established policies and guidelines. Information available includes links to applicable laws, internal policies on IT infrastructure, cyber security and general information on the CIO's office. Additional information is also available from the Business Management Division at 301-903-4340.

Use of Existing Contracts

Before entering into a new acquisition, the originating office should attempt to satisfy their requirements using existing Department-wide and other Government wide acquisition contracts such (GWACs) and the Federal Supply Schedule (FSS) contracts. Existing Department-wide contracts are listed at http://cio.doe.gov/RBManagement/Business/contracts/contract.htm

A list of GWACS contracts can be found at http://www.arnet.gov/gwac/govurls.html

FSS contracts are listed at http://www.gsa.gov.

GSA Programs – Federal Technology Service

The GSA Federal Technology Service (FTS) provides federal agencies with technical and contract assistance for any acquisitions involving information technology. Contact the regional GSA FTS office for assistance and information. See their Home Page for more information or call them at (703) 306-6140.
http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelId=-13291

Security and Privacy

The Department has a cyber security program in place for the consideration of security in all IT systems and acquisitions. DOE P 250.1, Departmental Cyber Security Program, and DOE G 250.1-1, Cyber Security Architecture Guidelines, are two of the many published policies and documents. The CIO's web page has a list of other links to help you or contact the Business Management Division at 301-903-4604.

Greening and Information Technology

Additional information on Energy Star and energy efficiency considerations relative to information technology is available at

http://www.energystar.gov and at http://www.eere.energy.gov/femp/ .

Special Headquarters Requirements

Acquisitions over $200,000 for all Headquarters IT services must obtain certification from the CIO that the acquisition complies with the Extended Common Integrated Technology Environment (eXCITE) program. Contact the Office of the Associate CIO for Information Technology Reform at 202-586-0166 for additional information.

SmartBUY Initiative:

SmartBUY is a federal government-wide software licensing initiative to streamline the acquisition process and provide best priced, standards-compliant IT. The SmartBUY initiative, mandated by the President's Office of Management and Budget (OMB), is a business discipline used to coordinate multiple IT investments and leverage the buying power of the government for commercial IT products and services.

In accordance with Office of Management and Budget Guidance, federal agencies are directed to review all commercial software acquisitions for appropriateness for inclusion into the SmartBUY program in order to leverage government purchasing power and reduce redundant purchases. Department components must also have the appropriate agency official review planned IT acquisitions for IT major projects (those in excess of $2 million) to ensure that the acquisition does not duplicate any E-Government Initiative. Before beginning any new software acquisition, the contracting officer should insure that the necessary coordination has been completed.

Review of Management Contractors Purchasing Systems Purchase Card Considerations

References	Title
DEAR 970.44	Management and Operating Contractor Purchasing
DEAR 970.4401	Responsibilities
DEAR 970.4401-1	General
DEAR 970.4401-2	Review and Approval
DEAR 970.4402	Contractor Purchasing System
DEAR 970.4402-1	Policy
DEAR 970.4402-2	General Requirements

In Case of Questions?

Contact Richard Langston of the Office of Procurement and Assistance Policy, on 202-287-1339 or via e-mail at richard.langston@hq.doe.gov.

What is the Purpose of this Chapter?

The purpose of this chapter is to provide guidance to contracting officers regarding the review and approval of the purchasing systems of the Department's major facility management contractors whose contracts contain the Contractor Purchasing System clause, DEAR 970.5244-1. The guidance focuses on the use by contractors of purchase cards to effect the purchase of property and services.

What is the Background of this Chapter?

Commercial organizations, including Government contractors, have for many years made effective use of purchase cards to facilitate the acquisition of property and services. Purchase cards provide a convenient mechanism for facilitating the acquisition and payment processes for relatively small dollar value items as well as delivery orders against established contracts. Purchase cards may also provide a mechanism for empowering other than contracting professionals to directly acquire small dollar value items at significantly reduced administrative costs and in a more timely fashion. Major facility management contractors may, as authorized by the Contracting Officer, obtain purchase cards through the General Services Administration SMARTPAY Program. Contractors may also choose to use other bank card programs.

Pursuant to the Contractor Purchasing System clause, DEAR 970.5244-1, the Department's major facility management contractors must obtain the Contracting Officer's approval of their purchasing systems to ensure that costs incurred are allowable and reasonable. This chapter provides contracting officers with additional guidance concerning the Department's expectations for contractor managed purchase card programs for use in determining whether contractor purchasing systems adequately protect the Government's interests under a cost reimbursement contract. The chapter also further defines the role of the contracting officer in ensuring that major facility management contractors conform to approved purchasing system policies and procedures.

What Are the Responsibilities of the Contracting Officer?

√ Contracting officers should, in their review and approval of a contractor's purchasing system, ensure that systems which authorize the use of purchase cards provide adequate policies, procedures and management controls to guard against fraud, waste, and abuse and ensure the incurrence of allowable costs; the absence of such may result in the disapproval of the contractor's purchasing system, and disallowance of associated costs, as appropriate.

√ Contracting officers should, as a facet of their normal operational awareness and systems oversight, ensure that contractor purchase card policies, procedures and management controls are implemented by major facility management contractors.

√ Contracting officers should ensure that they have access to major facility management contractors' list of purchase card users and associated single purchase or other card use restrictions or limitations.

What Are DOE's Expectations Regarding An Acceptable Purchase Card Program?

In reviewing a contractor's purchasing system in accordance with DEAR 970.44, contracting officers should determine whether the contractor intends to use purchase cards to facilitate procurement actions and, if so, the issuing institution. If cards are to be authorized for use, the contractor's written system description must provide policies and procedures for the use of purchase cards that provide effective management controls to guard against fraud, waste, and abuse, and ensure that purchase card expenditures meet contract criteria for the reimbursement of allowable costs. Contractors who use the Federal government's GSA SMARTPAY Program must comply with the terms and conditions of the GSA SMARTPAY contract and develop local purchase card procedures which reflect the policies and principles set forth in the DOE Guidelines and Operating Procedures for Use of the GSA SMARTPAY Purchase Card. For contractors using other, commercially available, purchase card programs, the contractor's purchasing system should contain the following program elements which are indicative of an effective management system that provides adequate controls for the use of purchase cards:

1. Designation of a purchase card program coordinator or other central management official responsible for maintenance of policies and procedures, interface with the

issuing bank, interface with the DOE contracting officer, and overall purchase card program management and oversight.

2. Written limitations on the use of the purchase card (e.g., subject matter restrictions, dollar limits on individual transactions, and monthly or yearly total expenditures) as appropriate to the need of its prescribed uses and its user(s).

3. Written designation and authorization of cardholders and reviewing or approving officials.

4. Maintenance of an up-to-date listing of all authorized cardholders and their purchase limitations.

5. Training of cardholders and reviewing or approving officials prior to assuming their roles and receiving cards.

6. Procedures for assuring cards are available only to those with a confirmed need.

7. Prescribed limitations on the number of cardholders that may be assigned to reviewing or approving officials in order to ensure that control functions will be effectively carried out.

8. Procedures regarding internal annual audit or review of the effectiveness of the contractors purchase card policies and procedures, cardholder files, and transactions in accordance with standard sampling techniques. This may be accomplished by internal audit staff operating under the Cooperative Audit Program, by the contractor purchase card coordinator, or both.

9. Procedures for communication to the DOE contracting officer of issues identified as a result of audits/reviews, including the identification of any transactions which have or may have resulted in unallowable costs. Costs incurred as a result of purchase card transactions which are unallowable in amount or purpose, including costs associated with fraudulent transactions, are unallowable under the contract.

10. Procedures to ensure the collection of rebates, if available and when appropriate.

11. Procedures for ensuring that cards are cancelled at the termination of an authorized user's employment

12. Policies and procedures for sanctioning the abuse or misuse of purchase cards in effecting purchasing transactions, including procedures for assignment to a position not authorized purchase card usage, when appropriate in response to abuse or misuse.

13. Transaction management controls, including:

a) Controls to ensure the appropriateness of the transaction and the absence of fraud, waste or abuse (e.g., controls requiring each purchase or class of purchases to be reviewed and approved in advance and/or subsequent to the transaction by a designated independent reviewing or approving official);
b) Controls requiring that invoices or packing lists for supplies or services are reviewed and approved by the cardholder and a designated independent reviewing or approving official in order to confirm appropriate billing and actual receipt of goods or services ordered; and,
c) Controls requiring that property acquired through purchase cards is entered into the contractor's property management system as appropriate.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-18

DATE: February 14, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Small Business Contracting Policy Update**

SUMMARY: This Policy Flash forwards (1) information on locating Service-Disabled Veteran-Owned Small Business (SDVOSBs) and (2) a solicitation provision which provides guidance to prospective offerors on the impact of teaming arrangements on their small business status.

1. To locate SDVOSBs, you can go to the Department of Veteran Affairs' website for the Center for Veterans Enterprise site at http://www.vetbiz.gov/default2.htm. From that site you can link to the "Search for a Business" at http://vip.vetbiz.gov/search/default.asp to find SDVOSBs.

2. The following provision is recommended for solicitations where teaming arrangements are contemplated, to advise prospective offerors on the impact of those arrangements on their small business status. It advises offerors of the Small Business Administration's (SBA's) affiliation rules and suggests they seek legal counsel when proposing a joint venture, subcontracting, or another form of teaming arrangement:

L.## GUIDANCE FOR PROSPECTIVE OFFERORS – IMPACT OF TEAMING ARRANGEMENTS ON SMALL BUSINESS STATUS

(a) This procurement has been set aside for small business. In order to ensure that award is made to an eligible small business, prospective Offerors, in consultation with legal counsel, are encouraged to review the Small Business Administration's (SBA's) size eligibility standards found at Title 13 of the Code of Federal Regulations, Section 121 (13 C.F.R. § 121). In particular, Offerors proposing a joint venture, subcontracting, or another form of teaming arrangement should review 13 C.F.R. § 121.103, How does SBA determine affiliation?, prior to submitting a proposal.

(b) The SBA is the sole authority for making determinations of small business status for small business programs. Such determinations are binding on the Offeror and the Contracting Officer. Accordingly, a finding by the SBA of affiliation between an Offeror and its proposed team member(s) or subcontractor(s) may result in the Offeror being found to be other than a small business and therefore ineligible for contract award.

(c) Business concerns are considered to be affiliates of each other if either one directly or indirectly controls or has the power to control the other, or if another concern controls both. In determining whether affiliation exists, factors such as common ownership (stock ownership or options, convertible securities and agreements to merge), common management, and contractual relationships are considered. An Offeror will also be found to be affiliated with its subcontractor(s) if the Offeror is unusually reliant upon its subcontractors or if the subcontractor(s) will perform primary and vital requirements of a contract.

(d) The SBA has issued extensive decisions concerning its evaluation of affiliation of an Offeror and its proposed subcontractor(s). The following examples set forth characteristics that the SBA has reviewed in considering the question of affiliation and may assist prospective Offerors in developing any teaming arrangements and their proposals.

(1) The SBA considers whether proposed subcontracting, partnership, joint venture, or other teaming arrangements contain discrete descriptions of the tasks or work to be performed by each party. The SBA considers whether the Offeror or, if the Offeror is a joint venture or partnership, the joint venture participants or partners, perform

the primary or vital portions of the Statement of Work. The SBA considers whether teaming arrangements clearly set forth the relationship between the parties, as well as the individual roles and responsibilities assigned.

(2) The SBA considers whether there is a clear separation of facilities, employees, and management (decision-making authority) between the Offeror and any entities with which it has teaming arrangements.

(3) The SBA considers the extent to which the Offeror directly employs Key Personnel (Program Manager, Project Manager, etc.).

(4) If the Offeror is an eligible small business prime contractor, the SBA considers whether the majority of the technical expertise resides with the Offeror. If the Offeror is an eligible joint venture the SBA considers whether the majority of the technical expertise resides among the joint venture members.

(5) The SBA considers the Offeror's profit sharing arrangements with its proposed subcontractor or other entities.

(6) In reviewing affiliation between the Offeror and its proposed subcontractors or entities with which the Offeror has a teaming arrangement, SBA considers the previous contractual or business relationships between the Offeror and that entity.

Any questions regarding this information may be directed to Stephen Zvolensky at (202) 287-1307

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-19

DATE: March 1, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **STARS Conversion**

SUMMARY: In April 2005, the Department will be converting to the new Standard Accounting and Reporting System (STARS). Department contractors and vendors will be encouraged to submit invoices early for goods or services to be delivered in March 2005 so they can be processed and paid by the end of the month. For such payment, invoices must be received by the Oak Ridge Financial Service Center not later than March 17, 2005, and approving officials must provide their approvals by March 24, 2005.

To ensure a smooth transition, a one-time, limited delegation of Contracting Officer authority has been granted to the Director at Oak Ridge Financial Service Center for the purpose of signing and sending the attached notice to Department contractors, as well as processing payments to such contractors during the period March 17 through the initiation of STARS operations.

This one-time, limited authority extends to the alteration of billing instructions, and as necessary, processing of payments under contracts, orders and other contractual obligations in the fulfillment of the provisions of the attached notice.

In consideration of the unique hardship that potentially could be imposed on the Department's small business contractors, invoices received from small businesses will be logged into the accounting system and processed for payment if approved by the appropriate Contracting Officer or approving official. However, Contracting Officer's and/or approving officials are cautioned to exercise due diligence in the review of such requests, prior to approval, to ensure a reasonable burden does indeed exist.

This transition also should not affect normal final contractor payment procedures for fixed price deliverables prior to their receipt and final acceptance by the Government.

Any financial questions regarding this policy are to be addressed to the points of contact in the attached notice. Procurement related questions may be addressed to Ms. Jackie Kniskern at (202) 287-1342 or the undersigned.

Michael P. Fischetti

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment

REQUEST FOR EARLY SUBMISSION OF INVOICES – GOODS OR SERVICES TO BE DELIVERED MARCH 2005

In April, the Department of Energy (DOE) will be converting to a new accounting system, the Standard Accounting and Reporting System (STARS). For that reason, DOE contractors and vendors are encouraged to submit invoices early for goods or services to be delivered in March so the invoices can be processed and paid by the end of the month.

For payment to be made by the end of March, invoices must be received by the Oak Ridge Financial Service Center no later than March 17, 2005. For goods, the invoices should separately identify actual quantities delivered and quantities expected to be delivered by March 31, 2005. For services, invoices should separately identify actual costs incurred at the time of billing and estimates of costs to be incurred over the balance of your March billing period.

Subsequent invoices submitted should separately identify any adjustments necessary to reconcile any discrepancies between estimates contained in March invoices with actual quantities delivered or costs incurred for the estimated period.

Those entities electing to not submit their March invoice early can expect the payment to be made during the month of May. Payments will be made in accordance with the terms of your contract or the Prompt Payment Act, including any appropriate late payment provisions.

DOE understands that this process may have the potential to impose financial hardship on some small businesses. Accordingly, DOE will be able to pay invoices during the month of April from small businesses that may be adversely affected.

We appreciate your cooperation in this matter, and look forward to your assistance in transitioning to our new accounting system. If you have any questions, please contact Penny Sharp at (865) 576-2226, Tim Southard at (865) 241-2059, or orfscmail@oro.doe.gov.

Sincerely,

Nancy J. Fitchpatrick
Contracting Officer

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-20

DATE: March 3, 2005

TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: New Financial Assistance Letters and Change to the DOE Special Terms and Conditions for Use in Most Grants and Cooperative Agreements.

SUMMARY: This Policy Flash distributes Financial Assistance Letters (FALs) No. 2005-01 "Financial Assistance Letters Remaining in Effect" and No. 2005-02 "Management of Report Deliverables," and provides a minor change to the DOE Special Terms and Conditions for Use in Most Grants and Cooperative Agreements.

POLICY FLASH 2005-20

FAL 2005–01 Financial Assistance Letters Remaining in Effect

This FAL lists the letters remaining in effect. It also identifies the letters that have been discontinued and explains why they are no longer in effect.

FAL 2005-02 Management of Report Deliverables

This FAL provides the same policy guidance provided in FAL 2001-04, except for technical updates (e.g., new regulatory cites, revised web sites, etc.). It also deletes requirements previously incorporated into the "DOE Special Terms and Conditions for Use in Most Grants and Cooperative Agreements" or the "Federal Assistance Reporting Checklist and Instructions" (DOE F 4600.2).

NOTICES OF CHANGES IN DOE-WIDE FINANCIAL ASSISTANCE DOCUMENTS

DOE Special Terms and Conditions for Use in Most Grants and Cooperative Agreements

The Consolidated Appropriations Act, 2005, Division C – Energy and Water Appropriations Act, does not contain the Purchase of American-Made Equipment and Products – Sense of Congress notice requirement that was included in previous Energy and Water Appropriations Acts. Therefore, the prescription for using this notice has been changed in the DOE Special Terms and Condition for Use in Most Grants and Cooperative Agreements. The "Notice Regarding the Purchase of American-Made Equipment and Products – Sense of Congress" provision is still required to be incorporated into financial assistance awards when funds made available under the Interior Act are obligated to the award since this provision was made permanent in the FY 2000 Interior and Related Agencies Act.

The DOE Special Terms and Conditions for use in Most Grants and Cooperative Agreements are maintained on the Applicant and Recipient page at http://grants.pr.doe.gov and the Professionals Home Page at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument. We have updated the DOE Special Terms and Conditions to reflect this change. Please use the version on the Web for any new awards.

Questions concerning this Policy Flash should be directed to Trudy Wood at (202) 287-1336.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachments

cc: FAAC

Department of Energy
Financial Assistance Regulation

No. 2005-01
Date 03/02/05

FINANCIAL ASSISTANCE LETTER

Financial Assistance Letters (FALs) that remain in effect are identified below. All other previously issued FALs have been superseded by a formal rulemaking, incorporated into other guidance, and/or canceled.

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Financial Assistance Letters Remaining in Effect

Number	Date	Subject
96-01	03/08/96	Implementation Guidance on Sections 3001 and 3002 of EPAct
96-02	08/01/96	Implementation Guidance on Section 2306 of EPAct
97-05	12/18/97	Merit Review/Lobbying *
2004-03	02/12/2004	Intellectual Property
2004-04	05/12/2004	OMB Circular A-133 Audits and the Federal Audit Clearinghouse *
2004-05	08/03/2004	Selecting the Appropriate Award Instrument *
2004-06	11/02/2004	Award Terms
2005-02	03/02/2005	Management of Report Deliverables *

Financial Assistance Letters Discontinued

2001-02	07/30/2001	Preservation of Open Competition and Government Neutrality Towards Contractor's Labor Relations on Federally Funded Construction Projects. This requirement has been incorporated into the DOE Special Terms and Conditions for Use in Most Grants and Cooperative Agreements.
2001-03	10/12/2001	Determining Appropriate Award Instrument. Cancelled by FAL 2004-05

2001-04	10/25/2001	Management of Report Deliverables. Cancelled by FAL 2005-02.
2003-03R	10/28/2003	Implementation of OMB Grant Management Policies. The new policies have been incorporated into the Department's financial assistance regulations and DOE announcement template on the Professionals Homepage. Contracting Officers/Program Officials must continue to use the DOE announcement template to issue program announcements of funding opportunities.
2004-02	02/12/2004	Implementation of FY 2004 Legislative Provisions. These provisions have been incorporated into the DOE Special Terms and Conditions for Use in Most Grants and Cooperative Agreements (See Professionals Home Page at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument for the current version of this document).

* The requirements in these Financial Assistance Letters will be incorporated into a new Financial Assistance Guide in the near future.

Department of Energy
Financial Assistance Regulation

No. 2005-02
Date 03/02/05

FINANCIAL ASSISTANCE LETTER

Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

SUBJECT: Management of Report Deliverables

What is the Purpose of this Financial Assistance Letter (FAL)?

This FAL provides Contracting Officers and other grants personnel guidance relating to the establishment and enforcement of reporting requirements.

How will this Change My Work Processes?

There is no major change to your work processes. This FAL provides the same guidance as that provided in FAL 2001-04, except it updates a few regulatory cites and web sites; deletes a notice and a grant award provision; and deletes the attachments. The standard DOE Special Terms and Conditions for Most Grants and Cooperative Agreements and the new Financial Assistance Reporting Checklist and Instructions (DOE F. 4600.2) attached to FAL 2004-06 include the requirements that have been deleted.

When is this FAL Effective?

This FAL is effective on the date of issuance. This FAL supersedes and cancels FAL 2001-04.

When does this FAL Expire?

This FAL remains in effect until incorporated into the new Financial Assistance Guide or until canceled.

Who is the Point of Contact?

Contact Trudy Wood of the Office of Procurement and Assistance Policy by telephone at (202) 287-1336 or by email at trudy.wood@hq.doe.gov.

Guidance Included in this Financial Assistance Letter

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I. PRE-AWARD ACTIONS

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II. POST AWARD ACTIONS

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B. What are the procedures for obtaining overdue reports? 6

C. When can the Contracting Officer waive a reporting requirement? 7

D. What other enforcement actions can be taken? 7

I. PRE-AWARD ACTIONS

A. What are the DOE Project Officer's responsibilities?

The DOE Project Officer is responsible for specifying the required management and scientific/technical reports on the Federal Assistance Reporting Checklist (DOE F 4600.2) and including this checklist in the Procurement Request Package. The DOE F 4600.2 form and instructions are available at the Professionals Home Page at http://professionals.pr.doe.gov/ma5/MA-web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument. The Project Officer and Contracting Officer should always use the DOE F 4600.2 form that is on the Professionals Home Page to ensure that the current version of the form and instructions are included in the award.

Project Officers should consider the scope, complexity, duration of the project, and program legislation, when establishing reporting requirements, and identify any special reporting requirements in the block, entitled "Special Instructions."

1. Research, Development, and Demonstration (RD&D), and Other Scientific/Technical Awards: RD&D and other scientific/technical awards should generally require periodic Progress Reports, Special Status Reports, and a final Scientific/Technical Report.

    a. Progress Reports: Progress Reports are management reports which provide information on project status. These reports are used by the DOE Project Officer to monitor the project and to provide early recognition of potential problem areas. These reports should not be sent to the Office of Scientific and Technical Information (OSTI), since any preliminary results may be incomplete or misleading. If the award requires a final Scientific/Technical Report, no Progress Report is required at the end of the final year. The frequency of these reports should be the minimum needed to monitor performance. Examples of reporting requirements for typical projects are:

        i. Basic research grants: Generally, these awards would require an annual Progress Report, a final Scientific/Technical Report, and Special Status Reports on an as needed basis.

        ii. Technology development grants: Generally, these awards would require an annual or semi-annual Progress Report, a final Scientific/Technical Report, and Special Status Reports on an as needed basis.

        iii. Large cooperative agreements: Generally, these awards would require quarterly Progress Reports, a final Scientific/Technical Report, and Special Status Reports on an as needed basis.

b. Scientific/Technical Reporting: Scientific/technical reports and products provide the results of scientific and technical studies, investigations that relate to research, development, demonstration, and other specialized areas such as environmental and health protection and waste management. These reports/products must be accompanied by the appropriate DOE Form 241, "Announcement of Department of Energy Scientific and Technical Information."

i. Generally, the DOE Project Officer would request only a final Scientific/Technical Report.

ii. While the DOE Project Officer may require a Scientific/Technical Report at the end of a phase, he/she should not require annual reports. Progress Reports provide sufficient information to monitor progress.

c. Special Status Reports: Special Status Reports provide notice of problems, delays, or adverse conditions which materially impair the recipient's ability to meet the objectives of the award or have a significant favorable impact on the project.

2. Non-R&D Awards: A Non-R&D award should generally require only periodic Progress Reports and Special Status Reports. A final Progress Report is usually sufficient to determine whether the objectives of a non-R&D project have been accomplished.

B. What are the Contracting Officer's responsibilities?

The DOE Contracting Officer is responsible for:

1. Incorporating an appropriate Federal Assistance Reporting Checklist (DOE F 4600.2) and instructions in the award. This includes:

a. Ensuring that the DOE Project Officer selected the minimum management and scientific/technical reports necessary to monitor progress and report results.

b. Specifying the financial reporting requirements.

c. Specifying closeout reporting requirements.

2. Assessing a prospective award recipient's past performance to determine whether the recipient has a history of poor programmatic performance, is financially unstable, has inadequate management systems, or has not complied with the terms of previous awards, including providing the required reports. To determine whether the recipient has submitted the required reports, Contracting Officers should review: (1) local report tracking systems to identify delinquent reports; (2) the Procurement and Assistance Data System to review overage closeout actions, and/or (3) the Department's E-Link. System to identify reports received.

a. If serious or numerous performance deficiencies are found, the Contracting Officer should deny the award, unless law, regulation, or evaluation/selection criteria dictate otherwise.

b. When denial of an award based on past performance is not deemed appropriate, the Contracting Officer should include special award conditions in the award (e.g., use a reimbursement payment method rather than advance funding and establish milestone payments associated with the progress of the work, or set aside a portion of the award funding until deliverables are received; require more frequent financial or progress reporting than otherwise required under the program as allowed by 10 CFR 600). (See 10 CFR 600.114, 600.212, and 600.304).

3. Negotiating other terms and conditions when a prospective recipient is unable to comply with the requirement to submit scientific/technical reports in a PDF format via the E-Link system (e.g., recipient may submit the report on a diskette or a CDROM or use one of the following acceptable formats: PDF image or regular (normal), TIFFG4, HTML, SGML, XML, Word, WordPerfect, and Postscript).

4. Until such time as the report is submitted, the recipient and the Contracting Officer may agree that the report can include proprietary data (limited rights data), classified information, or information subject to export control classification.

II. POST AWARD ACTIONS

A. Who is responsible for reviewing reports?

Generally, the DOE Project Officer is responsible for monitoring Progress Reports and Special Status Reports and the Contracting Officer is responsible for monitoring the receipt of other reports.

1. The Contracting Officer must ensure that these roles are clearly understood and that the DOE Project Officer understands his/her responsibilities for monitoring the receipt of reports and the required follow-up actions.

2. Contracting Officers and DOE Project Offers should keep each other informed if reports are not received.

3. Each Contracting Activity must establish procedures that ensure reports are received and that Scientific/Technical Reports are sent to OSTI. Contracting Activities are encouraged to send reminders to appropriate recipient officials a few weeks before a reporting period ends. This will prevent reporting delinquencies due to mere oversight on the part of the recipient and so reduce the need for follow-up action.

7. Additional Actions: The requirements of this section do not preclude additional actions, as explained in Paragraph, II.D.

C. When can the Contracting Officer waive a reporting requirement?

The only acceptable reasons for waiving an overdue report or setting a new due date are: (1) the report cannot be furnished in a timely manner for reasons legitimately beyond the control of the recipient; or (2) the purposes for which the report is to be used will be accomplished through other means. The recipient must be informed or reminded of this policy in the first letter sent when a report becomes overdue or in the notice of payment withholding.

D. What other enforcement actions can be taken?

In addition to the actions required by this FAL, other actions that may be appropriate should be considered, such as:

1. Converting to a reimbursement method of payment if the conditions are met for using this payment method. (See 10 CFR 600.122(n)).

2. Withholding any additional awards for the project or program (See 10 CFR 600.162, 600.243, and 600.352)

3 Making a site visit to determine whether the recipient is violating other terms of the award or performing an audit of the award.

4. Awarding no discretionary funds while the report is overdue for all or some of the other eligible projects of activities conducted by the recipient.

5. Consulting with the legal counsel to consider legal action for recovery of funds and other legal remedies that may be available.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-21

DATE: March 15, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **FY 2005 Procurement Related Legislative Provisions**

SUMMARY: This Flash transmits the new Acquisition Letter that provides implementing guidance on the below listed FY 2005 appropriation requirements:

- Sections 301, 304, 307, 312, 313, and 501 of the Energy and Water Development Appropriations Act, 2005, Pub. L 108-447, hereinafter referred to as the "Energy and Water Act."

- Sections 301, 302, 332, and an unnumbered administrative provision contained in the Department of Interior and Related Agencies Appropriations Act, 2005, Pub. L. 108-447, hereinafter referred to as the "Interior Act."

- Sections 807, 817, 818, and 821 of the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, hereinafter referred to as the "Defense Authorization Act."

The Flash and Acquisition Letter are posted at http://professionals.pr.doe.gov .

For questions related to this Acquisition Letter, contact the undersigned at (202) 287-1330 or via e-mail at Michael.Fischetti@hq.doe.gov .

Michael P. Fischetti

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment

Department of Energy
Assistance Regulation

No. AL-2005-02
Date 03/09/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA

Subject: **Implementation of Fiscal Year (FY) 2005 Legislative Provisions**

References:

DEAR 917.6	Management and Operating Contracts
DEAR 970.1706-1	Award, Renewal, and Extension

When is this Acquisition Letter (AL) Effective?

This AL implements certain provisions contained in the Consolidated Appropriations Act, 2005, Pub. L. 108-447. The Energy and Water Development Appropriations Act, 2005, Pub. L. 108-447 (Division C), and the Department of Interior and Related Agencies Appropriations Act, 2005, Pub. L. 108-447 (Division E), are contained in the Consolidated Appropriations Act. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, implements additional statutory provisions. The statutory provisions addressed in this AL are effective on the date of the enactment of these laws. The Energy and Water Development Appropriations Act, 2005, and the Department of Interior and Related Agencies Act, 2005, were enacted December 8, 2004, and the Ronald W. Reagan National Defense Authorization Act, 2005, was enacted October 28, 2004.

When Does This AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Denise Wright of the Office of Procurement and Assistance Policy at (202) 287-1340 or by email at denise.wright@hq.doe.gov.

Visit our website at www.pr.doe.gov for additional information on Acquisition Letters and other policy issues.

What is the Purpose of this Acquisition Letter?

The purpose of this Acquisition Letter (AL) is to provide information and guidance regarding the Department's implementation of the following statutory provisions and legislative direction.

- Sections 301, 304, 307, 312, 313, and 501 of the Energy and Water Development Appropriations Act, 2005, Pub. L 108-447, hereinafter referred to as the "Energy and Water Act."

- Sections 301, 302, 332, and an unnumbered administrative provision contained in the Department of Interior and Related Agencies Appropriations Act, 2005, Pub. L. 108-447, hereinafter referred to as the "Interior Act."

- Sections 807, 817, 818, and 821 of the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, hereinafter referred to as the "Defense Authorization Act."

Detailed guidance regarding the scope of these provisions is provided below.

What is the Background?

Sections 304, 307, and 501, of the Energy and Water Act are carried-over from the FY 2004 Energy and Water Development Appropriations Act, Pub. L. 108-137. Section 301 numbering remains consistent with previous Energy and Water appropriations legislation; however, Section 301 incorporates previous direction provided by Congress on the FY 2004 Energy and Water appropriations and previous direction provided by Congress regarding the extend/compete process for five Management and Operating (M&O) contracts. It also includes new direction regarding the use of competitive procedures for the award or significant extension or expansion of other M&O contracts and Secretarial notification to Congress in the absence of such competition. New to the Act this year are Sections 312 and 313, which discuss the breaking out of requirements from current facility management and operating contracts, among other things.

Sections 301, 302, 332, of the Interior Act and an unnumbered provision are carried-over from the FY 2004 Department of Interior and Related Agencies Appropriations Act (Pub. L. 108-108).

Sections 807, 817, 818, and 821 of the Ronald W. Reagan National Defense Authorization Act are acquisition related provisions with Government-wide applicability which requires implementation through the Federal Acquisition Regulation or other appropriate mechanism.

Guidance Included in this Acquisition Letter

I. Summaries of Statutory Provisions, Legislative Direction, and Statutory Impact 4

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* *

I. Summaries of Statutory Provisions, Legislative Direction, and Statutory Impact

Energy and Water Act

Section 301. Prohibits the use of funds appropriated by this Act, any other appropriations Act for FY 2005 or any previous year, to make payments for a noncompetitive management and operating (M&O) contract unless the Secretary of Energy publishes in the Federal Register and submits to the Committees on Appropriations of the House and Senate a written notice of the decision to use competitive procedures for the award of the contract, or not to renew the contract when the term of the contract expires.

This prohibition does not apply to an extension for up to 2 years of a noncompetitive M&O contract, if the extension is for purposes of allowing time to competitively award a new contract, provide continuity of service between contracts, or complete a contract that will not be renewed.

Note: The term "noncompetitive management and operating contract" means a contract that was awarded more than 50 years ago without competition for the management and operation of Ames Laboratory, Argonne National Laboratory, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, and Los Alamos National Laboratory.

The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition" as provided in Section 4 of the Office of Federal Procurement Policy Act (41 USC 403), including procedures described in Section 303 of the Federal Property and Administrative Services Act of 1949 (41 USC 253), a procedure that solicits a proposal from only one source.

For all M&O contracts other than the five identified Laboratory contracts, none of the funds appropriated by this Act may be used to award a M&O contract, or award a significant extension or expansion to an existing M&O contract, unless such contract is awarded using competitive procedures or the Secretary of Energy grants, on a case-by-case basis, a waiver to allow for such an award. The Secretary is directed not to delegate the authority to grant such a waiver. At least 60 days before a contract award for which the Secretary intends to grant a waiver, the Secretary shall submit to the Committees on Appropriations of the House of Representatives and the Senate a report notifying the Committees of the waiver and setting forth, in specificity, the substantive reasons why the Secretary believes the requirement for competition should be waived for the particular award.

Section 304. Prohibits the use of funds appropriated in the Energy and Water Act to prepare or initiate Request For Proposals (RFPs) for a program if Congress has not funded the program.

Section 307. Directs the Department of Energy to ensure that broad public notice be given when a user facility is made available to universities and other potential users or when the Department of Energy seeks input from universities and other potential users regarding significant characteristics or equipment in a user facility or a proposed user facility. In addition, this provision further requires the Department of Energy to employ "full and open competition" in selecting a university or other potential users as a formal partner in the establishment or operation of a user facility.

Section 312. Provides, in part, that appropriated funds may be used to establish any procurement action necessary to achieve DOE's small business contracting goals set forth in 15 USC 644(g), except that none of the funds may be used for procurement actions resulting from the break-out of requirements from current facility M&O contracts unless, consistent with the requirements of FAR 19.4, Cooperation with the Small Business Administration, the Secretary of Energy or his designee formally requests, considers, and renders an appropriate decision on the views of the SBA Breakout Procurement Center Representative or the Representative's designee concerning cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives of procurement actions at issue.

Section 313. Prohibits the use of funds appropriated by this Act to require M&O contractors to perform contract management oversight, or administration functions prohibited by FAR 7.503 in connection with any small business prime contract awarded by the Department.

Section 501. Prohibits the use of funds appropriated in the Act, either directly or indirectly, to influence congressional action on any legislation or appropriation matter pending before Congress, other than to communicate to Members of Congress as described in section 1913 of title 18, United States Code.

Interior Act

Section 301. Provides, with respect to funds appropriated under this Act, that any consulting service through procurement contract, pursuant to 5 U.S.C. 3109, be limited to those contracts where expenditures are a matter of public record and are available for public inspection, except where otherwise provided by existing law or Executive order pursuant to existing law.

Section 302. Prohibits the use of funds appropriated in this Act for any activity or the publication or distribution of literature to promote public support or opposition to any legislative proposal on which Congressional action is not complete.

Administrative Provision (unnumbered). Similar to Section 304 of the Energy and Water Act, this section of the Interior Act prohibits the use of funds appropriated in this Act to

prepare, issue, or process procurement documents for programs or projects for which appropriations have not been made.

Section 332. Limits DOE funding to $500,000 to initiate or continue competitive sourcing studies in fiscal year 2005 for programs, projects, and activities for which funds are appropriated by this Act or any other Act for Fiscal Year 2005, until such time as the Secretary submits a reprogramming proposal to the Committees on Appropriations of the Senate and the House of Representatives, and such proposal has been processed consistent with the reprogramming guidelines in House Report 108-330.

"Competitive sourcing study" is defined as a study on subjecting work performed by Federal Government employees or private contractors to public-private competition or on converting the Federal Government employees or the work performed by such employees to private contractor performance under the Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy.

Statutory Impact – Ronald Reagan Defense Authorization Act and Consolidated Appropriations Act

The Ronald Reagan Defense Authorization Act and the Consolidated Appropriations Act also contain acquisition related provisions that require uniform Government-wide implementation. These requirements will be addressed through the Federal Acquisition Rulemaking process and supplemented by DOE as appropriate. When additional information is warranted, further guidance will be provided.

II. Competitive Procedures

What is the scope of this requirement?

Section 301 of the Energy and Water Act establishes various requirements that apply to five (Ames Laboratory, Argonne National Laboratory, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, and Los Alamos National Laboratory) Federally Funded Research and Development Centers (FFRDC) managed by M&O contractors and to other procurement actions where funds may be used to award a M&O contract, or award a significant extension or expansion to an existing M&O contract.

This affects new M&O contracts, amendments, and modifications that extend existing M&O contracts beyond the term provided for in the contract (except as noted below) and that are awarded using funds appropriated in this Act without providing for full and open competition in accordance with the policies and procedures set forth at DEAR 917.602(b) and FAR Subpart 6.3. Section 301 and the guidance set forth herein do not apply to the exercise of an option in accordance with DEAR 970.1706-1.

What procedures need to be followed to implement this requirement?

The existing policy and procedure regarding the extend/compete process, specifically AL 96-09, remains unchanged and continues to affect all M&O contracts. The justification and Secretarial authorization required by DEAR 917.602(c) satisfy Section 301(c) of the Energy and Water Act for M&O contracts, other than the five FFRDC contracts specifically identified in Section 301(b)(1).

III. Preparation and Issuance of Procurement Documents for Unfunded Programs

What is the scope of this requirement?

The requirement of Section 304 of the Energy and Water Act and the unnumbered administrative provision contained in the Interior Act apply to Departmental initiatives for a program or project that has not been funded by Congress:

- Section 304 of the Energy and Water Act requires that funds appropriated by the Act shall not be used to prepare or initiate RFPs for a program if the program has not been funded by Congress.

- The unnumbered administrative provision of the Interior Act prohibits the use of funds to prepare, issue, or process procurement documents for programs or projects for which appropriations have not been made.

What procedures need to be followed to implement this requirement?

- For programs funded by the Energy and Water Act, contracting activities shall not prepare or initiate RFPs, in support of a program or project for which funds have not been appropriated.

- For programs funded by the Interior Act, contracting activities shall not prepare, issue, or process procurement documents in support of a program or project for which funds have not been appropriated.

Energy and Water Act (Programs)

Energy Supply
Non-Defense Environmental Management
Uranium Facilities Maintenance and Remediation
Science
Nuclear Waste Disposal
Departmental Administration
Office of Inspector General
Power Marketing Administrations
Federal Energy Regulatory Commission
National Nuclear Security Administration
Defense Environmental Management

Energy and Water Act (Programs cont.)

Defense Nuclear Waste Disposal
Energy Security and Assurance
Security
Intelligence
Counterintelligence
Independent Oversight and Performance Assurance
Environmental, Safety and Health
Worker and Community Transition
Hearing and Appeals

Interior Act (Programs)

Naval Petroleum and Oil Shale Reserves
Elk Hills School Lands Fund
Strategic Petroleum Reserve
Clean Coal Technology
Economic Regulation
Energy Information Administration
Energy Conservation
Fossil Energy Research & Development

IV. User Facilities

What is the scope of this requirement?

There are three circumstances under which Departmental processes are affected by Section 307:

- The first circumstance is where the Department or its management and operating (M&O) contractor makes a user facility available to universities and other potential users;

- The second is where the Department seeks advice or information from universities or other potential users on the significant characteristics or equipment to be used in a user facility or a proposed user facility; and

- The third instance is where the Department seeks to create a formal partnership with a university or other potential user for the establishment or operation of a user facility. This can occur in two ways: (1) the Department seeks to enter into a formal partnership with a private party to establish or operate a user facility; or (2) a DOE contractor responsible for the management and operation of a DOE user facility seeks

to enter into a formal partnership with a university or other potential user to establish or operate a user facility.

Note: Normally, neither DOE nor its M&O contractors enter into formal partnerships for the management or operation of DOE user facilities. Rather, the operation of these facilities is accomplished under contractual service arrangements, which do not contain legal indicia of a formal partnership. Accordingly, it is not anticipated that this circumstance will arise.

What procedures need to be followed to implement this requirement?

In the first two circumstances as noted on the previous page, DOE should assure that the activities are conducted in a manner that promotes broad participation by all potential scientific and technical users of the facility. The DOE or contractor program element with responsibility for a user facility should ensure that broad public notice of these two activities is provided through publication in the Federal Register or FedBizOpps, in addition to relevant scientific journals.

The third circumstance requires that any formal partnership between DOE, its M&O contractor, and a private party for the establishment or operation of a user facility be accomplished through a selection process based on "full and open competition".

Contracting officers should assure that, in the unlikely event that DOE or its M&O contractor seeks to establish a formal partnership for the establishment or operation of a user facility, the competition requirements conform to this AL.

V. Achieving Small Business Contracting Goals

What is the scope of this requirement?

Section 312 of the Energy and Water Act provides that funds appropriated by the Act may not be used for the break-out of requirements from current M&O contracts unless, consistent with the requirements of FAR 19.4, Cooperation with the Small Business Administration (SBA), the Secretary of Energy or his designee formally requests, considers, and renders an appropriate decision on the views of the SBA Break-out Procurement Center Representative or designee concerning "cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives of procurement actions at issue."

For DOE, there are two instances when a break-out requirement may occur. The requirement may arise either as a result of a determination by the Advance Planning Acquisition Team (APAT) or the contracting officer in the review of a particular acquisition. While the APAT does not apply to NNSA (see AL 2004-3), the breakout requirement may occur in NNSA as a result of a determination by the contracting officer in the review of a particular acquisition. The Director of the Office of Small Disadvantage Business Utilization (OSDBU) is the Department of Energy designated point of contact for obtaining the views of the SBA representative and rendering an appropriate decision. For NNSA, the Service Center Small Business Program Manager (SCSBPM) is the POC and the Head of Contracting Activity (HCA) of NNSA will render the decision.

What procedures need to be followed to implement this requirement?

- DOE contracting officers, prior to the use of appropriated funds for the intended break-out of work under an M&O contract, shall contact the Director of the Office of Small Disadvantage Business Utilization (OSDBU) for a decision on the views of the SBA Representative. The OSDBU will obtain the views of the designated SBA representative with respect to "cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives," and render an opinion on the views of the SBA representative to the contracting officer.

- NNSA contracting officers, prior to the use of appropriated funds for the intended break-out of work under an M&O contract, shall contact the SCSBPM to obtain the views of the SBA Representative with respect to "cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives," and forward a recommendation on the views of the SBA representative, coordinated through OSDBU, for approval by the NNSA HCA, prior to rendering the approval decision to the contracting officer.

- When determined by the APAT that an opportunity to break-out procurement requirements exists, the contracting officer shall be notified by the Director of the OSDBU on the views of the SBA Representative. The Director, OSDBU, should consider the views of the SBA Representative with respect to the elements identified in statute and render a decision as a result of that analysis. The views of the SBA

Representative and the OSDBU decision should be forwarded to the contracting officer and made part of the contract file.

VI. Limitation on Contract Management by M&O Contractors

What is the scope of this requirement?

Section 313 provides that DOE is prohibited from using funds under the Energy and Water Act to require M&O contractors to perform inherently governmental functions, as identified in FAR 7.503. FAR 7.503 specifically identifies inherently governmental functions to include, among other things, the following procurement activities with respect to federal prime contracts:

(1) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(2) Participating as a voting member on any source selection boards;

(3) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;

(4) Awarding contracts;

(5) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

(6) Terminating contracts;

(7) Determining whether contract costs are reasonable, allocable, and allowable; and reasonable;

(8) Participating as a voting member on performance evaluation boards.

Note: FAR 7.503(d) contains a list of functions which are examples of actions not generally considered inherently governmental functions, as it relates to contract management, oversight, or administration on contracts awarded by DOE where the M&O contractor is performing work.

What procedures need to be followed to implement this requirement?

- Contracting Officers shall ensure that the contracting officer's representative (COR) and contracting officer (CO) functions do not cause the M&O contractor to perform inherently governmental functions as part of any DOE contract.

- Contracting Officers shall ensure that the Acquisition Strategy that is developed for a procurement action fully describes the Government's management approach so as to ensure successful completion of work under a particular program or project without the risk of contractor performance of inherently governmental functions.

VII. Lobbying Restrictions

What is the scope of this requirement?

Section 501 of the Energy and Water Act and Section 302 of the Interior Act apply, respectively, to all solicitations and awards of DOE contracts under which funds appropriated in these Acts are obligated.

What procedures need to be followed to implement this requirement?

The following clause shall be incorporated into solicitations and awards of contracts where the expenditure of funds is made available under the Energy and Water Act:

Lobbying Restriction (Energy and Water Act 2005)

The contractor agrees that none of the funds obligated on this award shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.

(End of Clause)

The following clause shall be incorporated into solicitations and awards of DOE contracts where the expenditure of funds is made available in the Interior Act:

Lobbying Restriction (Interior Act 2005)

The contractor agrees that none of the funds obligated on this award shall be made available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete. This restriction is in addition to those prescribed elsewhere in statute and regulation.

(End of Clause)

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-22

DATE: March 11, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Information on the National Industries for the Blind**

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) is an independent Federal agency that administers and promotes the Javits-Wagner-O'Day (JWOD) program through the National Industries for the Blind (NIB) and NISH (serving people with a wide range of severe disabilities). NIB

and NISH are the two private, nonprofit agencies designated by the Committee to provide assistance to qualified nonprofit agencies that employ people who are blind, or have other severe disabilities, on Federal contracts.

NIB now offers their services on a commercial basis through GSA's Multiple Award Schedules program, Contract Number GS-00F-0032P. A list of services available follows:

- Logistics support services
- Document and records management services
- Mailing and distribution services
- IT facility operation and maintenance services
- Office, imaging and document solution services
    - Needs assessment and analysis services
    - Education and training support services
    - Records management services
    - Document production on-site and off-site services
    - Document conversion services
    - Network connectivity support services
    - Mailroom management services
    - List management services, including data entry and address label printing
    - Mailroom ergonomic analysis services
    - Mail screening and inspection services
- IT services, including resources and facilities management, database planning analysis, network services, programming, data and records management, and subscription/publication electronic media services
- Supply and value chain management
- Logistics services (LOGWORLD Schedule)

By consolidating the demand and purchasing power of the Federal government, NIB and its associated agencies supply Federal markets with over 3,000 qualified products and services, manufactured and provided by almost 5,000 people who are blind, at more than 80 associated agencies across the nation, paying over $60 million per year in wages and benefits, operating in over 100 base supply centers (including DOE Headquarters office supply stores), and delivering millions of dollars in products and services to Federal, state and commercial customers.

NIB and the JWOD Program are considered a model Federal program, encouraging public/private partnerships by offering customers high quality supplies and services, on-time delivery, reasonable prices, reduced paperwork, incidental pre and post-award costs, central points of contact for problem resolution and, as a desirable social by-product, reduced disability payments and increased tax revenues.

The Department encourages maximizing contracting opportunities to NIB and NISH. Should you have any questions regarding NIB and the GSA Schedules program, please contact Mr. Jeffrey Rubenstein in the Office of Headquarters Procurement Services (ME-64) at (202) 287-1516.

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment

NATIONAL INDUSTRIES FOR THE BLIND

1901 N. Beauregard Street, Suite 200, Alexandria, VA 22311-1727
703/998-0770 http://www.nib.org

February 9, 2005

Dear Ms. Speake,

People who are blind remain one of America's greatest untapped labor resources, with nearly 70 percent of working age adults not employed. National Industries for the Blind (NIB) is committed to providing employment opportunities for Americans who are blind by providing quality solutions to our Federal customers.

For many years, NIB services have been available for procurement through the Javits-Wagner-O'Day (JWOD) program. I am now pleased to announce that we can offer the same reliable, high quality, cost effective services on a commercial basis through the GSA Multiple Award Schedules program. With services in the areas of tele-services; document solutions; and warehousing/distribution available on the GSA Schedule (#GS-00F-0032P), NIB is now able to better meet the needs of our Federal customers.

I ask for your support in communicating this new offering to your agency's program and contracting officers and in encouraging them to choose NIB services as a procurement solution.

We would be happy to provide more information about how NIB can meet your procurement needs. Please contact Peggy Newman, Director of Services, at 703-578-6550. Thank you for considering NIB as your quality services provider.

Sincerely,

J.A. Mangual
Chief Operating Officer

NATIONAL INDUSTRIES FOR THE BLIND

1901 N. Beauregard Street, Suite 200, Alexandria, VA 22311-1727
703/998-0770 http://www.nib.org

February 9, 2005

Dear Mr. Carnes,

People who are blind remain one of America's greatest untapped labor resources, with nearly 70 percent of working age adults not employed. National Industries for the Blind (NIB) is committed to providing employment opportunities for Americans who are blind by providing quality solutions to our Federal customers.

For many years, NIB services have been available for procurement through the Javits-Wagner-O'Day (JWOD) program. I am now pleased to announce that we can offer the same reliable, high quality, cost effective services on a commercial basis through the GSA Multiple Award Schedules program. With services in the areas of tele-services; document solutions; and warehousing/distribution available on the GSA Schedule (#GS-00F-0032P), NIB is now able to better meet the needs of our Federal customers.

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We would be happy to provide more information about how NIB can meet your procurement needs. Please contact Peggy Newman, Director of Services, at 703-578-6550. Thank you for considering NIB as your quality services provider.

Sincerely,

J.A. Mangual
Chief Operating Officer

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-23

DATE: March 11, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letter 2005-06, Small Business Procurement Goals**

SUMMARY: This Policy Flash forwards information on establishing, and reporting against, contract goals for small business concerns at the prime and subcontract levels. The Department of Energy remains committed to increasing awards to small and small disadvantaged businesses in both prime contracting and subcontracting. To ensure

that the percentages of both prime and subcontracting awards to small business are accurately reported, it is necessary to correctly identify the bases against which contracting and subcontracting goals are measured.

Establishing the bases for small business goals for awards to prime contractors shall comply with the SBA's "Goaling Guidelines for Small Business Preference Programs for Prime and Subcontractor Federal Procurement Goals & Achievements " (http://www.sba.gov/GC/goals/ggtotal71503.pdf).

The procedures to be used by prime contractors for establishing subcontracting goals and specific requirements for subcontracting plans are established in FAR 19.704, Subcontracting plan requirements (http://www.arnet.gov/far/loadmainre.html). The only two exclusions from the subcontracting goaling base are currently listed on the Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report. These exclusions are (1) subcontracts involving performance outside the U.S. or its outlying areas and (2) purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor. Contracting Officers shall ensure that prime contractors are aware of these procedures and do not apply additional exclusions when developing their subcontracting base.

Any questions regarding this information may be directed to Stephen Zvolensky at (202) 287-1307

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-24

DATE: March 18, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Information Technology Contracts Inventory

SUMMARY: As you may be aware, the Department is in the process of completing an Information Technology Competitive Sourcing Study. As part of that study, the Office of the Chief Information Officer has completed an Information Technology Contract Vehicle Inventory. They are now

requesting your assistance in verifying the accuracy of their inventory, by providing information for your contracting activity. The inventory is to include all information technology related contracts, i.e. hardware, software, or related support services. You are asked to insert the expiration date for each contract in the last column of the inventory worksheet. You are also asked to furnish a listing of any contracts missing from the inventory by completing the input worksheet. The Chief Information Officer contact person is Robert Wilson, Robert.Wilson@hq.doe.gov at 301-903-4604. This information is required by April 1, 2005.

As background and to assist in responding to this request we are forwarding five attachments. They are:

1. March 15, 2005 Memorandum, Subject: Information Technology Contracting activities from the NNSA and DOE Procurement Executives.
2. March 26, 2004 Memorandum, Subject: Single Integrated IT Infrastructure for the Department from the Under Secretary
3. October 5, 2004 Memorandum, Subject: IT A-76 Transition Planning and Implementation from the Chief Information Officer
4. IT Inventory — This is an Excel Program file containing 2 worksheets. The first is the actual IT Contract inventory. The second is an input sheet for any contracts which may be missing from the inventory. You must be in Excel for it to function correctly
5. Directions.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy
Office of Procurement and
Assistance Management

Attachments

cc:
Robert Wilson, IM-12

Department of Energy
Washington, DC 20585

October 5, 2004

MEMORANDUM FOR DISTRIBUTION

FROM: ROSITA O. PARKES
CHIEF INFORMATION OFFICER

SUBJECT: IT A-76 Transition Planning and Implementation

The Department-wide A-76 Information Technology (IT) Competitive Sourcing Study is moving into the final phases. As you know, the request for proposal (RFP) was released in mid-August. I would like to take this opportunity to inform you of future activities related to the remaining aspects of the process.

Responses to the RFP are due in November 2004. Upon receiving the responses, a dedicated Department-wide team will carefully evaluate all submissions. A targeted award date has been set for the third quarter of fiscal year 2005. As we approach that critical milestone, several important activities will need to be accomplished by the Department-wide IT community, and I am soliciting your support to this end.

The competitive sourcing study has provided the entire Department with a unique opportunity to reaffirm it's commitment to strengthened IT policies and practices. As we move forward, it is imperative to implement various policies, plans, and activities related to IT organizational realignment and the acquisition of IT support services. This will promote an effective transition to the service provider, and forward improved IT performance across the Department. Be assured that your organization will be involved in and kept abreast of all such activities.

To help ensure the Department-wide IT community is properly aligned for the overall transition, we will continue to work with your A-76 points-of-contact (POC) to facilitate the activities as referenced above, and in the future, may request additional specialists to assist in the implementation effort. Please review the attached list of POCs and email any updates or changes for your organization to Mr. Kevin Cooke of my staff at Kevin.cooke@hq.doe.gov.

I would like to thank you for your continued support throughout this entire process. Should you have any questions regarding these matters, please do not hesitate to contact me on 202-586-0166.

Attachment

Printed with soy ink on recycled paper

The Deputy Secretary of Energy
Washington, DC 20585

MAR 26 2004

MEMORANDUM FOR DISTRIBUTION

FROM: KYLE E. MCSLARROW

SUBJECT: A Single Integrated IT Infrastructure for the Department

The Department has made great progress in achieving efficiencies and economies of scale in working the President's Management Agenda (PMA) initiatives, and I thank you for your efforts thus far. There is, however, still work to be done. Early on we recognized an opportunity to reduce our operational costs and increase security by moving to a single, integrated information technology (IT) infrastructure. This model is common practice in both private industry and in agencies across the federal government. In this context, the DOE infrastructure incorporates utility-like functions (networks, desk-top computing, help desk and support) that are similar across all components.

This memorandum clarifies and reconfirms my commitment to a single, integrated IT infrastructure across DOE. The question is not whether we will do this, but rather how we will accomplish it. Standardizing and consolidating like functions to achieve efficiencies is at the core of both OMB and DOE-sponsored e-Government initiatives. This objective affects two PMA initiatives currently underway, the Extended Common Integrated Technology Environment (eXCITE), an internal DOE e-Government initiative, and the Department-wide IT Competitive Sourcing Study.

I have directed the Chief Information Officer to continue eXCITE implementation, which will provide standard desktop, e-mail, and related services to Headquarters Program Offices.

I have also asked her to meet with each of you, as necessary, to review the concept of operations as developed for the IT Competitive Sourcing Study. The scope of the IT study addresses the full range of services that support a single, integrated infrastructure. The study does not address corporate business systems like I-MANAGE or mission-specific systems that ride over the infrastructure. Management of corporate business and mission-specific systems will remain with the Program Offices.

Further, I have asked the CIO to accommodate your specific requirements to the fullest extent possible and to make every effort to integrate and leverage efficiencies already achieved. Please contact her directly with any questions you may have and to coordinate planning and implementation efforts.

DISTRIBUTION

Deputy Secretary
Associate Deputy Secretary
Under Secretary for National Nuclear Security Administration
Under Secretary for Energy, Science and Environment
Executive Director, Secretary of Energy Advisory Board
Department Representative to the Defense Nuclear Facilities Safety Board
Assistant Secretary for Congressional and Intergovernmental Affairs
Assistant Secretary for Energy Efficiency and Renewable Energy
Assistant Secretary for Environment, Safety and Health
Assistant Secretary for Environmental Management
Assistant Secretary for Fossil Energy
Assistant Secretary for Policy and International Affairs
Chief Information Officer
Director, Office of Energy Assurance
General Counsel
Inspector General
Director, Office of Counterintelligence
Director, Office of Economic Impact and Diversity
Director, Office of Hearing and Appeals
Director, Office of Security and Safety Performance Assurance
Office of Intelligence
Director, Office of Management, Budget and Evaluation/ Chief Financial Officer
Director, Office of Public Affairs
Director, Office of Nuclear Energy, Science and Technology
Director, Office of Science
Director, Office of Worker and Community Transition
Director, Office of Civilian Radioactive Waste Management
Director, Office of Security
Director, Legacy Management
Administrator, Energy Information Administration
Administrator, Bonneville Power Marketing Administration
Administrator, Southeastern Power Administration
Administrator, Southwestern Power Administration
Administrator, Western Area Power Administration

ATTACHMENT 2

Department of Energy
Washington, DC 20585

October 5, 2004

MEMORANDUM FOR DISTRIBUTION

FROM: ROSITA O. PARKES Rosita O. Parkes
CHIEF INFORMATION OFFICER

SUBJECT: IT A-76 Transition Planning and Implementation

The Department-wide A-76 Information Technology (IT) Competitive Sourcing Study is moving into the final phases. As you know, the request for proposal (RFP) was released in mid-August. I would like to take this opportunity to inform you of future activities related to the remaining aspects of the process.

Responses to the RFP are due in November 2004. Upon receiving the responses, a dedicated Department-wide team will carefully evaluate all submissions. A targeted award date has been set for the third quarter of fiscal year 2005. As we approach that critical milestone, several important activities will need to be accomplished by the Department-wide IT community, and I am soliciting your support to this end.

The competitive sourcing study has provided the entire Department with a unique opportunity to reaffirm it's commitment to strengthened IT policies and practices. As we move forward, it is imperative to implement various policies, plans, and activities related to IT organizational realignment and the acquisition of IT support services. This will promote an effective transition to the service provider, and forward improved IT performance across the Department. Be assured that your organization will be involved in and kept abreast of all such activities.

To help ensure the Department-wide IT community is properly aligned for the overall transition, we will continue to work with your A-76 points-of-contact (POC) to facilitate the activities as referenced above, and in the future, may request additional specialists to assist in the implementation effort. Please review the attached list of POCs and email any updates or changes for your organization to Mr. Kevin Cooke of my staff at Kevin.cooke@hq.doe.gov.

I would like to thank you for your continued support throughout this entire process. Should you have any questions regarding these matters, please do not hesitate to contact me on 202-586-0166.

Attachment

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ATTACHMENT 3 Worksheet 2

Current IT and Support Services Contracts

				Contract Lifecycle											
				Base Period		Option 1		Option 2		Option 3		Option 4		Option 5	
Site	Office Name	Award BIN	Awardee Name	Start Date	End Date	Start Date	End Date	Start Date	End Date	Start Date	End Date	Start Date	End Date	Start Date	End Date

Department of Energy
Washington, DC 20585

MAR 1 5 2005

MEMORANDUM FOR DISTRIBUTION

FROM: RICHARD H. HOPF, DIRECTOR
OFFICE OF PROCUREMENT AND
ASSISTANCE MANAGEMENT

ROBERT C. BRADEN, DIRECTOR
OFFICE OF ACQUISITION AND
SUPPLY MANAGEMENT

SUBJECT: Department-wide Information Technology Contracting Activities

This memorandum is issued in accordance with the Deputy Secretary's memorandum of March 26, 2004 (Attachment 1) regarding the Department of Energy's (DOE's) commitment to a single Department-wide Information Technology (IT) infrastructure, and to continue to identify opportunities for reducing cost, maximizing efficiencies and improving the Department's cyber security posture.

The Department's ability to achieve these objectives will be facilitated, in part, through the implementation of the Information Technology Competitive Sourcing Study (Attachment 2) which is currently being conducted by the Office of the Chief Information Officer. The performance decision resulting from this study is projected for June 2005. All Departmental entities (except major site and facility management contractors) will be required to transition certain IT infrastructure and related services to the IT competitive sourcing performance solution following that award. The target date for completion of this transition is December 31, 2005. To facilitate required transition activities, all current IT and IT support service contracts must be reviewed to develop necessary and appropriate transition strategies, as well as to further identify opportunities to realize benefits from enhancing our current IT environment while also respecting individual program's IT related mission requirements.

To this end, it is imperative that data pertaining to all existing procurement vehicles for IT and IT support services be accurate and complete. A list of all current IT procurement instruments is contained in Attachment 3. All DOE IT services, including support services, which are not provided as part of a site or facility management contract must be included in your survey response. Please review the information in Attachment 3 and revise or update as appropriate. You are also requested to identify any other procurement vehicles for IT or IT services that are not included in Attachment 3.

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Please provide your response to Mr. Robert Wilson by **April 1, 2005** at robert.wilson@hq.doe.gov. Subsequently, we will work with your office to determine the specific areas and timetable for contract transition. The transition strategy will be consistent with the published DOE Information Technology Support Services Competitive Sourcing Study performance work statement and the Department-wide single consolidated infrastructure initiative.

Additional guidance and/or policies regarding the IT Competitive Sourcing Study is forthcoming. If you have any questions, please contact Mr. Robert Wilson, Office of the Chief Information Officer, on (301) 903-4604.

Attachments

DISTRIBUTION

Aundra M. Richards, Director, Contracts Division Oakland Operations Office
Jerry Zimmer, Director, Office of Acquisition & Financial Assistance Golden Field Office
Charles Dan, Director, Contracts Management Division Rocky Flats Field Office
John Bashista, Director, Office of Headquarters Procurement Services
Mike Adams, Acting Director, Contracts Management Division Idaho Operations Office
John Greenwood, Manager, Acquisition & Assistance Group Chicago Operations Office
Gary C. Landry, Director, Acquisition & Sales Division Strategic Petroleum Reserves
Donald J. Garcia, Director, Contracts & Procurement Division Albuquerque Operations Office
Stanley Colt, Acting Procurement Director, Carlsbad Field Office
Melody Bell, Director, Contracts Management Division Nevada Operations Office
Birdie V. Hamilton-Ray, Director, Contracts Management Division Office of Civilian Radioactive Waste Management
Mona Snyder, Director, Contracts Ohio Field Office
Michael Allison, Director, Contracts Management Division Savannah River Operations Office
Charles Crowe, Director, Procurement & Contracts Division Oak Ridge Operations Office
Anthony E. Lorenz, Director, Procurement Division Richland Operations Office
Dale Siciliano, Procurement Director National Energy Technology Laboratory

cc:
Deputy Secretary
Associate Deputy Secretary
Under Secretary for Energy, Science and Environment
- Assistant Secretary for Energy Efficiency and Renewable Energy
- Assistant Secretary for Environmental Management
- Assistant Secretary for Environment, Safety and Health
- Assistant Secretary for Fossil Energy
- Director, Office of Civilian Radioactive Waste Management
- Director, Office of Electric Transmission and Distribution
- Director, Office of Legacy Management
- Director, Office of Nuclear Energy, Science and Technology
- Director, Office of Science

Under Secretary for National Nuclear Security Administration
Executive Director, Secretary of Energy Advisory Board
Department Representative to the Defense Nuclear Facilities Safety Board
Assistant Secretary for Congressional and Intergovernmental Affairs
Assistant Secretary for Policy and International Affairs
Chief Information Officer
Administrator, Energy Information Administration
General Counsel

Inspector General
Director, Office of Counterintelligence
Director, Office of Economic Impact and Diversity
Director, Office of Energy Assurance
Director, Office of Hearing and Appeals
Director, Office of Independent Oversight and Performance Assurance
Director, Office of Intelligence
Director, Office of Management, Budget and Evaluation/ Chief Financial Officer
Director, Office of Public Affairs
Director, Office of Security and Safety Performance Assurance

OPERATIONS OFFICES
Chicago Operations Office
Idaho Operations Office
Oak Ridge Operations Office
Richland Operations Office
Savannah River Operations Office

FIELD OFFICES
Carlsbad Field Office
Golden Field Office
Ohio Field Office
Rocky Flats Field Office

ATTACHMENT 1

The Deputy Secretary of Energy
Washington, DC 20585

MAR 26 2004

MEMORANDUM FOR DISTRIBUTION

FROM: KYLE E. MCSLARROW

SUBJECT A Single Integrated IT Infrastructure for the Department

The Department has made great progress in achieving efficiencies and economies of scale in working the President's Management Agenda (PMA) initiatives, and I thank you for your efforts thus far. There is, however, still work to be done. Early on we recognized an opportunity to reduce our operational costs and increase security by moving to a single, integrated information technology (IT) infrastructure. This model is common practice in both private industry and in agencies across the federal government. In this context, the DOE infrastructure incorporates utility-like functions (networks, desk-top computing, help desk and support) that are similar across all components.

This memorandum clarifies and reconfirms my commitment to a single, integrated IT infrastructure across DOE. The question is not whether we will do this, but rather how we will accomplish it. Standardizing and consolidating like functions to achieve efficiencies is at the core of both OMB and DOE-sponsored e-Government initiatives. This objective affects two PMA initiatives currently underway, the Extended Common Integrated Technology Environment (eXCITE), an internal DOE e-Government initiative, and the Department-wide IT Competitive Sourcing Study.

I have directed the Chief Information Officer to continue eXCITE implementation, which will provide standard desktop, e-mail, and related services to Headquarters Program Offices.

I have also asked her to meet with each of you, as necessary, to review the concept of operations as developed for the IT Competitive Sourcing Study. The scope of the IT study addresses the full range of services that support a single, integrated infrastructure. The study does not address corporate business systems like I-MANAGE or mission-specific systems that ride over the infrastructure. Management of corporate business and mission-specific systems will remain with the Program Offices.

Further, I have asked the CIO to accommodate your specific requirements to the fullest extent possible and to make every effort to integrate and leverage efficiencies already achieved. Please contact her directly with any questions you may have and to coordinate planning and implementation efforts.

DISTRIBUTION

Deputy Secretary
Associate Deputy Secretary
Under Secretary for National Nuclear Security Administration
Under Secretary for Energy, Science and Environment
Executive Director, Secretary of Energy Advisory Board
Department Representative to the Defense Nuclear Facilities Safety Board
Assistant Secretary for Congressional and Intergovernmental Affairs
Assistant Secretary for Energy Efficiency and Renewable Energy
Assistant Secretary for Environment, Safety and Health
Assistant Secretary for Environmental Management
Assistant Secretary for Fossil Energy
Assistant Secretary for Policy and International Affairs
Chief Information Officer
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Director, Office of Civilian Radioactive Waste Management
Director, Office of Security
Director, Legacy Management
Administrator, Energy Information Administration
Administrator, Bonneville Power Marketing Administration
Administrator, Southeastern Power Administration
Administrator, Southwestern Power Administration
Administrator, Western Area Power Administration

ATTACHEMENT 3 Worksheet 1

Site		Office Name	Award BIN	Awardee Name	Expiration Date
HEADQUARTERS					
Headquarters Procurement Operations	AD	OFC OF ADMIN & HUMAN RES MGT	AC01-99AD38144	LOGISTICS APPLICATIONS INC	
	AD	OFC OF ADMIN & HUMAN RES MGT	AD01-99AD74080	BELL ATLANTIC NYNEX	
	AD	OFC OF ADMIN & HUMAN RES MGT	AD01-99AD74083	MOBILECOMM	
Headquarters Procurement Operations	CN	OFFICE OF COUNTERINTELLIGENCE	AD01-03CN70039	DOCUMENTUM, INC	
	EA	OFFICE OF ENERGY ASSURANCE	AC01-03EA02007	GENSCAPE INC	
	EE	ASST SEC FOR ENERGY EFF AND RENEW ENERGY	AF01-03EE27638	INNOVATIVE WEB APPLICATIONS	
	EI	ENERGY INFORMATION ADMINISTRATION	AC01-87EI19800	SCIENCE APPLICATIONS INTL CORP	
	EI	ENERGY INFORMATION ADMINISTRATION	AC01-00EI35800	STANDARD & POOR'S DRI	
	EI	ENERGY INFORMATION ADMINISTRATION	AC01-00EI36873	STANDARD & POOR'S DRI	
	EI	ENERGY INFORMATION ADMINISTRATION	AC01-01EI37263	DRI WEFA INC	
	EI	ENERGY INFORMATION ADMINISTRATION	AT01-01EI37444	INFO ENGINEERING CONSORTIUM	
	EI	ENERGY INFORMATION ADMINISTRATION	AF01-03EI37607	NRG ASSOC	
	EI	ENERGY INFORMATION ADMINISTRATION	AC01-03EI37666	PETROLEUM INFORMATION/DWIGHTS LLC	
	EI	ENERGY INFORMATION ADMINISTRATION	AP01-03EI37716	IKON OFFICE SOLUTIONS	
	EI	ENERGY INFORMATION ADMINISTRATION	AP01-03EI37865	LADY DR GEORGE M	
	EI	ENERGY INFORMATION ADMINISTRATION	AT01-01EI85001	ACTIONET INC	
	EI	ENERGY INFORMATION ADMINISTRATION	AT01-02EI85381	ACTIONET INC	
	EI	ENERGY INFORMATION ADMINISTRATION	AD01-03EI85539	EXECUTIVE INFORMATION SYS LLC	
	EI	ENERGY INFORMATION ADMINISTRATION	AC01-03EI85585	RS INFORMATION SYSTEMS INC	
	EI	ENERGY INFORMATION ADMINISTRATION	AD01-03EI85641	EXECUTIVE INFORMATION SYSTEMS, LLC	
	EI	ENERGY INFORMATION ADMINISTRATION	AP01-03EI85735	INNOVATION DATA PROCESSING	
	EI	ENERGY INFORMATION ADMINISTRATION	AD01-03EI85736	EXECUTIVE INFORMATION SYS LLC	
	EI	ENERGY INFORMATION ADMINISTRATION	AD01-03EI85758	GOVCONNECTION INC	
Headquarters Procurement Services Office	EI	ENERGY INFORMATION ADMINISTRATION	AP01-03EI37685	LADY, GEORGE DR	
Headquarters Procurement Operations	EW	ENVIRONMENTAL RESTORATION & WASTE MANAGE	AD01-01EW15164	FOCAL COMMUNICATIONS CORP	
	FM	OFC OF FINANCIAL MANAGEMENT & CONTROLLER	AT01-01FM90034	PROJECT PERFORMANCE CORP	
	FM	OFC OF FINANCIAL MANAGEMENT & CONTROLLER	AT01-00FM90075	INTERNATIONAL BUSINESS MACHINES CORPORATION	
Headquarters Procurement Operations	IM	OFFICE OF INFORMATION MANAGEMENT	AT01-03IM00001	RS INFORMATION SYSTEMS INC	
	IM	OFFICE OF INFORMATION MANAGEMENT	AT01-03IM00002	RS INFORMATION SYSTEMS INC	
	IM	OFFICE OF INFORMATION MANAGEMENT	AT01-03IM00003	RS INFORMATION SYSTEMS INC	
	IM	OFFICE OF INFORMATION MANAGEMENT	AT01-03IM00013	RS INFORMATION SYSTEMS INC	
	IM	OFFICE OF INFORMATION MANAGEMENT	AF01-03IM00018	CONGRESSIONAL QUARTERLY INC	
	IM	OFFICE OF INFORMATION MANAGEMENT	AF01-03IM00020	REUTERS AMERICA INC	
	IM	OFFICE OF INFORMATION MANAGEMENT	AD01-03IM00023	ASRC AEROSPACE CORPORATION	
	IM	OFFICE OF INFORMATION MANAGEMENT	AP01-03IM00032	ROBELLE SOLUTIONS TECHNOLOGY	
	IM	OFFICE OF INFORMATION MANAGEMENT	AP01-03IM00034	ENTRIX COMPUTING LTD	
	IM	OFFICE OF INFORMATION MANAGEMENT	AD01-03IM05001	YORK TELECOM CORP	
	IM	OFFICE OF INFORMATION MANAGEMENT	AD01-03IM05002	YORK TELECOM CORP	
	IM	OFFICE OF INFORMATION MANAGEMENT	AD01-03IM05003	YORK TELECOM CORP	
	IM	OFFICE OF INFORMATION MANAGEMENT	AD01-03IM05004	YORK TELECOM CORPORATION	
	IM	OFFICE OF INFORMATION MANAGEMENT	AD01-03IM05005	YORK TELECOM CORPORATION	
	IM	OFFICE OF INFORMATION MANAGEMENT	AD01-03IM05015	YORK TELECOM CORPORATION	
	IM	OFFICE OF INFORMATION MANAGEMENT	AD01-03IM05016	YORK TELECOM CORPORATION	
	IN	OFFICE OF INTELLIGENCE	AT01-01IN30028	CONTROL CONCEPTS INC	
	ME	OFFICE OF MGMT,BUDGET AND EVALUATION	AC01-03ME03812	ASRC AEROSPACE CORP	
	ME	OFFICE OF MGMT,BUDGET AND EVALUATION	AP01-03ME04160	QBIC III SYSTEMS INC	
	ME	OFFICE OF MGMT,BUDGET AND EVALUATION	AC01-03ME11813	MILLENNIUM TEK INC	
	ME	OFFICE OF MGMT,BUDGET AND EVALUATION	AC01-03ME15804	PROJECT PERFORMANCE CORP	
	ME	OFFICE OF MGMT,BUDGET AND EVALUATION	AD01-02ME40663	ANNAMS SYSTEMS CORP	
National Nuclear Security Admin Srvc Ctr	NA	NATIONAL NUCLEAR SECURITY ADMINISTRATION	AT01-03NA00019	CLIENT NETWORK SERVICES INC	
	NA	NATIONAL NUCLEAR SECURITY ADMINISTRATION	AT01-01NA01011	CLIENT NETWORK SERVICES INC	
	NA	NATIONAL NUCLEAR SECURITY ADMINISTRATION	AF52-03NA99558	FOUR POINTS TECHNOLOGY	
	NA	NATIONAL NUCLEAR SECURITY ADMINISTRATION	AD52-03NA99559	ENGINEERING & PROFESSIONAL SVC	
	NA	NATIONAL NUCLEAR SECURITY ADMINISTRATION	AD52-03NA99604	TSA SYSTEMS LTD	
	NA	NATIONAL NUCLEAR SECURITY ADMINISTRATION	AC52-03NA99606	TSA SYSTEMS LTD	
Headquarters Procurement Operations	NN	NONPROLIFERATION AND NATIONAL SECURITY	AC01-98NN50049	DYNCORP EENSP INC	
Headquarters Procurement Operations	SO	OFC OF SECURITY & EMERGENCY OP	AT01-01SO20105	MCMUNN ASSOC INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AP01-03SO20178	DATACARD CORPORATION	
	SO	OFC OF SECURITY & EMERGENCY OP	AC01-00SO30057	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-00SO30058	DYNCORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-00SO30109	BELL ATLANTIC FED INT SOLUTION	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-01SO30140	LEXIS NEXIS	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30261	DUN & BRADSTREET INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AF01-02SO30262	CONGRESSIONAL QUARTERLY INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AC01-02SO30263	WEST THOMAS	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30265	CHOICEPOINT BUSINESS & GOV SER	
	SO	OFC OF SECURITY & EMERGENCY OP	AC01-02SO30267	DIALOG CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AF01-02SO30285	REUTERS AMERICA INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30289	GARTNER GROUP INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AC01-02SO30295	FEI SYSTEMS INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AC51-02SO30297	TECHNICAL & MGMT RESOURCES INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AF01-02SO30296	SAS INSTITUTE INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AF01-02SO30298	MOBIUS MANAGEMENT SYSTEMS INC	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30297	ORACLE CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AF01-02SO30299	INNOVATION DATA PROCESSING	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30301	ORACLE CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30400	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30401	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30402	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30403	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30404	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30405	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30406	ELECTRONIC DATA SYSTEMS CORPORATION	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30407	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30408	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30409	ELECTRONIC DATA SYSTEMS CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AT01-02SO30410	ELECTRONIC DATA SYSTEMS CORPORATION	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30547	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30548	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30549	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30550	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30551	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30552	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30553	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30554	YORK TELECOM CORP	
	SO	OFC OF SECURITY & EMERGENCY OP	AD01-02SO30555	YORK TELECOM CORP	
Headquarters Procurement Operations	OA	OFFICE OF INDEPENDENT OVERSIGHT/ASSURANC	AD01-02OA02011	NETWORK MANAGEMENT CORPORATION	
Headquarters Procurement Operations	PI	ASST SEC POLICY & INTERNATIONAL AFFAIRS	AP01-03PI31069	PFC ENERGY INC	
Office of Repository Development	RW	OFF OF CIVILIAN RADIOACTIVE WASTE MGMT	AD28-03RW12229	SPECTRUM SYSTEMS, INC	
Headquarters Procurement Operations	W0	HEADQUARTERS DOE/C-Web AWARDS	AD01-03W006957	ASRC AEROSPACE CORP	
	W0	HEADQUARTERS DOE/C-Web AWARDS	AF01-03W008102	GENERAL DYNAMICS C4 SYSTEMS	
FIELD					
Albuquerque Operations Office	AL	ALBUQUERQUE OPERATIONS OFFICE	AD04-03AL66978	AT & T CORP	
	AL	ALBUQUERQUE OPERATIONS OFFICE	AF04-02AL67714	MOBILE SATELLITE VENTURES	
Chicago Operations Office	CH	CHICAGO OPERATIONS OFFICE	AC02-99CH10988	INFOSYS INTERNATIONAL	
	CH	CHICAGO OPERATIONS OFFICE	AC02-01CH11038	RS INFORMATION SYSTEMS INC	
Chicago Operations Office	ER	DIRECTOR OF ENERGY RESEARCH	AC01-01ER15148	INSTITUTE SCIENTIFIC INFO INC	
	ER	DIRECTOR OF ENERGY RESEARCH	AT02-03ER25548	1 SOURCE CONSULTING INC	
	ER	DIRECTOR OF ENERGY RESEARCH	AT02-02ER35790	COMPUTER SYSTEMS MGMT INC	

daho Operations Office	ID	IDAHO OPERATIONS OFFICE	AD07-01ID60481	ML TECHNOLOGIES INC
	ID	IDAHO OPERATIONS OFFICE	AD07-02ID60477	ML TECHNOLOGIES INC
	ID	IDAHO OPERATIONS OFFICE	AD07-03ID60496	ML TECHNOLOGIES INC
	ID	IDAHO OPERATIONS OFFICE	AD07-03ID60497	ML TECHNOLOGIES INC
	ID	IDAHO OPERATIONS OFFICE	AD07-03ID60501	ML TECHNOLOGIES INC
	ID	IDAHO OPERATIONS OFFICE	AD07-03ID60502	ML TECHNOLOGIES INC
National Energy Technology Laboratory	FT	NATIONAL ENERGY TECHNOLOGY CENTER	AD26-00FT00052	XEROX CORPORATION
	FT	NATIONAL ENERGY TECHNOLOGY CENTER	AT26-99FT71100	DN AMERICAN
National Energy Technology Laboratory	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26-00NT00124	DATA TREE INC
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AF26-00NT00544	SAVVIS COMMUNICATIONS
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AF26-01NT00974	FOSTER WHEELER USA CORP
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26-02NT20151	ORACLE CORP
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26-03NT30073	LYME COMPUTER SYSTEMS INC
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26-03NT30157	ORACLE CORPORATION
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26-03NT30300	ORACLE CORP
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26-03NT30531	GOVCONNECTION INC
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AF26-03NT30662	SWETS BLACKWELL
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AF26-03NT30769	ASPEN TECHNOLOGY INC
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26-03NT30868	GOVERNMENT MICRO RESOURCES INC
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26-03NT30874	WAMNET GOVERNMENT SERVICES
	NT	NATIONAL ENERGY TECHNOLOGY LABORATORY	AD26 01NT00916	IKON OFFICE SOLUTIONS
Nevada Operations Office	NV	NEVADA OPERATIONS OFFICE	AC08-95NV11580	SOFTWARE CONTROL INTL INC
Office of Repository Development	NV	NEVADA OPERATIONS OFFICE	AD28-99NV12097	RS INFORMATION SYSTEMS, INC
	NV	NEVADA OPERATIONS OFFICE	AC52-01NV13948	ALBANY COUNTY RESEARCH CORP
	NV	NEVADA OPERATIONS OFFICE	AD52-02NV14265	MOMENTUM SYSTEMS CORP
Ohio Field Office	OH	OHIO FIELD OFFICE	AD24-01OH30141	ACS GOVT SOLUTIONS GROUP INC
	OH	OHIO FIELD OFFICE	AD24-01OH30142	ACS GOVT SOLUTIONS GROUP INC
Oak Ridge Operations Office	OR	OAK RIDGE OPERATIONS OFFICE	AC05-88OR21779	COR INC
	OR	OAK RIDGE OPERATIONS OFFICE	AC05-95OR22429	DIAL PAGE INC
	OR	OAK RIDGE OPERATIONS OFFICE	AD05-99OR22746	SCIENCE APPLICATIONS INTL CORP
	OR	OAK RIDGE OPERATIONS OFFICE	AM05-02OR22864	NOLA COMPUTER SERVICES INC
	OR	OAK RIDGE OPERATIONS OFFICE	AT05-03OR22955	SECURITY CONSULTANTS GROUP, INC.
	PP	PORTSMOUTH PROJECT OFFICE	AF01-03PP00389	PRESS ASSOC
	PP	PORTSMOUTH PROJECT OFFICE	AF01-03PP00390	REUTERS AMERICA INC
	PP	PORTSMOUTH PROJECT OFFICE	AP01-03PP00405	US NEWSWIRE
	PP	PORTSMOUTH PROJECT OFFICE	AF01-03PP00413	REUTERS AMERICA INC
	PP	PORTSMOUTH PROJECT OFFICE	AF01-03PP00414	ASSOC PRESS
Richland Operations Office	RL	RICHLAND OPERATIONS OFFICE	AC06-03RL14432	CONSULTANT FOR ENVIR SYST TECH
Oakland Operations Office	SF	OAKLAND OPERATIONS OFFICE	AD03-01SF22353	AGILENT TECHNOLOGIES INC
	SF	OAKLAND OPERATIONS OFFICE	AD03-03SF22722	VERIZON WIRELESS
	SF	OAKLAND OPERATIONS OFFICE	AD03-03SF22747	SKYTEL GOVERNMENT
	SF	OAKLAND OPERATIONS OFFICE	AD52-03SF22748	VERIZON WIRELESS
	SF	OAKLAND OPERATIONS OFFICE	AD03-03SF22778	FRONT RANGE SOLUTIONS INC
Savannah River Operations Office	SR	SAVANNAH RIVER OPERATIONS OFFICE	AC09-02SR22242	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AM56-03SR22261	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22300	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22301	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22303	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22304	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22305	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22306	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22307	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22308	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT56-03SR22309	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AT09-03SR22341	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AC09-02SR22242	LEGIN GROUP INC
	SR	SAVANNAH RIVER OPERATIONS OFFICE	AM56-03SR22261	LEGIN GROUP INC
Oak Ridge Operations Office	TE	OFC OF SCIENTIFIC & TECHNICAL INFO	AT05-01TE40204	INFORMATION INTL ASSOC INC
Western Area Power Administration	WA	WESTERN-LAKEWOOD CO	AD65-03WA24424	HEWLETT-PACKARD COMPANY
	WA	WESTERN-LAKEWOOD CO	AD65-03WA00065	JAVIS AUTOMATION & ENGINEERING
	WA	WESTERN-LAKEWOOD CO	AD65-01WA18309	INNOVATIVE LOGISTICS TECHNIQUE
	WA	WESTERN-LAKEWOOD CO	AD65-01WA18744	INNOVATIVE LOGISTICS TECHNIQUE
	WA	WESTERN-LAKEWOOD CO	AF65-03WA23313	INFORMATION HANDLING SERVICES
	WA	WESTERN-LAKEWOOD CO	AD65-03WA24592	ISYS INC
	WG	WESTERN-PHOENIX OFFICE	AT65-00WG15523	GENERAL SERVICES ADMIN
	WG	WESTERN-PHOENIX OFFICE	AT65-02WG21482	CRYSTALVIEW TECHNOLOGY INC
	WG	WESTERN-PHOENIX OFFICE	AC65-03WG22548	FORTECH SOFTWARE CONSULTING
	WG	WESTERN-PHOENIX OFFICE	AF65-03WG23903	INDUS TECHNOLOGY
	WG	WESTERN-PHOENIX OFFICE	AF65-03WG24416	FRON INC
	WG	WESTERN-PHOENIX OFFICE	AF65-03WG24855	GE ENERGY MGMT SVC INC
	WJ	WESTERN - LOVELAND AREA OFFICE	AF65-03WJ22678	GLOBAL TECHNOLOGY RESOURCES
	WJ	WESTERN - LOVELAND AREA OFFICE	AF65-03WJ24455	OPEN ACCESS TECHNOLOGY INTL
	WJ	WESTERN - LOVELAND AREA OFFICE	AF65-03WJ24936	GLOBAL TECHNOLOGY RESOURCES
	WN	WESTERN FOLSOM AREA OFFICE	AC65-99WN13131	TRIMA JONATHAN
	WN	WESTERN-FOLSOM AREA OFFICE	AD65-02WN60533	JAVIS AUTOMATION & ENGINEERING
	WN	WESTERN-FOLSOM AREA OFFICE	AC65-02WN61078	DYNAMIC SOFTWARE INC

Current IT and Support Services Contracts

				Contract Lifecycle											
				Base Period		Option 1		Option 2		Option 3		Option 4		Option 5	
Site	Office Name	Award BIN	Awardee Name	Start Date	End Date	Start Date	End Date	Start Date	End Date	Start Date	End Date	Start Date	End Date	Start Date	End Date

Attachment 3

IT Contract Vehicles

DIRECTIONS

Worksheet 1 contains a list of IT contract vehicles detailed by organization and site. Please review the vehicles for your organization/site and **indicate the Expiration Date in column D.** If for some reason a vehicle is included in your area that should not be, please indicate this in column D instead of providing an expiration date.

Worksheet 2 is a blank spreadsheet for use in identifying all **current contract vehicles** dealing with IT and support services partially or in totality that are NOT included in Worksheet 1. **Please complete all columns provided and include any contracts that should have been included in the Worksheet 1.** This document will serve as a part of the baseline for the IT Competitive Sourcing Study.

This information is requested by April 1st, 2005. Upon completion, please return the Excel spreadsheet file to Mr. Robert Wilson of the Office of the Chief Information Officer at robert.wilson@hq.doe.gov. Should you have any questions please do not hesitate to contact Mr. Wilson via email or on (301) 903-4604.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-25

DATE: March 22, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **1. DoD Memorandum on the Use of Federal Supply Schedules and Market Research**
2. Department of Energy Guide to Financial Assistance

SUMMARY: This Flash forwards a copy of the subject Department of Defense (DoD) memorandum dated January 28, 2005, and releases the revised DOE Guide to Financial Assistance.

1) The DoD memo is forwarded as background on recent concerns in this area and how other agencies are managing them. DOE has addressed these issues in its Strategic Acquisition Transactions Guide (SATG) (Attachment to Acquisition Guide Chapter 38.1) and Acquisition Letter (AL) 2005-05, Use of Non-DOE Procurement Instruments.

   The SATG has coverage on evaluating price reasonableness in best value selections, requesting discounts on orders, and soliciting quotations. AL 2005-05 provides guidance on market research and obtaining work within contract scope. Please share this flash and the DoD guidance with acquisition and other interested personnel to highlight the need for due diligence when placing orders against the Federal Supply Schedules.

2) The new financial assistance guide, dated March 2005, replaces in its entirety the previous version dated April 1996, to provide DOE personnel updated guidance in processing financial assistance awards. This Guide is an evolving document and suggestions on new topics are welcomed. The DOE Financial Assistance Rules, 10 CFR 600, Financial Assistance Letters, and the Guide encompass current existing guidance for DOE financial assistance personnel. It can be found on the Professional's Homepage at http://professionals.pr.doe.gov/ma5/ma-5web.nsf/?Open.

Questions on either topic should be directed to Ms. Jackie Kniskern at Jacqueline.kniskern@hq.doe.gov or 202-287-1342.

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachments

cc:
FAAC
PPAG

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

ACQUISITION
TECHNOLOGY
AND LOGISTICS

JAN 2 8 2005

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (ACQUISITION, LOGISTICS AND TECHNOLOGY)
ASSISTANT SECRETARY OF THE NAVY (RESEARCH, DEVELOPMENT AND ACQUISITION)
ASSISTANT SECRETARY OF THE AIR FORCE (ACQUISITION)
DIRECTORS OF DEFENSE AGENCIES

SUBJECT: Use of Federal Supply Schedules and Market Research

The Department of Defense utilizes the Federal Supply Schedules of the General Services Administration to meet a significant number of our requirements. The "Use of Federal Supply Schedules" is governed by the requirements in FAR 8.404. FAR 8.404 says in part, "by placing an order against a schedule contract using the procedures in FAR 8.405 – "Ordering Procedures for Federal Supply Schedules" the ordering activity has concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs." In response to recent recommendations of the Department of Defense Inspector General (DoDIG) and in support of the recently released policy on the "Proper Use of Non-DoD Contracts" (29 October 2004) the following guidance and clarification is provided when utilizing Federal Supply Schedules:

- Although GSA has already determined rates for services offered at hourly rates under schedule contracts to be fair and reasonable (FAR 8.404(d)), Contracting Officers must not only consider labor rates but also labor hours and labor mixes when establishing a fair and reasonable price for an order.

- Contracting Officers are required to consider the proposed prices for both the services and products when awarding orders for a combination of products and services.

- Contracting Officers are reminded to seek discounts for orders exceeding the maximum order threshold. In cases where a discount is not obtained, explain why in the contract file. When discounts are obtained, explain in the contract file how the discount was determined to be fair and reasonable.

- Contracting Officers are encouraged to solicit as many contractors as practicable when using Federal Supply Schedules. On those occasions where this is not possible, explain why in the contract file.

For all procurements above the simplified acquisition threshold, Military Departments and Defense Agencies are reminded that "Market Research" (FAR Part 10) plays a key role in identifying potential sources of supply and helps identify the best acquisition approach to meet our requirements. Contracting Officers should document the contract file on the market research efforts conducted in support of each acquisition.

As part of the recommendations included in audit report title, the DoDIG recommended that the nine contracting activities visited during their audit (attached) should be "monitored". I agree with the DoDIG recommendation that greater management attention be focused on the quality of price reasonableness determinations and request that you ensure that the adequacy of contracting officer price reasonableness determinations be made a part of Procurement Management Reviews (PMRs) or any other relevant internal review. For the activities listed on the attached, please provide me a list of all completed or planned PMRs, or other internal reviews, that have been completed since March 21, 2002, and identify whether or not the quality of price reasonableness determinations were addressed in the review. This information should be provided to Michael Canales of my staff by March 15, 2005. Please ensure that this requirement is addressed in all future PMRs.

Questions or comments may be referred to Mr. Michael Canales, DPAP/Policy, (703) 695-8571 or e-mail: Michael.Canales@osd.mil.

Deidre A. Lee
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated

DEPARTMENT OF ENERGY

GUIDE TO FINANCIAL ASSISTANCE

A GUIDE TO THE AWARD AND ADMINISTRATION OF FINANCIAL ASSISTANCE

OFFICE OF PROCUREMENT AND ASSISTANCE POLICY
OFFICE OF PROCUREMENT AND ASSISTANCE MANAGEMENT
MARCH 2005

THE DOE GUIDE TO FINANCIAL ASSISTANCE iv

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THE DOE GUIDE TO FINANCIAL ASSISTANCE

INTRODUCTION

The Guide to Financial Assistance is a reference document that provides a compilation of non-regulatory information and guidance related to the implementation of existing statutory and regulatory requirements. Regulatory requirements are contained in the DOE Financial Assistance Rules, 10 CFR Part 600 and applicable program rules. Each year DOE obligates nearly $2 billion on financial assistance actions. Financial Assistance, in the form of grants and cooperative agreements, is provided to states, local and tribal governments, universities, non-profit organizations, for-profit organizations, and individuals.

This guidance is intended to help DOE staff carry out its financial assistance activities. Information contained herein is intended to be consistent with the regulatory guidance provided in the DOE Financial Assistance Rules. In the event of inconsistencies between the information provided in this Guide and provisions of the DOE Financial Assistance Rules, the rule controls. Any apparent inconsistencies between this guide and the DOE Financial Assistance Rules should be reported to the Office of Procurement and Assistance Policy.

The DOE Guide to Financial Assistance will be issued and maintained by the Office of Procurement and Assistance Policy, in coordination with the Office of Acquisition and Supply Management, National Nuclear Security Administration (NNSA), and will be amended to add material or to revise existing material as necessary. Questions regarding specific topics in the Guide and suggested topics may be submitted to the Office of Procurement and Assistance Policy.

CHAPTER 1 – BASIC INFORMATION

1.1 DOE as a Financial Assistance Issuing Organization

1.1.1 Legislative Authority

The Federal Grant and Cooperative Agreement Act (FGCA) of 1977 (31 U.S.C. 6301-08) establishes criteria for determining whether a transaction is financial assistance. A financial assistance instrument is used when the principal purpose of the transaction is the transfer of money or property to accomplish a public purpose of support or stimulation as authorized by Federal statute. The Act also establishes the basis for determining whether to use a grant or a cooperative agreement.

Other statutes, such as the Energy Policy Act of 1992 (EPAct), provide authority for DOE to enter into financial assistance agreements. Generally, these statutes will identify the purpose of the program, the type of financial assistance to be provided, eligible activities to be funded, eligible recipients, how funds will be distributed, and any special administrative requirements pertinent to the program such as cost sharing.

1.1.2 Program Rules

Statutes governing a number of DOE programs stipulate that the Secretary is authorized or required to issue regulations to carry out the purposes of the statutes and to provide for their orderly administration. These regulations are usually developed by the organization responsible for the administration of the program statute, with the assistance of the Office of General Counsel and the review and comment of appropriate DOE offices. These programmatic regulations provide more detailed guidance about how a particular program operates. Examples of program rules within DOE are the State Energy Conservation Program at 10 CFR Part 420, the Weatherization Program at 10 CFR Part 440, and the Office of Science Financial Assistance Program at 10 CFR Part 605.

Not all program offices issue program rules, i.e., regulations. For example, Fossil Energy in operating the Clean Coal Program issued internal guidance only since the authorizing statute did not require implementing regulations and provided sufficient detail regarding program requirements.

1.1.3 Financial Assistance Rules

DOE has regulations which provide the administrative requirements and operational rules for carrying out financial assistance award and administration. The DOE Financial Assistance Rules, 10 CFR Part 600, implement the FGCA and establish uniform policies and procedures for the award and administration of DOE financial assistance. Incorporated into the regulations are the Government-wide administrative requirements that apply to financial assistance agreements. These requirements stem from certain Office of Management and Budget (OMB) Circulars. To the extent the coverage of these OMB Circulars applies to

recipients, they have been incorporated into the DOE Financial Assistance Rules either in full text or by reference. The OMB Circulars incorporated into the regulations are:

OMB Circular A-110, Uniform Administrative Requirements for Grants and Cooperative Agreements With Institutions of Higher Education, Hospitals and Other Non-Profit Organizations,

OMB Circular A-102, Grants and Cooperative Agreements with State and Local Governments,

OMB Circular A-133, Audits of States, Local Governments and Non-Profit Organizations (the Single Audit Act), and the circulars for cost principles,

OMB Circular A-21, Cost Principles for Educational Institutions,

OMB Circular A-87, Cost Principles for State, Local and Indian Tribal Governments, and

OMB Circular A-122, Cost Principles for Non-Profits.

1.1.4. Internal Guidance

In addition to the above statutes and regulations, DOE periodically issues guidance to Contracting Officers by way of Financial Assistance Letters, policy flashes and this guide.

1.2 Functions and Responsibilities of Federal Staff

1.2.1 Senior Procurement Executive

The Department of Energy has designated two Senior Procurement Executives; one for non-NNSA activities and one for NNSA activities at the Department. The Senior Procurement Executive is responsible for the overall quality and effectiveness of the financial assistance function within DOE. These functions include:

- Publishing regulations and procedural guidance;
- Assuring an efficient and effective financial assistance process;
- Developing financial assistance training;
- Providing advice and guidance regarding financial assistance policies and procedures;
- Approving or denying requests for class deviations; and
- Authorizing assistance actions that exceed the delegated authority of heads of contracting activities.

1.2.2 Head of Contracting Activity

The head of the contracting activity (HCA) is responsible for:

- overseeing the financial assistance function within that activity and ensuring that agency policies and procedures are implemented;

- establishing review and approval levels for financial assistance actions;

- reviewing requests for deviation; and

- appointing Contracting Officers.

1.2.3 Contracting Officer

The following activities are the responsibility of the Contracting Officer or a designated representative. Contracting Officers should consult and coordinate with appropriate officials such as program staff, legal counsel, servicing finance officers and the Inspector General, in carrying out these activities. Within the limits of delegated authority, a duly appointed Contracting Officer may:

-Execute, administer and amend financial assistance instruments;

-Determine the appropriate type of financial assistance instrument;

-Develop and post funding opportunity announcements;

-Receive and review recipients' requests to either incur costs or undertake activities which require DOE prior approval, consulting with program staff as necessary;

-Administer financial assistance award instruments in such a way as to safeguard the funds and the interests of the Federal Government, ensure that all significant actions are fully documented, and assist program organizations in ensuring the most effective use of program funds for financially assisted activities;

-Serve as focal point for dissemination and interpretation of financial assistance policies and procedures;

-Perform budget review and cost analysis (if needed), and related reviews, such as adequacy of an applicant's accounting system, prior to award of financial assistance instruments;

-Negotiate, as necessary, the financial and business arrangements of financial assistance instruments, including cost share and program income;

-Ensure that recipients comply with all terms and conditions of the award;

-Review and approve or disapprove requests for payment, if cost reimbursable;

-Review financial reports

-Maintain the official financial assistance files and ensure that they contain all pertinent materials, records, and documentation;

-Arrange for pre-award and post-award audits, as appropriate; review annual audits (e.g. A-133 audits; and resolve audit findings on DOE awards; and

-Take actions required to close out financial assistance instruments.

1.2.4 Program Manager

The program manager is an official of a program office who has been delegated responsibility for implementation and administration of a specific program which may include one or more projects. This may include oversight of the development of program regulations and/or program announcements, supervision of the evaluation of applications/plans, and development of recommendations for ranking and selection. The program manager may also delegate some or all of his or her responsibility for overseeing or approving specific award and administration issues within a program to a technical project officer either within Headquarters or a field activity.

1.2.5 Project Officer

The project officer is an individual designated by the program manager and whose assigned responsibilities include developing the programmatic aspects of a proposed announcement, participating in the technical review and evaluation of applications, participating in the development of recommendations for selection, and monitoring the programmatic aspects of project performance.

1.3 Catalog of Federal Domestic Assistance (CFDA)

The CFDA is a Government-wide compendium of Federal programs, projects, services, and activities that provides assistance or benefits to a variety of recipients. The CFDA summarizes financial and nonfinancial assistance programs administered by departments and agencies of the Federal Government. The primary purposes of the catalog are to help users identify programs which meet specific objectives of the potential applicant, to provide general information on Federal assistance programs, and to improve coordination and communication between the Federal Government and State and local governments.

Responsibility for coordinating CFDA entries for DOE is assigned to the DOE Office of Management Systems and Services, Information Management Systems Divisions, ME-651, Office of Procurement and Assistance Management.

1.4 National Policy Assurances

A list of National Policy Assurances that apply to financial assistance awards is maintained on the internet at http://grants.pr.doe.gov.

1.5 Financial Assistance Career Development Program

A Financial Assistance Career Development Program has been established at DOE in conjunction with the Acquisition Career Development Program. Information on the program can be found in DOE O 361.1A "Acquisition Career Development Program".

CHAPTER 2 – PRE-AWARD

2.1 Planning

2.1.1 Selecting Appropriate Award Instrument: Procurement Contract or Financial Assistance Agreement

(a) Responsibility. The Contracting Officer, based on input from the program official pertaining to the purpose of the award, is responsible for selecting the appropriate award instrument. This decision is significant because the laws and policies governing procurement generally differ from those governing financial assistance.

(b) Basis of Decision. In accordance with the FGCA as codified in 31 U.S.C. §§ 6301 to 6308, the decision whether to use a contract or a financial assistance agreement must be based on the principal purpose of the award, including its intended primary beneficiary. The type of recipient (e.g., university, non-profit, or for-profit organization) or a requirement for cost sharing are not factors in determining the appropriate award instrument.

(1) Contract. The Contracting Officer should use a procurement contract when: (1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or (2) he/she decides in a specific instance that the use of a type of procurement contract is appropriate. If DOE/NNSA provides specifications for the project, is having the project completed based on its own identified needs, or will directly use the report or results of the project to support its mission objectives, then, in most cases, the principal purpose is to acquire property or services for the direct benefit or use of DOE/NNSA and the award instrument should be a contract.

31 U.S.C. § 6303 provides agencies the flexibility to select a procurement contract after a deliberate determination that it is more appropriate, even if the purpose of the award is to accomplish a public purpose of support or stimulation. For example, a Contracting Officer should select a procurement contract if the work is classified, even if the work serves a public purpose of support, to ensure that the appropriate FAR/DEAR security clauses are included in the award since the DOE financial assistance regulation does not include security requirements. Also, a Contracting Officer should select a procurement contract if the award has the characteristics of a contractual relationship and includes contract requirements such as: (1) technical direction, except when such direction is necessary to redirect the work because of the interrelationship of the project to other projects (See 2.1.2(f)(3)); (2) monthly reporting requirements, except when special award conditions are needed for high risk recipients; and (3) fee, except for SBIR/STTR awards or in accordance with 10 CFR 605.15.

(2) Financial Assistance Instrument (i.e., grant or cooperative agreement). The Contracting Officer should use a grant or cooperative agreement whenever the principal purpose of the relationship is the transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring property or services for the direct benefit or use of the United States

Government. The primary beneficiary under a grant or cooperative agreement is the general public, as opposed to the United States Government. However, there may be situations where the Department expects to derive some use or benefit from the project activities. If the project will produce a benefit or use to DOE/NNSA that is only indirect or incidental in nature, a grant or cooperative agreement may be used.

(3) Decision Process. To ensure that the appropriate instrument is selected, the Contracting Officer should ask the following questions:

(a) Is the primary purpose of the award to acquire goods or services that will directly benefit or be used by the Department to further a specific DOE/NNSA mission or requirement? If the answer to this question is "yes," then the award instrument should be a contract. If the answer is "no," then the Contracting Officer should use a grant or cooperative agreement.

(b) Is the work to be performed by the recipient primarily for its own purposes in the furtherance of the public good, and DOE/NNSA is merely supporting this effort with financial or other assistance? If the answer to this question is "yes," then the award instrument should be a grant or cooperative agreement. If the answer is "no," then the award instrument should be a contract.

(c) Statutory Language Affect on Instrument Selection. A statute authorizing or providing appropriations for a program or activity occasionally may specify the use of a particular award instrument, notwithstanding the fact that, under the guidance provided in the FGCA, the purpose of the award would necessitate the use of a different type of instrument. In these situations, the Contracting Officer must attempt to harmonize the language of the two statutes. Unless the authorization or appropriation act provides that a particular award instrument will be used notwithstanding the provisions of the FGCA, the principles articulated in that statute and this guide generally should be applied to determine the appropriate award instrument. When confronted with conflicting statutory language, the Contracting Officer should consult with legal counsel to determine the appropriate course of action.

(d) Examples of Ambiguous Circumstances.

(1) Conferences. The appropriate instrument for funding conferences should be determined based on the statutory criteria (i.e., the principal purpose of the conference, including the intended primary beneficiary). For example, a conference whose primary purpose is to exchange and disseminate information to the public should be funded using a grant. While the awarding office may benefit from information exchanged at the conference, the principal intent of the award is to stimulate dissemination of knowledge to benefit the public. If, however, a conference is being conducted to benefit a Federal agency, funding should be provided under a contract. For example, a conference to provide specialized training to grantees that would otherwise be provided by Federal agency personnel should be funded by a contract. In this example, although the recipients of the training benefit from the conference, the principal purpose of the award

is for the Government to procure training services in lieu of conducting its own training program, thus meeting the FGCA contract standard of directly benefiting the Federal agency.

(2) Evaluations or studies. Evaluations or studies are other activities that, depending on the circumstances, can be appropriately awarded as either a financial assistance instrument or a contract. For example, a study to assess the benefits of solar energy for State and local communities should be funded using a grant if the primary beneficiaries are the State and local communities. However, if the study is being conducted to assist DOE in planning and forecasting its solar energy budget requirements or to prepare a mandated report for Congress, then a contract should be used. While the Federal Government might benefit from the information obtained from the study in the first scenario, the primary beneficiaries are the State and local communities. In the second scenario, the study is for the direct use of DOE, even though it may be disseminated to the general public and may be used by other organizations and governments in their own solar energy efforts.

2.1.2 Selecting Type of Financial Assistance: Grant or Cooperative Agreement

(a) Responsibility. The Contracting Officer, based on input from the program official on the extent of Federal involvement in the project, is responsible for selecting the appropriate financial assistance instrument.

(b) Differences. The primary distinguishing feature between a grant and cooperative agreement is that under a cooperative agreement substantial involvement is anticipated between the DOE/NNSA program office and the recipient during performance of the funded activity. As a general rule, a cooperative agreement has the same characteristics as a grant; however, cooperative agreements also involve the following features that are not typical of a grant:

(1) Substantial Federal involvement in and contribution to the technical aspects of the effort are necessary for its accomplishment. This involvement may include collaboration, participation in the management of the project, or intervention in the activity and is over and above the exercise of Federal stewardship responsibilities (See paragraph 2.1.2 (e)).

(2) The nature of the collaboration is clearly defined and specified in a special award condition entitled "Statement of Substantial Involvement."

(c) OMB Policy on Substantial Involvement. Agencies should limit Federal involvement in cooperative agreement activities to the minimum consistent with program requirements.

(d) Decision Process. Anticipated substantial Federal involvement is a relative rather than an absolute concept. The determination to use a cooperative agreement, as opposed to a grant, should be based primarily on "programmatic" considerations as differentiated from management considerations. A cooperative agreement should not be used solely as a means

of exercising greater control over a recipient or the project than would be the case under a grant. The proposed Federal involvement must provide programmatic benefits that the recipient would not otherwise have available to it in carrying out the project. The general policy is:

(1) Substantial involvement is not anticipated if the recipient is expected to run the project without agency collaboration, participation, or intervention as long as it is run in accordance with the terms of the assistance instrument.

(2) Substantial involvement is anticipated if the project would not be possible without Federal collaboration or participation in the management of the project.

(e) No Substantial Involvement. Substantial involvement does not include the exercise of normal Federal stewardship responsibilities such as:

(1) Approving recipient plans prior to award.

(2) Providing technical assistance prior to the start of the activity and the recipient understands this prior to award, if requested by the recipient.

(3) Providing technical assistance to correct deficiencies in project or financial performance when reports or monitoring indicates some sort of problem.

(4) Performing site visits.

(5) Reviewing financial, performance, and audit reports.

(6) Performing technical reviews to determine whether to continue funding the next budget period.

(7) Reviewing performance to ensure that the objectives, terms, and conditions of the award are accomplished.

(8) Providing general administrative requirements, such as prior approvals required by the financial assistance regulations and/or OMB Circulars.

(9) Reviewing performance after completion.

(f) Substantial Involvement. Federal involvement would exist and depending on the circumstances could be substantial, if such involvement includes, for example:

(1) Review and approval of one stage before work can begin on a subsequent stage. Such review and approval is in addition to the exercise of the normal Federal stewardship responsibility to determine whether to continue funding the next budget period, which does not constitute substantial involvement. (See 2.1.2(e) for examples of no substantial involvement.)

(2) Collaboration or joint participation in the project, such as, sharing facilities and personnel or a jointly authored report or education curriculum product.

(3) Additional monitoring to permit specified kinds of direction or redirection of the work because of interrelationships with other projects.

(4) Substantial direct operational involvement or participation is anticipated to ensure compliance with statutory requirements such as environmental protection. Such participation must be over and above the normal exercise of Federal stewardship responsibilities. (See paragraph 2.1.2(e) for examples of no substantial involvement.)

(5) The power to immediately halt an activity if detailed performance specifications (e.g., construction specifications) are not met. In this case, the "Substantial Involvement Statement" must include provisions that go beyond the normal suspension remedies available to the Federal Government for nonperformance.

(g) Award Provision – Statement of Substantial Involvement. The project officer must prepare a "Statement of Substantial Involvement" for each cooperative agreement, which explicitly describes the nature, character, and extent of anticipated Federal involvement. Merely stating that "DOE will be substantially involved in the project" is not sufficient. These statements must be developed with care, ensuring that the Government's responsibilities are described with sufficient specificity to avoid unnecessarily increasing the Department's liability under the award. The Contracting Officer is responsible for ensuring that the involvement is substantial (i.e., over and above the normal stewardship responsibilities identified in paragraph (e)), and that the award provision clearly describes the nature and extent of the anticipated involvement.

(h) Program Announcement. If the Contracting Officer determines that only cooperative agreements will be awarded under a specific program announcement, the announcement must include a Statement of Substantial Involvement as a proposed award term. If the Contracting Officer determines that either a grant or a cooperative agreement may be awarded under the program announcement, the announcement must specify that either grants or cooperative agreements may be awarded and that cooperative agreements will include a Statement of Substantial Involvement to be determined prior to award.

2.1.3 Competition

(a) It is DOE policy to use competition in the award of grants and cooperative agreements to the maximum extent feasible. This policy conforms with 31 USC 6301(3) which encourages the use of competition in awarding all grants and cooperative agreements. Contracting Officers must use merit-based, competitive procedures to award grants and cooperative agreements to the maximum extent feasible. Merit review is discussed below at paragraph 2.4.2.

(b) The Contracting Officer may restrict eligibility to a type or types of applicant(s) if authorized by statute, program rule, or if appropriate to the activity to be funded. A decision to restrict eligibility shall be supported by the determination required by 10 CFR 600.6(b).

(c) The Contracting Officer may award a grant or cooperative agreement on a noncompetitive basis only if the application satisfies one or more of the selection criteria in 10 CFR 600.6.

(d) The responsible program official, in consultation with the Contracting Officer and local legal counsel, should prepare a Determination of Noncompetitive Financial Assistance (DNFA) explaining the basis for the proposed noncompetitive award. The determination should include the following information:

-The name of the sponsoring program office;

-The programmatic statutory authority for the award;

-The name of the awarding office;

-The type of award proposed (e.g., grant or cooperative agreement);

-The name of the proposed recipient;

-A description of the nature of the financial assistance to be provided (e.g., research, conference grant, etc.);

-The amount and availability of DOE funds required;

-Any cost-participation/sharing required or proposed;

-To the extent relevant, a discussion of the programmatic evaluation conducted and the results of that evaluation, including the overall merit and relevance to the DOE mission, the anticipated objectives, and probability of success in meeting them, the quality of the proposed recipient's personnel and facilities, and the appropriateness and adequacy of the proposed budget;

-A brief description of the public purpose of support or stimulation to be served by the proposed award, and, in non-technical terms, identification of any particular significance or specialized character of the proposed activity to be funded;

- A statement of whether the application was solicited or not solicited and the nature of any significant preapplication contact between the applicant and DOE; and

-A statement of which of the criteria in 10 CFR 600.6 (Eligibility) are being relied upon to justify the action and an explanation in general, non-technical terms, of why each criterion identified applies.

2.1.4 Intergovernmental Review

Executive Order 12372, "Intergovernmental Review of Federal Programs," was issued with the desire to foster intergovernmental partnership and strengthen federalism by relying on State and local processes for the coordination and review of proposed Federal financial assistance and direct Federal development. The Executive Order is implemented at 10 CFR 1005. The Contracting Officer or program official that issues the program announcement should determine if a review is required. The program announcement must specify whether a review is or is not required.

2.1.5 Reporting

(a) The DOE Project Officer is responsible for specifying the required management and scientific/technical reports on the Federal Assistance Reporting Checklist (DOE F 4600.2) and including this checklist in the Procurement Request Package. The DOE F 4600.2 and instructions are available at the Professionals Home Page at http://professionals.pr.doe.gov/ma5/MA-web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument. The Project Officer and Contracting Officer should always us the DOE F 4600.2 that is on the Professionals Home Page to ensure that the current version of the form and the instructions are included in the award.

Project Officers should consider the scope, complexity, duration of the project, and program legislation, when establishing reporting requirements, and identify any special reporting requirements in the block, entitled "Special Instructions."

(1) Research, Development, Demonstration (RD&D), and Other Scientific/Technical Awards: RD&D and other scientific/technical awards should generally require periodic Progress Reports, Special Status Reports, and a final Scientific/Technical Report.

(a) Progress Reports: Progress Reports are management reports which provide information on project status. These reports are used by the DOE Project Officer to monitor the project and to provide early recognition of potential problem areas. These reports should not be sent to the Office of Scientific and Technical Information (OSTI), since any preliminary results may be incomplete or misleading. If the award requires a final Scientific/Technical Report, no Progress Report is required at the end of the final year. The frequency of these reports should be the minimum needed to monitor performance. Examples of reporting requirements for typical projects are:

i. Basic research grants: Generally, these awards would require an annual Progress Report, a final Scientific/Technical Report, and Special Status Reports on an as needed basis.

ii. Technology development grants: Generally, these awards would require an annual or semi-annual Progress Report, a final Scientific/Technical Report, and Special Status Reports on an as needed basis.

iii. Large cooperative agreements: Generally, these awards would require quarterly Progress Reports, a final Scientific/Technical Report, and Special Status Reports on an as needed basis.

(b) Scientific/Technical Reporting: Scientific/technical reports and products provide the results of scientific and technical studies, investigations that relate to research, development, demonstration, and other specialized areas such as environmental and health protection and waste management. These reports/products must be accompanied by the appropriate DOE Form 241, "Announcement of Department of Energy Scientific and Technical Information".

i. Generally, the DOE Project Officer should request only a final Scientific/Technical Report.

ii. While the DOE Project Officer may require a Scientific/Technical Report at the end of a phase, he/she should not require annual reports. Progress Reports provide sufficient information to monitor progress.

(c) Special Status Reports: Special Status Reports provide notice of problems, delays, or adverse conditions which materially impair the recipient's ability to meet the objectives of the award or have a significant favorable impact on the project.

(2) Non-R&D Awards: A Non-R&D award should generally require only periodic Progress Reports and Special Status Reports. A final Progress Report is usually sufficient to determine whether the objectives of a non-R&D project have been accomplished.

(b) The DOE Contracting Officer is responsible for

(1) Incorporating an appropriate Federal Assistance Reporting Checklist (DOE F 4200.2) and instructions in the award. This includes:

(a) Ensuring that the DOE Project Officer selected the minimum management and scientific/technical reports necessary to monitor progress and report results.

(b) Specifying the financial reporting requirements.

(c) Specifying closeout reporting requirements.

(2) Assessing a prospective award recipient's past performance to determine whether the recipient has a history of poor programmatic performance, is financially unstable, has

inadequate management systems, or has not complied with the terms of previous awards, including providing the required reports. To determine whether the recipient has submitted the required reports, Contracting Officers should review (1) local report tracking systems to identify delinquent reports; (2) the Procurement and Assistance Data System to review overage closeout actions, and/or (3) the Department's E-Link System to identify reports received.

(a) If serious or numerous performance deficiencies are found, the Contracting Officer should deny the award, unless law, regulation, or evaluation/selection criteria dictate otherwise.

(b) When denial of an award based on past performance is not deemed appropriate, the Contracting Officer should include special award conditions in the award (e.g., use a reimbursement payment method rather than advance funding and establish milestone payments associated with the progress of the work, set aside a portion of the award funding until deliverables are received, or require more frequent financial or progress reporting than otherwise required under the program or allowed by 10 CFR 600). See 10 CFR 600.114, 600.212 and 600.304.

(3) Negotiating other terms and conditions when a prospective recipient is unable to comply with the requirement to submit scientific/technical reports in a PDF format via the E-link system (e.g., recipient may submit the report on a diskette or a CDROM or use one of the following acceptable formats: PDF image or regular (normal), TIFFG4, HTML, SGML, XML, Word, WordPerfect, Postscript.

(4) Until such time as the report is submitted, the recipient and the Contracting Officer may agree that the report can include proprietary data (limited rights data), classified information or information subjects to export control classification.

2.2 Announcement of Funding Opportunity

2.2.1 Synopsizing the Opportunity

The Contracting Officer is responsible for ensuring that all discretionary grant and cooperative agreement funding opportunity program announcements and modifications to the announcements are posted to the Grants.gov/FIND Internet site via the Industry Interactive Procurement System at the same time that the announcement is posted on IIPS. The Contracting Officer must:

- Develop the program announcement file in accordance with paragraph 2.2.2 below.
- Ensure that the program office has a valid Catalog of Domestic Assistance (CFDA) number for the announcement.

- Go to "Create FA Opportunity" and complete the "Financial Assistance Form" (i.e., synopsis information). This form includes all the required data elements for posting a synopsis on the Grants.gov Find Internet site;
- Ensure that "Yes" is checked for the field "Post to FedGrants?"; and
- Upload the announcement file to the "File Upload" section and click on "Submit Form."

2.2.2 Program Announcement of Funding Opportunity

Program announcements include any issuance used to announce funding opportunities that would result in the award of a competed discretionary grant or cooperative agreement, whether it is called a solicitation, program announcement, program notice, broad agency announcement, research announcement, notice of program interest, or something else.

A standard program announcement template has been developed for issuing DOE announcements of funding opportunities. This template follows the standard format adopted by the Office of Management and Budget. Contracting Officers and Project Managers must use the standard DOE template to develop program announcements. The template is maintained on the Professionals Home Page at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument.

2.3 Applications

2.3.1 Pre-Applications

Pre-applications are a useful tool for obtaining information, providing feedback and reducing the number of poor or non-responsive applications. The program announcement should indicate whether or not pre-applications are required. If pre-applications are required, the program announcement must state that it is a mandatory requirement and describe the content of the pre-application, page limitation, and how the pre-application will be evaluated and used.

2.3.2 Applications

An application is the written or electronic request for financial assistance. An application is required for all financial assistance projects or programs. In general, the application should include:

(1) A facesheet containing basic identifying information. The facesheet shall be the Standard Form (SF) 424 or other Government-wide application form;

(2) A detailed narrative description of the proposed project, including the objectives of the project and the applicant's implementation plan;

(3) A budget with supporting justification; and

(4) Any required pre-award assurances.

Instructions on the format and required forms for an application package must be included in the program announcement. The program announcement must also include instructions on where and how to submit the application.

2.3.3 Unsolicited Applications

An Unsolicited Application is an application for support of an idea, method, or approach, which is submitted by individuals, businesses, and organizations solely on the applicant's initiative, rather than in response to a Government program announcement. Financial assistance awards resulting from unsolicited applications are considered noncompetitive actions.

DOE encourages the submission of unsolicited applications that will contribute to its mission objective. DOE considers proposals in all areas of energy and energy-related research and development with emphasis on long-term, high-risk, high-payoff technologies. An unsolicited application may be accepted by DOE if it:

- Demonstrates a unique and innovative concept, or demonstrates a unique capability of the applicant;
- Offers a concept or services not otherwise available to the Government; and,
- Does not resemble the substance of a recently completed, current or pending competitive announcement.

If an unsolicited application is accepted, a program official must prepare a DNFA citing the appropriate exception from 10 CFR 600.6. (See Chapter 2, paragraph 2.1.2)

A detailed booklet titled Guide for the Submission of Unsolicited Proposals that outlines the unsolicited application process can be accessed at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/WebAttachments/UnsolicitedProposal/$File/UnsolicitedProposal.pdf

All unsolicited proposals must be submitted through the Unsolicited Proposal Manager. For more information, contact the Unsolicited Proposal Manager, John Augustine:

Mr. John Augustine
Unsolicited Proposal Manager
U.S. Department of Energy
National Energy Technology Laboratory (PGH)
P.O. Box 10940, MS 921-107
626 Cochrans Mill Road
Pittsburgh, PA 15236-0940
Telephone: (412) 386-4524
Fax: (412) 386-6137
E-mail: john.augustine@netl.doe.gov

2.4 Evaluation and Selection

2.4.1 Initial Screening of Applications

Upon receipt of applications, the Contracting Officer should perform an initial review to determine that: (1) the applicant is eligible for an award; (2) the information required by the announcement has been submitted; (3) all mandatory requirements are satisfied; and (4) the proposed project is responsive to the objectives of the funding opportunity announcement. Applications not meeting any of the requirements of the program announcement should be rejected and the applicant informed of the reason for the application not being evaluated.

2.4.2 Merit Review

It is DOE policy that all discretionary financial assistance, competitive or noncompetitive, be awarded through a merit-based selection process. Merit review means a thorough, consistent, and objective examination of applications based on pre-established criteria by persons who are independent of those submitting the applications and who are knowledgeable in the field of endeavor for which support is requested.

Each Program Office conducting reviews must ensure (1) their merit review implementation policies require an objective merit review of noncompetitive as well as competitive applications, and (2) the policy is implemented for all discretionary financial assistance activities under their cognizance whether the reviews are conducted in headquarters or at a field activity.

DOE has published a guide on merit review aptly titled "Department of Energy Merit Review Guide for Financial Assistance and Unsolicited Proposals". The Merit Review Guide can be found at http://www1.pr.doe.gov/meritrev.wpd.

2.4.3 Program Policy Factors

Program Policy Factors may be used during the selection process to provide for consideration of factors that are not indicators of the application's merit. The purpose of considering these factors is to maximize the effectiveness of available Government funding and to best achieve DOE program objectives. These factors should be as objective and clearly stated as possible. For example, program policy factors may reflect the desirability of selecting projects based on geographic distribution, diverse approaches, or complementary efforts. Such factors should be specified in the program announcement or program rule to notify applicants that factors essentially beyond their control will affect the selection process. A written justification of the application of the program policy factors should be prepared by the selection official or designated reviewer.

2.4.4 Selection

The Selection Official reviews the Merit Review Summary Statements and Ranking Sheet, applies the program policy factors, prepares a statement to document the selection of applications to receive funding. The selection statement should address the following items:

(1) Title and number of program announcements
(2) The Summary Statements for the Merit Review
(3) The Merit Review Ranking Sheet
(4) Justification on the application of program policy factors
(5) Identification of selected applications and proposed funding
(6) Other information as applicable

2.5 Award Considerations

2.5.1 Budget Review and Financial Management Assessment

(a) The purpose of a budget review is to determine that proposed activities in a financial assistance application will be supported by adequate resources. The budget review is the process of verifying cost data, evaluating specific elements of the budget, examining data to determine the allowability, allocability and reasonableness, and determining that proposed costs are consistently treated in accordance with generally accepted accounting principles and applicable cost principles. The extent of the budget review should not be determined solely on the basis of the amount of funds requested. Instead, the extent of the review to be performed should be based on past experience with the prospective recipient; the size and nature of the project; information provided by the technical reviewers; and other known factors that may affect the organization's financial capabilities to operate under the award.

The budget review is performed after the Selection Official selects those applications to be considered for negotiation of an award. While budget reviews are the responsibility of the Contracting Officer, contracting staff should rely heavily on the technical and cost input provided by the program/project office. In conducting budget reviews, the Contracting Officer may also obtain pre-award audits or consult cost and/or technical specialists as necessary.

(b) A financial management assessment should be undertaken by the Contracting Officer to assess the applicant's ability to manage the financial aspects of an award and its plans to accomplish project activities with reasonable economy and efficiency. The standards for acceptable financial management systems are found at 10 CFR 600.121, 600.220, and 600.311. This review should take place only when:

(1) DOE has not previously funded the organization;

(2) The applicant is a newly organized concern; or

(3) The organization is known or suspected to have operational and/or financial difficulties or inadequacies.

2.5.2 Determination of Responsibility

Prior to making award, Contracting Officers must make an affirmative determination of responsibility. This determination includes the financial management assessment discussed above in paragraph 2.5.1, review of audits under OMB Circular A-133, review of the Certification/Assurance/Representation forms, and review of activities under previous awards, especially submission of required reports.

2.5.3 High Risk Recipients

Contracting Officers may discover while assessing responsibility, that a potential recipient exhibits factors that indicate a high degree of risk in the successful completion of the award. The following factors tend to indicate high risk:

1. Poor financial stability (i.e., insolvency or threat of insolvency).

2. Inexperience such as may occur in newly formed organizations or in those which have not previously received Federal financial assistance awards .

3. Financial dependence on Federal support (i.e. 80% or more of the organization's revenues are expected to be derived from Federal awards in the forthcoming year).

4. Serious deficiencies in program or business management systems (e.g., substantial failure to comply with the financial management standards or procurement standards in 10 CFR 600).

5. A history of unsatisfactory performance, material violations of award terms and conditions, or large cost disallowances on previous awards from the same or other Federal programs.

Contracting Officers should consider incorporating special award conditions of a programmatic and/or administrative nature if an organization exhibits one of these risk factors. The potentially adverse impact of a particular special condition(s) on an awardee's ability to carry out the program must be considered and be balanced with the need to protect the Government's interests. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected. Special award condition(s) may include, but are not limited to, one or more of the following as appropriate for the specific award or awardee:

(1) Use of a reimbursement payment method rather than advance funding.

(2) More frequent financial or progress reporting than otherwise required.

(3) Technical assistance from DOE or access to additional resources from DOE.

2.5.4 Payment Methods

Payment may be made by either advance or reimbursement. The determination of the payment method is dependent upon the results of the financial management assessment. Advance payment may be made only if the minimum standards in 10 CFR 600.122 are met for non-profits, universities and hospitals. Advance payment to for-profit organizations may be used only in exceptional circumstances as prescribed in 10 CFR 600.312(b)(2) and as approved by the Contracting Officer.

Advance payment, via the Treasury Department's Automated Standard Application for Payment (ASAP) system, is the preferred method of payment for grants and cooperative agreements with non-profits, universities and hospitals. The Contracting Officer may determine that payment by reimbursement is appropriate even if the minimum standards have been met if special conditions are applicable to the award.

2.5.5 EPAct Determination

See Financial Assistance Letters 96-01 and 96-02.

2.5.6 Intellectual Property Considerations

See Financial Assistance Letter 2004-03, Intellectual Property

2.5.7 Fixed Obligation Awards

As provided in 10 CFR 600.29, Fixed Obligation Awards, DOE Contracting Officers may make grants and cooperative agreement awards on a fixed obligation basis for projects that do not require Federal monitoring or reviewing of actual costs incurred. Fixed Obligation awards may not exceed $100,000 nor be more than one year in length.

The proposed recipient should submit a budget and sufficient documentation to allow the Contracting Officer to determine that the amount requested is fair and reasonable for the project description and the deliverable(s) identified. A written analysis should be made on the allowability, allocability and reasonableness of the budget. The award document should indicate only the total dollar value approved. No budget should be included in the agreement. Any special restrictions due to budget concerns should be documented in the agreement.

Fixed obligation awards may not include mandatory cost share. Any other cost sharing, such as program income, should be evaluated as part of the budget review, but need not be identified in the maximum obligations clause. If applicable, direction should be provided to add program income to the funds committed to the project, and to use program income to further eligible project objectives.

The budget period and project period identified on the Notice of Financial Assistance Award, DOE F 4600.1, must indicate the same time period and be no more than 12 months.

Extensions to fixed obligations awards require a deviation to 10 CFR 600.29. The award document must not authorize extensions in accordance with 10 CFR 600.26(d).

2.5.8 Program Income

Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in 10 CFR 600.124 (e) and (h) for educational institutions, hospitals, and nonprofits, see 600.225 for state and local governments and 600.314 for for-profit organizations). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of DOE funds is not program income.

Generally, program income earned during the project period shall be retained by the recipient and, in accordance with program regulations or the terms and conditions of the award, shall be used in one or more of the following ways.

(1) Added to funds committed to the project and used to further eligible project objectives.

(2) Used to finance the non-DOE share of the project.

(3) Deducted from the total project allowable cost in determining the net allowable costs on which the share of costs is based.

2.6 Notification

2.6.1 Congressional Notification

Notification of award is made via the Advanced Award Notification System and DOE F 4220.10. The instructions to DOE F 4220.10 provide the dollar thresholds for notification but in general, any award to a nonprofit, educational institution or state, local or tribal government of $50,000 or more, or an award of $500,000 or more for any other entity, needs to be reported.

2.6.2 Notification to Successful and Unsuccessful Applicants

Contracting Officers should ensure that notification is made to all applicants on the selection or non-selection of their applications. Unsuccessful applicants should be notified in writing

that their applications were not selected for award and provided with a brief explanation as to why. After consultation with the Contracting Officer, the notification to the unsuccessful applicants should be prepared and signed by the Selection Official, with a copy to the Contracting Officer for the official record. Successful applicants should be notified as soon as possible to commence negotiation leading to the execution of the Notice of Financial Assistance Award.

2.7 PADS/FAADS

The Bureau of the Census operates the Federal Assistance Award Data System (FAADS), which is the central source of data on domestic assistance programs of the Federal government. These domestic assistance programs are detailed in the Catalog of Federal Domestic Assistance (CFDA). The Department reports its financial assistance data to FAADS through the Procurement and Assistance Data System (PADS). All awards should be reported to PADS within five working days of execution.

Additional information on reporting is available at Federal Assistance Award Data System.

CHAPTER 3 – AWARD

3.1 Notice of Financial Assistance Award/Terms and Conditions

See FAL 2005-06, "Award Terms"

3.2 Pre-Award Costs

Recipients may charge to an award pre-award costs that were incurred within the 90-day period immediately preceding the effective date of the award if such costs would be reimbursable under the agreement if incurred after the agreement was awarded. Pre-award expenditures are made at the recipient's risk and do not impose an obligation on DOE: (1) in the absence of appropriations; (2) if an award is not made; or (3) if an award is made for a lesser amount than the recipient anticipated.

Requests for pre-award costs for periods exceeding 90 calendar days must be approved in advanced by the Contracting Officer. The decision to approve pre-award costs exceeding 90 days should consider items such as: (1) time between selection and award, if competitive; (2) time between receipt of application and award, if non-competitive; (3) value to the overall success of the project; (4) severability of funded project to recipient's overall activities; (5) effect on total budget; and (6) statutory authorization and appropriations for the programmatic area.

3.3 Budget and Project Periods

(a) Project periods for both grants and cooperative agreements should generally be no longer than five (5) years in length, unless the Head of Contracting Activity approves a longer period. A determination and findings that the longer project period is necessary for the success of the project should be included in the file.

Recipients, other than SBIR and fixed obligation award recipients, may authorize a one-time extension of the expiration date of the agreement of up to 12 months if additional time beyond the established project and final budget period is required to assure adequate completion of the original project scope within the funds already made available. This one-time extension may not be exercised merely for the purpose of using unexpended funds. Recipients are not authorized to extend an award that contains a zero balance. The recipient shall notify DOE in writing of the extension, providing supporting reasons for the extension and the revised expiration date, at least ten days prior to the expiration date specified in the agreement. The award instrument should be modified to indicate the new project period end date. A one-time extension does not require HCA approval even if the total project period is extended past five years.

(b) The budget period is the interval of time specified in the award, into which a project is divided for budgetary purposes. Typically, budget periods are established on an annual basis. In some cases, shorter or longer budget periods may be established for compelling programmatic or administrative reasons such as to allow for project phases not evenly divisible with 12-month

increments or to provide program personnel with logical decision points to evaluate whether the project should proceed. Project periods less than 12 months should have co-extensive budget and project periods.

CHAPTER 4 - ADMINISTRATION

4.1 Monitoring Project Performance

4.1.1 Recipient Responsibilities

A recipient has full responsibility for the conduct of the project or activity supported and for the results achieved. The recipient should monitor the performance of the project to assure adherence to performance goals, time schedules or other requirements as appropriate to the project or the terms of the agreement. The recipient is responsible for monitoring the activities of and pass through requirements to any sub-recipients.

4.1.2 Federal (DOE) Responsibilities

It is DOE policy to limit involvement between itself and the recipient in the performance of a project to the minimum necessary to achieve program objectives and ensure conformance with requirements of the grant or cooperative agreement. DOE's role is that of a partner where the Government provides the financial assistance and the recipient carries out the project activities.

Monitoring is a process whereby the programmatic progress and financial and business management aspects of a financial assistance award are reviewed by assessing information gathered from program and financial reports, site visits, teleconferences, and other means. DOE requires financial assistance recipients to have adequate management systems to ensure that project objectives are met and funds are properly spent. To the extent possible, financial assistance award monitors rely on the management systems of the financial assistance recipients to meet project objectives, comply with award terms and conditions, and account for funds.

4.2 Revisions and Extensions

4.2.1 Project Revisions

Contracting Officers must provide prior written approval before the recipient may make any of the following project changes;

(1) A change in scope or objectives of the project, even if there is no associated budget revision.

(2) The absence or change of the Principal Investigator/Project Director. An absence of a continuous period of more than 3 months or a 25 percent reduction in time devoted to the project.

(3) The need for additional Federal funding to complete the approved project.

(4) The transfer of a significant part of the research or programmatic effort.

Contracting Officers should consider the value to the overall success of the project or increased significance and value of the amended project when reviewing request(s) for project revisions.

Project revisions to awards from a competitive announcement must remain within the programmatic boundaries of the announcement and should be considered meritorious under the merit review criteria of the announcement. Substantial changes to the project's scope or objectives will require a determination of non-competitive financial assistance if the changes would not be acceptable under the original announcement.

4.2.2 Project Period Revisions

The end date of the project period may be changed as a result of a no-cost extension, or, in some cases, by a renewal modification. See Subchapter 3.3 - Budget and Project Periods and Subchapter 4.4-Renewal Awards.

4.2.3 Budget Revisions

The Contracting Officer must approve budget revisions when the revision results from changes to the scope or objectives of the project, additional funds are required to complete the project, or prior approval is required by the applicable OMB cost circular.

4.3 Continuation Awards

Continuation award means a non-competitive award for a succeeding or subsequent budget period after the initial budget period of an approved project period. Funding for continuation awards is contingent on DOE approval of a continuation application. The content of the continuation application should be included in the agreement's terms and conditions.

Continuation funding is contingent on (1) availability of funds; (2) satisfactory progress towards meeting the objectives of your approved application; (3) submittal of required reports; and (4) compliance with the terms and conditions of the award. The Contracting Officer and Project Officer review a continuation application for the adequacy of the awardee's progress and planned conduct of the project in the subsequent budget period. A continuation application shall not be required to compete against any other application. The amount and award of continuation funding is subject to the availability of appropriations.

4.4 Renewal Awards

Renewal awards "add" one or more budget periods and extend the project period. Discretionary renewal awards may be made on the basis of a solicitation; or on a noncompetitive basis when reviewed for merit and justified in accordance with 10 CFR 600.6(c), Eligibility. Renewal applications should be submitted no later than six months prior to the scheduled expiration of the project period unless a program rule or other document establishes a different application deadline. Before DOE may make a renewal award for a formula award, the recipient must submit a revised or amended State plan in accordance with program rules and other instructions from DOE.

4.5 Audit Requirements for States, Local Governments and Non-Profit Organizations

4.5.1. General

All States, Local Governments and Non-Profit Organizations that expend over $500,000 in Federal funds in any year are required to have a single audit conducted in accordance with OMB Circular A-133. This requirement flows down to subrecipients that meet the dollar threshold. An independent auditor shall perform the audit in accordance with the Government Auditing Standards and must: 1) audit and provide opinions on the fair presentation of the financial statements and the schedule of expenditures of Federal awards; 2) gain an understanding of internal control over Federal programs and 3) audit and provide an opinion on compliance with requirements for major programs.

Any entity that does not meet the threshold for expenditures is not required by OMB Circular A-133 to have a single audit performed. However, if a Contracting Officer determines special circumstances make a review or audit necessary, such a requirement should be included in the terms and conditions of the award as a special condition.

(a) Audit Objective. The single audit provides an independent, cost-effective tool for obtaining information on the recipient's financial management practices and administration of Federal funds. The audit does not provide detailed information on individual awards but will show whether or not the recipient has an adequate accounting system and management controls, financial statements prepared in accordance with general accepted practices, accurate and reliable reports, and expenditure of Federal funds in accordance with Federal laws and regulations.

(b) Reporting Requirements. The Single Audit Report is submitted to the Federal Audit Clearinghouse (http://harvester.census.gov/sac) via the Internet and Standard Form SAC (SF-SAC) "Data Collection Form for Reporting on Audits of States, Local Governments and Non-profits Organizations."

The single audit report includes:

- the financial statements;
- a schedule of expenditures of Federal awards;

- auditor's opinions on the fair presentation of the financial statements and schedule of expenditures of Federal awards;
- auditor's report on internal control and compliance pertaining to financial reporting;
- auditor's report on internal control and opinion on compliance pertaining to major programs;
- auditor's schedule of findings and questioned costs;
- auditee's corrective action plans; and
- a summary schedule of prior audit findings which includes planned and completed corrective actions.

4.5.2 Recipient and Auditor Responsibilities

(a) Recipient Responsibilities. Recipients are responsible for managing their Federal awards. This is accomplished by establishing and maintaining internal controls that provide assurances that all requirements can be met; establishing and maintaining an accounting system that uses general accepted accounting principles and that can adequately accumulate and segregate costs; and promptly and accurately preparing financial statements and other related documents.

Recipients are responsible for identifying Federal awards received and expended and for preparing financial statements and a Schedule of Expenditures of Federal Awards. Recipients are responsible for ensuring that the audit required by OMB Circular A-133 is completed and submitted to the Clearinghouse on SF-SAC within nine months of the end of its fiscal year.

Recipients are responsible for retaining an independent auditor; providing the auditor with all necessary information for the audit; and submitting the audit to the Clearinghouse.

Recipients are responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the recipient shall prepare a summary schedule of prior audit findings. The recipient shall also prepare a corrective action plan for current year audit findings. The summary schedule of prior audit findings shall report the status of all audit findings included in the prior audit's schedule of findings and questioned costs relative to Federal awards. The summary schedule shall also include audit findings reported in the prior audit's summary schedule of prior audit findings except audit findings listed as corrected. Subpart C, Section .315 of OMB Circular A-133 provides specifics on the summary schedule and the correction action plan.

Recipients are also responsible for monitoring sub-recipients that are required to submit an audit based on the expenditure of Federal funds under their project.

(b) Auditor Responsibilities. The auditor is responsible for performing the audit in accordance with generally accepted government auditing standards, i.e. "The Yellow Book"; assessing whether the auditee has complied with laws, regulations and agreement provisions that have a direct effect on the Federal programs where funds have been expended; testing the internal controls and financial management systems; and follow-up on prior audit findings and assess the reasonableness of the corrective plans and actions.

The auditor is responsible for preparing a report which includes an opinion on whether the financial statements are presented fairly; statements on internal controls; a statement on compliance which includes an opinion as to whether the auditee complied with the laws, regulations and agreement provisions; and a schedule of findings.

Audit findings are required to include: (1) a deficiency in internal controls; (2) a material noncompliance with the laws, regulations or agreement provisions; (3) detected fraud; (4) misrepresentation of the status of a prior finding; (5) questioned costs which exceed $10,000 for non-major programs; and (6) questioned costs which exceed $10,000 for each type of compliance requirement for major programs.

The auditor is required to assist the recipient in the preparation of SF-SAC by completing specific components and sections.

(c) Responsibilities of Pass-Through Entities. A pass-through entity is responsible for monitoring its subrecipient(s) and ensuring that those that expend Federal funds meet the requirements of OMB Circular A-133.

4.5.3 Agency Responsibilities

Federal agencies are responsible for ensuring that audits are completed and reports received in a timely manner and in accordance with the requirements of this part; for providing technical advice and counsel to auditees and auditors as requested; for issuing a management decision on audit findings within six months after receipt of the audit report; and for ensuring that the recipient takes appropriate and timely corrective action. Agencies are also responsible for providing annual updates to the A-133 compliance supplement.

An agency may have additional responsibilities depending on the amount of funding provided to a recipient. An agency is given the designation of cognizant agency or oversight agency if it has provided the most direct funding to the recipient. The cognizant designation is used when the funding level is over $50 million.

If a program specific audit is required, the agency is responsible for all levels of agency responsibilities. This includes providing program specific audit requirements.

4.5.4 Contracting Activity Responsibilities

Each Contracting Activity is responsible for ensuring agency compliance with the requirements of OMB Circular A-133 at the local level. Each Contracting Activity should

designate a responsible person for retrieving audits with findings under that activity's cognizance. The named person will be required to have a password and user ID for the secured portion of Clearinghouse database. Passwords and user IDs should be coordinated through the Office of Procurement and Assistance Policy.

Each Contracting Activity should implement and maintain a tracking system that ensures that audit findings and recommendations are monitored through resolution for each recipient that reports audit findings that affect awards made at that activity. SF-SAC Part III, Item 9 identifies the Federal agencies which have relevant findings in the audit report. The tracking system should be able to track the recipient, the fiscal year(s) and the stage of completion of the correction action plan(s). The system should be searchable to aid in the completion of management reports required by OMB Circular A-133.

4.5.5 Contracting Officer Responsibilities

The Contracting Officer is responsible for including the appropriate audit requirements in the award instrument; monitoring compliance with audit requirements; reviewing problem audits; and approving and monitoring corrective action plans to resolve audit findings and recommendations. The Contracting Officer should ensure that audits are completed and submitted as part of the administration of the award's reporting requirements.

4.5.6 Other Uses for the Clearinghouse

(a) Pre-Award. Contracting Officers are responsible for determining the business and financial management capabilities of potential recipients. The SF-SAC in the Clearinghouse database can assist the Contracting Officer in making the determination that a potential recipient has an acceptable accounting system and internal controls.

Contracting Officers should check the database for previous audit reports, questioned costs, corrective action plans and their resolution, and document the file with the findings from the review. Copies of the supporting audits may be obtained from the Clearinghouse if not previously received by the Contracting Officer.

Potential recipients with prior audit findings and corrective action plans should be considered for special conditions, payment by reimbursement or other controls to ensure that the funding is properly used.

(b) During the Project Period. The Clearinghouse should be checked when reviewing the continuation award package just as in the pre-award phase. Recipients that were held to special conditions or controls and that have shown improvement in their audits, should have those conditions or controls lessened or removed. New conditions or controls should be placed on recipients that have had negative audit findings since the start of the project or that have not submitted the audit(s).

(c) Post-Award and Close-out. Audits should be reviewed during the close-out process to ascertain if any negative audit findings will affect the agreement. An agreement should not be retired if the audit findings would impact the budget or other terms and conditions.

4.6 Reporting

(a) Generally, the DOE Project Officer is responsible for monitoring Progress Reports and Special Status Reports and the Contracting Officer is responsible for monitoring the receipt of other reports.

(1) The Contracting Officer should ensure that these roles are clearly understood and that the DOE Project Officer understands his/her responsibilities for monitoring the receipt of reports and the required follow-up actions.

(2) Contracting Officers and DOE Project Officers should keep each other informed if reports are not received.

(3) Each Contracting Activity must establish procedures that ensure reports are received and that Scientific/Technical Reports are sent to OSTI. Contracting Activities are encouraged to send reminders to appropriate recipient officials a few weeks before a reporting period ends. This will prevent reporting delinquencies due to mere oversight on the part of the recipient and so reduce the need for follow-up action.

(b) Contracting Officers should take the following actions for overdue reports:

1. Immediate follow-up action: When a report has not been received by the terms of the award, the Contracting Officer should contact the recipient by telephone or electronic mail to advise of the delinquency.

2. First Letter: If a report is overdue by 30 days, the Contracting Officer must send a letter to the recipient notifying it of the delinquency and requesting the report. This letter may be sent electronically. The letter must state that, if the report cannot be submitted promptly, the recipient should explain the reason and state the date by which DOE will receive the report.

3. Second Letter: If neither a report nor an acceptable explanation for not submitting it is received from the recipient within 30 days of the date of the first letter, the Contracting Officer must send (by certified mail, return receipt requested) a written notice of noncompliance, as required by 10 CFR 600.24. Among other things, this notice must state what enforcement action will be taken if the report is not received within 30 days (e.g., suspension or termination of the award if still active, withholding of any additional funds for the project, etc.). Enforcement actions are set forth in 10 CFR 600.162, 600.243 and 600.352.

4. Funds Cutoff: If neither the report nor an acceptable explanation is received within 30 days of the second letter, no additional funds shall be awarded for the project while the report remains overdue and the award, if still active, shall be suspended. The suspension notice must set a final date by which the report must be received. If the report or an acceptable explanation

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-26

DATE: March 30, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Purchase Card Policy and Operating Procedures**

SUMMARY: We are issuing the March 2005 Update of the DOE Policy and Operating Procedures for use of the Purchase Card. Most of the revisions are editorial in nature but the more noteworthy changes are listed below.

- A hyperlink was added for the Headquarters Strategic Sourcing Opportunities Home Page.
- Qualification standards were added for the Agency and Organizational Program Coordinator positions. We have also adopted those terms throughout the Guide for consistency with GSA usage.
- A hyperlink was added to access the Excluded Parties List System.
- A notice was added that all purchase card transactions above $2500 must be reported to the Federal Procurement Data System.
- Definitions of *Blanket Letter of Approval* and *Split Purchase* were added.
- A reference was added to the provision at FAR 32.1108 which allows the purchase card to be used as a method of payment under certain contracts.
- A hyperlink was added for the individual state tax exemption letters available on the GSA Home Page.
- The Affirmative Procurement Program list of recycled products was updated.

If you have questions you may call Richard Langston at 202-287-1339 or Richard.Langston@hq.doe.gov .

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy
Office of Procurement and
Assistance Management

Attachment

March 2005 Update

Contracting activities and authorized contractor SMARTPAY participants may revise the content to reflect their specific circumstances, e.g., identify your local coordinator, identify your central receiving office, etc. Revisions may not delete prohibitions or reduce the level of controls required by the GSA Purchase Card Guide or these DOE Guidelines. The GSA Master Contract and the Contract Guide, listed as Attachment 1, are available on the GSA Home Page at

http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=11989&noc=T

DEPARTMENT OF ENERGY

POLICY AND OPERATING PROCEDURES FOR USE OF THE GSA SMARTPAY PURCHASE CARD BY DOE AND AUTHORIZED CONTRACTOR PERSONNEL

ISSUED BY THE DIRECTOR
OFFICE OF PROCUREMENT AND ASSISTANCE MANAGEMENT

March 2005 REVISION

DEPARTMENT OF ENERGY

**POLICY AND OPERATING PROCEDURES
FOR USE OF THE
GSA SMARTPAY PURCHASE CARD
BY DOE AND AUTHORIZED CONTRACTOR EMPLOYEES**

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1. GOVERNMENT-WIDE COMMERCIAL CREDIT CARD SERVICE CONTRACT GUIDE GS-23-98004

FAR REFERENCES

2. FAR SUBPART 3.104, PROCUREMENT INTEGRITY
3. FAR PART 8 REQUIRED SOURCES OF SUPPLIES
4. FAR PART 12, ACQUISITION OF COMMERCIAL ITEMS
5. FAR PART 13, SIMPLIFIED ACQUISITION PROCEDURES
6. FAR PART 23, ENVIRONMENTAL CONSIDERATIONS

PURCHASE CARD FORMS AND THE SELF ASSESSMENT QUESTIONNAIRE ARE AT THE DOE PROCUREMENT HOME PAGE AT CHAPTER 13 OF THE DOE ACQUISITION GUIDE

7. DISPUTE (STATEMENT OF QUESTIONED ITEM) FORM
8. DOE PURCHASE CARD DESTRUCT NOTICE FORM
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DEPARTMENT OF ENERGY POLICY AND OPERATING PROCEDURES FOR THE USE OF THE GOVERNMENT SMARTPAY PURCHASE CARD BY DOE AND AUTHORIZED CONTRACTOR EMPLOYEES

1. PURPOSE

The purpose of this document is to establish DOE policy for the use of the Government purchase card. These procedures supplement and implement procedural aspects of the "U.S. General Services Administration Federal Supply Service Government-wide Commercial Credit Card Service, Contract Guide GS-23F-98004". In the event of any inconsistencies between these Guidelines and the terms and conditions of the Contract Guide or Federal Acquisition Regulation (FAR) Parts 3, 8, 13 and 23, the inconsistency will be resolved in favor of (1) the FAR, (2) the terms and conditions of the Contract Guide, and (3) these procedures.

Commercial purchase card services provide DOE with a means to simplify its small purchase procedures and improve its cash management by:

a. offering an alternative to the use of purchase orders, blanket purchase agreements (BPAs), and imprest funds;
b. streamlining the acquisition process by reducing paperwork, improving lead times, and expediting Contractor payments;
c. reducing the administrative costs associated with small purchases, BPAs, and imprest fund transactions; and
d. providing greater and more detailed statistical data and an audit trail as an aid in managing purchasing activities.

2. DEFINITIONS

The following definitions supplement the definitions contained in the Federal Supply Schedule.

a Administrative Office is the office with oversight responsibility for the DOE Purchase Card Program.

b. Approving official is the individual delegated approving authority by the Head of the Contracting Activity (HCA) or designee who is responsible for reviewing the monthly Statement of Account for each cardholder under his or her cognizance to ensure that purchases are made in accordance with all regulatory and procedural guidance contained or referenced herein.

c. Agency Program Coordinator (APC), is the individual having overall responsibility for the management of the DOE-wide purchase card program. Serves as the lead DOE representative in discussions with the Bank at the Agency level.

d. Best Value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

e. *Blanket Letter of Approval* is a written approval issued by an approving official identifying certain types of purchases that their Cardholders may make without seeking their Approving Offical's approval prior to the transaction.

f.. Cardholder is a DOE, or authorized contractor, employee with purchasing authority who:
(1) Is issued the DOE Purchase Card;
(2) Has his or her name embossed on the card;
(3) Is the sole user of the card; and
(4) Is the custodian of the card.

g.. Certificate of Appointment (SF-1402) is a formal written Contracting Officer warrant that is issued by the HCA to a cardholder, stating any limitations on the scope of authority to be exercised. The SF-1402

shall be used to evidence the contracting officer appointment for delegation of purchase cardholders exceeding micro-purchase authority.

h. Consolidated Statement is a monthly statement sent by Bank of America to the Finance Office which shows purchases by and credits issued to all the Cardholders under their purview.

i. Delegation of Authority is a formal written delegation of DOE Purchase Card purchasing authority that is issued by the HCA or designee, to a cardholder with single purchase limit authority up to $2,500. This purchasing authority is not evidenced by a Certificate of Appointment. This delegation specifies the single purchase and monthly dollar limitations and any other conditions applicable to DOE Purchase Card purchases made by that individual, including identification of their approving official.

j. Government Purchase Card is a distinctly designed VISA purchase card issued by the Bank of America under the General Services Administration SMARTPAY Program. The plastic purchase card is embossed with the employee's name and can only be used by the employee. "U. S. Govt Tax Exempt" is also embossed on the card. The card is uniquely designed so that it will not be easily confused with other cards. Unlike most personal credit card programs, the SMARTPAY Program is not a revolving credit program.

k. Head of the Contracting Activity (HCA), means the official in charge of the purchasing function for a contracting activity.

l. Individual Statement of Account is a monthly listing of all payments authorized for purchases and credits by a cardholder and billed by the merchant during a designated billing period.

m. Limits
(1) Single Purchase Limit is the maximum dollar limit for an individual purchase card transaction.
(2) Monthly Spending Limit is the maximum dollar amount authorized to be spent by the cardholder within a 30-day period.

n. Oral Purchase Procedure, as used herein, is a procedure where an order is placed or a purchase is made through an oral agreement which is made in person or by telephone by the cardholder. No written purchase order or contract is issued by the Government. The supplies or services are provided by the merchant and payment is made using the DOE Purchase Card.

o. Organizational Program Coordinator (OPC), is responsible for managing the purchase card program at the contracting activity or contractor organization.

p. *Split purchase* is the deliberate practice of splitting a transaction into two or more smaller transactions to keep the purchase beneath a cardholder's single purchase limitation, or other stated purchase limitation. If a purchase would exceed a cardholder's single purchase limit, the purchase must be accomplished using other acquisition procedures, as appropriate. These purchases will be accomplished by the local purchasing staff.

q. 30-Day Cycle is a monthly reporting/billing cycle which begins on the 28th of one month and ends on the 27th of the following month.

3. **RESPONSIBILITIES**

a. The Head of the Contracting Activity or designee, will:
(1) Designate an individual to serve as the organizational program coordinator for the contracting activity.
(2) Determine who the approving officials and cardholders will be and ensure that purchasing authority is delegated to cardholders and approving officials.
(3) Authorize purchase cards to the minimum extent necessary to carry out the contracting activities mission.

(4) Establish a single purchase limit as part of the Delegation of Purchasing Authority or Certificate of Appointment (SF-1402) for each cardholder.
(5) Establish a monthly spending limit by the Certificate of Appointment or Delegation of Purchasing Authority for each cardholder.
(6) Establish the monthly office limit consistent with budget restrictions.
(7) Establish and maintain written local procedures for use of the DOE Purchase Card consistent with the procurement regulations, the GSA Contract Guide terms and conditions, and this document. This will include the establishment of procedures to ensure the physical security and proper use of the DOE Purchase Card Program and the conduct of an annual review addressing at least the considerations in the Self Assessment Questionnaire at Attachment 12.
(8)Ensure that training on the DOE Purchase Card Program and related responsibilities are developed and provided to approving officials, cardholders, and other appropriate personnel. The training should include the best value concept. Conduct refresher training based upon these procedures, lessons learned over time, and feedback from annual reviews. The refresher training should be provided to cardholders and approving officials at least biennially.
(8) Authorize no more than one purchase card to an individual cardholder unless the Head of the Contracting Activity or designee determines that a cardholder has a need for more than one card.
(9) Ensure that personnel procedures include return of the card in the departing employees checklist. The procedures should ensure that the card is returned to the Organizational Program Coordinator who will deactivate the cardholder account and dispose of the card.
(10) Ensure that departing employees leave their log and records with the approving official or another designated employee for appropriate retention.
(11) Consider suspending or terminating cardholder accounts if the cardholder does not submit monthly account reconciliations in a timely manner.
(12) Authorize cards only for employees of the contracting activity or contractors managing DOE facilities.
(13) Counsel and, if necessary, replace approving officials who do not submit monthly account reconciliations in a timely manner.

(b) Organizational Program Coordinators will:
(1) Review and coordinate the approval of Delegations of Purchasing Authority or Certificates of Appointments.
(2) Process applications for new cardholders through Bank of America.
(3) Arrange for or provide training, including biennial refresher training, for cardholders and approving officials as needed.
(4) Maintain and process changes for cardholders.
(5) Maintain records of cardholder training and purchase limits.
(6) Handle problems or issues related to the purchase card program with the cardholders and/or Bank of America.
(7) Arrange for or conduct reviews and assessments of cardholders' purchases to ensure compliance with the regulations, policies, and agency procedures.
(8) Refer cardholders to the Head of the Contracting activity or designee for suspension or termination if monthly account reconciliations are not submitted in a timely manner.
(9) Maintain an up-to-date inventory of purchase cardholders.
(10) Deactivate purchase card accounts of past employees.
(11) Refer approving officials to the Head of the Contracting Activity or designee if monthly account reconciliations are not submitted in a timely manner.

(c) Cardholders will:
(1) Certify that the quantity and quality of the items/services furnished are in accordance with the agreement (verbal or written) with the vendor.
(2) Ensure that funds are reserved prior to the items being purchased.
(3) Obtain the approval of their approving official prior to the transaction unless the transaction is a purchase covered by a blanket letter of approval issued by the approving official.

(4) Comply with the requirements of FAR Part 8 entitled, Required Sources of Supplies and Services, and Part 13 entitled, Simplified Acquisition Procedures, when making purchases using the DOE Purchase Card as well as these procedures.
(5) Maintain physical custody of the DOE Purchase Card at all times. The cardholder must not allow anyone to use the purchase card or account number. A violation of this trust may require that the card be withdrawn from the cardholder with the possibility of subsequent disciplinary action. The cardholder will take care to separate the Government card from personal cards in order to prevent its accidental use for personal transactions.
(6) Not "split" purchases in order to fall within the single purchase limit. If a purchase would exceed a cardholder's single purchase limit, the purchase must be accomplished using other acquisition procedures, as appropriate. These purchases will be accomplished by the local purchasing staff.
(7) Make purchases only in accordance with the requirements of these Guidelines and its references.
(8) Save all customer receipts.
(9) Review (see Sections 18. and 19.), complete, sign and date the Individual Statement of Account.
(10) Submit completed Statement of Account and customer receipts to approving official within 5 working days.
(11) Comply with monetary and activity limits.
(12) Immediately report lost or stolen cards to Bank of America, to the approving official, and to the Organizational Program Coordinator.
(13) Inform the merchant that the purchase is tax exempt, to prevent being charged with taxes (See Section 28. for use of Standard Form 1094, "U.S. Tax Exemption Certificate").
(14) Perform follow-up on purchases to ensure items are received prior to processing the Individual Statement of Account.
(15) Ensure compliance with property requirements.
(16) Ensure that supplies and services that are purchased with the card are consistent with appropriation guidelines.
(17) Complete training prescribed at section 32.
(18) Federal cardholders will complete Annual Financial Disclosure Report (OGE-450) or Executive Branch Public Financial Disclosure Report (SF-278) and complete the annual online Ethics Training.

(d) Approving officials will:
(1) Nominate employees to serve as cardholders by submitting a form such as that illustrated at Attachment 13.
(2) Ensure that each cardholder has access to the Policy and Operating Procedures and understands the requirements for use of the DOE Purchase Card.
(3) Review and approve, prior to purchase, DOE Purchase Card purchases, except those having blanket letters of approval.
(4) Review and approve, in a timely manner, cardholders' monthly Statements of Account ensuring that the statements have supporting documentation and are complete, accurate, and reflect only authorized purchases.
(5) Promptly sign, date, and forward all cardholders' Statements of Account and any dispute forms to the Finance Office so that the statements are received by the Finance Office not later than the date required by the Finance Office.
(6) Complete the training prescribed at section 33.

(e) Finance Offices will:
(1) Review and reconcile all Statements of Account to the invoice submitted from the Bank of America.
(2) Ensure that payments to the Bank of America are made in accordance with the Prompt Payment Act.
(3) Distribute DOE Purchase Card charges and credits to the appropriate accounts.
(4) Assure all payments meet the requirements of applicable law and regulations, including determining the availability of appropriations as to purpose for items purchased.
(5) Establish procedures for receiving and verifying the amount of rebates received from Bank of America and depositing rebate checks received from Bank of America.

(6) Notify purchase card program coordinator of any problems with individual cardholder accounts.
(7) Ensure that:
  (a) proper approvals are present on all statements before charging program office accounts;
  (b) instances in which cardholders statements are not received in a timely manner are referred to the Organizational Program Coordinator; and,
  (c) program accounts are only charged in accordance with the funding direction provided on approved cardholder statements.

4. **PROGRAM FEATURES**

(a) The DOE Purchase Card is a VISA commercial purchase card that has a unique numbering system which identifies the Agency/Bureau, subunit, single purchase limit, and the cardholder number. The DOE Purchase Card is not to be used by anyone other than the employee whose name appears on it and shall not be used for personal purchases.
(b) Bank of America will be paid the actual cost of transactions for which the DOE Purchase Card was used.
(c) Purchases that have been made using the DOE Purchase Card will be paid in accordance with the Prompt Payment Act.
(d) Bank of America provides program services support, full reporting, purchase authorization, customer service, and account setup services.
(e) Purchases can be returned within 120 days following purchase to the merchant for credit.
(f) Purchases are tax exempt in those states which honor the tax exempt status of the U.S. Government. See Tax Exemption State Letters at
http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=13558&noc=T
g. DOE Purchase Cards are mailed to the cardholders' offices. Bank of America will have no record of the cardholder's home address, personal credit history, or social security number.

5. **PURCHASING AUTHORITY**

Each cardholder must have purchasing authority evidenced by either a Delegation of Authority or a Contracting Officer's Certificate of Appointment. This authority allows the cardholders to use the DOE Purchase Card to purchase goods and services within established single purchase and monthly spending limits. The single purchase and monthly dollar limitation delegated to the purchase cardholder shall accurately reflect the dollar levels of purchases that the cardholder will be making as part of their official duties.

6. **CONDITIONS FOR USING THE DOE PURCHASE CARD**

The DOE Purchase Card will be used for purchases that meet the dollar and activity limits authorized on the DOE Purchase Card. Purchases accomplished using the DOE Purchase Card must meet the following conditions:

(a) The total of a single purchase may comprise multiple items and cannot exceed the authorized single purchase limit stated in the delegation of authority or the notice of limitations and conditions.
(b) All purchases accomplished using the DOE Purchase Card will be in accordance with Part 8, "Required Sources of Supplies and Services" and Part 13, "Simplified Acquisition Procedures" of the Federal Acquisition Regulation (FAR) and the Policy and Operating Procedures and the Cardholder's Delegation of Purchasing Authority.
(c) The supplies or services must be available and received prior to the end of the billing period wherever practicable. Items or services not received prior to the end of the billing cycle may not be approved for payment by the cardholder and approving official on the monthly Statement of Account.

The purchase card may, pursuant to FAR 32.1108, be used as a method of payment under certain contracts provided the contract contains a clause authorizing such method of payment through a clause such as that at FAR 52.232-36.

7. **PERSONAL PROPERTY MANAGEMENT AND ACCOUNTABILITY**

(a) **Personal Property Management**

(1) DOE maintains a personal property management program to maintain adequate inventory controls and accountability systems for all property under its control. A critical element of the personal property management program involves the acquisition and receipt of needed items and the recording of the transaction on the formal accountable records of the Department. The acquisition of personal property can be accomplished by a number of methods, including credit card purchases.

(2) In all acquisitions of personal property, after receiving the item, the physical property must be issued for use or placed into service and the documentation of receipt must be forwarded to the property management office. Generally, this responsibility lies with other than the end user of the property. However, when the end user has acquired the personal property with a credit card and the property is delivered directly to the cardholder, the cardholder becomes accountable for the property and assumes responsibility for ensuring that the property items are recorded in the property management system.

(b) **Property Accountability**

(1) Purchases Shipped or Delivered by the Vendor. All personal property acquired by using the purchase card should generally be delivered to and *processed by the receiving office*. This will ensure *inventory control identification*, as *appropriate* and *recording in the personal property management records*.

(2) Purchases Hand Carried by the Cardholder. Personal property purchased and hand carried by the cardholder or delivered directly to the cardholder requires inventory control identification and recording in the personal property management records, as appropriate. As soon as practicable following the purchase of the personal property, the cardholder will advise the property management office in writing (i.e., via E-mail or facsimile) requesting that the equipment/property be identified and recorded, as appropriate. Written confirmation should include the following information:

(a) Cardholder name, office symbol, telephone number, building and room number;
(b) Brief description of the personal property;
(c) Model No. and Serial No. of the personal property; and
(d) Receipt verification witness name, office symbol, telephone number, building and room number.

8. **PROHIBITIONS AND RESTRICTIONS**

(a) DOE Purchase Card purchases are subject to the following restrictions and prohibitions: The following are prohibited uses of the DOE Purchase Card:

(1) Cash advances;
(2) Rental or lease of land or buildings;
(3) Purchase of software requiring a negotiated license agreement between DOE and the contractor (excludes "shrink wrap" license affixed to commercially available software);
(4) Reserved.
(5) Purchases of food, beverages and entertainment, except under very limited circumstances generally associated with away from work place training that must be approved in advance in all cases; and
(6) The DOE Purchase Card will not be used in lieu of the Government authorized travel charge card.

(b) Generally, the following items are centrally managed and procured. Check for local guidance before using the purchase card to obtain the following.

(1) Messenger services and package delivery services;
(2) Office supplies and paper;
(3) Lease or purchase of Government vehicles;

(4) Building alterations;
(5) Office moves;
(6) Carpet installation and repair;
(7) Shuttle bus service;
(8) Printing jobs;
(9) Photocopier equipment;
(10) Books, publications, subscriptions, etc.

(c) The Bank groups vendors within merchant categories based on their type of business. Purchases from the following merchant category codes have been blocked. Should a cardholder need to make a valid purchase from a vendor in one of these category codes, their Purchase Card Coordinator will need to clear the purchase with the Bank.

3000 - 3441Airlines & Rental Cars
4111 Commuter Transp, Ferries
4112 Passenger Railways
4119 Ambulance Services
4411 Cruise Lines
4511 Airlines, Air Carriers
4722 Travel Agencies, Tour Operators
4723 TUI Travel – Germany
4761 Transportation Travel
4829 Wires, Money Orders
5309 Duty Free Stores
5681 Fur Stores
5698 Wig and Toupee Stores
5718 Fireplace Accessory Stores
5735 Record Shops
5814 Fast Food Restaurants
5921 Package Liquor Stores
6760 Savings Bonds
7012 Timeshares
7032 Sporting/Recr Camps
7033 Trailer Parks, Campgrounds
7273 Dating/Escort Services
7276 Tax Preparation Service
7297 Massage Parlors
7832 Motion Picture Theaters
7841 Video Tape Rental Stores
7932 Billiard/Pool Establishments
7933 Bowling Alleys
7941 Sports Clubs/Fields
5932 Antique Shops
5933 Pawn Shops
937 Antique Reproductions
5944 Jewelry Stores
5945 Hobby, toys and Game shops
5960 Direct Marketing - Insurance
5962 Direct Marketing - Travel
5972 Stamp and Coin Stores
5973 Religious Goods Stores
5977 Cosmetic Stores
5993 Cigar Stores and Stands
5996 Swimming Pools Sales/Serv
6010 Manual Cash Disburse
6011 Automated Cash Disburse
6051 Non FI, Money Order
6211 Security Brokers/Dealers
6300 Insurance Underwriting, Pre
7992 Golf Courses – Public
7993 Video Game Supplies
7994 Video Game Arcades
7995 Betting/Casino Gambling
7996 Amusement Parks/Carnivals
7998 Aquariums
8661 Religious Organizations
8675 Automobile Associations
9223 Bail Bonds Payments
9311 Tax Payments
9700 Automated Referral Serv.

9. **PURCHASES**

Purchases of goods and services should be made based upon a properly approved requisition signed by an authorized employee, independent of the purchase cardholder, describing the good or service to be purchased, the delivery requirements, potential sources, and documentation that funds are available for the purchase. In limited circumstances, as provided by the Head of the Contracting Activity or designee, purchases may be authorized without prior review. The goods or services to be purchased shall be those necessary to meet the Government's best value, given cost, schedule, and performance requirements.

Purchases of services may be made with the purchase card, however, if the nature of the service is subject to the Service Contract Act, refer the matter to the contracting officer. Such purchases should be fixed price or fixed hourly rate with a maximum ceiling. If the services are purchased on a recurring

basis, consideration should be given to consolidation under a contract. The card may not be used unless ordering and delivery of the services can both occur within the billing period. The card should not be used to procure services subject to the Service Contract Act in an amount of $2,500 or greater. Service contracts provide labor other that bona fide executive, administrative or professional in nature.

Purchases of construction may be made with the purchase card only if local procedures provide for such use. Purchase card purchases of construction may not exceed $2,000.

If the cardholder purchases goods or services directly from a merchant, the merchant should give the cardholder a copy of the charge slip and, if applicable, any other customer receipt. The cardholder must ensure that the charge slip contains full documentation of items purchased. The cardholder is required to save the charge slip and any other receipt for forwarding to the cognizant approving official along with the monthly Statement of Account. In addition, if an item is returned to the merchant and a credit is given, the credit slip should also be saved and attached to the Statement of Account which shows the credit.

10. **PREPARATION OF INTERNAL REVENUE SERVICE FORMS FOR CERTAIN PURCHASES**

Purchases of services exceeding $600.00 necessitate the issuance of a Standard Form 1099 to the merchant and the Internal Revenue Service. When making such purchases, the cardholder should obtain the merchant's Taxpayer Identification Number and. provide it to the finance office. Purchases made through use of the DOE/C Web system already conform to this requirement. Likewise purchases, where funds are reserved through use of the STARS system, will conform to this requirement. In the case of such purchases outside either of these systems, the cardholder should check with the finance office concerning any special procedures to facilitate this.requirement.

11. **RESERVED**

12. **TELEPHONE ORDERING**

Care must be taken to ensure that the items are received prior to the end of the billing cycle. Since the Statement of Account will be issued to the cardholders immediately after the end of each billing cycle, the following instructions will apply:

(1) Telephone ordering should allow enough time for purchases to be delivered within the same cycle;
(2) Subscriptions may be telephonically ordered and payment authorized even though the subscription has not been received by the end of the billing cycle;
(3) Merchants must agree to not charge the DOE Purchase Card account number until the shipment is made;
(4) Cardholders must instruct the merchant to include the following information on the shipping document or packing slip:
   - Cardholder name;
   - Cardholder telephone number;
   - Building number, room address, street address, city, and state of delivery point.

13. **ORAL PURCHASES (INCLUDING TELEPHONE ORDERS) AND MAIL ORDER PURCHASES**

(1) Oral Purchases and mail order purchases to acquire supplies or services may be accomplished using the DOE Purchase Card provided that (1) the supplies or services can be described in sufficient detail so that the parties have a clear understanding of what is required; (2) the amount of the purchase is $25,000 or less; and (3) a purchase order or contract is not required by either the merchant or DOE. These types of purchases must be documented. Documentation will address such things as extent of competition (see Section 35).
(2) As used in these Guidelines, oral purchasing procedures mean a procedure whereby an order is placed using the purchase card through a verbal agreement which is made in person or via

telephone. The cardholder verbally places the order, the vendor supplies the items or services requested by the cardholder, and payment is made to the vendor using the purchase card.

(3) When an order is placed via telephone using the purchase card, the cardholder will:

(a) Notify the vendor that the purchase is tax exempt. Should a vendor refuse to acknowledge the tax exempt status of the purchase, the ultimate recourse for the cardholder is to inform the vendor that the Government's purchase will be taken elsewhere. If necessary, give the merchant a completed SF 1094, U.S. Tax Exemption Certificate, as illustrated at Attachment 11 of these procedures.

(b) Ensure that the items or services acquired will be received prior to the end of the billing cycle. Items or services not received prior to the end of the billing cycle may not be approved for payment by the cardholder and approving official on the monthly Statement of Account. Therefore, the cardholder should confirm that the vendor agrees not to charge the purchase card until shipment is made so that the receipt of supplies may be certified on the monthly Statement of Account.

(c) Ensure that the price quoted represents the full obligation of the Government for the item or service acquired. Cardholders will ensure that the prices quoted represent the total price to the Government, including shipping charges, packaging, etc., to avoid future billing and payment problems.

(d) Instruct the vendor to include the following information on the shipping document or packing slip, if required. This information will alert the receiving officer and the requisitioner that the supplies have been purchased with the purchase card:

(i) Cardholder's name and routing symbol;

(ii) Building number, room number, street address, city and state of delivery point; and

(iii) Cardholder's telephone number.

(4) The cardholder will execute and maintain appropriate records of each transaction.

14. **RECORD KEEPING**

All cardholders must keep complete and accurate records of their purchases in accordance with Attachments 9 and 10 and the instructions for their use included in Section 18 of these Guidelines. This shall include evidence of receipt of any property or supplies purchased using The Purchase Card. Central filing of such documentation is acceptable. Automated systems are acceptable provided they provide equivalent documentation. Records of departing employees should be maintained by the approving official or another employee for the appropriate retention period.

15. **RESERVATION/OBLIGATION OF FUNDS**

Local procedures shall be established to certify and obligate funds.

16. **CARD ABUSE**

Use of the card for other than Official Government business may be considered as an attempt to commit fraud against the U. S. Government and may result in immediate cancellation of the card and disciplinary action against the cardholder under applicable Departmental or Government-wide administrative procedures. Suspected fraudulent misuse should be reported to the Office of the Inspector General and the Organizational Program Coordinator. The cardholder will be personally liable to the Government for the amount of any non-approved purchases and possible subjection to a fine of not more than $10,000 or imprisonment for not more than five (5) years or both under 18 U.S.C. 287.

17. **REPORTING**

At the end of the billing cycle, Bank of America will issue detailed statements as follows:

a. Cardholders will receive an individual Statement of Account showing all purchases and credits processed by Bank of America during the billing cycle.
b. The Finance Office will receive a consolidated statement of all purchases and credits applicable to all cardholders.

18. **REVIEW PROCESS**

Each monthly statement must be reviewed and approved, in a timely manner, by both the cardholder and an approving official, who is either in the cardholder's supervisory chain of command, or a person independent of the purchase cardholder at a level equivalent to a supervisor. An approving official should normally be responsible for no more than five cardholders, or 500 transactions per month, except with the approval of the HCA or designee. For NNSA contracting activities, an approving official should be responsible for no more than a reasonable number of cardholders consistent with the activities normal span of supervisory control except with the approval of the HCA or designee.

Upon receipt of the statements from Bank of America, the following actions will be performed:

a. Cardholders will:
   (1) Reconcile the Statement of Account with their Bankcard Ordering Log, copies of charge/credit slips and any other customer receipts, and certify that the supplies and services are in accordance with the orders that were placed.
   (2) Retain any charge/credit slips and customer receipts for purchases not listed on the Statement of Account for the next billing cycle.
   (3) Document statement errors with an explanation using the Bank of America cardholder dispute form and forward a copy to Bank of America.
   (4) Certify the receipt and accuracy of all purchases by signing and dating each page of the Statement of Account.
   (5) Forward the reconciled Statement of Account, charge/credit slips, other customer receipts and, if applicable, the completed dispute form to the approving Official within five working days of receipt of the Statement of Account.
   (6) If Cardholder does not have a customer copy of the charge/credit slip, the cardholder will mark the word "lost" over in the date of purchase column on the Statement of Account and attach an explanation. If the charge slip is lost, ask the merchant for a copy. If the cardholder is planning to be on travel or on leave and will not be available to review the Statement of Account at the time it is received, the cardholder should provide the approving official with the charge/credit slips.
b. Approving officials will:
   (1) Review the individual cardholder's Statement of Account for accurate reconciliations, supporting documents, authorized purchases, credits, budget and cost classifications, and other related information.
   (2) Obtain any other necessary information in a timely manner from the cardholders within their jurisdiction.
   (3) Approve by signing and dating the reconciled Statements of Account and forward them to the Finance Office by the 15th day of each month. Return receipts and other supporting documentation to the cardholder for record maintenance unless local procedures provide for Finance Office maintenance of records.
c. Finance Offices will:
   (1) Review Individual Statements of Account and any dispute forms for accurate reconciliations.
   (2) Account for all DOE Purchase Card transactions.
   (3) Reconcile Finance Offices consolidated statement with cardholders' Statements of Account.
   (4) Reconcile the Bank of America's invoice with the consolidated report.
   (5) Make payment to Bank of America in accordance with the Prompt Payment Act.

(6) Forward any dispute forms to Bank of America.
(7) Assure all payments meet the requirements of applicable law and regulations, including determining the availability of appropriations as to purpose for items purchased.

19. BILLING ERRORS AND DISPUTES

a. Dispute Form
If a cardholder receives a statement that lists a transaction for an item or service that has not been received, or represents an unauthorized charge, the cardholder or approving official will complete the cardholder dispute form and forward a copy of the form to Bank of America and the original to the Finance Office with the cardholder's reconciled monthly Statement of Account and supporting documentation. Bank of America will credit the transaction until the dispute is resolved. Bank of America will assist in reconciling the questioned item only if it is evidenced by the dispute form within 60 days from the date of the Statement of Account that first contained the questioned item. However, it is the responsibility of the cardholder to make every effort to resolve errors, discrepancies and disputes.

b. Defective Items
If items purchased with the purchase card are found to be defective, the cardholder has the responsibility to obtain replacement or correction of the item as soon as possible. If the merchant refuses to replace or correct a faulty item, then the purchase of the item will be considered in dispute. Items in dispute are handled in the same manner as billing errors in that disputed items are reported using the dispute form by forwarding a copy to Bank of America and a copy to the Finance Office with the monthly Statement of Account. The 60 day period applies to defective items as well as questioned items.

20. DEPARTURE OF EMPLOYEES

a. Employees Leaving the Agency
If a cardholder's employment is ending (e.g., resignation, retirement), the DOE Purchase Card should be destroyed prior to the release date. The cardholder must complete the form entitled "DOE Purchase Card Destruct Notice Form" (See Attachment 8). This completed form should be forwarded through the approving official to the Organizational Program Coordinator who will notify the Bank of America. The Cardholder's letter of delegation or Contracting Officer warrant will be cancelled at the same time.

b. Transferring Employees
If a cardholder is transferring to another position, which will also require use of the purchase card, the cardholder will notify the Organizational Program Coordinator. The Organiztional Program Coordinator, in consultation with the losing and gaining approving officials and Bank of America will arrange for transfer of the account to the gaining office. The gaining and losing offices will cancel and reissue the Cardholders's letter of delegation or Contracting Officer warrant. If it is determined that the purchase card should not be retained by the cardholder, the purchase card should be destroyed and the notification procedures outlined above should be followed by the cardholder.

21. UTILIZATION OF SMALL BUSINESS

Federal Acquisition Regulation (FAR) Part 13 (copy attached) prescribes that acquisition of supplies and services of an anticipated dollar value of $2,500 through $100,000 will be reserved exclusively for small business concerns. Only when there is no reasonable expectation of obtaining the goods or services from two or more responsible small business concerns that will be competitive in terms of market price, quality, and delivery, may the purchase be made from a large business. Each such purchase will be appropriately documented.

22. **COMPETITION**

Purchases not exceeding $2,500 are called "micro-purchases" and may be made without securing competitive quotations if the cardholder considers the prices obtained from a single source to be reasonable. Purchases made without securing competition will be distributed among qualified suppliers by means of rotating recurring purchases among vendors. If a purchase recurs frequently, consideration should be given to consolidating the requirements to obtain quantity discounts. Refer such matters to your Organizational Program Coordinator.

23. **MICRO-PURCHASES UNDER THE DOE PURCHASE CARD PROGRAM**

The Federal Acquisition Streamlining Act (FASA) of 1994 was signed into law by President Clinton on October 13, 1994. FASA established "micro-purchase" procedures for acquiring products and services valued at $2,500 and below.

The primary objective of micro-purchase procedures is to dramatically simplify the method in which Government officials can acquire low-dollar value products and services in the performance of their mission duties and responsibilities.

Key streamlining features of the micro-purchase program are that (1) purchases may be made without securing competitive quotations if it is determined that the price for the purchase is reasonable, and (2) purchases are exempt from the provisions of the Buy American Act and the small business set-aside provisions of the Small Business Act.

The following requirements apply to micro-purchases:

(1) Micro-purchases do not need to be competed. However, noncompetitive micro-purchases should be equitably distributed among qualified vendors, i.e., if there are multiple vendors and a recurring requirement, rotate the award among the vendors.

(2) The mandatory sources described in Section 29 of the Guidelines and Operating Procedures apply to micro-purchases. In addition, all other requirements contained in the Guidelines and Operating Procedures apply to micro-purchases.

24. **PROCUREMENT INTEGRITY REQUIREMENTS FOR FEDERAL EMPLOYEE PURCHASE CARDHOLDERS**

FAR Subpart 3.104 implements the Federal Government's policy related to conduct and procurement activities of Federal employee procurement officials. For the purposes of these procedures, purchase cardholders are considered procurement officials. This applies to the cardholder's approving officials to the extent that the approving official had personal and substantial participation in a purchase card transaction.

For cardholders, whose purchases do not exceed the Simplified Acquisition Threshold, $100,000, the requirements of FAR 3.104-3(c) do not apply. Namely, if a cardholder or approving official is contacted by a person who is a bidder or offeror for a purchase transaction regarding non-Federal employment, the cardholder or approving official need not:

- Promptly report the contact in writing to his/her supervisor and to the designated agency ethics official; and
- Reject the possibility of non-Federal employment; or
- Disqualify himself/herself from further personal and substantial participation in that purchase.

Prohibited Conduct of Federal Procurement Officials - During the conduct of any Federal agency procurement, including purchase card transactions, of property or services, no procurement official will knowingly:

(1) Solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor;

(2) Ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or,

(3) Disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

25. **ACQUISITON REGULATION**

The Federal Acquisition Regulation applies to card purchases. See especially, FAR Subpart 3.104, FAR Part 8, FAR Part 12 and FAR Part 13: Copies of these parts are attached.

26. **PROGRAM SUPPORT**

The purchasing and finance offices will provide full program support and assistance to cardholders and approving officials. Each of these offices will identify staff members who can assist cardholders and resolve problems which may be encountered.

27. **HEAD OF THE CONTRACTING ACTIVITY REVIEWS**

The HCA is responsible for the conduct of an effective and efficient acquisition program. Accordingly, purchase cardholders and approving officials are responsible for the card purchases in accordance with the Policy and Operating Procedures and Guidelines and the references attached. The HCA should conduct annual reviews of cardholder records to determine the extent of adherence to prescribed procedures, guidelines, policies, regulations, and good management practices, and to identify any needs for improvement, guidance and/or training. Annual reviews should include an assessment of the appropriateness of transaction dollar limitations as well as a validation of the need for the account based upon usage, e.g. no transactions within the past 6 months. If purchases are at significantly lower levels, lower limitations should be considered. Attachment 12 to this Guideline provides a review checklist that should be used in conducting this annual review. Additionally, the Organizational Program Coordinator should conduct monthly oversight reviews to identify any seemingly abnormal purchases so that they may be promptly reviewed and any problems resolved.

28. **U.S. GOVERNMENT TAX EXEMPT PURCHASES**

Each DOE Purchase Card is embossed with the notice: "U.S. GOVT TAX EXEMPT." The cardholder must inform the merchant prior to placing the telephone order or making an over the counter purchase, that the purchase is exempt from all state or local taxes, including sales taxes.

To the extent that the merchant does not initially acknowledge that DOE Purchase Card purchases are exempt from state and local taxes, the cardholder will specifically instruct the merchant that the Government wide card provides that all Card purchases will be exempt from state and local taxes. In addition, FAR Subpart 29.302, "Application of state and local taxes to the Government," states that purchases and leases made by the Federal Government are immune from state and local taxation. FAR Subpart 29.305, "State and local tax exemptions," states that evidence of exemption from state and local taxes includes copies of purchase orders, shipping documents, purchase card imprinted sales slips, paid or acknowledged invoices, or similar documents that identify an agency of the U.S. as the buyer.

Another method of evidencing the purchase as tax exempt from state and local taxes is by furnishing a copy of the U.S. Tax Exemption Certificate (SF-1094) to the merchant. This Certificate may be executed by the cardholder. A copy of the SF-1094 (U.S. Tax Exemption Certificate) is made a part of these Guidelines and Operating Procedures as Attachment 12.

Each state has provided GSA a tax exemption letter discussing its statutes in this area. They are available at: http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=13558&noc=T

29. **MANDATORY SOURCES**

a. Cardholders are subject to the regulatory requirements contained in FAR Part 8, "Required Sources of Supply," a copy is attached.

b. By law, the Javits-Wagner-O'Day Act Program (JWOD) is a mandatory source program for the Federal Government. The program was established as a result of the passage of the Wagner-O'Day Act of 1938. That Act, and subsequent amendments are designed to promote the socioeconomic goal of generating employment and training opportunities for persons who are blind or are otherwise severely disabled. The JWOD program carries the highest socioeconomic priority involving Federal acquisitions in that no other provision of the FAR permits exception to the mandatory nature of JWOD products and services provided by the National Industries for the Blind and NISH nonprofit agencies and only the Federal Prison Industries can override JWOD's priority for products. In addition, the provisions of the Federal Acquisition Streamlining Act of 1994 do not amend the mandate to procure JWOD products and services set forth in the JWOD Act. Purchase cardholders are prohibited from acquiring supplies equivalent to JWOD items from other sources, including discount office supply stores and firms supplying Federal agencies under consolidated office supply contracts except as provided for at Section 30 below. Further detailed guidance for the purchase of office supplies follows in Section 30 below, entitled **OFFICE SUPPLIES AND JWOD**.

c. Federal Prison Industries (FPI) provides training and employment for prisoners confined in Federal prison and correctional institutions through the sale of its supplies and services to Federal agencies. Cardholders are required to purchase those supplies listed in the FPI schedule only from FPI to the extent the supplies are otherwise not prohibited under Section 8 of these Procedures.

30. **OFFICE SUPPLIES AND JWOD**

Under the provisions of the Javits-Wagner-O'Day Act, GSA, JWOD, and those GSA Multiple Award Office Supply Schedule contractors are the exclusive distributors of JWOD office supplies with the following ordering options:

WWW.JWOD.COM. This is JWOD's on-line system for ordering next-day delivery of thousands of Skilcraft and other JWOD products. This is the recommended ordering option for purchase cardholders using the purchase card as the most convenient and efficient method of purchasing office supplies.

■ GSA Advantage On-Line Shopping Service. This Internet site (http://www.gsa.advantage.gov) allows customers to browse, search and review prices and delivery options before placing an order on the Internet. GSA's National Help Line at 800-488-3111 will answer questions and refer you to local JWOD Program assistance through Customer Service Directors in each state.

■ GSA Multiple Award Schedule Program. In addition to acquiring office supplies directly from GSA using one of the options described above, as of August 30, 1996, high quality office supplies under the JWOD Program are available nationwide from commercial vendors under GSA's Multiple Award Office Products Next Day Delivery Program (Desktop Schedule 75 III A). There is no maximum order quantity under the GSA Multiple Award Schedule Program. Discounts and JWOD supplies are only available for catalog orders placed using the Government toll-free numbers below -- walk-in stores are not included. The authorized Office Supply vendors accept the Government Purchase Card. Blanket Purchase Agreements (BPAs) between DOE buying activities and the vendors are permitted. The following vendors are included in the GSA Desktop Schedule:

Boise Cascade Office Products
Telephone No. 800-505-3337

BT Office Products International
Telephone No. 888-862-8674

Corporate Express
Telephone No. 800-706-9267

Innovative Sales Brokers
Telephone No. 800-283-1903

Office Depot
Telephone No. 888-263-9586

Staples National Advantage
Telephone No. 800-538-2728

These GSA multiple award vendors accept the Government purchase card. Product schedules are available to cardholders by phoning the telephone numbers listed above. It is recommended that cardholders obtain product schedules from each of the GSA multiple award vendors and utilize either the GSA Advantage On-Line Shopping Service or the GSA Multiple Award Schedule Program to acquire office supplies. GSA Multiple Award Schedule Program vendors are prohibited from selling commercial products which are essentially the same as JWOD products.

31. COMPLEX-WIDE STRATEGIC SOURCING OPPORTUNITIES DOE-WIDE ACQUISITION VEHICLES READY TO USE

Strategic Sourcing acquisition instruments are available on the DOE Procurement Home Page for use by all U.S. Department of Energy (DOE) activities. In addition, subject to the specific ordering procedures of each award, DOE site and facility contractors are eligible to use these instruments. Hyper-text links are provided so you can examine each instrument and then the 'Schedule' to determine what is available and at what price. An activity or contractor can easily place Orders against the contract by following the Ordering Procedures linked under each instrument.

It is at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Complex-wide+strategic+sourcing+opportunities?OpenDocument

32. **QUALIFICATIONS AND TRAINING REQUIREMENTS FOR PURCHASE CARDHOLDERS**

Federal Acquisition Regulation (FAR) Subpart 1.603-3 Appointment, states that contracting officers shall be appointed in writing on a Standard Form (SF) 1402, Certificate of Appointment, stating any limitations on the scope of authority to be exercised. The SF 1402 shall be used to evidence the contracting officer appointment for delegation of purchase cardholders exceeding micro-purchase authority (i.e. above $2,500). A Certificate of Appointment is not required for cardholders exercising only micro-purchase authority. A Delegation of Purchasing Authority will evidence this appointment.

Minimum Training Requirement for Micropurchase Cardholders

- All cardholders should receive training on the Purchase Card Program arranged for or presented by the local Organizational Program Coordinator.
- GSA SMARTPAY Purchase Card Program, a 1 hour online training course addressing responsible use of the purchase card at http://www.energyolc.com
- and 1/2 hour training entitled *Affirmative and Environmentally PreferableProcurement Training for Purchase Card Users and Approving Officials* available at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+and+the+Environment?OpenDocument

Recommended Training for Micropurchase Cardholders

1-day Government-wide Purchase Card courses available from the GSA Interagency Training Center, USDA Graduate School, Management Concepts, Inc., and other training centers.

Minimum Experience and Training Requirement for Cardholders with Authority Exceeding Micropurchase

- Experience: At least 6 months of experience as a cardholder at the micropurchase threshold; and.

Minimum Training:

Training course of at least 16 hours on simplified acquisition techniques, including market research, competition, commercial item purchasing, best value source selection, and socioeconomic procurement programs. This training may be waived by the HCA for experienced cardholders who have acquired experience equivalent to this training.

Other Training Requirements

In addition to this formal training, the Organizational Program Coordinator will conduct, biennially, a refresher training seminar for all cardholderss, using this Guideline, lessons learned throughout the year, and feedback from the annual review source material. As part of this refresher training, Cardholders will complete a certification that they have read and understand the DOE purchase card policy and procedures.

33. APPROVING OFFICIAL TRAINING

a. Training

The Purchase Card Program Coordinator shall arrange for or provide approving official training. This training should be at least four hours in length and encompass the roles and responsibilities of an approving official as well as an understanding of the responsibilities of the cardholder. Biennial refresher training will be provided. As part of this refresher training, Approving Officials will complete a certification that they have read and understand the DOE purchase card policy and procedures.

b. Available Online Training

Online training is available and may count toward the 4 hour requirement.

- Course Title: GSA SMARTPAY Purchase Card Program. This online training tool addresses responsible use of the purchase card by your cardholders. http://www.energyolc.com
- Affirmative and Environmentally Preferable Procurement Training for Purchase Card Users and Approving Officieals at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+and+the+Environment?OpenDocument

34. QUALIFICATION STANDARDS FOR AGENCY AND ORGANIZATIONAL PROGRAM COORDINATORS

Individuals appointed as Agency and Organizational Program Coordinators shall be experienced contracting personnel. The Agency Program Coordinator must have Level III Certification in the Energy Acquisition Career Development Program. Organizational Program Coordinators must have Level II Certification and Level III is prefered for those larger organizations with large numbers of cardholders. All Coordinators shall complete the SmartPay On Line Training available at:
http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelId=-13445
Coordinators are also expected to participate in recurring telephone conference calls which will be scheduled by the Agency Program Coordinator. Contractor personnel serving in these positions should have course

work equivalent to that associated with the DOE Certification levels. All Coordinators are encouraged to attend the Annual Purchase Card Training Conference sponsored by the Bank and the General Services Administration. Cardholders, Approving Officials, and Coordinators have a one year period to complete any new training requirements.

35. **DOCUMENTATION FOR EACH PURCHASE**

Each card purchase will be documented by completion of the following forms:

- Purchase Card Quotation Worksheet
- Bankcard Telephone Ordering Log
- Evidence of Property Receipt

Similar local forms which capture the necessary information are acceptable. A copy of each of these forms will be submitted with the monthly Cardholder Statement of Account to the approving official. The original of each of these forms will be maintained by each cardholder for record keeping purposes.

36. **LOST OR STOLEN CARDS**

a. Telephone Notification

If the purchase card is lost or stolen, it is the responsibility of the cardholder to notify their Organizational Program Coordinator and the Bank of America as soon as practicable at the following telephone numbers 24 hours/day:

Inside the continental United States - 1-800-472-1424
Outside the continental United States - call collect 1 (757) 441-4124

b. Written Notification

The cardholder will also notify the approving official and the contracting activity program coordinator of the lost or stolen card within 1 work day after discovering the card missing, or as soon as practicable. The approving official will submit a written report to the local program coordinator within 5 work days. The report will include the following information:

(1) Card number;
(2) Cardholder's complete name;
(3) Date and location of the loss;
(4) Date and time Bank of America was notified;
(5) Any purchases made on the day the card was lost/stolen, or the last known purchase before the card was lost/stolen;
(6) Any other pertinent information.

c. Card Replacement

A new card will be mailed within 2 business days of the loss or theft. A card that is subsequently found should be cut in half and given to the approving official. The approving official will be responsible for notifying Bank of America that the card has been destroyed.

d. Unauthorized Use

The Government will not be liable for any unauthorized use of the card. "Unauthorized use" means the use of the purchase card by a person other than the cardholder, who does not have the actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit. A cardholder who makes unauthorized purchases or carelessly uses the card may be liable to the Government for the total dollar amount of unauthorized purchases made in connection with the intentional or negligent use of the card. In addition, the cardholder may be subject to disciplinary action for unauthorized or negligent use of the card, including a fine not to exceed $10,000 or imprisonment for not more than 5 years, or both pursuant to Title 18 United States Code 287.

37. AFFIRMATIVE PROCUREMENT PROGRAM

This section discusses Government practices for maximizing the purchase of recycled products. These requirements have been incorporated into the Department of Energy facility management contracts so purchase cardholders, Federal or contractor, need to be aware of these requirements. Section 6002 of the Resource Conservation and Recovery Act and Executive Order 13101, Greening the Government Through Waste Reduction, Recycling and Federal Acquisition, require Federal agencies to develop Affirmative Procurement Programs for Environmental Protection Agency (EPA)-designated items when purchases of these items exceed $10,000 in a fiscal year.

The EPA is responsible for designating items that are or can be made with recovered materials. EPA-designated items are listed at 40 CFR Part 247, "Comprehensive Guideline for Procurement of Products Containing Recovered Materials" (CPG). Current items are identified in the attached list. In addition, EPA's Recovered Materials Advisory Notice (RMAN) provides recovered material content ranges for designated items. EPA's Home Page for this topic is
http://www.epa.gov/epaoswer/non-hw/procure/index.htm

One hundred percent of an agency's purchases of EPA-designated items are to contain recovered materials unless written justification is provided that the recycled item does not meet performance, availability, competition, or price criteria.

DOE's Affirmative Procurement Program

The Department's Environmental Executive has issued the U.S. Department of Energy Affirmative Procurement Program for Recovered Materials. This guidance outlines the Department's affirmative procurement program for purchasing EPA-designated items. Extensive information on this program is available on the Internet at http://www.eh.doe.gov/p2/ap/default.htm

On January 11, 2005, the U.S. Department of Agriculture published a final rule to establish a Biobased Preference Program for Federal agencies. A FAR Case to implement this case across the Government has begun. When complete, the Program requirements are expected to be a part of the Affirmative Procurement Program.

The Department of Energy Acquisition Regulation (DEAR), Parts 923 and 970, provide for the acquisition and use of environmentally preferable products and services, including recycled products. It includes a clause for incorporating environmentally preferable purchasing into the Department's facility management contracts.

EPA's Availability Lists

EPA has compiled availability lists for all designated items. These lists do not represent an endorsement by EPA, but rather serve as potential sources of vendors for procurement initiators and contracting officers to consider. EPA's availability lists may be obtained by calling the EPA Hotline at (800) 424-9346, or, for customers in the Washington, DC area, at (703) 412-9810.

Best Practices

Affirmative Procurement Program purchases must be reported. Procedures vary from site to site. If cardholders purchase these items they should consult their Site Recycling Coordinator. In the case of purchases through the GSA Advantage system, if your order from GSA stores stock with your GSA Account (Activity Address Code) GSA will report the purchase. If you order direct from the vendor or create your own order in GSA Advantage, you need to report the purchase. You should also report purchases from Federal Supply Schedule vendors.

Procurement initiators should consider Federal supply sources such as the GSA, the Government Printing Office, and the Defense Supply Center as sources for recycled products. These sources offer products that have been competitively bid, and meet or exceed recycled content and performance standards. EPA-designated items purchased through GSA do not have to be tracked and reported by individual agencies as GSA performs this function.

Procurement initiators should include recycled content requirements in their statements of work/specifications. Contracting officers do not process procurement requests for EPA-designated items without the requisite recycled content unless a justification accompanies the request.

ITEMS LISTED IN EPA'S COMPREHENSIVE PROCUREMENT GUIDELINES

Construction Products

Building insulation products
Carpet
Carpet cushion
Cement and concrete containing
- fly ash
- ground granulated blast furnace slag
- Cenospheres
- Silica fume

Consolidated and reprocessed latex paint
Floor tiles
Flowable fill
Laminated paperboard
Modular threshold ramps
Nonpressure pipe
Patio blocks
Railroad grade crossing surfaces
Roofing materials
Shower and restroom dividers/partitions
Structural fiberboard

Landscaping Products

Compost made from yard trimmings or food waste
Garden and soaker hoses
Hydraulic mulch
Plastic lumber and landscaping timbers
Lawn and garden edging
Yard trimmings compost

Miscellaneous Products

Awards and plaques
Bike racks
Blasting grit
Industrial drums
Manual grade strapping
Mats
Pallets
Signage
Sorbents

Non-Paper Office Products

Binders, clipboards, file folders, clip portfolios, and presentation folders
Office furniture
Office recycling containers
Office waste receptacles
Plastic desktop accessories
Plastic envelopes
Plastic trash bags
Printer ribbons
Toner cartridges

Paper and Paper Products

Commercial/Industrial sanitary tissue
Miscellaneous papers
Newsprint
Paperboard and packaging products
Printing and writing paper

Park and Recreation Products

Park benches and picnic tables
Plastic fencing
Playground surfaces
Playground equipment
Running tracks

Transportation Products

Channelizers
Delineators,
Flexible delineators
Parking stops
Traffic barricades
Traffic cones

Vehicular Products
Engine coolants
Rebuilt vehicular parts
Re-refined lubricating oils
Retread tires

38. **ENERGY EFFICIENCY**
Reference: FAR 10.002(e), FAR 23.203 and Executive Order 13123

Overview

This section discusses the procurement of energy efficient and water-saving products.

Background

Executive Order 13123, Greening the Government Through Efficient Energy Management directs Federal agencies to increase, to the extent life cycle cost-effective, purchases of energy efficient and water-saving products. Energy-efficient products are defined as those identified through the Energy Star Program or those that are in the upper 25 percent of energy efficiency as designated by the Federal Energy Management Program.

Among other things, the Order requires goals and reporting for energy and water efficiency in Federal facilities.

In addition, each agency's implementation program is to be designed to speed the introduction of cost-effective, energy-efficient technologies into Federal facilities. The Order assigns the Department of Energy, through its Federal Energy Management Program, the lead in implementing the Order. While it is unlikely that cardholders will be making acquisitions of this type, seek further information if you are purchasing such things as electrical appliances, office equipment, construction products, etc.

Further Information

For more information on the Product Recommendation program or to request that an efficiency recommendation be developed for a specific product, contact the Federal Energy Management Program at (202) 586-4858. The Home Page for this effort is at http://www.eere.energy.gov/femp. For Energy Star Program information see http://www.energystar.gov.

39. CONVENIENCE CHECKS

Bank of America will furnish convenience checks upon request. These may be used for purchases from merchants who do not accept the purchase card. When a purchase is made with a convenience check, the check value will be treated as a charge against the cardholders account. There is a charge of 1.75% of the face value of each check processed. Cardholders are to manage such checks in the same manner as they do card purchases, i.e. reservation of funds, approving official coordination, documentation, maintenance of receipts, and reconciliation. Cardholders individual purchase limits are the same for convenience checks as for card transactions except for the convenience check ceiling.

The purchase card is the preferred method for completion of simplified acquisitions. When considering the use of convenience checks, the total cost to the Government, including the 1.75% fee, should be included in determining which method is the best value for the Government. If there is another merchant from whom the transaction could reasonably be completed then that method might offer a better value than utilizing the convenience check.

Convenience checks shall not be issued in amounts greater than $2,500 except by a Contracting Officer. Convenience checks shall not be written to cash, to the account holder or to other employees. Cardholders must maintain a Convenience Check Log which must include the check number, merchant name, merchant Tax Identification Number (only needed when issuing checks for services in amounts greater than $600), the items purchased, the dollar amount of the purchase, the dollar amount of the check fee, and the total cost.

The following description is extracted from the GSA contract guide description.

Convenience Checks

Convenience checks shall be issued and accepted domestically and internationally by merchant establishments and financial institutions. Convenience checks are an integrated part of the purchase card program. The checks shall be guaranteed by the Bank of America against theft or loss, thus affording the agency protection against financial loss when using the Bank of America's product. The Bank of America shall:

Assist agencies in the implementation of their convenience check program;
Provide a supply of checks to a designated cardholder drawn on the cardholder's purchase card account;

- Process the checks as they are presented for payment;
- Provide a listing of the checks cleared on the cardholder's statement of account and
official invoice as a separate line item;
- Provide convenience checks that vary in maximum payment amounts as designated by the agency;
- Ensure that convenience checks are multi-copied (one copy for the cardholder's records,
the original for the merchant);
- Store cleared convenience checks in accordance with Record Retention and Retrieval;
- Provide copies of cleared convenience checks within 14 calendar days of the agency's request;
- Have the ability to stop payment on the convenience check within 24 hours, as requested by the A/OPC;
- Provide electronic access or Bank of America-provided software to enable agencies to automate their convenience check system. The system shall, at a minimum, provide the ability to track, add, tally, report and reorder convenience checks;
- Provide an audit trail which permits tracing of all transactions; and
- Establish payment procedures for agency-issued convenience checks. Payment for these checks shall not occur prior to use by the agency.

Convenience Check Account Establishment: Within 10 calendar days after receipt of a task order issued in accordance with the terms and conditions of this contract, the Bank of America shall contact the A/OPC to discuss implementation procedures and, if requested by the agency, meet with agency representatives to review specific requirements. All Bank of America travel costs associated with this meeting shall be borne by the Bank of America.

Convenience Check Inventory Replenishment: The Bank of America shall provide the following inventory replenishment options:

- Automatic replenishment; and
- Toll free or collect telephone line reorder capability; and
- 24 hour replenishment when requested by the A/OPC.

40. ELECTRONIC AND INFORMATION TECHNOLOGY (EIT)

(a) This section implements section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards (36 CFR part 1194).

(b) Further information on section 508 is available via the Internet at http://www.section508.gov.

(c) When acquiring EIT, Cardholders should be aware that agencies must ensure that --

(1) Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities; and

(2) Members of the public with disabilities seeking information or services from an agency have access to and use of information and data that is comparable to the access to and use of information and data by members of the public who are not individuals with disabilities.

(d) When cardholders acquire EIT, they should ask whether the equipment users may have disabilities such that special features may be required and ask the vendor if the equipment they plan to provide will afford equal access for those with disabilities.

41. DEBARMENT AND SUSPENSION

There is a formal system by which contractors and individuals may be excluded from eligibility for Federal procurement or assistance programs in case of certain serious offences. The Excluded Parties List System is available on the Internet at http://epls.arnet.gov Purchases are not to made from parties on the list. A merchant's name may be entered to ensure that the merchant is not on the list.

42. FEDERAL PROCUREMENT DATA SYSTEM (FPDS) REPORTING

All purchase card transactions exceeding $2,500 require reporting under FPDS beginning in FY2005. If you are not in the procurement organization but have such transactions, consult your Organizational Program Coordinator for procedures.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-27

DATE: April 4, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition and the Environment Home Page**

SUMMARY: The Acquisition and the Environment Home Page has been revised. The former "Purchase Card Affirmative Procurement Online Training" has been expanded and renamed to Affirmative and Environmentally Preferable Online Training." It now covers not only affirmative procurement (i.e. recycled content products), but also energy and water

efficient products and products with biobased content. If you have Purchase Cardholders routinely purchasing office supplies or construction materials should complete this training, as both the Environmental Protection Agency and United States Department of Agriculture (USDA) have targeted these product lines for their programs. A USDA briefing on the status of their Buy Biobased Products Program has been added.

USDA expects to issue a notice identifying products in April and to finalize the rule making in December 2005. A FAR Case to implement the Program is in process. USDA expects to initially list approximately 30 products that Agencies must procure with biobased content. These on-line training materials should help you prepare for the changes, and are located at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+and+the+Environment?OpenDocument . The Power Point briefing materials are still available upon request. If you have questions, please contact Richard Langston at 202-287-1339 or Richard.Langston@hq.doe.gov .

Michael P. Fischetti

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy
Office of Procurement and
Assistance Management

- Site Map
- Search
- What's New?
- Regulations & Guidance
- Data Systems, Information and Forms
- Contacts/Links
- Question and Answer Forum
- Acquisition and the Environment
- E-Center
- Visit Energy.gov

ACQUISITION AND THE ENVIRONMENT

Last Updated April 1, 2005

This Web site is intended as an information resource and tool for the DOE acquisition community. Please share suggestions for its further development and improvement. Provide your comments to Richard Langston at (202) 287-1339, or e-mail them to

NEW PURCHASE CARD TRAINING This has been updated to include biobased products.

Affirmative and Environmentally Preferable Procurement Training for Purchase Card Users and Approving Officials

USEFUL GUIDES ON VARIOUS ENVIRONMENTAL TOPICS

U.S. Department of Agriculture Buy Bio Program Status

Environmental Purchasing How-to Guide, published by the National Park Service

Janitorial Products and Practices, published by the National Park Service

GREEN PURCHASING OVERVIEW

The White House Task Force on Recycling along with the US Army Center for Health Promotion and Preventative Medicine prepared this Train the Trainer presentation on Green Purchasing. It consists of a Power Point presentation which is divided into several modules. Depending on the audience, different modules would be used. The anticipated audiences are Purchase Cardholders, Acquisition staff including contract personnel, requisition and supply personnel, A-Es, facility management representatives, etc, and Management. The coverage is quite broad. It includes all the Greening the Government Executive Orders, and USDA's Buy-Bio Program. There is also a Word script which, like the slides, is in modules which can be arranged to accomodate the different audiences. This material was prepared in June 2003.

Green Purchasing Presentation (MS PowerPoint)

Green Purchasing Script (RTF Format)

GREEN ACQUISITION ADVOCATES

Listing of Green Acquisition Advocates

The Greening the Government Executive Orders

Executive Order 13101, September 14, 1998, Greening the Government Through Waste Prevention, Recycling and Federal Acquisition was the first of a series of 5 Executive Orders which feature the "Greening the Government" theme. Executive Order 13101 stresses the importance of the acquisition community (procurement, program, supply, facility management, construction, etc.) to the success of the recycling efffort and the need for its members to interact as a team.

Executive Order 13123, June 3, 1999, Greening the Government Through Efficient Energy Management was the second "Greening" Executive Order. It promotes energy-efficient products and services. It provides that the Federal Government when acquiring energy using products will acquire energy-efficient products whenever life cycle cost effective. Energy efficient products are ENERGY STAR® products and products in the top 25% of energy efficiency as defined by DOE's Federal Energy Management Program.

Executive Order 13221, Energy Efficient Standby Power Devices. This Executive Order supplements EO13123 by calling on Federal agencies to purchase energy using products that have standby power devices that use one watt or less of energy while in their standby mode.

Executive Order 13148, April 21, 2000, Greening the Government Through Leadership in Environmental Management, requires Federal agencies to establish Environmental Management Systems for Federal facilities and to conduct facility environmental compliance audits. Within DOE, the Environmental Management Systems and environmental audits are a subset of the existing Integrated Safety Management System which are implemented through the DOE Directives, see DOE Order and Manual 450.1.

Executive Order 13149, April 21, 2000, Greening the Government Through Federal Fleet and Transportation Efficiency, calls for reduced use of petroleum for the Federal motor vehicle fleet through the acquisition of more fuel efficient conventional vehicles and increased use of alternative fuel vehicles and the use of alternative fuels in these vehicles. It requires the use of environmentally preferable motor vehicle products for maintenance of the Federal motor vehicle fleet.

EXECUTIVE ORDERS

Executive Orders concerning "Greening of the Government" can be accessed at http://www.ofee.gov/eo/eo.htm

ACQUISITION LETTER 2002-05

Acquisition Letter 2002-05 implements Executive Order 13101, 13123, 13148, 13149, and 13221. It may be viewed at professionals.pr.doe.gov.

INFORMATION TOOLS

The Environmental Protection Agency maintains a "Consolidated Procurement Guidelines" Web page which contains the products which EPA has designated for procurement with recycled content by Federal agencies pursuant to authority of the Resource Conservation and Recovery Act. It lists the products, their specifications, their suppliers, and much more information you will want to explore. It is suggested that this site become your source of current information regarding the EPA designated products. The page is at http://www.epa.gov/cpg/

The Environmentally Preferable Purchasing (EPP) Database is a tool developed by EPA to make it easier to purchase products and services with reduced environmental impacts. The database can be accessed at http://yosemite1.epa.gov/oppt/eppstand2.nsf.

The Office of the Federal Environmental Executive's Web Site contains information about waste prevention, recycling, affirmative procurement, and the acquisition of recycled and environmentally preferred products and services. It can be accessed at http://www.ofee.gov

The Office of Environment, Safety, and Health maintains a home page describing its many programs and responsibilities at http://tis.eh.doe.gov/p2

Another important DOE site is maintained by the Office of Energy Efficiency and Renewable Energy at http://www.eere.energy.gov/femp/. This site describes the Federal Energy Management Programs many initiatives to conserve energy and promote the procurement of energy efficient products.

http://www.energystar.gov describes the joint EPA/DOE ENERGY STAR® program.

http://www.eere.doe.gov/femp/financing/mechanisms.cfm contains information concerning Energy Savings Performance Contracts.

http://www.greenseal.org/ is the Home Page of a nonprofit organization that sets environmental standards and awards a "Green Seal of Approval" to products that cause less harm to the environment than other similar products.

http://www.recycle.net/ is an industrial Home Page with a directory of firms involved in recycling and recovered materials.

http://www.recycle-steel.org/ is another industrial site sponsored by the steel industry but covering a broad range of recycling, including hyperlinks to related industrial Home Pages.

ENVIRONMENTALLY PREFERABLE PURCHASING TRAINING SITE

A site operated by the Environmental Protection Agency as an Environmentally Preferable Purchasing training site is http://www.epa.gov/oppt/epp/

SUGGESTIONS

This Web site is intended as an information resource and tool for the DOE procurement community. Please share suggestions for its further development and improvement. Provide your comments to Richard Langston at (202) 287-1339, or e-mail them to richard.langston@pr.doe.gov.

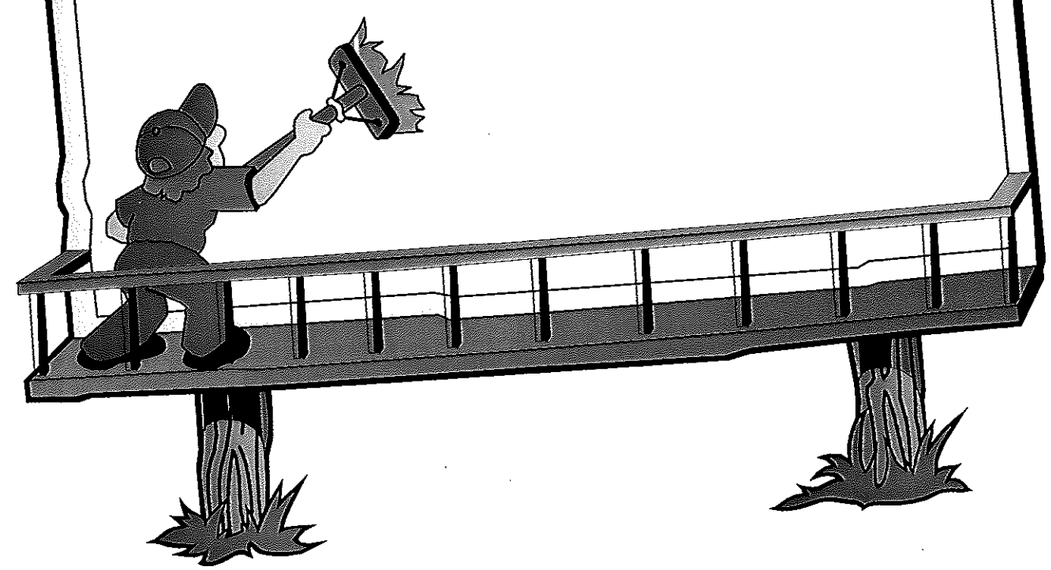
Headquarters Policy Flash

FLASH 2005-28

DATE: April 19, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management
SUBJECT: **Section 508 Micro-purchase Applicability**

PURCHASE CARD USER REMINDER

SUMMARY: The purpose of the notice is to remind purchase card users that purchases under $2,500 are subject to the requirements of Section 508 of the Rehabilitation Act of 1973 as it pertains to Electronic and Information Technology (EIT).



Recently, there were two Policy Flashes issued that implemented guidance on EIT acquisitions that relate to purchases under $2,500 (See Policy Flashes 2005-02 and 2005-011). Section 508 requires that EIT developed, procured, maintained, or used by the Federal Government provides individuals with disabilities access to and use of information and data that is comparable to the access and use of information and data by individuals without disabilities. The law was implemented first through standards developed by the Architectural and Transportation Barriers Compliance Board, then incorporated into the Federal Acquisition Regulation (FAR) and subsequently made applicable to purchases under $2,500.

How will this affect work processes?

- Consult with the Chief Information Officer's office prior to purchasing any EIT products or services to ensure compliance with standards developed by the Architectural and Transportation Board.

- Access the 508 Universe, which offers free training on subjects pertaining to Section 508, including a NEW course module on **Micro-Purchases / Credit Card Training**. The web address is www.section508.gov

- Examine the purchase card holder responsibilities for making purchases under Section 508 in the DOE Acquisition Guide Chapters 13 and 39.

Questions concerning this Flash should be directed to Denise P. Wright at (202) 287-1340 or Denise.Wright@hq.doe.gov or Richard Langston at (202) 287-1339 or Richard.Langston@hq.doe.gov

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-29

DATE: April 26, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Revised Acquisition Letter (AL) 2005-05, Interagency Contracting**

SUMMARY: The Flash forwards the revised AL dated April 26, 2005.

The AL was revised to: 1) add guidance for when DOE acts as the Servicing Agency under a Funds-In Interagency Agreement and a contract is required; 2) establish a new requirement for Funds-Out Interagency Agreements with the General Services Administration (GSA); and 3) add a reminder under FSS and GWACs to perform price reasonableness determinations. The subject line of this AL has been changed to reflect the Government Accountability Office's term for the types of procurement instruments discussed in the AL.

Questions should be directed to Miss Jackie Kniskern at Jacqueline.kniskern@hq.doe.gov or 202-287-1342.

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachments

cc: PPAG

Department of Energy
Acquisition Regulation

No. 2005-05 Rev
Date 04/26/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: *Interagency Contracting*

References:

FAR Part 7	Acquisition Planning
FAR Part 8	Required Sources of Supplies and Services
FAR Part 10	Market Research
FAR 17.2	Options
FAR 17.5	Interagency Acquisitions Under the Economy Act
FAR 37	Service Contracting
FAR Part 38	Federal Supply Schedule Contracting
Guide Chapter 7.1	Acquisition Planning
Guide Chapter 17.1	Interagency Agreements
Guide Chapter 38.1	Task Order Contracting
	Strategic Acquisition Transaction Guide
Guide Chapter 71.1	Headquarters Review of Contract and Financial Assistance Actions
DOE I 481.1C	Work for Others (Non-Department of Energy Funded Work)
Chapters 12 and 13	Accounting Handbook

Effective date of the Acquisition Letter (AL)

This AL is effective upon issuance.

AL Expiration

This AL remains in effect until superseded or canceled.

Contact for More Information

Contact Jacqueline Kniskern of the Department of Energy (DOE), Office of Procurement and Assistance Policy at (202) 287-1342, or at jacqueline.kniskern@hq.doe.gov.

Purpose of the AL

The purpose of this AL is to provide guidance on the use of external or non-DOE procurement instruments including the following: Economy Act transactions/Interagency Agreements (IAA) supported by servicing agency contracts, Government-Wide Acquisition Contracts (GWACs), Federal Supply Schedules (FSS) awarded by the General Services Administration (GSA), and contracts or orders awarded through Franchise Fund organizations. This AL applies to all DOE elements, including the National Nuclear Security Administration. For the purpose of this AL, "DOE" refers to both DOE and/or NNSA, as applicable.

The purposes of this revision are to: 1) establish a new requirement for Funds-Out Interagency Agreements with the General Services Administration (GSA); 2) provide guidance for when DOE acts as the Servicing Agency under a Funds-In Interagency Agreement and a contract is required; and 3) add a reminder under FSS and GWACs to perform price reasonableness determinations. The subject line of this AL has also been revised. The revised text is in italics.

Background

Recent events involving the misuse of one Federal Government agency's contract by another Federal Government agency have created a need to re-emphasize the proper use of other agencies' procurement instruments by the DOE. The DOE and NNSA Senior Procurement Executives sent memoranda to DOE Procurement Directors and the NNSA Service Center Office of Business Services, respectively, reminding contracting professionals to practice due diligence in using other agencies' contracts (See Policy Flash 2004-23 and NNSA Memorandum dated September 27, 2004). On November 1, 2004, this DOE Policy Flash was forwarded to the Heads of all DOE Program Offices with a specific request for their cooperation, as well as requesting their assistance and inviting them to participate in upcoming training.

* * * * * * * * * * * * * * * * * * *

Guidance Included in this Acquisition Letter

1. General Areas of Guidance

- **A. Acquisition Planning**
- **B. Administration**

2. Guidance on Specific Non-DOE Procurement Instruments

- **A. Economy Act and Funds-Out Interagency Agreements *(Rev)***
- ***B. Economy Act and Funds-In Interagency Agreements***
- ***C.* Government-Wide Acquisition Contracts**
- ***D.* Federal Supply Schedules**
- ***E.* Franchise Fund Organizations**

Guidance Included in this Acquisition Letter

1. General Areas of Guidance

A. Acquisition Planning

The use of non-DOE acquisition instruments is an additional consideration in and not a substitute for acquisition planning. The Contracting Officer must work with the requiring program officials during acquisition planning to obtain supplies or services in a manner which best meets their needs. Factors to be considered in selection of instrument type during planning include:

Customer Requirements
Schedule
Cost (which should include any applicable fee or service charge for use of another agency's contract)
Scope of Work
Oversight/Monitoring/Reporting requirements
Unique terms, conditions or requirements needed to comply with any DOE-specific statutes, regulations, directives and other requirements
DOE policies on small business, performance-based contracting and competition
DOE funding restrictions

Another agency's contract shall not be used to circumvent DOE requirements.

B. Contract Administration

When another agency's contract is used to support a DOE requirement, the DOE Contracting Officer, in conjunction with the requiring program official and the servicing agency, should determine the nature and level of contract administration support to be provided by DOE and/or the servicing agency.

DOE Contracting Officers should monitor tasks provided to the servicing agency to ensure that they are consistent with the scope of the agreement with the other agency and/or the terms of the servicing agency contract.

Areas of consideration include:

Designation of DOE Contracting Officer Representative (COR)
Servicing agency Contracting Officer responsibilities, including quality assurance plan
Verification of services proposed
Verification of receipt of deliverables

Due diligence is required by DOE Contracting Officers and their designated representative(s) during the period of performance to ensure that the contractor, as well as

the servicing agency, continues to comply with all applicable regulations, policies and practices. Review of contractor required deliverables and invoices should include items such as ensuring that services provided remain within the scope of work and that labor is provided by appropriate, and if applicable, approved labor categories.

DOE Contracting Officers should undertake the same review process when exercising options or extending a period of performance as they perform during the pre-award phase. They must ensure than an extension or option to an instrument is in the best interest of the Government before proceeding with the extension or option. They must also document this rationale in the determination and findings for the option exercise, as required by FAR 17.207, or in a memorandum to the file for an extension.

2. Guidance on Specific Acquisition Instruments

A. Economy Act and Other Funds-Out Interagency Agreements

The Economy Act (31 U.S.C. 1535), as implemented by FAR 17.5, authorizes agencies under certain circumstances and in accordance with certain requirements to enter into mutual agreements to obtain supplies or services by interagency acquisition. The Economy Act applies when more specific statutory authority does not exist to enter into an interagency acquisition (FAR 17.500). For example, it does not apply to acquisitions from required or optional sources of supply prescribed in FAR Part 8. It also does not apply to acquisitions using GWACs. An Economy Act transaction shall not be used to circumvent: (1) Federal or DOE regulations, (2) limitations on the use of appropriated funds; (3) requirements of FAR 7.3, Contractor Versus Government Performance; or (4) any other agency's authority or responsibility.

To ensure that Interagency Agreements (IAAs) issued under the authority of the Economy Act are proper, all IAAs shall be signed by a cognizant DOE Contracting Officer. In addition, Contracting Officers are instructed to undertake the following actions when DOE is the requiring agency:

1) If the IAA uses an existing servicing agency contract(s), the initiating DOE program official shall include a copy of the contract's statement of work and other applicable contractual documents with the Procurement Request. If the documents are not included, the DOE Contracting Officer should ensure they are obtained. The DOE Contracting Officer shall review the statement of work and other documents to determine that the supplies or services requested under the IAA are within the scope of the servicing agency's contract and confirm this determination with the servicing agency's Contracting Officer. The DOE Contracting Officer shall document this review in the written Determination and Findings discussed below. To the maximum extent practicable, the DOE Contracting Officer shall also ensure that use of the servicing agency's contract does not circumvent DOE policies with respect to competition, small business and performance-based acquisition.

2) If the servicing agency will be awarding a contract or awarding a task or delivery order under an existing contract to meet the IAA requirements, the DOE Contracting Officer shall include any special terms and conditions in the IAA to ensure that applicable DOE policies and procedures are not circumvented.

3) Prepare and sign a written Determination and Findings that:

a) sets forth, with supporting documentation, the prerequisites found at FAR 17.503;
b) states conformance to all DOE regulations, policies and procedures.
c) states that the supplies or services obtained are within the authority of the servicing agency;
d) states that any services to be contractually provided by the servicing agency are within the scope of the IAA statement of work and that any follow-on tasks will be reviewed by the DOE Contracting Officer to ensure that they are also within the scope of the IAA statement of work;
e) states that any services to be contractually provided by the servicing agency have been determined to be within the scope of the servicing agency's contract statement of work by both the DOE and the servicing agency's cognizant Contracting Officer;
f) includes detailed information on the supplies or services that are to be provided, performance/delivery schedules and the responsibilities of the servicing agency to ensure compliance with all contractual requirements;
g) describes any DOE special or unique terms, conditions or requirements to be incorporated into the IAA and/or servicing agency contract/order;
h) states it is in the best interest of DOE for satisfying customer requirements, schedule, cost and administrative requirements; and
i) complies with the requirements of FAR 7.3.

4) Unless the cognizant DOE Contracting Officer determines it appropriate to perform the functions directly, a DOE Contracting Officer's Representative (COR) shall be designated by the cognizant DOE Contracting Officer for each IAA to monitor the agreement and any DOE requirements to be fulfilled contractually by the servicing agency. The COR, in coordination with the DOE Contracting Officer, shall also provide such information as the servicing agency may require to support the administration of their contract or order.

5) Submit IAAs with supporting file documentation to the Office of Contract Management (ME-62) for DOE, and Office of Acquisition and Supply Management (NA-63) for NNSA, when the dollar value of the IAA is over the approval threshold of the Head of Contracting Activity.

6) The GSA Administrator has requested that the following statement be included in any IAA that requests GSA to award a contract or place an order on DOE's behalf. DOE Contracting Officers shall include this statement in all IAAs with GSA.

By signing the funding document you have verified that the funds are legally available for the purpose of the acquisition activities to be performed by GSA; all unique funding and procurement requirements, including statutory or regulatory requirements applicable to the funding being provided, have been disclosed to GSA; and all internal reviews and approvals required prior to placing the order with GSA have been completed.

B. Economy Act and "Funds-In" Interagency Agreements

(This section does not apply to reimbursable work subject to DEAR 970.5217-1 Work for Others Program or DOE Order 481.1C Work for Others (Non-DOE Funded Work)).

Under the Economy Act, DOE may only provide supplies or services if the transaction has been determined to be in the best interest of the Government and the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source. In addition, if the transaction or order will require the use of a contract, one of the following three circumstances (see FAR 17.503) must apply:

(1) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services;

(2) The servicing agency has capabilities or expertise to enter into a contract for such supplies or services which is not available within the requesting agency; or

(3) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies.

A Funds-In IAA is required when DOE will be the servicing agency and the use of a DOE contract is required. DOE Contracting Officers should inform the requesting agency technical and/or contracting personnel that the Funds-In IAA must include the following:

1) *The signature of an individual within the requesting agency authorized to approve IAAs*

2) *Billing data, such as the names and mailing addresses of the servicing and requesting parties' accounting offices*

3) *A termination provision for the IAA*

4) *A citation of the requesting agency's funding and appropriation data, including any special restrictions for use of the funds*

5) *Identification of the contractor and contract number*

6) *A statement of work and an estimated cost*

7) Provisions for inspection and acceptance of the contractor's work

8) Intellectual property provisions, if applicable

9) Unique terms and conditions required by the requesting agency, if applicable

10) A copy of the requesting agency's Determination & Findings for the IAA

The DOE Contracting Officer is responsible for compliance with all legal or regulatory requirements applicable to the contractual action required by the Funds-In IAA, including:

1) having adequate statutory authority for the contractual action;

2) complying fully with the competition requirements of FAR Part 6; and

3) complying with the requirements for small business set-asides in FAR 19.5.

Work requested under an on-going contract must be within the scope of the contract. Reimbursable work must be authorized under on-going contracts by the issuance of a new task assignment, task order, or other work authorization by a DOE Contracting Officer. The authority to authorize reimbursable work under on-going contracts may not be delegated to Contracting Officer's Representatives. The contractor must develop a budget before the authorization to start work and track the costs associated with the reimbursable separately. ***DOE Contracting Officers shall neither award contracts nor place order under on-going contracts for other agencies that does not conform to DOE regulations, policies, and procedures.***

C. Government-Wide Acquisition Contracts (GWACs)

A GWAC is a multiple award contract issued by one agency that may be used by other agencies to procure information technology products and services. Each GWAC is operated by an executive agent designated by the Office of Management and Budget (OMB) pursuant to section 5112(e) of the Clinger-Cohen Act. OMB has designated four agencies as executive agents for GWACs: GSA, National Institutes of Health, National Aeronautics and Space Administration, and Department of Commerce. A list of GWACs is included in the Strategic Acquisition Transactions Guide.

GWACs are valuable tools for the acquisition of information technology supplies and services, but the DOE Contracting Officer must ensure that: (1) the GWAC is not used to circumvent applicable DOE policies or regulations; (2) the ordering agency properly administers all contract terms and conditions and adheres to Federal acquisition regulations and policy; (3) DOE requirements are within the scope of the master GWAC contract; and (4) subsequent task orders are under the scope of the contract.

To ensure that GWACs are used properly, DOE Contracting Officers shall undertake the following actions:

1) Obtain a copy of the statement of work and other applicable contractual documents and validate that the services requested are within the scope of that GWAC. Document in a memo to the file this review of the statement of work.

2) Place only orders that comply with all DOE regulations, policies and procedures. The Contracting Officer must pay particular attention to complying with performance-based and small business policies, and the procedures prescribed in the GWAC for providing a fair opportunity to all GWAC contractors.

3) Document that the order is in the best interest of DOE for satisfying customer requirements, schedule, cost and administrative requirements.

4) Designate a DOE COR if the servicing agency is not acting as the COR.

5) Perform and document a price reasonableness determination.

D. Federal Supply Schedules (FSS)

The General Services Administration (GSA) has statutory authority to enter into contracts for government-wide use. The primary statutory authority for the FSS program is derived from both Title III of the Administrative Services Act of 1949 (41 U.S.C. 251, et seq.) and Title 40 U.S.C., Public Buildings, Property and Works. The FSS contracts, also known as Multiple Award Schedules, are awarded by GSA for acquisition of supplies or services by all Federal Government agencies. Each schedule in FSS has specific supplies or specialized services that can be obtained by the ordering agency. **All task or delivery orders issued under FSS shall be signed by the cognizant DOE Contracting Officer.**

When placing orders against the FSS, DOE Contracting Officers must comply with the procedures in FAR Part 8. GSA has additional instructions and information for use of the schedules at www.gsa.gov. Contracting Officers may only place orders against the FSS for supplies or services listed on the vendor's schedule contract. The Contracting Officer shall not include services outside the scope of the Schedule contract in the order. If new labor rates are required for the task order, they must be negotiated and incorporated into the schedule contract by GSA before they can be included in the order.

To ensure that FSS are used properly, DOE Contracting Officers shall:

1) Ensure that use of FSS is not being used to circumvent DOE policy or regulation.

2) Review the schedule contract's statement of work and other applicable contractual documents and validate that the supplies/services requested are within the scope of that schedule. Document the review of the statement of work in a memorandum for the file.

3) Review follow-on task orders to ensure that they remain within the scope of the contract.

4) Comply with the specific requirements of the FSS, including those for competitive tasking, consistency with the scope of work, and use of the instruments for a specific, not overly broad or undefined, purpose.

5) Seek and document advice from the cognizant GSA Contracting Officer on proper us of the FSS whenever an issue is in doubt.

6) Perform and document a price reasonableness determination.

E. Franchise Fund Organizations

The Government Management Reform Act of 1994 authorized the Office of Management and Budget to designate franchise fund pilots. A franchise pilot is a self-supporting business-like entity that provides common administrative services on a fully reimbursable basis to other Federal agencies. These services include procurement support services.

DOE's past experience with the use of franchise fund organizations to support the acquisition of its requirements has not been positive. **Accordingly, no franchise fund organization shall be used to obtain acquisition management services unless approved by the cognizant Head of Contracting Activity, with notice to the Senior Procurement Executive.** As in the case of other non-DOE procurement instruments previously discussed, franchise fund organizations may not be used to circumvent DOE policies or regulations. All services to be provided by a franchise fund organization must be obtained through an interagency agreement that follows the requirements described in paragraph 2A above under Economy Act and Funds-Out Interagency Agreements.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-30

DATE: May 5, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **DOE Acquisition Guide Updates**

SUMMARY: This Policy Flash is issued to disseminate the final installment of the 2004/2005 update of the DOE Acquisition Guide.

The following updated chapters of the DOE Acquisition Guide have been posted on the Professionals Home Page:

1. Chapter 16.1 - General Guide to Contract Types for Requirements Officials
2. Chapter 42.4 - Contract Close Out
3. Chapter 42.15 - Contractor Past Performance Information (previously numbered 42.2)
4. Chapter 43.1 - Contract Modifications
5. Chapter 70.5 - Contractor Compensation – Variable Pay
6. Chapter 70.9 - Contractor Past Performance Information
7. Chapter 70.28 - Contractor Insurance

There are no significant changes to existing guidance as a result of these revisions. Questions may be referred to Richard Langston at (202) 287-1339 or Richard.Langston@hq.doe.gov

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy
Office of Procurement and
Assistance Management

Attachment – Chapter Update Status

DOE Acquisition Guide – Final 2004/2005 Update

Yellow Highlight Indicates Updated Chapters

#	Title	Author	Nature and Date of Change
1.1	Acquisition Regulations System	ME-61	Editorial Only March 2004
1.2	Balanced Score Card	ME-62, S. Logan	Editorial Only March 2004
2	Definitions	Reserved	
3.1	Procurement Integrity	ME-61, S. Zvolensky	Editorial Only March 2004
3.2	Antitrust Teaming	ME-61, R. Webb	Editorial Only March 2004
4.1	Procurement and Assistance Data System (PADS) Reporting	ME-651, P. Coombs	Content Update FPDS-NG and Fin. Asst. - March 2004
4.2	Public Relations Contracts	PA-20, Chester Gray, J. Kniskern	New August 2004
5.1	Release of Information – Advance Award Notification.	ME-61, J. Kniskern	Substantive revisions. January 2005 Update.
6.1	Competition	ME-62, B. Schreiber	Add some materials "overlooked" when Order was canceled. Update June 2004.
7.1	Acquisition Planning	ME-62, T. Brown	New Acquisition Plan Preparation Guide and Acquisition Plan Template - March 2004 .
8	Required Sources of Supplies and Services	Reserved	
9.1	Organizational Conflicts of Interest	ME-61, R. Webb	Editorial only March 2004.
9.2	Performance Guarantees	ME-61, R. Webb	Editorial only March 2004.
9.3	Debarment and Suspension	ME-65, C. Yee	Editorial only March 2004.
10	Market Research	Reserved	
11	Describing Agency Needs	Reserved	
12	Acquisition of Commercial Items	Reserved	
13	Simplified Acquisition Procedures		
13.1	Government Purchase Card	ME-65, B. Craig, ME-61, R. Langston	Updated March 2005
14	Sealed Bid	Reserved	
15	Contracting by Negotiation		
15.1	Source Selection	ME-62, R. Leotta ME-61, R. Langston	Editorial Only. August 2004.
15.2	Unsolicited Proposals	NETL, J. Augustine	Editorial Only, March 2004.

15.3	Evaluation Criteria	ME-62, D. Leotta ME-61, R. Langston	Editorial Only. August 2004.
15.4	Weighted Guidelines	ME-61, T. Sheppard	Updated December 2004
16.1	Types of Contracts for Requirements Personnel	ME-61, R. Leotta ME-61 R. Langston	Editorial Only. February 2005.
17.1	Interagency Agreements	ME-61, D. Wright ME-61, R. Langston	Update when OMB Intra-governmental Transactions Project Completed
17.2	Cost Participation	ME-61, T. Sheppard	Editorial Revisions Only June 2004.
17.3	Acquisition, Use and Disposal of Real Estate	ME-90, A. Duran	New organizational contacts and editorial updates – March 2004.
17.4	Program Opportunity Notices	NETL, J. Augustine ME-61, R. Langston	Editorial Revisions Only. June 2004.
17.5	Program Research and Development Announcement	NETL, J. Augustine ME-61, R. Langston	Editorial Revisions Only. June 2004.
18	Reserved in FAR		
19.1	Small Business	ME-61, S. Zvolensky	Revised AL planned for June 2005.
22.1	Labor Standards for Construction	LM-20, D. Sullivan ME-61, R. Langston	Editorial revisions only. June 2004.
26.1	Energy Policy Act Implementation & Attachment	ME-61, R. Webb	Editorial revisions only. January 2005.
26.2	Energy Policy Act Cost Sharing Requirements	ME-61, T. Wood	Editorial revisions only. January 2005.
27	Patents, Data and Copyright	Reserved	
28	Bonds and Insurance	Reserved	
29	Taxes	Reserved	
30	Cost Accounting Standards	Reserved	
31	Contract Cost Principles and Procedures		
31.1	Cost Reasonableness	ME-61, T. Sheppard	Editorial Revisions Only. March 2004.
32	Contract Financing	Reserved	
33	Protests, Disputes and Appeals		

33.1	Protests	ME-61, R. Webb	Update as needed. September 2004.
33.2	Alternate Dispute Resolution	GC-61, G. Cadieux	Update as needed. September 2004.
34	Major Systems Acquisition	Reserved	
35	Research and Development Contracting		
35.1	Scientific and Technical Information	OSTI, S. Jordan ME-61, R. Langston	Updated. June 2004 Eliminate DEAR 935.010
37.1	Support Service Contracting	ME-61, D. Wright	Updates and editorial revisions. January 2005.
37.2	Performance Based Contracting Work Statements	ME-62, D. Leotta ME-61, D. Wright	September 2004. No update at this time.
38.1	Task Order Contracting	ME-64, J. Bashista	Substantive/Editorial August 2004
39.1	Acquisition of Information Resources	ME-61, T. Sheppard	Updates and editorial revisions. January 2005.
41.1	Acquisition of Utility Services	ME-61, T. Sheppard	Updated. December 2004.
42	Contract Administration		
42.1	Indirect Cost Rates	ME-61, T. Sheppard	Updated. December 2004.
42.15	Contractor Past Performance	ME-65, R. Leotta ME-61, R. Langston	Editorial Update. April 2005. Chapter number changed from 42.2 to 42.15.
42.3	Novation Agreements	ME-61, R. Webb	Editorial Update. November 2004.
42.4	Contract Closeout	ME-61, R. Langston	Editorial Update. April 2005.
42.5	Contract Management Planning	ME-62, J. Tower	New Coverage (Issued February 2004 Updated November 2004)
43.1	Contract Modifications	ME-61, J. Kniskern	Update. October 2004.

45.1	Government Property	ME-63, J. Carpenter ME-61, R. Langston	Removed and Reserved Hold for possible replacement.
47.1	Transportation Air Charter	ME-64, P. Fuller ME-61, T. Sheppard	Updated. June 2004.
52.1	Local Contract Clauses	ME-61, D. Wright	September 2004. No update at this time.
70	Management and Operating Contracts		
70.1	Removed and Reserved		
70.2	Removed and Reserved		
70.3	Make or Buy	ME-62, I. Brown	Cancel when NOPR eliminating make or buy analysis goes final
70.4	Cooperative Audit Strategy	ME-61, R. Webb	Substantive. March 2004.
70.5	Contractor Compensation- Variable Pay	GC-61, L. Fullerton ME-61, R. Langston	Editorial Update. April 2005.
70.7	Contract Administration	ME-62, J. Tower	Chapter 1 updated November 2004
70.8	Performance Based Contracting	ME-62, J. Tower	Placeholder and hyperlink. No update required at this time.
70.9	Contract Options – Evaluating Contractor Past Performance	ME-64, R. Leotta ME-61, R. Langston	Editorial Update. April 2005.
70.10	Inter-Contractor Purchases	ME-61, R. Webb	Updated March 2003. No update needed at this time.
70.11	DOE Directives	ME-61, M. Righi	Issued in fall 2003. Do not revise at this time.
70.28	Contractor Insurance	ME-63, E. Leyba	April 2005 Editorial Revision
70.31	Cost Associated with Whistleblower Activities	GC-61, L. Fullerton ME-61, T. Sheppard	March 2004 Update
70.44	Approval of Contractor Purchasing Systems – Purchase Card Considerations	ME-62, I. Brown ME-61, R. Langston	New. January 2005 (Previous AL 2002-07).
71.1	Headquarters Review of Contract and Financial Assistance Actions	ME-62, D. Leotta ME-61, R. Langston	March 2004 Update

General Guide To Contract Types

For Requirements Officials

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GENERAL GUIDE TO CONTRACT TYPES FOR REQUIREMENTS OFFICIALS

I. Introduction

First there must be an understanding of what a contract is. A contract is a mutually binding legal relationship obligating the seller to furnish the supplies or services and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. Thereby, a contract sets up arrangements that are clear and certain regarding the relationship and performance requirements of the parties involved. In the case of a government contract, when an agency desires to procure goods and services, a contract is the appropriate method of mutually binding the parties to their promise. The Federal Acquisition Regulations (FAR) governs the use of the many types of government contracts.

The purpose of this document is to provide general guidance regarding contract types as described under FAR Part 16. This guide is not intended to supercede information contained in the FAR.

There are different meanings associated with the term "contract type." In one sense, it signifies different compensation arrangements, of which there are many. However, most compensation arrangements fall into two major groups: cost reimbursement or fixed price. In another sense, the term "contract type" is used to signify differences in contract structure or form. For example, this structure could be a letter contract, purchase order, performance-based, completion, or term contract. Finally, the term "contract type" is used to identify an intended end purpose. Examples of this would be contracts such as, management and operating, research and development, and supply. Consistent with the FAR, this guide focuses on compensation and contract structure to describe "contract type." However, none of these connotations is mutually exclusive, as a contract represents each of these terms. Together, these "contract types" will help ensure the success of a contract.

A wide selection of contract types is available to the Department of Energy (DOE) and its contractors to provide flexibility in acquiring the large variety and volume of supplies and services needed by DOE to fulfill and support its mission. However, no single contract type is right for every contracting situation. Selection must be made on a case-by-case basis, considering many programmatic, performance and financial factors. The goal is to select the contract type that will result in the most optimum business arrangement between the parties.

II. The Selection Of Contract Type

In Federal procurement, the Government sets out the type of contract in the terms and conditions of the solicitation. In non-competitive procurements and in a limited number of negotiated procurements, the contractor may be given an opportunity to propose different types of contracts than contemplated by the Government. The selection of the contract type should give the contractor an incentive to perform efficiently and effectively. Thus, selecting the appropriate contact type affects the Government's ability to obtain fair and reasonable prices.

III. Contracting Officer Responsibility For Selecting The Type Of Contract

The Contracting Officer is responsible for selecting the appropriate contract type. However, in most instances the requirements initiator will be responsible for drafting the Statement of Work (SOW) and other technical/performance requirements. Requirements personnel, familiar with the technical requirements and degree of uncertainties in the SOW, are in an important position to provide the Contracting Officer with information critical to the contract type selection. Thus, their responsibilities are viewed as an integral part of the procurement process. Expenditures for goods and services is seen not simply as the business of contracting personnel, but also that of the requirement officials who initiate and use the goods and services obtained.

IV. How The Statement Of Work Influences The Contract Type

The SOW is the key element in deciding the selection of a contract type. The level of detail, clarity, and identification of performance objectives and expectations in the SOW drive all other conditions of the contract, from pricing structure, to the contractor's entitlement to payment, and to the level of contract administration. That said, the greater the degree to which the Government can articulate its needs accurately and clearly, the greater the likelihood that the contractor will accept greater performance and cost risk associated with a particular type of contract.

The types of questions to be addressed when the Statement of Work is being prepared:

- What is the risk associated with contract performance?
- Can the job be done?
- What are the technical, environmental, regulatory, schedule and financial risks?
- Can the man hours and type of labor required for performance be estimated with any degree of assurance?
- Can equipment and material required for performance be estimated with any degree of assurance?
- Are there unknown site conditions?
- What is the quality of Government Furnished Services and Information?

When there is little or no performance risk or the degree of risk can be predicted with an acceptable degree of certainty, a firm fixed price contract is preferred. However, when uncertainties are significant, other types of fixed price or cost type contracts should be considered. To award a fixed price contract when the effort has significant uncertainties may result in an eventual higher price, through later financial claims by the contractor.

V. Categories Of Contract Types:

Basically, there are two major compensation categories of contracts: fixed-price and cost-reimbursement. Within these categories are firm fixed price at one end and cost plus fixed fee at the other end. In between are various compensation/profit structures providing for varying degrees of contractor responsibility, depending upon the degree of uncertainty involved in contract performance. Selection of contract type is the principal method of allocating cost and

performance risk between the Government and the contractor. When performance risk to the contractor is minimal or can be predicted with an acceptable degree of certainty allowing for reasonable cost estimates, a firm fixed price contract is preferred. However, as uncertainties increase, other fixed price or cost type contracts must be used to mitigate these uncertainties and avoid placing too great a cost risk on the contractor. These two major compensation categories of fixed price and cost reimbursement, with the various types of fixed price and cost reimbursement contracts contained therein, are presented below. Additionally, a listing is also provided of other contracts that do not fit within the categories of fixed price and cost reimbursement contracts, but fit within the meaning of contract structure or form.

VI. Contract Type Preference:

Generally, a firm fixed price type contract is the most preferred and cost reimbursement type contracts the least preferred. However, selecting a contract should be tailored to the unique circumstances of each individual case with the exception of sealed bidding. Sealed bidding must be either firm fixed priced, or fixed priced with economic price adjustments.

VII. Motive:

Compensation/Profit is in most cases the basic motive of business enterprise. However, there are situations, particularly in the early stages of research and development, in which the profit motive may be secondary. Both the DOE and its contractors should be concerned with harnessing the appropriate motive to work for an effective and economical contract performance. Therefore, parties should seek to negotiate and use the contract type best suited to stimulate outstanding performance. Proper application of these objectives on a contract-by-contract basis should normally result in a range of contract types.

VIII. Incentives:

DOE has found incentive techniques to be particularly useful to enhance contractor performance for a wide variety of work requirements, but especially those with clear performance objectives, such as with respect to DOE closure sites. These sites lend themselves to defining work in measurable, mission-related terms. This allows for performance standards (i.e., quality, quantity, timeliness) to be tied to performance requirements. Under performance–based contracting, all aspects of an acquisition are structured around the purpose/objective of work to be performed, as opposed to the manner in which it is performed. It is designed to ensure that contractors are given freedom to determine how to meet the government's performance objectives, how appropriate performance quality levels are achieved, and that payment is only made upon achieving these levels. The key to success regarding the use of incentives in meeting technical, schedule and cost baselines is the intelligent selection of appropriate objective measures to accurately gauge the contractor's achievement of contract performance objectives. It is thus necessary, under performance-based contracts, to establish a Government quality assurance plan that describes how contractor performance will be measured against the performance standards.

IX. Contract Type Categories

A. Compensation Type:

- Under a fixed-price contract the contractor must deliver the product or perform the service for a pre-set firm fixed price or ceiling established in the contract. This contract type places upon the contractor maximum risk, full responsibility for all costs and resulting profit or loss, provides maximum incentive for the contractor to control costs and perform effectively, and imposes a minimum administrative burden upon the contracting parties. There are various types of fixed price contracts. The following are variations of fixed price contracts used in Government contracting:

  - Firm-Fixed-Price Contracts (FFP)
  - Fixed-Price Contracts with Economic Price Adjustments
  - Fixed-Price Incentive Contracts (FPI)
    1. Fixed-Price Incentive (Firm Target) Contracts
    2. Fixed-Price Incentive (Successive Targets) Contracts
  - Fixed-Price Contracts with Prospective Price Redetermination
  - Fixed-Price Contracts with Retroactive Price Redetermination
  - Firm-Fixed-Price, Level-of-Effort Term Contracts (FP/LOE)

- Under a cost-reimbursement contract, the contractor agrees to expend its best efforts to achieve the specified requirement, within the estimated amount established in the contract. If the contract is not fully performed at the time the contractor expends the funds, the contractor has no obligation for further performance, unless the contract is modified to increase the funds. Cost reimbursement contracts include the following:

  - Cost Contracts
  - Cost-Sharing Contracts
  - Cost-Plus-Incentive-Fee Contracts (CPIF)
  - Cost-Plus-Award-Fee Contracts (CPAF)
  - Cost-Plus-Fixed-Fee Contracts (CPFF)

B. Structure Type:

- There are other contract types that do not fall easily into only one of the two primary categories of fixed-price and cost-reimbursement contracts. These contracts are as follows:

  - Performance-Based Contracts
  - Indefinite-Delivery/Quantity Contracts (IDIQ)
  - Definite-Quantity Contracts
  - Requirements Contracts
  - Time-and-Materials & Labor-Hour Contracts (T&M)
  - Letter Contracts
  - Basic Agreements (BA)

- Basic Ordering Agreements (BOA)
- Blanket Purchase Agreements (PBA)
- Task Orders
- Government Wide Acquisition Contracts (GWAC)
- Federal Supply Schedule Buys

X. Risk Factors Considered In Determining The Appropriate Type Of Contract

The contract type should be commensurate with the level of risk in performance of the SOW. The objective in selection of contract type should be to establish the pricing arrangement that is most likely to produce a fair and reasonable price for performing a given SOW. Weighing cost and technical risks and consciously assigning them to either the Government or the contractor achieve this. If too much risk is assigned to the contractor, then there will be excessive pricing contingencies included to cover the high level of risk. If, on the other hand, not enough risk is left for the contractor, then there will be little or no incentive for exercising management skill to perform efficiently and thereby control costs. Therefore, it is essential that Government officials fully understand the risk factors that should be considered when determining the contract type. These factors are as follows:

- Type And Complexity Of The Requirement: Requirements that are complex and unique to the Government create the likelihood of changes in technical direction and for performance uncertainties, normally placing greater risk assumptions on the Government. Therefore, greater uncertainties would likely result in cost reimbursement type contracts as this type of arrangement shifts cost risk from the contractor to the government. As requirements recur, they allow for a substantial degree of certainty related to achieving the objectives of the requirement. In this case, cost risk should shift to the contractor, creating the potential for a fixed price type contract. An example of a requirement that might be best suited for a cost type contract is a contract for management and operation of government facilities where program requirements and funding greatly fluctuates year to year. In contrast, certain facilities may have operations/requirements with stable performance history that may make it suitable for a fixed price type contract.

- Urgency Of The Requirement: If urgent, the Government may have to assume a greater proportion of risk, or offer incentives to ensure timely contract performance. An example of an urgent need that may be appropriate for a cost type contact may be the continued of operation of a facility assumed from a defaulted contractor.

- Period Of Performance: When the contract period extends over a relatively long period (greater than 5 years), it is difficult for both DOE and the contractor to establish accurate contract value and cover all contingencies in performance. The longer the time of performance, the risk of performance and budget levels increase. Accordingly in such case, consideration should be given to the use of economic price adjustment terms or other repricing mechanism.

- Technical Capability: Consideration should be given to: "has this type of effort done before?" Is the technical requirement well defined, or is this a new state of the art

requirement? This will determine the level of contractor technical capability necessary to execute contract requirements. For example, meeting technical requirements that require a high degree of technical capability may have a greater risk to achieve in an effective and efficient manner, and is a consideration when determining the contract type.

- Financial Capability: Consideration should be given to a contractor's financial risk. For example, smaller firms with limited expertise may not have the financial backing to accomplish the requirement in a timely and efficient manner.

- Performance/Cost Incentives: Incentives may be considered when realistic, measurable targets can be set out in the statement of work and successful project performance identified. In order for realistic and measurable targets to be developed, good technical, schedule and cost baselines are essential. Government technical personnel must be able to monitor contractor performance and make timely decisions on technical matters. A combination of performance and cost incentives should be used as applicable.

  - Performance incentives should be considered when the Government desires improvements in performance.
  - Cost incentives should be used to motivate the contractor to effectively manage costs.

- Adequacy of the Contractor's Accounting System: Before reaching a decision regarding a contract type other than firm-fixed-price, the contracting officer shall ensure that the contractor's accounting system will permit timely tracking and reporting of necessary cost data in the form required by the proposed contract type. This factor may also be critical when a fixed price type contract requires price revision while performance is in progress, or when a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis.

- Concurrent Contracts: If performance under the proposed contract involves concurrent performance under other contracts, the impact on those contracts, including their pricing arrangements, should be considered. For example, a contractor having security contracts at various sites should have better control and understanding of the technical and cost aspects required, thereby leading to cost plus incentive and fixed price type contracts. However, two issues need to be considered under these circumstances: (1) If the contractor has both fixed and cost type concurrent contracts, how is the contractor going to ensure there is no cross charging of costs?; and (2) What contract type does the contractor have for the same or similar services?

XI. Detailed Information On Each Contract Type

There is no magic formula or template that can automatically match a contract type to any contracting circumstances and still consistently promote the best interests of the Government. Sound mature judgment by the most qualified personnel familiar with the influencing factors, considering the importance and magnitude of the contemplated contract, is essential. To make an intelligent selection of a specific or combination type contract to best fulfill a

specific need, the contracting officer must know and understand each of the types of contracts available, the benefits and constraints of each in a given situation, the requirements of the program office, and the various types of risks involved.

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A. FIRM-FIXED-PRICE (FFP)

FAR REFERENCE:

FAR 16.202

CHARACTERISTICS:

Requires delivery of a product or services at a specified price, fixed at the time of contract award and not subject to any adjustment.

APPLICATION:

Standard commercial type services.

Products are "off-the-shelf" or modified commercial products for which sound prices can be developed.

Definite design or performance specifications are available.

Performance uncertainties can be identified and reasonable costs estimated and negotiated.

Fair and reasonable prices can be established at the time of award.

More than one contractor is experienced (adequate competition).

BENEFITS:

Places 100% responsibility and risk on the contractor.

Encourages contractor efficiency and economy.

CONSTRAINTS:

Lacks flexibility in pricing and performance

Difficult to make changes in the requirement after award.

REMARKS:

Most preferred type of contract.

Minimum administration.

Funds obligated in total at time of award.

B. FIXED PRICE WITH ECONOMIC PRICE ADJUSTMENT

FAR REFERENCE:

FAR 16.203

CHARACTERISTICS:

Provides for upward and downward revision to the contract price if, and to the extent, contractually stipulated contingencies occur, of which there are three general types:

- Adjustments based on established prices,
- Adjustments based on actual costs of labor or material, and
- Adjustments based on cost indexes of labor or material.

An example of a contingency is the rise or fall in unit rate costs for specified labor and/or material utilized for the supply item.

APPLICATION:

Extended production life contracts involving market and/or labor cost elements that can be isolated and are subject to hourly pay or unit of sale rate fluctuations.

Eliminate contingency allowances from contractor's basic price for the incorporation of economic price adjustment provision.

Instability of market and/or labor conditions over an extended period is anticipated.

BENEFITS:

Reduces contingency allowances to standardized charges.

Reduces Government and Contractor risk during unstable market and labor condition.

CONSTRAINTS:

Transfers part of price risk to the Government.

Increases administrative cost and burden to Government.

To extent possible, restrict adjustment to Industry-wide contingencies beyond the control of the Contractor.

Adjustment applies only to specific wage or material cost rates.

No upward adjustment to apply to supplies delinquent through non-excusable fault of Contractor.

REMARKS:

Specify criteria for determining acceptability of wage and material rate fluctuation, i.e., order of a Government agency, union contract, prices published in specified newpaper, trade publications, etc.

Contractor must validate all claims for price adjustments and certify as to correctness and completeness of all invoices.

The schedule shall specifically detail the types of labor and materials subject to adjustment, the labor rates (including fringe benefits, if any), the unit prices of material subject to fluctuation and the quantities of labor allocable to each unit of supplies to be delivered.

Consider material on hand and in process by Contractor at time of labor or material rate changes prior to making adjustment.

C. FIXED PRICE INCENTIVE (FPI) CONTRACTS

FAR REFERENCE:

FAR 16.204

CHARACTERISTICS:

Provides incentive for efficiency and economy in performance by:

- High profit for outstanding performance,
- Modest profit for mediocre performance, and
- Low profit or loss for below average performance

Price ceiling, target cost, target profit, and formula for adjusting profit at time of award.

APPLICATION:

When a firm-fixed-price is not suitable.

There is a possibility of cost reduction.

Incentives will likely result in a savings and better performance.

Achievable incentives must be identified, and criteria established for evaluation of performance to determine if incentives are met. These incentives must be objective.

BENEFITS:

Motivates contractor efficiency and economy.

Profit is directly related to contractor performance.

CONSTRAINTS:

Difficult to evaluate performance.

Must determine (1) to be least costly contract type and (2) that any other type is impractical.

REMARKS:

Performance and delivery incentive provisions may be added to cost incentive.

Billing price, flexible within ceiling limits, is established at time of award as interim basis for payment.

Final price is negotiated.

Funds are obligated for the target price.

Two types:

1. Fixed-Price Incentive (Firm Target)
2. Fixed-Price Incentive (Successive Targets)

C.1. FIXED PRICE INCENTIVE (Firm Target)

FAR REFERENCE:

FAR 16.403-1

CHARACTERISTICS:

Parties agree on possible range of cost of performance and negotiate initially: a reasonable target cost and target profit, a price ceiling, and positive, economic-incentive share formula for establishing final price in accord with relationship which final cost bears to target cost.

Omits ceiling and floor on allowable profit. Profit varies inversely with cost.

Price ceiling is maximum that can be paid.

APPLICATION:

Whenever a firm target and formula for establishing final price can be negotiated at the outset, which will provide a fair and reasonable incentive, confidence in achieving performance is high, and technical and cost uncertainties can be reasonably identified.

BENEFITS:

Provides timely and positive incentive to the Contractor to control costs.

Can enable the Government to obtain material and/or services at a lower cost than might otherwise be normally expected.

Contractor has full liability for all incurred costs beyond the price ceiling.

Share formula may be varied to fit the specific situation, commensurate with degree of confidence parties have in range of possible cost of performance, and in magnitude of possible cost variations above or below target cost.

CONSTRAINTS:

Requires establishing realistic target cost where there is equal probability of an under-run or over-run.

Within limit of price ceiling, the Government shares cost of over-run with Contractor.

Unrealistic target price can invite reversing the goal of the incentive provision, i.e., cost over-run may not be reflective of lack of cost control by Contractor, nor cost under-run reflective of outstanding cost control by a Contractor.

Adequate cost data for negotiating a reasonable firm target must be available at the outset.

The contractor's accounting system is adequate for a firm target cost, to be negotiated prior to negotiating firm target profit or share formula.

REMARKS:

The primary consideration in selecting a FPI Contractor as opposed to a CPIF Contractor is technical certainty, not cost certainty.

Contractor should budget performance costs at or below target cost.

Final costs are negotiated.

C.2. FIXED PRICE INCENTIVE (SUCCESSIVE TARGETS)

FAR REFERENCE:

FAR 16.403-2

CHARACTERISTICS:

Parties agree on possible range of cost of performance and negotiate at outset: an initial target cost and profit, a price ceiling, a formula for fixing the firm target profit (including profit ceiling and floor parameters between which firm target profit shall be negotiated) and a specified production point, incident to the contract, to apply the formula.

When the production point is reached, the firm target cost is negotiated, considering experience cost, etc., and then the formula is applied to obtain the firm target profit. The formula, including the profit ceiling and floor may then be retired. The original price ceiling set for the initial target price may be sustained or adjusted downward as appropriate thru negotiation.

If the firm target price is considered reasonable and provides normal risk for the Contractor, a FFP may be negotiated. If this is not felt appropriate, parties may negotiate a formula for establishing final price (by negotiation on completion of the contract) using the firm target price as a guide.

APPLICATION:

When the available pricing data at the outset is not sufficient to permit the negotiating of a firm target price.

When reasonable assurance indicates that additional reliable costing data will be available at an early point in the performance of the contract to permit negotiating either a FFP or firm targets.

Although used infrequently, its main usage has been on second production contracts of newly developed items where the Contractor is still in production on the first production contract.

BENEFITS:

Same as Firm Target.

Allows application of profit motive through economic incentive under circumstances which preclude firm target incentive at the outset.

CONSTRAINTS:

Same as Firm Target.

Increases administrative burden and cost to both Government and Contractor.

Contractor's accounting system is adequate for providing data for negotiating firm targets and a realistic profit adjustment formula, as well as later negotiation of final costs.

Cost or pricing information must be adequate for establishing a reasonable firm target cost at an early point in contract performance.

REMARKS:

Possibility exists that the Contractor may not maximize economic potentials during the initial target period in order to keep the firm target cost high.

D. FIXED PRICE WITH PROSPECTIVE PRICE REDETERMINATION CONTRACT (Redetermination at Stated Time or Times during Performance)

FAR REFERENCE:

FAR 16.205

CHARACTERISTICS:

FFP for an initial period as long as will allow fair and reasonable pricing at outset.

Redetermination periods generally at least 12 months duration, expressed in terms of units delivered or as calendar date (s); can adjust price up or down.

Ceiling price is optional, applied to total contract, or alternatively, a ceiling amount stipulated for each or any redetermination. Level of ceiling price should reflect reasonable sharing of risk.

Negotiation of redetermined price applies to all cost factors, including profit.

APPLICATION

Appropriate for a long term, quantity production contract for which a FFP can be agreed upon for only part of the contract period.

Can eliminate or reduce charges for contingencies.

When parties lack adequate long range cost data, and accurate cost computation and escalation is not appropriate.

BENEFITS:

Provides a means of eliminating contingencies.

Provides protection to Government and Contractor where specs are not definite enough to allow firm and accurate cost estimates.

Allows Contracting Officers to adjust profit in relation to degree of efficiency, economy and overall quality of Contractor performance.

CONSTRAINTS:

Transfers part of risk to the Government.

Requires Contractor accounting system to be adequate for redetermination of prices.

Relatively heavy cost and burden of administration.

Prolonged period of funding obligation before correct and final funding need is known.

Cannot be used unless FFP contract is inappropriate.

Contractor accounting system must be adequate and operationally coordinated with redetermination cycle to allow proper and timely redeterminations.

Don't use if administration of the redetermination clause would cost more than allowing contingencies.

REMARKS:

Should not be used as a substitute for intelligent and timely initial analysis and negotiation of price.

E. FIXED PRICE WITH PROVISION FOR REDETERMINATION (Retroactive After Completion)

FAR REFERENCE:

FAR 16.206

CHARACTERISTICS:

Provides for a price ceiling and retroactive redetermination upon completion of the contract.

Includes fair and reasonable billing price for interim payments and price ceiling which reflects reasonable risk by Contractor.

APPLICATION:

Where it is established at the time of negotiation that a fair and reasonable FFP cannot be negotiated, and the amount of money involved is so small or the time for performance so short that use of any other type contract is impracticable.

BENEFITS:

Same as for fixed price with redetermination.

CONSTRAINTS:

Aside from price ceiling, provides minimal incentive to Contractor to control costs.

Government is in relatively weak bargaining position at redetermination since contract is completed.

Contractor accounting system must be adequate for proper and timely redetermination.

Ceiling price.

Must be reasonable assurance that redetermination action will be taken promptly at the time specified.

F. FIRM-FIXED-PRICE LEVEL OF EFFORT TERM (FP/LOE)

FAR REFERENCE:

FAR 16.207

CHARACTERISTICS:

Work cannot be clearly defined.

The level of effort desired can be identified, and agreed upon at time of award.

Useful in research and exploratory development.

APPLICATION:

Negotiated at time of award

Requires expenditure of a specific number of labor hours during a stated period of time.

Describes the scope of work in general terms (usually investigation or study).

Contractor normally required to submit reports which show the results achieved with the level of effort.

Payment is based on effort expended, not on results.

BENEFITS:

Under FP/LOE contract the contractor must perform without increase in price and level of effort.

CONSTRAINTS:

No guarantee that desired results will be achieved.

Should be used only when the work to be performed cannot be clearly defined.

Level of effort desired must be identified with reasonable assurance that the results desired could not be achieved by fewer labor hours.

REMARKS:

Heavy technical administration burden to assure that Contractor makes best possible effort to achieve desired results within specified level of effort.

Funds obligated at time of award for a fixed price including profit.

G. COST

FAR REFERENCE:

FAR 16.302

CHARACTERISTICS:

Negotiated at time of award.

Estimated cost ceiling for purpose of fund obligation, and limitation of costs that will be reimbursed.

Provides for payment of costs only, no fee.

APPLICATION:

Fixed Price contract is not possible because of magnitude of performance uncertainties.

When contractor wants production experience or to keep operational.

Normally R&D work with a nonprofit educational institution or other nonprofit organizations and for facilities contracts.

BENEFITS:

Economical if contractor is efficient and conscientious in performance.

CONSTRAINTS:

Heavy technical administration monitoring.

Little, if any, incentive for contractor to reduce costs.

Ceiling amount may not be exceeded without Contracting Officer approval.

Government pays only incurred costs.

Government surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used.

REMARKS:

Contractor may consider monitoring by technical personnel a bother.

H. COST SHARING

FAR REFERENCE:

FAR 16.303

CHARACTERISTICS:

Share-in-savings whereby service or product provided by contractor with little or no up-front funding by the agency.

Provides for sharing cost in lieu of full reimbursement of cost.

Provides for payment of costs only – (no fee).

Cost Share agreement reached prior to award.

Established baseline.

APPLICATION:

Only when there is a high probability that the contractor will realize substantial benefits (savings, revenue, or improved efficiency).

IT improvements.

Recovering bad debts.

Facility improvements.

BENEFITS:

Mutual benefit to contractor and Government.

CONSTRAINTS:

Must have measurable, clear goals.

Little, if any, incentive to reduce costs, but more than in a cost contract.

Significant administrative monitoring required from technical personnel.

Ceiling amount on cost must be established at time of award.

Cannot use to obtain unfunded effort solely in support of programs of interest to the Government.

Contractor must show conclusive evidence of anticipated benefits.

Government monitoring during performance will provide reasonable assurance that efficient methods and effective cost controls are used.

REMARKS:

Critical to have a high return on investment and a fast recovery period.

Funds obligated (costs, no fee) not in excess of Government share.

I. COST-PLUS-INCENTIVE-FEE (CPIF)

FAR REFERENCE:

FAR 16.304

CHARACTERISTICS:

Negotiated at time of award:

- Target cost, target fee, minimum and maximum fee, and fee adjustment formula. and
- Delivery, performance or cost incentives – individually or a combination of both.

Upon completion: Formula applies, subject to the minimum and maximum fee limits.

Fee is adjusted - increased from target for cost underrun and decreased for cost overrun.

APPLICATION:

Fixed price incentive is not possible because of technical and cost uncertainties.

Performance objectives are known.

Confidence in achieving objectives is high.

Formula can be negotiated that will provide for performance incentives.

Development and test programs

BENEFITS:

Encourages economic, efficient and effective performance when cost reimbursement type of contract is necessary.

CONSTRAINTS:

Heavy burden on both contracting and technical personnel to administer.

Overall weight factors must be identified and applied to performance, delivery and cost objective.

Government monitoring during performance will provide reasonable assurance that efficient methods and effective cost controls are used.

REMARKS:

Maximum fee for reasonable foreseeable variation above target costs; (minimum fee may be zero) minimum fee at lowest reasonable foreseeable cost.

Probability of large cost variance does not dictate use of this contract type in lieu of a fixed-price-incentive.

J. COST-PLUS-AWARD-FEE (CPAF)

FAR REFERENCE:

FAR 16.305

CHARACTERISTICS:

Combines characteristics of CPFF and CPIF contracts:

All allowable costs are reimbursed.

Minimum fee and award fee.

Contractor's performance will be measured against an award fee plan that contains evaluation criteria.

Specific times are established for evaluation of performance by the Government to determine the quality of the effort and the amount of fee earned.

APPLICATION:

Another type of contract could not be used because definite milestones, targets, or goals to measure contractor performance cannot express performance objectives.

Level of effort is known, mission feasibility is established but measurement of achievement must be subjective rather than objective.

BENEFITS:

More incentive for contractor economic efficiency than a cost-plus-fixed-fee where use of a cost-plus-incentive-fee is not feasible.

CONSTRAINTS:

Significant emphasis on contract monitoring and administration.

Criteria for evaluating contractor performance, coupled with achievable performance ranges must be included in the contract for award fee to be earned.

Shall not use:

To avoid cost-plus-fixed-fee (CPFF) when the criteria for a CPFF contract applies.

To avoid the effort of establishing objective targets so a cost-plus-incentive fee contract can be used,

For procurement of engineering development or operational systems development which have undergone contract definition. (Once the development has been completed and the requirement defined, then a Firm Fixed price contract would be more appropriate).

Not appropriate when the contract amount, period of performance or the benefits expected are insufficient to offset the additional administrative effort or cost.

REMARKS:

Performance is affected by inefficient Government administration action

Timeliness of periodic evaluation reports is critical to proper administration.

The statement of work should indicate precisely what results the Government expects.

The amount of the award fee that is actually paid is determined by the Government's evaluation of the contractor's performance in terms of criteria stated in the contract.

K. COST-PLUS-FIXED-FEE (CPFF)

FAR REFERENCE:

FAR 16.306

CHARACTERISTICS:

Negotiated at time of award: Estimated cost and fixed fee

Costs are reimbursed up to the estimated cost (limited), and specified fee paid.

Fee is not changed unless there is a change in work or term of the contract.

APPLICATION:

Use of any fixed price contract is inappropriate.

Level of effort is justified because of high technical and cost uncertainty.

Practical use for development and test projects.

TWO FORMS:

COMPLETION FORM: Scope of work must have a definite goal or target, and an end product to be delivered.

TERM FORM: Scope of work is in general terms and obligates the contractor to deliver a specified number of hours (level of effort) for a specified period. No end product is required to be delivered.

BENEFITS:

May proceed with general scope and indefinite specifications.

CONSTRAINTS:

Minimum incentive to contractor for cost control.

Fee, without risk, for contractor – reduces contractor responsibility to control costs.

Government monitoring during performance will provide reasonable assurance that efficient methods and effective cost controls are used.

REMARKS:

Research, preliminary exploration or studies to determine feasibility of development, and level of effort required is unknown.

Completion form requires contractor to complete and deliver end product before payment of entire fixed fee can be made.

A renewal for further performance under the term form is considered a new procurement and involves new fee and cost arrangements.

The completion form is preferred over the term form.

The estimated cost and fixed-fee may be incrementally funded.

L. PERFORMANCE BASED CONTRACTS

FAR REFERENCE:

FAR Subpart 37.6

CHARACTERISTICS:

Performance Based contracting emphasizes that all aspects of an acquisition be structured around the purpose of the work to be performed as opposed to the manner in which the work is to be performed. It is designed to ensure that contractors are given freedom to determine how to meet the government's performance objectives that appropriate performance quality levels are achieved, and that payment is only made for services that meet these levels.

Can be used with various types of contracts.

APPLICATION:

A performance work statement (PWS) is the foundation of performance based contracting. The PWS describes the effort in terms of measurable performance standards (outputs). These standards should include such elements as "what, when, where, how many, and how well" the work is to be performed. A Quality Assurance Plan (QAP), which directly corresponds to the performance standards and measures contractor performance, is needed to determine if the contractor is meeting the PWS requirements. Positive and/or negative performance incentives, based on QAP measurements, should be included. The PWS performance standards, QAP and incentives are interdependent and must be compatible in form, style and substance, and should be cross-referenced.

BENEFITS:

Clearer expression of the Government's needs and how work will be judged.

Risk of performance shifted to the contractor.

Contractor gets paid for successful completion of the work.

Supports fixed price contracting when practical.

Performance based contracting helps correct problems commonly associated with services contracts including cost overruns, schedule delays and failure to achieve specified results.

CONSTRAINTS:

Converting to a Performance Based contract has an initial increase in up front costs.

Increased time and costs associated with contract administration.

For small dollar value procurement of less than $100,000 the increase in time and cost for contract administration may not be worth the benefit in increased contractor performance.

Individuals developing the statement of work need to know what they want.

No undefined adjectives and adverbs.

Makes contractors clearly propose how they will execute work; invoke in the contract.

Good technical, schedule and cost baselines are essential for performance based contracting.

Increased emphasis on contract administration is necessary.

REMARKS:

Care must be exercised in establishing the quality level at which performance standards are set. The minimum acceptable performance standard should rarely be 100 percent, since the standard directly affects the cost of the service. Conversely, if the quality is too low, it may act as a disincentive to good contractor performance.

Incentives should be used when they will induce better quality performance and may be either positive, negative, or a combination of both. They should be applied selectively to motivate contractor efforts that might not otherwise be emphasized, and to discourage inefficiency. Incentives should apply to the most important aspects of the work, rather than every individual task

M. INDEFINITE-DELIVERY/INDEFINITE-QUANTITY CONTRACTS

FAR REFERENCE:

FAR 16.504

CHARACTERISTICS:

The contract:

Does not fully specify the time of delivery and/or the quantity to be delivered, but provides an estimate of with a minimum and maximum of the needs to be ordered.

Contains terms and conditions that will apply to future contracts (orders) during a specific period of time,

Provides description of supplies or services (as specific as practicable),

Identifies method (s) for pricing, issuing of orders, and delivery terms.

APPLICATION:

With negotiated firm-fixed-price or cost-reimbursement contracts.

BENEFITS:

Saves time in negotiation.

CONSTRAINTS:

Terms and provisions of an agreement may be changed only by modification of the agreement and not by a contract incorporating the agreement.

Does not imply agreement to place future contracts.

Shall not be used to avoid competition.

REMARKS:

Possible to save time – but does not delete requirement for compliance with FAR. However, compliance with the FAR is met if the ID/IQ contract was competitively awarded.

N. DEFINITE-QUANTITY CONTRACTS

FAR REFERENCE:

FAR 16.502

CHARACTERISTICS:

Provides for:

Definite quantity of supplies or services at fixed prices within stated limits during a definite period.

Minimum and maximum quantities for individual orders.

Delivery orders issued for specific quantities

APPLICATION:

Quantity needs of commercial or commonly used, recurring need items are known but time of need is not.

Items are readily available or require only short delivery time.

BENEFITS:

Saves administrative and negotiation time in awards.

CONSTRAINTS:

None

REMARKS:

Funds obligated for total contract amount – We have bought the quantity specified even if we never issue a delivery order.

O. REQUIREMENTS

FAR REFERENCE:

FAR 16.503

CHARACTERISTICS:

Provides for:

- Purchase of all actual needs of specific supplies or services at fixed-price (s), during a specific period of time,
- Estimated total quantity, and
- Maximum limit of contractor's obligation to deliver.

Delivery orders issued to schedule deliveries.

APPLICATION:

Precise quantity of commercial or commercial-type items are not known but it is a known recurring need.

BENEFITS:

Flexible regarding quantity and delivery scheduling.

Price savings possible by combining several requirements into one action. Faster delivery.

CONSTRAINTS:

Savings may be off-set by contractor building in an "uncertainty" compensation factor in price.

REMARKS:

Funds obligated on delivery orders.

Minimum and maximum may be stated in the contract.

Fixed price or Cost Reimbursement type arrangements can be used.

P. TIME AND MATERIALS (T&M) LABOR HOUR (LH)

FAR REFERENCE:

FAR 16.601 and FAR 16.602

CHARACTERISTICS:

Direct labor hours at specified fixed hourly rates, and material at cost.

Requires a price ceiling which contractor may not exceed except at own risk.

LABOR HOUR (variant) may provide for payment of labor hours only.

APPLICATION:

Not possible at time of award to estimate costs with any degree of confidence.

Nature of work is known at time of award but not the extent or duration.

BENEFITS:

Can fulfill a special need that no other contract type can serve.

CONSTRAINTS:

Heavy burden on technical personnel to perform surveillance to preclude inefficiency or waste.

No positive profit incentive for contractor to control costs.

LIMITATIONS:

Determination that no other contract type will serve.

REMARKS:

Engineering and design services or repair, maintenance or overhaul, or work under emergency conditions. The contract may be structured like an Indefinite Quantities type contract and funds may be obligated by issuance of task order (s) or delivery order (s) under the contract.

Q. LETTER CONTRACTS

FAR REFERENCE:

FAR 16.603

CHARACTERISTICS:

A legal, preliminary, negotiated contract that authorizes contractor to start work pending negotiation of a definitized contract, which may be any type, or combination of types.

Provides for:

- Maximum liability of the Government (amount estimated to be necessary to cover performance until definitized), and
- The type of contract anticipated to be negotiated.

APPLICATION:

Emergencies only – an immediate binding agreement is required so performance can start.

BENEFITS:

Expedites the procurement process, contractor begins performance on urgent requirements prior to completion of procedural requirements.

CONSTRAINTS:

No incentive for cost control by the contractor.

Government is in a very weak bargaining position at the time the contract is definitized.

A letter contract may be used only after the head of the contracting activity or a designee determines in writing that no other contract is suitable. Letter contracts shall not –

- Commit the Government to a definitive contract in excess of the funds available at the time the letter contract is executed;
- Be entered into without competition when competition is required by FAR Part 6.
- Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment is subject to the same requirements and limitations as a new letter contract.

REMARKS:

Can easily result in the Government paying more for less, or ending up in a dispute which is a manpower intensive procedure for both contracting and technical personnel.

Use only when have exhausted all other options.

Government liability shall be the estimated amount necessary to cover the contractor's requirements for funds before definitization (should not exceed 50% of the estimated cost of the definitized contract).

R. BASIC AGREEMENTS (BA)

FAR REFERENCE:

FAR 16.702

CHARACTERISTICS:

A basic agreement is not a contract. It is a written instrument of understanding executed between a department or procuring activity and a contractor which sets forth the negotiated contract clauses which will be applicable to future contracts entered into between parties during the tem of the basic agreement. The use of the basic agreement contemplates the coverage of a particular requirement by the execution of a formal contractual document which will provide for the scope of the work, price, delivery, and additional matters peculiar to that specific requirement, and will incorporate by reference or append the contract clauses agreed upon in the basic agreement as required or applicable. Basic agreements may be used with fixed-price or cost-reimbursement type contracts.

Basic agreements should provide for discontinuance of their future application upon 30 days written notice by either party. Discontinuance of basic agreement will not affect any individual contract referencing the basic agreement (or the clauses appended thereto) entered into prior to the effective date of discontinuance.

Basic agreements may include negotiated overhead rates for cost-reimbursement type contracts.

A basic agreement should be used to cover all subsequent transactions which fall within its scope. Provisions of the basic agreement, including supplements thereto, should be incorporated into the formal contractual document covering the particular requirement it supplements.

Basic agreements should contain a set of "General Provisions." These general provisions should include two groups of clauses. The first group, identified as "Part A," should include all of the clauses made mandatory by statue, Executive Order, or the DEAR. The second group, identified as "Part B," should consist of clauses that may be made a part of each formal contractual document, depending on their applicability.

APPLICATION:

Used where past experience and future plans indicate that a substantial number of separate contracts may be entered into with a contractor during the term of the basic agreement and substantial recurring negotiating problems exist with a particular contractor.

BENEFITS:

Eliminates some repetitive negotiating difficulties with a contractor.

CONSTRAINTS:

Requires contracting personnel to be somewhat familiar with the contents of the basic agreement and sometimes results in extra administrative effort in determining which clauses are applicable to the contract.

Should neither cite appropriations to be charged nor be used alone for the purpose of obligating funds.

Should not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor should it be used in any manner to restrict competition.

Should be utilized only in connection with negotiated contracts.

REMARKS:

A basic agreement may be modified only by a modification of the basic agreement itself and should not be modified or superseded by individual contracts or purchase orders entered into, under, and subject to the terms of such basic agreement. To minimize modification, revisions involving changes in authorized contract clauses utilized in basic agreements will provide appropriate direction with respect to any required modifications of basic agreements and to the extent possible, modifications will be required only in matters resulting from changes in statutes or Executive orders. As a minimum, basic agreements should be reviewed annually before the anniversary of their effective date and revised to conform to the current requirements.

A supplemental agreement should:

1. Incorporate the most recent basic agreement, including supplements thereto, to apply only to the work added by the supplemental agreement.

2. If it is in the interest of the Government, incorporate the most recent basic agreement, including supplements thereto, to apply to the entire contract as of the date of the supplemental agreement.

However, an existing contract may be amended by a supplemental agreement adding a new requirement without incorporating the most recent basic agreement only if all clauses then required by statue, Executive order, or regulation are included in the contract or the proposed supplemental agreement.

Clauses pertaining to subjects not covered in a basic agreement but applicable to the contract being negotiated should be included in the contract as if no basic agreement existed.

S. BASIC ORDERING AGREEMENTS (BOA)

FAR REFERENCE:

FAR 16.703

CHARACTERISTICS:

A basic ordering agreement is not a contract it is a written instrument of understanding, negotiated between the government and a contractor, which contains:

a. terms and clauses applying to future contracts (orders) between the parties during its term,
b. a description, as specific as practicable, of supplies or services to be provided, and
c. methods for pricing, issuing, and delivering future orders under the basic ordering agreement.

APPLICATION:

A basic ordering agreement may be used to expedite contracting for uncertain requirements for supplies or services when specific items, quantities, and prices are not known at the time the agreement is executed, but a substantial number of requirements for the type of supplies or services covered by the agreement are anticipated to be purchased from the contractor.

BENEFITS:

Under proper circumstances, the use of these procedures can result in economies in ordering parts for equipment support by reducing administrative lead-time, inventory investment, and inventory obsolescence due to design changes.

A basic ordering agreement shall not state or imply any agreement by the Government to place future contracts or orders with the contractor or be used in any manner to restrict competition.

Each basic ordering agreement shall:

(1) Describe the method for determining prices to be paid to the contractor for the supplies or services;
(2) Include delivery terms and conditions or specify how they will be determined;
(3) List one or more Government activities authorized to issue orders under the agreement;

(4) Specify the point at which each order becomes a binding contract (e.g., issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days);
(5) Provide that failure to reach agreement on price for any order issued before its price is established is a dispute under the Disputes clause included in the basic ordering agreement; and
(6) Use appropriate special data required by FAR 13.403, if fast payment procedures will apply to orders.

Each basic ordering agreement shall be reviewed annually before the anniversary of its effective date and revised as necessary to conform to the requirements of this regulation. Basic ordering agreements may need to be revised before the annual review due to mandatory statutory requirements. A basic ordering agreement shall be changed only by modifying the agreement itself and not by individual orders issued under it. Modifying a basic ordering agreement shall not retroactively affect orders previously issued under it.

REMARKS:

Ensure that orders placed under a basic ordering agreement do not circumvent competition requirements.

The order shall incorporate by reference the provisions of the basic ordering agreement.

T. BLANKET PURCHASE AGREEMENT (BPA)

FAR REFERENCE:

FAR 13.303

CHARACTERISTICS:

A simplified method of filling repetitive needs for supplies or services in small quantities and dollar values by establishing a "charge account", for a specific period of time.

Individual orders against BPAs shall not exceed the simplified acquisition threshold.

Individual BPAs and orders thereunder are to be documented.

Obligates the contractor to provide most favored customer prices.

Establishes periodic billing schedule.

APPLICATION:

Need to provide commercial source of supply for one or more offices or projects.

There is not an existing requirement contract for the supply or service.

BENEFITS:

Individuals outside the contracting activity may be authorized to place orders.

Bulk funded purchase requests may be used in lieu of individual purchase requests for each requirement.

CONSTRAINTS:

Contains the following mandatory terms and conditions:

- Description of agreement
- Extent of obligation
- Purchase limitations
- Lists individuals authorized to purchase under BPA
- Sales slip/delivery ticket necessary
- Invoices

Purchases under BPAs cannot exceed specific amount specified in letter authorizing orders.

REMARKS:

BPA may be established for expendable supplies and commercial type services.

Funds are obligated on an established schedule by issuance of an order for purchases placed under the BPA.

U. TASK ORDERS

FAR REFERENCE:

FAR 16.505

CHARACTERISTICS:

Not a contract - An arrangement for placing orders against various types of contracts such as indefinite delivery – indefinite quantity, multiple award and Government wide acquisition contracts.

Orders shall describe all services and supplies to be delivered.

Orders shall be within the scope, period of performance and max value of the contract.

APPLICATION:

Any contract that provides for task orders to fulfill the requirements.

Orders may be placed against DOE contracts, or any other agency contracts, including the General Services Administration.

Performance work statements must be used to the maximum extent practicable.

BENEFITS:

Expeditious processing of requirements.

Consolidation of requirements, negotiation and award of a contract that provides for delivery orders when need occurs nominally results in lower costs.

CONSTRAINTS:

May not be used to circumvent conditions and limitations imposed on the use of funds.

Cannot avoid requirements for competition.

REMARKS:

Not exempt for acquisitions plans.

May not be used to circumvent conditions and limitations imposed on the use of funds.

V. GOVERNMENT WIDE ACQUISITION CONTRACT (GWAC)

FAR REFERENCE:

FAR 2.101

CHARACTERISTICS:

A GWAC is a task-order or delivery order contract for information technology established by one agency for government wide use.

APPLICATION:

A task order or delivery order contract for information technology established for government wide use.

The task order or delivery order may be firm fixed price, time and material/labor hour, level of effort or cost reimbursement depending upon the specific GWAC flexibility.

GWACs offer total technology solutions that include hardware, software, systems integration services, asset management, security and program management.

BENEFITS:

GWACs offer Federal agencies the advantage of flexibility in meeting their various information technology requirements through on umbrella contract.

GWACs are administratively less burdensome than if an agency were to conduct its own series of individual procurements.

Procuring agencies realize savings through reduced procurement and administrative costs and through volume buying pricing.

GWACs utilize performance-based contracts focusing on outcome solutions.

Orders against GWACs are not protestable.

The host agency has already conducted the competition resulting in one or more contract awards to the best-in-class Information Technology (IT) product and service providers.

Provide the broadest availability of IT products and services.

The ordering award process takes approximately one-fourth of the lead-time required for traditional competitive acquisitions.

Individual prices are based upon competition in establishing the umbrella GWAC and are predetermined to be fair and reasonable for the placement of orders.

Small, minority and women-owned businesses, as well as large businesses are represented.

There are no FedBizOpps posting requirements for the ordering agency.

CONSTRAINTS:

Although the goal is to deliver products and services to user agencies as quickly as possible, host agencies policies, processes and lack of electronic capabilities can adversely affect delivery time.

Currently, each host agency has established a maximum value for their respective GWAC that is equal to the estimated Government usage for a ten-year period.

Each GWAC has an established limitation on how much of the total contact value one agency can use. This amount varies by GWAC and is determined by the host agency, which normally adds a small administrative, or user fee to cover its cost of administering the GWAC.

REMARKS:

User fees are higher for those agencies that require the host agency to award and administer the tasks issued in support of the ordering agency, while user fees are lower for those agencies willing to administer the tasks that are awarded by the host agency.

User fees are paid to the host agency. These fees are negotiable.

The use of GWACs is subject to the indefinite-delivery contracts requirements prescribed in FAR Subpart 16.5. However, GWACs are not subject to the requirements and limitations of the Economy Act, as specified in FAR Subpart 17.5.

Host agencies are designated pursuant to the authority of the Director, Office of Management and Budget, to establish GWACs.

Although DOE is not a designated GWAC agency, the Department can fully utilize GWACs that are awarded and administered by host agencies.

In order to ensure that the host agency complies with its GWAC commitments, an Interagency Agreement (IA) between the host agency and user agency and an accompanying memorandum of understanding (MOU) between the two agencies should be established. The IA/MOU should detail the performance expectation of the two agencies along with the administrative fees to be paid to the host agency.

The IA/MOU may be negotiated to provide for a reduction in the fee paid to the host agency, in the event that the expectations committed to by the host agency are not maintained.

W. FEDERAL SUPPLY SCHEDULE BUYS

FAR REFERENCE:

FAR Subpart 8.4

CHARACTERISTICS:

Federal Supply Schedule (FSS), also known as Multiple Award Schedule (MAS), is a listing of vendors awarded contracts for supplies or services by the General Services Administration (GSA). These schedules are available for use by any Federal agency requiring the identified supplies or services. There are also specialized schedules, such as the Management Organizational and Business Improvement Services (MOBIS) schedule, the Professional Engineering Services schedule, the Information Technology schedule and the Environmental Services and Products schedule, which allow procuring activities to focus their selection of contractors to special areas of interest.

APPLICATION:

In a competitive process, the GSA awards a schedule contract to commercial firms that give the Government the same or better discounts than they give their best customers. These discounts are then passed on to other agencies through the various FSS schedules. This program mirrors commercial buying practices more than any other procurement process in the Federal Government, and offers federal agencies a simplified process for getting their required products and services at volume buying prices.

BENEFITS:

Significantly reduced acquisition time.

GSA has already complied with competition requirements.

GSA has already performed pre-solicitation and pre-award requirements like the Service Contract Act review, the Small Business/Labor Set-Aside review, synopsis, and Equal Employment Opportunity review.

Volume purchase prices that are fair and reasonable.

Allow agencies to make payments with the Government-wide purchase card.

Delivery is quick.

Schedule orders to small businesses count towards DOE small business goals.

Access to state of the art technology and quality services and products.

Assures compliance with environmental requirements for applicable services and products.

The ordering and award process times are approximately 1/4th the leadtime required for the traditional competitive acquisition process.

Over 4 million products and services are covered by the schedules.

Agencies can establish Blanket Purchase Agreements (BPA) for recurring needs.

CONSTRAINTS:

FSS pricing may not be the most favorable; however, all FSS prices are deemed to be fair and reasonable.

Each schedule in the FSS has a maximum order threshold. This threshold is not meant to limit the amount of your purchase, but represents the level at which there could be a benefit from better pricing. It is the trigger point to seek additional price reductions form the schedule vendor.

REMARKS:

As a general rule, obtaining information from the FSS program and FSS vendors themselves is sufficient to satisfy the agency's obligations to conduct procurement planning and market research. However, the Contracting Officer will select the most appropriate schedule for the program's requirement. For instance, the Contracting Officer won't use the MOBIS schedule if professional engineering services are required.

When conducting evaluations and before placing orders, consider including, if available, one or more small business schedule contractors.

Though FSS vendors are not entitled to a debriefing in accordance with FAR Part 15, if an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation for the award decision must be furnished to the unsuccessful offeror.

The requirement of Organizational Conflicts of Interest applies to FSS orders.

CONTRACT CLOSE OUT

[Reference: FAR 4.8; DEAR 904.8]

Overview

This section of the chapter provides guidance relating to coverage found in Subpart 4.8 of the Federal Acquisition Regulation and Subpart 904.8 of the Department of Energy Acquisition Regulation. It provides general guidance for the close out of DOE contracts and interagency agreements.

Background

This Chapter concerns the final phase of the contract life cycle. The contract close out process can vary from very simple in the case of a fixed price supply order using simplified acquisition procedures to very complex in the case of a multiple year cost reimbursement contract. Timely contract close out may result in recovery of excess funds for possible use elsewhere, identifies the need for additional funds in a timely manner, and minimizes administrative costs for both the contractor and the Government.

The FAR and the DEAR both provide summary level closeout coverage. This Guide Chapter provides more detailed guidance regarding the individual steps that are required to close various types of contracts. It is intended as a general guide for use by all DOE contracting activities. It is not intended to replace established local procedures that may be necessary to address unique circumstances of a particular organization.

To ensure the timely closeout of contracts, FAR 4.804-1 provides the following closeout lead time standards:

- Simplified acquisitions - Immediately upon completion of delivery and payment.

- Firm-fixed-price contracts - Within 6 months of confirmation of contract completion.
- Contracts requiring settlement of indirect cost rates - Within 36 months of the month the contracting officer receives evidence of physical completion.
- All other contracts - Within 20 months of the month in which the contracting officer receives evidence of physical completion.

These standards apply unless there are circumstances involving litigation or appeal; outstanding audit or financial issues; or in the case of termination, actions that are required under FAR Part 49 are incomplete. In such cases, the issue(s) must be resolved prior to close-out, regardless of the applicable time standard.

Departmental regulations at DEAR 904.804-1 require that Heads of Contracting Activities ensure that necessary procedures and milestone schedules are established to meet the closeout lead time standards cited above, and that resources are applied to effect the earliest practical

deobligation of excess funds and the timely closeout of all contract files which are physically completed or otherwise eligible for closeout action.

Under certain circumstances, FAR 42.708 provides a quick closeout procedure for cost reimbursement contracts to reduce administrative costs and to enable deobligation of excess funds. Contracting Officers may negotiate the settlement of indirect rates in advance of the determination of final indirect rates if:

1) the contract is physically complete;
2) the amount of unsettled indirect cost to be allocated the contract is relatively insignificant, i.e.,
a) less than $1,000,000 total unsettled indirect cost to be allocated to a single contract;
b) the cumulative unsettled indirect costs to be allocated to one or more contracts in a single fiscal year do not exceed 15% of the estimated, total unsettled indirect costs for that fiscal year; and
3) agreement can be reached on a reasonable estimate of the allocable dollars.
Indirect cost rates used in the quick closeout of a contract cannot be considered a binding precedent when establishing the final indirect cost rates for other contracts.

Guidance

To assist contracting activities through the closeout process, four templets are provided as an attachment to this guide chapter for each of the closeout standards referenced above. The templets provide a checklist of the steps which are generally necessary to be completed to closeout a certain type of contract. When using templets, Contracting Officers may tailor checklists to consider only those items which are necessary for the circumstances under the individual contract being closed-out.

Many contracting offices are currently using automated systems to track close out actions and maintain electronic copies of close out documents. If you would like more information on processes used by other offices or if you would like examples of close out documents, please contact the Office of Procurement and Assistance Policy, Richard Langston at (202) 586-8247 or via e-mail at richard.langston@pr.doe.gov.

Best Practices

The Office of Federal Procurement Policy has issued guidance in a Contract Administration Guide to provide Contracting Officers information on best practices regarding closeout issues which may impede the timely closeout of contracts. The following list provides excerpts from the guide:

CONCERN - LACK OF MANAGEMENT ATTENTION TO CONTRACT CLOSEOUT

Establishing a separate closeout function within the contracting organization emphasizes the importance of contract closeout.

The best time to concentrate on contract closeout may be during the October to February time frame when the contract placement workload may be less.

Using contractor support may be an efficient way to accomplish contract closeout when in-house resources are limited.

Such administrative functions as creating the closeout file, soliciting required closeout forms from internal organizations, obtaining the contractor's release are duties that can be performed through contractor support as long as the forms are executed and approved by the Government contracting official. Although the contract specialist continues to work with the contractor through physical completion under "cradle-to-grave" contract administration, this does not prohibit a separate group from performing the closeout function.

Entering into agreements with the Defense Contract Management Command to perform contract administration and contract closeout functions may be useful when in-house resources are limited.

Rewarding employees through incentive awards (i.e., on-the-spot cash awards) for the highest number of closeouts completed is a good motivation factor.

Using measurement standards such as those prescribed in the FAR for closing various types of contracts helps to keep the focus on the closeout effort.

Cross-training in contract closeout is good for contract specialists as it helps them to understand the importance of writing good contracts as well as good contract administration.

CONCERN - POOR MANAGEMENT INFORMATION SYSTEMS TO MONITOR THE CONTRACT CLOSE OUT PROCESS.

Consider using a management information system with milestones to track contract closeout from physical completion through final payment.

Integrating the closeout system with a word processing capability allows for automatic generation of closeout letters which speeds up the closeout process.

Using contractor support for data entry services may be an alternative when in-house resources are limited.

CONCERN - POOR COORDINATION AMONG CONTRACTING ACTIVITY, INSPECTOR GENERAL (IG), AND COGNIZANT AUDIT AGENCY

It may be helpful to notify the IG and the cognizant audit agency whenever a cost-reimbursement contract is awarded that requires an incurred cost or indirect cost rate proposal audit. Providing

that information at the time of award helps the audit agency program future requirements into its workload projections.

Forecasting audit needs and communicating those needs to the IG and the cognizant audit agency helps to improve working relationships. Developing an information management system may be a useful tool to facilitate that process. Prioritizing audit requirements and communicating these requirements to the IG and the cognizant audit agency helps in projecting the audit workload. Specifically stating in the audit request any special information that should be included in the audit report makes the report more useful and improves working relationships between the contracting office, the IG's office, and the cognizant audit agency.

Using a team approach consisting of contracting officials and audit staff to determine those contractors that should be audited helps to forecast audit requirements better.

Sharing such information with the cognizant audit agency as a listing of prime and subcontracts awarded that are subject to defective pricing reviews or contracts physically completed but not closed over three years helps the auditors to better define the audit backlog, determine audit resources, and prioritize contractor locations for audits.

Subsequently, requesting the cognizant audit agency to provide such information as the directory of for-profit contractors with the audit office responsible for the contractor's audit and those contractors that are late in submitting their indirect cost rate proposals or submitted inadequate proposals helps the contracting office project its closeout workload.

CONCERN - LARGE BACKLOG OF UNSCHEDULED AUDITS.

Using quick closeout procedures to the extent practicable helps to reduce the audit workload. When a determination can be made that there is no evidence of fraud or waste, the contractor's performance is good, and there is no history of unallowable costs, then quick closeout procedures may be appropriate.

Performing risk assessments to determine contractors that should be audited will help to better manage the audit workload.

Encouraging contractors to submit their final vouchers in a timely manner avoids delays in requesting the final closeout audit under cost reimbursement contracts.

Using rate checks (labor and indirect cost rate) to the maximum extent possible instead of full blown audits when such audits would not add value helps to reduce audit backlog.

CONCERN - NONCOMPLIANCE WITH FAR PROVISION FOR SUBMITTING INDIRECT COST PROPOSALS BY SOME CONTRACTORS DELAYS THE AUDIT PROCESS.

Using the post award orientation session to educate the contractors (in particular small business firms) on the requirements for contract closeouts and the need to submit indirect cost proposals in a timely manner should help make the closeout process easier.

CONCERN - AVOIDING DISPUTES IN CLOSE OUT.

In construction contracting, claims sometimes cause closeout problems.

An alternative dispute resolution technique known as "partnering" should be considered. Creating a partnership agreement with the contractor helps to avoid disputes. Having the partnership agreement signed by all parties -- the contracting officer, COTR, and the contractor -- creates a buy-in to the overall goal: "Completion on time, within budget, and without claims."

CONCERN - LACK OF A SPECIFIC DOLLAR THRESHOLD FOR USING QUICK CLOSEOUT PROCEDURES.

Using specific dollar thresholds for quick closeouts may be practicable so long as the government's interests are protected, low risk is involved, and indirect rates can be verified. Knowing the contractor's history of incurred costs, billings, and performance are additional factors to be considered when establishing thresholds for using quick closeouts.

Establishing a good working relationship with the finance office helps in the closeout process. Getting the finance office to provide a listing of contracts where money will be lost if final settlement does not occur helps to target attention on those contracts that may be closed through quick closeout procedures.

CONCERN - ENSURING ADEQUATE CLOSE OUT DOCUMENTATION.

Always use a checklist and include it in the contract file when closing contracts. This helps assure that all actions have been completed.

SIMPLIFIED ACQUISITION CLOSE OUT TEMPLET

A simplified acquisition should be closed as soon as the Contracting Officer receives evidence of receipt of the deliverable and final payment. Close out of simplified acquisitions will ordinarily be quite simple as illustrated by the Milestone Checklist shown below.

Sample Close Out Checklist for Simplified Acquisitions

Action	Requested	Completed
Acceptance of Work		
Final Payment		
Others: As Applicable		
Prepare Close Out Individual Procurement Action Report		

Acceptance of Work - DOE does not specify a particular form or format for this action. For a simplified acquisition, simplicity is key. A local form or a note verifying receipt may be used.

Final Payment - Ascertain through a liquidation status report from the Departmental Integrated Standardized Core Accounting System (DISCAS) or other local system.

Others - Special circumstances may require the addition of a milestone, for example, if Government property was furnished a milestone would be added for its disposition.

Prepare Close Out Individual Procurement Action Report - Processing this form removes the action from the Procurement and Assistance Data System (PADS) register of completed awards awaiting final close out. There is an Individual Procurement Action Handbook available at http://www.pr.doe.gov under the "professionals" link.

FIRM-FIXED-PRICE CONTRACT CLOSE OUT TEMPLET

Prepare Close Out Checklist - The first step in any formal contract close out should be a review of the contract file to ascertain what will be needed and what may already be on hand. This can result in a tailored Contract Close Out Checklist specific to each contract. A sample is shown below. This has a greater number of items than would be typical of a simple, fixed price commercial product, supply contract. When creating a checklist, include only those items necessary for the circumstances.

Sample Close Out Checklist for Firm-Fixed-Price Contracts

Action	Requested	Completed
Acceptance of Work		
Final Invoice		
Contractor Closeout Request Letter		
Obtain Patent/Royalty Clearance		
Obtain Property Clearance		
Obtain Security Clearance		
Confirm Receipt of Technical Reports		
Final Release		
Approve Final Invoice for Payment		
Verify Final Payment		
Contract Completion Statement		
Prepare Close Out Individual Procurement Action Report		

Acceptance of Work - Contracting personnel are responsible for initiating close out of the contract after receiving notice of its completion. DOE does not specify a particular form or format for this notice. A local form, a note verifying receipt, or a form letter may be used. Generally, the Close Out Specialist obtains this from the Contracting Officer Representative or Project Officer.

Final Invoice - Under a simple fixed price contract an invoice for final payment will be received shortly after receipt of the deliverable. The invoice can be processed for payment pending completion of the closing process. Fixed price contracts for construction, architect engineer services, time and material and labor hours all include a payment retention which will not be released until closeout steps are completed and the contractor furnishes a final release.

Contractor Close Out Request Letter - A contractor close out request letter should be prepared and tailored, like a checklist, to the contract circumstances. If any reporting requirements are unsatisfied at the time of letter preparation, those reports should be requested in the letter. A final release is requested of all contractors. Additional items might include clearances for patents,

property, a request for final invoice (important if a portion of the payments have been retained), etc..

Patent/Royalty Clearance - Contracts with patent provisions require a patent and royalty certificate. It is completed by the contractor as part of the close out package and then coordinated with counsel.

Property Certificate - Disposition of any Government owned property must be made before close out can occur. A property certificate is used for this purpose. It is completed by the contractor as part of the close out package and coordinated with the property office.

Security Clearance - Pursuant to DOE 471.1, the Contracting Officer Representative is responsible for initiating the closing Contract Security Classification Specification, DOE Form 5634.2, along with a Certificate of Non-Possession. The Certificate of Non-possession must be coordinated with the contractor. Local procedures may vary but consider including a Certificate of Non-Possession in the close out package. At times, the contractor may need to continue some access authorizations for work on other contracts. This should be noted on the forms. The Contracting Officer Representative completes, signs and sends the closing DOE Form 5634.2 and Certificate of Non-Possession to Procurement for their signature on both items. These two documents are then sent to security for the contract to be deleted from the Safeguards and Security Information Management System. A completed DOE Form 5634.2 and a Certificate of Non-Possession are required for the prime contractor and each subcontractor. The Security Information Management System won't allow deletion of a prime without first deleting its subcontracts. Further details on these procedures are found in DOE M 471.2-1B.

Confirm Receipt of Technical Reports - For contracts with technical or scientific report requirements, verify that all OSTI-designated reports have been forwarded by checking the DOE Energy Link System at http://www.osti.gov/elink/ The Energy Link (E-Link) System is an interactive system for submitting electronic scientific and technical information reports and other electronic reporting products to the Department of Energy (DOE) over the Internet.

Final Release - A final release is a release discharging the Government, its officers, agents and employees from all liabilities, obligations and claims under the contract.
It is obtained on all fixed price contracts. Final payment need not be delayed for it except for construction, architect-engineer, and time and material/labor hour contracts where the withheld share of payments is not paid until the contractor submits the release.

Approve Final Invoice for Payment - If final payment has not already been made approve the final invoice for payment and provide notice to the finance office.

Verify Final Payment - Verify that the finance office has made final payment.

Contract Completion Statement - A contract completion statement containing the summary information required by FAR 4.804-5 (b) must be signed by the contracting officer and placed in the close out file.

Prepare Close Out Individual Procurement Action Report - Processing this form removes the action from the Procurement and Assistance Data System (PADS) register of completed awards awaiting final close out. A sample form is attached in the model close out documents section. Contract status should be coded RA. There is an Individual Procurement Action Handbook available at http://www.pr.doe.gov at the "professionals" link.

CONTRACTS REQUIRING SETTLEMENT OF INDIRECT COST RATES CLOSE OUT TEMPLET

Prepare Close Out Checklist - The first step in any formal contract close out should be a review of the contract file to ascertain what will be needed and what may already be on hand. This can result in a tailored Contract Close Out Checklist specific to each close out. A sample is shown below. When creating a checklist, include only those items necessary for your circumstances.

Sample Close Out Checklist for Contracts Requiring Settlement of Indirect Cost Rates, e.g. cost reimbursement contracts, fixed-price incentive contracts.

Action	Requested	Completed
Acceptance of Work		
Complete Funds Review		
Contractor Close Out Request Letter and Forms		
Review Contractor Forms		
Request Audit or Audit Waiver		
Patent/Royalty Certificate		
Property Certificate		
Security Clearance		
Confirm Receipt of Technical Reports		
Receive Audit and Resolve Audit Questions		
Summary Settlement Statement Review and Concurrence		
General Assignment and Final Release		
Approve Final Invoice for Payment		
Funding Adjustment		
Confirm Final Payment		
Contract Completion Statement		
Prepare Close Out Individual Procurement Action Report		

Acceptance of Work - The office administering the award is responsible for initiating administrative closeout of the award after receiving evidence of it's physical completion. The Acceptance of Work signifies official acceptance of deliverables and other reporting requirements on behalf of the government. The Contracting Officer Representative or Project Officer should return the certification within 10 working days of issue. The Acceptance of Work Form Letter can be sent via electronic mail. Reporting requirements clearance (OSTI Clearance) is addressed in a later step, however, the submission of all required reports is necessary for the

initiation of closeout activities. This is required for all award actions, prior to the initiation of closeout activities.

Complete Funds Review - A review of funds obligated to the award instrument, payments made to the awardee, and pending invoices should be made prior to the transmittal of the Contractor Close Out Request Letter and Forms package. Amounts should be compared to running balances included on the awardee's invoice/voucher, and against award documents.

Contractor Close Out Request Letter and Forms - The Close Out Letter is used to notify the awardee of the closeout process and transmit forms for awardee completion. If any reporting requirements are unsatisfied at the time of completion, those reports should be requested in this letter. This is a good time to remind the contractor of its responsibility to submit indirect cost rate proposals as required by the Allowable Cost and Payment clause of FAR 52.216-7. See Chapter 42 of this Guide for further information. Sample request letters are illustrated in the forms section. This is required for all close out actions.

Review Contractor Forms - All forms transmitted with the Completion Letter must be properly completed and returned prior to the completion of further closeout milestones. Review the contractor's completed forms as soon after receipt as possible and follow up on incomplete or missing information.

Request Audit or Audit Waiver - Audit should be handled as soon as possible in the close-out process since this is a time-consuming step often delayed due to audit workload, processing time, and priority level. The decision to waive a final audit should be decided on a case-by-case basis. Prudence should be used to ensure that the Government's financial interests are sufficiently protected. An audit is required when quick close-out procedures do not apply (See FAR 42.708).

Patent/Royalty Certificate - A Patent/Royalty Certificate, when applicable, is forwarded for contractor execution, as an attachment to the close out letter. The Patent/Royalty Certificate, executed by the contractor, is coordinated with Counsel.

Property Certificate - A Property Certificate, when applicable, is forwarded for execution by the contractor, as an attachment to the close out letter.
The Property Certificate, executed by the contractor, is coordinated with the Property Office. If there is property requiring disposition that office will generally take appropriate actions and advise when complete.

Security Clearance - Pursuant to DOE 471.1, the Contracting Officer Representative is responsible for initiating the closing Contract Security Classification Specification, DOE Form 5634.2, along with a Certificate of Non-Possession. The Certificate of Non-possession must be coordinated with the contractor. Local procedures may vary but consider including a Certificate of Non-Possession in the close out package. At times, the contractor may need to continue all or some access authorizations for work on other contracts. This should be noted on the forms. The COR completes, signs and sends the closing DOE Form 5634.2 and Certificate of Non-Possession to Procurement for their signature on both items. These two documents are then sent

to security for the contract to be deleted from the Safeguards and Security Information Management System. A completed DOE Form 5634.2 and a Certificate of Non-Possession are required for the prime contractor and each subcontractor. The Security Information Management System won't allow deletion of a prime without first deleting its subcontracts. Further details on these procedures are found in DOE M 471.2-1B.

Confirm Receipt of Technical Reports - For contracts with technical or scientific report requirements, verify that all OSTI-designated reports have been forwarded by checking the DOE Energy Link System at http://www.osti.gov/elink/ The Energy Link (E-Link) System is an interactive system for submitting electronic scientific and technical information (STI) reports and other electronic STI products to the Department of Energy (DOE) over the Internet.

Receive Audit and Resolve Audit Questions - If the audit identifies problems with claimed costs or questions costs, these matters must be resolved with the contractor.

Summary Settlement Statement Review and Concurrence - The Summary Settlement Statement outlines direct and indirect costs, fees, and retainage. The Contracting Officer verifies this document for accuracy following return from the awardee, prior to approval of final payment.

General Assignment and Final Release - The Contractor must execute a General Assignment which assigns to the Government any refunds, rebates, credits or other amounts allocable to costs for which the Contractor has been reimbursed by the Government. The Contractor must also execute a final release discharging the Government, its officers, agents, and employees from all liabilities, obligations and claims under the contract except claims which may be specified. Some offices add the final release to the contract completion statement and make the completion statement a bilateral document. This is an acceptable practice.

Approve Final Invoice for Payment - Following receipt of a signed Completion Statement, and the satisfaction of all other contract administration actions, notice of approval to pay the final invoice may be transmitted to the paying office.

Funding Adjustment - If funds remain after payment of the final invoice, the balance must be deobligated prior to the retirement of the award. Other funding adjustments might be necessary. Depending upon the type of award, the deobligation will be done by formal modification or deobligation without obligating documents per local procedures.

Confirm Final Payment - Ensure that final payment has been made.

Contract Completion Statement - A contract completion statement containing the summary information required by FAR 4.804-5 (b) must be signed by the contracting officer and placed in the close out file.

Prepare Close Out Individual Procurement Action Report - Processing this form removes the action from the Procurement and Assistance Data System (PADS) register of completed awards

awaiting final close out. A sample form indicating the blocks which must be completed is attached in the model close out documents section. There is an Individual Procurement Action Handbook available at http://www.pr.doe.gov at the "professionals" link.

OTHER CONTRACTS CLOSE OUT TEMPLET

Prepare Close Out Checklist - The first step in any formal contract close out should be a review of the contract file to ascertain what will be needed and what may already be on hand. This can result in a tailored Contract Close Out Checklist specific to each close out. A sample is shown below. When creating a checklist, try to include only those items necessary for your circumstances.

Sample Close Out Checklist for Other Contracts, e.g. Interagency Agreements

Action	Requested	Completed
Acceptance of Work		
Close Out Letter		
Patent/Royalty Certificate		
Property Certificate		
Confirm Receipt of Technical Reports		
Close Out Request to Finance		
Verify Final Payment		
Contract Completion Statement		
Prepare Close Out Individual Procurement Action Report		

Acceptance of Work - Contracting personnel are responsible for initiating close out of the agreement after receiving notice of its completion. DOE does not specify a particular form or format for this notice. A local form, a note verifying receipt, or a form letter such as the illustration at the model close out documents section may be used. Generally, the Close Out Specialist obtains this from the Contracting Officer Representative or Project Officer.

Close Out Letter - Like a checklist, a close out request letter should be prepared and tailored to the circumstances.

Patent Certificate - A Patent Certificate, when applicable, is forwarded for execution, as an attachment to the close out letter. The completed Patent Certificate is coordinated with Counsel.

Property Certificate - A Property Certificate, when applicable, is forwarded for execution by the other agency, as an attachment to the close out letter.

The Property Certificate, executed by the other agency, is coordinated with the Property Office. If there is property requiring disposition, the property office will generally take appropriate actions and advise when complete.

Confirm Receipt of Technical Reports - For interagency agreements with technical or scientific report requirements, verify that all OSTI-designated reports have been forwarded by

checking the DOE Energy Link System at http://www.osti.gov/elink/ The Energy Link (E-Link) System is an interactive system for submitting electronic scientific and technical information (STI) reports and other electronic STI products to the Department of Energy (DOE) over the Internet.

Close Out Request to Finance - If final payment has not yet been made, approval for final payment should be forwarded to the finance office. Construction, A-E, time and material and labor hour contracts typically retain of portion of the payments until final release and close out.

Verify Final Payment - Verify with the Finance Office that final payment has been made.

Contract Completion Statement - A contract completion statement containing the summary information required by FAR 4.804-5 (b) must be signed by the contracting officer and placed in the close out file.

Prepare Close Out Individual Procurement Action Report - Processing this form removes the action from the Procurement and Assistance Data System (PADS) register of completed awards awaiting final close out. A sample form indicating the blocks which must be completed is attached in the model close out documents section. There is an Individual Procurement Action Handbook available at http://www.pr.doe.gov at the "professionals" link.

Contractor Past Performance Information

Guiding Principles

Evaluation of past performance prior to the award or modification of a contract or the exercise of an option increases the likelihood of successful contract performance.

Evaluation of past performance facilitates best value selection decisions.

Consistent application of past performance evaluation factors increases the caliber of competitors.

[Reference: FAR 42.15, FAR 15.3, FAR 9.1, DEAR 909.1]

This section discusses contractor current and past performance as a tool to gauge contractors' performance on future contracts.

Background

The Federal Acquisition Streamlining Act of 1994, at section 1091, amended the Office of Federal Procurement Policy (OFPP) Act to specify that past performance is a relevant factor to consider in contractor selection. It directs OFPP to issue guidance on the use of past performance in contractor source selections.

The OFPP has issued a Guide to Best Practices for Collecting and Using Current and Past Performance Information. This Guide contains useful techniques for recording and using current and past performance information in the contractor selection process. DOE contracting activities should use the OFPP Guide as their primary reference.

The OFPP Guide is available on the Internet at:
http://www.acqnet.gov/Library/OFPP/BestPractices/pastpefguide.doc

General

DOE collects and maintains information on contractors' performance and routinely uses this information, as well as past performance information available from other sources, in making contract award decisions. DOE uses the National Institutes of Health Contractor Performance System (NIH CPS) as its automated contractor performance information database.

Contracting activities establish local procedures to provide for the collection and maintenance of necessary information pertaining to contractor performance.

DOE Collection and Maintenance Procedures:

HQ Office of Contract Management

This office provides overall guidance concerning DOE's efforts to effectively evaluate contractor's past performance. It assists contracting activities in the development of procedures and promotes uniformity to ensure that DOE contracts with responsible contractors. Upon request, the Office of Contract Management also assists the contracting activities in assuring the effectiveness of their local procedures.

Contracting Activities

Contracting activities establish local procedures for the collection and maintenance of information on contractor performance. The procedures identify the responsibilities of the technical and contracting offices for collecting, maintaining, disseminating, and using past performance information. The procedures identify pertinent performance data elements for collection. Contracting activities collect, review, and utilize information on contractor performance and share this information with the Office of Contract Management and other Federal contracting activities.

In order to ensure consistent, comprehensive, and meaningful past performance information, the information shall be collected for all contracts, task orders and delivery orders over $100,000. Local procedures should reflect the following:

Final evaluations are prepared at the completion of a contract, task order, or delivery order.

- For all contracts more than 2 years in length, interim evaluations should be conducted halfway through the contract period of performance.

- Evaluations should be conducted prior to any noncompetitive award or modification, especially prior to an extend/compete decision.

- Under multiple award type contracts evaluations should be conducted at the completion of a task order or group of task orders.

- That Contracting Officer and Contracting Officer Representative (COR) training on the NIH CPS is accomplished and that there is continuing refresher training at least once a year.

- That the contract specialist is responsible for ensuring that the COR and contractor are knowledgeable about the NIH CPS and the on-line training that is available to them. (Note: the Contracting Officer/Contract Specialist, COR and contractor have different on-line training modules)

- The Contracting Officer is the responsible party for monitoring, enforcing the use of and administering the NIH CPS.

- The contracting team members are collectively responsible for compliance with local procedures.

- The Contracting Officer Representative should ensure that detailed supporting rationale for the score is provided with each evaluation.

Program Offices

Program offices should assign a COR that is trained in the use of the NIH CPS and provides technical information into the system regarding a contractor's performance when requested by the Contracting Officer.

Best Practices

Past performance evaluation before consideration of option exercise may be used to reward quality performers.

Past performance evaluation is waived if its application is inappropriate to a specific solicitation, such as a once in a lifetime new project with no comparable precedent.

Past performance information is requested in a distinct solicitation section to increase the offerors' awareness of the importance of past performance.

In order to improve quality control associated with the NIH CPS, the contract specialist should be responsible for collecting the data and ensuring the data has been accurately entered into the NIH CPS. Under a centralized approach, this can be accomplished by requiring the contract specialist to perform a quality control function by accessing the system to verify the information entered by the administrative support person. This will also help contract specialists to become familiar with the system.

Offices should establish a "tickler system" to remind contract specialists when a performance report needs to be completed.

Contracting activities should not downgrade a contractor for filing protests or claims or not agreeing to use alternative dispute resolution (ADR) techniques. Conversely, contracting activities should not rate a contractor positively for not having filed protests or not having made claims or agreeing to use ADR techniques. However, the quality of a contractor's performance that gave rise to the protest or claim may be considered. In other words, while performance must be considered, a contractor exercising its rights may not.

Point of Contact

Questions regarding past performance issues may be directed to the Office of Contract Management, ME-62, at (202) 287-1349.

Contract Modifications

[Reference: FAR 43]

Overview

This section discusses the modification of contracts and purchase orders.

Discussion

Invoices may be received for an amount other than the original amount of the contract or purchase order. If the increase or decrease is for an administratively acceptable reason and the amount is minimal, there is no need for a formal modification of the contract or purchase order. Finance and procurement offices may simply make an informal annotation to their contract or purchase order records. Administratively acceptable reasons for differences in amounts might include a difference in shipping expenses, or if the original price was taken from an outdated catalog. A minimal amount is considered to be $250.00. These same principles are equally applicable when closing out contracts and purchase orders.

Best Practices

Before granting a change, the finance office representative ensures that the increase or decrease is justified as discussed above and then informs the procurement office of the action taken. Contracting personnel maintain informal records of such actions and deny them if it appears that a contractor is deliberately overstating amounts, or if a pattern of invoice increases is apparent.

Contractor Compensation - Variable Pay

[Reference: FAR 31.205-6, DEAR 970.3102-2, DOE Order 350.1]

Guiding Principle

Use of variable pay by contractors managing and operating DOE facilities is a cost effective compensation management practice to promote attraction, retention, and reward of valued contractor personnel..

Overview

This section provides guidelines for the Department's Contracting Officers to use in approving variable pay programs in contracts for the management and operation of Department of Energy facilities.

Background

The Department encourages the use of variable pay programs as described in this chapter in contracts for the management and operation of the Department's plants, laboratories and other facilities.

To enable DOE contractors to effectively compete in their employment markets for critical skills, contractor pay practices must be competitive with comparable employment markets. The end of the pay freeze for DOE contractors and increasing use of variable pay in the commercial marketplace provide an opportunity to implement variable pay programs as cost effective compensation management approaches for improving market competitiveness of contractor pay practices.

To augment the ability to attract, retain, motivate and reward employees, FAR 31.205-6, DEAR 970.3102-2 and DOE Order 350.1 permit contractors to implement variable pay programs.

Variable pay programs tied to performance can also support the Department's emphasis on performance based contracting.

The procedures for approving contractor compensation increase plans (CIPs) are included in DOE Order 350.1, Chapter IV.

Additional guidance is provided annually by the Director, Office of Contract and Resource Management.

Contractor Variable Pay Programs

Variable pay is a lump-sum, non-base building, cash payment. It provides contractors pay delivery options to remain competitive in attracting, retaining, motivating and rewarding skilled employees.

Variable pay is normally associated with achieving desired performance and significant accomplishments.

Variable pay provides the option of reinforcing the concept of salary management.
Use of variable pay recognizes that base pay alone may not be competitive with practices of companies comparable to DOE contractors.

For contractor compensation programs using variable pay, "pay" is defined as total direct cash compensation.

Contractors using variable pay compare base pay to market base pay and, total direct pay to market total direct pay (which can vary year-to-year).

Variable pay allows contractors the flexibility to deal with different employee groups appropriately (variable pay in a manufacturing setting for non-exempt employees could be based on meeting production targets and for exempt employees on meeting other objectives).

Objectives

The objectives of contractor variable pay programs are to:

Improve cost effectiveness of contractor compensation programs.

Promote the infusion of best practices and innovations into contractor compensation management programs.

Support the Department's emphasis on performance based contracting.

Facilitate accomplishment of DOE missions.

Guidelines for Variable Pay Program Design, Administration and Contracting Officer Approval

Variable pay should be affordable and justified within the constraints of the overall operating budget.

DOE contracting officer approval is required for contractor variable pay programs and budgets, including decisions related to:

- Impact on benefits.
- Method of fund generation.
- Relationship to Compensation Increase Plan (CIP).
- Change in funding arrangements.
- Integration with other contract provisions.

Variable pay may be used as a recruitment, retention and salary management tool. Individual or organizational performance is the basis for all non-recruitment variable pay awards. Payout can be to the individual, team/unit, or organization-wide.

Prerequisites for performance based variable pay programs are:

- an effective performance management system approved by DOE which provides a "line of sight" to the DOE mission at all levels, and is consistent with established "scorecard" or other performance measurement approaches.
- a sound performance appraisal system that is based on job-related criteria and standards, or performance against predetermined objectives.

Contracting Officers consider the type of contract incentive payment, (award fee, performance based) that exists to reward contractor performance when reviewing variable pay program designs, especially features related to eligible contractor employee participants in DOE reimbursed compensation programs.

Options for generating variable pay funding pools include:

- Using a portion of the base salary merit budget and permit accrual year-to-year.
- Using a discrete portion of the direct compensation budget (over and above the base salary merit budget).
- Using a fund generated or increased by pre-defined performance goals that factor dollar cost savings, productivity gains, etc..., into the variable pay fund.

Contractor Past Performance Information

[Reference: FAR 42.15, FAR 15.3, FAR 9.1, DEAR 909.1]

Guiding Principles

Evaluation of past performance prior to the award or modification of a contract or the exercise of an option increases the likelihood of successful contract performance.

Evaluation of past performance facilitates best value selection decisions.

Consistent application of past performance evaluation factors increases the caliber of competitors.

Overview

This section discusses contractor current and past performance as a tool to gauge contractors' performance on future contracts.

Background

The Federal Acquisition Streamlining Act of 1994, at section 1091, amended the Office of Federal Procurement Policy (OFPP) Act to specify that past performance is a relevant factor to consider in contractor selection. It directs OFPP to issue guidance on the use of past performance in contractor source selections.

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General

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Contracting activities establish local procedures to provide for the collection and maintenance of necessary information pertaining to contractor performance.

DOE Collection and Maintenance Procedures:

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This office provides overall guidance concerning DOE's efforts to effectively evaluate contractor's past performance. It assists contracting activities in the development of procedures and promotes uniformity to ensure that DOE contracts with responsible contractors. Upon request, the Office of Contract Management also assists the contracting activities in assuring the effectiveness of their local procedures.

Contracting Activities

Contracting activities establish local procedures for the collection and maintenance of information on contractor performance. The procedures identify the responsibilities of the technical and contracting offices for collecting, maintaining, disseminating, and using past performance information. The procedures identify pertinent performance data elements for collection. Contracting activities collect, review, and utilize information on contractor performance and share this information with the Office of Contract Management and other Federal contracting activities.

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Final evaluations are prepared at the completion of a contract, task order, or delivery order. For all contracts more than 2 years in length, interim evaluations should be conducted halfway through the contract period of performance.

Evaluations should be conducted prior to any noncompetitive award or modification, especially prior to an extend/compete decision.

Under multiple award type contracts evaluations should be conducted at the completion of a task order or group of task orders.

That Contracting Officer and Contracting Officer Representative (COR) training on the NIH CPS is accomplished and that there is continuing refresher training at least once a year.

That the contract specialist is responsible for ensuring that the COR and contractor are knowledgeable about of the NIH CPS and the on-line training that is available to them. (Note: the Contracting Officer/Contract Specialist, COR and contractor have different on-line training modules)

The responsible party for monitoring, enforcing the use of and administering the NIH CPS.

The responsible party for compliance with the local procedures.

That detailed supporting rationale for the score be provided with each evaluation.

Program Offices

Program offices should assign a COR that is trained in the use of the NIH CPS and provides technical information into the system regarding a contractor's performance when requested by the Contracting Officer.

Best Practices

Past performance evaluation before consideration of option exercise may be used to reward quality performers.

Past performance evaluation is waived if its application is inappropriate to a specific solicitation, such as a once in a lifetime new project with no comparable precedent.

Past performance information is requested in a distinct solicitation section to increase the offerors' awareness of the importance of past performance.

In order to improve quality control associated with the NIH CPS, the contract specialist should be responsible for collecting the data and ensuring the data has been accurately entered into the NIH CPS. Under a centralized approach, this can be accomplished by requiring the contract specialist to perform a quality control function by accessing the system to verify the information entered by the administrative support person. This will also help contract specialists to become familiar with the system.

Offices should establish a "tickler system" to remind contract specialists when a performance report needs to be completed.

Contracting activities should not downgrade a contractor for filing protests or claims or not agreeing to use alternative dispute resolution (ADR) techniques. Conversely, contracting activities should not rate a contractor positively for not having filed protests or not having made claims or agreeing to use ADR techniques. However, the quality of a contractor's performance that gave rise to the protest or claim may be considered. In other words, while performance must be considered, a contractor exercising its rights may not.

Point of Contact

Questions regarding past performance issues may be directed to the Office of Contract Management, ME-62, at (202) 287-1349.

Contractor Insurance

> **Guiding Principle**
>
> Proper review and approval of contractor liability insurance programs by DOE's Contracting Officers ensure cost effectiveness and protects the Government's best interest.

[Reference: FAR 28.3 and 42.302; DEAR 970.28; DOE Order 350.1]

Overview

This section provides guidance to Contracting Officers who are responsible for the review and approval of contractor insurance programs in accordance with FAR 28.3, FAR 42, DEAR 970.42, and DOE Order 350.1.

The Order concerns all Departmental Elements responsible for contracts for the management, operation, and control of DOE facilities. Application to other designated long-lived on-site contracts is optional at the discretion of the Departmental and Field Elements.

Background

FAR 42.302(a)(2) requires Contracting Officers, as part of their contract administration functions, to review contractor insurance plans. This responsibility is expanded in DEAR 970.28.

Bonds and Insurance, which prescribes contract clause 970.5228-1, Insurance - Litigation and Claims, for management and operating contracts.

This clause, at paragraphs (c) through (f), helps define the types and limits of insurance coverage the Department expects contractors to maintain. It also requires all bonds and insurance be in forms, amounts, and periods of coverage that the Contracting Officer may require and approve. DOE Order 350.1, Chapter VII, further refines this review and approval process by identifying responsibilities of the Field Office, the Head of the Contracting Activity, and the Contracting Officer. The Order also ***strongly encourages*** the use of the Department Retrospective Insurance Program or the Third Party Administrative Services Contract (TPA) as cost effective alternatives for commercial insurance.

Best Practices

Contracting Officers follow these guidelines in addressing contractor insurance issues:

Encourage contractors to self-insure or use the Department's Retrospective Insurance Program or its TPA contract, unless commercial insurance is demonstrably justified as more cost effective.

Use of commercial insurance must be discussed and coordinated with the Office of Resource Management (ME-63).

Ensure a clause is included in M&O contracts, and other contracts as determined by the DOE office, that limit cost recovery for insurance expenditures to actual losses plus administrative costs.

Ensure, when the approval of commercial insurance is necessary, that both DOE and contractor representatives clearly understand the **policy coverage(s), exclusion(s), deductible(s), and liability limit(s)** prior to approval or authorization of payments.

Initially and upon any significant policy changes, review all contractor's commercial insurance policies and coverages for which reimbursement is requested and ensure that they are in the Department's best interest and are allowable. Take appropriate action to fully recover any identified or discovered unallowable or unauthorized insurance costs.

Headquarters Point of Contact

Questions relating to contractor insurance programs may be directed to the Office of Resource Management at 202-287-1645.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-31

DATE: May 5, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Office of Federal Procurement Policy (OFPP) Determination of Executive Compensation Benchmark Amount for Costs Allowable Under Government Contracts during Contractors' Fiscal Year (FY) 2005**

SUMMARY: This Flash provides notice of OFPP's determination of the executive compensation benchmark amount applicable to Government contracts during contractors' FY 2005. (OFPP's memorandum was published in the Federal Register on May 5, 2005.)

OFPP has determined the "benchmark compensation amount" as required by Section 39 of the Office of Federal Procurement Policy Act (OFPP) Act (41 U.S.C. 435), as amended. The amount is $473,318. It applies to contractors' FY 2005 (and subsequent years, unless revised by OFPP).

Department of Energy Acquisition Regulation (DEAR) 970.3102-05-6, "Compensation for personal services," states that costs incurred for compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy, are unallowable.

Questions should be directed to Michael Righi at Michael.Righi@hq.doe.gov or 202-287-1337.

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

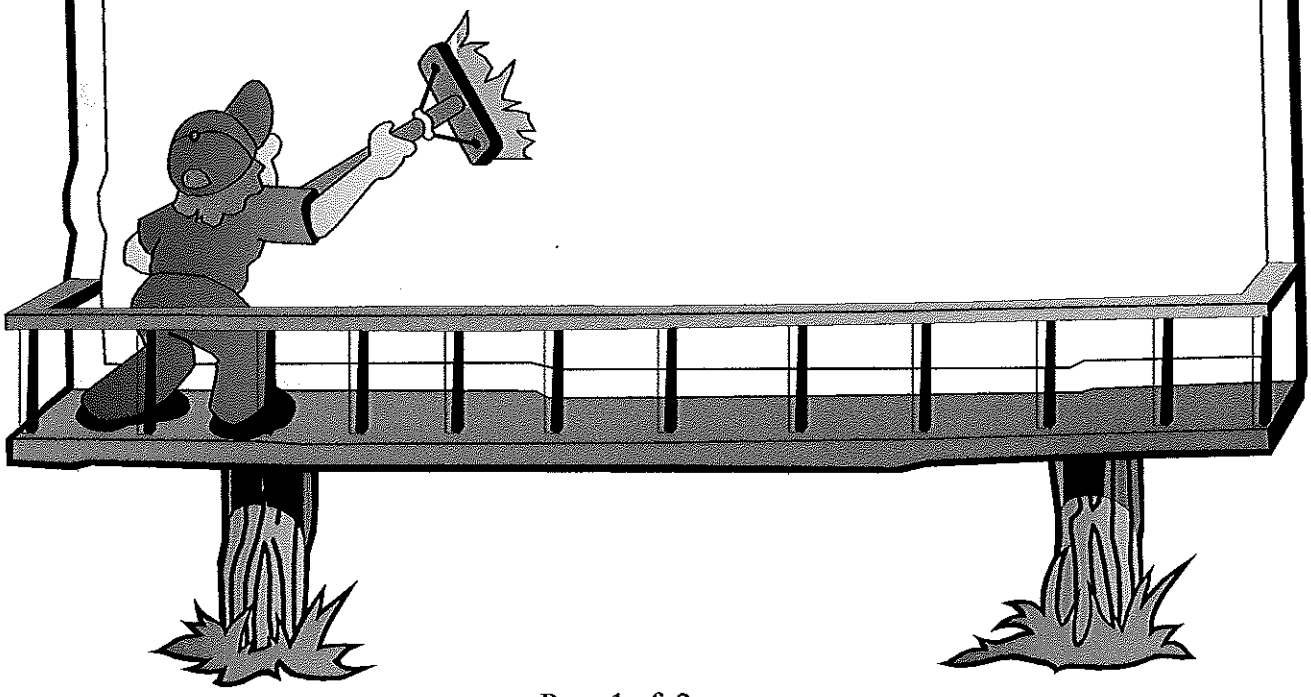
Headquarters Policy Flash

POLICY FLASH 2005-32

DATE: May 13, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Financial Assistance Letters (FAL) Remaining in Effect**

SUMMARY: This Flash issues FAL 2005-01 Rev., "Financial Assistance Letters Remaining in Effect".



FLASH 2005-32
May 13, 2005

The FAL has been revised to document four additional FAL's that have been discontinued.

Questions should be directed to Jackie Kniskern at Jacqueline.Kniskern@hq.doe.gov or (202) 287-1342.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachment

Department of Energy
Financial Assistance Regulation

No. 2005-01 rev.
Date 05/13/05

FINANCIAL ASSISTANCE LETTER

Financial Assistance Letters (FALs) that remain in effect are identified below. All other previously issued FALs have been superseded by a formal rulemaking, incorporated into other guidance, and/or canceled.

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Financial Assistance Letters Remaining in Effect

Number	Date	Subject
96-01	03/08/96	Implementation Guidance on Sections 3001 and 3002 of EPAct
96-02	08/01/96	Implementation Guidance on Section 2306 of EPAct
97-05	12/18/97	Merit Review/Lobbying
2004-03	02/12/2004	Intellectual Property
2004-06	11/02/2004	Award Terms

Financial Assistance Letters Discontinued

2001-02	07/30/2001	Preservation of Open Competition and Government Neutrality Towards Contractor's Labor Relations on Federally Funded Construction Projects. This requirement has been incorporated into the DOE Special Terms and Conditions for Use in Most Grants and Cooperative Agreements.
2001-03	10/12/2001	Determining Appropriate Award Instrument. Cancelled by FAL 2004-05
2001-04	10/25/2001	Management of Report Deliverables. Cancelled by FAL 2005-02.
2003-03R	10/28/2003	Implementation of OMB Grant Management Policies. The new policies have been incorporated into the Department's

		financial assistance regulations and DOE announcement template on the Professionals Homepage. Contracting Officers/Program Officials must continue to use the DOE announcement template to issue program announcements of funding opportunities.
2004-02	02/12/2004	Implementation of FY 2004 Legislative Provisions. These provisions have been incorporated into the DOE Special Terms and Conditions for Use in Most Grants and Cooperative Agreements (See Professionals Home Page at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument for the current version of this document).
2004-04	05/12/2004	OMB Circular A-133 Audits and the Federal Audit Clearinghouse - moved to new Financial Assistance Guide
2004-05	08/03/2004	Selecting the Appropriate Award Instrument - moved to new Financial Assistance Guide
2005-02	03/02/2005	Management of Report Deliverables - moved to new Financial Assistance Guide

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-33

DATE: May 25, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Letters Remaining in Effect**

SUMMARY: This Flash transmits information on Acquisition Letters remaining in effect. The Flash and Acquisition Letters are posted online at http://professionals.pr.doe.gov .

POLICY FLASH 2005-33
May 25, 2005

Acquisition Letter 2005-01

AL 2005-01, "Acquisition Letters remaining in Effect" was issued May 25, 2005.

For questions related to this Acquisition Letter, contact Michael Righi at (202) 287-1337 or Michael.Righi@hq.doe.gov .

Michael Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Department of Energy
Acquisition Regulation

AL No: 2005-01
Date: 05/25/2005

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA

Acquisition Letters (AL) that remain in effect are identified below. All other previously issued ALs have been superseded by a formal rule-making, incorporated into other guidance, and/or canceled.

* * * * * * * * * * * * * * * *

ACQUISITION LETTERS REMAINING IN EFFECT

NUMBER	DATE	SUBJECT
93-4	04/07/93	Displaced Workers Benefits Program
94-19	12/09/94	Basic Labor Policies Fringe Benefits
95-06	06/28/95	Personal Property Letter System
95-14	11/17/95	Subcontracts under the New Independent States - Industrial Partnering Program
96-09	09/16/96	Full and Open Competition - Management and Operating Contracts
98-11	09/18/98	Waiver of Synopsis Requirements
99-06	08/27/99	DOE Authorized Subcontract for Use by DOE Management and Operating Contractors with New Independent States' Scientific Institutes through the International Science and Technology Center
2000-05	05/17/00	DOE Authorized Subcontract for Use by DOE Management and Operating (M&O) Contractors with New Independent States' Scientific Institutes through the Science and Technology Center in Ukraine
2000-08	08/18/00	Site Utilization and Management Planning
2000-09	11/11/00	Source Selection Authority
2000-10R	08/16/01	FAR Class Deviation Addressing Service Contract Act Requirements for Subcontracts for Certain Commercial Services
2000-12	12/15/00	2000 Executive Compensation
2001-04	08/22/01	Guidance on Electronic and Information Technology (EIT) Accessibility- Section 508 of Pub. L. 105-220, As Amended
2002-04	07/09/02	Processing Requests for Indemnification or Other Extraordinary Contractual Relief Under Pub. L 85-804

NUMBER	DATE	SUBJECT
2002-05	07/10/02	Greening the Government Requirements in Contracting
2002-06	08/14/02	Domestic and Foreign Procurement Preference Rules
2002-08	12/02/02	Project Labor Agreements
2003-04	08/25/03	Value Engineering
2004-03	05/05/04	Small Business Programs
2005-01	05/25/05	Acquisition Letters Remaining in Effect
2005-02	03/09/05	Implementation of Fiscal Year (FY) 2005 Legislative Provisions
2005-03	10/08/04	Independent Peer Review Program for Contractors' Purchasing Systems
2005-04	11/02/04	Class Deviation to Reflect Changes to the Cooperative Audit Strategy
2005-05Rev	04/26/05	Interagency Contracting
2005-06	03/11/05	Small Business Procurement Goals

ACQUISITION LETTERS DISCONTINUED

NUMBER	DATE	SUBJECT/REASON FOR DISCONTINUING
1998-04	03/11/98	Diversity Plans (moved to Acquisition Guide)
1999-04	06/23/99	Consortium Buying (included in AL 2005-03)
2000-02	04/20/00	Small Business Programs (included in AL 2004-03)
2001-03	05/25/01	Costs Associated with Whistleblower Actions (included in DOE Acquisition Guide)
2001-05	10/12/01	Maximizing Opportunities for Small Business (included in AL 2004-03)
2002-03	03/13/02	Public Relations Requirements (included in DOE Acquisition Guide)
2002-07	10/02/02	Review of Management Contractors Purchasing Systems – Purchasing Systems – Purchase Card Considerations (included in DOE Acquisition Guide)
2003-05	09/10/03	Personal Property Management Career Development, Training, and Certification Program (included in DOE O 361.1 Chapter 2)
2004-01R2	03/31/04	Acquisition Letters in Effect (outdated)
2004-02	02/27/04	Implementation of Fiscal Year (FY) 2004 Legislative Provisions (outdated)
2005-05	12/08/04	Use of Non-Department of Energy Procurement Instruments (included in AL 2005-05 Rev)

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-34

DATE: June 1, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Ensuring Accurate Reporting of Small Business Subcontracting Data**

SUMMARY: This Policy Flash forwards the memorandum which addresses submittal of small business subcontracting data by contractors. The DOE Subcontracting Reporting System (SRS) is now back online to collect Standard Form

POLICY FLASH 2005-34
June 1, 2005

(SF) 294, Subcontracting Report for Individual Contracts, data for October 2004 and March 2005. Contractors have until June 30, 2005 to enter their reports in the DOE SRS. The reports must be reviewed and accepted by the HCAs into the system by July 29, 2005.

For questions related to this Policy Flash contact Steve Zvolensky at (202) 287-1307 or Stephen.Zvolensky@hq.doe.gov .

Robert M. Wehle
for Michael Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Department of Energy

Washington, DC 20585
June 1, 2005

MEMORANDUM FOR DISTRIBUTION

FROM: RICHARD H. HOPF, DIRECTOR
OFFICE OF PROCUREMENT
AND ASSISTANCE MANAGEMENT

ROBERT C. BRADEN, JR., DIRECTOR
OFFICE OF ACQUISITION
AND SUPPLY MANAGEMENT

THERESA ALVILLAR SPEAKE, DIRECTOR
OFFICE OF SMALL AND DISADVANTAGED
BUSINESS UTILIZATION

SUBJECT: Ensuring Accurate Reporting of Small Business Subcontracting Data

The purpose of this memorandum is to ensure that the procedures for submitting small business subcontracting data are clearly communicated to all contractors. In October of 2004, the Office of Federal Procurement Policy (OFPP) delayed the requirement for reporting fiscal year (FY) 2004 subcontracting reports pending the award of the new Electronic Subcontracting Reporting System (eSRS). Subsequently, there were delays in awarding and implementing eSRS. As a result, the DOE Subcontracting Reporting System (SRS) is now back online to collect Standard Form (SF) 294, Subcontracting Report for Individual Contracts, data for October 2004 and March 2005.

Contractors have until June 30, 2005 to enter their reports in the DOE SRS. The reports must be reviewed and accepted by the HCAs into the system by July 29, 2005. After that date, the system will be closed for collecting reports, but will be accessible for historical data. The Department must ensure that the latest subcontracting reports are reviewed for accuracy before transitioning to the new Electronic Subcontracting Reporting System (eSRS), which should be operational by August 2005. Once the new system is online, the October 2004 SF295 reports will need to be submitted into eSRS. By October 2005, the Department should be back on a normal reporting schedule utilizing only the eSRS.

The accuracy of the subcontracting statistics reported is vital to the credibility of the Department's performance in this area, which continues to be monitored by Congress, the SBA, trade organizations, small business advocacy groups, and other entities.

Printed with soy ink on recycled paper

Please ensure that your contractors comply with the reporting procedures identified in the attachment, SBA's "Goaling Guidelines for Small Business Preference Programs for Prime and Subcontractor Federal Procurement Goals & Achievements," and our Acquisition Letter 2005-06. Questions regarding submittals of individual and summary subcontracting reports should be directed to Mara Grissom ME-651 at (202) 287-1769.

Attachment

Distribution List:

Director, Headquarters Procurement Services, ME-64
Manager, Acquisition & Assistance Group, Chicago Operations Office
Manager, Procurement Program, Golden Field Office
Director, Procurement Services Division, Idaho Operations Office
Director, Procurement & Contracts Division, Oak Ridge Operations Office
Director, Procurement Services Division, Richland Operations Office
Director, Procurement, Office of River Protection
Director, Contracts Management Division Savannah River Operations Office
Director, Acquisition and Sales Division, Strategic Petroleum Reserves Project Management Office
Director, Acquisition & Assistance Division, National Energy Technology Laboratory THRU: Assistant Secretary, Fossil Energy, FE-1
Assistant Administrator, Human Resources and Administration, Southeastern Power Administration
Director, Division of Acquisition of Property, Southwestern Power Administration
Director, Division of Procurement, Western Area Power Administration
Director, Contract Management Division, Office of National Transportation (RW-31W)
Manager, Berkeley Site Office, Office of Science
Manager, Stanford Site Office, Office of Science
Assistant Director, Office of Contracting, Environmental Management Consolidated Business Center
Senior Contracting Officer, Portsmouth & Paducah

The following procedures must be followed for SF 294s:

1. Contracting Officers shall ensure that the contractor submits the SF 294, Subcontracting Report for Individual Contracts, in accordance with FAR 52.219-9, Small Business Subcontracting Plan

2. Only two exclusions from the subcontracting goaling base are currently listed on the SF 294. These exclusions are (1) subcontracts involving performance outside the U.S. or its outlying areas and (2) purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor. Contracting Officers shall ensure that prime contractors are aware of these procedures and do not apply additional exclusions when developing their subcontracting base.

3. Contractors must accurately provide the appropriate data. This report requires the current goals and actual cumulative whole dollars since the inception of the contract. In the case of the National Nuclear Security Administration (NNSA) contracts that exceed five years, the cumulative amount is calculated from the beginning of the last option exercise and maintained through the completion of the contract. Whole dollar figures reported shall be the actual amount and shall not exceed the amount obligated on the contract. Contractors shall use subcontracting plan information for blocks 10a through 16, entitled "Current Goal." Prime contractors shall not include lower tier subcontracting figures in their reports.

4. Contracting Officers (COs) need to thoroughly review the SF 294 against the subcontracting plans and against the previously submitted reports to ensure consistency and accuracy. In the past, we have received subcontracting reports that contained erroneous information (e.g., adding Cooperative Agreements). This would not have happened if reports were properly reviewed with the appropriate tools.

The following procedures must be followed for the SF 295, Summary Subcontract Report:

1. COs shall ensure that the contractor submits the SF 295 in accordance with the clauses at FAR 52.219-9.

2. Only two exclusions from the subcontracting goaling base are currently listed on the SF 295. These exclusions are (1) subcontracts involving performance outside the United States or its outlying areas and (2) purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor. COs shall ensure that prime contractors are aware of these procedures and do not apply additional exclusions when developing their subcontracting base.

Changes under eSRS

Once the Electronic Subcontracting Reporting System (eSRS) is operational, paper reports will be eliminated. If a paper copy is necessary for the contract file, the new system will allow reports to be printed.

The Department will no longer use the terminology SF 294 or SF 295. The SF294 will become the Individual Subcontracting Report. The SF295 will become the Summary Subcontracting Report. Also, lower tier reporting will be required on the Individual Subcontracting Reports. The FAR is being changed to require prime contractors to flow down the subcontracting reporting clause to their lower tier, large business subcontractors.

Responsibilities for report reviews are changing with the new system. COs are responsible for reviewing the Individual Subcontracting Reports that pertain to their contracts. OSDBU will be responsible for the Summary Subcontracting Reports and for making sure that the Small Business Program Managers review them.

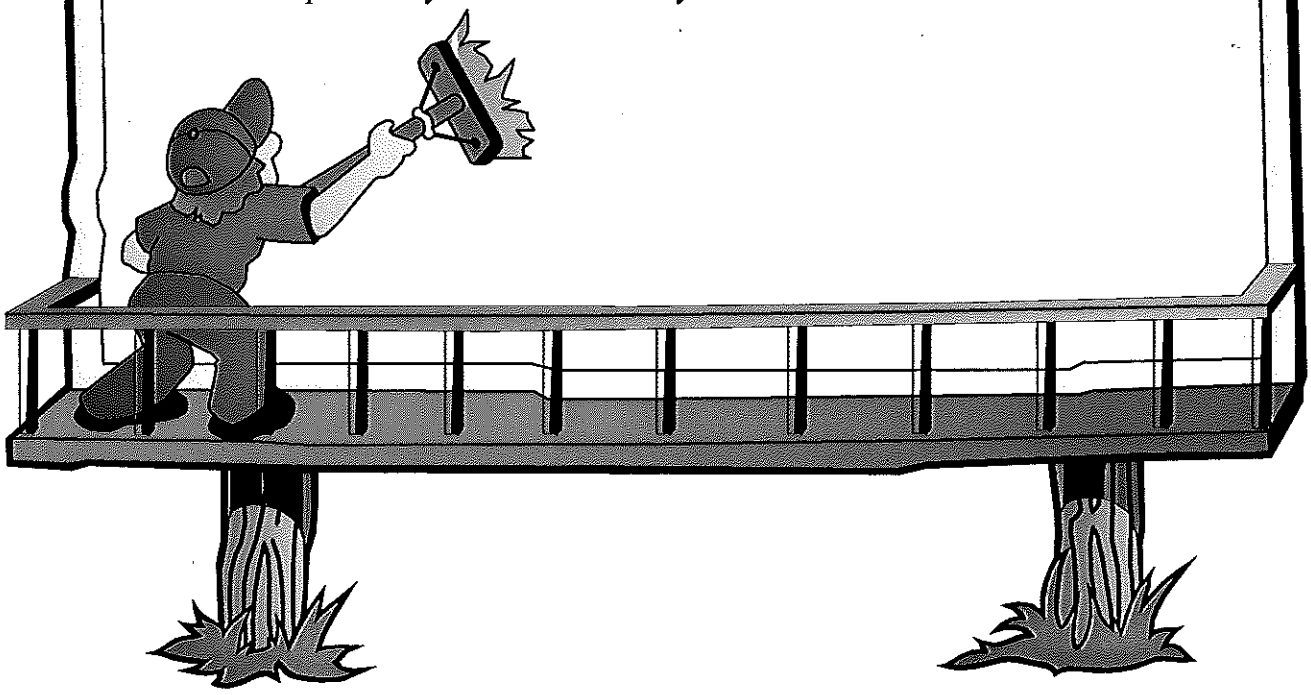
Headquarters Policy Flash

POLICY FLASH 2005-35

DATE: June 2, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Update on the Vendor Invoice Approval System (VIAS)**

SUMMARY: This Flash provides an update on the Standard Accounting and Reporting System (STARS) conversion and invoice approvals previously discussed in Policy Flash 2005-19.



FLASH 2005-35
June 2, 2005

The STARS conversion has been completed. The attached page provides an update on invoice approvals under STARS and some general areas of concern.

For questions related to Policy Flash 2005-35, contact Jackie Kniskern at 202-287-1342 or via e-mail at Jacqueline.Kniskern@hq.doe.gov

Robert M. Weber
for Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachment

THE VENDOR INVOICE APPROVAL SYSTEM (VIAS)

As most of you know, the Department has converted to a new accounting system referred to as STARS. As expected in any conversion of this magnitude, a few growing pains have been experienced. One item to note is that invoice approval e-mails are not being generated from the STARS system as expected. Also be aware that duplicate requests for approval may have been issued or approvals may have been sent after invoices were already approved. To avoid further issues the Oak Ridge Financial Service Center will resume responsibility for issuing the invoice approval e-mail notifications. This is expected to occur by 6/3/05.

In the meantime, please log onto VIAS at https://finweb.oro.doe.gov/invoices/logon.asp to check for invoices awaiting your approval. This URL can be bookmarked and accessed without an e-mail notification. In other words, an approving official does not need to wait for an invoice approval e-mail notification in order to access the VIAS and approve invoices for payment.

Additional information related to the STARS implementation is included on the VIAS website. Key highlights and areas of concern are noted below:

- The invoice approval system reflects the new STARS values. (Value is the new term for accounting and appropriation data.) Legacy values can be displayed by placing your cursor over each data field. A crosswalk of data values can be found at http://www.mbe.doe.gov/ME2-5/i-manage/STARSinterfaceDocs.htm. The crosswalk, All B&R to Program Values, is a good place to look first.
- Financial staff at each location should be working with the procurement staff to transition procurement documents to the new STARS values. Local financial officials are also responsible for the certification of funds.
- Contracting Officers and Contracting Officer's Representatives should assure there is adequate funding to perform the work requested. The payment center is encountering more than an occasional incident in which there is insufficient funding to pay invoices.
- Timely approval or rejection of invoices is critical. Delays in rejection of invoices will significantly reduce the cycle time for payment of the replacement invoice and could result in payment of interest penalties. Approving officials should establish a proxy to provide invoice approvals when they are out of the office for an extended period of time.
- Approving officials are critical to the payment process. Please ensure the appropriate officials are established and they are updated as job responsibilities change.
- Expedited payments require the authorization of the Chief Financial Officer (CFO) or Head of the Field Element.

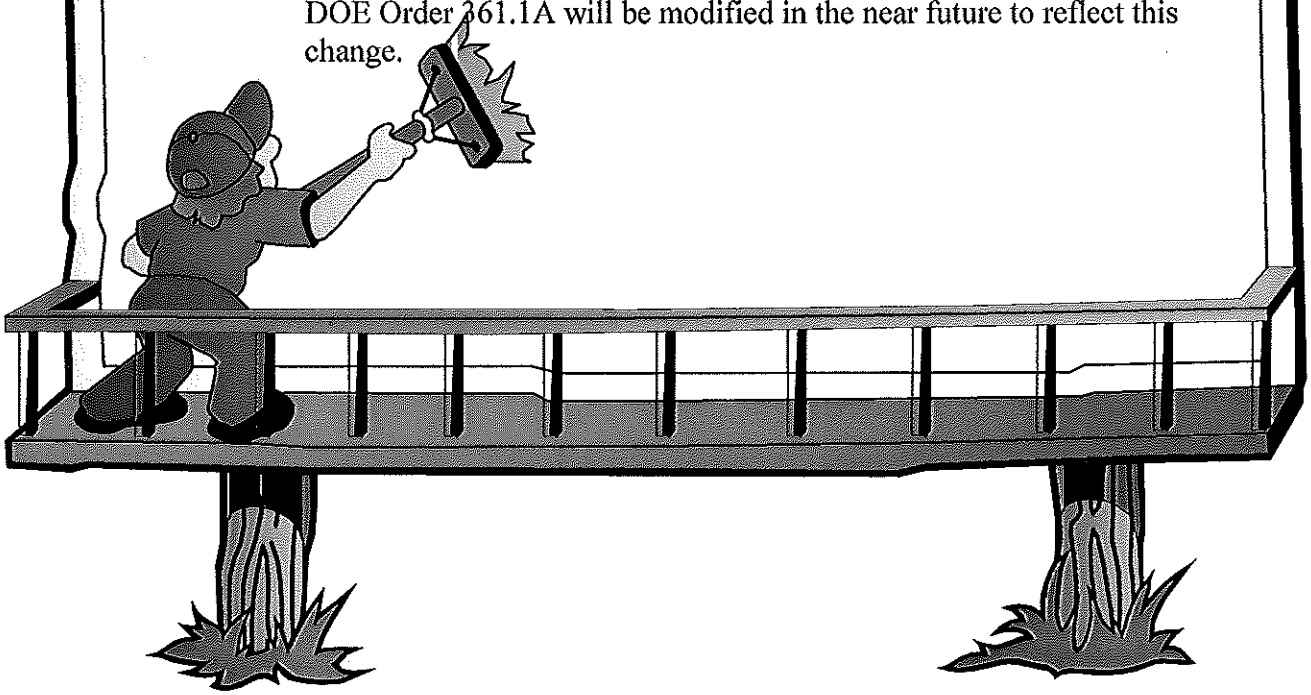
We apologize for the confusion this may have caused. If you have any questions or have trouble with the VIAS system, please call our toll free number at 1-888-251-3557 or e-mail ORFSCMAIL@oro.doe.gov. Thank you for your patience and understanding as we work through these changes.

Headquarters Policy Flash

POLICY FLASH 2005-36

DATE: June 2, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management
SUBJECT: **DOE Order 361.1A, Acquisition Career Development Program, Chapter I, Contracting and Purchasing Career Development Program Module Revised DOE Core Curriculum – Acquisition Letter 2005-07**

SUMMARY: This Policy Flash transmits the attached Acquisition Letter, which amends DOE Order 361.1A, Acquisition Career Development Program, by revising the curriculum for certification in the contracting career field as prescribed in the Acquisition Career Development (ACD) Program. DOE Order 361.1A will be modified in the near future to reflect this change.



FLASH 2005-36
June 2, 2005

Questions concerning this Flash and/or the attached Acquisition Letter should be directed to Cynthia Yee at (202) 287-1666 or Cynthia.Yee@hq.doe.gov .

for Robert M. Weber
Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Department of Energy
Assistance Regulation

No. AL-2005-07
Date 06/03/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA

Subject: **DOE Order 361.1A, Acquisition Career Development Program, Chapter I, Contracting and Purchasing Career Development Program Module Revised DOE Core Curriculum**

References:

DOE Order 361.1A Acquisition Career Development Program

When is this Acquisition Letter (AL) Effective?

This AL is effective immediately. The information and guidance provided in the AL does not apply to the National Nuclear Security Administration (NNSA).

When Does This AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Cynthia Yee, Director, Acquisition Career Development Program, Office of Procurement and Assistance Management at (202) 287-1666 or by email at Cynthia.Yee@hq.doe.gov.

Visit our website at www.pr.doe.gov for additional information on Acquisition Letters and other policy issues.

What is the Purpose of this Acquisition Letter?

The purpose of this Acquisition Letter (AL) is to revise the core career path curriculum for certification in the contracting career field under the Acquisition Career Development Program thus incorporating **Earned Value Management and Performance Based Service Acquisition** into the core requirements.

What is the Background?

The DOE Acquisition Career Development (ACD) Program is modeled after the Department of Defense (DOD) acquisition career development program, as it is considered one of the most comprehensive in the Federal Government. DOD recently revised its certification program for GS-1102s to provide a more business-focused approach that emphasizes the role of the contracting officer as business advisor and focuses on understanding and supporting the customer's mission. Because the DOE certification program is modeled after, and is analogous, to the DOD curriculum, the DOE curriculum is similarly being revised. The ACD, as modified, also provides the GS-1102 workforce in-depth training in such areas as earned value management and performance-based contracting.

What are the revisions to the ACD Program Curriculum?

Revised Core Curriculum

As described in DOE Order 361.1A, Chapter I, Section 5 paragraph a, the table of core courses is amended as follows:

Grade	Level	Course
GS 5-7	I	CON 100 Shaping Smart Business Arrangements CON 110 Mission Support Planning CON 111 Mission Support Execution CON 112 Mission Performance Assessment CON 120 Mission Focused Contracting
GS 9-12	II	CON 210 Government Contract Law CON 202 Intermediate Contracting CON 204 Intermediate Pricing One assignment-specific course from the following: Earned Value Management Performance-Based Contracting
GS 13-15	III	CON 353 Advanced Business Solutions for Mission Support Project Management One assignment-specific course from the following: Construction Contracting Performance-Based Contracting Advanced Cost/Price Analysis

Assignment-specific Requirement

Level II - Any GS-1102 requiring certification to Level II having responsibility for a project which requires an earned value management system must take a course in Earned Value Management in order to attain certification. All other GS-1102s requiring certification to Level II may take either a course in earned value management or in performance-based contracting.

Level III - Individuals and supervisors are encouraged to discuss which of the three assignment-specific courses would be most appropriate given the individual's current and projected assignments.

Note: Individuals certified to Level II and III on the effective date of this AL retain their certification regardless of the new requirements.

What training courses are available?

Course and Training Providers

The courses and training providers indicated below are deemed to be satisfactory for meeting the requirement for the assignment-specific courses. Other courses offered by local trainers or universities may satisfy the requirements.

Earned Value Management

Course	Provider
Earned Value in Project Management	Management Concepts, Inc. www.managementconcepts.com
Earned Value Management	PMCDP, Course Code 001026
Earned Value	DOE, PMJ173, Course Code 001061
Fundamentals of EVM	DAU, BCF102 www.dau.mil

Performance-Based Contracting

Performance-Based Service Contracting	Management Concepts, Inc.
Performance-Based Services Acquisition	AMCI www.amciweb.com
Performance-Based Contracting	PMCDP, Course 001040

Project Management

Managing Projects	ESI International www.esi-intl.com
Project Management for Contracting Professionals	ESI International
Project Management Essentials	PMCDP, Course Code 001022
Project Management Principles	Management Concepts Inc.
Project Management	USDA www.grad.usda.gov

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-37

DATE: June 10, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Acquisition Letter (AL) 2005-08, Small Business Program

SUMMARY: The purpose of this AL is to update Department guidance on contracting and subcontracting with small business concerns. AL-2004-03 (Small Business Programs, dated May 5, 2004), is rescinded in its entirety.

We have made revisions/updates in various small business areas including Mentor Protégé programs, market research databases, subcontracting plans, and subcontracting reporting requirements.

Questions regarding this AL may be addressed to Stephen Zvolensky (202) 287-1307 or Stephen.Zvolensky@hq.doe.gov.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy
Office of Procurement and
Assistance Management

Department of Energy
Acquisition Regulation

No. 2005-08
Date 06/10/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: **Small Business Programs**

References:

FAR 7.107	Additional requirements for acquisitions involving bundling
FAR 19.201	General policy
FAR 19.202-1	Encouraging small business participation in acquisitions
FAR 19.302	Protesting a small business representation
FAR 19.306	Protesting a firm's status as a HUBZone small business concern
FAR 19.307	Protesting a firm's status as a service-disabled veteran-owned small business concern
FAR Subpart 19.5	Set-Asides for Small Business
FAR Subpart 19.7	The Small Business Subcontracting Program
FAR Subpart 19.8	Contracting with the Small Business Administration (The 8(a) Program)
FAR Subpart 19.11	Price Evaluation Adjustment for Small Disadvantaged Business Concerns
FAR Subpart 19.12	Small Disadvantaged Business Participation Program
FAR Subpart 19.13	Historically Underutilized Business Zone (HUBZone) Program
FAR Subpart 19.14	Service-Disabled Veteran-Owned Small Business Procurement Program
FAR 52.219-4	Notice of Price Evaluation Preference for HUBZone Small Business Concerns
FAR 52.219-10	Incentive Subcontracting Program
FAR 52.219-22	Small Disadvantaged Business Status
FAR 52.219-24	Small Disadvantaged Business Participation Program-Targets
FAR 52.219-25	Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting
DEAR Subpart 919.5	Set-Asides for Small Business
DEAR Subpart 919.7	Subcontracting with Small Business, Small Disadvantaged Business, and Women-Owned Small Business Concerns
DEAR Subpart 919.8	Contracting with the Small Business Administration (The 8(a) Program)
DEAR Subpart 919.70	The Department of Energy Mentor-Protégé Program
DEAR 970.1504-4-1	Make-or-buy plans
DEAR 970.5215-2	Make-or-buy plan
DOE Acquisition Guide Chapter 38	Task Order Contracting
13 CFR Chapter 1	Small Business Administration
OFPP Letter 99-1	Small Business Procurement Goals

Effective date of the Acquisition Letter (AL)

This AL is effective 10 business days from the date of issuance.

AL Expiration

This AL remains in effect until superseded or canceled. This AL supersedes AL-2004-03 (Small Business Programs, dated May 5, 2004), which is rescinded in its entirety.

Points of Contact

Contact Stephen Zvolensky, Department of Energy (DOE) Office of Procurement and Assistance Policy, at (202) 287-1307 or stephen.zvolensky@hq.doe.gov, or Gary Lyttek, National Nuclear Security Administration (NNSA) Office of Acquisition and Supply Management, at (202) 586-8304 or gary.lyttek@nnsa.doe.gov. Questions regarding the Office of Small and Disadvantaged Business Utilization (OSDBU) may be directed to Yosef Patel at (202) 586-7377 or yosef.patel@hq.doe.gov.

Purpose of the AL

The purpose of this AL is to make available guidance on contracting with small business concerns.

This AL is divided into three parts: Part I applies to the award of prime contracts; Part II applies to the award of subcontracts; and Part III includes other considerations.

Background on Small Business

The Small Business Act contains a government-wide goal for participation by small business concerns of not less than 23 percent of the total value of all prime contract awards for each fiscal year as well as individual goals for women-owned small business concerns (5%), small disadvantaged business concerns (5%), service-disabled veteran-owned small business concerns (3%) and HUBZone small business concerns (3%). The Act further provides that agencies negotiate annual goals with the Small Business Administration (SBA). Information on the government-wide goaling guidelines for the small business preference programs can be found at http://www.sba.gov/GC/goals/ggtotal71503.pdf. DOE annually negotiates Department-wide goals with SBA. The Department establishes individual element goals using the Office of Small and Disadvantaged Business Utilization (OSDBU) goal documents and forms (found on the OSDBU website). The OSDBU also issues an annual Small Business Strategic Plan (http://smallbusiness.doe.gov/OSDBU_Strategic_Plan.pdf) that provides steps the Department will take to increase its small business awards.

Definitions

The definitions for the various preference programs (e.g., HUBZone) used in this Acquisition Letter can be found at FAR Subpart 2.1 (hyperlink: arnet).

Part I. Prime Contracting

A. SMALL BUSINESS CONTRACTING PROCESSES

B. SMALL BUSINESS PROCUREMENT TOOLS

C. SMALL BUSINESS MARKET RESEARCH

D. SMALL BUSINESS ACQUISITION PLANNING

Part II. Subcontracting with Small Business

A. SUBCONTRACTING PLANS

B. SUBCONTRACTING PROCEDURES

Part III. Other Considerations

A. SECURITY CLEARANCES

B. SMALL BUSINESS STATISTICS

C. SECRETARY'S SMALL BUSINESS AWARDS

Part I. Prime Contracting

A. SMALL BUSINESS CONTRACTING PROCESSES

Total small business set-asides. Each acquisition of supplies or services that has an anticipated dollar value exceeding $2,500 ($15,000 for acquisitions as described in the Federal Acquisition Regulation (FAR) 13.201(g)(1)(i) and $25,000 as described in FAR 13.201(g)(1)(ii)), but not over $100,000 ($250,000 for acquisitions described in paragraph (1), and $1 million for acquisitions described in paragraph (2), of the Simplified Acquisition Threshold definition at FAR 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the Contracting Officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. This obligation also applies to purchase card transactions. The Contracting Officer shall set aside any acquisition over $100,000 for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (2) award will be made at fair market prices.

Awards to 8(a) Firms. For procurements with an anticipated total value, including options, not exceeding $5 million for acquisitions assigned manufacturing North American Industry Classification System (NAICS) codes and $3 million for all other acquisitions, if an 8(a) certified firm can be identified with the expectation that the award would be at a fair market price, an award may be made noncompetitively to an 8(a) firm. If the procurement is valued in excess of $3 million ($5 million for manufacturing) and two or more capable 8(a) firms can be so identified, the procurement also may be set aside for competition among 8(a) firms (see FAR 19.805-1(a)(2)). These 8(a) competitive thresholds do not apply to awards made to 8(a) businesses owned by tribal governments or Alaskan Native Corporations (ANCs). That is, awards valued in excess of the competitive threshold may be made to such entities on a sole source basis without regard to the estimated cost of the acquisition (see FAR 19.805-1). Contracting activities may make awards under the 8(a) program with Department of Energy/National Nuclear Security Administration (DOE/NNSA) Contracting Officers signing on behalf of Small Business Administration (SBA), in accordance with the 2003 partnership agreement with SBA. This delegated signature authority saves time and effort in completing the award between DOE and SBA and the subcontract between SBA and the selected 8(a) firm.

Small Business Competitiveness Demonstration. DOE participates in the Small Business Competitive Demonstration program established by the Small Business Competitiveness Demonstration Program Act of 1988. See FAR 19.1005 for the list of applicable NAICS Codes under the program. OSDBU will monitor the attainment of their small business goals on annual basis. OSDBU will report to the SBA the data for the previous fiscal year not later than January 31st of the next year.

Price evaluation preference for HUBZone small business concerns. Price evaluation preferences of 10 % shall be used to facilitate an award to HUBZone small business concerns in acquisitions conducted using full and open competition (see FAR 19.1307). The price evaluation preference shall not be used (1) in acquisitions expected to be less than or equal to the simplified acquisition threshold; (2) if price is not a selection factor so that a price evaluation preference would not be considered, or (3) if all fair and reasonable offers are accepted (*e.g.*, the award of multiple award schedule contracts).

Set-Asides for HUBZone Small Business Concerns. FAR 19.1305(b) requires that Contracting Officers set aside acquisitions exceeding the simplified acquisition threshold for competition restricted to HUBZone small business concerns if there is a reasonable expectation that offers will be received from two or more HUBZone small business concerns and award will be made at a fair market price. Contracting Officers shall consider HUBZone set-asides before considering HUBZone sole source awards (see 19.1306) or small business set-asides (see Subpart 19.5).

Service-disabled veteran-owned small business set-aside procedures. FAR 19.1405 permits Contracting Officers to set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to service-disabled veteran-owned small business concerns if there is a reasonable expectation that offers will be received from two or more service-disabled veteran-owned small business concerns and award will be made at a fair market price. If the contracting officer receives only one acceptable offer from a service-disabled veteran-owned small business concern in response to a set-aside, the contracting officer should make an award to that concern (see FAR 19.1405(c)). The contracting officer shall consider service-disabled veteran-owned small business set-asides before considering service-disabled veteran-owned small business sole source awards (see 19.1406(a)).

B. SMALL BUSINESS PROCUREMENT TOOLS

Mentor-Protégé Agreements. A method of increasing the participation of small businesses in government contracting is the use of Mentor-Protégé agreements. DOE and SBA operate such programs. DOE Contracting Officers who seek to increase prime contract awards to small businesses can use the SBA Mentor-Protégé program. DOE prime contractors who seek to increase subcontract awards can use the DOE Mentor-Protégé program.

DOE Mentor-Protégé Program. DOE's Mentor-Protégé Program seeks to foster long-term business relationships between small business entities and prime contractors, and to increase the overall number of subcontract awards to small businesses. Mentors and protégés are encouraged to form teams to submit offers that will advance the protégé's competitiveness in the market.

The DOE Mentor-Protégé Program regulations are found in DEAR 919.70. This program is designed to encourage prime contractors to mentor small business concerns including (1) firms certified by SBA under Section 8(a) of the Small Business Act, (2) other small disadvantaged businesses, (3) women-owned small businesses, (4) Historically Underutilized Business Zone (HUBZone) businesses and (5) small business concerns owned and controlled by service disabled veterans. Historically Black Colleges and Universities (HBCU) and other minority institutions of higher learning may also serve as protégés.

SBA Mentor-Protégé Program. SBA's regulations (see 13 CFR 121.103(f)(3)(iii)) provide for a joint venture that may include a large business and an 8(a) firm that qualify as a Mentor-Protégé arrangement, respectively, under SBA's Mentor-Protégé Program (see 13 CFR 124.520). Such a joint venture will be recognized as small for the size standard corresponding to the NAICS code assigned to the procurement, and for purposes of 8(a) sole source procurements, as long as the participating Protégé 8(a) firm has not reached the dollar limit set as of the date that the requirement is accepted for the 8(a) program without taking into account whether the value of that award will cause the limit to be exceeded.

DOE, through the use of the 8(a) Mentor-Protégé Program is initiating a pilot project to establish 8(a) Mentor-Protégé arrangements in advance of specific contract opportunities. This effort will result in a pool of firms that can more quickly be approved by SBA as Joint Ventures eligible to bid on a specific project. Based on an agreement between the Department and SBA, when using the SBA's Mentor-Protégé program, the protégé firm must perform at least 25 percent of the cost for contract personnel with its own employees.

Teaming Arrangements. Another method of increasing the participation of small businesses in the award of DOE prime contracts is the use of teaming arrangements among small businesses. Such arrangements supplement the capabilities of small businesses to perform large, complex requirements. Teaming arrangements not only increase business opportunities for small businesses, but also expand the skill mix of the team.

A sample solicitation provision, *Guidance for Prospective Offerors - Impact of Teaming Arrangements on Small Business Status*, is attached to this AL. Inclusion of the provision is recommended for solicitations if teaming arrangements are contemplated, to advise prospective offerors on the impact of those arrangements on their small business status. It advises offerors of the Small Business Administration's affiliation rules and suggests they seek legal counsel if proposing a joint venture, subcontracting, or other form of teaming arrangement.

Multiple Award Contracts. Solicitations for multiple award contracts (MACs), as defined in FAR 2.101, should be structured in a manner that will allow small business firms an opportunity to compete for prime contracts, which then will allow them to compete for individual orders under the contracts. The following techniques should be applied when using MACs to fill program requirements: (1) Contracting Officers should work closely with program officials and their Small Business Program Manager to identify small business opportunities early in the acquisition planning process; (2) Business strategies such as teaming arrangements should be encouraged in an effort to maximize opportunities for small businesses. Teaming arrangements not only increase business opportunities for small businesses, but also expand the skill mix of the team in some cases; (3) MACs should be set-aside exclusively for competition among small businesses when there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns; (4) If a total set-aside is not practicable, consideration should be given to identifying opportunities for a component of the statement of work to be set-aside for competition among small businesses; and (5) If a total or partial set-aside is not feasible, consideration should be given to reserving and specifying in the solicitation, a certain number of awards for small businesses.

Governmentwide Acquisition Contracts. A "Governmentwide Acquisition Contract" (GWAC), as defined in FAR 2.101, is a task-order or delivery-order contract for information technology established by one agency for Governmentwide use. GWACs also are referred to as "multi-agency" or "omnibus" contracts. GWACs often simplify the acquisition process for the authorizing agency as the contracting agency may maintain, and make available to the authorizing agency, their list of pre-screened contractors capable of performing certain types of requirements. The Department of Commerce's GWAC is entitled "COMMerce Information Technology Solutions" or "COMMITS" and can be found online at: http://www.commits.doc.gov/.

C. SMALL BUSINESS MARKET RESEARCH

Sources Sought Synopsis. In accordance with FAR 5.2, Synopses of Proposed Contract Actions: Sources Sought Synopsis is a notice published in FedBizOpps at http://www.fedbizopps.gov/ to improve small business access to acquisition information and enhance competition by identifying contracting and subcontracting opportunities. Although the notice includes "screening criteria", the criteria are not used to "qualify" potential sources or to exclude potential competitors. The purposes of screening respondents are to allow the government to assess the potential competitive base, to determine whether a "Justification for other than full and open competition" is required, or whether various set-asides are appropriate.

Central Contractor Registration Database. The Federal Government maintains a web site to access the Central Contractor Registration (CCR) database at http://www.ccr.gov/. It allows firms to register their company profile and allows Contracting Officers to search the database with results stratified by numerous small business qualifiers (e.g., WOSB, SDB, 8(a), HUBZone small business concern). The qualifiers can be combined to narrow the search results to very specific categories of small businesses having very specific qualifications. FAR 4.1103(a) states that unless the acquisition is exempt under FAR 4.1102, the contracting officer shall verify that the prospective contractor is registered in the CCR database before awarding a contract or agreement.

OSDBU Database. DOE has developed a customized Small Business (SB) database for use by its program offices and prime contractors. Small business profiles in this database are downloaded from the CCR and reflect small business concerns that have indicated an interest in working with DOE. Contractors on the OSDBU database are cross-referenced by company, contact name, size status, North American Industry Classification System (NAICS) code, and key words. Contractors that want to be included in the OSDBU database need to be registered with the CCR and must submit their Dunn and Bradstreet number to OSDBU.

The OSDBU data base has been developed to be accessed through DOE's forecast of Prime and Subcontracting Opportunities. DOE and facility management contractors (FMCs) small business program managers are encouraged to use the forecast found at https://hqlnc.doe.gov/registration.

Other Market Research Efforts. FAR 10.002(b)(2) includes additional ways agencies can determine industry's capabilities such as: (1) Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements; (2) Reviewing results of recent market research for similar or identical requirements; (3) Publishing formal requests for information in appropriate technical or scientific journals or business publications; (4) Querying the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at www.contractdirectory.gov and other Government and commercial databases; (5) Participating in interactive, on-line communication among industry, acquisition personnel, and customers; (6) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources; (7) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line; and (8) Conducting interchange meetings or holding presolicitation conferences to involve potential offerors early in the acquisition process.

D. SMALL BUSINESS ACQUISITION PLANNING

Implementation of Fiscal Year (FY) 2005 Legislative Provisions. Contracting Officers and Program Managers should review AL 2005-02 for information and guidance regarding the Department's implementation of the statutory provisions and legislative requirements at: http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/WebAttachments/AL2005-02/$File/AL2005-02.doc

This AL 2005-02 requires that DOE contracting officers, prior to the use of appropriated funds for the intended break-out of work under an M&O contract, shall contact the Director of the Office of Small Disadvantage Business Utilization (OSDBU) for a decision on the views of the SBA Representative. The OSDBU will obtain the views of the designated SBA representative with respect to "cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives," and render an opinion on the views of the SBA representative to the contracting officer.

For NNSA, the AL requires that contracting officers, prior to the use of appropriated funds for the intended break-out of work under an M&O contract, shall contact the Service Center Small Business Program Manager (SCSBPM) to obtain the views of the SBA Representative with respect to "cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives," and forward a recommendation on the views of the SBA representative, coordinated through OSDBU, for approval by the NNSA Head of the Contracting Activity (HCA), prior to rendering the approval decision to the contracting officer.

Advanced Planning Acquisition Team. DOE has established an "Advanced Planning Acquisition Team" (APAT), comprised of the Office of Procurement and Assistance Management, the OSDBU, and the Small Business Administration Procurement Center Representative (SBA-PCR) and the element requesting the acquisition. The Contracting Officer will refer to the OSDBU all proposed acquisitions over $3 million (new requirements, exercise of options, or other extension requests of existing acquisitions) which have not been proposed for small business set aside. OSDBU will review the analysis and conclusions with respect to the proposed action to determine if it is justified to not set it aside and, when justified, identify strategies to maximize small business participation as subcontractors. These reviews will apply to all procurement requests, including M&O contracts, orders against GSA schedules, and orders against GWACS.

The Contracting Officer shall submit the final request for review to the OSDBU allowing 10 business days for the review process. The request for review will include the following: copies of the procurement request and the statement of work; the source list; and a statement of the reason(s) it cannot be set-aside. [Note the APAT requirement does not apply to NNSA.]

Contracting for Support Services. All support services contracts should be considered for award to small business concerns, unless findings from the SBA Procurement Center Representatives (PCR) and OSDBU support a HCA determination that (1) there are no responsible small business firms capable of performing the services, (2) mission critical reasons preclude the reservation of a requirement exclusively for small business concerns; or (3) a justification for other than full and open competition is approved in accordance with FAR 6.303. [Note: The support services requirements do not apply to NNSA.]

Contract Bundling. The consolidation of smaller contracts that have been performed, or could have been performed, by small business concerns into a single contract awarded to a large business may have detrimental effects on some small businesses. As a consequence, Congress enacted legislation to regulate the consolidation of contracts. If contract consolidation is otherwise meritorious, such consolidated procurement should present maximum practicable opportunities to small business in accordance with the policy stated in FAR 19.202(a). By definition, consolidated contracts awarded to small businesses are not bundled contracts. Likewise, M&O contracts are not bundled contracts. If a consolidated procurement is not set aside for small business, the Contracting Officer should rethink the acquisition strategy.

Program offices proposing to bundle a contract must quantify identified benefits and explain how their impact would be measurably substantial. Reduction of administrative or personnel costs alone is not sufficient justification for bundling unless the cost savings are expected to be at least 10 percent of the estimated contract value (including options) of the bundled requirements if the value is $75 million or less; or 5 percent of the estimated contract value (including options), if the value exceeds $75 million.

If the proposed acquisition strategy involves substantial bundling (i.e., any bundling that results in a contract with an average annual value of $5 million or more), the Contracting Officer must include the following in acquisition strategy documentation: (1) the specific measurably substantial benefits or the criticality of bundling to the Department's mission; and (2) plans to preserve and promote small business participation as prime contractors and efforts to include small businesses as subcontractors (see FAR 7.107(e)). Contracting Activities are required to coordinate with the SBA Procurement Center Representative (SBA-PCR) on acquisition strategies or plans contemplating bundled awards at or above $5 million

The OSDBU has been designated as the Department's focal point for the review of bundled acquisitions, excluding NNSA. DOE program offices intending to proceed with a bundled procurement must submit the acquisition to the OSDBU for review to ensure conformance with the statutory requirements regarding bundling, and to identify ways to maximize the participation of small businesses in the procurement. Should the OSDBU determine that the proposed bundling of a contract is not necessary and there is no agreement between the program office and the OSDBU about the need to bundle, the matter will be referred to the Deputy Secretary through the HCA and Senior Procurement Executive. The Deputy Secretary, without power of delegation, may determine that bundling is necessary and justified if: (1) the expected benefits do not meet the thresholds identified in this section, but are critical to mission success; and (2) the acquisition strategy provides for maximum practicable participation by small business concerns. [Note: This OSDBU bundling review procedure does not apply to NNSA.]

Evaluation Factor for Past Performance in Subcontracting. Plans to preserve and promote small business participation in a bundled contract might include teaming by small business for the prime contract and may include the following: a factor to evaluate past performance under previous subcontracting plans; and inclusion of the clause at 52.219-10, Incentive Subcontracting Program in the resulting contract.

Pre-bid and Pre-proposal Conferences. Contracting Officers are encouraged to hold pre-bid and pre-proposal conferences (see FAR 15.201) for major procurements if the procurement will be set-aside for small businesses.

Small Business Program Managers. Small Business Program Managers, designated by the HCA, should perform the following functions: (1) Participate in the planning of, and make recommendations as to set aside, for acquisitions over $100,000. The review process should address small business categories areas which are goaled (HUBZone small business, small disadvantaged business, small business, service-disabled veteran-owned small business, and women-owned small business concerns); (2) Conduct the review before the issuance of the solicitation and document the results; (3) Maintain copies of the results for requirements exceeding $1 million [$100,000 applies to NNSA] ; (4) Maintain liaison with the small business community; and (5) Review all subcontracting plans prior to acceptance by the Contracting Officer.

Part II. Subcontract Awards to Small Business

HCAs must ensure that purchasing systems of contractors for the management and operation of major sites and facilities include small business outreach programs.

A. SUBCONTRACTING PLANS

Contracting Officers shall ensure: (1) that all M&O contractors, except small businesses, with contracts over $500,000 ($1 million if construction) have a small business subcontracting plan in place that has aggressive small business goals and (2) that subcontract reports, Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and (SF) 295, Summary Subcontract Report, are submitted in a timely and accurate fashion reporting the actual small business achievements. [Note: Once the Electronic Subcontracting Reporting System (eSRS) is operational, reporting will be done in eSRS and the current SF 294 and SF 295 will be eliminated. The SF294 will be replaced with the Individual Subcontracting Report. The SF295 will be replaced with the Summary Subcontracting Report.]

Every subcontracting plan should, at a minimum, support achievement of the agency-wide goals negotiated with the SBA by the OSDBU. Subcontracting plans reflecting less than the agency-wide goals must be submitted through the OSDBU to the HCA for approval/disapproval. OSDBU will monitor compliance with subcontracting plans. [NOTE THESE REQUIREMENTS DO NOT APPLY TO NNSA.]

Contracting Officers, in consultation with Small Business Program Managers, shall meet periodically with directors of contractor purchasing to review the status of the contractor's performance against its small business subcontracting plan.

Responsibilities for report reviews will change with the eSRS. DOE anticipates that eSRS training will be available in August 2005. Concurrent with this training, OSDBU plans to issue a Standard Operating Procedure addressing oversight responsibilities under the eSRS. Contracting Officers will be responsible for reviewing the Individual Subcontracting Reports against the subcontracting plans that pertain to their contracts. OSDBU will have overall responsibility for the Summary Subcontracting Reports. OSDBU shall ensure that the Small Business Program Managers review the Summary Subcontracting Reports for completeness and accuracy. The OSDBU will also conduct periodic reviews of the contractor's performance against its small business subcontracting plans and will coordinate such reviews with the cognizant Contracting Officers and Small Business Program Managers.

B. SUBCONTRACTING PROCEDURES:

8(a) Pilot Program. Contractors responsible for the management or operation of sites and facilities are authorized to award subcontracts with a value of $5 million or less for manufacturing NAICS codes and $3 million or less for all other acquisitions on a noncompetitive basis to firms certified as participants by the SBA under its 8(a) program. Contractors may also reserve for competition among 8(a) firms requirements in excess of those thresholds. The contractor shall assure that awards are made at fair market prices and are identified as awards to 8(a) firms and Small Disadvantaged Businesses (SDBs) under the reporting provisions of the Small Business Subcontracting Plan clause. A special effort may be made to identify and make awards to 8(a) firms in HUBZones. If such a program is instituted, the contractor shall assure that awards are made at fair market prices.

HUBZone Set-Aside. *Awards to HUBZone 8(a) Firms.* For procurements under $3 million ($5 million for manufacturing NAICS codes) if an 8(a) certified firm can be identified and award can be made at a fair market price, an award may be made noncompetitively to a HUBZone 8(a). If the procurement is valued in excess of $3 million ($5 million for manufacturing) and two more HUBZone 8(a) firms can be identified, the procurement may be set aside for competition among HUBZone 8(a) firms.

Contractors responsible for the management and operation of DOE sites and facilities are authorized to use HUBZone set-aside and HUBZone sole source procurement techniques in the award of subcontracts under conditions similar to those applicable to the award of Federal prime contracts.

Service Disabled Veteran-Owned Small Business (SDVOSB) Set-Aside. Contractors responsible for the management or operation of sites and facilities may restrict competition to SDVOSB concerns if there is a reasonable expectation that two or more SDVOSB concerns will submit offers and that the award can be made at a fair market price.

Discretionary Set-Asides. Contractors responsible for the management and operation of sites and facilities are authorized to set aside purchases at any dollar value for award to small businesses and to make purchases valued up to $100,000 on a sole source basis to small businesses. If such programs are instituted, the contractor shall assure that awards are made at fair market prices.

DOE Mentor-Protégé Program. Contracting Officers should encourage prime contractors to enter into Mentor-Protégé agreements with small businesses. DOE regulations that provide for a Mentor-Protégé Program can be found at DEAR 919.70. DOE's Mentor-Protégé Program seeks to foster long-term business relationships between small business entities and prime contractors, and to increase the overall number of small business entities that receive contract and subcontract awards. Mentors recognized under the DOE Mentor-Protégé Program are authorized, subject to the best commercial practices and procedures required by DEAR 970.4402-2(d), to award noncompetitive subcontracts, of any dollar value, to their Protégés. Further, other site and facilities management contractors may award noncompetitive subcontracts to a Protégé of another DOE Mentor contractor if those awards are made at fair market prices. OSDBU maintains a current listing of active Mentor-Protégé agreements.

Part III. Other Considerations

A. SECURITY CLEARANCES

Much of the DOE's work is classified and performance of that work requires cleared facilities and staff. For many small businesses, obtaining appropriate clearances may require background checks that often take three months to complete; whereas, large businesses are more likely to have personnel and facilities that already have the necessary security clearances. Contracting Officers should consider the following when processing procurements that involve classified work:

Security personnel should be consulted when preparing draft statements of work that may involve security requirements to assure that the security requirements are not overstated.

Solicitations should be issued and the award made sufficiently in advance to allow for the processing of required security clearances. The absence of existing personnel security clearances should not be the sole basis for denying an award, unless the solicitation made security clearances a requirement. Offerors should be allowed a reasonable time for the workforce of the successful offeror to be cleared.

Further information is contained in a pamphlet, *DOE's Security Requirements for Small Business Contractors*. It can be found at the bottom of the following web site: http://www1.pr.doe.gov/small.html.

B. SMALL BUSINESS STATISTICS

Collecting and Reporting Small Business Contracting Information. The systems for collecting and reporting small business award information are the Federal Procurement Data System—Next Generation (FPDS-NG - *Prime contract award data*), and the Subcontract Reporting System (SRS - *prime contractor subcontracting award data*).

The accuracy of the statistics reported in these systems is vital to the credibility of the DOE's performance in this area, which is continually monitored by Congress, the SBA, trade organizations, small business advocacy groups, and other entities.

Improving the Accuracy of Small Business Information. HCAs should assure that proper quality control systems are in place to ensure the accurate reporting of small business data.

HCAs should include the accuracy of Federal contract data as a compliance standard for the contracting activities' Federal assessment program.

The Contracting Officer is responsible for taking all reasonable steps to validate an offeror's Small Business representation prior to any Federal prime contract award. [Note: NNSA Contracting Officers shall adhere to the FAR standard of self-certification.]

The Contracting Officer should refer to the SBA and the Office of the Inspector General any certification of small business status that is inaccurate and refer instances of misrepresentation of

small business status to the DOE/NNSA Procurement Executive for consideration of suspension/debarment.

The Contracting Officer is responsible for ensuring that M&O contractors (1) establish reasonable controls to ensure small business subcontracting data reports are accurate, including data submissions to electronic data collection systems; (2) maintain current and accurate listings of small business suppliers to the extent such listings are used; (3) obtain certification of size status; (4) conform to the list of exclusions from subcontract reporting in the SBA document, *Goaling Guidelines for the Small Business Preference Programs for Prime and Subcontract Federal Procurement Goals & Achievements*; and (5) refer to the Contracting Officer instances of small business status misrepresentation.

Additional guidance on establishing subcontracting goals can be found in Acquisition Letter 2005-06, Small Business Procurement Goals, dated March 11, 2005.

C. SECRETARY'S SMALL BUSINESS AWARDS

DOE recognizes the outstanding small business achievements of its departmental elements, prime contractors and other organizations. Colleagues and headquarters personnel nominate outstanding individuals to receive the "Secretary's Small Business Awards." The awards program was established in 1978. The following awards are presented annually:

Element Awards. (1) Award for the element that breaks out the greatest percent of small business awards from an existing facility management contract.

(2) Award for the element with the greatest percentage increase in awards to small business from the prior year.

(3) Award for the element with the highest percentage of diversity in its small business awards.

M&O Awards. (1) Award for the M&O with the most significant small business teaming arrangements.

(2) Award for the M&O with the greatest percentage increase in awards to small business from the past year.

(3) Award for the M&O with the highest percentage of diversity in its small business awards.

Small Business Program Manager Awards. (1) Award for the SB program manager who has made the most progress in promoting small business contracting at the HQ level.

(2) Award for the SB program manager who has made the most progress in promoting small business contracting at the field level.

(3) Award for the SB program manager who has made the most progress in promoting small business contracting at the M&O level.

Mentor-Protégé Award. Award for the most outstanding Mentor, Protégé or Mentor-Protégé team.

Attachment 1 to AL 2005-08

L. ## GUIDANCE FOR PROSPECTIVE OFFERORS - IMPACT OF TEAMING ARRANGEMENTS ON SMALL BUSINESS STATUS

(a) This procurement has been set aside for small business. In order to ensure that award is made to an eligible small business, prospective Offerors, in consultation with legal counsel, are encouraged to review the Small Business Administration's (SBA's) size eligibility standards found at Title 13 of the Code of Federal Regulations, Section 121 (13 C.F.R. § 121). In particular, Offerors proposing a joint venture, subcontracting, or another form of teaming arrangement should review 13 C.F.R. § 121.103, "How does SBA determine affiliation?," prior to submitting a proposal.

(b) The SBA is the sole authority for making determinations of small business status for small business programs. Such determinations are binding on the Offeror and the Contracting Officer. Accordingly, a finding by the SBA of affiliation between an Offeror and its proposed team member(s) or subcontractor(s) may result in the Offeror being found to be other than a small business and therefore ineligible for contract award.

(c) Business concerns are considered to be affiliates of each other if either one directly or indirectly controls or has the power to control the other, or if another concern controls both. In determining whether affiliation exists, factors such as common ownership (stock ownership or options, convertible securities and agreements to merge), common management, and contractual relationships are considered. An Offeror will also be found to be affiliated with its subcontractor(s) if the Offeror is unusually reliant upon its subcontractors or if the subcontractor(s) will perform primary and vital requirements of a contract.

(d) The SBA has issued several decisions concerning its evaluation of affiliation of an Offeror and its proposed subcontractor(s). The following examples set forth characteristics that the SBA has reviewed in considering the question of affiliation and may assist prospective Offerors in developing any teaming arrangements and their proposals.

(1) The SBA considers whether proposed subcontracting, partnership, joint venture, or other teaming arrangements contain discrete descriptions of the tasks or work to be performed by each party. The SBA considers whether the Offeror or, if the Offeror is a joint venture or partnership, the joint venture participants or partners, perform the primary or vital portions of the Statement of Work. The SBA considers whether teaming arrangements clearly set forth the relationship between the parties, as well as the individual roles and responsibilities assigned.

(2) The SBA considers whether there is a clear separation of facilities, employees, and management (decision-making authority) between the Offeror and any entities with which it has teaming arrangements.

(3) The SBA considers the extent to which the Offeror directly employs Key Personnel (Program Manager, Project Manager, etc.).

(4) If the Offeror is an eligible small business prime contractor, the SBA considers whether the majority of the technical expertise resides with the Offeror. If the Offeror is an

eligible joint venture the SBA considers whether the majority of the technical expertise resides among the joint venture members.

(5) The SBA considers the Offeror's profit sharing arrangements with its proposed subcontractor or other entities.

(6) In reviewing affiliation between the Offeror and its proposed subcontractors or entities with which the Offeror has a teaming arrangement, SBA considers the previous contractual or business relationships between the Offeror and that entity.

Headquarters Policy Flash

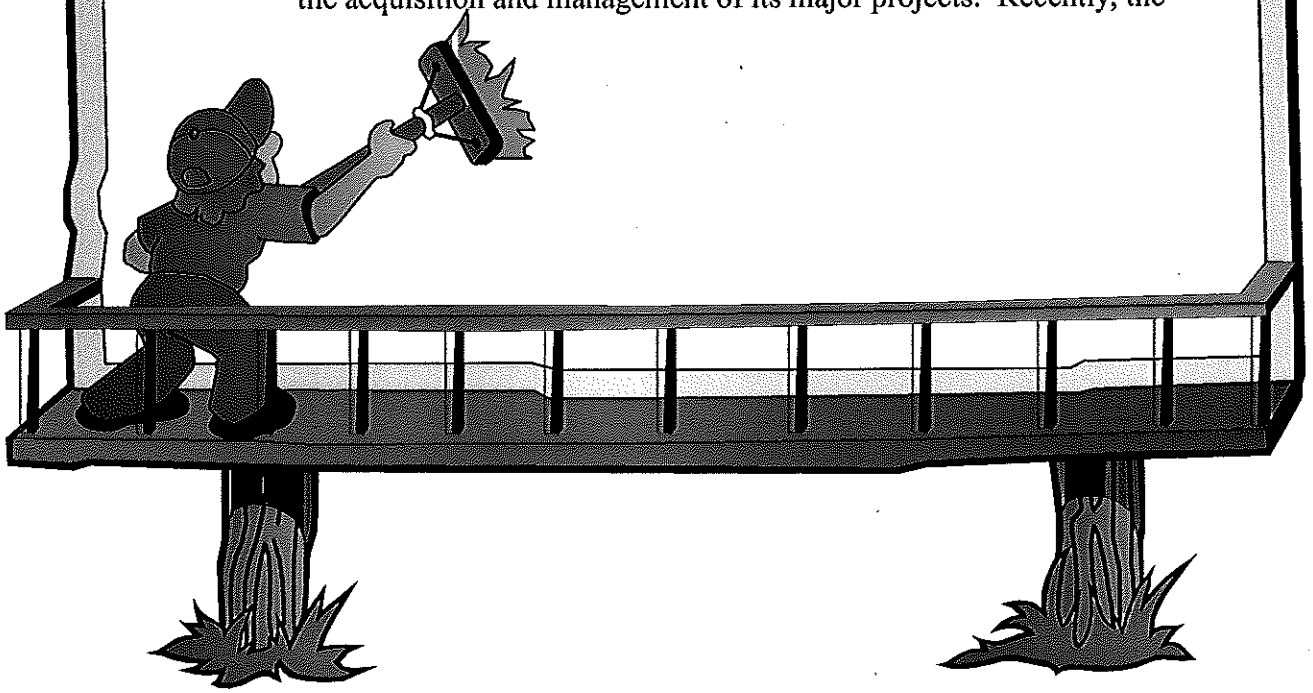
FLASH 2005-38

DATE: June 10, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Guide Chapter 34.1 – Project Management and the Acquisition of Major Systems**

SUMMARY: This Policy Flash forwards a new Acquisition Guide Chapter 34.1 entitled "Project Management and the Acquisition of Major Systems.

The Department has continually emphasized the importance of improving the acquisition and management of its major projects. Recently, the



Government Accountability Office (GAO) reviewed the Department's management of its contracts containing requirements for major projects. The GAO, in the resulting report entitled "Contract Reform: DOE Has Made Progress, but Actions Needed to Ensure Initiatives Have Improved Results" (GAO-02-798) made several recommendations. One of those recommendations was to "develop a major projects chapter in the DOE Acquisition Guide . . ."

The new DOE Acquisition Guide chapter comports with the GAO's recommendation and summarizes the Department's policy on structuring and managing contracts for the acquisition of major projects. If there are any questions regarding this subject, please contact James Tower at 202-287-1370 or at james.tower@hq.doe.gov.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

cc: PPAG

PROJECT MANAGEMENT AND THE ACQUISITION OF MAJOR SYSTEMS

Guiding Principle:

✓ Sound planning and management of DOE's contracts for the acquisition of projects are essential to the success of the Department's missions.

Applicability:

This section is applicable to projects as defined by DOE Order 413.3 under the responsibility of elements of the Department of Energy. However, the principles, concepts and guidance may be applied to other "project-like" work scopes, as appropriate.

References:

- DOE Order 413.3, "Program and Project Management for the Acquisition of Capital Assets"
- DOE Manual 413.3-1, "Project Management for the Acquisition of Capital Assets"[1]
- DOE O 361.1 "Acquisition Career Development Program"
- OMB Circular A-11, Part 7 "Planning, Budgeting, Acquisition and Management of Capital Assets"
- DOE P 413.1 "Program and Project Management for the Planning, Programming, Budgeting and Acquisition of Capital Assets"
- DOE Acquisition Guide, Chapter 42.5, "Contract Management Planning"
- DOE Acquisition Guide, Chapter 70.7, "Reference Book for Contract Administrators," Chapter 1, "Project Management"
- Federal Acquisition Regulation Part 34, "Major System Acquisitions"

- DOE Acquisition Guide, Chapter 70.8, Appendix B, "DOE Performance-Based Contracting Guide"
- Office of Engineering and Construction Management Information Center Website: http://oecm.energy.gov

What Is the Purpose of this Section?

The purpose of this section is to set forth guidance for contracting professionals on the appropriate planning and management of DOE's contracts for the acquisition of major systems as they are implemented as projects under DOE Order 413.3 and DOE Manual 413.3-1. The chapter will cover, from the point of view of contracting professionals, the following areas:

- how project management requirements are incorporated into contracts,
- the contracting officers' responsibilities relating to managing contracts for the acquisition of projects,
- the importance of Contract Management Plans in managing contracts for projects,
- how the project management life-cycle relates to contracting professionals,
- what to consider when making contracts for the acquisition of projects performance-based,
- the importance of having reliable project performance data,
- how contracts which support projects relate to the budgeting process,
- the Earned Value Management System, and
- project management training requirements.

What is the Background Information You Need to Know?

The Department has applied the discipline of project management to its acquisition of major systems at DOE. The Department's missions are supported by major systems acquisitions ranging from projects for the construction of scientific research facilities to the building of vitrification plants for the processing of toxic waste. To complete these projects successfully, safely and within budget, the Department has significantly revised its project management policies and practices to increase accountability, require effective up-front planning, improve performance measurement, and manage risk within the Department's acquisition management system. DOE's projects are among the most challenging in the world because they are frequently one of a kind using complex systems and technologies in a first time application. Obviously, this requires rigorous planning at the inception of a project and skillful management throughout the life-cycle of the project.

On June 25, 1999, the Deputy Secretary directed a DOE-wide initiative to reform the way the Department manages projects by strengthening accountability for project performance, and thereby, improving project performance. The following summarizes the actions that the Department has taken since 1999 to strengthen its project management capabilities:

1. Established and strengthened the corporate project management organization in the Office of Management, Budget and Evaluation/ Chief Financial Officer to strengthen project management direction and oversight.

2. Established project management, tracking, and control systems.

3. Established the Chief Operations Officer's (COO's) Watch List for projects with significant issues or emerging problems.

4. Strengthened line management accountability for project management results.

5. Established greater contractor accountability for project management.

6. Revised the criteria and funding processes related to DOE projects.

7. Developed a longer term program for institutional capacity building including the training of project management and contracting professionals in aspects of project management (including the Earned Value Management System).

What is the Guidance Contained in this Section?

Although the basic principles for contracts for the acquisition of projects are similar to those of other contracts, there are some points which need to be stressed. Contracting professionals will find in the following pages guidance on key areas of which they should be familiar in planning and managing contracts for the acquisition of projects.

1. How are project management requirements incorporated into contracts?

In order to explain how project management requirements are incorporated into contracts, we must first make a distinction between the contracts which are required to employ the clauses in Part 970 of the Department of Energy Acquisition Regulation (DEAR) and those which are not. The Department's management and operating (M&O) contracts (as well as certain facility management contracts, when appropriate) use the clauses at DEAR 970. DEAR clause 970.5204-2, "Laws, Regulations, and DOE Directives," is used, in

part, to incorporate the requirements of DOE directives into contracts. This list of specified DOE requirements must appear in the contract as "List B."

All M&O and other prime contracts containing requirements for projects at DOE facilities with a total project cost greater than $5M must contain DOE O 413.3 incorporated through List B of DEAR 970.5204-2. The requirements of the order which are applicable to contractors are contained in the Contract Requirements Document which is an attachment to DOE O 413.3.

The key elements of DOE O 413.3 to be required of contractors through the Contracts Requirements Document are:

1. Implementation of the industry standard for project control systems described in American National Standards Institute (ANSI) EIA-748, Earned Value Management Systems for a total project cost (TPC) greater than $20M.

2. Reporting to DOE of cost and schedule performance, milestone status, and financial status on a monthly basis using DOE-approved work breakdown structure elements and data elements for all projects with a TPC greater than or equal to $20M, except for time and- materials contracts, firm fixed-priced contracts, or level-of-effort support contracts, for control of project performance during the project execution phase.

3. Submission to the contracting officer for concurrence of a written Acquisition Plan that is appropriate for the requirement and dollar value of each subcontract for the acquisition of a project and consistent with the intent of the FAR for contracts that will be accomplished by M&O/M&I contractors,

4. Reporting to DOE of technical performance analyses and corrective action plans for variances to the project baseline objectives resulting from design reviews, component and system tests, and simulations.

5. Submission to DOE of a critical path schedule and a project master schedule.

6. Performance of cost estimating must be an integral part of cost baseline and life-cycle cost development and maintenance, budget request development, and estimates at completion.

7. Identification, quantification, and mitigation (as appropriate) of project technical, cost, and schedule risks. Risk mitigation strategies must be developed and implemented.

8. Development and maintenance of an integrated contractor technical, cost, and schedule baseline.

9. Establishment of a configuration management process.

10. Utilization of a value engineering process.

11. Development and implementation of a quality assurance program for the contract scope of work in compliance with DOE O 414.1A, "Quality Assurance"

12. Development and implementation of an Integrated Safety Management system.

13. Application of sustainable building design principles to the siting, design, and construction of new facilities.

Those contracts not subject to incorporation of DEAR 970 clauses, but which are for the acquisition of projects as defined in DOE O 413.3, must have the appropriate project management requirements, including EVMS, incorporated through a special contract requirements clause (i.e., a "section H" clause}.

2. What are my responsibilities, as the contracting officer (CO), relating to managing contracts for the acquisition of projects?

Prior to award, the CO, as part of the integrated project team discussed in DOE O 413.3, must ensure that, to the extent applicable, project management requirements (including the Earned Value Management System) are addressed during the acquisition planning phase. The CO is responsible for ensuring that all requirements for the acquisition of the project including DOE O 413.3 are incorporated into contracts and requests for proposals for the acquisition of projects. These requirements include, but are not necessarily limited to, the project statement of work, delivery requirements, reporting requirements, the Earned Value Management System (EVMS) and applicable quality and inspection requirements. The Contract Requirements Document attached to the order sets forth when the EVMS is applicable to the contract.

Contracting Officers must ensure that, when an offeror is required to submit an EVMS plan as part of its proposal, the plan is determined to be adequate pursuant to ANSI/EIA Standard 748. The contracting officer must provide the Plan to the Federal Project Director for evaluation.

After award, the CO is responsible for:

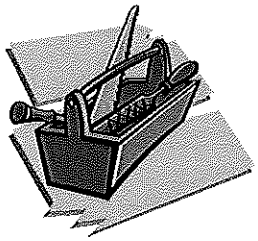
- ensuring compliance with the terms of the contract including the submission of the EVMS plan and reports,
- notifying the contractor, as appropriate, of the adequacy (or deficiency) of the EVMS plan,
- notifying the contractor, as appropriate, of the requirement to conduct an independent baseline review,
- safeguarding the interests of the contractual relationships,
- requesting and considering advice of specialists in audit, law, project management, engineering, and other fields, as appropriate,
- monitoring performance, and
- enforcing the Government's rights when necessary.

Ultimately, the CO is responsible for enforcing the terms of the contract and requesting corrective action as necessary. In fulfilling this responsibility it is extremely important that the CO maintains a solid relationship with the Federal Project Manager and stay abreast of project performance under the contract in order to address deficient or endangered performance when it occurs. In accomplishing all of this, the CO relies on subject matter experts for information on contract performance, technical and legal analysis, advice on the integrity of the project management system, etc.

Success depends on good contract management planning and execution, and an integrated and communicative management team! Effective administration of performance-based contracts relies heavily on the integration efforts of groups of people representing many functional areas, customers, and stakeholders. Past problems can sometimes be traced to lack of an integrated effort in managing contract performance.

Key tools for the management of such contracts are :

- The Quality Assurance Surveillance Plan,
- The Contract Management Plan, and
- Earned Value Management



You can find a more in-depth presentation of your roles as and responsibilities as a contract administrator related to contract management and project management in Chapter 1, "Project Management," of the Reference Book for Contract Administrators and on the DOE Professionals Homepage at:

http://professionals.pr.doe.gov/ma5/ma-5web.nsf/?Open

You can also find two excellent video presentations on contract management planning and EVMS as it relates to contract administration on the DOE procurement professionals home page. When you get to the website, click on the hot-link entitled, "Oversight of Performance-based Contracts DVD," and it will take you to presentations on both "Effective Contract Management Planning for Performance-based Contracts" and "Using Earned Value Management for Better Contract Administration."

3. What should Contract Management Plans contain relating to projects?

Basically, work related to projects is treated the same as any other work under the contract when it comes to contract management planning. Projects should be thoroughly reviewed for all of the considerations delineated in DOE Acquisition Guide chapter 42.5, "Contract Management Planning," and those considerations should be scrupulously addressed in the Contract Management Plan including, but not limited to:

- the roles and responsibilities of all the key member of the Integrated Project Team including how they should interact to effectively manage the requirements,
- the project schedule,
- reporting requirements,
- quality and inspection requirements,
- configuration control
- the risk mitigation plan, and
- government furnished services, property and information.

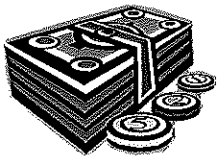
4. How does the project management cycle affect my job as the Contracting Officer?

It is imperative that the contracting officer understands how his or her responsibilities relate to the life-cycle of projects and ensures his or her participation on the Integrated Project Team from the very earliest stages of a project. The following paragraphs will demonstrate how the different phases in a project's life relate to the contracting officer's responsibilities.

Project, financial, budget and contract planning, implementation and management processes are all interrelated. They support and rely on each other during the acquisition process.

For example:

- We couldn't issue a solicitation prior to knowing the Federal (or DOE) required performance parameters for a project. Clear documentation of project requirements at CD-1 form the basis for the design and engineering project phase.
- How we determine the most appropriate type of contract for a solicitation is dependent on considering the project risks. An initial risk management plan is developed as part of CD-1.
- How we structure contract deliverables and options in a solicitation depends on our understanding of the mission need date, project milestones and budget process. Project cost and schedule milestones are baselined at CD-2. The project funding profile is submitted to Congress in the Project Data Sheet after CD-2 approval.



A word on funding: Since FY2003, DOE has used Project Engineering and Design (PED) funds. PED funds are used only for design purposes for the preliminary and final design. PED funds are not to be used for construction, long-lead procurement or major equipment items. The Department receives two appropriations which may be used for the acquisition of capital assets: Operating Expense and Capital Construction. Depending on the project and its state, the budget requests, along with the Capital Asset Plans and project Data Sheets will contain a request for one or both types of funds in a fiscal year.

Detailed explanations and formats for preparation of budgets and the direction regarding what funds are to be identified for specific types of efforts are found in the DOE's Budget Formulation Handbook. Additionally, the Field Budget Call is available to DOE Federal employees on the Office of Budget intranet website at:

http://crinfo.doe.gov/officedocs/me30/

This guidance supplements guidance provided in the Field Budget Handbook.

There are a number of project related actions in which contracting officers must become involved in order to ensure that projects are executed properly and in a timely matter. Early involvement by the contracting officer **is required** and will help to ensure that the actions and documents needed to procure the project are produced in a timely manner. The following table shows the relationship among the different project phases, the critical decision points, project funding and the major actions which may be conducted under each phase.

The Contracting Officer and others on the IPT need to understand at least a few basic ties among contract, budget and project planning. The table on the following page shows the relationship among the different project phases, the critical decision points, project funding and the major actions which may be conducted under each phase.

PROJECT LIFE CYCLE

INITIATION PHASE	DEFINITION PHASE	EXECUTION PHASE			TRANSITION CLOSEOUT PHASE
	CD-0 Approve Mission Need	CD-1 Approve Alternative Selection and Cost Range	CD-2 Approve Performance Baseline	CD-3 Approve Start of Construction	CD-4 Approve Start of Operations or Project Closeout
Use Operating Funds/Program Funds			Use PED Funds	Use Project Funds	
Major Actions: • Strategic Planning • Present Performance Assessment • Performance Requirements Analysis • Alternatives to Capital Assets • Mission Need Statement Identified in Terms of Capability	Major Actions: • Conceptual Design Report • Requirements Analysis • Alternatives Analysis • Systems Engineering & Value Management Planning • Preliminary Risk Analysis • **Acquisition Strategy** • Preliminary Project Execution Plan	Major Actions: • **Preliminary Design** • Performance Baseline • Project Execution Plan	Major Actions: • **Develop or acquire the Final Design** • **Acquisition Plan*** • **Develop Documents to support solicitations, contracts or modifications** *as required for contracts by the Federal Acquisitions Regulation	Major Actions: • **Draft solicitations, contracts or modifications** • **Conduct the acquisition process** • **Award contract/modification** • **Manage the contract and project** • Execute the Project	Major Actions: • **Manage the contract and project** • **Closeout the contract and/or project** • Transitioning & Turnover to Operations

Note: Actions, in bold above, may require involvement of the contracting officer as part of the Integrated Project Team.

Depending upon how the project is developed, some or all of the above activities may be covered under a single contract or under multiple contracts. For example, the Government may perform the Preconceptual Planning but want a contractor for design (conceptual, preliminary and final) and a separate contractor for construction and yet another for operation. Alternatively, all of the activities may be covered under a single contract like a

Management and Operating (M&O) contract, where the major site or facility management contractor actually initiates the project planning, design, construction and operation, with some or all activities possibly subcontracted by the M&O contractor.

Following is a discussion of the various critical decision points in the project's life and the major responsibilities of the contracting officer relating to those critical decision points.

a. Critical Decision-0, "Approve Mission Need"

Critical Decision-0 (CD-0), "Approve Mission Need," formally establishes a project and initiates a requirement for project status reporting. The DOE Project Assessment and Reporting System (PARS) provides a web-based system to report project status. Starting at CD-0, project status is reported monthly utilizing the PARS, and the Acquisition Executive begins conducting quarterly progress reviews.

Develop an Acquisition Strategy (Following CD-0 Approval)

The acquisition strategy must be developed early during the Definition Phase prior to approval of Critical Decision (CD)-1, "Approve Alternative Selection and Cost Range." The approved Mission Need will have identified the range of acquisition alternatives. As the concept evolves and alternatives are investigated, an acquisition strategy must be developed that will provide the conceptual basis for the plan a project will follow during its execution. A carefully developed and consistently executed strategy is key to a successfully executed project. An important early step in acquisition planning is the identification of the Integrated Project Team (IPT).

An acquisition strategy is a high-level business and technical management approach designed to achieve project objectives within specified resource constraints. It is the framework for planning, organizing, staffing, controlling, and leading a project. It provides a master schedule for activities essential for project success and for formulating functional strategies and plans. The acquisition strategy must reflect the interrelationships and schedule of acquisition phases and events based on a logical sequence of demonstrated accomplishments, not on fiscal or calendar expediency.

It can't be stressed enough that adequate time must be allowed for the various phases of the project cycle and the acquisition actions which will arise from it. Artificially trying to expedite the timelines beyond what is prudent can have detrimental results for the acquisition and the project.

The acquisition strategy conveys the Integrated Project Team's (IPT) approach for the successful acquisition of the project, its intended outcomes, and rationale for that approach. The contracting officer must be a member of the IPT. The approach should address, in part, market conditions, effective use of competition, and performance based

contracting opportunities. Chapter 5, "Definition Phase," of DOE M 413.3-1 discusses in-depth the types of information and analysis which will go into the acquisition strategy and also presents the format for the acquisition strategy.

b. CD-1, "Approve Alternative Selection and Cost Range"

Key activities that take place leading up to Critical Decision-1 include alternative and requirements analysis, conceptual design, development of an acquisition strategy, evaluation of project risks, hazards analysis, systems engineering, and value management.

At the conclusion of the concept exploration process, the alternative selected as best solution to a mission need is presented to the Acquisition Executive for approval (CD-1 approval). While a range of costs, schedule, and performance bound the solution/alternative, there is no committed or approved baseline until the design matures when estimates and schedules can be defined with an acceptable degree of certainty. The approval package must include a description of alternatives considered, risks, life-cycle costs, trade studies, development efforts, and testing requirements. Approval of the alternative selection and cost range (CD-1) authorizes the beginning of preliminary design work.

Complete Acquisition Planning (Following CD-1 Approval)

Acquisition planning is the process of identifying and describing requirements and determining the best method for meeting those requirements. On major acquisitions, participants include the Federal Project Director, Contracting Officer, technical experts, logisticians, financial and legal personnel. However, this team can be tailored to meet specific project needs, but **the CO must always be an active participant**. Acquisition planning focuses on the business and technical management approaches designed to achieve project objectives within specified resource constraints and the contracting strategies necessary for implementation.

A distinction needs to be made between the acquisition strategy as discussed in DOE M 413.3-1 and acquisition planning as discussed in the Federal Acquisition Regulation. DOE M 413.3-1 requires an appropriate acquisition strategy for projects. However, that does not mean that all projects will have acquisition planning and an acquisition plan as described by the FAR. Acquisition plans are prepared for contracts or classes of contracts. However, there are times when a project will be implemented by a contractor under a major site and facility management contract, and an acquisition plan will not be appropriate.

In such cases, when the prime contractor is responsible for executing subcontract acquisition planning, the Integrated Project Team should review the plans for significant

procurements in collaboration with the prime contractor. On some contracts, the acquisition plans for significant subcontract procurements are required to be submitted to the government for review prior to announcement.

When an acquisition plan is required for a contract, it must be completed as early in the acquisition cycle as possible. Federal Acquisition Regulation (FAR) 7.102(b) states that the purpose of acquisition planning is to ensure that the government meets its needs in the most effective, economical, and timely manner. Guidance on writing Acquisition Plans for contracts is contained in Chapter 7 of the DOE Acquisition Guide. Integrated Project Teams use acquisition planning as an opportunity to review and evaluate the entire procurement process, so that sound judgments and decision making will facilitate the success of the overall project. Specific contract acquisition planning should be appropriate and proportionate to the complexity and dollar value of the requirement. A plan for each contemplated contract or class of procurements should address the significant considerations of the procurement action. An acquisition plan may cover more than one contract. The contract acquisition plan represents the Integrated Project Team's agreement for conducting the procurement. The written acquisition plans are comprehensive and intended to facilitate attainment of the acquisition objectives by addressing milestones and other significant considerations that will control the acquisition. In preparing the Acquisition Plan, the information contained in the Project Acquisition Strategy and the Project Execution Plan must be considered and utilized. The Federal Project Director has overall responsibility for acquisition planning when the Department will directly contract for the acquisition. Understanding the major technical, cost, and schedule project risks to successful completion of the project is a significant factor for the Integrated Project Team decision makers.

Develop the documents needed to support procurement of the project requirements (between CD-1 approval and CD-3 approval)

During the Execution Phase (which encompasses CD-1, CD-2 and CD-3) shown in the previous table, actions are being taken and documents are being developed which will define the technical requirements which will eventually be incorporated into the procurement package for procuring the requirements for construction of the project. The contracting officer must be involved, to the extent necessary and practicable, to ensure that the documents which will support the eventual procurement of the project requirements are adequate and produced in a timely manner. The various phases of the project cycle are explained in more detail in DOE Manual 413.3-1.

Preliminary Design (following CD-1 Approval)

Evolving the conceptual design into the preliminary design provides the depth and detail to allow the project asset to take shape and form. Preliminary design initiates the process

of converting concepts to a design appropriate for procurement or construction. This stage of the design is complete when it provides sufficient information to support development of the Performance Baseline. During this phase, PED funding may be used to procure the preliminary design of the project. The contracting officer should work with the IPT to ensure that all requirements for the preliminary design are adequately described to place under contract whether through adding the requirements to an existing contract such as a major site and facility management contract or through a competition.

c. CD-2, "Approve Performance Baseline"

When the design is at a level of maturity and the project is able to define the Performance Baseline with some certainty, the project is submitted to the Acquisition Executive for approval to formally establish the Performance Baseline (CD-2 Approval). The Performance Baseline is the original baseline for the project and is used to prepare and submit project budget requests and capital asset plans to Congress and Office of Management and Budget. The Performance Baseline defines the key parameters for the project, including the performance parameters, technical scope, schedule, and cost to clearly establish the capabilities being acquired along with the total cost and schedule.

Final Design (Following CD-2 Approval)

Final design is the last phase of development prior to contractual implementation of the project requirements. The purpose of the Final Design Phase is to prepare final drawings, technical specifications, and all the other components which will comprise the solicitation and/or contract documents required to obtain bids and quotes for procuring the requirements for construction. The final design should also include clear statements of testing requirements and acceptance criteria for the safety and functionality of all subsystems. The project scope should be frozen and changes should be permitted only for compelling reasons, (i.e., substantial economies achieved through value engineering, accommodation of changed conditions in construction, reduction in funds or changes in requirements). During this phase, Project Engineering and Design (PED) funding may be used to procure the final design of the project. The contracting officer should work with the IPT to ensure that all requirements for the final design are adequately described to place under contract whether through adding the requirements to an existing contract such as a major site and facility management contract or through a competition. If early construction funding is approved, long lead items may be procured prior to CD-3 to support projects if those long lead items were addressed in the approved acquisition stratetgy.

Documentation (statements of work, specifications, etc.) necessary to support the later preparation of the request for proposals, contract modification, etc., should be initiated during the final design phase so that shortly after approval of CD-3, "Approve Start of Construction," a procurement package is ready for award.

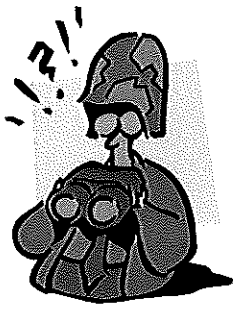
It is imperative that the Contracting Officer is a participating member of the Integrated Project Team and communicates to the other IPT members what is needed to timely produce the required contractual documents for procuring the project requirements on schedule.

d. CD-3, "Approve Start of Construction "

CD-3 approval provides authorization to complete all procurement and construction and/or implementation activities and the planning, implementing, and completion of all acceptance and turnover activities. This authorizes the project to commit all the resources necessary, within the funds provided, to execute the project. Prior to approval of CD-3 no project construction funds may be used. However, once CD-3 is approved, a contract for the construction of a project may be awarded. Consequently, depending upon the need and schedule for the project, the IPT must be ready to issue solicitations, contracts or modifications shortly after CD-3 approval.

Once the contract is awarded or the requirements are placed under an existing contract, the contracting officer's responsibilities regarding contract administration and management come into play. It is especially important for the contracting officer to understand the mechanisms which are used to monitor performance under the project, i.e., the earned value management system (EVMS). As discussed earlier in this chapter, the EVMS is a tool for monitoring and measuring performance under the project and it performs as an early warning system alerting us to potential problems under the project.

5. In making contracts for the acquisition of projects performance-based, what strategy should I follow?



Basically, the strategy for making contracts for the acquisition of projects performance-based is similar to the strategy that you would use for any other contract:

- Form a team to analyze the requirement
- Analyze the requirement and identify the objective(s)/mission of the contract including how to measure success
- Examine how others have handled similar requirements
- Construct a performance-based statement of work
- Identify those critical objectives which require incentives
- Select the contract type which best fits the requirements
- Construct performance and schedule incentives in accordance with applicable guidance (see the FAR, DEAR and the DOE Acquisition Guide)
- Ensure that cost incentive(s) and/or cost constraint(s) exist that make prudent business sense and comply with the regulations and guidance – ensure that cost

incentive(s) and cost constraint(s) work to constrain the incurrence of costs under performance and schedule incentives under the contract

- Document in writing your decision rationale regarding whether or not to construct performance and schedule incentives and cost incentives or cost constraints dedicated to individual projects under the contract

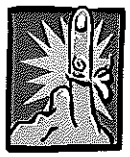
6. Should projects have individual performance or schedule incentives under the contract?

Maybe! It depends on the situation. When determining the incentive structure of the contract, evaluate how the project(s) relate to the overall objectives of the contract.

Projects may be incorporated into contracts in two different ways. First, a contract may represent as its sole mission the accomplishment of a single project. In such a case, the contract has been executed to achieve the project. An example of such a contract could be the construction of an individual building or facility. The question whether or not to structure incentives for the successful completion of the project in this case is easy. Since accomplishment of the project means accomplishing the objective of the contract, the answer is a resounding "YES!"

When a contract contains one or more projects but the contract's sole mission is not the accomplishment of the project or projects, the question becomes more complex. In such cases, each project must be examined and evaluated to determine if it merits the construction of an incentive. An example of such a scenario could be a site cleanup contract which contains a number of projects.

If the project(s) represent intermediate efforts or milestones leading to the overall achievement of the objective of the contract (i.e., closure of the site), then the objective of the contract (and not the individual projects) may be all that requires incentive(s). If, however, individual project(s) are of critical significance in comparison to other work under the contract, then assignment of incentives to those projects may indeed be advisable.



Remember! The "DOE Performance-Based Contracting Guide" states, "Fee is to be tied to those **critical few** performance measures or group of measures which are necessary to successful accomplishment of the performance objectives." Construct incentives only for those projects and other work where the analysis indicates that such incentives are absolutely required.

Chapter Five of the "DOE Performance-Based Contracting Guide" provides general factors to consider when making the decision whether or not to construct incentives. Please read Chapter Five for a more in-depth discussion of the following factors.

Developing incentives will depend on a number of considerations of which the following list forms only a part:

- The inclusion of cost incentives if other incentives (e.g. performance, schedule, etc.) are to be included.
- The adequacy of the contractor's accounting system and the ability of that system to segregate and track costs.
- The degree to which the performance measures and/or metrics can be defined.
- The definitiveness of the baseline.
- Importance of the task to the achievement of the program.
- The degree of additional benefit obtained by the government if the baseline performance level is exceeded.
- The degree to which additional increases in the level of performance of a performance measure become harder to obtain and thus more costly.
- The degree to which the attainment of a level of performance of a performance measure is within the contractor's ability.
- The degree to which the DOE obtains benefit from the performance of a performance measure in an incremental versus a continuous fashion.
- The degree to which continued incentives are important.
- The degree to which offering incentives for some performance measures may be to the detriment of others.

The decision you make is basically the same type of decision which is made whenever the contract's scope of work is examined to determine what should be incentivized and what should not. However, the decision whether or not to assign incentives to individual projects must be made on a case by case basis for every major system project as defined in DOE O 413.3 as you would whenever considering incentivizing work under the contract. The decision whether or not to assign incentives to other projects (less than major system projects) should be made on a case by case basis as practicable.

7. If a performance incentive has been assigned to an individual project, does the contract need a cost incentive or cost constraint?

First, what do the regulations say? FAR 16.402-1(a) states, in part, that "No incentive contract may provide for other incentives without also providing a cost incentive (or constraint)." FAR 16.402-4(b) states that a properly structured multiple-incentive arrangement should: "Compel trade-off decisions among the incentive areas, consistent with the Government's overall objectives for the acquisition. Because of the interdependency of the Government's cost, the technical performance, and the delivery goals, a contract that emphasizes only one of the goals may jeopardize control over the others. Because outstanding results may not be attainable for each of the incentive areas, all multiple-incentive contracts must include a cost incentive (or constraint) that

operates to preclude rewarding a contractor for superior technical performance or delivery results when the cost of those results outweighs their value to the Government."

In short, if a contract has a performance or schedule incentive then that contract (but not necessarily the project) **must have** a cost incentive or cost constraint **AND** that cost incentive or cost constraint must, at the very least, cover the work which bears the performance or schedule incentive.

8. OK, if we have a performance or schedule incentive on the project, do we need a cost incentive or cost constraint dedicated to that project?

The answer to this question is: The question of whether or not to include a dedicated cost incentive depends on the individual situation. The regulations require a cost incentive or constraint in the contract whenever a non-cost incentive is used. If the contract contains only a single cost incentive or constraint, then it must cover all of the work which has been assigned schedule or performance incentives. For example, if the contract has multiple performance or schedule incentives on projects and other work, if it is a cost-plus-incentive-fee contract (CPIF), and if the CPIF arrangement covers all work under the contract, then no other cost incentives or constraints would be required.

That's what the regulations say. Now you must ask yourself: "What makes good business sense?"

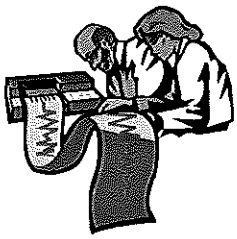
Although projects have measures under the Earned Value Management System to monitor and manage performance and cost progress, it may make prudent business sense to also construct a cost incentive or constraint specifically for the project(s) under the contract.

One situation where it would be prudent to establish a cost incentive or cost constraint for a project is when the incentive structure of the contract is not adequate to contain of the costs to be incurred under the project or where success in limiting costs is of such critical importance as to merit a separate cost incentive or constraint. An example of such a situation would be where a major new research facility was being constructed at a laboratory under the M&O contract for the facility. In this circumstance success under the project may be so distinct from success under the rest of the contract as to merit separate incentives including the application of a cost incentive or cost constraint.

Under non-DOE acquisitions, the sole purpose of a contract may often be the implementation of a single project, i.e., construction of a building. Under those

circumstances, a cost incentive would be dedicated to the project. However, at DOE, a single site or facility management contract may contain the requirements for a number of projects. An example would be a contract for the closure of a site which contains requirements for several projects related to clean-up, waste disposal, and site closure. The requirement may be structured as cost-plus-incentive-fee (CPIF) contract with closure required by a date certain. Under this example, all of the projects would work in concert to close the site by the required date and the single cost incentive (the CPIF contract structure) would be sufficient to contain or incentivize costs under the contract including all of the projects.

9. How do we ensure that incentive fee awards are based on reliable performance data?



Whenever we award fee under the contract, we must have confidence that the initial cost estimates (target cost, etc.) and the incurred cost or performance data, on which we base our decisions or calculations, is accurate. The initial cost estimates or targets (the baselines from which we measure performance) for contracts are established in one of two ways. First, such cost estimates or targets may be established through the competitive process. Offerors propose such costs, those costs are subjected to a cost realism analysis, compared to a government estimate and the competitive process itself, if conducted properly, ensures the reasonability of the costs.

Secondly, such cost estimates or targets may be proposed by a contractor in a sole source situation without the market forces of competition honing the proposed costs. In such cases, the contracting officer must ensure that the proposed costs are analyzed, negotiated and determined to be reasonable before they can be the basis for measuring performance. Such analysis and validation of baseline costs can be conducted by outside organizations such as the Defense Contract Audit Agency, the DOE Office of the Inspector General, or in the case of External Independent Reviews arranged by OECM, they may be conducted by an outside contractor. Additionally, baseline costs may be validated by teams put together the program offices. For example, the Office of Environmental Management (EM) regularly reviews and validates site Integrated Life-Cycle Baselines and Contract Project Baselines. The criteria for the EM reviews include, but are not limited to, cost estimation, scope definition, project schedule, earned value management system, performance metrics, regulatory requirements, and government furnished services and items.

Establishment of valid baselines is only one aspect of ensuring that the performance data for contracts and projects is accurate and reliable. We must also ensure that the costs and performance data accumulated over the life of the contract or project is also accurate. Cost and labor hour data is accumulated under all contracts through contractors' accounting

systems. So, first, the contracting officer must ensure that the contractor's accounting system is adequate for the type of contract under which it will perform. As FAR 16.104(h) states, before agreeing on a contract type other than firm-fixed-price, the contracting officer shall ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This is a matter of the contractor's responsibility which must be determined prior to awarding the contract. FAR 9.104-1 states that in order to be determined to be responsible, a prospective contractor must, among other things, have the necessary accounting controls or the ability to obtain them.

In order to help reduce any over-reliance on contractor data and baselines which haven't yet been analyzed and validated, contracting professionals should, to the extent practicable, participate as members on program office reviews of contractors' baselines and EVM systems. However, the External Independent Reviews of contractor baselines for which OECM contracts are, by definition, reviews which are conducted by independent entities outside of the Department and are not open to participation from the Department.

Remember! Earned Value Management Systems, which comply with American National Standards Institute (ANSI) EIA-748, are required on those projects with a total project cost greater than $20 million. The requirement is contained in the Contract Requirements Document attached to DOE O 413.3.

10. How are contracts supporting projects tied to the budgeting process?

There are several important contracting and project management areas closely tied to the budgeting process. A few of the major points are summarized below. More detailed annual budget guidance is posted in the Field and CRB-OMB Budget Guidance posted at:

http://crinfo.doe.gov/officedocs/me30 (DOE access only).

Integrated Project Team members should be aware of this guidance to help improve contract and project planning.

In March 2005, the Office of Budget (ME-30) issues guidance to prepare the FY 2007 Field Budget Call. This guidance reflects updates based on the latest policies and reporting requirements from appropriations language and other sources. This guidance may address such issues as how Decontamination and Decommissioning costs for facilities being replaced are treated as part of the project. Project data sheets are the primary documents used to defend funding for real property capital projects exceeding $5 million regardless of the funding source. A project data sheet is submitted for new project efforts and for ongoing

projects that require Congressional appropriations. They are the primary documents used to defend funding for capital projects throughout the budget formulation process.

All projects requesting Project Engineering and Design (PED) funds must have an approved Critical Decision - 0. Approval of a project CD-0 allows budget submission for PED funds. However, PED funds may not be obligated on a contract until after approval of CD-1.

All projects with a Total Project Cost (TPC) greater than $20 million, must have performance baselines validated by OMBE/OECM.

To support the budget process, a project must be baselined at CD-2 by August 2005 to submit a Project Data Sheet for FY 2007. Under DOE O 413.3, the Performance Baseline is established at CD-2 following validation that includes an External Independent Review. In general, projects are not validated until completion of preliminary design. Project data sheets and conceptual design reports are required prior to project validation. Performance baselines for all projects greater than $20 million in TPC must be validated by OMBE/OECM in order to request construction funding. Some exceptions may be necessary to adequately address budget cycle impacts on the project. Coordinate exceptions with OMBE/OECM. No construction funds may be obligated until CD-3 approval, unless an early authorization for long lead construction items has been approved.

For the FY 2007 budget cycle, ME-30 issued a combined CRB-OMB Budget Call the end of March 2005. ME-20, ME-90 and others provided updated planning guidance. This budget guidance may address such areas as General Plant Projects and Major Items of Equipment.

The Federal Acquisition Streamlining Act of 1994, Title V requires agencies to establish cost, schedule and measurable performance goals for all major acquisition programs and achieve on average 90 percent of those goals. This is implemented by:

- OMB Circular A-11, Part 7, Planning, Budgeting, Acquisition and Management of Capital Assets;
- DOE M 413.3-1 Project Management for the Acquisition of Capital Assets; and
- OECM's tracking of project cost and schedule performance through the Project Assessment and Reporting System throughout a project's life-cycle with monthly reporting to senior management.

Data from the project data sheets are used to develop the OMB Circular A-11 Project Status Report to meet performance reporting requirements of FASA and A-11.

11. Where did Earned Value Management come from?

The concept of using Earned Value Management to monitor performance of work has been around for over thirty years. The goal has been to monitor a project's progress and to attempting to project whether the project would be successful. Initially, Earned Value was used by industrial engineers on factory floors in the early 1900's to attempt to measure "cost-performance" efficiencies. This was done by comparing the *earned standards* (the physical factory output) against the *actual costs* incurred. Then they compared their earned standards to the original *planned standards* (the physical work they planned to accomplish) to assess the schedule results.

In the 1960's this basic concept was picked up by the Department of Defense (DOD). Initially, DOD developed a system referred to as Program Evaluation and Review Technique (PERT), which was then followed by a revised program entitled PERT/Cost. PERT/Cost was an important step towards today's EVMS as for the first time, it began to measure what was *physically accomplished* against what was *spent*. PERT/Cost was eventually abandoned and was replaced with the Cost/Schedule Control Systems Criteria (C/SCSC) concept. These various concepts were mandated for use by industry in DOD's contracts. However, in the mid-1990's, industry became involved in the design and requirements of the earned value program and the present day concept of EVMS was born. To establish a true 'standard' for use by industry and the Government, ANSI/EIA 748-98 EVMS was developed in 1998, adopted by DOD in 1999, and it is how we implement EVMS today for Government projects.

12. How does the contractor's Earned Value Management System (EVMS) relate to its accounting system?

In order to be able to use EVMS for effectively measuring the contractor's performance under a DOE project, the contractor must first have a cost accounting system which is capable of segregating the costs of a project from any other costs under the contract. Additionally, the accounting system must be able to break down and track those costs at a sufficiently detailed level (work breakdown structure) to adequately measure progress under the various tasks which comprise the project.

In order to award a contract, the contracting officer must determine in advance of award that the offeror's accounting system is adequate to record costs incurred under the contract. The contracting officer will use the Defense Contract Audit Agency and/or a pre-award survey to make this responsibility determination in the case of FAR-based contracts and will use the DOE Chief Financial Officer's organization and/or the Office of the Inspector General audit function in the case of an M&O contractor. The adequacy of the contractor's accounting system is a matter of contractor responsibility (as defined in the Federal Acquisition Regulation) which is determined before awarding the contract.

However, the adequacy of the contractor's EVMS (as determined by certifying that the EVMS complies with ANSI/EIA-748) is a matter of contract management - not a matter of contractor responsibility.

The EVMS is a little like a manufacturing plant. The accounting system accumulates the raw material (financial and labor hour cost data) and organizes it. The EVMS combines that raw material with data on project performance, manipulates it and repackages it into a number of different products which give us a snapshot in time regarding where the project currently is compared to where it was in the past and where it should be if on schedule and within cost. These products are extremely useful to project managers and contracting professionals in managing contracts for the acquisition of projects and in timely anticipating problem areas. In order for the EVMS to successfully manipulate the data to measure performance under the project, it must be compliant with the industry standard ANSI/EIA-748-98/

The contractor uses EVM to control cost and schedule performance as well as to report progress against the contract. DOE uses EVM to monitor and verify progress on contract (project) costs and schedule performance, monitor and validate contractor accomplishments on specific fee and PBI incentives, and as an early warning system to identify deficient progress.

13. If the EVMS is not yet approved, does this mean that cost targets negotiated for the contract will not be accurate?

Absolutely not! Cost targets, such as comprise the elements of cost-plus-incentive-fee or other types of incentive contracts, are usually negotiated prior to contract award using the data from the contractor's accounting system. The EVMS takes the data from the accounting system and manipulates that data in a meaningful way to produce information for measuring progress under projects. Whether or not the EVMS is approved at that time has no bearing on the accuracy of the accounting system data which is used for establishing those targets.

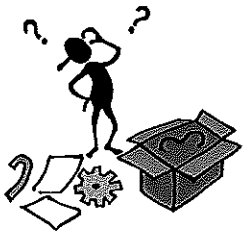
14. What about those contracts which use the EVMS to determine interim fee payments?

On some DOE contracts, the EVMS is used to determine interim (provisional) fee payments based on performance progress. Final fee payments are based on completion information not necessarily from the EVMS. However, under those contracts which do employ the EVMS for making interim fee payments, it is

important to ensure that the EVMS system is compliant with the industry standard ANSI/EIA-748-1998 to make sure that interim payments are made on an accurate basis.

To the extent practicable, contracting professionals should participate on the teams which will evaluate the contractors' EVM Systems for approval.

15. Under contracts with projects, which indirect work-related activities should be considered in awarding contractors' fees?



Recently, during a review of contracts with projects by the Government Accountability Office (GAO), the question came up if the Department should be more specific regarding which indirect work-related activities should be considered in awarding contractor's fees and which should not. What the GAO meant by "indirect work related activities" are those activities which support the work under the contract but which may not be directly related to accomplishing the mission of the project. Such indirect work-related activities might be the submitting of reports on time, maintenance of site infrastructure, the efficient conduct of business operations, etc.

The question regarding whether to consider such indirect work related activities when awarding fee will vary from contract to contract depending on various factors, including, but not limited to, the type of contract, the contract's mission, individual site conditions, other areas incentivized under the contract, etc. Contracts which have a single mission such as the closure of a cleanup site may focus fee entirely on achieving the cleanup and closure of the site and may exclude the consideration of indirect work-related activities when awarding fee. Indeed, some EM environmental cleanup contracts are focusing fee entirely on the cleanup operations.

However, not all DOE contracts have such focused missions. Contracts for the general management and operation of a site or facility may also contain requirements for the execution of one or more projects. These contracts with a more diverse mission may consider the performance of such indirect work-related activities in the awarding of fee if those activities are considered to be of <u>such a high priority</u>, compared to other work at the site, as to merit such consideration. An example of such an activity might be the improvement of site infrastructure (buildings, roads, etc.) when the improvement of that infrastructure is of such relative importance as to merit focusing the contractor's efforts on it. However, such indirect work-related activities are normally considered through a subjective award fee structure.

Chapter Nine of the "DOE Performance-Based Contracting Guide" (PBCG), already specifically addresses this subject with regard to contracts for research and development:

> "In moving to performance based award fee contracts, the Department has emphasized the need to create objective performance measures for the performance of support functions (such as facilities management, property management, financial management, etc.), but has de-emphasized associating those measures with fee. The rational for this is that while it is important to have measures in place for the performance of support functions as a management tool, the major focus of the contractor should be on mission specific work, and it is with this [that] fee should be associated. Further, often in order to successfully perform mission work, the support work must be performed to at least a satisfactory level. This applies to all the Department's contractors including those managing and operating the Department's laboratories (in the case of the laboratories the mission work is science and technology). Therefore, unless there is a problem with a support area or a need to emphasize a critical support area, fee should only be associated with the performance of support functions in a general subjective award fee fashion." [emphasis added]

Chapter Five of the PBCG discusses in a broad manner constructing performance measures and incentives. The chapter recognizes that there is no single approach which can be applied to constructing measures and linking fee to work efforts (including indirect work-related activities). Instead of attempting to prescribe a particular method for constructing measures and incentives, it provides general factors to consider in making those decisions.

16. Where can I get training for contracting professionals on project management?

DOE Order 361.1 requires the course, "Project Management Overview," for all contracting professionals in order to attain a Level III certification.

As mentioned earlier in this chapter, you can find a more in-depth presentation of your roles as and responsibilities as a contracting professional related to contract management and project management on the DOE Professionals Homepage at:

http://professionals.pr.doe.gov/ma5/ma-5web.nsf/?Open

When you get to the website, click on the hot-link entitled, "Oversight of Performance-based Contracts DVD," and it will take you to excellent presentations on both "Effective Contract Management Planning for Performance-based Contracts" and "Using Earned Value Management for Better Contract Administration."

Any GS-1102 requiring certification to Level II who has responsibility for a project which requires an earned value management system must take a course in Earned Value Management in order to attain that certification. All GS-1102s are required to

take a course in Project Management for certification to Level III. A list of individual courses and training providers which are satisfactory for meeting the level II and III training requirements is provided in Acquisition Letter 2005-07.

Additionally, for those who want more in-depth training on the various aspects of project management, there are a number of courses on the subject listed in the CHRIS catalog at: https://mis.doe.gov/ess/training_catalog.cfm?sort_by=reg&skey=none.

17. Conclusion:

This chapter brings together a number of different issues with regard to forming and administering contracts for the acquisition of projects. The decisions that you will make regarding constructing measures and incentives for projects are basically the same types of decisions which you would make when structuring any performance-based contract. More information on applying performance-based contracting approaches and techniques is found in the "DOE Performance-Based Contracting Guide." The Department's main sources of guidance on projects are DOE Order 413.3, "Program and Project Management for the Acquisition of Capital Assets" and DOE Manual 413.3-1, "Project Management for the Acquisition of Capital Assets." Other excellent sources of information may be found within the documents mentioned in the References section of this chapter.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-39

DATE: June 27, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Financial Assistance Letter Number 2005-03 – Eligibility Determination Required by Section 2306 of the Energy Policy Act

SUMMARY: This Policy Flash distributes Financial Assistance Letter (FAL) No. 2005-03 - Eligibility Determination Required by Section 2306 of the Energy Policy Act.

POLICY FLASH
2005-39

This FAL updates and simplifies the requirements in FAL 96-02 and supplements the guidance in 10 CFR 600, Subpart F, entitled "Eligibility Determination for Certain Financial Assistance Programs – General Statement of Policy." Subpart F implements the requirements of section 2306 of the Energy Policy Act (EPACT) of 1992.

The major changes to the previous guidance are:

- The eligibility requirements are no longer applicable to awards that are equal to or less than $100,000. Therefore, the EPACT Representation form for awards under $100,000 has been eliminated.

- The HCA can now rely upon available information in making a determination that a foreign-owned parent company satisfies the reciprocity requirements of 20 CFR 600.502(b)(2). If the HCA is unable to make a determination based on available information, he/she may seek the assistance of the U.S. Trade Representative through the Office of the Assistant General Counsel for Technology Transfer and Intellectual Property.

Questions concerning this Policy Flash should be directed to Trudy Wood at (202) 287-1336.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachment

Department of Energy
Financial Assistance Regulation

No. 2005-03
Date 6/27/05

FINANCIAL ASSISTANCE LETTER

This Financial Assistance Letter is issued under the authority of the DOE and NNSA Procurement Executives

SUBJECT: Eligibility Determination Required by Section 2306 of the Energy Policy Act

What is the Purpose of this Financial Assistance Letter (FAL)?

This FAL supplements the guidance in 10 CFR 600, Subpart F, entitled "Eligibility Determination for Certain Financial Assistance Programs – General Statement of Policy," which implements the requirements of section 2306 of the Energy Policy Act (EPACT) of 1992 (42 U.S.C 13525).

When is this FAL Effective?

This FAL is effective 10 days after the date of issuance. This FAL supersedes and cancels FAL 96-02.

When does this FAL Expire?

This FAL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Trudy Wood of the Office of Procurement and Assistance Policy by telephone at (202) 287-1336 or by email at trudy.wood@hq.doe.gov.

What is the Background?

Section 2306 of EPACT (42 U.S.C. 13525) imposes eligibility requirements on companies seeking financial assistance under Titles XX through XXIII of the EPACT. The Department of Energy implemented the EPACT eligibility requirements in 10 CFR 600, Subpart F – Eligibility Determination for Certain Financial Assistance Programs – General Statement of Policy. This subpart establishes policy, including procedures and interpretations, to guide DOE officials in making mandatory pre-award determinations of eligibility for awards made under Titles XX through XXIII of the EPACT. Those titles relate to research, development, demonstration, and commercialization programs in diverse areas of energy efficiency, energy supply, and related basic research.

Section 2306 provides for a two-part determination. An applicant must be found to satisfy the conditions of both parts in order to be eligible. The first part (section 2306(1)) involves a finding that the award is in the economic interest of the United States (See 10 CFR 600.502(a)). 10 CFR 503 provides some illustrative examples of the kinds of evidence that would support such a finding: investments in the United States in research, development, and manufacturing; significant contributions to employment in the United States; and agreements, with respect to any technology arising from the financial assistance provided, to promote the manufacture within the United States of products resulting from that technology and to procure parts and materials for such manufacture from competitive suppliers.

The second part of the determination, section 2306(2), involves two subparts, one of which must be satisfied (See 10 CFR 600.502(b)). The first subpart is satisfied if the applicant is a ``United States-owned company." The second subpart is satisfied if the applicant is found to be incorporated in the United States and the applicant's parent company is incorporated in a foreign country that: (a) affords opportunities to United States-owned companies comparable to those afforded to any other company to participate in government-supported joint ventures in energy research and development; (b) affords opportunities to United States-owned companies comparable to those afforded to any other company with regard to general investment opportunities; and (c) affords adequate and effective protection of intellectual property rights owned by United States-owned companies.

Guidance Included in this Financial Assistance Letter

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I. Implementing Policy for Section 2306 of EPACT 3

II. Applicability 3

III. Covered Programs 4

IV. Authority to Make Eligibility Determinations 4

V. Contracting Officer's Responsibilities 4

VI. Eligibility Determinations 4

I. Implementing Policy for Section 2306 of EPACT

10 CFR 600, Subpart F, entitled "Eligibility Determination for Certain Financial Assistance Programs – General Statement of Policy," implements section 2306 of EPACT. It provides a general statement of policy, definitions, a list of what DOE may consider in determining that a financial assistance award would be in the economic interest of the United States, information on what an applicant must submit, and other information DOE may consider. This subpart provides a decision making framework to guide DOE officials in making a determination that a particular applicant complies with the eligibility requirements of section 2306 of EPACT.

II. Applicability

The requirements of 10 CFR 600, Subpart F, apply to new and renewal grants and cooperative agreements made to a company under a covered program, except for awards that are equal to or less than $100,000 or awards executed under the authority of the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs. A company is defined in 10 CFR 600.501 as any business entity other than an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. §501(c)(3)). The EPACT eligibility requirements do not apply to non-profit organizations described in section 501(c)(3) of the Internal Revenue Code of 1954 or State, local, or tribal governments.

III. Covered Programs

10 CFR 600.501 defines a covered program as a program under Titles XX through XXIII of the Act. A list of covered programs is provided as Attachment 1 to this FAL.

IV. Authority to Make Eligibility Determinations

The Secretary has delegated the authority to make the eligibility determinations required by EPACT to the Director of the Office Procurement and Assistance Management. The Director of the Office of Procurement and Assistance Management, by memorandum dated April 11, 1995, redelegated this authority to the Heads of Contracting Activities (HCAs).

V. Contracting Officer's Responsibilities

Contracting Officers must ensure that:

- Program announcements for covered programs include the Energy Policy Act Eligibility Requirements in Part III of the announcement. (See DOE Announcement Template on the Professionals Homepage at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument.)

- Companies applying for financial assistance under a covered program submit with the application, or at such later time as specified in the program announce, the EPACT Representation provided as Attachment 2 to this FAL. In order to minimize the administrative burden on applicants, Contracting Officers would usually require an EPACT Representation only from those applicants that have been selected for award. In the event that the information in the EPACT Representation is inadequate to support an eligibility determination, the Contracting Officer should request such additional information as may be required. The applicant is responsible for providing sufficient information to permit the HCA to make an appropriate determination concerning economic interest and ownership status.

- The HCA provides a written determination that an applicant under a covered program meets the eligibility requirements in 10 CFR 600, Subpart F. A sample format for making this determination is provided as Attachment 3 to this FAL.

- The determination is included in the award file.

VI. Eligibility Determinations

1. In determining if a company's participation is in the economic interest of the United States, an HCA must consider:

- Individually the contributions of all companies participating in a joint venture application.

- For applications that propose "team" arrangements, the contributions of all team members as a whole, including any subrecipient, contractor or supplier that an applicant has named and relied upon in its application.

2. In determining the ownership status, the HCA's special findings regarding foreign-owned companies are required only for the applicant or, if a joint venture application is received, for each company participating in the joint venture. These findings are not required for a subrecipient, contractor or supplier that an applicant has named and relied upon in its application. However, if the facts submitted with an application disclose that foreign-owned companies are doing the majority of the work and getting the majority of the benefits of the program, but may have formed relationships with a U.S.-owned company to avoid the scrutiny of a reciprocity finding, the HCA may consider "team" members as appropriate, in making the determination.

3. If, in making the Eligibility Determination under 10 C.F.R. 600.502, it is found that the Applicant's parent company is foreign-owned, the HCA will determine whether the country of which the parent is incorporated satisfies the reciprocity requirements of 10 C.F.R. 600.502(b)(2). In making this determination the HCA should rely upon the following information; (1) U.S. Trade Representative Inventory of Foreign Trade Barriers, (2) U.S. Trade Representative Special 301 Report, and, (3) such other relevant information available to the HCA. The links to this information currently are as follows: http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/Section_Index.html ; http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_NTE_Report/Section_Index.html. The EPACT determination must address each of the eligibility criteria and explain why or why not the company meets the criteria. If the HCA is unable to make a determination based on the available information, he/she should seek the assistance of the U.S. Trade Representative through the Office of the Assistant General Counsel for Technology Transfer and Intellectual Property (GC-62).

ATTACHMENTS:

1. **LIST OF COVERED PROGRAMS**

2. **EPACT REPRESENTATION**

3. **SAMPLE FORMAT - "DETERMINATION OF ELIGIBILITY FOR FUNDING REQUIRED BY 10 CFR 600, SUBPART F"**

COVERED PROGRAMS	EPACT SECTIONS
Fossil Energy R & D Petroleum:	§ 2011, 2012
All Programs	
Gas: Natural Gas Research	§ 2013-2015, 2112
All Programs, including:	
Resource & Extraction	§ 2013, 2014
Delivery & Storage	§ 2013, 2014
Utilization	§ 2112
Turbines	§ 2013, 2014
Environmental Research & Regulatory Analysis	§ 2013, 2014
Midcontinent Energy Research Center*	§ 2013, 2015
Fuel Cells:	§2115
All Programs, including:	
Advanced Research	§ 2115
Molten Carbonate Systems	§ 2115
Advanced Concepts	§ 2115
Energy Conservation:	
Transportation	§ 2021-2025, § 2027
Alternative Fuels Utilization	§ 2021, 2023
Materials Development	§ 2021
Heat Engine Development	§ 2021, 2112
Electric & Hybrid Propulsion	§ 2021, 2025
Development Implementation & Deployment	§ 2021
Management	§ 2021
Capital Equipment	§ 2021
Advanced Automotive Fuel Economy	§ 2021, 2022
Biofuels User Facility*	§ 2021, 2024
Advanced Diesel Emissions Program*	§ 2021, 2027
Telecommuting Study*	§ 2021, 2028
Utility: All Programs	§ 2101-2108
Industry:	§ 2101-2108
All Programs, including:	
Industrial Wastes	§ 2101
Municipal Solid Wastes	§ 2101
Cogeneration	§ 2101
Electric Drives	§ 2101, 2105

Materials and Metals Processing	§ 2101, 2107
Other Process Efficiency	§2101
Process Heating & Cooling	§ 2101, 2102
Implementation & Deployment	§ 2101
Management	§ 2101
Capital Equipment	§ 2101
National Advanced Manufacturing Tech *	§ 2101, 2202
Initiative Pulp & Paper*	§ 2101, 2103
Steel, Aluminum, and Metal Research*	§ 2101, 2106
Energy Efficient Environmental Program*	§ 2101, 2108
Buildings	§ 2101-2108
All Programs, including:	
Federal Energy Management Program	§ 2101
Implementation & Deployment	§ 2101
Management and Planning	§ 2101
Capital Equipment	§ 2101
Advanced Buildings for 2005*	§ 2101, 2104
Building Systems	§ 2101
Building Envelope	§ 2101
Building Equipment	§ 2101
Codes and Standards	§ 2101
Energy Supply R & D: Energy Research	§ 2114
Fusion Energy	
All Programs, including:	
Confinement Systems	§ 2114
Development & Technology	§ 2114
Applied Plasma Physics	§ 2114
Planning & Projects	§ 2114
Inertial Fusion Energy	§ 2114
Program Direction-Op Exp	§ 2114
Capital Equipment & Construction	§ 2114
Basic Energy Sciences:	§ 2203
All Activities, including:	
Materials Sciences	§ 2203
Chemical Sciences	§ 2203
Energy Biosciences	§ 2203
Engineering & Geosciences	§ 2203
Applied Math Sciences	§ 2203, 2204
Advanced Energy Projects	§ 2203
Program Direction	§ 2203
Capital Equipment	§ 2203

Advisory & Oversight/Program Direction	§ 2203
Energy Research Analysis	§ 2203
University & Science Education Programs	§ 2203
Experimental Program to Stimulate Competitive Research*	§ 2203
Laboratory Technology Transfer	§ 2203
Multi-Program Laboratory Support	§ 2203
<u>Nuclear Energy</u>	
Light Water Reactor	§ 2123, 2126
Advanced Reactor R&D	§ 2121, 2122, 2124,
Facilities	§ 2126
<u>Solar & Renewables:</u>	
Solar & Other Energy	§ 2021, 2026, 2111, 2117
All Programs, including:	
Photovoltaics	§ 2111
Biofuels	§ 2021, 2013, 2024
Solar Technology Transfer	§ 2111
Program Direction- Other Solar Energy	§ 2111
Solar Building Technology Research	§ 2111
Solar Thermal Energy Systems	§ 2111
Wind Energy Systems	§ 2111
Ocean Energy System	§ 2111
International Solar Energy Program	§ 2111
Resource Assessment	§ 2111
Program Support	§ 2111
Geothermal	§ 2111
Hydrogen Research	§ 2026
Electric Energy Systems including: Superconductivity	§ 2117, 2111
Energy Storage Systems	§ 2111
<u>Environmental Restoration & Waste Management</u>	
Facility Transition-Fast Flux Test Facility	§ 2116
Civilian Waste R & D	§ 2113
Electric & Magnetic Fields Research and Public Dissemination Program*	§ 2118
Spark M. Matsunga Renewable Energy & Ocean Technology Center*	§ 2111, 2119

*Direct citation from Title XX-XXIII.

EPACT REPRESENTATION FOR COVERED AWARDS OVER $100,000

Section 2306 of the Energy Policy Act of 1992, as implemented in 10 CFR, Subpart F, establishes eligibility requirements for companies to participate in certain financial assistance programs covered under Titles XX through XXIII of the EPACT. For this purpose, "company" means any business entity other than an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 [26 U.S.C. Section 501(c)(3)].

In order for the Department of Energy (DOE) to make an award to a company under a covered program, DOE must determine that the company's participation will be in the economic interest of the United States and, if the company is not a United States-owned company, that the parent company is incorporated in a foreign country that: affords national treatment to United States-owned companies with regard to access to Government-supported joint ventures in energy research and development; affords national treatment to United States-owned companies with regard to general investment opportunities; and affords protection to intellectual property rights owned by United States-owned companies. To assist DOE in making these determinations, the applicant must answer the following questions and make the representation provided therein. In the event the information submitted is inadequate for DOE to make a determination, DOE will request such additional information as may be required.

Company Ownership Information:

(Include this information for each participant in a joint venture.)

1. Company Name: _____

2. Project Title: _____

3. Is your company a United States-owned company? Yes ☐ No ☐

   (U.S.-owned company means (1) a company that has majority ownership by individuals who are citizens of the United States, or (2) a company organized under the laws of a State that either has no parent company or has a parent company organized under the laws of a State.)

4. Identify the city, state, and year in which your company is incorporated or organized.

   City: _____ State: _____ Year: _____

5. Is a majority of your company's stock owned or controlled by U.S. Citizens? Yes ☐ No ☐

6. Does your company have a parent company? Yes ☐ No ☐

7. If yes, identify the parent company and the country in which the parent company is incorporated or organized.

Parent company: _____

Country: _____

Economic Interest Information:

1. Will this project result in investments in the U.S. in research and development? Yes ☐ No ☐

If the answer is yes, what percentage of the total estimated cost of the project will be expended in the U.S.? (Contractor and supplier costs are to be included in total estimated costs.) Also, express in terms of dollars. _____% $ _____

2. Will this project result in investments in U.S. in manufacturing? Yes ☐ No ☐

If the answer is yes, what percentage of the total estimated cost of the project including contractor and supplier costs will be expended in U.S. manufacturing? Also, express in terms of dollars. _____% $ _____

3. Will this project contribute to U.S. employment? Yes ☐ No ☐

If the answer is yes, briefly describe how.

_____

4. Does the applicant agree that it will promote the manufacture within the U.S. of products resulting from any resultant technology and competitively procure parts and materials? Yes ☐ No ☐

Briefly describe plans, if any, for any manufacturing of products arising from the program supported research and development, including the location where such manufacturing is expected to occur.

_____

If your answer is no, please explain.

_____

What other benefits to the U.S. will result from this project?

_____

Applicant Representative: _____

Title: _____

Signature: _____

Date: _____

DETERMINATION OF ELIGIBILITY FOR FUNDING REQUIRED BY 10 CFR 600, SUBPART F

[INSERT PROJECT TITLE]

[TYPE OF ASSISTANCE ACTION] DE-[INSERT AWARD NO.]

Proposing Entity: [INSERT COMPANY NAME AND ADDRESS]

Company Profile:

[COMPANY NAME] is a U.S.-owned company, headquartered in [CITY AND STATE], with the majority of its stock owned or controlled by U.S. Citizens.

[OR]

[COMPANY NAME] was incorporated in [STATE] in [YEAR], and has no parent company.

[OR]

[COMPANY NAME] was incorporated in [STATE] in [YEAR]. Its parent company, [NAME], was incorporated in [STATE], in [YEAR].

[OR]

[COMPANY NAME] was incorporated in [STATE] in [YEAR]. [COMPANY NAME] has a parent company, [NAME], which is incorporated (or organized) in [COUNTRY].

Program Objectives:

The overall program objective is to develop [BRIEF DESCRIPTION].

ELIGIBILITY REQUIREMENTS AND JUSTIFICATION:

Section 2306 of the Energy Policy Act (42 U.S.C. 13525), as implemented by the DOE Financial Assistance Regulations (10 CFR 600.500 - 505), sets forth two requirements for a company to be eligible to receive an award of financial assistance under Section 2306 covered programs.

Eligibility Requirement No. 1: The company's participation in the covered program must be in the economic interest of the United States.

Finding: Award to [COMPANY NAME] satisfies the requirement for the following reasons:

The total estimated cost of the effort under this program is $[VALUE]. Of that amount,

$[VALUE], or [PERCENT]% will be invested in the U.S. in research and development. [IF APPLICABLE: An additional $[VALUE], or [PERCENT]% will be invested in manufacturing.] The balance of the cost will be invested as follows: [PROVIDE A BRIEF DESCRIPTION OF EFFORT TO BE PERFORMED OUTSIDE OF THE U.S.]. [COMPANY NAME] agreed to promote the manufacture within the U.S. of products resulting from the technology, taking into account the goals of promoting competitiveness of U.S. industry. [COMPANY NAME] agreed to procure parts and materials from competitive suppliers. This project will also contribute to U.S. employment by [PROVIDE A BRIEF DESCRIPTION OF EMPLOYMENT OPPORTUNITIES TO BE CREATED].

Intellectual Property Agreement: [Applicable only if the award is made to a United States-Owned Corporation, incorporated and doing 100% of their business in the U.S. If the company is foreign-owned or if the proposed project has foreign involvement at any level, see your Patent Counsel, for modifications and language that may be required.]

[COMPANY NAME] may request, and may subsequently receive, a waiver of Government patent rights to inventions made under the proposed award. However, as a condition of the waiver [COMPANY NAME] will agree that products, processes or services which embody subject inventions under the award must be manufactured, practiced or provided substantially in the United States, unless it is commercially infeasible and some other economic benefit to the United States will result. In the event [COMPANY NAME] does not request and receive a waiver, title to [COMPANY NAME] inventions under this award will be retained by the Government to use as it sees fit.

Eligibility Requirement No. 2: The company must either be a United States-owned company or incorporated or organized under the laws of any state and have a parent company which is incorporated or organized under the laws of a country that affords treatment to United States-owned companies that is comparable to treatment the United States affords foreign-owned companies in the following areas: access to government-supported joint ventures in energy research and development, general investment opportunities, and protection of intellectual property rights.

Finding: Based on the representation provided by [COMPANY NAME], (Attached), it is hereby determined that it is a United States-owned company and therefore satisfies the second eligibility requirement.

[OR]

[Describe the facts and approvals supporting a determination for other than a United States-owned Company]

DETERMINATION

Based on the forgoing findings, I determine that award to [COMPANY NAME] satisfies the requirements of Energy Policy Act 2306 as set forth in 10 CFR 600, Subpart F. I therefore determine that [COMPANY NAME] is eligible to receive financial assistance under this program.

_____ _____

Name of HCA
Head of Contracting Activity

Date

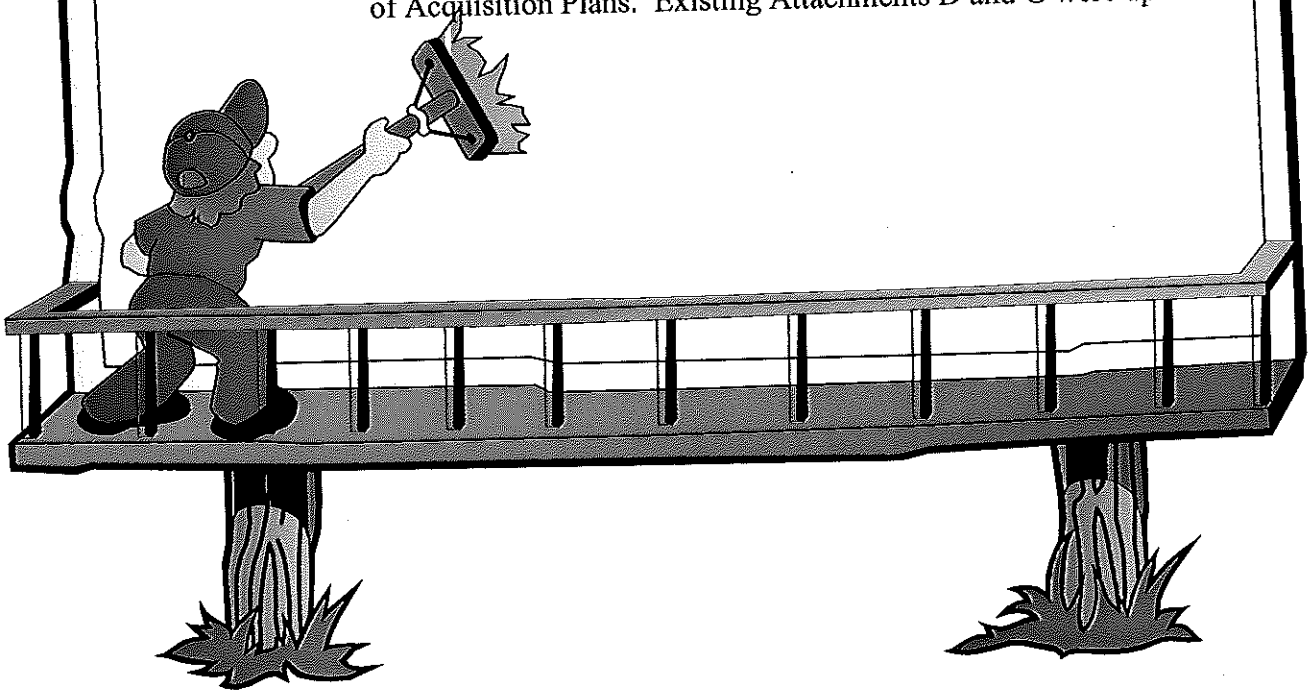
Headquarters Policy Flash

Policy Flash 2005-40

DATE: June 27, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Acquisition Letter 2005-40, DOE Acquisition Guide Chapter 71.1
Headquarters Review of Contract and Financial Assistance Actions

SUMMARY: This Policy Flash forwards the revised chapter, which has been updated, in order for DOE Contracting Activities to better plan for reviews by the Office of Contract Management, including a new attachment reflecting increased emphasis on timing and submission of Acquisition Plans. Existing Attachments D and G were updated



to reflect proper timing as well as the types of information required for review. Finally, the chapter was revised to clarify responsibilities of the Headquarters Office of Engineering and Construction Management in reviewing procurement actions under projects.

If there are any questions regarding this subject, please contact James Tower at 202-287-1370 or at james.tower@hq.doe.gov.

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy
Office of Procurement and
Assistance Management

Attachment

HEADQUARTERS REVIEW OF CONTRACT AND FINANCIAL ASSISTANCE ACTIONS

Guiding Principles

- ✓ Know your "buddy"
- ✓ Do an annual plan
- ✓ Allow adequate lead time
- ✓ Complete your internal review
- ✓ Submit complete packages

Overview

This section discusses the procedures for Headquarters Business Clearance review and approval of contract and financial assistance actions awarded by DOE contracting activities other than the National Nuclear Security Administration. Separate NNSA coverage is in BOP-003 and BOP-304.

Background

Solicitations, contract awards, and other contract and financial assistance actions which exceed the authority delegated to the Head of Contracting Activity (HCA), that are likely to provoke unusual public interest, or, that are new or of an unusual nature, are to be submitted to the Procurement Executive, or designee, for appropriate review and approval.

Reviewable actions include those relating to the solicitation and award of contracts, financial assistance, subcontracts, and agreements with other governmental agencies, and subsequent modifications, extensions, and settlements or terminations thereof.

The Office of Contract Management (OCM) is available to consult with Headquarters and Field Office personnel regarding actions that are likely to provoke unusual public interest, are of a new and unusual nature, are questions of policy or are questions of a procedural nature that may arise in the course of contract negotiation, award, and administration. Such issues should be raised to the OCM at the earliest practicable date.

Annual Projected Actions

Prior to the beginning of each fiscal year, the OCM issues a request for each contracting activity to provide a projection for the upcoming fiscal year of known or contemplated contract and financial assistance actions exceeding delegated thresholds, and other appropriate actions expected for that year. Based on the contracting activity's submission, the OCM will identify

specific actions to be submitted to the OCM for Headquarters Business Clearance review and approval. If an action is selected for Headquarters Business Clearance review and approval, the OCM, will notify the Procurement Director at which point(s) in the acquisition cycle the action must be submitted for Headquarters Business Clearance review and approval. The OCM may, under certain circumstances, select an action for "limited" review, e.g., review of the solicitation only as opposed to review of both the solicitation and the subsequent award documents. Actions not selected for Headquarters Business Clearance review and approval are deemed to have received a waiver from such review.

Contracting activities are also expected to report to the OCM any action that may arise during the course of the fiscal year which exceeds the local delegation thresholds and that has not been submitted in the annual projected actions. The OCM will review each action on a case-by-case basis to determine if the action should be submitted for Headquarters Business Clearance review and approval. Accordingly, contracting officers (COs) should ensure that adequate lead time exists in the acquisition schedule to permit Headquarters Business Clearance review and approval to occur. Poor acquisition planning is not an acceptable basis for a waiver.

Headquarters Business Clearance Review

A complete package must be submitted to OCM in order to facilitate the review process. The attachments to this chapter list the documentation to be submitted for each type of action. A complete package is one that contains all the appropriate documentation listed in the attachments hereto. The initial review is one that results in a set of questions, comments, issues and/or suggestions that are submitted to the CO for resolution. The final review is one that results in the receipt of Headquarters Business Clearance review and approval based upon the resolution of questions, comments, issues and/or suggestions that were submitted to the CO. Normally the initial review should be completed within 10 working days from receipt of a complete package. The initial review may, or may not, result in Headquarters Business Clearance review and approval. The time required for Headquarters Business Clearance review and approval varies on a case-by-case basis, as approval is dependent on such things as the complexity of the procurement, the nature and extent of review comments, internal coordination requirements within Headquarters, and the quality of the documents submitted for review. Experience indicates that final Headquarters Business Clearance review and approval for competitive solicitations and contracts for major site and facility management may take significant time. Contract and financial assistance lead times should take these variables into consideration. In the event that an expedited review is needed to support program needs, COs should contact the contracting activity's OCM liaison ("buddy").

An advance review is one that is performed on a less than complete package and has not been through any internal review and approval by the contracting activity. Advance review of preliminary draft documents for advice/consultation or to facilitate the review process should be coordinated with the contracting activity's "buddy". However, an advance review of preliminary draft documents should not be considered as final Headquarters Business Clearance review and approval.

Depending on the type of action being reviewed, the OCM will send the review package to the following offices for review, as appropriate:

- Assistant General Counsel for Procurement and Financial Assistance, (GC-61).
- The Office of Procurement and Assistance Policy (ME-61).
- The Office of Resource Management (ME-63).
- Assistant General Counsel for Technology Transfer and Intellectual Property (GC-62).
- The cognizant Headquarters program official.
- The Office of Small and Disadvantaged Business Utilization, (ED-3).
- The Office of Environment, Safety, and Health, (EH-73).
- The Deputy General Counsel for the Environment and Nuclear Programs, (GC-50).
- The Office of Legacy Management, (LM-1).
- The Office of Engineering and Construction Management (ME-90)

Additional offices may be requested to review a package depending on the nature of the requirement. The purpose of having other HQ offices participate in the Business Clearance review, as requested by OCM, is to bring the subject matter or technical expertise of the requested office to bear as part of the overall HQ review. Each office contributes its own subject matter or technical knowledge to the review and is not expected to review areas outside or beyond their own expertise. The OCM is aware of the time constraints the contracting activities are under, therefore, every attempt will be made to coordinate the action and resolve questions, comments, issues and/or suggestions in "real time". That is, OCM will facilitate dialogue between Headquarters' review offices and the contracting activity during the course of the review.

Submission of Documents

In general, electronic submission of the review package is preferred. If paper copies are to be submitted, the number of copies needed should be coordinated with the contracting activity's "buddy" based on anticipated review requirements.

Attached hereto, by type of action are document submission requirements and a summary of the general scope of OCM's Headquarters Business Clearance review and approval. Attachment E, Management and Operating Contracts, applies specifically to extend/compete, option exercise, and PBI/award fee actions as they relate to M&O or other major site and facility contracts. Any other actions for M&O or other major site and facility contracts should refer to the other attachments to this document for guidance as appropriate.

Attachments

Attachment A - Contract Solicitations
Attachment B - Competitive/Non-competitive Contracts/Contract Modifications
Attachment C - Negotiation Memorandum
Attachment D - Financial Assistance
Attachment E - Management and Operating Contracts/Site and Facility Management Contracts
Attachment F - Ratification Actions
Attachment G - Subcontract Actions
Attachment H – Interagency Agreements

ATTACHMENT A —CONTRACT SOLICITATIONS (See note 1)

DOCUMENTS SUBMISSION

Prior to Submission of the Draft Request for Proposal (RFP)/Invitation for Bid (IFB)

The following documents and information shall be submitted:

- Approved Site Utilization and Management Plan (SUMP)(or equivalent), if required;
- Acquisition Plan (AP);
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Name and telephone number of the cognizant Headquarters program official; and
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof.

Draft Request for Proposal (RFP) (Including the Model Contract)

The following documents and information shall be submitted:

- Draft RFP, including the model contract;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Name and telephone number of the cognizant Headquarters program official;
- Acquisition Plan (if DOE Order 413.3 is applicable include a copy of the Secretarial Acquisition Executive or Acquisition Executive approval, or if a project Acquisition Strategy was developed, a copy of that approved Strategy);
- Site Utilization and Management Plan(or equivalent), if required;
- Justification for Other Than Full and Open Competition (JOFOC), if applicable;
- Rating Plan or Source Selection Plan, if applicable;
- A synopsis of the major areas to be addressed in the Contract Management Plan (CMP). Once the draft CMP is completed, by the procurement representative to the SEB, but prior to approval, the draft CMP is to be submitted for review to the Contract Administration Division (ME-622). It is to be submitted as soon as it is completed but not later than 30 days after contract award. (See Chapters 7 and 42 for guidance on contract management planning and creating formal CMPs. If a CMP is required, the procurement representative to the SEB shall be responsible for preparation of the synopsis/CMP.);
- Copies of any deviations being requested; and,
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof.

Note 1: By previous Secretarial direction, OPAM, through OCM, is responsible for the review and approval of solicitations and contracts for privatization projects funded by the Office of Environmental Management (EM). Accordingly, acquisition plans, solicitations, and contracts for EM-funded

privatization projects are to be submitted to OCM for review and approval. OCM will provide for the coordination of the review and approval process with other cognizant Headquarters organizations.

Draft Invitation for Bid (IFB) (Including the Model Contract)

The following documents and information shall be submitted:

- Draft IFB;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Name and telephone number of the cognizant Headquarters program official;
- Acquisition Plan (if DOE Order 413.3 is applicable include a copy of the Secretarial Acquisition Executive (SAE) or Acquisition Executive approval, or if a separate Project Acquisition Plan was developed, a copy of that approved Plan);; and
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof.

DOCUMENTS REVIEW

Acquisition Plan (AP)

The OCM review of the AP will include:

- The appropriateness and adequacy of the acquisition strategy in meeting program requirements;
- The AP is consistent with the SUMP (if required), and
- Sufficiency in addressing the requirements FAR Part 7.105, and DOE Acquisition Guide Chapter 7 to include:
    - Requirements (FAR 7.105(a)). Are performance outcomes and results consistent with program objectives and the site or institutional plan (if applicable)?
    - Logistics Strategies (FAR 7.105(b)(13)). Is the acquisition consistent with Department of Energy (DOE) wide logistics strategies, if any? Does the logistics strategy make sound business sense?
    - Risks (FAR 7.105(a)(7)). Does the contract, and/or contract management plan address and or mitigate identified risks?
    - Contract Type (FAR 7.105(b)(4)). Does the proposed contract type make sound business sense?
    - Performance-Based Contracting. Does the proposed procurement/contract maximize the use performance-based contracting techniques?
    - Competition (FAR 7.105(b)(2)(i)). Is full and open competition sought to the maximum extent practicable?

- Socioeconomic Considerations. Is the proposed procurement consistent with DOE small businesses and/or other socioeconomic policies and strategies?
- Postaward Business Arrangements. Does the contract management plan address significant, unusual, or complex issues?

Draft RFP (Including the Model Contract)

The OCM review of the solicitation package will include:

- Appropriateness and adequacy of the acquisition strategy;
- Review the solicitation to ensure that it is internally consistent. For example, verify the following:
  - Sections I and L are consistent, e.g., any contract requiring the DEAR 52.204-2, Security clause, in Section I, would require the DEAR 970.204-73 Facility Clearance provision, in Section L;
  - Sections L and M are consistent and there are no discrepancies between what offerors are asked to provide in section L versus what the Government plans to evaluate as stated in section M;
  - Section M is consistent with the rating/source selection plan;
  - The evaluation criteria are clear and do not overlap;
  - The evaluation criteria are appropriate for the acquisition, including how cost/price will be evaluated and how best value trade-offs will be determined; and
  - Past performance is evaluated in accordance with FAR Part 15, and that the information requested in the past performance questionnaire is consistent with the information requested and evaluated in sections L and M.

The OCM review of the model contract will include:

- Regulatory and policy compliance;
- Position descriptions are clear and appropriately written to meet the Government's requirements (that is, not overly restrictive or overly permissive);
- Verification that the clauses, including the Section H, Special Contract Requirements and deviations, are appropriate for the type of contract requirements;
- The following as appropriate:

  - Appropriate security clauses are included if access to restricted or classified data is anticipated;
  - If the solicitation contemplates a set-aside, the required small business or small disadvantaged business clauses;
  - Appropriate cost accounting standards clauses;
  - Organizational Conflicts of Interest clauses specified by FAR Subpart 9.5 and Department of Energy Acquisition Regulation (DEAR) Subpart 909.5; and

- Compliance with the requirements of FAR Part 19. Review the solicitation for price evaluation adjustment factors and any other required evaluation factors for small disadvantaged business and HUBZone business participation as specified in FAR Subparts 19.11, 19.12, and 19.13.
- Verification that the RFP contains the required performance based elements.
- Is the Statement of Work (SOW) written in terms of results/outcome vs. "how" the work is to be accomplished? Ensure that performance objectives are focused on the outcome and results rather than process or activities.
- Are there performance requirements that define the work in measurable, mission-related terms?
- Does it contain performance standards (e.g., quality, timeliness, quantity, cost control) tied to the performance requirements?
- For capital asset acquisitions greater than $5 million, application of DOE Order and Manual 413.3, any Section H special provisions related to project management and Earned Value Management, and required deliverables (including as appropriate, requirements for submission of a Project Control System Definition, Project Control System Description, Project Schedule and Cost Baselines, and Project Risk Assessment, etc.)
- Is there a Government quality assurance (QA) plan that describes how the contractor's performance will be measured against the performance standards?
- Are there positive and negative incentives tied to the Government QA plan measurements?
- Ensure that the performance objectives, measures and performance based incentives (PBIs) are appropriate in scope, number, etc., fee allocated to the specific objective is reflective of the value or importance of the work contemplated.
- If the SOW is not performance based, the cognizant contracting officer must provide a written explanation as to why the solicitation cannot be performance based or why it is exempt from the requirement.
- Verification that the SOW does not contain any inherently Governmental functions.
- The OCM review of the synopsis of the major areas to be addressed in the CMP will include:
    - Compliance with existing guidance on CMPs, and
    - Coverage of significant contract management concerns (risk areas, contract type, transition, etc.)

<u>Draft IFB</u>

The OCM review of the model contract will include:

- Regulatory and policy compliance;

- Verification that the clauses, including the Section H, Special Contract Requirements and deviations, are appropriate for the type of contract requirements;
- The following as appropriate:
    - Appropriate security clauses are included if access to restricted or classified data is anticipated;
    - If the solicitation contemplates a set-aside, the required small business or small disadvantaged business clauses;
    - Appropriate cost accounting standards clauses;
    - Organizational Conflicts of Interest clauses specified by FAR Subpart 9.5 and Department of Energy Acquisition Regulation (DEAR) Subpart 909.5; and
    - Compliance with the requirements of FAR Part 19. Review the solicitation for price evaluation adjustment factors and any other required evaluation factors for small disadvantaged business and HUBZone business participation as specified in FAR Subparts 19.11, 19.12, and 19.13.
    - For capital asset acquisitions greater than $5 million, application of DOE Order and Manual 413.3, any Section H special provisions related to project management and Earned Value Management, and required deliverables (including as appropriate, requirements for submission of a Project Control System Definition, Project Control System Description, Project Schedule and Cost Baselines, and Project Risk Assessment, etc.)
    - Verification that the SOW does not contain any inherently Governmental functions.

ATTACHMENT B —COMPETITIVE/NON-COMPETITIVE CONTRACTS AND CONTRACT MODIFICATIONS

DOCUMENTS SUBMISSION

The following documents and information shall be submitted:

- Draft RFP/contract modification;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Name and telephone number of the cognizant Headquarters program official;
- Justification for Other Than Full and Open Competition (JOFOC), if applicable;
- Documentation (including technical evaluation of costs) to support a pricing action;
- Copies of any deviations processed or being requested;
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof; and
- Draft CMP. (See Chapters 7 and 42 for guidance on contract management planning and creating formal CMPs.)

DOCUMENTS REVIEW

The OCM review of the contract/contract modification will include:

- Appropriateness and adequacy of the acquisition strategy;
- Regulatory and policy compliance;
- Verification that the clauses, including the Section H, Special Contract Requirements, and deviations, are appropriate for the type of contract requirements;
- Verification that the contract/contract modification is in compliance with the terms and conditions of the contract.
- Verification that the SOW does not contain any inherently Governmental functions;
- For capital asset acquisitions greater than $5 million, application of DOE Order and Manual 413.3, any Section H special provisions related to project management and Earned Value Management, and required deliverables (including as appropriate, requirements for submission of a Project Control System Definition, Project Control System Description, Project Schedule and Cost Baselines, and Project Risk Assessment, etc.)
- Verification that release language, if appropriate, is included;
- Ensure that the cost evaluation makes sound business sense and was accomplished using all appropriate resources (i.e. DCAA audit reports, government estimate, technical evaluation of costs, etc.);
- Verification that the contract/contract modification contains the required performance based elements; and
- Verification that the CMP comports with existing guidance and addresses the significant administration/management concerns under the contract.

ATTACHMENT C —NEGOTIATION MEMORANDUM

DOCUMENTS SUBMISSION

The following documents and information shall be submitted to the OCM, in accordance with the procurement cycle phase set forth below:

Prior to Negotiations. Prior to the start of formal negotiations and briefing of the Source Selection Official (not discussions with offerors) concerning contract awards, the following documents are required for review:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Technical Evaluation Committee (TEC) or Source Evaluation Board (SEB) report (if applicable);
- Draft (unsigned) Source Selection Statement (SSS) (if applicable);
- Documentation (including technical evaluation of costs) to support a pricing action (including evaluation of fee or profit); and
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof.

For IFBs, the following documents and information are required:

- Record of bid opening and selection;
- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- A copy of the successful bid;
- A record of the price analysis that was performed; and
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof.

Prior to the Completion of Negotiations. If there were significant departures from the objectives of the pre-negotiation plan or provisions of the model contract, or if new and significant issues developed which were not addressed in the pre-negotiation plan, the CO shall submit these revisions to the OCM for review and approval.

After Completing Negotiations. One copy of the post negotiation summary and negotiated contract shall be submitted for Headquarters Business Clearance review and approval to the OCM prior to award of the contract. In the event all of the pre-negotiation objectives were substantially met, OCM may elect to waive, or limit, its review of post negotiation documents. In this event, the CO should provide OCM with a copy for information purposes and not for the purpose of obtaining Headquarters Business Clearance review and approval.

DOCUMENTS REVIEW

The OCM review of the pre-negotiation package will:

- Ensure that TEC or SEB report is consistent with the rating/source selection plan;
- Ensure that the evaluation (technical and cost) of offers conforms with Sections L and M of the solicitation and that evaluation criteria were properly evaluated;
- Ensure that strengths and weaknesses cited in the TEC or SEB report are supportable and properly documented;
- Ensure that evaluation of offerors was consistent and in accordance with the rating/source selection plan;
- Ensure that the cost evaluation makes sound business sense and was accomplished using all appropriate resources (i.e. DCAA audit reports, government estimate, technical evaluation of costs, etc.);
- If discussions were held, ensure that discussions were complete and meaningful;
- Ensure that the SSS is in accordance with the rating/source selection plan, applies sound business judgment, and is legally supportable; and
- Ensure that the SSS contains a sufficiently documented discussion of cost vs. technical tradeoffs.

IFBs

The OCM review of the IFB will:

- Ensure the price analysis documentation was performed properly and makes sound business sense;
- Ensure that the award will be made to the lowest acceptable bidder; and
- Ensure that the apparent successful bid, and the award, conforms to the provisions of the IFB.

ATTACHMENT D —FINANCIAL ASSISTANCE

DOCUMENTS SUBMISSION

Prior to the release of the solicitation, the following documents and information shall be submitted:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Copies of any deviations processed or being requested;
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof;
- If it is a competitive action, the draft funding opportunity announcement including merit review criteria, Program Policy Factors,, and the Merit Review Plan;
- If it is a non-competitive action, the Determination of Non-competitive Financial Assistance and the model agreement; and
- Renewal applications/awards. The CO shall notify OCM when the renewal will cause the financial assistance award to exceed the delegation authority of the contracting activity.

Prior to the award of the financial assistance action, the following documents and information shall be submitted:

- The draft agreement;
- Supporting documentation such as a copy of the selected proposal, budget review documentation and technical evaluation (if applicable);
- Recommendation to the Source Selection Official and the SSS (if applicable); and
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof.

DOCUMENTS REVIEW

The OCM review of the financial assistance package prior to release of the announcement will include:

- Solicitation strategy to include technical, business and financial aspects;
- Regulatory and policy compliance; and
- Verification that the announcement's provisions are appropriate (i.e. non-profit, universities, etc.).

The OCM review of the financial assistance package prior to award of the financial assistance action will include:

- Verification that the announcement's provisions are appropriate (i.e., non-profit, universities, etc.) if not previously reviewed;

- Ensure that the budget review makes sound business sense and was accomplished using all appropriate resources (i.e. DCAA audit reports, government estimate, technical evaluation of costs, etc.); and
- Verification that the selection documentation is consistent with the announcement's selection criteria and programmatic policy factors.

ATTACHMENT E —MANAGEMENT AND OPERATING CONTRACTS/SITE AND FACILITY MANAGEMENT CONTRACTS

DOCUMENTS SUBMISSION

Extend/Compete Actions (including options in non-competitively awarded contracts)

No later than 18 months prior to the expiration of the term of the contract, a recommendation to extend/compete a management and operating contract shall be submitted to the Head of the Agency through the Director for Procurement and Assistance Management. In accordance with AL 96-09, the following documents must accompany such a submittal.

- A JOFOC (if extension is recommended) prepared in accordance with FAR Part 6;
- Certification by the HCA and cognizant program Assistant Secretary that the use of full and open competition is not in the best interests of the Department (if extension is recommended);
- A description of the incumbent's performance history including measurable results against established performance measures and criteria;
- Identification of significant projects planned during the extension period and review to ensure for capital asset acquisitions greater than $5 million, incorporation of DOE Order and Manual 413.3 in List B of DEAR 970.5204-2 Laws, Regulations and Directives (or depending on the nature of the contract through some other clause);
- Identification of issues and negotiation objectives for the extension period, including the extent to which performance based management provisions are present, or, can be negotiated into the contract;
- If the contractor is a Federally Funded Research and Development Center (FFRDC), a review of the use and continued need for the FFRDC designation in accordance with FAR 35.017-4;
- A determination that the M&O contract or performance based management contract remains appropriate;
- A discussion of the potential impact of a change in contractor on program needs; and
- Site Utilization and Management Planning Documentation.

Exercise of Option for an M&O or Other Major Site or Facility Contract

The exercise of an option shall be approved by the Procurement Executive and the cognizant Assistant Secretary(ies). The documentation required is identical to the documentation required in an extend/compete package, less the JOFOC and the Certification by the HCA and cognizant program Assistant Secretary that the use of full and open competition is not in the best interests of the Department. The contracting activity shall submit documentation prepared by the CO and approved by the cognizant Assistant Secretary(ies) that the exercise of the option is in the best interest of the Government.

PBIs/Award Fee Plans

The following information shall be provided with the documents submitted to OCM for Headquarters Business Clearance review and approval prior to commencement of negotiations with an offeror, or in the case of an existing contracts, the incumbent contractor:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- The Performance Evaluation and Management Plan/Award Fee Plan (or equivalent document);
- Documentation supporting the fee methodology;
- Documentation supporting the selection and/or changes to performance-based requirements, objectives, measures and incentives; and
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof.

DOCUMENTS REVIEW

Extend/Compete Actions

The OCM will:

- Review the JOFOC and supporting documents;
- Prepare Action Memo from Procurement Executive to ME-1;
- Prepare Action Memo from ME-1 through the Undersecretary to the Secretary;
- Prepare Statement authorizing The Use of a Management and Operating Contract with signature line to be authorized by the Secretary, Deputy Secretary or Under Secretary;
- Prepare Statement authorizing the continued Use of an FFRDC Designation; and
- Prepare letters notifying Congress of non-competitive extensions in accordance with Acquisition Letter 2000-11 (12/15/00).

Exercise of Option for an M&O or Other Major Site or Facility Contract

The OCM will:

- Review supporting documents;
- Prepare letters informing Congress of the option exercise; and
- Prepare Action Memo for Procurement Executive.

PBIs/Award Fee Plans (to include cost reduction/cost saving incentive programs)

The OCM will:

- Review the relationship of the performance objectives, measures and incentives to the critical strategic path and the tactical objectives of the site;
- Ensure that the performance objectives, measures and incentives are appropriate in scope, number, etc. for the work contemplated;
- Ensure that the objectives to be measured are suited for the application of PBIs/award fee;
- Review the structure of the PBI itself;
- Ensure that the amount of fee allocated to the specific objective are reflective of the value or importance of the work;
- Ensure that performance objectives are focused on the outcome and results rather than process or activities;
- Review the fee structure and the allocation between and among, objective and subjective measures;
- Ensure that performance objectives, measures and incentives are structured to improve overall contractor performance;
- Verify that any performance objectives, measures and incentives are in accordance with procedures of the applicable Headquarters program office and that appropriate Headquarters program office coordination has occurred;
- Review the relationship of proposed performance objective, measures and incentives to current/past performance objectives, measures and incentives to ensure that proposed metrics have considered/built on past metrics; and
- Ensure that the impact of year-to-year changes to operating conditions have been considered in the development of performance objectives, measures and incentives

The Procurement Executive may waive review of PBI/Award Fee plans upon an affirmative demonstration by the HCA that internal processes are adequate to ensure that the performance measures and associated fee structures are properly developed and administered. Requests for such waiver must demonstrate that an internal process exists which (a) assesses all performance objectives, award fees, and specific incentives tied to discreet performance objectives to ensure they are well-defined, rational, appropriately integrated prior to their negotiation and inclusion in the contract, and (b) ensures that mechanisms exist as part of contract administration for the validation of contractor performance against objectives.

ATTACHMENT F —RATIFICATION ACTIONS

DOCUMENTS SUBMISSION

The following documents and information shall be submitted for ratification of an unauthorized commitment:

- All records and documents concerning the commitment;
- A written statement through the cognizant local supervising Program Office Director containing:
    - Name of the Government representative who entered into the unauthorized commitment;
    - A statement as to why authorized procurement procedures were not used;
    - Rationale why the contractor was selected;
    - A list of other sources considered;
    - Description of work performed or products delivered;
    - A reference to funds availability at the time of the unauthorized commitment.
    - The status of the work; and
    - Recommendation(s) for corrective action(s) for avoidance of unauthorized commitments; and
- A document originated by the CO and signed off by the HCA that includes:
    - A statement that supplies or services have been provided and accepted by the Government, or that the Government has or will obtain a benefit resulting from performance;
    - A synopsis of events that transpired resulting in the unauthorized commitment;
    - A statement that the resulting contract would have been proper if made by a CO;
    - A determination by the CO that the price is fair and reasonable;
    - A statement by the CO recommending payment;
    - Evidence of local legal review; and
    - A statement that funds are currently available.

DOCUMENTS REVIEW

The OCM will:

- Forward any comments to CO for response/resolution;
- Obtain GC's concurrence;
- Prepare a point paper to present to the Procurement Executive with a recommendation to either approve or not approve the ratification; and
- Send response back to the CO.

ATTACHMENT G —SUBCONTRACT ACTIONS

DOCUMENTS SUBMISSION

The following documents and information shall be submitted to the OCM as appropriate for the procurement (i.e., sole source or competitive):

Prior to release of subcontract action. Prior to releasing the RFP or model subcontract the following documents are required for review:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- Acquisition Plan;
- Draft RFP/model subcontract;
- If sole source, a copy of the justification for a noncompetitive action;
- If competitive a copy of the source selection criteria; and
- Evidence of local independent review and approval including legal review by both the contractor and DOE Field/Site office. This includes submission of comments and resolution thereof.

Prior to the subcontract award. If the subcontract action is competitive, the following documents shall be submitted for review:

- Documentation supporting the technical evaluation;
- Documentation (including technical evaluation of costs) to support a pricing action (including evaluation of fee or profit);
- Draft (unsigned) Source Selection Statement (if applicable); and
- Evidence of local independent review and approval including legal review by both the contractor and DOE Field/Site office. This includes submission of comments and resolution thereof.

Prior to the start of negotiations. If the subcontract action is non-competitive, the following documents shall be submitted for review:

- Documentation (including technical evaluation of costs) to support a pricing action (including evaluation of fee or profit);
- Evidence of local independent review and approval including legal review by both the contractor and DOE Field/Site office. This includes submission of comments and resolution thereof.

Prior to the Completion of Negotiations. If there were significant departures from the objectives of the pre-negotiation plan or provisions of the model contract, or if new and significant issues developed which were not addressed in the pre-negotiation plan, the CO shall submit these revisions to the OCM for review and approval.

After Completing Negotiations. One copy of the post negotiation summary and negotiated contract shall be submitted for Headquarters Business Clearance review and approval to the OCM prior to award of the contract. In the event all of the pre-negotiation objectives were substantially met, OCM may elect to waive, or limit, its review of post negotiation documents. In this event, the CO should provide OCM with a copy for information purposes and not for the purpose of obtaining OCM review and approval.

DOCUMENTS REVIEW

The OCM review of the subcontract package will include:

- Acquisition strategy to include business and financial aspects;
- Regulatory and policy compliance;
- Verification that the clauses are appropriate for the type of contract and technical requirements;
- Review may include the following:
  - Appropriate security clauses are included if access to restricted or classified data is anticipated;
  - For capital asset acquisitions greater than $5 million, application of DOE Order and Manual 413.3
  - If the solicitation contemplates a set-aside, the required small business or small disadvantaged business clauses;
  - Appropriate cost accounting standards clauses; and
  - Organizational Conflicts of Interest clauses specified by FAR Subpart 9.5 and DEAR Subpart 909.5.

- Review the documentation to ensure that it is internally consistent. For example, verify the following:
  - The evaluation criteria are clear and do not overlap;
  - The evaluation criteria are appropriate for the acquisition including how cost/price will be evaluated;
  - Past performance is evaluated;
  - Position descriptions are clear and appropriately written to meet requirements (that is, not overly restrictive or overly permissive). and
  - The prime contractor may be asked to provide an explanation and justification for any unusual solicitation language.

ATTACHMENT H —INTERAGENCY AGREEMENTS

DOCUMENTS SUBMISSION

The following documents and information shall be submitted:

- Name and telephone number of the cognizant Headquarters program official;
- Name, telephone number and email address of the cognizant CO and contract specialist;
- A copy of the SOW and other applicable contractual documents should the servicing agency be using an existing contract;
- The Determination and Findings signed by the CO supporting the use of an interagency agreement (IA) ; and,
- Evidence of local independent review and approval including legal review. This includes submission of comments and resolution thereof.

DOCUMENTS REVIEW

The OCM review of the IA package will include:

- Regulatory and policy compliance;
- Ensure that the supplies or services requested under the IA are within the scope of the servicing agency's contract;
- Ensure the servicing agency's contract does not circumvent DOE policies with respect to competition, small business and performance based acquisition;
- Verification that any special DOE unique terms and conditions are appropriate for the type of contract requirements;
- Ensure that the supplies or services being acquired are within the servicing agency's authority; and
- Appropriate security clauses are included if access to restricted or classified data is anticipated.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-41

DATE: June 29, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Department of Energy Rulemaking on Research Misconduct

SUMMARY: This Policy Flash distributes the Department's interim final rules on research misconduct that were published in the Federal Register on June 28, 2005 and are effective on July 28, 2005. These rules includes a general statement of policy and standard financial assistance and procurement requirements that implement the government-wide policy on research misconduct issued by the White House Office of Science and Technology Policy.

POLICY FLASH
2005-41

The attached Federal Register Notice promulgates a new 10 CFR Part 733, "Allegations of Research Misconduct," and amends the financial assistance and procurement regulations as follows:

Amendments to the DOE Acquisition Regulations (DEAR):

- Adds § 935.070, Research misconduct, and § 935.071, Contract clause, which prescribes the inclusion of the research misconduct clause.
- Adds a new research misconduct clause at § 952.235-71.
- Amends § 970.5204-3, Access to and ownership of records, to provide that records generated by a management and operating contractor during the course of responding to allegations of research misconduct will be considered owned by the contractor.

Amendment to the DOE Assistance Rules: Adds a new section on research misconduct at 10 CFR 600.31.

Contracting Officer's Responsibilities

Contracting Officers must:

1. Insert the DEAR changes in applicable solicitations issued on or after the effective date of this rule, and may, at their discretion, include these DEAR changes in solicitations issued before the effective date of this rule, provided award of the resulting contract(s) occurs on or after the effective date.

2. Modify existing management and operating (M&O) contracts involving research at the next fee negotiation/annual renewal after the effective date of this rule.

3. Apply the DEAR changes to M&O contracts that involve research when the contract is extended in accordance with the Department's extend/compete policies or when an option is exercised.

4. Advise Trudy Wood in the Office of Procurement and Assistance Policy (See e-mail address below) when applicable DOE M&O contracts have been modified and Scott Clemons in the National Nuclear Security Administration at scott.clemons@nnsa.doe.gov when applicable NNSA M&O contracts have been modified.

If you have questions regarding the research misconduct requirments or this Policy Flash, contact Trudy Wood at 202 287-1336 or by e-mail at trudy.wood@hq.doe.gov.

Attachment

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

§ 5502.105 Agency procedures.

(a) The designated agency ethics official or, with the concurrence of the designated agency ethics official, each of the separate agency components of HHS listed in § 5501.102(a) of this chapter may prescribe procedures for the submission and review of each report filed under this part. These procedures may provide for filing extensions, for good cause shown, totaling not more than 90 days.

(b) For good cause, the designated agency ethics official may extend the reporting deadlines for reports required under this part during the initial implementation phase for any reporting requirement, without regard to the 90 day maximum specified in paragraph (a) of this section.

■ 3. Amend § 5502.106 by revising paragraph (c) to read as follows:

§ 5502.106 Supplemental disclosure of prohibited financial interests applicable to employees of the Food and Drug Administration and the National Institutes of Health.

* * * * *

(c) *Report of prohibited financial interests.*—(1) *New entrant employees.* A new FDA employee, other than a public filer or a confidential filer, shall report in writing within 30 days after entering on duty with the FDA any prohibited financial interest held upon commencement of employment with the agency. A new NIH employee, other than a public filer or a confidential filer, who enters on duty at the NIH after February 3, 2005, and before September 4, 2005, shall report in writing on or before October 3, 2005, any prohibited financial interest held upon commencement of employment with the agency. A new NIH employee, other than a public filer or a confidential filer, who enters on duty at the NIH on or after September 4, 2005, shall report in writing within 30 days after entering on duty with the NIH any prohibited financial interest held upon commencement of employment with the agency.

(2) *Reassigned employees.* An employee of a separate agency component other than the FDA or of the remainder of HHS who is reassigned to a position at the FDA shall report in writing within 30 days of entering on duty with the FDA any prohibited financial interest held on the effective date of the reassignment to the agency. An employee of a separate agency component other than the NIH or of the remainder of HHS who is reassigned to a position at the NIH after February 3, 2005, and before September 4, 2005, shall report in writing on or before October 3, 2005, any prohibited financial interest held on the effective date of the reassignment to the agency. An employee of a separate agency component other than the NIH or of the remainder of HHS who is reassigned to a position at the NIH on or after September 4, 2005, shall report in writing within 30 days of entering on duty with the NIH any prohibited financial interest held on the effective date of the reassignment to the agency.

(3) *Incumbent employees.* An incumbent employee of the FDA who acquires any prohibited financial interest shall report such interest in writing within 30 days after acquiring the financial interest. An incumbent employee of the NIH who acquires any prohibited financial interest after February 3, 2005, and before September 4, 2005, shall report such interest in writing on or before October 3, 2005. An incumbent employee of the NIH who acquires any prohibited financial interest on or after September 4, 2005, shall report such interest in writing within 30 days after acquiring the financial interest. An incumbent employee on duty at the NIH on February 3, 2005, shall report in writing on or before October 3, 2005, any prohibited financial interest held on February 3, 2005.

[FR Doc. 05–12733 Filed 6–23–05; 5 pm]

BILLING CODE 4150–03–P

DEPARTMENT OF ENERGY

10 CFR Parts 600 and 733

48 CFR Parts 935, 952 and 970

RIN 1901–AA89

Policy on Research Misconduct

AGENCY: Department of Energy.

ACTION: Notice of interim final rulemaking and opportunity for comment.

SUMMARY: The Department of Energy (DOE) is publishing an interim final general statement of policy and interim final financial assistance and procurement requirements to implement the government-wide Federal Policy on Research Misconduct. These interim final rules are designed to protect the integrity of research and development funded by DOE.

DATES: The effective date is July 28, 2005. Written comments must be received on or before the close of business August 29, 2005.

ADDRESSES: Comments (5 copies) should be addressed to: Christine Chalk, SC–5, U.S. Department of Energy, Office of Science, Room 3H–051, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Christine Chalk at 202–586–7203 *(Christine.Chalk@science.doe.gov).*

SUPPLEMENTARY INFORMATION:

I. Background.
II. Discussion of the General Statement of Policy and Standard Requirements.
III. Public Comment Procedures.
IV. Procedural Review Requirements.
A. Review Under Executive Order 12866.
B. Review Under Executive Order 12988.
C. Review Under the Regulatory Flexibility Act.
D. Review Under the Paperwork Reduction Act.
E. Review Under the National Environmental Policy Act.
F. Review Under Executive Order 13132.
G. Review Under The Unfunded Mandates Reform Act of 1995.
H. Review Under the Treasury and General Government Appropriations Act, 1999.
I. Review Under the Treasury And General Government Appropriations Act, 2001.
J. Review Under the Small Business Regulatory Enforcement Fairness Act.

I. Background

In 1996, the White House Office of Science and Technology Policy (OSTP) began the process of formulating a uniform government-wide Federal policy on research misconduct. OSTP published a proposed policy on research misconduct in the **Federal Register** at 64 FR 55722, October 14, 1999, and published the final policy at 65 FR 76260, December 6, 2000 (Federal Policy). The Federal Policy is available on the Office of Science Web site at *http://www.sc.doe.gov/misconduct/finalpolicy.pdf.*

The objective of the Federal Policy is to create a uniform policy framework for Federal agencies for the handling of allegations of misconduct in federally funded or supported research. Within this framework, each Federal agency funding or supporting research is expected to fashion its own regulations to accommodate the various types of research transactions in which it is engaged. This rule implements the Federal Policy for DOE including the National Nuclear Security Administration. In keeping with these objectives, these DOE regulations incorporate key aspects of the Federal Policy. In particular, research misconduct is being defined as including fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but not as including honest error or differences of opinion. In addition, a finding of research

misconduct requires a determination, based on a preponderance of the evidence, that research misconduct has occurred, including a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

The core principle of the Federal Policy is that, while research organizations have the primary responsibility for the inquiry, investigation, and adjudication of allegations of research misconduct, Federal agencies have ultimate oversight authority for the research they fund or support. While there may be some overlap in the actions that may be pursued by Federal agencies and research organizations, DOE has designed this rule to assure that if an allegation of research misconduct is made against a contractor or recipient of financial assistance, either the contractor or recipient or, if appropriate, DOE, investigates that allegation. Federal law prescribes procedural frameworks for adverse contract actions, adverse assistance actions, suspensions, or debarments that are different from procedural frameworks for competing for Federal procurement or assistance awards, and for adverse personnel actions against Federal civil service employees. Further, the DOE Office of the Inspector General (OIG) may proceed under its previously existing administrative investigation process when misconduct is alleged against Federal civil service employees, contractors or recipients of financial assistance. In addition, if a contractor or financial assistance recipient cannot conduct its own research misconduct investigation the rule provides that DOE will be responsible for conducting the investigation.

In order to best implement the Federal Policy, DOE promulgates a new 10 CFR part 733 (Allegations of Research Misconduct), which sets forth a general statement of policy applicable to research conducted under a DOE contract or financial assistance agreement. Consistent with the general statement of policy, DOE today amends 10 CFR part 600 (Financial Assistance Rules), 48 CFR part 935 (Research and Development Contracting), 48 CFR part 952 (Solicitation Provisions and Contract Clauses), and 48 CFR part 970 (DOE Management and Operating Contracts). The Secretary of Energy has approved this notice for publication in the **Federal Register**. For all contracts, contracting officers must apply the DOE Acquisition Regulations (DEAR) changes (codified at 48 CFR) to solicitations issued on or after the effective date of this rule and may, at their discretion, include these DEAR changes in solicitations issued before the effective date of this rule, provided award of the resulting contract(s) occurs on or after the effective date.

For management and operating contracts, contracting officers must apply these DEAR changes: to contracts extended in accordance with the Department's extend/compete policies and procedures (48 CFR 917.6, 48 CFR 970.1706, and internal guidance); and to options exercised under competitively awarded management and operating contracts (48 CFR 970.1706).

For management and operating contracts, contracting officers should modify existing contracts at the next fee negotiation/annual renewal after the effective date of this rule.

II. Discussion of the General Statement of Policy and Standard Requirements

Since research for DOE occurs pursuant to financial assistance agreements or contracts, the general statement of policy provides that DOE will implement the Federal Policy through the insertion in financial assistance agreements and contracts of standard requirements based on the Federal Policy. DOE expects that these standard requirements will result in most allegations of research misconduct being handled in accordance with the Federal Policy by the research institution where the research misconduct is alleged to have taken place.

The general statement of policy also sets forth guidance to DOE offices with regard to the processing of allegations of research misconduct made directly to DOE. The guidance provides for initial handling of such allegations by the DOE office programmatically responsible for an assistance agreement or contract. That office in turn will consult with the DOE Office of the Inspector General (IG) to determine whether that office will choose to investigate the allegation. If the IG declines to investigate, the DOE program office will refer the allegation to the appropriate contracting officer responsible for the administration of the assistance agreement or contract for processing by the assistance recipient or contractor consistent with requirements of the applicable research misconduct requirements. If the Department elects to act in lieu of the contractor or financial assistance recipient, the research misconduct investigation shall be conducted by the DOE office programmatically responsible for the assistance agreement or contract with support from other departmental elements, as appropriate.

DOE is amending the DEAR at 48 CFR part 935 to prescribe the inclusion of requirements on research misconduct in all DOE contracts that involve research. DOE also is amending part 952 of the DEAR and 10 CFR part 600, respectively, to add requirements that by accepting the funds under a contract, including a management and operating contractor a financial assistance award, the recipient of DOE funds is making assurances that it has established an administrative process for reviewing, investigating, and reporting allegations of research misconduct and that it will comply with its own administrative process and the requirements of 10 CFR part 733 for review, investigation, and reporting of research misconduct. DOE also is amending part 970 of the DEAR to provide that records generated by a management and operating contractor during the course of responding to allegations of research misconduct will be considered owned by the contractor.

As suggested in the Federal Policy, DOE expects debarment and suspension would be available as possible recommended remedies for a finding of research misconduct. These remedies would exclude a person or organization from participating in research activities funded by the Federal Government. DOE's non-procurement suspension and debarment rule is promulgated at 10 CFR part 606, while the Federal procurement suspension and debarment rule is promulgated at 48 CFR part 909. Both regulations require a fact-finding process if there are any facts in dispute prior to a suspension or debarment determination. The fact-finding process used to make a determination of research misconduct under this rule would satisfy the requirements for a fact-finding hearing as adopted in the DOE's non-procurement debarment and suspension regulations, as well as the requirements for a fact-finding hearing as described in the FAR.

III. Public Comment Procedures

Interested persons are invited to participate by submitting data, views or arguments with respect to the new regulation in this rulemaking. Five copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice of rulemaking. All comments received will be available for public inspection as part of the administrative record on file for this rulemaking in the Department of Energy Freedom of Information Reading Room, Room 1E–090, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–

3142, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received by the date indicated in the DATES section of this notice of rulemaking and all other relevant information in the record will be carefully assessed and fully considered prior to the publication of the final rule. Any information or data considered to be exempt from public disclosure by law must be so identified and submitted in writing, one copy, as well as one complete copy from which the information believed to be exempt from disclosure is deleted. DOE will determine if the information or data is exempt from disclosure.

IV. Procedural Review Requirements

A. Review Under Executive Order 12866

This regulatory action has been determined to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB). OMB has completed its review.

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. The review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department has completed the required review and determined that, to the extent permitted by law, the regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires that a Federal agency prepare a regulatory flexibility analysis for any rule for which the agency is required to publish a general notice of rulemaking. Today's rule consists of a general statement of policy, amendments to financial assistance regulations, and amendments to procurement regulations. Each part of today's rule is exempt from the requirement to publish a general notice of proposed rulemaking under the Administrative Procedure Act (5 U.S.C. 553) or any other law. Therefore, the Regulatory Flexibility Act does not apply to this rulemaking.

D. Review Under the Paperwork Reduction Act

No new information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, are imposed by today's regulatory action.

E. Review Under the National Environmental Policy Act

The Department has concluded that promulgation of this rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by Department of Energy regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the rule and amendments to the Department of Energy Acquisition Regulation (DEAR) would be strictly procedural (categorical exclusion A6). Therefore, this rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 1999) requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have "Federalism implications." As defined in the Executive Order, policies that have Federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The Department has examined this rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of $100 million or more. This rulemaking affects private sector entities, and the impact is less than $100 million.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's rule does not impact on the autonomy or integrity of the family institution. Accordingly, the Department has concluded that it is not necessary to prepare a Family Policymaking Statement.

I. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to the general guideline issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002) and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rulemaking under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under the Small Business Regulatory Enforcement Fairness Act

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's interim final rule prior to its effective date. The report will state that the rule is not a major rule under 5 U.S.C. 804(2).

List of Subjects

10 CFR Part 600

Administrative practice and procedure.

10 CFR Part 733

Investigations, Reporting and recordkeeping requirements, Research, Science and technology, Scientists.

48 CFR Parts 935, 952, and 970

Government procurement.

Issued in Washington, DC on June 20, 2005.

Raymond L. Orbach,

Director of Science.

■ For the reasons set out in the preamble, Chapters II and III of title 10 and Chapter 9 of title 48 of the Code of Federal Regulations respectively, are to be amended as set forth below:

PART 600—FINANCIAL ASSISTANCE RULES

■ 1. The authority citation for 10 CFR part 600 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.*; 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.*, unless otherwise noted.

■ 2. Add § 600.31 to subpart A to read as follows:

§ 600.31 Research misconduct.

(a) A recipient is responsible for maintaining the integrity of research of any kind under an award from DOE including the prevention, detection, and remediation of research misconduct, and the conduct of inquiries, investigations, and adjudication of allegations of research misconduct in accordance with the requirements of this section.

(b) For purposes of this section, the following definitions are applicable:

Adjudication means a formal review of a record of investigation of alleged research misconduct to determine whether and what corrective actions and sanctions should be taken.

Fabrication means making up data or results and recording or reporting them.

Falsification means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Finding of Research Misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

Inquiry means information gathering and initial fact-finding to determine whether an allegation or apparent instance of misconduct warrants an investigation.

Investigation means the formal examination and evaluation of the relevant facts.

Plagiarism means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

Research means all basic, applied, and demonstration research in all fields of science, medicine, engineering, and mathematics, including, but not limited to, research in economics, education, linguistics, medicine, psychology, social sciences statistics, and research involving human subjects or animals.

Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

Research record means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

(c) Unless otherwise instructed by the contracting officer, the recipient must conduct an initial inquiry into any allegation of research misconduct. If the recipient determines that there is sufficient evidence to proceed to an investigation, it must notify the contracting officer and, unless otherwise instructed, the recipient must:

(1) Conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted;

(2) Inform the contracting officer if an initial inquiry supports an investigation and, if requested by the contracting officer thereafter, keep the contracting officer informed of the results of the investigation and any subsequent adjudication. When an investigation is complete, the recipient will forward to the contracting officer a copy of the evidentiary record, the investigative report, any recommendations made to the recipient's adjudicating official, and the adjudicating official's decision and notification of any corrective action taken or planned, and the subject's written response to the recommendations (if any).

(3) If the investigation leads to a finding of research misconduct, conduct an adjudication by a responsible official who was not involved in the inquiry or investigation and is separated organizationally from the element which conducted the investigation. The adjudication must include a review of the investigative record and, as warranted, a determination of appropriate corrective actions and sanctions.

(d) The Department may elect to act in lieu of the recipient in conducting an inquiry or investigation into an allegation of research misconduct if the contracting officer finds that:

(1) The research organization is not prepared to handle the allegation in a manner consistent with this section;

(2) The allegation involves an entity of sufficiently small size that it cannot reasonably conduct the inquiry;

(3) DOE involvement is necessary to ensure the public health, safety, and security, or to prevent harm to the public interest; or,

(4) The allegation involves possible criminal misconduct.

(e) DOE reserves the right to pursue such remedies and other actions as it deems appropriate, consistent with the terms and conditions of the award instrument and applicable laws and regulations. However, the recipient's good faith administration of this section and the effectiveness of its remedial actions and sanctions shall be positive considerations and shall be taken into account as mitigating factors in assessing the need for such actions. If DOE pursues any such action, it will inform the subject of the action of the outcome and any applicable appeal procedures.

(f) In conducting the activities in paragraph (c) of this section, the recipient and the Department, if it elects to conduct the inquiry or investigation, shall adhere to the following guidelines:

(1) *Safeguards for information and subjects of allegations.* The recipient shall provide safeguards to ensure that individuals may bring allegations of research misconduct made in good faith to the attention of the recipient without suffering retribution. Safeguards include: protection against retaliation; fair and objective procedures for examining and resolving allegations;

and diligence in protecting positions and reputations. The recipient shall also provide the subjects of allegations confidence that their rights are protected and that the mere filing of an allegation of research misconduct will not result in an adverse action. Safeguards include timely written notice regarding substantive allegations against them, a description of the allegation and reasonable access to any evidence submitted to support the allegation or developed in response to an allegation and notice of any findings of research misconduct.

(2) *Objectivity and expertise.* The recipient shall select individual(s) to inquire, investigate, and adjudicate allegations of research misconduct who have appropriate expertise and have no unresolved conflict of interest. The individual(s) who conducts an adjudication must not be the same individual(s) who conducted the inquiry or investigation, and must be separate organizationally from the element that conducted the inquiry or investigation.

(3) *Timeliness.* The recipient shall coordinate, inquire, investigate and adjudicate allegations of research misconduct promptly, but thoroughly. Generally, an investigation should be completed within 120 days of initiation, and adjudication should be complete within 60 days of receipt of the record of investigation.

(4) *Confidentiality.* To the extent possible, consistent with fair and thorough processing of allegations of research misconduct and applicable law and regulation, knowledge about the identity of the subjects of allegations and informants should be limited to those with a need to know.

(5) *Remediation and sanction.* If the recipient finds that research misconduct has occurred, it shall assess the seriousness of the misconduct and its impact on the research completed or in process. The recipient must take all necessary corrective actions. Such action may include but are not limited to, correcting the research record and as appropriate imposing restrictions, controls, or other parameters on research in process or to be conducted in the future. The recipient must coordinate remedial actions with the contracting officer. The recipient must also consider whether personnel sanctions are appropriate. Any such sanction must be consistent with any applicable personnel laws, policies, and procedures, and must take into account the seriousness of the misconduct and its impact, whether it was done knowingly or intentionally, and whether it was an isolated event or pattern of conduct.

(g) By executing this agreement, the recipient provides its assurance that it has established an administrative process for performing an inquiry, mediating if possible, investigating, and reporting allegations of research misconduct; and that it will comply with its own administrative process and the requirements and definitions of 10 CFR part 733 for performing an inquiry, possible mediation, investigation and reporting of allegations of research misconduct.

(h) The recipient must insert or have inserted the substance of this section, including paragraph (g), in subawards at all tiers that involve research.

PART 733—ALLEGATIONS OF RESEARCH MISCONDUCT

■ 3. Part 733 is added to Chapter III of title 10 of the Code of Federal Regulations to read as follows:

PART 733—[ADDED]

Sec.
733.1 Purpose.
733.2 Scope.
733.3 Definitions.
733.4 Research misconduct requirements.
733.5 Allegations received by DOE.
733.6 Consultation with the DOE Office of the Inspector General.
733.7 Referral to the contracting officer.
733.8 Contracting officer procedures.

Authority: 42 U.S.C. 2201; 7254; 7256; 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

§ 733.1 Purpose.

The purpose of this part is to set forth a general statement of policy on the treatment of allegations of research misconduct consistent with Federal Policy on Research Misconduct established by the White House Office of Science and Technology Policy on December 6, 2000 (65 FR 76260–76264).

§ 733.2 Scope.

This part applies to allegations of research misconduct with regard to scientific research conducted under a Department of Energy contract or an agreement.

§ 733.3 Definitions.

The following terms used in this part are defined as follows:

Contract means an agreement primarily for the acquisition of goods or services that is subject to the Federal Acquisition Regulations (48 CFR Chapter 1) and the DOE Acquisition Regulations (48 CFR Chapter 9).

DOE means the U.S. Department of Energy (including the National Nuclear Security Administration).

DOE Element means a major division of DOE, usually headed by a Presidential appointee, which has a delegation of authority to carry out activities by entering into contracts or financial assistance agreements.

Fabrication means making up data or results and recording or reporting them.

Falsification means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Financial assistance agreement means an agreement the primary purpose of which is to provide appropriated funds to stimulate an activity, including but not limited to, grants and cooperative agreements pursuant to 10 CFR Part 600.

Finding of research misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

Plagiarism means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

Research means all basic, applied, and demonstration research in all fields of science, engineering, and mathematics, such as research in economics, education, linguistics, medicine, psychology, social sciences, statistics, and research involving human subjects or animals.

Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

Research record means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles

§ 733.4 Research misconduct requirements.

DOE intends to apply the research misconduct policy set forth in 65 FR 76260–76264 by including appropriate research misconduct requirements in contracts and financial assistance awards that make contractors and financial recipients primarily responsible for implementing the policy in dealing with allegations of research

misconduct in connection with the proposal, performance or review of research for DOE .

§ 733.5 Allegations received by DOE.

If DOE receives directly a written allegation of research misconduct with regard to research under a DOE contract or financial assistance agreement, DOE will refer the allegation for processing to the DOE Element responsible for the contract or financial assistance agreement.

§ 733.6 Consultation with the DOE Office of the Inspector General.

Upon receipt of an allegation of research misconduct, the DOE Element shall consult with the DOE Office of the Inspector General which will determine whether that office will elect to investigate the allegation.

§ 733.7 Referral to the contracting officer.

If the DOE Office of the Inspector General declines to investigate an allegation of research misconduct, the DOE Element should forward the allegation to the contracting officer responsible for administration of the contract or financial assistance agreement to which the allegation pertains.

§ 733.8 Contracting officer procedures.

Upon receipt of an allegation of research misconduct by referral under § 733.7, the contracting officer should, by notification of the contractor or financial assistance recipient:

(a) Require the contractor or the financial assistance recipient to act on the allegation consistent with the Research Misconduct requirements in the contract or financial assistance award to which the allegation pertains; or

(b) In the event the contractor or the financial assistance recipient is unable to act:

(1) Designate an appropriate DOE program to conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted; and

(2) Make the appropriate findings consistent with the Research Misconduct requirements contained in the contract or financial assistance award, in order to act in lieu of the contractor or financial assistance recipient.

Title 48

PART 935—RESEARCH AND DEVELOPMENT CONTRACTING

■ 4. The authority citation for 48 CFR part 935 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

■ 5. Sections 935.070 and 935.071 are added to read as follows:

935.070 Research misconduct.

(a) *Applicability.* The DOE research misconduct policy set forth at 10 CFR part 733 addresses research misconduct by individuals who propose, perform or review research of any kind for the Department of Energy pursuant to a contract. The regulation applies regardless of where the research or other activity is conducted or by whom.

(b) *Definition.* Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or differences of opinion. A finding of research misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred, including a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

935.071 Contract clause.

The contracting officer must insert the clause at 952.235–71, Research Misconduct, in contracts, including management and operating contracts, that involve research.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. The authority citation for part 952 continues to read as follows:

Authority: 42 U.S.C. 2201, 2282a, 2282b, 2282c, 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

■ 7. Section 952.235–71 is added to read as follows:

952.235–71 Research Misconduct.

As prescribed in 48 CFR Part 935.071, insert the following clause:

Research Misconduct (JUL 2005)

(a) The contractor is responsible for maintaining the integrity of research performed pursuant to this contract award including the prevention, detection, and remediation of research misconduct as defined by this clause, and the conduct of inquiries, investigations, and adjudication of allegations of research misconduct in accordance with the requirements of this clause.

(b) Unless otherwise instructed by the contracting officer, the contractor must conduct an initial inquiry into any allegation of research misconduct. If the contractor determines that there is sufficient evidence to proceed to an investigation, it must notify the contracting officer and, unless otherwise instructed, the contractor must:

(1) Conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted;

(2) If the investigation leads to a finding of research misconduct, conduct an adjudication by a responsible official who was not involved in the inquiry or investigation and is separated organizationally from the element which conducted the investigation. The adjudication must include a review of the investigative record and, as warranted, a determination of appropriate corrective actions and sanctions.

(3) Inform the contracting officer if an initial inquiry supports a formal investigation and, if requested by the contracting officer thereafter, keep the contracting officer informed of the results of the investigation and any subsequent adjudication. When an investigation is complete, the contractor will forward to the contracting officer a copy of the evidentiary record, the investigative report, any recommendations made to the contractor's adjudicating official, the adjudicating official's decision and notification of any corrective action taken or planned, and the subject's written response (if any).

(c) The Department may elect to act in lieu of the contractor in conducting an inquiry or investigation into an allegation of research misconduct if the contracting officer finds that:

(1) The research organization is not prepared to handle the allegation in a manner consistent with this clause;

(2) The allegation involves an entity of sufficiently small size that it cannot reasonably conduct the inquiry;

(3) DOE involvement is necessary to ensure the public heath, safety, and security, or to prevent harm to the public interest; or,

(4) The allegation involves possible criminal misconduct.

(d) In conducting the activities under paragraphs (b) and (c) of this clause, the contractor and the Department, if it elects to conduct the inquiry or investigation, shall adhere to the following guidelines:

(1) *Safeguards for information and subjects of allegations.* The contractor shall provide safeguards to ensure that individuals may bring allegations of research misconduct made in good faith to the attention of the contractor without suffering retribution. Safeguards include: protection against retaliation; fair and objective procedures for examining and resolving allegations; and diligence in protecting positions and reputations. The contractor shall also provide

the subjects of allegations confidence that their rights are protected and that the mere filing of an allegation of research misconduct will not result in an adverse action. Safeguards include timely written notice regarding substantive allegations against them, a description of the allegation and reasonable access to any evidence submitted to support the allegation or developed in response to an allegation and notice of any findings of research misconduct.

(2) *Objectivity and Expertise.* The contractor shall select individual(s) to inquire, investigate, and adjudicate allegations of research misconduct who have appropriate expertise and have no unresolved conflict of interest. The individual(s) who conducts an adjudication must not be the same individual(s) who conducted the inquiry or investigation, and must be separate organizationally from the element that conducted the inquiry or investigation.

(3) *Timeliness.* The contractor shall coordinate, inquire, investigate and adjudicate allegations of research misconduct promptly, but thoroughly. Generally, an investigation should be completed within 120 days of initiation, and adjudication should be complete within 60 days of receipt of the record of investigation.

(4) *Confidentiality.* To the extent possible, consistent with fair and thorough processing of allegations of research misconduct and applicable law and regulation, knowledge about the identity of the subjects of allegations and informants should be limited to those with a need to know.

(5) *Remediation and Sanction.* If the contractor finds that research misconduct has occurred, it shall assess the seriousness of the misconduct and its impact on the research completed or in process. The contractor must take all necessary corrective actions. Such action may include but are not limited to, correcting the research record and as appropriate imposing restrictions, controls, or other parameters on research in process or to be conducted in the future. The contractor must coordinate remedial actions with the contracting officer. The contractor must also consider whether personnel sanctions are appropriate. Any such sanction must be considered and effected consistent with any applicable personnel laws, policies, and procedures, and shall take into account the seriousness of the misconduct and its impact, whether it was done knowingly or intentionally, and whether it was an isolated event or pattern of conduct.

(e) DOE reserves the right to pursue such remedies and other actions as it deems appropriate, consistent with the terms and conditions of the award instrument and applicable laws and regulations. However, the contractor's good faith administration of this clause and the effectiveness of its remedial actions and sanctions shall be positive considerations and shall be taken into account as mitigating factors in assessing the need for such actions. If DOE pursues any such action, it will inform the subject of the action of the outcome and any applicable appeal procedures.

(f) *Definitions.*

Adjudication means a formal review of a record of investigation of alleged research misconduct to determine whether and what corrective actions and sanctions should be taken.

Fabrication means making up data or results and recording or reporting them.

Falsification means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Finding of Research Misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

Inquiry means information gathering and initial fact-finding to determine whether an allegation or apparent instance of misconduct warrants an investigation.

Investigation means the formal examination and evaluation of the relevant facts.

Plagiarism means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

Research means all basic, applied, and demonstration research in all fields of science, medicine, engineering, and mathematics, including, but not limited to, research in economics, education, linguistics, medicine, psychology, social sciences statistics, and research involving human subjects or animals.

Research Misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

Research record means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

(g) By executing this contract, the contractor provides its assurance that it has established an administrative process for performing an inquiry, mediating if possible, or investigating, and reporting allegations of research misconduct; and that it will comply with its own administrative process and the requirements of 10 CFR part 733 for performing an inquiry, possible mediation, investigation and reporting of research misconduct.

(h) The contractor must insert or have inserted the substance of this clause, including paragraph (g), in subcontracts at all tiers that involve research.

(End of Clause)

PART 970—MANAGEMENT AND OPERATING CONTRACTS

■ 7. The authority citation for part 970 continues to read as follows:

Authority: 42 U.S.C. 2201, 2282a, 2282b, 2282c; 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

■ 8. Section 970.5204–3 is amended by revising paragraph (b)(1) to read as follows:

970.5204–3 Access to and ownership of records.

* * * * *

(b) * * *

(1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, except for those records described by the contract as being maintained in Privacy Act systems of records.

* * * * *

[FR Doc. 05–12645 Filed 6–27–05; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE227; Special Condition No. 23–169–SC]

Special Conditions: Diamond Aircraft Industries, DA–42; Diesel Cycle Engine Using Turbine (Jet) Fuel

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Diamond Aircraft Industries (DAI) DA–42 airplane. This airplane will have a novel or unusual design feature(s) associated with the installation of a diesel cycle engine utilizing turbine (jet) fuel. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for installation of this new technology engine. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is June 22, 2005.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-42

DATE: July 7, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Acquisition Letter 2005-10, Implementation of HSPD-12 and FIPS Pub 201

SUMMARY: This Flash transmits Acquisition Letter 2005-10 to implement Homeland Security Presidential Directive 12 (HSPD-12) and direct the use of Federal Information Processing Standard Publication 201 (FIPS Pub 201) in the solicitation and award of contracts involving physical access to agency premises and electronic authentication and access control to Federal

agencies computer systems and electronic infrastructure. This AL implements HSPD-12 and FIPS Pub 201 by providing specific procedures that require review by designated officials before contracting officers process covered procurements.

The major changes established by this guidance are:

- That solicitations for covered procurements require compliance with the FIPS Pub 201 standards through the use of a model contract clause provided by the AL and a statement of work revised, as necessary, for FIPS Pub 201 compliance;
- That covered procurements already solicited but not yet awarded be reviewed and amended to include the model contract clause and a FIPS Pub 201 compliant statement of work; and
- That active contracts with covered items not yet delivered be reviewed and modified, as necessary, to assure FIPS Pub 201 compliance.

In addition, the AL provides a waiver procedure; explains the AL's application to DOE's management and operating and other major facilities contractors; and explains the application to service contracts.

Questions concerning this Policy Flash should be directed to Robert Webb at (202)287-1338.

for Robert M. Webb
Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Department of Energy
Acquisition Regulation

No. AL-2005-10
Date 07/07/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE Procurement Executive.

Subject: Implementation of HSPD-12

References: **Homeland Security Presidential Directive 12 (HSPD-12)**

Federal Information Processing Standard Publication 201 (FIPS Pub 201)

When is this Acquisition Letter (AL) Effective?

This AL is effective upon issuance.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Robert M. Webb of the Office of Procurement and Assistance Policy at (202)287-1338 or Robert.Webb@hq.doe.gov.

Visit our website at www.pr.doe.gov for information on Acquisition Letters and other policy issues.

What is the Purpose of this Acquisition Letter?

The purpose of this Acquisition Letter is to implement HSPD-12 and direct the use of FIPS Pub 201 in the solicitation and award of contracts involving physical access to agency premises and electronic authentication and access control to Federal agency's computer systems and electronic infrastructure. As used in this AL, reference to DOE includes both NNSA and non-NNSA sites. Reference to the Chief Information Officer (CIO), refers to the DOE CIO for DOE sites and to the NNSA CIO for NNSA sites.

What is the Background?

On August 27, 2004, President Bush issued HSPD-12, entitled, "Policy for a Common Identification Standard for Federal Employees and Contractors." The Directive states that it is the "policy of the United States to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy by establishing a mandatory, government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors (including contractor employees)."

This policy requires agencies to interconnect badging, physical access, and logical authentication and subsequent access control systems, that is, systems for electronic access to agency electronic infrastructure. When fully implemented, an enhanced employee's or contractor's badge or access authorization, will be necessary for physical access to agency premises and electronic authentication and access control to the agency's computer systems and electronic infrastructure. In the latter case, under normal circumstances, the enhanced employee and contractor badge will take the place of ID/password based authentications for access to the agency's infrastructure, but not necessarily to individual applications, such as Corporate Human Resource Information System (CHRIS), Industry Interactive Procurement System (IIPS), etc. Additionally, when all components of FIPS PUB 201 are fully implemented, one agency's badge or access authorization will be interoperable among Federal agencies, with the host agency retaining responsibility for granting access.

In pursuit of this policy, the Department of Commerce has developed FIPS Pub 201, entitled, "Personal Identification Verification for Federal Employees and Contractors." FIPS Pub 201 is available at http://www.csrc.nist.gov/publications/fips/fips201/FIPS-201-022505.pdf. All Federal agencies are required to implement the identity verification and management and badge issuance objectives of FIPS Pub 201 by October 27, 2005. Full implementation of FIPS PUB 201 is required by October 2008. The DOE CIO is leading the intra-agency project team, which includes representatives of the Office of Security and Safety Performance Assurance (SSA), the Office of Management Budget and Evaluation, DOE program offices, NNSA, the Defense Nuclear Facilities Safety Board, the power marketing administrations, and the Federal Energy Regulatory Commission, responsible for DOE-wide implementation.

What is the Effect on DOE Procurements and Contracts?

The guidance provided in this Acquisition Letter affects the planning, solicitation, evaluation, and award of all procurements for hardware and software components of DOE's electronic infrastructure. This includes such things as access authorization badges, identification badges, badge issuance stations and associated hardware and software, electronic chips intended for use in conjunction with the badges, card readers, middleware to interface with badges, digital certificates, identity management solutions, authentication technologies, access control software, access authorizing equipment, computer components, servers, local area network components, and related hardware and software.

In addition, active contracts requiring the delivery of access or electronic services, hardware, or software as described above must be modified within the scope of the contract to ensure compliance with FIPS Pub 201 to the extent that services or supplies have not already been accepted. See Section C. below.

This AL provides specific guidance to DOE Contracting Officers so that HSPD-12 and FIPS Pub 201 may be implemented with the least impact on DOE's program activities. One should note that no monies are available specifically to implement FIPS Pub 201.

A. Acquisition Planning.

Contracting Officers must not process procurements for hardware, software, or services that involve the purchase of hardware or software associated with physical access to DOE facilities or electronic or logical authentication or access to DOE equipment, computer components, servers, local area network components, and other related hardware and software unless the requirements have been reviewed for compliance with HSPD-12 and FIPS Pub 201 and approved by a designated representative of the CIO or SSA, as appropriate. SSA is the office responsible for review of requirements for physical access control systems, identity verification and management systems, and badge production and issuance systems. A listing of designated CIO and SSA representatives is attached.

B. Current Procurements Pending Award.

If a solicitation for the acquisition of such hardware or software has been issued, Contracting Officers shall require the requestor to submit the statement of work or specifications to a designated representative of the CIO or SSA, as appropriate, for compliance with HSPD-12 and FIPS Pub 201. The Contracting Officer shall amend the solicitation to reflect any changes necessary, after assuring that funds in addition to the original Government estimate associated with bringing the statement of work into compliance are available. A model contract provision is attached for use in affected solicitations and resulting contracts.

C. Current Contracts with Pending Affected Deliveries.

In the case of active contracts for hardware or software involving physical access to DOE facilities or electronic or logical authentication or access to DOE equipment, computer components, servers, local area network components, and other related hardware and software, Contracting Officers must, in consultation with the requestor, notify the designated representative of the CIO or SSA, as appropriate, of any items on the contract not yet delivered and accepted. Pursuant to the guidance received from the representative of the CIO or SSA and consideration of the potential for increased costs, the Contracting Officer shall attempt to negotiate a bilateral modification, or, when necessary, issue a change order, pursuant to the Changes clause of the contract, to alter the original specification to one compliant with HSPD-12 and FIPS Pub 201. If necessary additional funds are not available, Contracting Officers may attempt to negotiate reduced quantities or issue a partial termination for convenience.

D. Waiver.

Program offices requiring hardware or software involved in physical access to DOE facilities or electronic or logical access to DOE equipment, computer components, servers, local area network components, and other related hardware and software may request a waiver from the requirements of HSPD-12 and FIPS Pub 201 from the Chief Information Officer or Director of SSA, as appropriate. Contracting Officers shall process such procurements only upon the written granting of the requested waiver.

E. DOE's Management and Operating and Other Major Facilities Contracts.

Contracting Officers shall instruct DOE's contractors that manage and operate major DOE facilities to comply with HSPD-12 and FIPS Pub 201 in their purchase of hardware or software involved in physical access to DOE facilities or electronic or logical authentication or access to DOE equipment, computer components, servers, local area network components, and related hardware and software.

Contracting Officers shall direct each such contractor to identify an employee to act as liaison with the designated representative of the CIO or SSA, as appropriate. That contractor employee shall coordinate and acquire DOE approval of any prospective purchases for compliance with HSPD-12 and FIPS Pub 201. Contracting Officers shall also direct that the contractor shall not waive any requirement unless approved in writing by the Chief Information Officer or Director of SSA, as appropriate. The contractor should provide a copy of any waiver to the Contracting Officer.

F. Service Contracts.

It should be rare that any contractor, other than DOE's management and operating contractors or other major facilities contractors, supply or acquire hardware, software, or services required to comply with HSPD-12 and FIPS Pub 201. One such circumstance would occur when a contractor has been employed to purchase IT, other electronic equipment, or software that could be used to provide physical access to DOE facilities or electronic or logical authentication or access to DOE equipment, computer components, servers, local area network components, and other related hardware and software. In such cases, the solicitation of prospective contracts shall require compliance with HSPD-12 and FIPS Pub 201.

When an award has been made with items yet to be delivered and any necessary additional funds are available, Contracting Officers shall attempt to negotiate a bilateral modification or, when that is not reasonable possible, issue a change order pursuant to the Changes clause of the contract to require compliance.

Support service contracts, in which contractor employees must have access to DOE facilities physically or electronically merely incidental to their performing their contract, are unaffected by FIPS Pub 201 since the conditions of access are under the control of DOE personnel and affected media such as badges, access authorizations, or passwords, are provided by DOE.

ATTACHMENT I- POINTS OF CONTACT FOR IMPLEMENTATION OF HSPD-12 AND FIPS PUB 201

OFFICE OR SECURITY AND SAFETY PERFORMANCE ASSURANCE:
Kathy S. Reader, SP-1, (202)586-1779.

DOE OFFICE OF CHIEF INFORMATION OFFICER:
Fred Catoe, IM-30, (202)586-3768.

NNSA OFFICE OF CHIEF INFORMATION OFFICER:
Linda Wilbanks, NA-65, (202)586-5242.

ATTACHMENT II- MODEL CONTRACT CLAUSE TO IMPLEMENT HSPD-12 AND FIPS PUB 201

Article XX- Compliance with FIPS Pub 201

This contract involves the acquisition of hardware, software, or services related to physical access to Federal premises or electronic authentication or access control to a Federal agency's computer systems and electronic infrastructure. Any such hardware, software, or services delivered under this contract shall comply with FIPS Pub 201, and FIPS Pub 201 shall take precedence over any conflicting performance requirement of this contract. Should the contractor find that the statement of work or specifications of this contract do not conform to FIPS Pub 201, it shall notify the Contracting Officer of such nonconformance and shall act in accordance with instructions of the Contracting Officer.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-43

DATE: July 15, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Acquisition Letter 2005-11, Home Office Expenses for Management and Operating Contracts

SUMMARY: This Flash transmits Acquisition Letter 2005-11, which provides application guidance to contracting officers on how to: (1) determine if the they should reimburse any home office expenses; (2) calculate a reasonable amount in advance (fixed amount or ceiling) for such expenses; (3) document the rationale for their determinations and calculations; (3) obtain appropriate reviews; and (4) ensure they pay only for what they negotiated.

The major changes established by this guidance are the contracting officer must:

- prior to approving a contractor's request for reimbursement of home office expenses, provide the appropriate Senior Procurement Executive a copy of: the proposed advance agreement; the contract file documentation of the rationale for considering any reimbursement in accordance with the DEAR 970.3102-3-70 criteria; and the analyses performed either to determine the specific costs to be reimbursed as actual costs (and to determine the appropriate ceiling) or to determine the costs to consider in determining the fixed amount; and

- when utilizing reimbursement of actual costs up to a ceiling, request, as appropriate, an audit of costs incurred for home office expenses to ensure only allowable costs are being reimbursed; and

- when utilizing a fixed amount, obtain an audit of the costs the contractor proposes in support of the fixed amount before agreeing to the amount to ensure that only allowable costs are included in the contractor's proposal and to support the determination of the reasonableness of any costs considered in negotiating an equitable amount.

Questions concerning this Policy Flash should be directed to Michael Righi at (202)287-1337.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Department of Energy
Acquisition Regulation

No. AL-2005-11
Date 07/15/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: **Home Office Expenses for Management and Operating Contracts**

References:

DEAR 970.3102-3-70	Home office expenses
FAR 15.404-1	Proposal analysis techniques
FAR 31.109	Advance agreements
FAR Appendix B Subpart 9904.403	Allocation of home office expenses to segments

When is this Acquisition Letter (AL) Effective?

This AL is effective immediately upon issuance.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Michael Righi of the Department of Energy (DOE) Office of Procurement and Assistance Policy at (202) 287-1337 or at Michael.Righi@hq.doe.gov.

Visit the website at http://professionals.pr.doe.gov for information on Acquisition Letters and other policy issues.

What are the Purposes of this AL?

DOE Acquisition Regulation (DEAR) 970.3102-3-70, "Home office expenses," establishes DOE policy for reimbursement of home office expenses under a management and operating (M&O) contract. This AL provides application guidance to contracting officers on how to: (1) determine if the they should reimburse any home office expenses; (2) calculate a reasonable amount in advance (fixed amount or ceiling) for such expenses; (3) document the rationale for their determinations and calculations; (3) obtain appropriate reviews; and (4) ensure they pay only for what they negotiated.

Background

DEAR 970.3102-3-70

DOE Policy is based on the assumption that the M&O contract structure obviates the need for routine contractor home office involvement. However, in accordance with DEAR 970.3102-3-70, "Home office expenses," the contracting officer may, with Head of Contracting Activity (HCA) approval, consider a contractor's request for additional compensation when there is more than minimal home office involvement in the M&O contract work that is not due to the fault or negligence of the contractor, and the request meets all of the other criteria for allowability under the Federal Acquisition Regulation (FAR) and DEAR. Examples could include home office legal support to deal with third party, environmental, safety, or health issues and corporate oversight to ensure strict adherence to critical DOE policies. (NOTE: The HCA's approval to consider a contractor's request is not approval to agree to an amount with the contractor; see "Procurement Executive Review" paragraph.)

Any additional compensation a contracting officer approves shall be only for non-routine contractor home office involvement in the M&O contract effort. The additional compensation may be in the form of "fee in addition to normal fee" or in the form of "compensation on the basis of actual cost." In practice, the former form is seldom used, and activities that recognize some home office expenses typically utilize ceilings (reimburse the contractor's home actual office expenses up to a amount that was determined in advance) or fixed amounts (establish, in advance, an amount the contractor will receive for home office expenses that does not depend on the costs the contractor subsequently actually incurs). Since the decision making process for determining additional compensation on the basis of actual cost is the same as the process for determining additional fee, this AL does not discuss fee separately.

Office of Inspector General (OIG) Reports

In recent audit reports, the OIG questioned the effectiveness of the contracting officer's/field chief financial officer's: reviews of contractors' requests for consideration of additional compensation for home office expenses; analyses of the structure of home office expenses; determinations of ceilings or fixed amounts for approved expenses; documentation of the rationale for agreeing to such ceilings or fixed amounts; and reimbursements of actual costs under negotiated ceilings.

The OIG found a lack of documentation of the distinction between home expenses and other expenses and fees that contracting activities were paying, causing a risk that home office expenses reimbursed under one category of cost could be recognized again under another category, such as additional fee or in the guise of another form of cost.

The OIG also found potentially unallowable costs in some contractors' billings.

What Application Guidance is Provided in this AL?

General

A contracting officer's first responsibility in managing home office expenses is to assess whether the contractor's request meets the requirements of DEAR for paying any additional compensation at all. If it does, the contracting officer must negotiate in advance the specific activity costs eligible for reimbursement that are reasonable and otherwise allowable costs under the contract. The eligible amount may be in the form of a reimbursement of actual costs up to a ceiling or a fixed amount based on an informed estimate of the costs expected to be incurred.

The contracting officer must ensure that in agreeing to the reimbursement of costs for home office expenses that such reimbursement does not duplicate other reimbursements for the same expenses; therefore, the contracting officer must be cognizant of the distinction between home expenses and other expenses and fees that the contractor receives under the contract. Home office expenses reimbursed under one category of cost may not be recognized in any other form of compensation under the contract.

Review and Analysis

Considering the Contractor's Request:

The contracting officer shall review a contractor's request consistent with the requirements of DEAR 970.3102-3-70. In order for its request to be eligible for approval, the contractor must demonstrate that: there is more than minimal home office involvement in the M&O contract work that is not due to the fault or negligence of the contractor; and the request meets all of the other criteria for allowability under the FAR and DEAR.

Form and Amount of Reimbursement:

Reimbursement of home office expenses that meet the criteria of DEAR may be in the form of either actual allowable costs incurred, up to a ceiling, or an agreed to fixed amount based upon an estimate of the allowable costs that will be incurred during the contract.

Reimbursement of actual costs up to a ceiling

The contracting officer, in consultation with the field chief financial officer, shall approve contractor requests for reimbursement of home office expenses on the basis of actual costs consistent with DEAR 970.3102-3-70. An advance agreement (FAR 31.109) shall be established that identifies with reasonable specificity the costs that may be reimbursed consistent with the contracting officer's determination that the costs meet the criteria of DEAR 970.3102-3-70. In no case shall the contracting officer approve reimbursement of costs inconsistent with the DEAR or otherwise unallowable under FAR. The contracting officer should use appropriate proposal analysis techniques from FAR 15.404-1 in determining the ceiling amount.

Additionally, to the extent that the contracting activity's process calls for the contractor to submit detailed requests for reimbursement of actual costs to the chief financial officer/contracting officer, the contracting officer must ensure the requests are reviewed for obvious incongruities with the terms of the contract, take all prudent action, and call the attention of the OIG and the contractor's internal control group to apparent issues.

Fixed amount

Any fixed amount agreed to shall be the subject of an advance agreement (FAR 31.109). The fixed amount shall be based on estimates of anticipated actual costs associated with approved home office activities, consistent with DEAR and FAR, using the appropriate proposal analysis techniques from FAR 15.404-1. In no event shall the fixed amount include estimates of costs unallowable under FAR.

Documentation

The contracting officer's decisions, made in consultation with the field CFO, regarding both whether to pay any additional compensation for home office expenses and in what amount, must be based on an established process. The contracting officer must document the process results in sufficient detail to demonstrate that the contemplated amount is consistent with the DEAR and FAR.

Procurement Executive Review

Prior to approving a contractor's request for reimbursement of home office expenses, the contracting officer shall provide the appropriate Senior Procurement Executive a copy of: the proposed advance agreement; the contract file documentation of the rationale for considering any reimbursement in accordance with the DEAR 970.3102-3-70 criteria; and the analyses performed either to determine the specific costs to be reimbursed as actual costs (and to determine the appropriate ceiling) or to determine the costs to consider in determining the fixed amount. The procurement executive will provide advice or recommendations as appropriate within ten business days of receipt.

Audit

The contracting officer shall:

- when utilizing reimbursement of actual costs up to a ceiling, request, as appropriate, an audit of costs incurred for home office expenses to ensure only allowable costs are being reimbursed; and

- when utilizing a fixed amount, obtain an audit of the costs the contractor proposes in support of the fixed amount before agreeing to the amount to ensure that only allowable costs are included in the contractor's proposal and to support the determination of the reasonableness of any costs considered in negotiating an equitable amount.

ME61-26

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005 – 44

DATE: July 18, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Revision to M&O Contractor Model Subcontract entitled "Standard Research Subcontract (Educational Institution or Nonprofit Organization)"

SUMMARY: This Policy Flash disseminates a minor revision to the M&O contractor model subcontract, which was issued by Policy Flash 2003-03 and last revised by Policy Flash 2005-05.

one small address change in the subject line please!

Done
Sm

POLICY FLASH
2005-44

On June 28, 2005, DOE issued a rulemaking on research misconduct effective July 28, 2005. The rule includes a new research misconduct clause that must be incorporated into M&O contracts that include research and development (R&D) work. The new clause includes a flowdown requirement. Therefore, we have revised the M&O contractor model subcontract entitled, "Standard Research Subcontract (Educational Institution or Nonprofit Organization)," to add the new DEAR clause.

This Policy Flash disseminates an errata sheet and a revised version of the Standard Research Subcontract. A word file of the subcontract is available on the DOE Professionals web site at http://professionals.pr.doe.gov. Click on "M&O Contractor Standard Research Subcontract" under the Procurement heading.

DOE/NNSA Contracting Officers are directed to ensure that their M&O contractors that perform R&D receive a copy of this Policy Flash.

If you have questions regarding this revision, contact Trudy Wood at 202 287-1336 or by e-mail at trudy.wood@hq.doe.gov.

Attachments

Michael Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

ME61-26 closed

Office of Procurement and Assistance Policy
ME-61 Routing and Transmittal Slip

Date: July 18, 2005

		Date:	Action Taken:	Initial
ME-61	Mike Fischetti, Acting Director	07/18/05		MF
ME-61	Sherry Robinson -Admin Asst	07/18/05	Prepared for review	

ME-61 Staff				
Wood, Trudy TW				
Zvolensky, Stephen				
Righi, Michael				
Webb, Robert				
Kniskern, Jacqueline				
Wright, Denise				
Langston, Richard				

Circle One:

Action	Concurrence	For your Information	For Conversation
Approval	Distribution	For your Review	Prepare Reply
As Requested	Fax	Hand carry to	Signature
Circulate X	File	Mail out	Type/Retype
Comments	For Correction	Note and Return	

Due Date:
File/Controlled #:

Xerox:
Copies:

Memorandum:
(Remarks)

The enclosed Policy Flash is ready for signature.

Changes made as requested.

SJR

Wood, Trudy A.

From: Sherry, Paul
Sent: Thursday, July 14, 2005 3:27 PM
To: Wood, Trudy A.
Subject: RE: Change to M&O model subcontract -"Standard Research Subcontract (Educational Institution or Nonprofit Organization.

Hi Trudy,

As per our phone call, if this addition/change is ministerial as you have indicated then your approach makes sense to me.

Paul

-----Original Message-----
From: Wood, Trudy A.
Sent: Wednesday, July 13, 2005 1:06 PM
To: Sherry, Paul; Clemons, Scott
Subject: Change to M&O model subcontract -"Standard Research Subcontract (Educational Institution or Nonprofit Organization.

Paul and Scott,

I'm planning to make a quick revision to the M&O model subcontract to include the new Research Misconduct clause. Please review and let me know if you concur with the changes. I do not intend to go through the formal concurrence process for this minor change unless you think it is necessary. We will issue the revision as a Policy Flash assuming NNSA concurs.

Change to Subcontract

1. 1. Added DEAR 952.235-71 Research Misconduct (See page 13)
2. Did not add clause 970.504-3, "Access to and ownership of records," since it is not currently in subcontract - no flow-down requirement.

Paul, Please check the language on page 11, Clause 10 – CLAUESE INCORPORATED BY REFERENCE. I think the first sentence in the 2nd paragraph covers the terms in this clause. The words "Department" and "DOE" as used in the Research Misconduct clause should keep their same meaning. Let me know if you agree.

Thanks,

Trudy

<< File: MOmodelsubcontractRevJULY2005.doc >>

Wood, Trudy A.

From: Clemons, Scott
Sent: Thursday, July 14, 2005 11:52 AM
To: Wood, Trudy A.; Sherry, Paul
Boyd, David
Subject: RE: Change to M&O model subcontract -"Standard Research Subcontract (Educational Institution or Nonprofit Organization.

Trudy,

Looks good to me, I would say go with it.

Scott

-----Original Message-----
From: Wood, Trudy A.
Sent: Wednesday, July 13, 2005 1:06 PM
To: Sherry, Paul; Clemons, Scott
Subject: Change to M&O model subcontract -"Standard Research Subcontract (Educational Institution or Nonprofit Organization.

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Thanks,

Trudy

<< File: MOmodelsubcontractRevJULY2005.doc >>

July 18, 2005

ERRATA SHEET
STANDARD RESEARCH SUBCONTRACT (EDUCATIONAL INSTITUTION OR NONPROFIT ORGANIZATION)

GENERAL PROVISIONS

CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:
Insert a new item DEAR 952.235-71 RESEARCH MISCONDUCT (JUL 2005).

NOTE: move this item to proper numeric place so that sequential numbering in model is maintained.

STANDARD RESEARCH SUBCONTRACT (EDUCATIONAL INSTITUTION or NONPROFIT ORGANIZATION) [FOR UNCLASSIFIED WORK] NO. _____	(DEPARTMENT OF ENERGY M&O CONTRACTOR) _____ NAME ADDRESS
Subcontractor: Attention: Address City, State, Zip Phone: Fax: E-Mail:	**Contractor's Procurement Representative [Contract Administrator]:** Proc. Rep Title: _____ Phone #: (Fax #: (E-Mail:

Introduction

This is a cost-reimbursement, no-fee, standard subcontract for unclassified research and development work, not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material. This Subcontract is between **[Insert contractor's name]**, (hereinafter "Contractor") and **[Insert subcontractor's name]** (hereinafter "Subcontractor"). The Subcontract is issued under Prime Contract No. **[Insert contract no.]** between the Contractor and the United States Department of Energy (hereinafter "DOE") **[include the following phrase in weapons lab contracts--** and the National Nuclear Security Administration (hereinafter "NNSA")] for the management and operation of **[insert name of the DOE/NNSA facility]** (hereinafter "DOE [or NNSA] Facility").

Agreement

The parties agree to perform their respective obligations in accordance with the terms and conditions of the Schedule and the General Provisions and other documents attached or incorporated by reference, which together constitute the entire Subcontract and supercede all prior discussions, negotiations, representations, and agreements.

[SUBCONTRACTOR NAME]	**[M&O CONTRACTOR NAME]**
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

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SCHEDULE OF ARTICLES

1. Statement of Work

The Subcontractor shall perform certain research and development work identified as **[insert brief title or statement of research]** and more fully described in the *Statement of Work* Attachment to this Subcontract. **[or Appendix I.]**

The Subcontactor's Principal Investigator assigned to this work is **[insert Principal Investigator's name]**. The Principal Investigator shall not be replaced or reassigned without the advance written approval of the Contractor's Procurement Representative **[or** Contract Administrator].

The Subcontractor shall submit three copies of the final and any intermediate reports to the Contractor's Procurement Representative **[or** Contract Administrator, Contractor's Technical Representative, **or** named individual] upon completion of the work and, when the Subcontract contains milestone requirements, on the indicated milestone dates. When requested by the Contractor's Technical Representative, the Subcontractor shall submit a draft copy of the final report for review prior to finalization. The Contractor's Technical Representative need not approve the Subcontractor's reported conclusions of the research.

2. Report Preparation Requirements

a. These instructions apply to all formal reports, including the final report, required by the Subcontract. It does not apply to letter reports or reports specifically identified as Milestones in *Article* 3. *Period of Performance* in this Subcontract as informal reports.

b. The final report shall contain a comprehensive summary of all work results and conclusions. All reports shall fairly and completely describe the efforts applied to and the results obtained toward achievement of objectives of the subcontract work. If an objective is not accomplished, such failure shall be fully documented and explained in the report.

c. Reports shall include the following elements: (a) a brief abstract of the report which describes the overall objectives and results; (b) a full statement of each objective and description of the effort performed and the accomplishments achieved; (c) a list of any publication or information release made of material developed or maintained through the performance of the subcontract; and (d) any other relevant information.

3. Period of Performance

The work described in Article 1, Statement of Work, shall commence upon signature of this Subcontract by both parties and shall be completed on or before **(insert end date)**

[OR, if there is a milestone schedule, add: in accordance with the following milestones:

Milestone	**Completion Date]**

4. Costs and Payments

a. The estimated cost of the work called for in this Subcontract is $_____, and is based upon the following estimated levels of effort necessary to perform the Subcontract work:

Category	No. of Staff	No. of Months

[OR:] is based on the Subcontractor's Cost Proposal Attachment **[or Appendix II]** to this Subcontract.

b. **[Check provision below that applies OR include only applicable provision]**

_____ This Subcontract is fully-funded and is subject to the *Limitation of Costs* clause of the General Provisions.

_____ This Subcontract is incrementally funded and is subject to the *Limitation of Funds* clause of the General Provisions. The funding amount currently allotted to this Subcontract is $ _____ and covers **[describe what work the incremental funding covers.]**

c. The Contractor will pay the Subcontractor for performance of this Subcontract, unless excluded or limited by other provisions of this Subcontract, the allowable direct costs incident to performance, plus the allocable portion of the allowable indirect costs of the Subcontractor. Allowable and allocable costs shall be determined in accordance with the cost principles of the Allowable Cost and Payment clause of the General Provisions.

5. Invoices for Payment

a. Payments for Subcontract work shall be made monthly based on invoices submitted by the Subcontractor for work performed. Invoices shall bear the following certification signed by a responsible official of the Subcontractor:

> "The undersigned certifies that the information set forth herein is true and correct and may be used as a basis for payment for work."

b. Invoices must identify the subcontract number, the period covered, and the total expenditures claimed for each of the following categories: salaries, fringe benefits, travel, materials and supplies, equipment, subcontracts/consultants, other direct costs such as rent, when applicable, and indirect or Facility and Administration costs.

c. Invoices shall be mailed to: **(Insert address)**

d. Payments shall be mailed to: **(Insert address)**

e. The Contractor will use its best efforts to process invoices for payment within 30 days of receipt; provided, however, that payments made more than 30 days after receipt of an invoice shall not be subject to penalty, interest, or late charges.

f. Invoices, which include the cost of property acquired by the Subcontractor at a cost of $5,000 or more, shall include a description of the property and shall identify the assigned property number; the manufacturer; the Serial number and model number; the acquisition date; the unit price, quantity, and total cost of the property; and the location of the property.

6. Contractor-Furnished and Subcontract-Acquired Property

a. The Contractor shall furnish the Subcontractor the materials, equipment, and supplies listed in *Contractor-Furnished Government Property* **[OR** Appendix III**]** to this Subcontract.

b. Purchase of equipment or other tangible personal property, which is not identified in the Subcontractor's cost proposal for this Subcontract and for which the Subcontractor is entitled to be reimbursed as a direct item of cost under this Subcontract, shall be approved in advance by the Contractor's Procurement Representative **[OR** Contract Administrator**]**.

c. All property furnished by the Contractor or acquired by the Subcontractor, as a direct cost under the Subcontract, title to which vests in the Government, shall be identified, controlled, and protected as required by the *Government Property* clause of the General Provisions of this Subcontract. Disposition of such property upon completion of this Subcontract shall be as directed by the Contractor's Procurement Representative **[OR** Contract Administrator**]**.

d. If the Contractor provides the Subcontractor property that is marked as "high risk property" for use under this award, the Subcontractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of this property in accordance with the policies, practices and procedures for property management contained in the DOE Property Management regulations (41 CFR 109-1.53). Title to all property marked as "high risk property" vests in the Government.

7. Subcontract Administration

a. The Contractor's Procurement Representative **[OR** Contract Administrator**]** for this Subcontract is **[insert name of PR/CA]**. The Procurement Representative **[OR** Contract Administrator**]** is the only person authorized to make changes in the requirements of this Subcontract or make modifications to this Subcontract, including changes or modifications to the Statement of Work and the Schedule. The Subcontractor shall direct all notices and requests for approval required by this Subcontract to the Procurement Representative **[OR** Contract Administrator**]** at the following address:

[Insert address]

Any notices and approvals required by this Subcontract from the Contractor to the Subcontractor shall be issued by the Procurement Representative **[OR** Contract Administrator].

b. The Contractor's Technical Representative for this Subcontract is **[insert name]**. The Technical Representative is the person designated to monitor the Subcontract work and to interpret and clarify the technical requirements of the *Statement of Work.* The Technical Representative is not authorized to make changes to the work or modify this Subcontract.

8. Travel Requirements

a. All travel not included in the Subcontractor's cost proposal must be approved in advance by the Contractor.

b. All foreign travel must be approved in advance by the Contractor, even if the cost is included in the Subcontractor's cost proposal for this Subcontract.

9. Performance of Work

The Subcontractor will perform the work at a location other than a DOE/NNSA Facility.

10. Incorporated Documents

The following documents are hereby incorporated as Attachments **[OR Appendices]** to the Schedule of Articles of this Subcontract:

General Provisions for Standard Research Subcontracts, dated _____
Statement of Work dated _____ **[OR Appendix I]**
Subcontractor's Cost Proposal dated _____ (if applicable) **[OR Appendix II]**
Contractor-Furnished Government Property dated _____ **[OR Appendix III]**
[List others if applicable.]

GENERAL PROVISIONS

CLAUSE 1 - PUBLICATIONS

A. The Subcontractor shall closely coordinate with the Contractor's Technical Representative regarding any proposed scientific, technical or professional publication of the results of the work performed or any data developed under this Subcontract. The Subcontractor shall provide the Contractor an opportunity to review any proposed manuscripts describing, in whole or in part, the results of the work performed or any data developed under this Subcontract at least forty-five (45) days prior to their submission for publication. The Contractor will review the proposed publication and provide comments. A response shall be provided to the Subcontractor within forty-five (45) days; otherwise, the Subcontractor may assume that the Contractor has no comments. Subject to the requirements of Clause 9, the Subcontractor agrees to address any concerns or issues identified by the Contractor prior to submission for publication.

B. Subcontractor may acknowledge the Contractor and Government sponsorship of the work as appropriate.

CLAUSE 2 – NOTICES

A. The Subcontractor shall immediately notify the Contractor's Procurement Representative **[OR** Contract Administrator] in writing of: (1) any action, including any proceeding before an administrative agency, filed against the Subcontractor arising out of the performance of this Subcontract; and (2) any claim against the Subcontractor, the cost and expense of which is allowable under the terms of this Subcontract.

B. If, at any time during the performance of this Subcontract, the Subcontractor becomes aware of any circumstances which may jeopardize its performance of all or any portion of the Subcontract, it shall immediately notify the Contractor's Procurement Representative **[OR** Contract Administrator] in writing of such circumstances, and the Subcontractor shall take whatever action is necessary to cure such defect within the shortest possible time.

CLAUSE 3 – ASSIGNMENTS

The Contractor may assign this Subcontractor to the Government or its designee(s). Except as to assignment of payment due, the Subcontractor shall have no right to assign or mortgage this Subcontract or any part of it without the prior written approval of the Contractor's Procurement Representative **[OR** Contract Administrator], except for subcontracts already identified in the Subcontractor's proposal.

CLAUSE 4 – DISPUTES

A. Informal Resolution

1. The parties to a dispute shall attempt to resolve it in good faith, by direct, informal negotiations. All negotiations shall be confidential. Pending resolution of the dispute, the Subcontractor shall proceed diligently with the performance of this Subcontract, in accordance with its terms and conditions.

2. The parties, upon mutual agreement, may seek the assistance of a neutral third party at any time, but they must seek such assistance no later than 120 days after the date of the Contractor's receipt of a claim. The requirement to seek the assistance of a neutral third party may be waived or modified only with the consent of all parties. The parties may request the assistance of an established Ombuds Program, where available, or hire a mutually agreeable mediator, or ask the DOE Office of Dispute Resolution to assist them in selecting a mutually agreeable mediator. The cost of mediation shall be shared equally by both parties. If requested by both parties, the neutral third party may offer a non-binding opinion as to a possible settlement. All discussions with the neutral third party shall be confidential.

3. In the event the parties are unable to resolve the dispute by using a neutral third party or waive the requirement to seek such assistance, the Contractor will issue a written decision on the claim.

B. Formal Resolution

1. If a dispute has not been resolved by informal resolution, it may be submitted to binding arbitration upon agreement of both parties, by and in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA). If arbitration is agreed to by both parties, such decision is irrevocable and the outcome of the arbitration shall be binding on all parties.

2. Each party to the arbitration shall pay its pro rata share of the arbitration fees, not including counsel fees or witness fees or other expenses incurred by the party for its own benefit.

3. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction.

C. Litigation

If arbitration is declined for such disputes, the parties may pursue litigation in any court of competent jurisdiction.

D. Governing Law

This Subcontract shall be interpreted and governed in accordance with all applicable federal and state

laws and all applicable federal rules and regulations.

CLAUSE 5 - RESPONSIBILITY FOR TECHNOLOGY EXPORT CONTROL

The parties understand that materials and information resulting from the performance of this Subcontract may be subject to export control laws and that each party is responsible for its own compliance with such laws.

CLAUSE 6 – COST ACCOUNTING STANDARDS (CAS) LIABILITY

[Applicable to Subcontracts exceeding $500,000]

Clause 10 below incorporates into these GENERAL PROVISIONS clauses entitled, "*COST ACCOUNTING STANDARDS" and "ADMINISTRATION OF COST ACCOUNTING STANDARDS."* Notwithstanding the provisions of these clauses, or of any other provision of the Subcontract, the Subcontractor shall be liable to the Government for any increased costs, or interest thereon, resulting from any failure of the Subcontractor, with respect to activities carried on at the site of the work, or of a subcontractor, to comply with applicable cost accounting standards or to follow any practices disclosed pursuant to the requirements of such clause.

CLAUSE 7 - DISCLOSURE AND USE RESTRICTIONS FOR LIMITED RIGHTS DATA

Generally, delivery of Limited Rights Data (or Restricted Computer Software) should not be necessary. However, only if Limited Rights Data will be used in meeting the delivery requirements of the subcontract, the following disclosure and use restrictions shall apply to and shall be inserted in, any FAR 52.227-14 Limited Rights Notice on any Limited Rights Data furnished or delivered by the Subcontractor or a lower-tier subcontractor:

A. These "Limited Rights Data" may be disclosed for evaluation purposes under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed;

B. These "Limited Rights Data" may be disclosed to other contractors participating in the Government's program of which this Subcontract is a part for information or use in connection with the work performed under their contracts and under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed; and

C. These "Limited Rights Data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed.

CLAUSE 8 - ORDER OF PRECEDENCE

Any inconsistencies in the documents comprising this Subcontract shall be resolved by giving precedence in the following order: (a) the SCHEDULE OF ARTICLES and this Subcontract Signature Page; (b) these GENERAL PROVISIONS; (c) other referenced documents, exhibits, and attachments; and (d) any referenced specification or *Statement of Work.*

CLAUSE 9 – SECURITY REQUIREMENTS

A. This Subcontract is intended for unclassified, publicly releasable research or development work. The Contractor does not expect that results of the research project will involve classified information or Unclassified Controlled Nuclear Information (UCNI) (See 10 CFR part 1017). However, the Contractor may review the research work generated under this Subcontract at any time to determine if it requires classification or control as UCNI.

B. If, subsequent to the date of this Subcontract, a review of the information reveals that classified information or UCNI is being generated under this Subcontract, then the security requirements of this Subcontract must be changed. If such changes cause an increase or decrease in costs or otherwise affect any other term or condition of this Subcontract, the Subcontract shall be subject to an equitable adjustment as if the changes were directed under the Changes clause of this Subcontract.

C. If the security requirements are changed, the Subcontractor shall exert every reasonable effort compatible with its established policies to continue the performance of work under the Subcontract in compliance with the change in the security requirements. If the Subcontractor determines that continuation of the work under this Subcontract is not practicable because of the change in security requirements, the Subcontractor shall notify the Contractor's Procurement Representative in writing. Until the Contractor's Procurement Representative provides direction, the Subcontractor shall protect the material as directed by the Contractor.

D. After receiving the written notification, the Contractor's Procurement Representative shall explore the circumstances surrounding the proposed change in security requirements and shall endeavor to work out a mutually satisfactory method to allow the Subcontractor to continue performance of work under this Subcontract.

E. Within 15 days of receiving the written notification of the Subcontractor's stated inability to proceed, the Contractor's Procurement Representative must determine whether (1) these security requirements do not apply to this contract or (2) a mutually satisfactory method for continuing performance of work under this Subcontract can be agreed upon. If this determination is not made, the Subcontractor may request the Contractor's Procurement Representative to terminate the Subcontract in whole or in part. The Contractor's Procurement Representative shall terminate the Subcontract in whole or in part, as may be appropriate, and the termination shall be deemed a termination under the terms of the Termination for the Convenience of the Government clause.

CLAUSE 10 - CLAUSES INCORPORATED BY REFERENCE

The FEDERAL ACQUISITION REGULATION (FAR) and the U.S. DEPARTMENT OF ENERGY ACQUISITION REGULATION (DEAR) clauses listed below, which are located in Chapters 1 and 9, respectively, of Title 48 of the Code of Federal Regulations, are incorporated by this reference as a part of these GENERAL PROVISIONS with the same force and effect as if they were given in full text, as prescribed below.

The full text of the clauses may be accessed electronically at http://www.arnet.gov/far/ (FAR) and http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation (DEAR).

As used in the clauses, the term "contract" shall mean this Subcontract; the term "Contractor" shall mean the Subcontractor; the term "subcontractor" shall mean the Subcontractor's subcontractor, and the terms "Government" and "Contracting Officer" shall mean the Contractor, except in FAR clause 52.227-14, and DEAR clauses 970.5227-4, 952.227-11, 970.5232-3 and 52.245-5 Alternate I, in which clauses "Government" shall mean the United States Government and "Contracting Officer" shall mean the DOE/NNSA Contracting Officer for Prime Contract DE-_____ with the Contractor. As used in DEAR clauses 952.204-72 and 952.227-9, the term "DOE" shall mean DOE/NNSA or the Contractor.

The modifications of these clause terms are intended to appropriately identify the parties and establish their contractual and administrative reporting relationship, and shall not apply to the extent they would affect the U.S. Government's rights. The Subcontractor shall include the listed clauses in its subcontracts at any tier, to the extent applicable.

APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:

DEAR 952.204-71	SENSITIVE FOREIGN NATIONS CONTROLS (APR 1994). Applies if the Subcontract is for unclassified research involving nuclear technology.
FAR 52.216-7	ALLOWABLE COST AND PAYMENT (DEC 2002). Substitute 31.3 in subcontracts with educational institutions and 31.7 in subcontracts with nonprofit organizations for 31.2 in paragraph (a).
FAR 52.216-15	PREDETERMINED INDIRECT COSTS RATES APR 1998).
FAR 52.222-21	PROHIBITION OF SEGREGATED FACILITIES (FEB 1999).
FAR 52.222-26	EQUAL OPPORTUNITY (APR 2002).
FAR 52.223-3	HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA SHEETS (JAN 1997) AND ALTERNATE I. Applies only if Subcontract involves delivery of hazardous materials.
FAR 52.225-13	RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (DEC 2003).
DEAR 970.5227-4	AUTHORIZATION AND CONSENT (AUG 2002), Paragraph (a).
DEAR 952.227-9	REFUND OF ROYALTIES (FEB 1995). Applies if "royalties" of more than $250 are paid by a subcontractor at any tier.
DEAR 952.227-11	PATENT RIGHTS - RETENTION BY THE CONTRACTOR (SHORT FORM) (FEB 1995). (Applies only if Subcontractor is a nonprofit organization as set forth in 48 CFR 27.301. If Subcontractor does not qualify in accordance with 48 CFR 27.301, it may request a patent waiver pursuant to 10 CFR 784.)
FAR 52.227-14	[Check provision below that applies OR include only applicable provision]. _____ RIGHTS IN DATA-GENERAL (JUN 1987) with ALTERNATE V and DEAR 927.409 Paragraphs (a) and (d)(3). Applies if the Subcontract is for development work, or for basic and applied research where computer software is specified as a Deliverable in the Statement of Work or other special circumstances apply as specified in the agreement. _____ RIGHTS IN DATA-GENERAL (JUN 1987) with ALTERNATE IV, subparagraph (c)(1) and DEAR 927.409, subparagraph (a) Definitions. Applies if the Subcontract is for basic or applied research and computer software is not specified as a Deliverable in the Statement of Work, and no other special circumstances apply per DEAR 927.409.
FAR 52.227-23	RIGHTS TO PROPOSAL DATA (TECHNICAL) (JUNE 1987). Applies if the Subcontract is based upon a technical proposal.
FAR 52.229-10	STATE OF NEW MEXICO GROSS RECEIPTS AND COMPENSATING TAX (APR 2003). Applies if any part of this Subcontract is to be performed in the State of New Mexico.
FAR 52.232-20	LIMITATION OF COST (APR 1984). Applies if the Subcontract is fully funded.
FAR 52.232-22	LIMITATION OF FUNDS (APR 1984). Applies if the Subcontract is incrementally funded.

DEAR 952.235-71	RESEARCH MISCONDUCT (JUL 2005)
FAR 52.242-15	STOP-WORK ORDER (AUG 1989) with ALTERNATE I (APR 1984).
FAR 52.243-2	CHANGES – COST-REIMBURSEMENT (AUG 1987), WITH ALTERNATE V
FAR 52.244-2	SUBCONTRACTS (AUG 1998) with ALTERNATE II. Insert in Paragraph (e): "Any subcontract or purchase order for other than "commercial items" exceeding the simplified acquisition threshold. ("Commercial item" has the meaning contained in FAR 52.202-1, Definitions.)"
FAR 52.245-5	GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIALS, OR LABOR-HOUR CONTRACTS (MAY 2004) with Alternate I (JUNE 2003). (Paragraphs (e)(1) and (e)(2) insert, "and DOE Acquisition Regulations Subpart 945.5," after the reference to FAR Subpart 45.5).
FAR 52.246-9	INSPECTION OF RESEARCH AND DEVELOPMENT (SHORT FORM) (APR 1984).
FAR 52.247-63	PREFERENCE FOR U. S. FLAG AIR CARRIERS (JUNE 2003). Applies if the Subcontract involves international air transportation.
FAR 52.247-64	PREFERENCE FOR PRIVATELY OWNED U.S.-FLAG COMMERCIAL VESSELS (APR 2003).
DEAR 952.247-70	FOREIGN TRAVEL (DEC 2000).
FAR 52.249-5	TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (EDUCATIONAL AND OTHER NONPROFIT INSTITUTIONS) (SEP 1996).
DEAR 952.217-70	ACQUISTION OF REAL PROPERTY (APR 1984). Applies if the Subcontract involves leased space that is reimbursed.
DEAR 970.5232-3	ACCOUNTS, RECORDS, AND INSPECTION (DEC 2000)

APPLICABLE IF THE SUBCONTRACT IS FOR $10,000 OR MORE:

FAR 52.222-35	EQUAL OPPORTUNITY FOR SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).
FAR 52.222-36	AFFIRMATIVE ACTION FOR WORKERS WITH DISABILITIES (JUNE 1998).
FAR 52.222-37	EMPLOYMENT REPORTS ON SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).

APPLICABLE IF THE SUBCONTRACT EXCEEDS $100,000:

FAR 52.203-5	COVENANT AGAINST CONTINGENT FEES (APR 1984)
FAR 52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (JULY 1995).

FAR 52.203-7	ANTI-KICKBACK PROCEDURES (JULY 1995), excluding Paragraph (c)(1).
FAR 52.203-10	PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY (JAN 1997).
FAR 52.203-12	LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (JUNE 2003).
FAR 52.219-8	UTILIZATION OF SMALL BUSINESS CONCERNS (MAY 2004).
FAR 52.222-04	CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION (SEP 2000).
DEAR 970.5227-5	NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (AUG 2002).

APPLICABLE IF THE SUBCONTRACT EXCEEDS $500,000:

FAR 52.215-10	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (OCT 1997) if subcontract exceeds $550,000.
FAR 52.215-11	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS (OCT 1997) not used when 52.215-10 is included. In subcontracts greater than $550,000.
FAR 52.215-12	SUBCONTRACTOR COST OR PRICING DATA (OCT 1997). Applies if 52.215-10 applies.
FAR 52.215-13	SUBCONTRACTOR COST OR PRICING DATA-MODIFICATIONS (OCT 1997). Applies if 52.215-11 applies.
FAR 52.219-9	SMALL BUSINESS SUBCONTRACTING PLAN (JAN 2002). Applies unless there are no subcontracting possibilities.
FAR 52.227-16	ADDITIONAL DATA REQUIREMENTS (JUNE 1987).
FAR 52.230-2	COST ACCOUNTING STANDARDS (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to full CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).
FAR 52.230-3	DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to modified CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).
FAR 52.230-5	COST ACCOUNTING STANDARDS – EDUCATIONAL INSTITUTION (APR 1998), excluding paragraph (b).
FAR 52.230-6	ADMINISTRATION OF COST ACCOUNTING STANDARDS (NOV 1999).

(END OF GENERAL PROVISIONS)

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-45

DATE: July 22, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Acquisition Guide Chapters 37.2 – Performance Based Service Acquisition and 39.2 – Guidance on Electronic and Information Technology (EIT) Accessibility – Section 508**

SUMMARY: This Policy Flash transmits the above two new Acquisition Guide chapters. Acquisition Guide Chapter 37.2 dated, June 2005, replaces an earlier version dated August 2001. The new guidance includes statutory coverage on preferences for performance based

contracting, as well as advice on Performance Work Statements (PWS) and Statement of Objectives (SOO), among other items. Acquisition Letter 2001-04 is hereby cancelled and replaced by Acquisition Guide Chapter 39.2, which includes updated training guidance on Section 508 of the Rehabilitation Act of 1973 and creates a link for guidance promulgated to Purchase Card Holders.

Questions concerning this Flash should be directed to Denise P. Wright at (202) 287-1340 or Denise.Wright@hq.doe.gov

Attachments

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Performance Based Service Acquisition

Guiding Principles
Performance-Based Service Acquisition strategies seek to embrace commercial best practices and innovative processes while leveraging the competitive forces of the marketplace. This methodology enables DOE to maximize competition by encouraging competitors to identify solutions or outcomes with a cost effective service delivery approach in mind. As part of the PBSA benefit, the acquisition team (program manager, project manager, legal, finance, contracting, etc.) and other stakeholders are better informed about the options that exist in this methodology and how to use them for maximum effect and efficiency.

Overview

This section provides guidance and instruction for the development of a Performance Work Statement (PWS) and a Statement of Objectives (SOO) under Performance Based Service Acquisitions.

Background

"Laws, policies, and regulations have dramatically changed the acquisition process into one that must operate with a mission-based and program-based focus." As a result of the Government Performance and Results Act of 1993 agencies are required to establish and manage to mission-related performance goals and objectives; in relation to this requirement, Performance Based Acquisition is the preferred method for acquiring mission related services (Public Law 106-398, § 821). The Department is committed to continued progress in support service contracting through the use of Performance Based Service Acquisition (PBSA).

DOE's efforts involve widespread use of PBSA to the maximum extent practicable. There are two ways to describe the Government's needs under PBSA - a performance work statement (PWS) or a statement of objectives (SOO). In terms of organization of information, a statement of work (SOW) like approach is suitable for a performance work statement, e.g., introduction, background information, scope, etc., recognizing that the PWS may be adapted as appropriate. The use of the statement of objectives is an emerging methodology that requires competing contractors to develop the statement of work, performance metrics and measurement plan, and quality assurance plan, which are evaluated before contract award. Acquisition planning and market research are integral components in assisting and maintaining our current PBSA success and building on it requires continued emphasis on the total acquisition approach.

Performance Based Service Acquisition

Development of a Performance Work Statement and a Statement of Objectives Guide

Introduction

The purpose of this guide chapter is to provide acquisition professionals (especially program offices) with a resource that enables them to achieve continued success in performance based service acquisition. This guidance supports the government-wide policy that:

- agencies use performance-based contracting methods to the maximum extent practicable when acquiring services; and
- agencies carefully select acquisition and contract administration strategies, methods, and techniques that best fit a particular requirement.

Recent Federal acquisition policy developments have established a preference for performance based service acquisition which has made it less challenging to link contract performance to mission related functions by clearly delineating a preferred methodology which is aimed at improving procurement services by encouraging the use of simplified commercial procedures under FAR Part 12.

Additionally, this guide chapter will address the benefits of acquiring services through the use of performance based service acquisition, such as, the conformance to statute and regulatory policy through a greater probability of meeting mission needs, directing the focus on intended results as opposed to process, less performance risk due to contractor involvement at the front end of the process, no need for detailed specifications or work process descriptions because the performance work statement and the statement of objectives describe the end use, etc. These advantages allow us to set the standard and the outcome while giving contractors the freedom to achieve in an innovative and unrestrictive method.

The following information is contained in the guide:

- Definitions
- Objectives of Performance Based Services Acquisition
- Development of the Performance Work Statement
- Development of the Statement of Objectives
- Managing to Contract Completion

It should be noted that the Department already has a Performance Based Contracting Guide that was developed to assist individuals establishing performance measures and incentives related to the Department's Management and Operating Contracts and other major operating contracts. Accordingly, there may be portions of the guide that may prove useful in the development of

performance work statements and incentives. The guide is located at the following site: http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/AG-Performance+Based+Contracting?OpenDocument

DEFINITIONS

The following list of terms is directly associated with the performance based service acquisition methodology. Some of the terms listed will be defined elsewhere in existing regulation and guidance; however, this guide seeks to provide a working definition of the terms discussed and should not be considered all inclusive:

Performance Based Service Acquisition	An acquisition strategy designed to meet mission and program needs that describe measurable performance objectives as related to specific outcomes or results.
Needs Assessment	The process by which the team determines what problem the agency needs to solve. What results or outcome is needed on a macro level and does it meethe organizational and mission objectives.
Performance Work Statement (PWS)	A document that describes the agencies requirement in clear, specific, objective, and measurable outcomes or results.
Measurable Performance Standards	Describes what is considered acceptable performance by use of quantifiable, easy to apply, attainable attributes.
Quality Assurance Surveillance Plan	Generally, a Government developed tool used to assess contractor success against the agreed upon performance standards.
Acceptable Quality Level	The minimum degree of variance from the standard or expectation, e.g., allowable error rate.
Incentives	Motivators of successful performance
Job Analysis	Identification of essential inputs, processes, and outputs.
So What Test	Verification of a continued need for an output determined during the Job Analysis.
Statement of Objectives (SOO)	A short descriptive document that provides basic high level objectives of the acquisition requiring offerors to formulate a competitive solution to the Government's needs.
Performance Objectives	Desired outcome of work to be performed as determined by the team analysis performed on agency business documents, e.g., business case, acquisition strategy, etc.

Performance Analysis	A review of Job Analysis outputs and a determination of how each output is measured using a quantifiable standard, e.g, time, cost, error rate, accuracy rate, etc.
Performance Metrics	A series of negotiable indicators meant to provide a way to measure contractor success and are also discriminators of quality in a best value scenario.
Best Value	The process used to select the most advantageous offer to the government using trade-offs while considering technical merit over price.

OBJECTIVES OF PERFORMANCE BASED SERVICE ACQUISITION

The major objective of performance based service acquisition is to create a nexus between mission needs and acquisition performance, while shifting the standard from contract compliance to a collaborative performance oriented process. This approach to contracting is intended to:

- Ensure performance quality levels are achieved and that payment is related to the degree of services performed which meet contractual standards.
- Maximize contractor performance through competition and innovation encouraging contractors to find a cost-effective way of service delivery;
- Advocate and promote the use of commercial services offering routine industry solutions at the same time providing minimal risk to the government;
- Move the focus from process to results providing a means for the preferred outcome; and,
- Achieve a cost savings.

Maximize Contractor Performance

Certain services lend themselves to the traditional construct of performance based service acquisition due to the ease at which measuring and performance expectations can be identified, such as information technology support services, janitorial services, guard services, etc.; likewise, maximum contractor performance presents minimal risk to the government. Conversely, there are other services which are more complex in nature which maximize contractor performance through competition and innovative processes that focus on the desired outcome. In this instance, a SOO and performance incentives may prove to be more useful and focus more on the end result. This technique may guard against being too prescriptive and still allow for the mitigation of technical risk and safety concerns.

Advocate and Promote the use of Commercial Services

The use of FAR Part 12 procedures streamlines the acquisition process and aligns government thinking with industry ideas capturing those services that are commercial in nature and effectively utilizing industry best practices thus expanding the range of potential solutions or outcomes. Market research serves as the genesis of the government's ability to buy best-value services from the commercial market-place. Applying the PBSA team approach to industry benchmarking is a collaborative variation on a basic FAR Part 12 process.

Move the Focus from Process to Results

Performance based service acquisition clearly spells out the desired end result expected of the contractor. It is critical to structure acquisitions around the purpose of the work to be performed as opposed to the manner, e.g., labor mix, number of hours, type of equipment, etc., in which work is to be accomplished. Contractors should be given as much freedom as possible to determine how to best meet the government's performance expectations.

Achieve a Cost Savings

Contractor innovation and ingenuity equals cost savings to the government. In addition, performance based service acquisition is designed to provide contractors the autonomy needed to determine how to best meet the defined performance objectives and ensure that the standards are achieved with acceptable levels of performance. The performance standards developed must be attainable and their measures clearly convey what is an acceptable level of performance. As necessary, tied to the accomplishment of these standards are positive or negative incentives acting as an agreed upon motivator of performance, e.g., monetary, past performance, government oversight, etc.

Critical to the success of PBSA is careful program and project planning (see DOE M 413.3-1, Project Management for the Acquisition of Capital Assets), collaborative market research, detailed performance work statements, high level statement of objectives, and the "critical-few" performance measures.

DEVELOPMENT OF THE PERFORMANCE WORK STATEMENT (PWS)

The PWS must be structured such that an offeror can determine the expected outcome or end result. The preparation process of the PWS requires a series of comprehensive analyses, job analysis, the first action, and performance analysis, the results identification action. Job analysis is an exhaustive examination of the requirement which forms the basis for establishing outputs, developing measurable performance standards, and creating quality assurance surveillance plans. This is a bottoms-up analysis with re-engineering in mind probing to gain a complete understanding of the requirement emerging with an informed capability to articulate desired outcomes or end results in terms of inputs, processes, and outputs. If this is a new requirement it becomes important to identify the agency needs, type of service and output required. If this is a repetitive requirement then it becomes important to verify and validate the need for certain

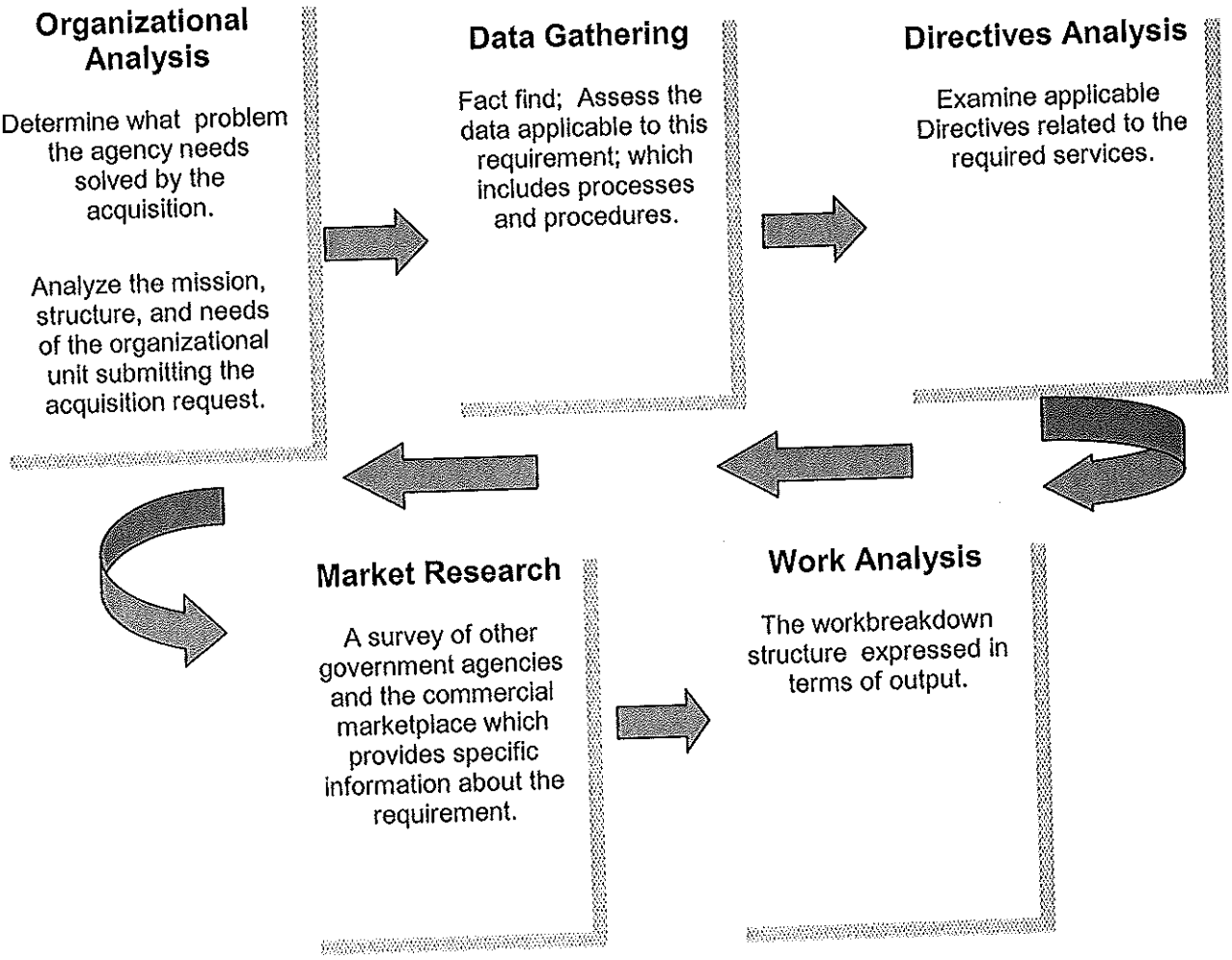
processes and procedures, ensuring that the outcomes are cost effective and solutions are industry driven. During this analysis it is important to differentiate between what is actually being done and perceptions of what is being done. A job analysis consists of:

- *Organizational Analysis (data may overlap with needs assessment)*;
- Data Gathering;
- Directives Analysis;
- Market Research; and,
- Work Analysis.

So as not to create a circular occurrence, you are cautioned that during this analytical process it is an exercise in examining "how" things are done which by its very nature could unintentionally lead to creating a PWS instructing the contractor how to perform a task or a provide a process oriented description. As a safeguard against this incidence the Seven Steps to Performance-Based Services Acquisition Guide advocates the use of the "so-what?" test during job-analysis. The application of this test will help ensure that the desired performance outcome is achieved. Once the outputs of the job analysis have been identified, the continued need for the output should be challenged. For example, a job analysis output of an Information Technology requirement may be to maintain an electronic modeling system. The team should ask questions and analyze responses, such as: who needs the output, what occurs as a result, why is the output needed, what is done with it, etc. If, after you ask these questions, the "so-what" inquiry reveals that the output is still significant or pertinent to the heart of the acquisition then the team should capture the results of the job analysis into a matrix or a diagram format that outlines the critical few performance standards necessary to meet the mission need (see Exhibit II) and proceed in the PBSA process.

Exhibit 1

DOE Job Analysis



The job analysis is the first step taken in developing a performance work statement. The job analysis requires a thorough review of the requirement.

Organizational Analysis

The first step in conducting the job analysis is to conduct an analysis of the organizational unit supported by the required services, its mission, structure and needs. The key question to address is "What does the organization want to achieve in terms of outcomes?" Once that question has been addressed, a general-purpose statement describing the objective of the procurement can be written.

Data Gathering

The next step is gathering data. The gathered data is related to workload, facilities, processes and procedures, laws and regulations, and resources. This data is critical to performing a proper job analysis and developing a performance work statement. Data gathering should include an examination of the facilities, data, equipment currently used and the benefit to the government of providing all or some of them to the contractor shall be conducted. If any changes affect the facility (i.e., changes to government furnished equipment), they must be factored into the data collected. Resource data such as the types of personnel currently used and their required minimum qualifications (i.e., education and experience), as well as specific qualification requirements such as security clearances must be developed. Any anticipated personnel requirements must be noted.

Directives Analysis

This involves the examination of all current Directives applicable to the services being contracted out. The performance work statement must contain all relevant Directives and reference documents related to the services being performed. Directives that apply in part should cite the pertinent portion of the Directive. The team should take care and guard against the application of too many Directives. This could result in excessive costs, inappropriate application of a Directive, and restriction of the contractor's innovative approach, etc.

Market Research

The objective of market research is to become informed and well versed in the service industry that will provide an solution to the problem. Market research should include an inquiry into how the required services are performed at other government agencies and the commercial market place. Market information can also be obtained from trade publications, contractor capability statements, the Small Business Administration, etc. A sources sought synopsis and/or a draft solicitation may be used in conjunction with a market survey to obtain information. Market research performed correctly can:

- Determine if the service is commercially available;
- Enable the acquisition team to understand what solutions are available in the marketplace;
- Provide insight regarding price expectations;
- Allow the agency to keep abreast of the latest technology and market trends; and,
- Assist in the overall acquisition planning

Work Analysis: Work Breakdown Structure

The final step in performing a job analysis is the work analysis (work breakdown structure). The organizational analysis, data gathering, directives analysis, and market research all factor into the work analysis. The work analysis is the work breakdown

structure expressed in terms of output. To complete the work breakdown structure the work inputs, work steps, and work outputs must be identified:
Work inputs - are actions or documents necessary to perform the services. Work steps - (the "how to") are actions that will be taken by the contractor in order to achieve the product or outcome (*Remember - how to complete the work steps are left up to the contractor).* Work outputs - are the items produced as a result of completing the work steps (*the output is the expected outcome the contractor agrees to deliver*). In addition, output provides the basis to measure the contractor's performance by providing measurable performance standards that can describe acceptable performance by use of quantifiable (timeliness, error rates, accuracy rates, completion rates, or cost control), easy to apply, attainable attributes. This phase of job analysis is important, in that it ensures accurate and complete contractual requirements that are measurable and lead to optimum performance. One suggested method to accomplish this is to set up a tree diagram dividing the job into parts contributing to a final outcome or result.

Undoubtedly, the ultimate goal of the job analysis and any analytical technique employed is to:

1) Understand and describe the desired outcome;
2) Arrive at measurable performance standards; and,
3) Describe acceptable quality levels.

Now that you have some of the components of the performance work statement established, e.g., desired outcome and measurable performance standards, another critical step should be applied to the work breakdown structure results prior to capturing these results into a matrix. As previously discussed, the "so what test" should be applied at this point as a team process quality control measure insuring the continued organizational need for a particular standard or outcome. A verification of the continued need for an output may involve questioning industry regarding standard industry practices as they apply to a particular output then assess whether the output is appropriate as a performance standard or outcome or is it an indiscriminate commercially acceptable process or procedure related to the required service. Additional, questions may follow such as, what is the cost of the performance standard or outcome and is it too burdensome? Can a different output serve the same purpose, etc.?

Performance Analysis

The performance analysis process will identify how the results of the job analysis, e.g., outcome, will be measured by establishing an objective or subjective performance standard (timeliness, accuracy rate, completion rate, cost, customer satisfaction, quality, value, feature benefit, etc.) and determines the acceptable quality level of performance associated with the standard. When creating performance standards it is important to identify the "critical few" focusing on the mission related objective, customer need, and the assessment of what is important to measure. The results of this analysis will further support the reasonableness or validity of the identified performance standards and establish any margin for error in achieving an acceptable level of performance.

Acceptable quality level (AQL) provides a minimum degree of variance from the performance standard. The development of this process comes from asking basic questions. What is the minimum level of quality that is acceptable in order to meet the mission need? What is the lowest acceptable error rate that will meet mission need? What is being measured, e.g., help desk efficiency or customer satisfaction? At what interval will the measurement be made, e.g., monthly, quarterly, semi-annually, etc.? How precise must the performance standard be? (Hint: there may be an industry standard which determines measurable success in a performance standard). The answer to these questions is typically recorded in terms of percentage, e.g., resolve a customer complaint on the first call 70% of the time or facility chilled water equipment must be operating at maximum efficiency 90% of the time. As you navigate through this process take care, every performance standard does not have to equal 100% to be successful. The commercial marketplace should play a key role in establishing an AQL for the applicable performance standards.

The result of the analyses (Job Analysis and Performance Analysis) should be captured in a Results Matrix, grouping findings within a specific category, e.g., desired outcome, performance standard, acceptable quality level, surveillance method, and incentive or disincentive, if applicable. This matrix only captures the salient elements or "critical few" determined as a result of the analysis performed. See Exhibit 2.

Exhibit 2
RESULTS MATRIX

Desired Outcomes *What is to be accomplished as the end result of this contract?*	**Required Service** *What task needs to be accomplished to achieve the desired result?*	**Performance Standard** *What should the standards for quality, value, customer satisfaction, feature benefit, accuracy, etc. be?*	**Acceptable Quality Level** *How much error is acceptable?*	**Monitoring Method** *How it will be determined that success is achieved?*	**Incentive/ Disincentive** *What will best reward or penalize performance.*
Provide a dedicated on-site repair service, preventative maintenance, and repair service to Government owned security equipment	Provide experienced personnel	Elements such as cost control/risk management, commercial or industry quality standards, quality awards, surveillance methodology, et cetera.	System must be operational 95% of the time.	Could be 100% inspection, random sampling, periodic sampling, et cetera..	Incentives and disincentives may include greater or lesser fee, longer or shorter performance term, less or more surveillance, et cetera.

Note: Incentives and disincentives may be used to motiviate successful contract performance as it relates to the desired outcomes. However, the use of incentives or disincentatives is not required as part of the PBSA methodology.

Performance Work Statement

The results of the analyses performed develops the foundation for the performance work statement (PWS). The PWS contains measurable performance standards associated with the identified output as determined by the performance analysis. The matrix may be included in the PWS as a summary document; however, the PWS should describe in greater detail what the Results Matrix depicts visually. During the writing process as the PWS takes shape keep in mind that the requirements are described in terms of results as opposed to process, such as, the contractor shall maintain equipment operability consistent with the industry standard or the contractor shall provide customer support in accordance with commercial practices. Describing your requirement in terms of result or outcome as opposed to compliance, e.g., the contractor shall provide help desk support between the hours of 9:00 am – 6:00 pm, Monday – Friday, provides an opportunity for the contractor to develop its approach absent of government direction subsequently lowering cost and ensuring successful contract performance.

Organizationally, while there is no preferred format for a PWS, the SOW design may prove beneficial in helping work through the PWS process by adapting sections of the SOW to a performance based document.

DEVELOPMENT OF THE STATEMENT OF OBJECTIVES (SOO)

The Statement of Objectives (SOO) is a short descriptive high level document that provides objectives of the acquisition requiring offerors to formulate a competitive solution to the Government's needs. A key aspect of the SOO which should not be overlooked is that it is a short, 3-5 pages, high level document. Given the detailed nature of the traditional acquisition processes, it is natural to want to write the depth and breathe of what it is we are attempting to describe; however, the SOO is the exact opposite of that action. The SOO describes the desired results as related to the agency mission, in terms of objectives, and identifies the associated constraints. The SOO may be used when limited acquisition related information is available regarding the requirement or when the PWS is inappropriate at this point in the acquisition process. Thus, the SOO may be used in place of the PWS. Unlike the PWS, the FAR advocates a preferred format for the SOO (see FAR 37.602-1, Performance work statements (PWSs) and statements of objectives (SOOs). The SOO should be incorporated into the request for proposal as Section C or part of Section C dependent upon how the solicitation is formatted.

As discussed in FAR, the SOO should address the following:

Purpose - According to FAR discussing the purpose is the first step in SOO development. The purpose should provide information to the offeror regarding the reason for this requirement. The purpose may layout a vision of what is to be achieved organizationally as a result of this acquisition.

Scope or Mission - The next step in SOO development is a description of how the requirement relates to the program and/or mission along with a description of the problem that will be solved as a result of this acquisition. Describing the scope of the requirement in the SOO should involve the use of a single clearly identifiable statement no matter what is being purchased; "the full range of services" is the goal. Describing the requirement in terms of the "full range of services" signals a departure from traditional SOW development and allows you to capture all aspects of what is being purchased, e.g., sufficiently quantifies the scope of work. In addition to the "full range of services" its descriptive companion would be "process enabler." These phrases inform the offeror that a full range of services is required but the actions or task related to these services are process enablers which help the agency attain its mission. For example, as observed in one agencies' scope or mission "Under the TSA Information Technology Managed Services effort, it is understood that the information technology services being delivered are enablers and do not represent in totality what TSA is acquiring through this task order. . ." TSA could have also used the phrase "full range of services" and would have positively indicated to the offeror what would be expected in the performance of this contract. The specific structure of the SOO provides for industry driven innovation, cost efficiency, and competitive solutions.

Performance Objectives - The performance objectives or desired outcomes are the core of the SOO. The Team determines the objectives as a result of analysis performed on agency business documents (plans and goals), e.g., the strategic and annual performance plans, program authorization documents, budget documents, directives review, and interviews with project stakeholders. Once the performance objectives have been established, any known impediments, i.e., constraints, to accomplishing the objectives must be identified

Constraints – A business definition for constraint as defined by one author is "anything that limits the performance of a system relative to its goal" which is different for the traditional usage of the term constraint. However, in the evolution of the SOO think of a constraint as something to be focused on and perhaps improved upon. This thinking will allow offerors to provide innovative and competitive solutions while giving due consideration to those things or events that limit performance. For example, most agencies have security requirements that address a contractor's access to the building; subsequently, the nature of the work involved in the requirement is limited by the security constraint. Therefore, an offeror must be innovative and creative enough to propose solutions to the requirement that would either accommodate the security concerns or work around them. This means that we need to be clear in identifying the constraints which provide the offeror focal points to center on in the submission of an offer.

QUALITY ASSURANCE SURVEILLANCE PLAN

The quality assurance surveillance plan establishes the process that the Government will use to assess the contractor's performance in accordance with the agreed upon performance standards. When using the Performance Work Statement approach the Quality Assurance Surveillance Plan (QASP) is developed by the Government, although there are times when a contractor developed QASP may be more desirable. For example, when commercial quality standards are applicable to a particular requirement industry may have a more effective and efficient measure. When using the Statement of Objectives approach the QASP may be developed by the contractor as part of the response to the RFP. The QASP focuses on the level of performance required. The quality assurance surveillance plan summarizes the performance standards and acceptable quality levels for the appropriate standard, it describes how performance will be monitored, how the results will be evaluated, and the affect on contract payment. The QASP concentrates on the level of performance and not the method for achieving it.

Performance Work Statement - The QASP may be part of the performance work statement, but it is usually contained as a separate document within the contract. There may be one QASP for the entire performance work statement or multiple plans associated with specific tasks within the performance work statement. The methodology used in the QASP is a determinant for assessing contractor success and overall contract management. The most common types of surveillance methods used are 100% inspection, random sampling, periodic sampling, customer input, and unscheduled inspections. The100% inspection is best suited for infrequent tasks or tasks with strict performance requirements. Inspection is required at each occurrence and often proves to be time consuming and administratively burdensome. Random sampling works best in instances where the service being performed is very large and valid samples can be obtained. Periodic sampling is appropriate for tasks that are infrequent and do not require a 100% sample.

It requires detailed analysis and judgment based on agency resources and the relative importance of each task as to which tasks should be inspected, how to inspect them, and how often they should be inspected. Customer input is a system that measures contractor performance based on the number and types of customer input received. It is usually accomplished through customer surveys. Administratively the government must manage the input system and demonstrate that it acted upon input received by customers. Unscheduled inspections are surprise inspections made at times and places deemed appropriate by the individuals responsible for monitoring contractor performance on behalf of the government.

The selection of a surveillance method is affected by a number of factors including:

- Number of performance standards to be inspected;
- Criticality and cost of the activity to be inspected;
- Location of the activity; and,
- Resources available to conduct surveillance.

The entire surveillance process requires scheduling, observing, documenting, and accepting service. The surveillance must be comprehensive and well documented as the results of the surveillance impact the incentives paid to the contractor. If the surveillance process becomes complicated, the performance work statement and performance standards should be reviewed and simplified. Contractors should be briefed on the surveillance requirements and should also be asked to provide a requirement specific quality control plan describing procedures used in order for them to maintain acceptable quality levels under the contract.

Statement of Objectives – The SOO approach is particularly suitable for having the offeror propose performance metrics and the QASP. The SOO requires each offeror to develop an innovative competitive solution to the government's requirement, as stated. Consequently, each proposal received could and should be different with its corresponding metrics, measures, and quality assurance plans. In this instance, the QASP should be tailored to the proposed solution as intended. One of our roles as contracting professionals within the team structure is to ensure that the necessary documents are submitted as part of the offer which provides for a meaningful source selection review. Therefore, the solicitation should require that certain elements are addressed in the QASP, such as, cost control/risk management, commercial or industry quality standards, quality awards, surveillance methodology, and past performance. In addition, the solicitation should inform the prospective offeror that the measures and metrics may be changed as contract performance progresses, in order to ensure that the right measure is actually being taken into consideration.

INCENTIVES

The incentive plan relates to the contractor performance and rewards a contractor that performs well and penalizes one that does not. Incentives encourage contractors to develop innovative cost-effective methods of performance while maintaining the quality of the services provided. They may be included in the quality assurance plan or set aside in a separate document. Incentives may be monetary or non-monetary in nature. Where monetary incentives are not desirable or considered effective as a motivating factor, non-monetary incentives such as

extensions to award term should be explored. If deductions are used, then incentives are usually included in the quality assurance plan. If award or incentive fees are used, they are usually addressed in a separate document.

The following chart provides examples of incentives:

Incentive	Performance Incentives
Fee	Fee dollars are directly linked to achieving or exceeding standards. A specific amount of fee may be directly related to the achievement of a specific performance standard. Fee dollars may also be associated with a target fee amount or an award fee pool, where the amount of fee earned is adjusted upwards or downwards based upon the contractor achieving performance standards.
Payments	When performance exceeds standards, pay x% of monthly payment into a pool. If performance is below standard, x% of that monthly payment is withheld. At the end of y months, pay the contractor the amount accrued in the pool. Payment may also be made when the contractor has accrued x dollars in the pool.
Re-work	When performance is below standard for a given period of time, require the contractor to re-perform the service at no additional cost.
Surveillance/monitoring	Adjust surveillance or contractor reporting based upon the contractor performance exceeding standards or not over a specified amount of time.

Past Performance	Document past performance report card, paying attention to performance that either failed to meet or exceeded standards.
Term	Adjust the contract performance period, either shorten or lengthen, depending on the contractor performance either failing to meet or exceeds performance standards during a stated period of time. **Note:** Although Award Term is currently being used by agencies, to include DOE, its application has not been regulated and its use should be coordinated with the cognizant SPE office.

A firm fixed price contract is the ultimate incentive laden performance based contract. If the contractor does not deliver the required supply or service, the contractor will not get paid. Fixed price incentive and cost plus incentive fee contracts are formula-type incentives that can provide for both positive and negative incentives based on target numbers and applied formulas depending on the extent to which the contractor exceeded or failed to meet target numbers. Formula incentives must contain cost incentives. Multiple incentive contracts should be considered when emphasis is required on more than cost control. Multiple incentive contracts must include a cost incentive and may include performance (technical) incentives and delivery incentives. Performance incentives should only be applied to the most important aspects of the work, rather than every individual task. Trade off decisions must be considered and should be consistent with the overall objectives of the acquisition. This prevents the contractor from concentrating its efforts on any one incentive area.

The cost plus award fee contract is a commonly used acquisition methodology that may support an award term incentive, if structured appropriately. It should be noted that award fee contracts are resource intensive in their administration. Therefore, it is recommended that this type of contract only be used with large dollar value requirements. The available award fee pool acts as a motivating factor upon contractor performance. The award fee incentive is expressed as a total dollar amount and is divided up and paid out periodically throughout the life of the contract based on the contractor's performance in relation to stated evaluation factors. These factors may be objective and subjective but should always be stated and agreed to. It should be noted that objective factors such as cost control, and timeliness of deliverables tend to be easily identifiable and usually motivate contractor performance effectively. However, in some cases it may be appropriate to use subjective factors such as quality of the product or feature and benefit performance standards/expectations. Objective factors lead contractors to believe that a certain outcome will result in a certain fee verses subjective factors that may appear vague and less

convincing. Notwithstanding, subjective factors can and should be used once it is clear that obvious discriminators can be used to describe a subjective term. Award fee incentives are flexible in that the award fee criteria may be changed during contract performance to reflect the current situation and changes in mission priorities.

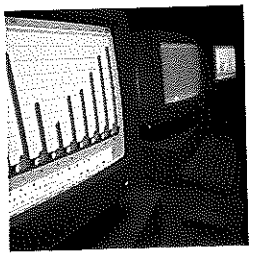
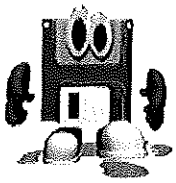
MANAGING TO COMPLETION

The key to successful project completion has its roots in managing contract performance within the performance based acquisition structure. The first step is identical to the last, maintaining team formation. Team effectiveness is critical to managing contract performance to success. Each individual brings a certain skill set to the team and performs according to the skills needed at a particular moment in time. However, once the contract is awarded team participation should not ramp down but evolve into another state where team roles and responsibilities are adjusted to the changed work requirements. In fact, at this stage the contractor is part of the team and the expertise and knowledge the contractor was selected for should be used to ensure project success.

The Seven Steps to Performance-Based Services Acquisition states that "effective contract management is a mission-critical agency function. This goes to the heart of the need to maintain sufficient core capability in the federal government to manage its programs. . . The management of contract performance is guided by the contract's terms and conditions and is achieved with the support of the business relationships and communications established between the contractor and the integrated solutions team."

Consequently, it would appear that the key to managing to contract completion would be the stability and commitment of the acquisition team and the skills and abilities brought to the acquisition process.

Guidance on Electronic and Information Technology (EIT) Accessibility - Section 508

References:

FAR 2.101	Definitions.
FAR 7.103	Agency-head responsibilities.
FAR 10.001	Policy.
FAR 11.002	Policy.
FAR 39.000	Scope of part.
FAR 39.2	Electronic and Information Technology.
FAR 39.201	Scope of subpart.
FAR 39.202	Definition.
FAR 39.203	Applicability.
FAR 39.204	Exceptions.
36 CFR 1194	Electronic and Information Technology Accessibility Standards.

Visit our website at http://professionals.pr.doe.gov for information on acquisition and assistance policies and procedures.

What is the Purpose of this Chapter?

The purpose of this chapter is to provide guidance to Department of Energy (DOE) and National Nuclear Security Administration (NNSA) contracting and program personnel regarding the following:

- Incorporating EIT standards in the acquisition process;
- How the EIT standards are to be applied; and
- Information and guidance on implementing policies and procedures for acquiring EIT.

What is the Background?

The Workforce Investment Act of 1998, Pub. L. 105-220, was enacted on August 7, 1998. Subsection 408(b) of the Workforce Investment Act of 1998 amended Section 508 of the Rehabilitation Act of 1973. The amendment strengthened the provisions covering access to information in the Federal sector.

Section 508 requires Departments and Agencies to:

- Procure, develop, maintain, or use Electronic and Information Technology (EIT), to ensure that disabled Federal employees have access to and use of information and data comparable to that of other Federal employees.

- Ensure that persons with disabilities who seek information or services from a Department or Agency have access to and use of information and data that is comparable to that provided to persons without disabilities.

In both instances cited, access is a statutory requirement unless an "undue burden" would be imposed on a Department or Agency. If an "undue burden" is established, the law requires that an alternative means of access be provided to individual(s) with disabilities.

Additionally, Section 508 requires the Architectural and Transportation Barriers Compliance Board (also referred to as the "Access Board") to publish standards setting forth a definition for EIT and technical and functional performance criteria necessary for such technology to comply with Section 508. The final standards were published on December 21, 2000, and became effective on February 20, 2001. The enforcement provisions of Section 508 took effect on June 21, 2001.

The law establishes an administrative process under which individuals with disabilities can file a complaint alleging that a Federal agency has not conformed to the standards. It provides injunctive relief and attorney's fees to the prevailing party, but does not include compensatory or punitive damages. Individuals may also file a civil action against an agency, if warranted.

Guidance Included in this Chapter

I. What is Electronic and Information Technology ? 3
II. How are the Accessibility Standards Applied? 3
III. What are the Procedures for Acquiring Section 508 Compliant Products and Services? 4

IV. What are the Exceptions to Compliance with the Electronic and Information Technology Standards? 8
Attachment - Section 508 Decision Tree for EIT Acquisition 10

I. What is Electronic and Information Technology?

Electronic and Information Technology (EIT), as defined in FAR 2.101, is information technology and any equipment or interconnected system or subsystem of equipment, that is used in the creation, conversion, or duplication of data or information. The term includes:

- ✓ telecommunications products (such as telephones);
- ✓ information kiosks and transaction machines;
- ✓ World Wide Web sites;
- ✓ multimedia; and
- ✓ office equipment (such as copiers and fax machines).

The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, **are not** EIT.

II. How are the Accessibility Standards Applied?

The standards define the types of technology covered and set forth provisions that establish a minimum level of accessibility. The following is a summary of the accessibility standards that a codified at 36 CFR 1194:

- ✓ **Subpart A – General.** This subpart outlines the purpose, scope, and coverage of the regulation containing the accessibility compliance standards; prescribes exceptions to the standards; defines terms related to the standards; and prescribes that the standards do not prevent the use of designs or technologies as alternatives to those prescribed in the regulation provided they result in substantially equivalent or greater access to and use of a product for persons with disabilities.

- ✓ **Subpart B – Technical Standards.** This subpart prescribes the technical standards for:

  - Software applications and operating systems;
  - Web-based intranet and internet information and applications;
  - Telecommunications products;

- Video and multimedia products;
- Self contained, closed products; and
- Desktop and portable computers.

✓ **Subpart C – Functional Performance Criteria.** The functional performance requirements prescribed in this subpart are intended for overall product evaluation and for technologies or components for which there is no specific requirement under the technical standards in subpart B. These criteria are designed to ensure that the individual accessible components work together to create an accessible product. They cover operation, including input and control functions, operation of mechanical mechanisms, and access to visual and audible information. These provisions are structured to allow people with sensory or physical disabilities to locate, identify, and operate input, control and mechanical functions and to access the information provided, including text, static or dynamic images, icons, labels, sounds or incidental operating cues. For example, one provision requires that at least one mode allow operation by people with low vision (visual acuity between 20/70 and 20/200) without relying on audio input since many people with low vision may also have a hearing loss.

✓ **Subpart D – Information, Documentation, and Support.** The standards also address access to all information, documentation, and support provided to end users (e.g., Federal employees) of covered technologies. This includes user guides, installation guides for end-user installable devices, and customer support and technical support communications. Such information must be available in alternate formats upon request at no additional charge. Alternate formats or methods of communication, can include braille, cassette recordings, large print, electronic text, Internet postings, TTY access, and captioning and audio description for video materials.

Consistent with Section 508, exceptions to the standards include systems that are used for military command, weaponry, intelligence, and cryptologic activities (not routine business and administrative systems used for other defense related purposes or by defense agencies or personnel). The standards also except "back office" equipment that is used only by service personnel for maintenance, repair, or similar purposes.

The standards only cover technology that is procured by Federal departments and agencies under contract with a private entity, and apply only to those products directly relevant to the contract and its deliverables. One of the exceptions provides that the standards *do not* apply to technology that is incidental to a Federal contract. Consequently, EIT products or services that are not specified as a deliverable under a contract with DOE are not subject to the compliance standards. For example, a firm that produces a report as a deliverable under the terms of a Federal prime contract would not have to procure accessible computers and software to develop the report even if they were used exclusively for that contract.

III. What are the Procedures for Acquiring Section 508 Compliant Goods and Services?

A. When does Section 508 Apply?

❑ Section 508 applies to all Federal prime contracts for EIT that are awarded on or after June 25, 2001.

❑ Section 508 also applies to task and delivery orders for EIT that are issued on or after June 25, 2001 under indefinite-quantity contracts; including, Federal Supply Schedules (FSS), Multiple Award Contracts (MAC), Government Wide Agency Contracts (GWAC), and other interagency acquisitions.

✓ Prior to the issuance of a task or delivery order for EIT on or after June 25, 2001 under an indefinite-quantity contract that was awarded *prior to* June 25, 2001, Contracting Officers and the cognizant program official(s) must determine whether such EIT is Section 508 compliant.

- It may be possible to facilitate compliance of noncompliant EIT that is currently available under such contracts via customary technical refreshment and/or technical obsolescence clauses, as applicable.

- Indefinite-quantity contracts may include noncompliant items provided that any task or delivery order issued for noncompliant EIT meets an applicable exception (see Section IV).

✓ The Contracting Officer must ensure that when acquiring EIT products or services from an FSS, GWAC, or MAC the Requiring Official and ordering activity have documented that the acquisition complies with the applicable accessibility (see FAR 39.203(b)(3)).

✓ When acquiring EIT products or services in the form of an Other Interagency Acquisition, i.e., interagency agreement, the Contracting Officer must ensure that the Requiring Official and ordering activity have documented compliance with the applicable accessibility standards for the products or services being procured.

❑ Section 508 compliance is not required for task and delivery orders for EIT that are issued after June 25, 2001, under definite quantity or requirements contracts that were awarded *prior to* June 25, 2001.

❑ Contracting offices that award indefinite-quantity contracts for EIT products or services which are made available for intra or inter-agency use must indicate to ordering offices which supplies or services that are available under the contract are

compliant, and show where full details of compliance can be validated.

- ❑ The requirements of Section 508 **do not** apply to a contractor's acquisition of EIT (see FAR 39.204 and Section G.4 of the Frequently Asked Questions (http://www.section508.gov/docs/508QandA.html)) for use during the performance of an awarded contract. Section 508 compliance is required for acquisitions of EIT that is acquired by Federal departments and agencies for use by Federal government employees and the general public.

  ✓Reference is made to the memorandum issued by the Acting Director, Office of Management and Administration, dated February 28, 2001, Subject: "Guidance on Management and Operating Contractor Purchasing." This memorandum re-emphasizes the Department's policy which prohibits the acquisition of goods and services by the Department's management and operating (M&O) contractors for the sole support of Department's Headquarters or its field offices. However, in certain limited circumstances, M&O contractors may purchase for mixed M&O/DOE site activities, when it is not practicable to segregate DOE requirements from those of the M&O contractor. In such instances, Requiring Officials should consult with local counsel and the Office of Procurement and Assistance Policy concerning the potential applicability of Section 508 to such acquisitions.

B. What are the Procedures for Requirements Development?

- ❑ Requiring Officials, with assistance from the Contracting Officer, should determine whether an identified need can be filled with a product or service that is fully or partially compliant with the Access Board's standards or whether an exception applies.

  Refer to the Attachment of this document for a "Decision Tree" providing a visual perspective of the events that take place during the acquisition of EIT products and/or services.

  ✓If the product or service is fully compliant and can be acquired from the commercial marketplace in time to meet delivery requirements, the Requiring Official must document the compliance with the standards and make the purchase, unless an undue burden exist (see FAR 39.204(e)(1)).

  ✓If only a partially compliant product(s) or service(s) can be acquired from the commercial marketplace in time to meet delivery requirements, the Requiring Official must document partial compliance, identify those standards which are not available (see FAR 39.203(c)(2)), and make the purchase, unless an undue burden exists (see FAR 39.204(e)(1)).

- If products or services are available that meet some but not all applicable standards, a product as a whole cannot be claimed as not available. If products or services are

commercially available that meet some but not all of the standards, the Contracting Officer must procure the product that best meets the standards. For example, Contractor A offers a technically equivalent product to that of Contractor B, Contractor A's product is partially compliant with the standards where Contractor B's product is non-compliant. The product offered by Contractor A must be procured, unless an undue burden would result, all factors considered.

- ✓ If no compliant products or services can be acquired in the commercial marketplace in time to meet delivery requirements, the Requiring Official must document the actions taken to conclude that the nonavailability of a compliant product or service exists. The documentation must include a description of market research performed and which standards cannot be met and proceed with purchasing products or services that meet the Government's needs (see FAR 11.002(f)).

- Determinations of "undue burden" are not required to address individual standards (in whole or in part) that cannot be met with products or services that are available in the commercial marketplace in time to meet agency delivery requirements.

  ✓Compliance with the Access Board's standards is required when requirements documents (specifications or statements of work) are developed pursuant to FAR 10.001(a)(3)(vii) and 11.002 for a product or service that does not meet an exception (see FAR 39.204).

C. <u>How Can Compliant Products and Services be Found?</u>

- ❑ A product's compliance with the Access Board's standards may be determined through market research (see FAR Part 10). Provided below are some techniques to use in order to determine compliant products and services:

  - ✓ Inspect the General Services Administration's (GSA) Section 508 website http://www.section508.gov , click on the "Buy Accessible" link. This website should be the doorway to market research and the link should be considered a beginning to determining a products' or services' compliance. The site will continuously be populated with data concerning EIT product and service compliance, periodic checks are recommended;

  - ✓ Check the GSA FSS website http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelId=-13263 The FSS website provides assistance in determining which complaint products or services are available off of the FSS. Click on "GSA Advantage;"

  - ✓ Consult EIT vendor/manufacturer websites. The websites of vendors and manufacturers may provide the most up to date and comprehensive information related to product or service compliance. Verify and document

all information collected;

- ✓ Contact vendors or manufacturers directly for EIT product compliance information. Literature provided by the vendor/manufacturer is a great resource in assessing a products' or services' compliance. Any documentation received should be included as part of the contract file;

- ✓ Issue a request for information through the Federal Business Opportunities website www.fedbizopps.gov . Information on compliant EIT products and services and alternatives may be obtained through this source. Verify and document all information received;

- ✓ The DOE CIO's office can provide assistance in helping to ascertain a products' and services' compliance with Section 508. Contact DOE's Section 508 Coordinator (202) 586-1342; and

- ✓ Contact the awarding office for product or service compliance information. In the case of MACs, GWACs, and other interagency contracts, the awarding office can provide product or service compliance information that may be used in documenting the contract file.

IV. What are the Exceptions to Compliance with the Electronic and Information Technology Standards?

Acquisition of EIT supplies and services must meet the applicable accessibility standards at 36 CFR part 1194, unless one of the following exceptions applies (see FAR 39.204):

- ❑ **National Security** - This exception covers equipment that is an integral part of a weapon or weapons system, or systems which are critical to the direct fulfillment of military or intelligence missions.

- ❑ **Goods or Services Acquired by a Contractor** - Acquisition of items purchased that are incidental to a contract and used by the contractor in its normal course of operation, are exempt.

  - ✓ Generally, Section 508 does not apply to a contractor's internal workplace. If the contractor's EIT is not used or accessed by Federal employees or members of the public, it is not subject to the standards. It should be noted, for purposes of Section 508, contractor employees operating in their professional capacity are not considered members of the public.

- ❑ **Back Office** - EIT that is located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment.

- ❑ **Undue Burden** - The term "undue burden" is derived from disability law and it is consistent with language used in the Americans with Disabilities Act (ADA) and other

civil rights legislation. The term has been defined as *"significant difficulty or expense."*

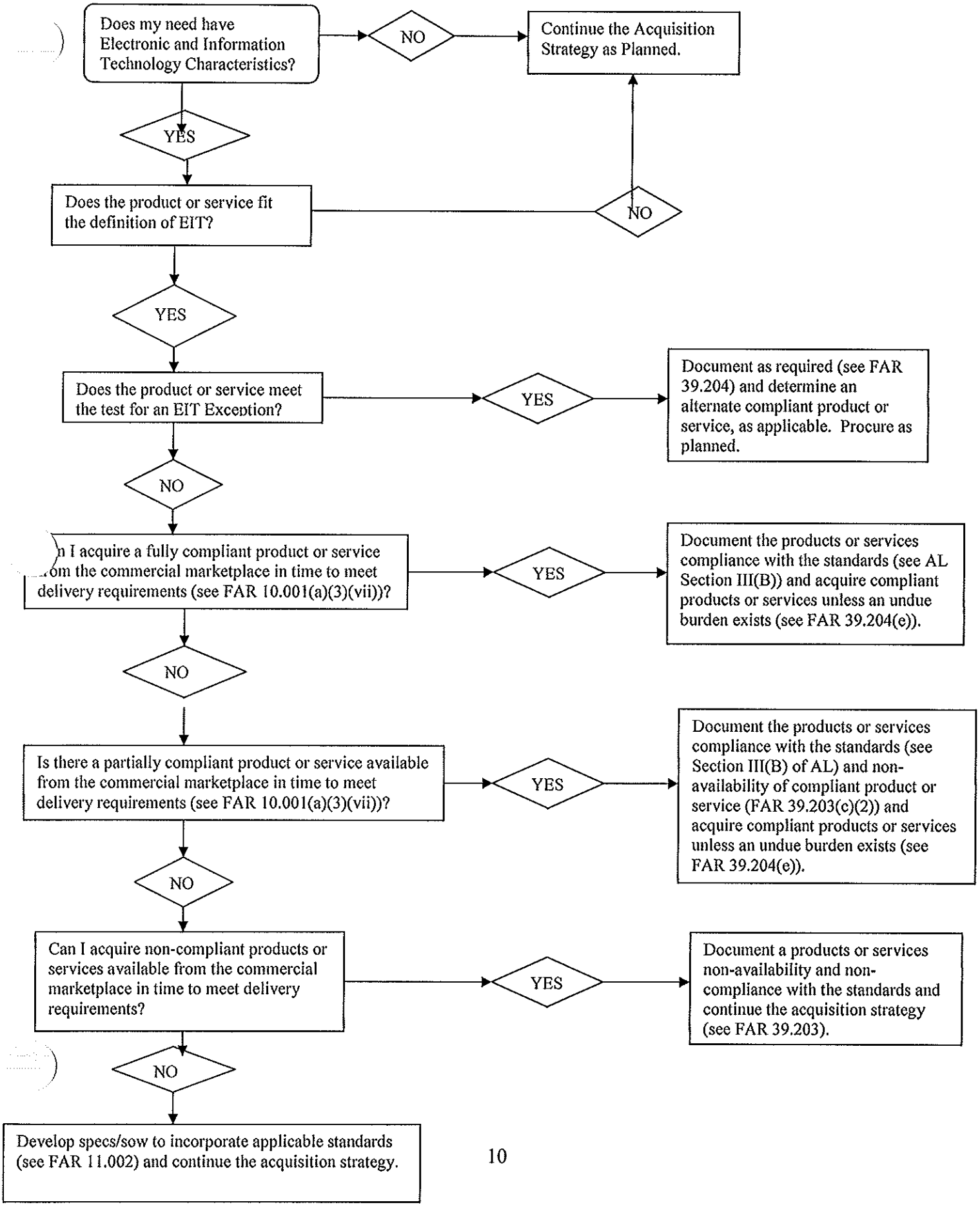
- ✓ Requesting Officials should consult with local EEO counsel, or the Office of General Counsel for General Law (GC-80), regarding determinations/documentation requirements of "undue burden" related to EIT Accessibility.

- ✓ When an undue burden is determined, an alternative means of access must be provided to individuals with disabilities, if available. The Contracting Officer must obtain an alternative product or service, if available, as identified by the Requiring Official.

Note: Exception determinations are required for indefinite-quantity contracts that include non-compliant products or services only when the requirements are satisfied at the time of award, as previously stated. Indefinite-quantity contracts may include non-compliant items, provided that the task and delivery orders issued for such items meet an applicable exception.

See the next page for a Decision Tree tool for use with electronic information technology acquisitions.

Section 508 Decision Tree for EIT Acquisition



Office of Procurement and Assistance Policy
ME-61 Routing and Transmittal Slip

Date: Ju[illegible]05

		Date:	Action Taken:	Initial
ME-6[illegible]	[illegible]ng	07/18/05	Approved	MF
MF[illegible]		[illegible]/18/05	Prepared for review	[illegible]
Zvolen[illegible]				
Righi, Micha[illegible]				
Webb, Robert				
Kniskern, Jacqueline				
Wright, Denise		DPW		
Langston, Richard				

Sherry done
1) See 2 small changes on pages 1 & 2
2) What about the pen and ink changes within the chapter itself? 37 should be before 36 when we release.

Circle One:

Action	Concurrence	For your Information	For Conversation
Approval	Distribution	For your Review	Prepare Reply
As Requested		Hand carry to	Signature
Circulate X			Type/Retype
Comments			

A 7/18

Due Date:
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(Remarks)

Denise, please do Mike's Comments above.
Thanks
Sherry

The enclose[illegible]

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Denise, pl[illegible] + initial 7/18
Thanks
Sherry

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005 – 46

DATE: July 20, 2005
TO: Procurement Directors and Heads of Contracting Activity
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Fiscal Year 2006 Subcontract Goals**

SUMMARY: This Policy Flash transmits the attached memorandum for distribution by the Department's Director of the Office of Small and Disadvantaged Business Utilization, Director of the DOE Office of Procurement and Assistance Management, and the Director of the NNSA Office of Acquisition and Supply Management. It requests that DOE prime contractors submit their recommendations for small business subcontracting goals in response to the Small Business Administration (SBA).

POLICY FLASH
2005-46

The document to be used in communicating with all DOE required prime contractors is attached. Note that goals should be submitted no later than August 12, 2005.

If you have any questions concerning this Policy Flash, contact Stephen Zvolensky at (202) 287-1307 or Stephen.Zvolensky@hq.doe.gov.

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Department of Energy
Washington, DC 20585

JULY 15, 2005

MEMORANDUM FOR DISTRIBUTION

FROM: THERESA SPEAKE, DIRECTOR
OFFICE OF SMALL AND DISADVANTAGED
BUSINESS UTILIZATION

RICHARD H. HOPF, DIRECTOR
OFFICE OF PROCUREMENT &
ASSISTANCE MANAGEMENT

ROBERT C. BRADEN, JR. DIRECTOR
OFFICE OF ACQUISITION
AND SUPPLY MANAGEMENT, NNSA

SUBJECT: FY 2006 SUBCONTRACT GOALS

The Department's Deputy Secretary has requested that prime contractors submit their recommendations for small business (SB) subcontracting goals in response to the request from the U.S. Small Business Administration (SBA) for FY 2006 goals. We need your help in obtaining that information from your contractors.

Like every other Federal agency DOE has traditionally established the department's overall SB subcontracting goals using reported historical achievements of its prime contractors. This year, many of our contractors may need to revise these goals based on SBA goaling guidelines limiting the number of allowable exclusions from the procurement base.

Attached is a document entitled "FY 2006 Subcontract Goals" that we request be used to communicate with your contractor(s). You and your small business program managers should plan to work with your contractor(s) to develop aggressive, but rational goals, for each contract based on historical information and other factors. The FY 2006 goals are due to the OSDBU office no later than August 15, 2005.

Should you have any questions regarding this request, please contact Yosef Patel of the OSDBU at (202) 586-7377, Stephen Zvolensky of the Office of Procurement and Assistance Policy (ME-61) at (202) 287-1307 or Gary Lyttek of NNSA at (202) 586-8304.

Attachments

Printed with soy ink on recycled paper

NOTICE TO PRIME CONTRACTORS

Re: FY 2006 SUBCONTRACT GOALS

The Small Business Administration (SBA) has recently requested all federal agencies to submit their small business (SB) subcontracting procurement goals for fiscal year (FY) 2006. These goals apply to all DOE prime contractors (other than small business) awarded a contract of $500,000 ($1 million in construction) or more and required to submit a subcontracting plan documenting their planned awards to small businesses.

Although DOE/NNSA, like other federal agencies, has historically developed its departmental SB subcontracting goals based on prior years' actual contractor reported achievement data, this year the Department requests specific SB goals for your firm. The purpose of this approach is to provide maximum latitude to our contractors, as they reevaluate their goals using the established SBA goaling guidelines that allow only two exclusions from the procurement base; i.e.; contracts with affiliates and contracts outside the United States.

In keeping with Section 15 (g) of the Small Business Act, you are requested to propose goals that reflect the maximum practicable opportunity for small business concerns given your procurement needs. Once these goals are received, DOE will develop the overall departmental subcontracting goals for FY 2006 and submit them to the SBA.

To assist in developing goals, we have provided the below SBA government-wide subcontracting goals benchmark information:

Small Business (SB)	40 percent
Small Disadvantaged Business (SDB)	5 percent
8 (a)	(1/2 of SDB)
Women-Owned Small Business (WOSB)	5 percent
HUBZone Small Business	3 percent
Service Disabled Veteran-Owned	3 percent

Goals should be submitted no later than August 12, 2005. Should you have any questions regarding this request, please do not hesitate to contact your contracting officer or small business program manager.

Office of Procurement and Assistance Policy
ME-61 Routing and Transmittal Slip

Date: July 20, 2005

			Date:	Action Taken:	Initial
2	ME-61	Mike Fischetti, Acting Director	07/20/05	Signed / Approved	MF
	ME-61	Sherry Robinson -Admin Asst	07/20/05	Prepared for review	SR

	ME-61 Staff				
	Wood, Trudy				
1	Zvolensky, Stephen				
	Righi, Michael				
	Webb, Robert				
	Kniskern, Jacqueline				
	Wright, Denise				
	Langston, Richard				

Circle One:

Action	Concurrence	For your Information	For Conversation
Approval	Distribution	For your Review	Prepare Reply
As Requested	Fax	Hand carry to	Signature
Circulate X	File	Mail out	Type/Retype
Comments	For Correction	Note and Return	

Due Date: **Xerox:**
File/Controlled #: **Copies:**

Memorandum:
(Remarks)

Steve Z: Please review the enclosed policy flash.
Mike F: Signature

* Package needs distribution for HCA's. Also need electronic document (attachments)

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-47

DATE: July 29, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: **Federal Acquisition Circulars 2005-04 and 2005-05**

SUMMARY: This Policy Flash advises you of the issuance of Federal Acquisition Circulars 2005-04 and 2005-05.

These Circulars have been issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council to formalize several final rules and interim final rules published in the *Federal Register*. A listing of the various cases is attached.

POLICY FLASH
2005-47

If there are any questions regarding this Policy Flash, please contact Richard Langston at 202-287-1339 or at Richard.Langston@hq.doe.gov .

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment

Office of Procurement and Assistance Policy
ME-61 Routing and Transmittal Slip

Date: July ~~25~~ 29, 2005

		Date:	Action Taken:	Initial
ME-61	Mike Fischetti, Acting Director	07/25/05 29	Approve	MF
ME-61	Sherry Robinson -Admin Asst	07/25/05	Prepared for review	SR

ME-61 Staff			
Wood, Trudy			
Zvolensky, Stephen			
Righi, Michael			
Webb, Robert			
Kniskern, Jacqueline			
Wright, Denise			
Langston, Richard		Richard Langston	7/25/05

Circle One:

Action	Concurrence	For your Information	For Conversation
Approval	Distribution	For your Review	Prepare Reply
As Requested	Fax	Hand carry to	Signature
Circulate X	File	Mail out	Type/Retype
Comments	For Correction	Note and Return	

Due Date:
File/Controlled #:

Xerox:
Copies:

Final

Memorandum:
(Remarks)

Richard L: Please review the enclosed policy flash.
Mike F: Signature

7/29 - changes made & put in correct format. SR
7/29 Corrections (2) SR

FEDERAL ACQUISITION CIRCULAR 2005-04

Item I—Notification of Employee Rights Concerning Payment of Union Dues or Fees (FAR Case 2004-010)

This final rule adopts, without change, the interim rule published in the Federal Register at 69 FR 76352, December 20, 2004, and issued as Item IV of FAC 2001-26. It amends FAR parts 2, 22, and 52 to implement Executive Order (E.O.) 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, and Department of Labor regulations at 29 CFR 470. The rule requires Government contractors and subcontractors to post notices informing their employees that under Federal law they cannot be required to join a union or maintain membership in a union to retain their jobs. The required notice also advises employees who are not union members that they can object to the use of their union dues for certain purposes. This rule applies to Federal contractors and subcontractors with contracts or subcontracts that exceed the simplified acquisition threshold, unless covered by an exemption granted by the Secretary of Labor.

Item II—Telecommuting for Federal Contractors (FAR Case 2003-025)

This rule finalizes without changes the interim rule published in the Federal Register at 69 FR 59701, October 5, 2004, and issued as Item III of FAC 2001-025. This final rule implements Section 1428 of the Services Acquisition Reform Act of 2003 (Title XIV of Public Law 108-136), which prohibits agencies from including a requirement in a solicitation that precludes an offeror from permitting its employees to telecommute or, when telecommuting is not precluded, from unfavorably evaluating an offeror's proposal that includes telecommuting unless it would adversely affect agency requirements, such as security. Contracting officers awarding service contracts should familiarize themselves with this rule.

Item III—Incentives for Use of Performance-Based Contracting for Services (FAR Case 2004-004)

This final rule amends the Federal Acquisition Regulation (FAR) to provide Government-wide authority to treat performance-based contracts or task orders for services as commercial items, if certain conditions are met. Agencies must report on the use of this authority. This change implements sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) and is intended to promote the use of performance-based contracting.

Item IV—Submission of Cost or Pricing Data on Noncommercial Modifications of Commercial Items (FAR Case 2004-035)

This interim rule implements an amendment to 10 U.S.C. 2306a. The change requires that the exception from the requirement to obtain certified cost or pricing data for a commercial item does not apply to noncommercial modifications of a commercial item that are expected to cost, in the aggregate, more than $500,000 or 5 percent of the total price of the contract, whichever is greater. Section 818 applies to offers submitted, and to modifications of contracts or subcontracts made, on or after June 1, 2005. This new policy applies only to acquisitions funded by DOD, NASA, or the Coast Guard, since the statute amends 10 U.S.C. 2306a, which only applies to those agencies. The new language does not apply to acquisitions funded by other than DOD, NASA, or the Coast Guard because Section 818 did not amend 41 U.S.C. 254b, which prohibits obtaining cost or pricing data for commercial items. However, the new policy applies to contracts awarded, task or delivery orders placed on behalf of those agencies by an official of the

United States outside of them, because the statutory requirement of Section 818 still applies.

Item V—Applicability of SDB and HUBZone Price Evaluation Factor (FAR Case 2003-015)

This final rule removes some of the exceptions to the Small Disadvantaged Business and HUBZone preference programs. The contracting officer will now apply a price evaluation adjustment to offers of eligible products in acquisitions subject to the Trade Agreements Act.

This rule will have a beneficial impact on all domestic concerns, especially small entities that are small disadvantaged business concerns or HUBZone small business concerns. See Acquisition Letter 2005-08 for Departmental guidance in this area.

Item VI—Labor Standards for Contracts Involving Construction (FAR Case 2002-004)

This final rule implements in the FAR the Department of Labor (DOL) rule revising the terms "construction, prosecution, completion or repair" (29 CFR 5.2(j)) and "site of the work" (29 CFR 5.2(l)). In addition, the Councils have clarified several definitions relating to labor standards for contracts involving construction and made requirements for flow down of labor clauses more precise.

The most significant impact of this rule is that contractors must pay Davis-Bacon Act wages at a secondary site of the work, if a significant portion of the work is to be constructed at that site and the site meets the other criteria specified in the rule. When transporting portions of the building or work between the secondary site of the work and the primary site of the work, the wages for the primary site of the work are applicable. The contracting officer must coordinate with the DOL when there is any uncertainty as to whether a work site is a secondary site of the work.

Item VII—Deferred Compensation and Postretirement Benefits Other Than Pensions (FAR Case 2001-031)

This final rule amends the FAR by revising paragraph (k), Deferred compensation other than pensions, and paragraph (o), Postretirement benefits other than pensions, of FAR 31.205-6, Compensation for personal services, cost principle. Changes to paragraph (k) include deletion of language that duplicates definitions provided in FAR 31.001, elimination of obsolete coverage, and use of terminology consistent with Cost Accounting Standards. Changes to paragraph (o) include: moving and revising language in (o)(3) through (o)(5) to (o)(2)(iii) because these requirements only apply to accrual costing other than terminal funding. In addition, new coverage is added to the related contract clause at FAR 52.215-18, Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other Than Pensions, specifying the method of recovery of refunds and credits. The rule revises the cost principle and contract clause by improving clarity and structure, and removing unnecessary and duplicative language.

The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, e.g., price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

Item VIII—Gains and Losses (FAR Case 2004-005)

This final rule amends FAR 31.205-16 to address the timing of the gain or loss recognition of sale and leaseback arrangements of contractor depreciable property or other capital assets. The final rule defines the disposition date for a sale leaseback arrangement as the date the contractor begins to incur an obligation for lease or rental costs. Contracting officers, auditors, and contractors with responsibilities related to allowable cost determinations involving sale and leaseback arrangements of contractor depreciable property or other capital assets will be impacted by new policies governing this area.

FEDERAL ACQUISITION CIRCULAR 2005-05

Item I—Definition of Information Technology (FAR Case 2004-030)

This interim rule amends FAR 2.101(b) to revise the definition of "information technology" to reflect the recent changes to the definition resulting from the enactment of Public Law 108-199. The new language at Section 535(b) of Division F of Public law 108-199 permanently revises the term "information technology," which is defined at 40 U.S.C. 11101, to add "analysis" and "evaluation" and to clarify the term "ancillary equipment." This permanent change to the terminology necessitated this interim rule to amend the FAR.

Item II—Documentation Requirement for Limited Sources under Federal Supply Schedules (FAR Case 2005-004)

On June 18, 2004, DoD, GSA, and NASA published FAR case 1999-603 (69 FR 34231) amending the FAR to incorporate ordering procedures for orders against Federal Supply Schedules (FSS), including the documentation requirements for justifying sole source orders. The rule inadvertently established these justification and approval requirements for sole source orders instead of when an ordering activity restricts consideration of schedule contractors to less than the required number. This rule corrects that oversight. The final rule also based the content of the documentation requirements on that in FAR 6.303-2. By doing so, the rule established some unintentional and inapplicable content requirements, especially for orders under the simplified acquisition threshold (SAT). This rule corrects those unintended changes by establishing the standard for justifying restricted orders under the SAT and accurately specifying the justification content for restricted orders above the SAT. The rule will clarify the procedures for ordering activities.

Item III—Payment Withholding (FAR Case 2004-003)

This amendment removes the mandatory requirement that a contracting officer withholds 5 percent of the payments due under a time-and-materials contract, unless it is necessary to withhold payment to protect the Government's interest or otherwise prescribed in the contract Schedule. It requires the use of a contract modification in order to make payment withholding and, in the event withholding is required, the contractor is responsible to withhold the amounts from its billings. Contracting officers and contracting officer's representatives who award or administer Time-and-Materials or Labor-Hour contracts or orders should be familiar with this amendment. Also, contractor personnel who are responsible for managing invoicing for those types of contracts should be aware of this new requirement.

Item IV—Confirmation of HUBZone Certification (FAR Case 2005-009) This interim rule amends FAR 19.703 and the clause at 52.219-9 to clarify that prime contractors must confirm that a subcontractor representing itself as a Historically Underutilized Business Zone (HUBZone) small business concern is certified, consistent with the requirements of 15 U.S.C. 632 et seq., as amended. This change is expected to increase subcontracting opportunities for certified HUBZone small business concerns and ensure accurate reporting of awards to HUBZone small business concerns under Government contracts.

Item V—Government Property Rental and Special Tooling (FAR Case 2002-015)

This final rule amends FAR Parts 45 and 52 to clarify the basis for determining rental charges for the use of Government property. The change, which is intended to promote the dual use of such property, will impact contracting officers and property administrators responsible for the management of Government property and contractors that desire to use Government property for commercial purposes.

Item VI—Technical Amendment

An editorial change is made at FAR 4.1102 in order to update a reference in the authority line of Part 4.

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-48

DATE: July 26, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: New Financial Assistance Property Form and Revised National Policy Requirements

SUMMARY: This Policy Flash distributes and provides guidance for a new DOE-wide financial assistance property report and revised national policy assurances.

POLICY FLASH
2005-48

1. The Office of Procurement and Assistance Policy, with the help of the Chicago Operations Office and the Financial Assistance Advisory Committee, developed a DOE-wide Financial Assistance Property Closeout Certification form (attached). This new form replaces the various property forms currently used by awarding offices. It is located on the Applicant and Recipient Page at http://grants.pr.doe.gov.

2. On June 28, 2005, the Department issued a rulemaking on research misconduct effective July 28, 2005 (See Policy Flash 2005-41). The rulemaking includes new research misconduct requirements (10 CFR 600.31) for financial assistance awards. To incorporate these requirements into new and renewal financial assistance awards, we have added a new research misconduct assurance to the end of the document entitled, "National Policy Assurances To Be Incorporated as Award Terms." This Policy Flash distributes the July 2005 version of the national policy assurances, which are located on the Applicant and Recipient Page at http://grants.pr.doe.gov.

Contracting Officer's Responsibilities

1. Contracting Officers must use the attached DOE-wide property form for financial assistance awards that end on or after October 1, 2005, and may, at their discretion, use the form on awards that end prior to that date.

2. Contracting Officers must ensure that the new research misconduct requirement is incorporated into new and renewal financial assistance awards, which involve research and development, issued on or after July 28, 2005. This can be done by one or more of the following methods:

    - Use the revised Notice of Financial Assistance Award form, DOE F 4600.1 (07/05), for the award document. The form was revised to specify that the award includes the national policy assurances in effect on the date of the award. The revised DOE F 4600.1 (07/05) form is on the Professionals Homepage at http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/FinancialAssistance/Financial+Assistance+Forms?OpenDocument.

    - Include an appropriate statement in the letter transmitting the award advising the recipient that the "National Policy Assurances To Be Incorporated as Award Terms (July 2005)" apply to the award.

    - Attach the "National Policy Assurances To Be Incorporated as Award Terms (July 2005)" to the award.

If you have questions regarding this Policy Flash, contact Trudy Wood at 202 287-1336 or by e-mail at trudy.wood@hq.doe.gov.

Michael P. Fischetti
Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachments: 1. U.S. Department of Energy Financial Assistance Property Closeout Certification (June 2005)
2. National Policy Assurances To Be Incorporated as Award Terms (July 2005)

NATIONAL POLICY ASSURANCES TO BE INCORPORATED AS AWARD TERMS (July 2005)
To the extent that a term does not apply to a particular type of activity or award, it is self-deleting.

Nondiscrimination
By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following, national policies prohibiting discrimination:

a. On the basis of race, color, or national origin, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, et seq.), as implemented by DOE regulations at 10 CFR part 1040.

b. On the basis of race, color, religion, sex, or national origin, in Executive Order 11246 [3 CFR, 1964-1965 Comp., p. 339], as implemented by Department of Labor regulations at 41 CFR part 60.

c. On the basis of sex or blindness, in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.), as implemented by DOE regulations at 10 CFR parts 1041 and 1042.

d. On the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.), as implemented by Department of Health and Human Services regulations at 45 CFR part 90 and DOE at 10 CFR part 1040.

e. On the basis of handicap, in:

1. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DOE regulations at 10 CFR part 1041.

2. The Architectural Barriers Act of 1968 (42 U.S.C. 4151, et seq.).

Organisms
By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following national policies concerning live organisms:

a. For human subjects, the Common Federal Policy for the Protection of Human Subjects, codified by the Department of Health and Human Services at 45 CFR part 46 and implemented by DOE at 10 CFR part 745.

b. For animals:

1. Rules on animal acquisition, transport, care, handling, and use in 9 CFR parts 1-4, Department of Agriculture rules implementing the Laboratory Animal Welfare Act of 1966 (7 U.S.C. 2131-2156) , and guidelines in the National Academy of Sciences (NAS) "Guide for the Care and Use of Laboratory Animals" (1996), including the Public Health Service Policy and Government Principles Regarding the Care and Use of Animals in Appendix D to the guide.

2. Rules of the Departments of Interior (50 CFR parts 10-24) and Commerce (50 CFR parts 217-227) implementing laws and conventions on the taking, possession, transport, purchase, sale, export, or import of wildlife and plants, including the: Endangered Species Act of 1973 (16 U.S.C. 1531-1543); Marine Mammal Protection Act (16 U.S.C. 1361-1384); Lacey Act (18 U.S.C. 42); and Convention on International Trade in Endangered Species of Wild Fauna and Flora.

Debarment and Suspension
The recipient agrees to comply with the requirements regarding debarment and suspension in Subpart C of 10 CFR part 606, which implements E.O. 12549 [3 CFR, 1986 Comp., p. 189]; E.O. 12689 [3 CFR, 1989 Comp., p. 235]; and Sec. 2455 of Federal Acquisition and Streamlining Act of 1994 (Pub. L. 103-355). The recipient also agrees to communicate the requirement to comply with Subpart C to persons at the next lower tier with whom the recipient enters into transactions that are "covered transactions" under Subpart B of 10 CFR part 606.

NATIONAL POLICY ASSURANCES TO BE INCORPORATED AS AWARD TERMS (July 2005)
To the extent that a term does not apply to a particular type of activity or award, it is self-deleting.

Hatch Act
The recipient agrees to comply with the Hatch Act (5 U.S.C. 1501-1508 and 7324-7328), as implemented by the Office of Personnel Management at 5 CFR part 151, which limits political activity of employees or officers of State or local governments whose employment is connected to an activity financed in whole or part with Federal funds.

Environmental Standards
By signing this agreement or accepting funds under this agreement, the recipient assures that it will:

a. Comply with applicable provisions of the Clean Air Act (42 U.S.C. 7401, et. seq.) and Clean Water Act (33 U.S.C. 1251, et. seq.), as implemented by Executive Order 11738 [3 CFR, 1971-1975 Comp., p. 799] and Environmental Protection Agency (EPA) rules at Subpart J of 40 CFR part 32.

b. Identify to the awarding agency any impact this award may have on:

1. The quality of the human environment, and provide help the agency may need to comply with the National Environmental Policy Act (NEPA, at 42 U.S.C. 4321, et. seq.) and to prepare Environmental Impact Statements or other required environmental documentation. In such cases, the recipient agrees to take no action that will have an adverse environmental impact (e.g., physical disturbance of a site such as breaking of ground) until the agency provides written notification of compliance with the environmental impact analysis process, as implemented by DOE at 10 CFR part 1021.

2. Flood-prone areas, and provide help the agency may need to comply with the National Flood Insurance Act of 1968 and Flood Disaster Protection Act of 1973 (42 U.S.C. 4001, et. seq.), which require flood insurance, when available, for Federally assisted construction or acquisition in flood-prone areas, as implemented by DOE at 10 CFR part 1022.

3. Coastal zones, and provide help the agency may need to comply with the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et. Seq.), concerning protection of U.S. coastal resources.

4. Coastal barriers, and provide help the agency may need to comply with the Coastal Barriers Resource Act (16 U.S.C. 3501, et. seq.), concerning preservation of barrier resources.

5. Any existing or proposed component of the National Wild and Scenic Rivers system, and provide help the agency may need to comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271, et seq.).

6. Underground sources of drinking water in areas that have an aquifer that is the sole or principal drinking water source, and provide help the agency may need to comply with the Safe Drinking Water Act (42 U.S.C. 300h-3).

Drug-Free Workplace
The recipient agrees to comply with the requirements regarding drug-free workplace requirements in Subpart B (or Subpart C, if the recipient is an individual) of 10 CFR part 607, which implements sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701, et seq.).

National Historic Preservation
The recipient agrees to identify to the awarding agency any property listed or eligible for listing on the National Register of Historic Places that will be affected by this award, and to provide any help the awarding agency may need, with respect to this award, to comply with Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470, et seq.), as implemented by the Advisory Council on Historic Preservation regulations at 36 C.F.R. part 800 and Executive Order 11593 [3 CFR, 1971-1975 Comp., p. 559].

Officials Not to Benefit
No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this agreement, or any benefit arising from it, in accordance with 41 U.S.C. 22.

Preference for U.S. Flag Carriers
Travel supported by U.S. Government funds under this agreement shall use U.S.-flag air carriers (air carriers holding certificates under 49 U.S.C. 41102) for international air transportation of people and property to the extent that such service is available, in accordance with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118) and the interpretative guidelines issued by the Comptroller General of the United States in the March 31, 1981, amendment to Comptroller General Decision B-138942.

Cargo Preference
The recipient agrees that it will comply with the Cargo Preference Act of 1954 (46 U.S.C. 1241), as implemented by Department of Transportation regulations at 46 CFR 381.7, which require that at least 50 percent of equipment, materials or commodities procured or otherwise obtained with U.S. Government funds under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned U.S.-flag commercial vessels, if available.

Relocation and Real Property Acquisition
The recipient assures that it will comply with 49 CFR part 24, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601, et seq.) and provides for fair and equitable treatment of persons displaced by Federally assisted programs or persons whose property is acquired as a result of such programs.

Lobbying
The recipient assures that it is not an organization described in section 501(c)(4) that has engaged in any lobbying activities described in the Lobbying Disclosure Act of 1995 (2 U.S.C. 1611). Recipients that are 501(c)(4) organizations further agree that they will not engage in such lobbying activities during the term of this award.

Native American Graves Protection and Repatriation Act of 1990
The recipient, if it is an organization which controls or possesses Native American remains and associated funerary objects and receives Federal funding even for a purpose unrelated to the Act, agrees to comply with the requirements of 43 CFR part 10, which implements the provisions of 25 U.S.C. 3001 et seq.

Research Misconduct
The recipient assures that it will comply with the DOE policy on research misconduct in 10 CFR 733 and the requirements regarding research misconduct in 10 CFR 600.31, both of which implement the government-wide Federal policy on research misconduct developed by the White House Office of Science and Technology Policy.

U.S. DEPARTMENT OF ENERGY JUNE 2005

FINANCIAL ASSISTANCE PROPERTY CLOSEOUT CERTIFICATION

Award Number	Recipient *(Name and address)*

e purpose of this report is to facilitate the closeout of the Award. Based on the records maintained by the Recipient in accordance h the Property Management standards set forth in the Award, the following data reflects the Recipient's closeout inventory of real and personal property that was provided by the Department of Energy (DOE) or partially or wholly acquired with project funds.

I. EQUIPMENT

A. **Federally-Owned:** *(Government Furnished Equipment): (10 CFR 600.133(a), 600.232, 600.322, or Federal Demonstration Partnership (FDP) General Terms and Conditions No. 33, as applicable):* ☐ No ☐ Yes

*(If **yes**, attach property inventory list that includes item description, manufacturer, model, serial number, original acquisition date, original acquisition cost and disposal condition code per the Federal Management Regulation 102-36.240)*

B. **Equipment Acquired with Award Funds where Title Vests in the Recipient with further obligations to DOE:** *(10 CFR 600.133, 600.134, 600.232, or 600.321, as applicable)*

☐ No ☐ Yes

If **yes**, does the equipment have a per unit fair market value of $5,000 or more? ☐ No ☐ Yes

*(If **yes**, attach a property inventory list that includes item description, manufacturer, model, serial number, original acquisition date, original acquisition cost, disposal condition code per the Federal Management Regulation 102-36-240 and one of the disposition codes listed below)*

(1) The property will continue to be used for the purposes authorized in the Award.

(2) The property is no longer needed for the purposes of the Award, and will be used on another Federally sponsored activity *(List Activity and Federal Agency):*

(3) The Recipient wishes to retain the property and compensate DOE for its share of the current per unit fair market value. *(Identify the fair market value on the attached property inventory list and describe how the value was determined).*

(4) The property is no longer needed for the purposes of the Award or other Federally sponsored activities and the Recipient requests DOE disposition instructions.

II. SUPPLIES *(10 CFR 600.135, 600.233, 600.324, or FDP General Terms and Conditions No. 35, as applicable)*

Does the residual inventory of unused supplies exceed $5,000 in total aggregate value? ☐ No ☐ Yes *(if **yes**, check block below)*

☐ The supplies will be used on another Federally sponsored activity *(List Activity and Federal Agency).*

☐ The supplies will be sold or retained for use on non-Federally sponsored activities and the Recipient will compensate DOE for its share of the sales proceeds (or estimate of current fair market value). Attach a list of the supplies and complete the following Worksheet:

Sale proceeds or estimate of current fair market value..... $_____

Percentage of Federal participation ..... _____%

Federal share ..... $_____

Selling and handling allowance ..... $_____

Amount to be remitted to DOE ..... $_____

U.S. DEPARTMENT OF ENERGY

FINANCIAL ASSISTANCE PROPERTY CLOSEOUT CERTICATION

REAL PROPERTY: *(Real Estate - 10 CFR 600.132, /600.231, 600.321, or FDP General Terms and Conditions No. 32, as applicable)* ☐ No ☐ Yes *(If yes, complete A –C)*

A. Description of Real Property:

B. Complete Address of Real Property:

C. Period of Federal Interest in the Property: From _____ To _____ (Unless the award specifies otherwise, the Federal Interest in the property ends when the award project period ends.)

D. Disposition Preference Request. If the period of Federal Interest in the property exceeds the project period, check one of the following blocks to indicate your disposition preference:

☐ Transfer property to another Federal award.

☐ Sell and compensate DOE.

☐ Return to DOE.

☐ Retain title and compensate DOE for its share of the current fair market value of the property.

Certification: I certify to the best of my knowledge and belief that all information presented in this report is true, correct and complete, and constitutes a material representation of fact upon which the Federal government may rely.

Name	Signature	Title	Date

U.S. DEPARTMENT OF ENERGY

FINANCIAL ASSISTANCE PROPERTY CLOSEOUT CERTIFICATION

To be completed by the Department of Energy:

DOE PROPERTY DISPOSITION

☐ **Negative Report**

☐ **Real Property:**

☐ **Equipment:**

☐ **Supplies:**

Property Management Official Name	Signature	Date

Office of Procurement and Assistance Policy
ME-61 Routing and Transmittal Slip

Date: July 25, 2005

			Date:	Action Taken:	Initial
2	ME-61	Mike Fischetti, Acting Director	07/25/05	Approved	MF
	ME-61	Sherry Robinson -Admin Asst	07/25/05	Prepared for review	[illegible]

ME-61 Staff				
1	Wood, Trudy			TW
	Zvolensky, Stephen			
	Righi, Michael			
	Webb, Robert			
	Kniskern, Jacqueline			
	Wright, Denise			
	Langston, Richard			

Circle One:

Action	Concurrence	For your Information	For Conversation
Approval	Distribution	For your Review	Prepare Reply
As Requested	Fax	Hand carry to	Signature
Circulate X	File	Mail out	Type/Retype
Comments	For Correction	Note and Return	

Due Date:
File/Controlled #:

Xerox:
Copies:

Memorandum:
(Remarks)

1 Trudy Wood: Please review the enclosed policy flash. Please add any attachments.
2 Mike F: Signature

Changes made 7/26/05
[illegible]

DOE F 4600.1#
(7/05)

U.S. DEPARTMENT OF ENERGY

NOTICE OF FINANCIAL ASSISTANCE AWARD

Under the authority of Public Law _____

1. PROJECT TITLE	2. INSTRUMENT TYPE ☐ GRANT ☐ COOPERATIVE AGREEMENT
RECIPIENT (Name, address, zip code)	4. INSTRUMENT NO. / 5. AMENDMENT NO. 6. BUDGET PERIOD FROM: THRU: / 7. PROJECT PERIOD FROM: THRU:
8. RECIPIENT PROJECT DIRECTOR (Name, phone and E-mail)	10. TYPE OF AWARD ☐ NEW ☐ CONTINUATION ☐ RENEWAL ☐ REVISION ☐ INCREMENTAL FUNDING
9. RECIPIENT BUSINESS OFFICER (Name, phone and E-mail)	
11. DOE PROJECT OFFICER (Name, address, phone and E-mail)	12. DOE AWARD ADMINISTRATOR (Name, address, phone and E-mail)

13. RECIPIENT TYPE

☐ STATE GOV'T ☐ INDIAN TRIBAL GOV'T ☐ HOSPITAL ☐ FOR PROFIT ORGANIZATION ☐ INDIVIDUAL

☐ LOCAL GOV'T ☐ INSTITUTION OF HIGHER EDUCATION ☐ OTHER NONPROFIT ORGANIZATION ☐ C ☐ P ☐ SP ☐ OTHER (Specify) _____

14. ACCOUNTING AND APPROPRIATIONS DATA:	15. EMPLOYER I.D. a. TIN: b. DUNS:

16. BUDGET AND FUNDING INFORMATION

a. CURRENT BUDGET PERIOD INFORMATION		b. CUMULATIVE DOE OBLIGATIONS	
(1) DOE Funds Obligated This Action	$_____	(1) This Budget Period *[Total of lines a.(1) and a.(3)]*	$_____
(2) DOE Funds Authorized for Carry Over	$_____		
(3) DOE Funds Previously Obligated in this Budget Period	$_____	(2) Prior Budget Periods	$_____
(4) DOE Share of Total Approved Budget	$_____		
(5) Recipient Share of Total Approved Budget	$_____	(3) Project Period to Date *[Total of lines b.(1) and b.(2)]*	$_____
(6) Total Approved Budget	$_____		

17. TOTAL ESTIMATED COST OF PROJECT, INCLUDING DOE FUNDS TO FFRDC: $_____
(This is the current estimated cost of the project. It is not a promise to award nor an authorization to expend funds in this amount.)

18. AWARD AGREEMENT TERMS AND CONDITIONS
This award/agreement consists of this form plus the following:
a. Special terms and conditions.
b. Applicable program regulations *(specify)* _____ *(Date)* _____.
c. DOE Assistance Regulations, 10 CFR Part 600at http://ecfr.gpoaccess.gov or, if the award is a grant to a Federal Demonstration Partnership (FDP) institution, the FDP Terms & Conditions and the DOE FDP Agency Specific Requirements at http://www.nsf.gov/awards/managing/fed_dem_part.jsp.
d. Application/proposal as approved by DOE.
e. National Policy Assurances to Be Incorporated as Award Terms at http://grants.pr.doe.gov. in effect on date of award

19. REMARKS

20. EVIDENCE OF RECIPIENT ACCEPTANCE	21. AWARDED BY
(Signature of Authorized Recipient Official) *(Date)*	*(Signature)* *(Date)*
(Name)	*(Name)*
(Title)	*(Title)*

Wood, Trudy A.

From: Johnson, Linda
Sent: Thursday, July 14, 2005 2:03 PM
To: Wood, Trudy A.
Subject: RE: Revised Research Misconduct language

Hi Trudy,

It looks fine to me. Thanks. Linda GC-61 Concurrence

-----Original Message-----
From: Wood, Trudy A.
Sent: Thursday, July 14, 2005 1:42 PM
To: Johnson, Linda
Subject: Revised Research Misconduct language

See attached. I think this reflects your comments, but I did a couple of things before I got to this and I may have lost my train of thought (It's not unusual.). Let me know if this language is okay.

Trudy

<< File: National Policy AssurancesAward TermsREV July2005.doc >>

NATIONAL POLICY ASSURANCES TO BE INCORPORATED AS AWARD TERMS (July 2005)

To the extent that a term does not apply to a particular type of activity or award, it is self-deleting.

Nondiscrimination

By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following, national policies prohibiting discrimination:

a. On the basis of race, color, or national origin, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, et seq.), as implemented by DOE regulations at 10 CFR part 1040.

b. On the basis of race, color, religion, sex, or national origin, in Executive Order 11246 [3 CFR, 1964-1965 Comp., p. 339], as implemented by Department of Labor regulations at 41 CFR part 60.

c. On the basis of sex or blindness, in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.), as implemented by DOE regulations at 10 CFR parts 1041 and 1042.

d. On the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.), as implemented by Department of Health and Human Services regulations at 45 CFR part 90 and DOE at 10 CFR part 1040.

e. On the basis of handicap, in:

1. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DOE regulations at 10 CFR part 1041.

2. The Architectural Barriers Act of 1968 (42 U.S.C. 4151, et seq.).

Organisms

By signing this agreement or accepting funds under this agreement, the recipient assures that it will comply with applicable provisions of the following national policies concerning live organisms:

a. For human subjects, the Common Federal Policy for the Protection of Human Subjects, codified by the Department of Health and Human Services at 45 CFR part 46 and implemented by DOE at 10 CFR part 745.

b. For animals:

1. Rules on animal acquisition, transport, care, handling, and use in 9 CFR parts 1-4, Department of Agriculture rules implementing the Laboratory Animal Welfare Act of 1966 (7 U.S.C. 2131-2156) , and guidelines in the National Academy of Sciences (NAS) "Guide for the Care and Use of Laboratory Animals" (1996), including the Public Health Service Policy and Government Principles Regarding the Care and Use of Animals in Appendix D to the guide.

2. Rules of the Departments of Interior (50 CFR parts 10-24) and Commerce (50 CFR parts 217-227) implementing laws and conventions on the taking, possession, transport, purchase, sale, export, or import of wildlife and plants, including the: Endangered Species Act of 1973 (16 U.S.C. 1531-1543); Marine Mammal Protection Act (16 U.S.C. 1361-1384); Lacey Act (18 U.S.C. 42); and Convention on International Trade in Endangered Species of Wild Fauna and Flora.

Debarment and Suspension

The recipient agrees to comply with the requirements regarding debarment and suspension in Subpart C of 10 CFR part 606, which implements E.O. 12549 [3 CFR, 1986 Comp., p. 189]; E.O. 12689 [3 CFR, 1989 Comp., p. 235]; and Sec. 2455 of Federal Acquisition and Streamlining Act of 1994 (Pub. L. 103-355). The recipient also agrees to communicate the requirement to comply with Subpart C to persons at the next lower tier with whom the recipient enters into transactions that are "covered transactions" under Subpart B of 10 CFR part 606.

NATIONAL POLICY ASSURANCES TO BE INCORPORATED AS AWARD TERMS (July 2005)

To the extent that a term does not apply to a particular type of activity or award, it is self-deleting.

Hatch Act

The recipient agrees to comply with the Hatch Act (5 U.S.C. 1501-1508 and 7324-7328), as implemented by the Office of Personnel Management at 5 CFR part 151, which limits political activity of employees or officers of State or local governments whose employment is connected to an activity financed in whole or part with Federal funds.

Environmental Standards

By signing this agreement or accepting funds under this agreement, the recipient assures that it will:

a. Comply with applicable provisions of the Clean Air Act (42 U.S.C. 7401, et. seq.) and Clean Water Act (33 U.S.C. 1251, et. seq.), as implemented by Executive Order 11738 [3 CFR, 1971-1975 Comp., p. 799] and Environmental Protection Agency (EPA) rules at Subpart J of 40 CFR part 32.

b. Identify to the awarding agency any impact this award may have on:

1. The quality of the human environment, and provide help the agency may need to comply with the National Environmental Policy Act (NEPA, at 42 U.S.C. 4321, et. seq.) and to prepare Environmental Impact Statements or other required environmental documentation. In such cases, the recipient agrees to take no action that will have an adverse environmental impact (e.g., physical disturbance of a site such as breaking of ground) until the agency provides written notification of compliance with the environmental impact analysis process, as implemented by DOE at 10 CFR part 1021.

2. Flood-prone areas, and provide help the agency may need to comply with the National Flood Insurance Act of 1968 and Flood Disaster Protection Act of 1973 (42 U.S.C. 4001, et. seq.), which require flood insurance, when available, for Federally assisted construction or acquisition in flood-prone areas, as implemented by DOE at 10 CFR part 1022.

Coastal zones, and provide help the agency may need to comply with the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et. Seq.), concerning protection of U.S. coastal resources.

4. Coastal barriers, and provide help the agency may need to comply with the Coastal Barriers Resource Act (16 U.S.C. 3501, et. seq.), concerning preservation of barrier resources.

5. Any existing or proposed component of the National Wild and Scenic Rivers system, and provide help the agency may need to comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271, et seq.).

6. Underground sources of drinking water in areas that have an aquifer that is the sole or principal drinking water source, and provide help the agency may need to comply with the Safe Drinking Water Act (42 U.S.C. 300h-3).

Drug-Free Workplace

The recipient agrees to comply with the requirements regarding drug-free workplace requirements in Subpart B (or Subpart C, if the recipient is an individual) of 10 CFR part 607, which implements sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701, et seq.).

National Historic Preservation

The recipient agrees to identify to the awarding agency any property listed or eligible for listing on the National Register of Historic Places that will be affected by this award, and to provide any help the awarding agency may need, with respect to this award, to comply with Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470, et seq.), as implemented by the Advisory Council on Historic Preservation regulations at 36 C.F.R. part 800 and Executive Order 11593 [3 CFR, 1971-1975 Comp., p. 559].

Officials Not to Benefit
No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this agreement, or any benefit arising from it, in accordance with 41 U.S.C. 22.

Preference for U.S. Flag Carriers
Travel supported by U.S. Government funds under this agreement shall use U.S.-flag air carriers (air carriers holding certificates under 49 U.S.C. 41102) for international air transportation of people and property to the extent that such service is available, in accordance with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118) and the interpretative guidelines issued by the Comptroller General of the United States in the March 31, 1981, amendment to Comptroller General Decision B-138942.

Cargo Preference
The recipient agrees that it will comply with the Cargo Preference Act of 1954 (46 U.S.C. 1241), as implemented by Department of Transportation regulations at 46 CFR 381.7, which require that at least 50 percent of equipment, materials or commodities procured or otherwise obtained with U.S. Government funds under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned U.S.-flag commercial vessels, if available.

Relocation and Real Property Acquisition
The recipient assures that it will comply with 49 CFR part 24, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601, et seq.) and provides for fair and equitable treatment of persons displaced by Federally assisted programs or persons whose property is acquired as a result of such programs.

Lobbying
The recipient assures that it is not an organization described in section 501(c)(4) that has engaged in any lobbying activities described in the Lobbying Disclosure Act of 1995 (2 U.S.C. 1611). Recipients that are 501(c)(4) organizations further agree that they will not engage in such lobbying activities during the term of this award.

Native American Graves Protection and Repatriation Act of 1990
The recipient, if it is an organization which controls or possesses Native American remains and associated funerary objects and receives Federal funding even for a purpose unrelated to the Act, agrees to comply with the requirements of 43 CFR part 10, which implements the provisions of 25 U.S.C. 3001 et seq.

Research Misconduct
The recipient assures that it will comply with the DOE policy on research misconduct in 10 CFR 733 and the requirements regarding research misconduct in 10 CFR 600.31, both of which implement the government-wide Federal policy on research misconduct developed by the White House Office of Science and Technology Policy.

Wood, Trudy A.

From: Wood, Trudy A.
Sent: Tuesday, July 12, 2005 1:19 PM
To: Johnson, Linda
Subject: Change to National Policy Assurances/Terms to include new research misconduct requirements.

I added the new research misconduct requirement to the list of nation policies. Let me know if you approve of this approach and the actual language. I'll also attach the rule which was published on June 28th and is effective on July 28th.

Thanks for your help with this,

Trudy

National Policy AssurancesAwar...

FR Notice 6-28-05.pdf (75 KB)

HEADQUARTERS POLICY FLASH

POLICY FLASH 2005-49

DATE: August 2, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Acquisition Letter 2005-12, Meal Costs in Management and Operating Contracts

SUMMARY: This Flash transmits Acquisition Letter 2005-12, which provides application guidance to contracting officers on: understanding the standards for reimbursement of contractor meal costs; applying the standards in determining the allowability of contractor meal costs; and overseeing the Department's and contractors' internal controls applicable to reimbursement of contractor meal costs.

POLICY FLASH
2005-49

The major changes established by this guidance are contracting officers--after assuring themselves that they understand the standards and how to apply them--must:

- review contractor internal policies, procedures, and internal controls on claiming contractor meal expenses as allowable costs;
- ensure those policies and procedures are compliant with the FAR and the application guidance of this acquisition letter;
- ensure the contractor has disseminated its polices and procedures to affected employees; and
- require, in coordination with the OIG, contractors to direct their internal audit staffs to ensure employees are adhering to the polices and procedures.

Questions concerning this Policy Flash should be directed to Michael Righi at (202)287-1337.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment

Department of Energy
Acquisition Regulation

No. AL-2005-12
Date 08/02/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: **Meal Costs in Management and Operating Contracts**

References:

FAR 31.201-2	Determining Allowability
FAR 31.201-3	Determining Reasonableness
FAR 31.205-13	Employee morale, health, welfare, food service, and dormitory costs and credits
FAR 31.205-14	Entertainment costs
FAR 31.205-34	Recruitment costs
FAR 31.205-43	Trade, business, technical and professional activity costs
DEAR 970.5232-2	Payments and Advances

When is this Acquisition Letter (AL) Effective?

This AL is effective immediately upon issuance.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Michael Righi of the Department of Energy (DOE) Office of Procurement and Assistance Policy at (202) 287-1337 or at Michael.Righi@hq.doe.gov.

Visit the website at http://professionals.pr.doe.gov for information on Acquisition Letters and other policy issues.

What are the Purposes of this AL?

The purposes of this AL are to provide additional application guidance on:

- understanding the standards for reimbursement of contractor meal costs;
- applying the standards in determining the allowability of contractor meal costs; and

- overseeing the Department's and contractors' internal controls applicable to reimbursement of contractor meal costs.

What is the Background?

Overview

Under the Federal Acquisition Regulation (FAR), the contracting officer can most effectively determine the allowability of contractor meal costs by applying what is essentially a two part test. First, the contracting officer determines if the costs are specifically unallowable per any of the cost principles. Second, the contracting officer determines if the costs are reasonable in nature and amount.

The Standards for Reimbursement of Contractor Meal Costs

The standards for determining allowability of contractor costs are found at Federal Acquisition Regulation (FAR) Subpart 31.2. FAR 31.201-2 reads:

> "(a) A cost is allowable only when the cost complies with all of the following requirements:
> (1) Reasonableness ...
> (4) Terms of the contract.
> (5) Any limitations set forth in this subpart."

Specifically Unallowable Costs

With respect to requirement (5), this FAR subpart reflects Government-wide policy limitations (cost principles on selected costs at FAR 31.205) that may specifically preclude certain costs that otherwise meet the other criteria for reimbursement. There are two such principles that are directly relevant and three that are indirectly related to the issue of whether a contractor's meal costs are reimbursable. Meal expenses are addressed specifically at FAR 31.205-43, trade, business, technical and professional activity costs, which reads:

> "The following types of costs are allowable: ... (c) When the principal purpose of a meeting, convention, conference, symposium, or seminar is the dissemination of trade, business, technical or professional information or the stimulation of production or improved productivity -- (1) Costs of organizing, setting up, and sponsoring the meetings, conventions, symposia, etc., including rental of meeting facilities, transportation, subsistence, and incidental costs; ..."

Additionally, meals costs are also addressed specifically at FAR 31.205-14, entertainment costs, which reads:

> "Costs of amusement, diversions, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are

unallowable. Costs made specifically unallowable under this cost principle are not allowable under any other cost principle."

The three cost principles that are indirectly related to meal costs are those for travel, recruitment, and employee morale and welfare (FAR 31.205-46 (a) 31.205-34, and 31.205-13, respectively).

Reasonableness

With respect to requirement (1) above, FAR 31.201-3 provides that a cost is allowable for reimbursement under a Government cost-type contract where that cost is, in its nature and amount, not excessive compared to that which would be incurred by a prudent person in the conduct of competitive business. What is reasonable depends upon a variety of considerations and circumstances, including: (1) whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance; (2) generally accepted sound business practices; (3) the contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and (4) any significant deviations from the contractor's established practices.

Incorporation of the Standards into M&O Contracts

The foregoing standards for reimbursement are incorporated by reference into DOE's M&O contracts (DEAR 970.5232-2, Payments and Advances, paragraph (j)), and provide both the contractual basis as well as the "decision tree" for analytical purposes for determining allowability of costs under the contracts.

Discretion to Establish a Cost as Unallowable Under a Specific Contract

While contracting officers may never permit costs that are unallowable under the FAR (or DEAR) to be allowable under any contract, they may for any specific contract establish in advance that certain costs, such as contractor employee meals costs, are unallowable despite their allowability under FAR. Of course such a determination must be communicated to the contractor before it incurs the costs.

What Guidance is Provided in this AL?

Applying the FAR requirements

To apply the FAR requirements effectively, the contracting office must ensure that prudent cost management is practiced. This may mean that--under contracts where contractor employee meals costs are expected to be significant--the contracting officer will decide, after consultation with appropriate program officials that certain types of contractor employee meal costs are not to be reimbursed, even if they would otherwise meet the FAR requirements for reimbursement. Such a determination could rest upon the local determination that the cost of reimbursing contractor employee meals exceeds the benefit. In such cases, of course, the contracting officer must communicate this determination in writing to the contractor before the contract effort starts.

On the other hand, prudent cost management may mean that--under other contracts where contractor employee meals costs are expected to be significant--the contracting officer will decide, after consultation with appropriate program officials that certain types of otherwise allowable contractor employee meal costs are to be reimbursed, based upon the local determination that the benefit of reimbursing contractor employee meals exceeds the cost. In such cases, the contracting officer should communicate this determination in writing to the contractor before the contract effort starts and establish explicit boundaries for which costs are acceptable. If contractor employee meals costs are not an issue under the contract, the contracting officer may determine that no specific communication regarding the costs is necessary. In no case, however, may the contracting officer permit costs that are unallowable under the FAR to be reimbursed.

Specific examples

For the specific examples discussed below and for any other situation, a reasonableness test (both nature and amount) must be met for any cost to be allowable. That is, to be allowable the nature of the reimbursement must be reasonable and its cost must also be reasonable. For example, prudent business people do not routinely pay the costs of their employees' meals. An employee working late does not routinely receive a free meal--the nature of the expense is not reasonable. An occasion could arise, however, in which the Government imposed a last minute stringent deadline, and the contractor, at the last minute, told a critical employee to work late and paid for her meal. The nature of this expense is reasonable. Even if the nature of the expense is reasonable, part of the expense could be unallowable because it is excessive. So in the previous example, if the contractor provided a lobster and steak meal to the employee, the amount of the expense would be unreasonable and only the cost of a standard meal would be allowable. Finally, the contractor's cost of providing meals to employees at normal recurring meetings would not be allowable since the nature of the cost is not reasonable, that is, it is not: the type of cost generally recognized as ordinary and necessary for the conduct of a contractor's business or contract performance; a generally accepted sound business practice; or congruent with the contractor's responsibilities to the Government and the public at large.

- The following contractor employee meal costs will always be unallowable entertainment expenses: those incurred at a meeting where business was incidentally discussed; those incurred at a meeting designed to entertain employees; or those incurred at a meeting that is a social event.

- In all cases the meeting itself must be for an allowable purpose defined in FAR 31.205-43 (c) for the meal cost to be allowable.

- The cost of a lunch could be considered unallowable or unreasonable where the meeting was not continued through the lunch period or where the meeting was continued through the lunch period but taking a lunch break would not irreparably damage the meeting's purpose. Additionally, in circumstances where the meal itself might itself be considered reasonable, providing an overly lavish meal would result in unallowable costs in the amount by which the cost of a reasonable meal is exceeded.

- For both the cost of meals to facilitate an extended meeting and the cost of refreshments to facilitate a working meeting, FAR 31.205-43 (c) requires the meals or refreshments to be an integral part of the function and the function's principle purpose is one of those stated in the cost principle.

- Meal or refreshment costs incurred at a meeting designed to improve working conditions, employer-employee relations, employee morale, and employee performance could be allowable under FAR 31.205-13—if all other conditions of allowability were met, such as business was discussed during the meal period, taking a meal break would irreparably damage the meeting's purpose, and the meal or refreshment costs were reasonable. These types of costs are not allowable, however, if they represent an unallowable entertainment cost, that is, a diversion or social activity.

- The cost of alcoholic beverages is always unallowable (FAR 31.205-51).

- Meals for staff working over their normally scheduled hours would almost always be an unallowable expense.

- Meals or hors d'oeuvres served at introductory or wrap-up events or receptions are generally unallowable because such events and receptions are usually social activities. If the events or receptions, however, are clearly not social activities and held to facilitate a working meeting per the criteria under the cost principle at FAR 31.205-43 (c), it is possible the costs could be allowable, but only if the meals or hors d'oeuvres are an integral part of the function whose principle purpose is one of those stated in the cost principle.

- For job interviews, meals for the interviewer and interviewee would be an allowable cost, as a per diem charge, if both were in valid travel status. If either party were not in travel status, the cost of that party's meal would be unallowable, unless a very strong justification is provided that demonstrates the meal is a necessary part of the recruitment process and not simply a social activity or diversion from the interview process.

An otherwise allowable cost would be unallowable due to unreasonableness if it occurred more frequently than necessary for contract performance. Working lunches required by critical deadlines in jeopardy may be reasonable in a few narrow circumstances, but not if they occur routinely. Since opinions may vary on how often the cost should reasonably occur, if the contracting officer suspects an issue could arise, he or she should ensure the contractor's policy covering the cost conforms to the contracting officer's judgment on reasonableness.

Documentation

As FAR 31.201-2, Determining Allowability, explains, a contractor is responsible for maintaining supporting documentation adequate to demonstrate that any costs it claims: have been incurred; are allocable to the contract; and comply with applicable cost principles.

FAR 31.201-2 explicitly states that the contracting officer may disallow all or part of a claimed cost that is inadequately supported. While there are no hard and fast rules covering what constitutes adequate documentation, the contracting officer should consider requiring, by notifying the contractor in advance of cost incurrence, that it must maintain the following documentation regarding business meals:

- an agenda that includes comments that business will continue during the meal;
- notes of the specifics of business discussed during the meal; and
- the rationale used to determine the meal was an integral part of the meeting, convention, conference, symposium, or seminar.

Contract Cost Audit

Contracting officers, as part of their review of the contractor's proposed Annual Audit Plan (see AL 2005-04 and Acquisition Guide Chapter 70.4), must ensure that the plan places appropriate emphasis on the audit of contractor meal expenses in accordance with FAR requirements and the application guidance of this Acquisition Letter.

Review of contractor internal policies, procedures, and internal controls

After assuring themselves that they understand the standards and how to apply them, Contracting officers must:

- review contractor internal policies, procedures, and internal controls on claiming contractor meal expenses as allowable costs;
- ensure those policies and procedures are compliant with the FAR and the application guidance of this acquisition letter;
- ensure the contractor has disseminated its polices and procedures to affected employees; and
- require, in coordination with the OIG, contractors to direct their internal audit staffs to ensure employees are adhering to the polices and procedures.

POLICY FLASH

POLICY FLASH 2005-50

DATE: August 23, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Increasing Awards to Service-Disabled Veteran-Owned Small Business

SUMMARY: On December 16, 2003, the President signed the Veterans Benefits Act of 2003 (Public Law 108-183 at section 308), requiring federal agencies and departments to give special consideration to small business concerns owned and controlled by service-disabled veterans during federal contracting and procurement. On October 20th, 2004, the President signed Executive Order 13360 calling for increased federal contracting and subcontracting opportunities for service-disabled veteran businesses. On June 7, 2005, the Secretary of Energy issued a memorandum, Contracting with Service-Disabled Veteran-Owned Small Businesses, which outlines the Department's policy on facilitating participation of SDVOSB concerns in our contracting process and utilization of the authority of section 308 of the Veterans Benefits Act of 2003.

FAR 19.1405 permits Contracting Officers to set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to service-disabled veteran-owned small business (SDVOSB) concerns if there is a reasonable expectation that offers will be received from two or more service-disabled veteran-owned small business concerns and award will be made at a fair market price. If the contracting officer receives only one acceptable offer from a service-disabled veteran-owned small business concern in response to a set-aside, the contracting officer should make an award to that concern (see FAR 19.1405(c)).

To support the government-wide and departmental policies, DOE acquisition personnel are encouraged to utilize every available resource to ensure DOE is doing its part to support SDVOSB concerns in its contracting process. DOE contracting officers should utilize the authorities implemented in the FAR, GSA Multiple Award Schedules (MASs), on-line resources (e.g., http://www.vetbiz.gov/), etc. to achieve this goal.

Questions regarding this flash should be directed to Stephen Zvolensky at (202) 287-1307.

Richard B. Langston for

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

POLICY FLASH

POLICY FLASH 2005-51

DATE: September 8, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: New Subcontracting Plan Requirement

SUMMARY: FAR 19.702(b)(1) states that subcontracting plans are not required from small business concerns. However, section 6022 of the recently passed Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Public Law 109-13) requires submittal of subcontracting plans from DOE contracted small businesses that receive prime contract awards over $25,000,000 which resulted from breaking out work from M&O contracts. This requirement (see attachment) is effective through the end of FY 2007. Please disseminate this information to contracting offers and affected contractors.

If you have any questions regarding this flash, please contact Steve Zvolensky at 202-287-1307.

Michael P. Fischetti, Acting Director
Office of Procurement
and Assistance Policy, OMBE

Attachment

(d)(1) Beginning on the date of enactment of this Act and ending at the conclusion of fiscal year 2007, in any case in which the Secretary of Energy decides to break-out appropriate large prime contracts, known as the management and operating contracts, for award to small businesses, the Secretary shall consider whether—

(A) the services under the contract have previously been provided by a small business concern; and

(B) the contract is of the type capable of being performed by a small business concern.

(2) In the case of a contract awarded by the Department of Energy as a result of a break-out of subcontracts previously awarded by management and operating prime contractors and rewarded as a small business prime contract under paragraph (1)—

(A) any such contract valued at more than $25,000,000 shall be required to have a subcontracting plan for small businesses; and

(B) the Secretary shall make a determination on the advisability of requiring a local presence for small business subcontractors.

This requirement is effective through the end of FY 2007. Please disseminate this information to your contracting officers.

POLICY FLASH

POLICY FLASH 2005-52

DATE: September 9, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Hurricane Katrina Emergency Contracting Authorities

SUMMARY: In order to facilitate the federal government's response to this natural disaster, various procurement authorities have been affected, which are summarized below.

Section 101 of the Emergency Supplemental Appropriations Act, enacted September 8, 2005, permits DOE (and other agencies) to use simplified acquisition and micro-acquisition procedures to support Hurricane Katrina rescue and relief operations. Although these procedures have been available since 1994, this Act increases the threshold for their use (see below).

GENERAL PROVISION

SEC. 101. For procurements of property or services determined by the head of an executive agency to be used in support of Hurricane Katrina rescue and relief operations--

(1) the emergency procurement authority in subsection 32A(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 428a(c)) may be used; and

(2) the amount specified in subsections (c), (d), and (f) of section 32 of the Office of Federal Procurement Policy Act (41 U.S.C. 428) shall be $250,000.

POLICY FLASH 2005-52

Section 101(1) permits the use of emergency procedures set out in 41 USC 428a ("Special emergency procurement authority") for current relief efforts and otherwise applies to "contingency operations" (defined in title 10 as a military operation that includes activating military in national emergencies) and to facilitate the defense and recovery from nuclear, biological, chemical, or radiological attack. 41 USC 428a increases the authority for "simplified acquisition procedures" and treats property and services as a "commercial items" purchase (see FAR 13.005).

Section 101(2) increases micro-purchase authority, enacted as part of the Federal Acquisition Streamlining Act of 1994, from $2,500 to $250,000 (see FAR 13.2).

In addition, the President has suspended Davis-Bacon coverage on those disaster areas affected. This proclamation is posted on the White House website at: http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html An "All Agency" Memorandum from the Department of Labor, outlining specifics of this matter is forthcoming and available for review at www.wdol.gov .

The Secretary of Defense and the Secretary of Homeland Security have also determined that the circumstances in the aftermath of Hurricane Katrina warrant exercising the emergency procurement authorities authorized at 41 USC 428a. A memorandum from the Civilian Agency Acquisition Council invoking this authority is attached.

Finally, forwarded for your general information is an article published by Acquisitions Solutions, Inc. on contracting in an emergency situation, which summarizes the use of emergency procurement authorities.

DOE contracting officers and other acquisition officials are cautioned to use and properly document the above authorities only for those activities having a clear and direct relationship to the current emergency. However, the favorable consideration of requests for waivers or deviations to reporting requirements, applications, deliverables, etc. for contractors or financial assistance recipients with offices in the areas affected by Hurricane Katrina is highly encouraged.

Questions or assistance concerning this policy flash should be directed to Jackie Kniskern at 202-287-1342 or jacqueline.kniskern@hq.doe.gov.

Michael P. Fischetti

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachments

ACQUISITION DIRECTIONS® Advisory

ACQUISITION SOLUTIONS®

ISSUES AND ANSWERS SEPTEMBER 2005

Responding to Katrina

Contracting in an Emergency Situation

By Catherine Poole and Bob Welch

In the aftermath of Hurricane Katrina, one of the worst natural disasters to befall our country in recent memory, this Advisory *updates guidance to provide the latest on contracting in emergency situations.*

Hurricane Katrina, one of the worst natural disasters to befall our country in recent memory, is causing a surge of emergency contracting situations. Four years ago, we faced a man-made disaster that required contracting operations to react quickly. Following the events of September 11, 2001, we prepared a guide on emergency contracting for use by contracting agencies across the government. This *Advisory* updates guidance to provide the latest on contracting in emergency situations.

Are there increased contracting thresholds following Katrina?

Yes, agency heads (see box below) have the authority to increase procurement thresholds for "acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a **contingency operation** or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack."[1]

Who Is an Agency Head?

"Agency head" or "head of the agency" means the secretary, attorney general, administrator, governor, chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.

FAR 2.101 Definition

Note: Our experience is that the "agency head" procurement authority normally is delegated to the assistant secretary for management, chief financial officer, chief acquisition officer, component acquisition executive, chief procurement officer, or senior procurement executive.

Why? Is the response to Katrina considered a "contingency operation"?

Yes. While a "contingency operation" has not been officially declared by the secretary of defense and likely would not be in this scenario, Hurricane Katrina would be considered a contingency operation, given the provisions of the Federal Acquisition Regulation (FAR). FAR 2.101 defines a contingency operation as:

"Contingency operation" (10 U.S.C. 101(a)(13)) means a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities

against an enemy of the United States or against an opposing military force; or

(2) *Results in the call or order to, or retention on, active duty of members of the uniformed services* under section 688, 12301(a), 12302, 12304, 12305, or 12406 of 10 U.S.C., Chapter 15 of 10 U.S.C, *or* any other provision of law during a war or during a national emergency declared by the President or Congress. [emphasis added]

The current situation fits item (2). More than 12,000 active-duty forces and 22,000 National Guardsmen already have been deployed.[2] Subsequently, the Department of Defense issued a memorandum authorizing the use of the increased thresholds. (More details on this are found on page 5.)

What are the elevated thresholds?

If authorized by the agency heads, the thresholds shown in Table 1 are applicable to a contingency operation.

Increasing these thresholds will help agencies significantly. Orders up to $15,000 will not require competition at all. Orders up to $250,000 require adherence to simplified procedures outlined in FAR part 13, allowing limited competition. *And perhaps most significant, orders up to $10 million for commercial items may use simplified procedures of FAR part 13 as well, allowing for limited competition.*

We note, with regard to the Davis-Bacon Act threshold, that President George Bush waived the Davis-Bacon Act following Hurricane Andrew in 1992. An August 31, 2005, editorial in *The Wall Street Journal* urges President George W. Bush to remove all federal impediments to a speedy reconstruction effort, and to waive the Davis-Bacon Act. We have seen no such waiver as we go to press, but will watch this closely and immediately report in the event that there is any relief to the current Davis-Bacon Act thresholds.

Per FAR 13.501(a)(2), the following justifications and approvals are required for sole-source acquisitions only, under the commercial items test program:

Table 2. Approval Requirements for Sole Source Actions under Test Program

Value of Sole-Source Contract	Approving Official
Over $100,000 but not exceeding $500,000	Contracting officer unless a higher approval level is established in accordance with agency procedures. See FAR 6.304(a)(1) and 13.501(a)(2)(i), unless agency procedures specify a higher approving authority.
Over $500,000 but not exceeding $10 million	Competition advocate for the procuring activity designated pursuant to FAR 6.501 or an official described in FAR 6.304(a)(3) or (a)(4). This authority is nondelegable.

All procurements under the test program must be documented in the file, per FAR 13.501(b), to include—

1. A brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR subpart 13.5 were used;
2. The number of offers received;
3. An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and
4. Any justification approved per the table above.

Table 1. Increased Thresholds for Contingency Operations

Procurement Level	Threshold Increased from	Threshold Increased to	FAR Reference	Exception	Comments
Micropurchases	$2,500	**$15,000**	13.201(g)(1)(i)	Construction contracts that are subject to the Davis-Bacon Act (threshold remains at $2,000)	No competition required under the threshold. Simply place an order with a responsible source at a reasonable price.
Simplified Acquisitions	$100,000	**$250,000** ($1 million for purchases made from outside the United States)	2.101	n/a	Provides relief from the applicability of several laws, provisions, and clauses, listed at FAR 13.005.
Commercial Items (test program)	$5 million	**$10 million**	13.500(e)	n/a	Same as above.

Note that commercial items are not limited to products; services can be considered commercial items as well. The definition of a commercial item at FAR 2.101 includes "Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions." Many of the items associated with recovery, relief, and clean-up efforts are available in the commercial marketplace.

What else is different about contracting in this situation?

There are a number of important differences, related to authority, preference, and exceptions, as follows:

- **Authority to Issue Oral Requests for Proposals.** While agencies may use oral requests for proposals (RFPs) at any time for procurements under the simple acquisition threshold (per FAR 13.106-1(c)), special authority to use oral proposals also kicks in during contingency operations or other emergency situations.

For FAR part 15 acquisitions, oral RFPs may be used when "processing a written solicitation would delay the acquisition of supplies or services to the detriment of the Government" and when a synopsis is not required for the procurement action. FAR 15.203(f) cites perishable items and support of contingency operations or other emergency situations as examples of procurements that do not require a synopsis and for which an oral RFP might be used.

Of course, the use of an oral RFP does not relieve the contracting officer from complying with other applicable FAR requirements. FAR 15.203 requires that the contract files supporting oral solicitations include a description of the requirement, rationale for using an oral solicitation, the sources solicited, and the solicitation number provided to prospective offerors.

- **Preference for Contracting with Local Organizations, Firms, and Individuals.** When a "major disaster" has been declared, as it has been in this case (see box on page 4), there is a preference for contracting with local organizations, firms, and individuals. The preference for local firms is established in the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5150). Implementing regulations at FAR 26.201 require:

> When contracting under this subpart for major disaster or emergency assistance activities, such as debris clearance, distribution of supplies, or reconstruction, preference shall be given, to the extent feasible and practicable, to those organizations, firms, or individuals residing or doing business primarily in the area affected by such major disaster or emergency.

The FAR provides that the authority to provide such a preference applies only to those acquisitions conducted "during the term of a major disaster or emergency declaration made by the President of the United States under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act." In these situations, agencies may use other than full and open competition, citing FAR 6.302-5(b)(5) as the authority.

Declarations and Designations

The following official declarations have been made to date regarding Katrina:

- **"Incident of National Significance" – August 31, 2005.**[4] Katrina is the first event given this designation, which triggers the brand-new National Response Plan, which names the Department of Homeland Security as the lead in coordinating federal response and recovery efforts.
- **"Major Disaster" – August 28 and 29, 2005.**[5] A major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") has been declared for the states of Louisiana, Mississippi, Alabama, and Florida.
- **"Emergency" – August 28, 2005, and September 3, 2005.**[6] Emergency declarations were approved by the President for Mississippi and Alabama on August 28, prior to the more significant and long-term declaration of a "major disaster" in these states. Emergency declarations subsequently were issued for Arkansas and Texas on September 3, to facilitate aid to these areas in their efforts to assist victims of Katrina.[7]
- **"Public Health Emergency" – August 31, 2005.**[8] Health and Human Services Secretary Mike Leavitt declared a public health emergency, which facilitates provision of medical services in the affected regions.

While these official declarations may further affect procurement authorities within individual departments or agencies, our research did not delve into authorities specific to individual agencies.

While not officially declared, because active-duty troops have been deployed, agency heads may consider the current situation a "contingency operation" under which increased procurement thresholds take effect, as do a select few other authorities mentioned herein.

• **Exemption from Registration in the Central Contractor Registration (CCR) database.** Contractors typically are required to be registered in the Central Contractor Registration (CCR) database. However, in situations such as this one, FAR 4.1102(a) provides the following exception to registering in the CCR:

> (3) Contracts awarded by—
>
> (i) Deployed contracting officers in the course of military operations, including, but not limited to, *contingency operations* as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(7); or
>
> (ii) Contracting officers in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, *e.g.*, Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121). [emphasis added]

The reference to the Stafford Act in item (ii) applies to a "major disaster" situation, which has been declared in this situation.

• **Exemption from Electronic Funds Transfer (EFT) Requirements.** The government generally is required to provide all contract payments through electronic funds transfer (EFT). However, during contingency operations or when responding to emergency situations such as this one, FAR 32.1103(e) provides the following exception to making payment via EFT:

> (e) A contract is awarded by a deployed contracting officer in the course of military operations, including, but not limited to, *contingency operations* as defined in 2.101, or a contract is awarded by any contracting officer in the conduct of *emergency operations, such as responses to natural disasters* or national or civil emergencies, if—
>
> (1) EFT is not known to be possible; or
>
> (2) EFT payment would not support the objectives of the operation

What permanent authorities can we apply in the current situation?

While the above-mentioned authorities apply only to emergency-type situations, there are several procurement options that are always in the contracting officer's toolkit. We cite a few below:

• **Limit competition based on an "Urgent and Compelling Need."** FAR 6.302-2 allows agencies to contract "without providing for full and open competition" when the agency's need for the supplies or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals. Use of this authority requires a written justification and approval in accordance with FAR 6.303 and 6.304. Approvals are detailed in Table 3 below. To use this authority for other than full and open competition, a written justification of the urgency is required, although the FAR allows the justification to be prepared after contract award if approval prior to award would unreasonably delay the acquisition.

Table 3. Approval Requirements for Actions Subject to Other than Full and Open Competition

Value of Sole-Source Contract	Approving Official
Not exceeding $500,000	Contracting officer unless a higher approval level is established in accordance with agency procedures.
Over $500,000 but not exceeding $10 million	Competition advocate for the procuring activity designated pursuant to FAR 6.501 or an official described in FAR 6.304(a)(3) or (a)(4). This authority is nondelegable.
Over $10 million but not exceeding $50 million (or for DoD, NASA, and Coast Guard, not exceeding $75 million)	Head of the procuring activity, or a designee who—(i) if a member of the armed forces, is a general or flag officer; or (ii) if a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or a comparable or higher position under another schedule).
Over $50 million (or for DoD, NASA, and the Coast Guard, over $75 million)	Senior procurement executive (SPE) of the agency. Not delegable except in the case of the under secretary of defense for acquisition, technology, and logistics, acting as the SPE for DoD.

Source: Federal Acquisition Regulation 6.304

• **Leverage existing contract vehicles.** Place task orders or delivery orders against existing contracts. It is possible to adopt expedited competitive procedures using such tools as purchase cards in tandem with federal supply schedule contracts, Federal Supply Service multiple award schedule (MAS) blanket purchase agreements, government-wide acquisition contracts (GWACs), and multiagency contracts (MACs). Rarely would you use a FAR part 14 or 15 procedure when responding to an emergency situation.

• **Leverage the use of purchase cards.** The purchase card is a convenient and widely accepted simplified acquisition method described in FAR part 13. Purchases on the cards are not limited to those under the micropurchase

Stafford Act

§ 5149. PERFORMANCE OF SERVICES (Sec. 306)[10]

a. Utilization of services or facilities of State and local governments

In carrying out the purposes of this Act, any Federal agency is authorized to accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government.

b. Appointment of temporary personnel, experts, and consultants; acquisition, rental, or hire of equipment, services, materials and supplies

In performing any services under this Act, any Federal agency is authorized—

1. to appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in competitive service;
2. to employ experts and consultants in accordance with the provisions of section 3109 of such title [5 U.S.C. § 3109], without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title [5 U.S.C. §§ 5101 et seq. and 5331 et seq.] relating to classification and General Schedule pay rates; and
3. to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by an agency in such amount as may be made available to it by the President.

threshold. While purchase card spending limits typically are set to accommodate day-to-day operations, such limits can be increased on demand to accommodate emergency situations, in accordance with agency purchase card procedures. This likely would require coordination through the cardholder's supervisor and the agency purchase card coordinator.[9] In response to Katrina, the Department of Defense is now allowing purchases up to $250,000 to be placed on purchase cards.

- **Award letter contracts.** The award of letter contracts expedites the start of work and is authorized by FAR 16.603. A letter contract is a preliminary contract issued when time is of the essence and the government's interests demand that the contractor be given a binding commitment so work can start immediately. Negotiation of specific terms and conditions (such as final price) must be definitized in a contract within a specified period of time thereafter. A letter contract, of course, should be as complete and definite as feasible under the circumstances.

In addition, for any procurements that are protested, FAR 33.104(b)(1)(i) allows the head of a contracting activity to make a written determination that "urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the [Government Accountability Office]," and subsequently award a contract as long as this action is taken within 30 days of the written determination.

Of course, discretion is required in determining appropriate procedures and the extent to which certain actions should be waived. Where there is potential for imminent loss of life or when necessary to prevent additional damage, the most expedited procedures are warranted (that is, use of a letter contract or purchase card order).

Can agencies seek outside help?

Yes. Section 5149 of the Stafford Act allows "any federal agency" to appoint temporary personnel, experts, and consultants to assist in responding to the situation. Agencies may incur obligations "by contract or otherwise" for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities, "in such amount as may be made available to it by the President." The President already has signed, on September 2, 2005, a $10.5 billion emergency supplemental act, appropriating $10 billion to the Department of Homeland Security (DHS) and $500 million to the Department of Defense.[11]

In addition, the Stafford Act authorizes "any Federal agency" to accept and utilize the services or facilities of any state or local government.

Have agencies already begun issuing their policies?

Yes. The Department of Defense issued two documents (accessible via the Library feature at www.acqsolinc.com/emergencycontracting) on September 2, 2005, as follows:

- **Authorization to use increased procurement thresholds.** The under secretary of defense issued a policy that specifically authorizes the use of the special emergency procurement thresholds previously mentioned.
- **Authority to use purchase cards up to $250,000.** The acting director of defense, procurement and acqui-

sition policy, issued a memorandum authorizing a class deviation that allows contracting officers, when using their government-wide purchase cards in support of Hurricane Katrina relief efforts, to deviate from the requirements of Defense Federal Acquisition Regulation Supplement (DFARS) 213.301(2)(i)(A) and (C). The effect of the memo is that cardholders may use their purchase cards to make purchases up to $250,000 each. The memorandum includes an attachment that clearly identifies the applicable laws that must be adhered to. The deviation does not apply to construction contracts.

The Department of Homeland Security has instructed its procurement offices that it is waiving all headquarters reviews required by the FAR, the Homeland Security Acquisition Regulation (HSAR), and the Homeland Security Acquisition Manual (HSAM). Heads of contracting activities (HCAs) have been delegated such approval authorities until further notice.

Other agencies are formulating their policies as we go to press on this *Advisory*.

Where can we find available policies and additional guidance?

To aid the acquisition community in its emergency and relief efforts, we have developed a special publicly available website at www.acqsolinc.com/emergencycontracting. Through this website, we will provide information relevant to emergency contracting in response to Hurricane Katrina. This website includes or soon will include:

- This *Advisory* and our prior *Advisory* on emergency contracting
- Temporary public access to our proprietary database of Streamlined Acquisition Vehicles, including GWACs, MACs, and other sources of help
- Daily News: Legislation and other emergency contracting material
- Library on Emergency and Contingency Contracting Guidance
- Inquiry Responses: Answers to clients' questions (will be posted as available), such as
  - What special acquisition authorities are in effect for DHS and where are they implemented?
- Research Responses: White papers (posted as available) on related topics such as:
  - Acceptance of Donations
  - Strategic Sourcing and Supply Chain Techniques as Emergency Solutions
  - Alpha Contracting
  - Lessons Learned
- Other information to be determined

Conclusion

Contracting in emergency situations can be challenging, but there are authorities that allow agencies to contract quickly and effectively with limited or no competition to meet critical needs expeditiously. Situations such as these represent the true meaning of "urgent and compelling." It is our hope that this *Advisory* and our new emergency contracting website will assist the men and women in the federal acquisition workforce, who are working diligently to provide the goods and services needed to help the Gulf Coast recover from the devastation of Hurricane Katrina.

As reported on *60 Minutes* on Sunday, September 04, 2005, this is the worst U.S. natural disaster in the past hundred years. We all give in the way we can. For acquisition professionals, in government or outside it, this is an opportunity to use the science and art of procurement to meet objectives: in this case, relief to American citizens. Keep the objective in mind, make good business judgments, use these flexibilities and the FAR Guiding Principles, provide for competition where you can, and take care of documentation, if need be, later. Lives hang in the balance. ♦

Special thanks to Steve Cohen and Steve Slavsky, who contributed to this Advisory.

Endnotes

1 The Federal Acquisition Regulation (FAR) uses this term within the definitions of micropurchase threshold and simplified acquisition threshold to describe the times during which these thresholds may be increased. http://205.130.237.11/far/current/html/Subpart%202_1.html#wp1145507. These authorities originally were granted by the Services Acquisition Reform Act (SARA), section 1443; http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ136.108.pdf.

2 Donna Miles, "More Active, Guard Troops Join Katrina Response," Department of Defense American Forces Information Service, September 3, 2005, http://www.defenselink.mil/news/Sep2005/20050903_2605.html

3 "Katrina's Awful Wake," *Wall Street Journal*, August 31, 2005, http://www.opinionjournal.com/editorial/feature.html?id=110007190.

4 "Press Conference with Officials from Homeland Security, the Environmental Protection Agency, and the Departments of Health and Human Services, Energy, Transportation, and Defense," press release, Department of Homeland Security, August 31, 2005; http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0724.xml.

5 FEMA defines "major disaster" as "any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought) or, regardless of cause, any fire, flood, or explosion in any part of the United States that, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby," http://training.fema.gov/EMIWeb/IS/is14/glossary.htm. A "major disaster" provides more long-term relief than a "declaration of emergency." Major disaster declarations: (1) Florida, August 28, 2005: http://www.fema.gov/news/newsrelease.fema?id=18459; (2) Alabama, August 29, 2005: http://www.fema.gov/news/newsrelease.fema?id=18479; (3) Louisiana, August 29, 2005: http://www.fema.gov/news/newsrelease.fema?id=18478; (4) Mississippi, August 29, 2005: http://www.fema.gov/news/newsrelease.fema?id=18474.

6 "Emergency Declaration Ordered for Mississippi," press release, FEMA, August 28, 2005, http://www.fema.gov/news/newsrelease.fema?id=18460; "Emergency Declaration Ordered for Alabama," press release, FEMA, August 28, 2005, http://www.fema.gov/news/newsrelease.fema?id=18462.

7 "President Approves Emergency Declaration for Arkansas," press release, FEMA, September 3, 2005, http://www.fema.gov/news/newsrelease.fema?id=18580; "President Approves Emergency Declaration for Texas," press release, FEMA, September 3, 2005; http://www.fema.gov/news/newsrelease.fema?id=18579

8 Secretary of Health and Human Services, Declaration of Public Health Emergency, August 31, 2005, http://www.hhs.gov/emergency/determination.pdf

9 GSA's emergency purchase card guidance at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/Emergency%20Procurement%20Authority_R2E-c-o9_0Z5RDZ-i34K-pR.doc is an example.

10 Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended by Public Law 106-390, October 30, 2000, http://www.fema.gov/library/stafact.shtm

11 Statement on H.R. 3645, the "Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising From the Consequences of Hurricane Katrina, 2005," September 2, 2005, http://www.whitehouse.gov/news/releases/2005/09/20050902-9.html; H.R. 3645; http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03645:@@@D&summ2=1&.

Special Authority to Disseminate this Publication

Unlike our normal practice, for this issue, Acquisition Solutions™ hereby grants readers the authority to distribute this document (as is) outside the organizations that subscribe to our Acquisition Directions® service. In fact, we encourage broad dissemination, with the hope the information contained herein will be of value to the contracting community working to help the victims of Hurricane Katrina.

The *Advisory* is published monthly as part of the Acquisition Solutions Research Institute™ on-call acquisition knowledge management subscription service, made available by Acquisition Solutions, Inc., P.O. Box 3948, Oakton, Virginia 22124, 703-378-3226, fax 703-222-5475, www.acquisitionsolutions.com. Information and opinions are based on best available information, but their accuracy and completeness cannot be guaranteed. Layout by Julie Olver. Graphics by Mentwab Easwaran, Contents ©2005 by Acquisition Solutions, Inc. All rights reserved. Single copies and volume discounts are available from Acquisition Solutions, Inc.

GSA Office of the Chief Acquisition Officer

CIVILIAN AGENCY ACQUISITION COUNCIL LETTER 2005-04

SEP 7 2005

MEMORANDUM FOR CIVILIAN AGENCIES OTHER THAN NASA

FROM: JULIA WISE
CHAIR
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Hurricane Katrina Contingency Contracting Authorities

In the aftermath of Hurricane Katrina, the Secretary of Defense and the Secretary of Homeland Security determined that existing circumstances warrant the exercise of authority in accordance with 41 USC 428a. As a result of this declaration, the emergency procurement authorities authorized by section 1443 of the Services Acquisition Reform Act of 2003 (Title XIV of Pub. Law 108-136) are available. Therefore, pursuant to the authorities granted under Title XIV, Sec. 1443 of Pub. L. 108-136 codified at 41 U.S.C. 428a, and as implemented in the Federal Acquisition Regulations, the following authorities apply:

- The Micro-purchase threshold as defined in FAR 2.101 is $15,000 for acquisitions of supplies or services that, as determined by the head of your agency, are to be used to support the contingency operation. ($2,000 for construction subject to the Davis-Bacon Act).

- The Simplified Acquisition Threshold as defined in FAR 2.101 is $250,000 for acquisitions of supplies or services that, as determined by the head of your agency, are to be used to support the contingency operation.

- The FAR 19.502-1 requirements for setting aside acquisitions do not apply to purchases of $15,000 or less for acquisitions used to support the contingency operation.

- The threshold for application of the clauses FAR 52.225-1, Buy American Act--Supplies and FAR 52.225-13, Restrictions on Certain Foreign Purchases is $15,000 for acquisitions that, as determined by the head of your agency, are to be used to support the contingency operation (see FAR 25.1101 and 1103).

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

POLICY FLASH

POLICY FLASH 2005-53

DATE: September 29, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management
SUBJECT: **E-Government Initiative – Federal Technical Data Solution (FedTeDS), October 1, 2005 Implementation**

SUMMARY: The purpose of this notice is to make you aware of the process changes associated with the pending implementation of the Federal Technical Data Solution (FedTeDS), into the FAR. Developed under the Integrated Acquisition Environment (IAE), an E-Gov initiative which is part of the President's Management Agenda (PMA), FedTeDS is a web application specifically designed to safeguard sensitive acquisition related information.

It is anticipated that FedTeDS implementation in the FAR will make its use mandatory government-wide. Therefore, beginning October 1, 2005, DOE will use FedTeDS as the primary source of electronically disseminating sensitive acquisition related information.

Working in concert with other e-gov initiatives, such as the Central Contractor Registration (CCR) and Federal Procurement Data System-Next Generation (FPDS-NG), FedTeDS is the web application intended to safeguard Sensitive But Unclassified (SBU) acquisition related information during the solicitation phase. In addition to safeguarding the distribution and dissemination of SBU materials, FedTeDS will be integrated within DOE's electronic business processes (e.g., Industry Integrated Procurement System (IIPS)).

Once properly registered, FedTeDS is easily accessed via IIPS.

Forthcoming training and the IIPS user manual will provide detailed instruction on accessibility.

How will this affect work processes?

- Contracting officers must assess what sensitive acquisition related information will be posted on FedTeDS, after consulting with project team members and adhering to DOE Order O 471.1-A, "Identification and Protection of Unclassified Controlled Nuclear Information" and DOE O 471.3, "Identifying and Protecting Official Use Only Information."

- Contracting officers must ensure that prospective offerors have access to all necessary acquisition related information for affected procurements, according to their appropriate level of access.

- Contracting officers should register at http://www.fedteds.gov in order to post sensitive information to FedTeDS and designate vendor access.

- Contracting officers should participate in FedTeDS scheduled training sessions.

Training sessions on FedTeDS are scheduled for October 13th and 20th, twice each day. These sessions will be broadcast via web conferencing. Please see the attached training advisory for detailed information. Further guidance will be issued once changes to the FAR have been made.

Questions concerning this Policy Flash should be directed to Denise P. Wright at (202) 287-1340 or Denise.Wright@hq.doe.gov questions concerning training or technical concerns contact Mara Grissom at (202) 287-1769 or Mara.Grissom@hq.doe.gov

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Federal Technical Data Solution (FedTeDS)
Training Announcement
Offered by IBM

Four Sessions Offered:

- October 13, 2005-

  10:00 AM to Noon **or** 1:30 to 3:30 PM

- October 20, 2005

  10:00 AM to Noon **or** 1:30 to 3:30 PM

Please inform Mara Grissom of the training sessions you or your office plan to attend. Email-
mara.grissom@hq.doe.gov
Phone-202-287-1769

Directions to Access Web Services:

To participate, an office needs to set up a conference room with a speakerphone and a single computer projected onto a screen and connected to the internet. Once that computer has connected to our WebDemo system, the audience will able to see my screen in real-time as I demonstrate the system. The speakerphone will allow the audience to hear my presentation, ask questions, etc.

Because old internet browsers, restrictive network security settings, etc. can prevent a computer from connecting to the WebDemo server, it is important to verify a computer's ability to connect to the system in advance of the scheduled session to ensure that it can start on time, with all expected participants.

As a result, we ask that each location run the WebDemo "Browser Test" on the computer that will be used for the session. This test only takes a minute and should be completed as soon as possible. Directions are as follows:

1. Go to the following website: http://64.119.37.82/
2. Click on the "Test Browser" button on the left side of the page.
3. As the test is run, you will likely receive a security warning from your browser regarding the Linktivity WebDemo software. Please select "Run," "Accept," "Yes," etc. to continue. Failure to do so will result in a failed test.

In the unlikely event that a computer fails this test, self-help materials can be found on the Linktivity support site (http://www.linktivity.com/faq.html). If the user is unable to resolve the issue, he or she should contact Linktivity Support Services at 800-200-2766 (Monday through Friday, 7:30 am - 4:00 pm PDT).

If you have any questions, let me know. Micki P. McMann, IBM Global Services, Phone: 703.653.7272 or email: mmcmann@us.ibm.com.

POLICY FLASH

POLICY FLASH 2005-54

DATE: September 30, 2005

TO: Procurement Directors

FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Acquisition Letter 2005-13, Performance-Based Service Acquisition

SUMMARY: This Flash transmits Acquisition Letter 2005-13, which provides administrative requirements within contracting offices to ensure that performance-based contracting approaches and techniques are used to the maximum extent practicable.

Questions concerning this Policy Flash should be directed toMichael Righi at (202) 287-1337.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Department of Energy
Acquisition Regulation

No. 2005-13
Date 09/30/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE Procurement Executive.

Subject: **Performance-Based Service Acquisition**

References:

FAR 37.6	Performance-Based Contracting
DEAR 970.1100-1	Performance-Based Contracting
DOE Acquisition Guide Chapter 37.2	Performance-Based Service Acquisition
DOE Acquisition Guide Chapter 70.8	Performance-Based Contracting

When is this Acquisition Letter (AL) Effective?

This AL is effective 10 business days from the date of issuance.

When Does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Mr. David Leotta of the Office of Contract Management at (202) 287-1363 or david.leotta@hq.doe.gov.

Visit our website at www.pr.doe.gov for more information on Acquisition Letters and other policy issues.

What is the Purpose of this AL?

The purpose of this AL is to establish administrative requirements within contracting offices to ensure that performance-based contracting (PBC) approaches and techniques are used to the maximum extent practicable, consistent with Federal and Department of Energy (DOE) policies. This AL does not apply to the National Nuclear Security Administration (NNSA) activities, unless otherwise directed by NNSA officials.

What is the Background?

The Floyd D. Spence National Authorization Act for Fiscal Year (FY) 2001 established the statutory preference for PBC in Federal acquisitions. The Federal Acquisition Regulation (FAR) Part 37.102 establishes a preference to use performance-based contracting to the maximum extent practicable when acquiring eligible services (See FAR 37.102 regarding eligible services). PBC is addressed in the FAR in areas related to acquisition planning (FAR Part 7-105), contract structure (including the development of the Statement of Work) (FAR Part 37.602-1), contract type (FAR Part 37.602-4), contract management planning and Quality Assurance Surveillance Plans (QASP) (FAR Part 37.602-2). In summary, the objectives of Federal and Departmental policies on the use of PBC are that agencies will use PBC methods to the maximum extent practicable when acquiring eligible services, and that acquisition strategies, methods, and techniques will be carefully selected to best facilitate PBC.

What is the Guidance Provided by this AL?

Within DOE, the application and use of PBC remains a management priority and is the preferred method for acquiring eligible services, consistent with the objectives noted above.

Contracting Officers are responsible for ensuring that PBC approaches and techniques are employed to the maximum extent practicable in requirements for eligible service acquisitions. However, the Contracting Officer's responsibilities must be supported by effective management and organizational tools and controls. It is critical that contracting offices establish and maintain local procedures for the management of PBC implementation to: (1) provide management visibility and attention to ensure that the PBC methods are used to the maximum extent practicable; (2) ensure that adequate and appropriate training is provided in a timely manner for contracting professionals, requirements initiators, and Contracting Officer Representatives (CORs) involved in the award and administration of PBCs; (3) ensure that acquisition planning activities fully consider and apply PBC methods; and (4) provide for periodic assessment of contract awards and reporting data.

What Actions are Necessary to Promote PBC?

Each Procurement Director (PD) shall establish and maintain local procedures to manage PBC, to include:

- PD approval of the non-use of PBC for an eligible service contract requirement. This is to be a non-delegable approval requirement;

POLICY FLASH
2005-55

Policy Flash 2005-55

DATE: September 30, 2005

TO: Procurement Directors

FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Acquisition Letter 2005-14, Competition Requirements for Management and Operating Contracts under Section 995 of the Energy Policy Act

SUMMARY: Congress has included competition requirements in Section 995 of the recently enacted Energy Policy Act (EPACT) of 2005. These are described in Acquisition Letter 2005-14, attached to this Flash.

The Energy and Water Development Appropriations Act for Fiscal Year 2006 is also expected to include competition language. As in the past, when the new statute is enacted, an Acquisition Letter will be issued with additional guidance.

Questions may be referred to Richard Langston at (202) 287-1339 or richard.langston@hq.doe.gov .

Michael P. Fischetti, Acting Director
Office of Procurement and Assistance Policy
Office of Procurement and Assistance Management

Attachment

Department of Energy
Acquisition Regulation

No. AL 2005-14
Date 09/30/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: **Competition Requirements for Management and Operating Contracts under Section 995 of the Energy Policy Act of 2005**

References: FAR 6.1, Full and Open Competition
FAR 17.6, Management and Operating Contracts
DEAR 917.6, Management and Operating Contracts
DOE Acquisition Guide, Chapter 6.1, Competition Requirements
Energy Policy Act of 2005, Public Law 109-58, Section 995

When is this Acquisition Letter (AL) effective?

This AL is effective immediately.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Richard Langston of the Department of Energy (DOE) Office of Procurement and Assistance Policy at (202) 287-1339, or Richard.Langston@hq.doe.gov or Steve Law, National Nuclear Security Administration (NNSA) Office of Acquisition and Supply Management at (202) 586-4321, or Stephen.Law@nnsa.doe.gov .

What is the Purpose of this AL?

The purpose of this AL is to disseminate guidance on Section 995 of the Energy Policy Act of 2005.

What is the Background Information?

Congress has included competition requirements for management and operating contracts for National Laboratories in Section 995 of the recently enacted Energy Policy Act (EPACT) of 2005. These requirements are similar to those included in Section 301 of the FY 2005 Energy and Water Development Appropriations Act.

What is the Guidance contained in this AL?

EPACT Section 995 provides that none of the funds authorized to be appropriated to the Secretary by this title may be used to award a management and operating contract for a National Laboratory unless that contract is competitively awarded or the Secretary grants, on a case by case basis, a waiver. The Secretary may not delegate this authority and must notify Congress of the waiver at least 60 days prior to the date of award of such a contract. Lawrence Livermore, Los Alamos, Sandia, and Savannah River National Laboratories are excluded.

Section 301 of the Energy and Water Development Appropriations Act for Fiscal Year (FY) 2005, contained similar language that was applicable to all management and operating contracts with particular coverage for five FFRDCs (see Acquisition Letter 2005-02). We expect similar language in the FY 2006 Act.

The existing policy and procedures regarding the extend or compete process, contained in Acquisition Letter 96-09, remain unchanged.

POLICY FLASH

POLICY FLASH 2005-56

DATE: October 4, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Hurricane Katrina Emergency Contracting Authorities

SUMMARY: The Office of Management and Budget (OMB) has limited the use of special micro-purchase threshold emergency procurement authority for purchase cards. OMB concluded that the need for this increased authority has diminished and therefore agencies are to utilize it only under "exceptional circumstances" (see Policy Flash 2005-52).

Thus, if a higher limit is still required, please contact the undersigned for guidance. The Office of Procurement and Assistance Policy will coordinate your requirement with OMB.

Questions concerning this policy flash should be directed to Jackie Kniskern at 202-287-1342 or jacqueline.kniskern@hq.doe.gov.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment: OMB Memo dated October 3, 2005

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 3, 2005

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Clay Johnson III
Deputy Director for Management

SUBJECT: Limitation on Use of Special Micro-purchase Threshold Authority for Hurricane Katrina Rescue and Relief Operations

Section 101(2) of the Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina (Public Law 109-62) raised the micro-purchase threshold to $250,000 for procurements of property or services to support Hurricane Katrina rescue and relief operations. On September 13, 2005, the Office of Management and Budget provided your Chief Acquisition Officers and Chief Financial Officers with detailed guidance to ensure responsible and effective use of this authority.

After consultation with officials from many of the departments and agencies, we have concluded that the need for the increased micro-purchase threshold authorized by section 101(2) has diminished. We therefore request that agencies not utilize this increased authority unless there are exceptional circumstances. If an agency believes that such exceptional circumstances exist, please contact me directly at 202-456-7070.

This memorandum should be distributed broadly to all individuals (i.e., program, contracting, finance, legal, and other officials) who may have responsibilities associated with micro-purchase authority. Thank you for your prompt attention to this matter.

POLICY FLASH

POLICY FLASH 2005-57

DATE: October 5, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Implementation of the Price-Anderson Amendments Act of 2005

SUMMARY: On August 8, 2005, the Energy Policy Act, 2005, (EPACT), Pub.L. 109-58, became law. EPACT, among other things, contained sections 601 through 610, known as the Price-Anderson Amendments Act of 2005 (PAAA 2005). The Price-Anderson Act resides at section 170d. of the Atomic Energy Act of 1954, as amended. The Price-Anderson Act indemnifies DOE's contractors and subcontractors under contracts that involve a risk of public liability for a nuclear incident. This Flash transmits Acquisition Letter 2005-15, implementing PAAA 2005.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment: OMB Memo dated October 3, 2005
Acquisition Letter 2005-15

Department of Energy
Acquisition Regulation

No. AL-2005-15
Date 10/05/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: Implementation of the Price-Anderson Amendments Act of 2005

References: DEAR 970.250-70, Nuclear Hazards Indemnification Agreement.

The Price-Anderson Amendments Act of 2005, §§ 601-611 of the Energy Policy Act, 2005, Pub.L. 109-58.

When is this Acquisition Letter (AL) Effective?

This AL is effective upon issuance.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Robert M. Webb of the Office of Procurement and Assistance Policy at (202)287-1338 or Robert.Webb@hq.doe.gov.

Visit our website at www.pr.doe.gov for information on Acquisition Letters and other policy issues.

What is the Purpose of this Acquisition Letter?

The purpose of this AL is to distribute a model clause that reflects the changes to the clause at DEAR 970.250-70, Nuclear Hazards Indemnity Agreement, necessary to implement the Price-Anderson Amendments Act of 2005. As used in this AL, reference to DOE includes NNSA sites.

What is the Background?

On August 8, 2005, the Energy Policy Act, 2005, (EPACT), Pub.L. 109-58, became law. EPACT, among other things, contained sections 601 through 610, known as the Price-Anderson Amendments Act of 2005. The Price-Anderson Act resides at section 170 of the Atomic Energy Act of 1954, as amended (AEA). The Price-Anderson Act at section 170d. indemnifies DOE's contractors and subcontractors under contracts that involve a risk of public liability for a nuclear incident, as defined in the AEA. The indemnification provides a structure that assures that monies are readily available to remedy damage to the public that may occur as the result of a nuclear incident. The indemnity applies as matter of right, not dependent upon contractual implementation.

The Price-Anderson Amendments Act of 2005 (PAAA 2005) altered the indemnity in three major ways. The statute:

1. Establishes prior law, establishes a specific $10 billion liability limit for the indemnity. Previously, the indemnification had to be computed in accordance with a statutorily prescribed computational method;

2. Directs that the Secretary adjust the indemnification at least once every five years;

3. Increases the indemnification for damage outside the United States resulting from a nuclear incident occurring within the United States or involving Federal radiological materials from $100 million to $500 million; and

In addition, the PAAA 2005 removes from the Secretary the duty to determine whether civil penalties for violation of DOE nuclear safety directives or regulations by other not-for-profit contractors should be remitted. It further removes the exemptions from civil penalties for seven named management and operating contractors, their subcontractors, and suppliers, reflected in Note I to the clause at 970.250-70 (JUNE 1996). In place of the named exempt entities, the PAAA 2005 provides that civil penalties for any not-for-profit contractors, subcontractors, or suppliers, as defined in the PAAA 2005, "may not exceed the total amount of fees paid within any 1-year period (as determined by the Secretary) under the contract under which the violation occurs." Lastly, the changes to civil penalties in the PAAA 2005 do not apply to any violation of the AEA occurring under a contract entered into before August 8, 2005, the date of enactment of the PAAA 2005.

What is the Guidance?

The clause at DEAR 970.250-70 (JUNE 1996) reflects the statutory indemnity prior to enactment of the PAAA. This AL transmits a replacement model clause that makes the changes necessary to conform that clause to the recent statute. Specific changes in text from the prior version have been highlighted. See Attachment 1 to this AL.

Contracting officers shall incorporate the model clause or equivalent in all solicitations and all new contracts when performance involves the risk of public liability from a nuclear incident. In those

solicitations and contracts, there is no need for an effective date provision. See Note I(a) to the model clause.

Contracting officers shall incorporate the model clause or equivalent into existing contracts that contain the clause at 970.250-70 (JUNE 1996) and include the appropriate effective date provision required by Note I. In contracts in effect upon the effective date of this AL, the prior clause expresses the indemnity before August 8, 2005 and liability for civil penalties. The model clause expresses the revised indemnity and liability civil penalties as a result of the PAAA 2005.

Therefore, for those contracts awarded on or after August 8, 2005, but before the effective date of this AL, replace the clause at 952.250-70 or prior version with this model clause or equivalent and the effective date provision in accordance with NOTE I(b).

For contracts awarded prior to August 8, 2005, add this model clause or equivalent, leaving the clause at 950.250-70 (JUNE 1996) or prior version in the contract, in accordance with NOTE I(c).

ATTACHMENT 1-MODEL CLAUSE, IMPLEMENTING THE PRICE-ANDERSON AMENDMENTS ACT OF 2005.

DEAR 952.250-70 Nuclear hazards indemnity agreement. (OCT. 2005)

Insert the following clause in accordance with section 950.7006.

NUCLEAR HAZARDS INDEMNITY AGREEMENT

(a) *Authority.* This clause is incorporated into this contract pursuant to the authority contained in subsection 170d. of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(b) *Definitions.* The definitions set out in the Act shall apply to this clause.

(c) *Financial protection.* Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (d)(2) below. DOE may, however, at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover such public liability, provided that the costs of such financial protection are reimbursed to the contractor by DOE.

(d)(1) *Indemnification.* To the extent that the contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE, DOE will indemnify the contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the contractor and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170d. of the Act, as that amount may be increased in accordance with section 170t., in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or $500 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in subparagraph (d)(1) of this clause is public liability as defined in the Act which (i) arises out of or in connection with the activities under this contract, including transportation; and (ii) arises out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.

(e)(1) *Waiver of Defenses.* In the event of a nuclear incident, as defined in the Act, arising out of nuclear waste activities, as defined in the Act, the contractor, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or governmental immunity.

(2) In the event of an extraordinary nuclear occurrence which:

(i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility; or

(ii) Arises out of, results from, or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility; or

(iii) Arises out of or results from the possession, operation, or use by the contractor or a subcontractor of a device utilizing special nuclear material or by-product material, during the course of the contract activity; or

(iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the contractor, on behalf of itself and other persons indemnified, agrees to waive:

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault of persons indemnified, including, but not limited to:

1. Negligence;

2. Contributory negligence;

3. Assumption of risk; or

4. Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God;

(B) Any issue or defense as to charitable or governmental immunity; and

(C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(v) The term *extraordinary nuclear occurrence* means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR part 840.

(vi) For the purposes of that determination, "offsite" as that term is used in 10 CFR part 840 means away from "the contract location" which phrase means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any contractor-owned or controlled facility, installation, or site at which the contractor is engaged in the performance of contractual activity under this contract.

(3) The waivers set forth above:

(i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;

(ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;

(iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(iv) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;

(v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workmen's compensation or occupational disease law;

(vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(vii) Shall be effective only with respect to those obligations set forth in this clause and in insurance policies, contracts or other proof of financial protection; and

(viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (A) the limit of liability provisions under subsection 170e. of the Act, and (B) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) *Notification and litigation of claims.* The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE, copies of all pertinent papers received by the contractor or filed with respect to such actions or claims. DOE shall have the right to, and may collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right to (1) require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder; and (2) appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) *Continuity of DOE obligations.* The obligations of DOE under this clause shall not be affected by any failure on the part of the contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the contractor, or by the completion, termination or expiration of this contract.

(h) *Effect of other clauses.* The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including the clause entitled Contract Disputes, provided, however, that this clause shall be subject to the clauses entitled Covenant Against Contingent Fees, and Accounts, records, and inspection, and any provisions that are later added to this

contract as required by applicable Federal law, including statutes, executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.

(i) *Civil penalties.* The contractor and its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to civil penalties, pursuant to section 234A of the Act, for violations of applicable DOE nuclear-safety related rules, regulations, or orders. If the contractor is a not-for-profit contractor, as defined by section 234Ad.(2), the total amount of civil penalties paid shall not exceed the total amount of fees paid within any 1-year period (as determined by the Secretary) under this contract.

(j) *Criminal penalties.* Any individual director, officer, or employee of the contractor or of its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to section 223(c) of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended, and applicable DOE nuclear safety-related rules, regulations or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.

(k) *Inclusion in subcontracts.* The contractor shall insert this clause in any subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (d)(2) above. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for the activities under the subcontract.

Effective date

( ) See Note I below for instructions related to this section on Effective Date.

Relationship to general indemnity

( ) See Note I below for instructions related to this section on Relationship to General Indemnity.

(End of clause)

Note I

(a) For contracts with an award date after the effective date of Acquisition Letter 2005-15, October 4, 2005, do not include an effective date provision. Delete the title.

(b) For contracts with an award date on or after August 8, 2005, but before the effective date of Acquisition Letter 2005-15, and containing the Nuclear Hazards Indemnity Agreement clause, dated June 1996 or prior version, replace the clause at DEAR 952.250-70 with this model clause and use the EFFECTIVE DATE title and language, as follows:

"(l) Effective Date. This contract was awarded on or after August 8, 2005 and at contract award contained the clause at DEAR 952.250-70 (JUNE 1996) or prior version. That clause has been deleted and replaced with this clause. The Price-Anderson Amendments Act of 2005, described by this clause, control the indemnity for any nuclear incident that occurred on or after August 8, 2005. The Contractor's

liability for civil penalties for violations of the Atomic Energy Act of 1954 under this contract is described by paragraph (i) of this clause.

(c) For those contracts awarded prior to August 8, 2005 and containing the Nuclear Hazards Indemnity Agreement clause, dated June 1996 or prior version, add this clause in addition to the clause at 952.250-70 or prior version and use the EFFECTIVE DATE title and language, as follows:

"(1) Effective Date. This contract was in effect prior to August 8, 2005 and contains the clause at DEAR 952.250-70 (JUNE 1996) or prior version. The indemnity of paragraph (d)(1) is limited to the indemnity provided by the Price-Anderson Amendments Act of 1988 for any nuclear incident to which the indemnity applies that occurred before August 8, 2005. The indemnity of paragraph (d)(1) of this clause applies to any nuclear incident that occurred on or after August 8, 2005. The Contractor's liability for violations of the Atomic Energy Act of 1954 under this contract is that in effect prior to August 8, 2005.

(End of note)

Note II

The following alternate will be added to the above Nuclear Hazards Indemnity Agreement clause for all contracts that contain a general authority indemnity pursuant to 950.7101. Caution: Be aware that for contracts that will have this provision added which do not contain an effective date provision, this paragraph shall be marked (1). In the event an Effective Date provision has been included, it shall be marked (m).

"( ) To the extent that the contractor is compensated by any financial protection, or is indemnified pursuant to this clause, or is effectively relieved of public liability by an order or orders limiting same, pursuant to 170e of the Act, the provisions of the clause providing general authority indemnity shall not apply."

(End of note)

POLICY FLASH

POLICY FLASH 2005-58

DATE: October 05, 2005
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Implementation of the Identity Proofing Requirements of HSPD-12 and FIPS Pub 201

SUMMARY: This Flash transmits the second acquisition letter implementing portions of HSPD-12 and FIPS Pub 201 (see Policy Flash 2005-42). The schedule for implementation of HSPD-12 requires that agencies make their procedures for granting badges allowing physical access to Government-owned or leased facilities more rigorous for Federal and contractor employees not so authorized as of October 27, 2005. This AL implements that requirement for contractor employees.

Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy, OMBE

Attachment: Acquisition Letter 2005-16

Department of Energy
Acquisition Regulation

No. AL-2005-16
Date 10/04/05

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

Subject: Implementation of HSPD-12

References: Homeland Security Presidential Directive 12 (HSPD-12)

Federal Information Processing Standard Publication 201 (FIPS Pub 201)

DOE Notice 206.2 Identity Proofing

Acquisition Letter 2005-10 dated July 7, 2005

When is this Acquisition Letter (AL) Effective?

This AL is effective upon issuance.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Robert M. Webb of the Office of Procurement and Assistance Policy at (202) 287-1338 or Robert.Webb@hq.doe.gov.

Visit our website at www.pr.doe.gov for information on Acquisition Letters and other policy issues.

What is the Purpose of this Acquisition Letter?

This is the second Acquisition Letter implementing HSPD-12 and FIPS Pub 201 in the solicitation and award of contracts involving physical access to agency premises and electronic authentication and access control to Federal agency's computer systems and electronic infrastructure. DOE has promulgated the requirements for identity proofing covered by this AL as they affect Federal employees and DOE's M&O and other major facilities contractors in DOE Notice 206.2, dated September 14, 2005, and its associated Contractor Requirements Document, respectively. This AL provides guidance on implementation of the identity proofing requirements of HSPD-12 and FIPS Pub 201 for all other DOE contracts. As used in this AL, reference to DOE includes both NNSA and non-NNSA sites.

What is the Background?

On August 27, 2004, President Bush issued HSPD-12, entitled, "Policy for a Common Identification Standard for Federal Employees and Contractors." See, http://csrc.nist.gov/policies/Presidential-Directive-Hspd-12.html. The Directive states that it is the "policy of the United States to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy by establishing a mandatory, government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors (including contractor employees)."

This policy requires agencies to interconnect badging, physical access, and logical authentication and subsequent access control systems, that is, systems for electronic access to agency electronic infrastructure. When fully implemented, an enhanced employee's or contractor's badge or access authorization, will be necessary for physical access to agency premises and electronic authentication and access control to the agency's computer systems and electronic infrastructure. In the latter case, under normal circumstances, the enhanced employee and contractor badge will take the place of ID/password based authentications for access to the agency's infrastructure, but not necessarily to individual applications, such as Corporate Human Resource Information System (CHRIS), Industry Interactive Procurement System (IIPS), etc. Additionally, when all components of FIPS PUB 201 are fully implemented, one agency's badge or access authorization will be interoperable among Federal agencies, with the host agency retaining responsibility for granting access.

In pursuit of this policy, the Department of Commerce has developed FIPS Pub 201, entitled, "Personal Identification Verification for Federal Employees and Contractors." FIPS Pub 201 is available at http://www.csrc.nist.gov/publications/fips/fips201/FIPS-201-022505.pdf. All Federal agencies are required to implement the identity verification and management and badge issuance objectives of FIPS Pub 201 by October 27, 2005. Full implementation of FIPS PUB 201 is required by October 2008. The DOE CIO is leading the intra-agency project team, which includes representatives of the Office of Security and Safety Performance Assurance (SSA), the Office of Management Budget and Evaluation, DOE program offices, NNSA, the Defense Nuclear Facilities Safety Board, the power marketing

administrations, and the Federal Energy Regulatory Commission, responsible for DOE-wide implementation.

AL 2005-10, dated July 7, 2005, provided guidance on the planning, solicitation, evaluation, and award of all procurements for hardware and software components of DOE's physical access and electronic infrastructures. See http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Letters?OpenDocument.

Implementation of HSPD-12 and FIPS Pub 201 requires a more rigorous process for identity proofing of Federal and contractor employees prior to their receiving a credential that allows physical access to a DOE-owned or –leased facility. The identity proofing process does not affect the process for applying for a security clearance, only applying for a security badge allowing physical access. This AL implements HSPD-12 and FIPS Pub 201, as they relate to contractor employee physical access to a DOE-owned or leased facility. One should note that no monies are available specifically to implement HSPD-12 or FIPS Pub 201.

What is the Effect on DOE Procurements and Contracts?

Contracting Officers shall insert the clause in Attachment 1 in solicitations and contracts, other than for DOE Management and Operating (M&O) or other major facilities solicitations and contracts, under which an employee(s) of the contractor will require a security badge, allowing physical access to a DOE-owned or leased facility, for a period of more than six (6) months or such lesser period as may be determined by the program official, in coordination with the cognizant security office.

Contracting Officers may negotiate this clause into active contracts, other than for DOE M&O or other major facilities solicitations and contracts, in effect on October 27, 2005, under which new employee(s) of the contractor will require a security badge, allowing physical access to a DOE-owned or leased facility, for a period of more than six (6) months or such lesser period as may be determined by the program official, in coordination with the cognizant security office as necessary to assure compliance with the identity proofing requirements of the clause.

DOE has implemented the requirements for identity proofing covered by this AL as they affect Federal employees and DOE's M&O and other major facilities contractors in DOE Notice 206.2, dated September 14, 2005, and its associated Contractor Requirements Document, respectively.

ATTACHMENT I- MODEL CONTRACT CLAUSE TO IMPLEMENT IDENTITY PROOFING REQUIREMENTS OF HSPD-12 AND FIPS PUB 201

ARTICLE XXX-ACCESS TO DOE –OWNED OR LEASED FACTILITIES

(a) The performance of this contract requires that employees of the Contractor have physical access to DOE-owned or leased facilities; however, this clause does not control requirements for an employee's obtaining a security clearance. The Contractor understands and agrees that DOE has a prescribed process with which the Contractor and its employees must comply in order to receive a security badge that allows such physical access. The Contractor further understands that it must propose employees whose background offers the best prospect of obtaining a security badge approval for access, considering the following criteria, which are not all inclusive and may vary depending on access requirements:

(1) is, or is suspected of being, a terrorist;
(2) is the subject of an outstanding warrant;
(3) has deliberately omitted, concealed, or falsified relevant and material facts from any Questionnaire for National Security Positions (SF-86), Questionnaire for Non-Sensitive Positions (SF-85), or similar form;
(4) has presented false or forged identity source documents;
(5) has been barred from Federal employment;
(6) is currently awaiting a hearing or trial or has been convicted of a crime punishable by imprisonment of six (6) months or longer; or
(7) is awaiting or serving a form of pre-prosecution probation, suspended or deferred sentencing, probation or parole in conjunction with an arrest or criminal charges against the individual for a crime that is punishable by imprisonment of six (6) months or longer.

(b) The Contractor shall assure:

(1) In initiating the process for gaining physical access, (i) compliance with procedures established by DOE in providing its employee(s) with any forms directed by DOE, (ii) that the employee properly completes any forms, and (iii) that the employee(s) submits the forms to the person designated by the Contracting Officer.

(2) In completing the process for gaining physical access, that its employee (i) cooperates with DOE officials responsible for granting access to DOE –owned or leased facilities and (ii) provides additional information, requested by those DOE officials.

(c) The Contractor understands and agrees that DOE may unilaterally deny a security badge to an employee and that the denial remains effective for that employee unless DOE subsequently determines that access may be granted. Upon notice from DOE that an employee's application for a security badge is or will be denied, the Contractor shall promptly identify and submit the forms referred to in subparagraph (b)(1) of this clause for the substitute employee. The denial of a security badge to individual employees by DOE shall not be cause for extension of the period of performance of this Contract or any contractor claim against DOE.

(d) The Contractor shall return to the Contracting Officer or designee the badge(s) or other credential(s) provided by DOE pursuant to this clause, granting physical access to DOE -owned or leased facilities by the Contractor's employee(s), upon (1) the termination of this Contract; (2) the expiration of this Contract; (3) the termination of employment on this Contract by an individual employee; or (4) demand by DOE for return of the badge.

(e) The Contractor shall include this clause, including this paragraph (e), in any subcontract, awarded in the performance of this Contract, in which an employee(s) of the subcontractor will require physical access to DOE –owned or leased facilities.